CONFERENCE MANUAL

DAY ONE

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CENTER OF NATIONAL SECURITY AND THE LAW
GEORGETOWN LAW

NOVEMBER 5—NOVEMBER 6, 2015

THE CAPITAL HILTON
1001 16TH STREET, NW
WASHINGTON, D.C.
## CONFERENCE MATERIAL: DAY ONE

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PANEL I:

EXECUTIVE BRANCH UPDATES ON DEVELOPMENTS IN NATIONAL SECURITY LAW

MODERATOR:
JAMES E. BAKER
Public Law 253, 80th Congress; Chapter 343, 1st Session; S. 758.

AN ACT
To promote the national security by providing for a Secretary of Defense; for a National Military Establishment; for a Department of the Army, a Department of the Navy, and a Department of the Air Force; and for the coordination of the activities of the National Military Establishment with other departments and agencies of the Government concerned with national security.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE
That this Act may be cited as the “National Security Act of 1947”.

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DECLARATION OF POLICY

Sec. 2. In enacting this legislation, it is the intent of Congress to provide a comprehensive program for the future security of the United States, to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security; to provide three military departments for the operation and administration of the Army, the Navy (including naval aviation and the United States Marine Corps), and the Air Force, with their assigned combat and service components; to provide for their authoritative coordination and unified direction under civilian control but not to merge them; to provide for the effective strategic direction of the armed forces and for their operation under unified control and for their integration into an efficient team of land, naval, and air forces.

TITLE I—COORDINATION FOR NATIONAL SECURITY

National Security Council

Sec. 101.

(a) There is hereby established a council to be known as the National Security Council (hereinafter in this section referred to as the “Council”).

The President of the United States shall preside over meetings of the Council: PROVIDED, That in his absence he may designate a member of the council to preside in his place.

The function of the Council shall be to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security.

The Council shall be composed of the President; the Secretary of State, the Secretary of Defense, appointed under section 202; the Secretary of the Army, referred to in section 205; the Secretary of the Navy; the Secretary of the Air Force, appointed under section 207; the chairman of the National Security Resources Board, appointed under section 103; and such of the following named officers as the President may designate from time to time: The Secretaries of the executive departments, the Chairman of the Munitions Board appointed under section 213, and the chairman of the Research and Development Board appointed under section 214; but no such additional member shall be designated until the advice and consent of the Senate has been given to his appointment to the office the holding of which authorizes his designation as a member of the Council.

(b) In addition to performing such other functions as the President may direct, for the purpose of more effectively coordinating the policies and functions of the departments
and agencies of the Government relating to the national security, it shall, subject to the
direction of the President, be the duty of the council—

(1) to assess and appraise the objectives, commitments, and risks of the United
States in relation to our actual and potential military power, in the interest of
national security; for the purpose of making recommendations to the President in
connection therewith; and

(2) to consider policies on matters of common interest to the departments and
agencies of the Government concerned with the national security, and to make
recommendations to the President in connection therewith.

c) The Council shall have a staff to be headed by a civilian executive secretary who shall
be appointed by the President, and who shall receive compensation at the rate of $10,000
a year. The executive secretary, subject to the direction of the Council, is hereby
authorized, subject to the civil service laws and the Classification Act of 1923, as
amended, to appoint and fix the compensation of such personnel as may be necessary to
perform such duties as may be prescribed by the council in connection with the
performance of its functions.

d) The Council shall, from time to time, make such recommendations, and such other
reports to the President as it deems appropriate or as the President may require.

Central Intelligence Agency

Sec. 102.

(a) There is hereby established under the National Security Council a Central Intelligence
Agency with a Director of Central Intelligence, who shall be the head thereof. The
Director shall be appointed by the President, by and with the advice and consent of the
Senate, from among the commissioned officers of the armed services or from among
individuals in civilian life. The Director shall receive compensation at the rate of $14,000
a year.

(b) 

(1) If a commissioned officer of the armed services is appointed as Director
then—

(A) in the performance of his duties as Director, he shall be subject to no
supervision, control, restriction, or prohibition (military or otherwise)
other than would be operative with respect to him if he were a civilian in
no way connected with the Department of the Army, the Department of
the Navy, the Department of the Air Force, or the armed services or any
component thereof; and

(B) he shall not possess or exercise any supervision, control, powers, or
functions (other than such as he possesses, or is authorized or directed to
exercise, as Director) with respect to the armed services or any component
thereof, the Department of the Army, the Department of the Navy, or the
Department of the Air Force, or any branch, bureau, unit or division
thereof, or with respect to any of the personnel (military or civilian) of any of the foregoing.

(2) Except as provided in paragraph (1), the appointment to the office of Director of a commissioned officer of the armed services, and his acceptance of and service in such office, shall in no way affect any status, office, rank, or grade he may occupy or hold in the armed services, or any emolument, perquisite, right, privilege, or benefit incident to or arising out of any such status, office, rank, or grade. Any such commissioned officer shall, while service in the office of Director, receive the military pay and allowances (active or retired, as the case may be) payable to a commissioned officer of his grade and length of service and shall be paid, from any funds available to defray the expenses of the Agency, annual compensation at a rate equal to the amount by which $14,000 exceeds the amount of his annual military pay and allowances.

(c) Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

(d) For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the direction of the National Security Council—

(1) to advise the National Security Council in matters concerning such intelligence activities of the Government departments and agencies as relate to national security;

(2) to make recommendations to the National Security Council for the coordination of such intelligence activities of the departments and agencies of the Government as relate to the national security;

(3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: PROVIDED, That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions: PROVIDED FURTHER, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: AND PROVIDED FURTHER, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;

(4) to perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security council determines can be more efficiently accomplished centrally;

(5) to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.
(e) To the extent recommended by the National Security Council and approved by the President, such intelligence of the departments and agencies of the Government, except as hereinafter provided, relating to the national security shall be open to the inspection of the Director of Central Intelligence, and such intelligence as relates to the national security and is possessed by such departments and other agencies of the Government, except as hereinafter provided, shall be made available to the Director of Central Intelligence for correlation, evaluation, and dissemination: PROVIDE HOWEVER, That upon the written request of the Director of Central Intelligence, the Director of the Federal Bureau of Investigation shall make available to the Director of Central Intelligence such information for correlation, evaluation, and dissemination as may be essential to the national security.

(f) Effective when the Director first appointed under subsection (a) has taken office—

1. the National Intelligence Authority (11 Red. Reg. 1337, 1339, February 5, 1946) shall cease to exist; and

2. the personnel, property, and records of the Central Intelligence Group are transferred to the Central Intelligence Agency, and such Group shall cease to exist. Any unexpended balances of appropriations, allocations, or other funds available or authorized to be made available for such Group shall be available and shall be authorized to be made available in like manner for expenditure by the Agency.

National Security Resources Board

Sec. 103.

(a) There is hereby established a National Security Resources Board (herinafter in this section referred to as the “Board”) to be composed of the Chairman of the Board and such heads or representatives of the various executive departments and independent agencies as may from time to time be designated by the President to be members of the Board. The chairman of the Board shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $14,000 a year.

(b) The Chairman of the Board, subject to the direction of the President, is authorized, subject to the civil-service laws and the classification Act of 1923, as amended, to appoint and fix the compensation of such personnel as may be necessary to assist the Board in carrying out its functions.

(c) It shall be the function of the Board to advise the President concerning the coordination of military, industrial, and civilian mobilization, including—

1. policies concerning industrial and civilian mobilization in order to assure the most effective mobilization and maximum utilization of the Nation’s manpower in the event of war;

2. programs for the effective use in time of war of the Nation’s natural and industrial resources for military and civilian needs, for the maintenance and stabilization of the civilian economy in time of war, and for the adjustment of such economy to war needs and conditions;
(3) policies for unifying, in time of war, the activities of Federal agencies and departments engaged in or concerned with production, procurement, distribution, or transportation of military or civilian supplies, materials, and products;

(4) the relationship between potential supplies of, and potential requirements for, manpower, resources, and productive facilities in time of war;

(5) policies for establishing adequate reserves of strategic and critical material, and for the conservation of these reserves;

(6) the strategic relocation of industries, services, government, and economic activities, the continuous operation of which is essential to the Nation’s security.

(d) In performing its functions, the Board shall utilize to the maximum extent the facilities and resources of the departments and agencies of the Government.

TITLE II—THE NATIONAL MILITARY ESTABLISHMENT

Establishment of the National Military Establishment

Sec. 201.

(a) There is hereby established the National Military Establishment, and the Secretary of Defense shall be the head thereof.

(b) The National Military Establishment shall consist of the Department of the Army, the Department of the Navy, and the Department of the Air Force, together with all other agencies created under title II of this Act.

Secretary of Defense

Sec. 202.

(a) There shall be a Secretary of Defense, who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate: PROVIDED, That a person who has within ten years been on active duty as a commissioned officer in a Regular component of the armed services shall not be eligible for appointment as Secretary of Defense. The Secretary of Defense shall be the principal assistant to the President in all matters relating to the national security. Under the direction of the President and subject to the provisions of the Act he shall perform the following duties:

(1) Establish general policies and programs for the national Military Establishment and for all of the departments and agencies therein:

(2) Exercise general direction, authority, and control over such departments and agencies;

(3) Take appropriate steps to eliminate unnecessary duplication or overlapping in the fields of procurement, supply, transportation, storage, health, and research;

(4) Supervise and coordinate the preparation of the budget estimates of the departments and agencies comprising the National Military Establishment; formulate and determine the budget estimates for submittal to the Bureau of the Budget; and supervise the budget programs of such departments and agencies
under the applicable appropriation Act: PROVIDED, That nothing herein contained shall prevent the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force from presenting to the President or to the Director of the Budget, after first so informing the Secretary of Defense, any report or recommendation relating to his department which he may deem necessary: AND PROVIDED FURTHER, That the Department of the Army, the Department of the Navy, and the Department of the Air Force shall be administered as individual executive departments by their respective Secretaries and all powers and duties relating to such departments not specifically conferred upon the Secretary of Defense by the Act shall be retained by each of their respective Secretaries.

(b) The Secretary of Defense shall submit annual written reports to the President and the Congress covering expenditures, work, and accomplishments of the National Military Establishment, together with such recommendations as he shall deem appropriate.

(c) The Secretary of Defense shall cause a seal of office to be made for the National Military Establishment, of such design as the President shall approve, and judicial notice shall be taken thereof.

Military Assistants to the Secretary

Sec. 203. Officers of the armed services may be detailed to duty as assistants and personal aides to the Secretary of Defense but he shall not establish a military staff.

Civilian Personnel

Sec. 204.

(a) The Secretary of Defense is authorized to appoint from civilian life not to exceed three special assistants to advise and assist him in the performance of his duties. Each such special assistant shall receive compensation at the rate of $10,000 a year.

(b) The Secretary of Defense is authorized, subject to the civil service laws and the Classification Act of 1923, as amended, to appoint and fix the compensation of such other civilian personnel as may be necessary for the performance of the functions of the National Military Establishment other than those of the Departments of the Army, Navy, and Air Force.

Department of the Army

Sec. 205.

(a) The Department of War shall hereafter be designated the Department of the Army, and the title of the Secretary of War shall be changed to Secretary of the Army. Changes shall be made in the titles of other officers and activities of the Department of the Army as the Secretary of the Army may determine.

(b) All laws, orders, regulations, and other actions relating to the Department of War or to any officer or activity whose title is changed under this section shall, insofar as they are not inconsistent with the provisions of the Act, be deemed to relate to the Department of the Army within the National Military Establishment or to such officer or activity designated by his or its new title.
(c) The term “Department of the Army” as used in this Act shall be construed to mean the Department of the Army at the seat of government and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Department of the Army.

(d) The Secretary of the Army shall cause a seal of office to be made for the Department of the Army, of such design as the President may approve, and judicial notice shall be taken thereof.

(e) In general the United States Army, within the Department of the Army, shall include land combat and service forces and such aviation and water transport as may be organic therein. It shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations on land. It shall be responsible for the preparation of land forces necessary for the effective prosecution of war except as otherwise assigned and, in accordance with integrated joint mobilization plans, for the expansion of peacetime components of the Army to meet the needs of war.

**Department of the Navy**

Sec. 206.

(a) The term “Department of the Navy” as used in this Act shall be construed to mean the Department of the Navy at the seat of government; the headquarters, United States Marine Corps; the entire operating forces of the United States Navy, including naval aviation, and of the United States Marine Corps, including the reserve components of such forces; all field activities, headquarters, forces, bases, installations, activities, and functions under the control or supervision of the Department of the Navy; and the United States Coast Guard when operating as part of the Navy pursuant to law.

(b) In general the United States Navy, within the Department of the Navy, shall include naval combat and service forces and such aviation as may be organic therein. It shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea. It shall be responsible for the preparation of naval forces necessary for the effective prosecution of war except as otherwise assigned and, in accordance with integrated joint mobilization plans, for the expansion of peacetime components of the Navy to meet the needs of war.

All naval aviation shall be integrated with the naval service as part thereof within the Department of the Navy. Naval aviation shall consist of combat and service and training forces, and shall include land-based naval aviation, air transport essential for naval operations, all air weapons and air techniques involved in the operations and activities of the United States Navy, and the entire remainder of the aeronautical organization of the United States Navy, together with the personnel necessary therefor.

The Navy shall be generally responsible for naval reconnaissance, antisubmarine warfare, and protection of shipping.

The Navy shall develop aircraft, weapons, tactics, technique, organization, and equipment of naval combat and service elements; matters of joint concern as to these functions shall be coordinated between the Army, the Air Force, and the Navy.
(c) The United States Marine Corps, within the Department of the Navy, shall include land combat and service forces and such aviation as may be organic therein. The Marine Corps shall be organized, trained, and equipped to provide fleet marine forces of combined arms, together with supporting air components, for service with the fleet in the seizure or defense of advanced naval bases and for the conduct of such land operations as may be essential to the prosecution of a naval campaign. It shall be the duty of the Marine Corps to develop, in coordination with the Army and the Air Force, those phases of amphibious operations which pertain to the tactics, technique, and equipment employed by landing forces. In addition, the Marine Corps shall provide detachments and organizations for service on armed vessels of the Navy, shall provide security detachments for the protection of naval property at naval stations and bases, and shall perform such other duties as the President may direct: PROVIDED, That such additional duties shall not detract from or interfere with the operations for which the Marine Corps is primarily organized. The Marine Corps shall be responsible, in accordance with integrated joint mobilization plans, for the expansion of peacetime components of the Marine Corps to meet the needs of war.

**Department of the Air Force**

Sec. 207.

(a) Within the National Military Establishment there is hereby established an executive department to be known as the Department of the Air Force, and a Secretary of the Air Force, who shall be the head thereof. The Secretary of the Air Force shall be appointed from civilian life by the President, by and with the advice and consent of the Senate.

(b) Section 158 of the Revised Statutes is amended to include the Department of the Air Force and the provisions of so much of title IV of the Revised Statutes as now or hereafter amended as is not inconsistent with this Act shall be applicable to the Department of the Air Force.

(c) The term "Department of the Air Force" as used in this Act shall be construed to mean the Department of the Air Force at the seat of government and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Department of the Air Force.

(d) There shall be in the Department of the Air Force an Under Secretary of the Air Force and two Assistant Secretaries of the Air Force, who shall be appointed from civilian life by the President by and with the advice and consent of the Senate.

(e) The several officers of the Department of the Air Force shall perform such functions as the Secretary of the Air Force may prescribe.

(f) So much of the functions of the Secretary of the Army and of the Department of the Army, including those of any officer of such Department, as are assigned to or under the control of the Commanding General, Army Air Forces, or as are deemed by the Secretary of Defense to be necessary or desirable for the operations of the Department of the Air Force or the United States Air Force, shall be transferred to and vested in the Secretary of the Air Force and the Department of the Air Force: PROVIDED, That the National Guard Bureau shall, in addition to the functions and duties performed by it for the Department of the Army, be charged with similar functions and duties for the Department of the Air
Force, and shall be the channel of communication between the Department of the Air
Force and the several States on all matters pertaining to the Air National Guard: AND
PROVIDED FURTHER, That, in order to permit an orderly transfer, the Secretary of Defense
may, during the transfer period hereinafter prescribed, direct that the Department of the
Army shall continue for appropriate periods to exercise any of such functions, insofar as
they relate to the Department of the Air Force, or the United States Air Force or their
property and personnel. Such of the property personnel, and records of the Department of
the Army used in the exercise of functions transferred under this subsection as the
Secretary of Defense shall determine shall be transferred or assigned to the Department
of the Air Force.

(g) The Secretary of the Air Force shall cause a seal of office to be made for the
Department of the Air Force, of such device as the President shall approve, and judicial
notice shall be taken thereof.

United States Air Force

Sec. 208.

(a) The United States Air Force is hereby established under the Department of the Air
Force. The Army Air Forces, the Air Corps, United States Army, and the General
Headquarters Air Force (Air Force Combat Command), shall be transferred to the United
States Air Force.

(b) There shall be a Chief of Staff, United States Air Force, who shall be appointed by the
President, by and with the advice and consent of the Senate, for a term of four years from
among the officers of general rank who are assigned to or commissioned in the United
States Air Force. Under the direction of the Secretary of the Air Force, the Chief of Staff,
United States Air Force, shall exercise command over the United States Air Force and
shall be charged with the duty of carrying into execution all lawful orders and directions
which may be transmitted to him. The functions of the Commanding General, General
Headquarters Air Force (Air Force Combat Command), and of the Chief of the Air Corps
and of the Commanding General, Army Air Forces, shall be transferred to the Chief of
Staff, United States Air Force. When such transfer becomes effective, the offices of the
Chief of the Air Corps, United States Army, and Assistants to the Chief of the Air Corps,
United States Army, provided for by the Act of June 4, 1920, as amended (41 Stat. 768),
and Commanding General, General Headquarters Air Force, provided for by section 5 of
the Act of June 16, 1936 (49 Stat. 1525), shall cease to exist. While holding office as
Chief of Staff, United States Air Force, the incumbent shall hold a grade and receive
allowances equivalent to those prescribed by law of the Chief of Staff, United States
Army. The Chief of Staff, United States Army, the Chief of Naval Operations, and the
Chief of Staff, United States Air Force, shall take rank among themselves according to
their relative dates of appointment as such, and shall each take rank above all other
officers on the active list of the Army, Navy, and Air Force: PROVIDED, That nothing in
this Act shall have the effect of changing the relative rank of the present Chief of Staff,
United States Army, and the present Chief of Naval Operations.

(c) All commissioned officers, warrant officers, and enlisted men, commissioned, holding
warrants, or enlisted, in the Air Corps, United States Army, or the Army Air Forces, shall
be transferred in branch to the United States Air Force. All other commissioned officers, warrant officers, and enlisted men, who are commissioned, hold warrants, or are enlisted, in any component of the Army of the United States and who are under the authority or command of the Commanding General, Army Air Forces, shall be continued under the authority or command of the Chief of Staff, United States Air Force, and under the jurisdiction of the Department of the Air Force. Personnel whose status is affected by this subsection shall retain their existing commissions, warrants, or enlisted status in existing components of the armed forces unless otherwise altered or terminated in accordance with existing law; and they shall not be deemed to have been appointed to a new or different office or grade, or to have vacated their permanent or temporary appointments in an existing component of the armed forces, solely by virtue of any change in status under this subsection. No such change in status shall alter or prejudice the status of any individual so assigned, so as to deprive him of any right, benefit, or privilege to which he may be entitled under existing law.

(d) Except as otherwise directed by the Secretary of the Air Force, all property, records, installations, agencies, activities, projects, and civilian personnel under the jurisdiction, control, authority, or command of the Commanding General, Army Air Forces, shall be continued to the same extent under the jurisdiction, control, authority, or command, respectively, of the Chief of Staff, United States Air Force, in the Department of the Air Force.

(e) For a period of two years from the date of enactment of this Act, both military and civilian personnel under the jurisdiction, control, authority, or command of the Commanding General, Army Air Forces, shall be continued to the same extent under the jurisdiction, control, authority, or command, respectively, of the Chief of Staff, United States Air Force, in the Department of the Air Force.

(f) In general the United States Air Force shall include aviation forces both combat and service not otherwise assigned. It shall be organized, trained, and equipped primarily for prompt and sustained offensive and defensive air operations. The Air Force shall be responsible for the preparation of the air forces necessary for the effective prosecution of war except as otherwise assigned and, in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Air Force to meet the needs of war.

**Effective Date of Transfers**

Sec. 209. Each transfer, assignment, or change in status under section 207 or section 208 shall take effect upon such date or dates as may be prescribed by the Secretary of Defense.

**War Council**

Sec. 210. There shall be within the National Military Establishment a War Council composed of the Secretary of Defense, as Chairman, who shall have power of decision; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Chief of Staff, United States Army; the Chief of Naval Operations; and the Chief of Staff, United States Air Force. The War Council shall advise the Secretary of Defense on
matters of broad policy relating to the armed forces, and shall consider and report on such
other matters as the Secretary of Defense may direct.

Joint Chiefs of Staff

Sec. 211.

(a) There is hereby established within the National Military Establishment the Joint
Chiefs of Staff, which shall consist of the Chief of Staff, United States Army; the Chief
of Naval Operations; the Chief of Staff, United States Air Force; and the Chief of Staff to
the Commander in Chief, if there be one.

(b) Subject to the authority and direction of the President and the Secretary of Defense, it
shall be the duty of the Joint Chiefs of Staff—

(1) to prepare strategic plans and to provide for the strategic direction of the
military forces;

(2) to prepare joint logistic plans and to assign to the military services logistic
responsibilities in accordance with such plans;

(3) to establish unified commands in strategic areas when such unified commands
are in the interest of national security;

(4) to formulate policies for joint training of the military forces;

(5) to formulate policies for coordinating the education of members of the military
forces;

(6) to review major material and personnel requirements of the military forces, in
accordance with strategic and logistic plans; and

(7) to provide United States representation on the Military Staff Committee of the
United Nations in accordance with the provisions of the Charter of the United
Nations.

(c) The Joint Chiefs of Staff shall act as the principal military advisers to the President
and the Secretary of Defense and shall perform such other duties as the President and the
Secretary of Defense may direct or as may be prescribed by law.

Joint Staff

Sec. 212. There shall be, under the Joint Chiefs of Staff, a Joint Staff not to exceed one
hundred officers and to be composed of approximately equal numbers of officers from
each of the three armed services. The Joint Staff, operating under a Director thereof
appointed by the Joint Chiefs of Staff, shall perform such duties as may be directed by
the Joint Chiefs of Staff. The Director shall be an officer junior in grade to all members
of the Joint Chiefs of Staff.

Munitions Board

Sec. 213.

(a) There is hereby established in the National Military Establishment a Munitions Board
(herinafter in this section referred to as the "Board").
(b) The Board shall be composed of a Chairman, who shall be the head thereof, and an Under Secretary or Assistant Secretary from each of the three military departments, to be designated in each case by the Secretaries of their respective departments. The Chairman shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $14,000 a year.

(c) It shall be the duty of the Board under the direction of the Secretary of Defense and in support of strategic and logistic plans prepared by the Joint Chiefs of Staff—

1. to coordinate the appropriate activities within the National Military Establishment with regard to industrial matters, including the procurement, production, and distribution plans of the departments and agencies comprising the Establishment;

2. to plan for the military aspects of industrial mobilization;

3. to recommend assignment of procurement responsibilities among the several military services and to plan for standardization of specifications and for the greatest practicable allocation of purchase authority of technical equipment and common use items on the basis of single procurement;

4. to prepare estimates of potential production, procurement, and personnel for use in evaluation of the logistic feasibility of strategic operations;

5. to determine relative priorities of the various segments of the military procurement programs;

6. to supervise such subordinate agencies as are or may be created to consider the subjects falling within the scope of the Board’s responsibilities;

7. to make recommendations to regroup, combine, or dissolve existing interservice agencies operating in the fields of procurement, production, and distribution in such manner as to promote efficiency and economy;

8. to maintain liaison with other departments and agencies for the proper correlation of military requirements with the civilian economy, particularly in regard to the procurement or disposition of strategic and critical material and the maintenance of adequate reserves of such material, and to make recommendations as to policies in connection therewith;

9. to assemble and review material and personnel requirements presented by the Joint Chiefs of Staff and those presented by the production, procurement, and distribution agencies assigned to meet military needs, and to make recommendations thereon to the Secretary of Defense; and

10. to perform such other duties as the Secretary of Defense may direct.

(d) When the Chairman of the Board first appointed has taken office, the Joint Army and Navy Munitions Board shall cease to exist and all its records and personnel shall be transferred to the Munitions Board.

(e) The Secretary of Defense shall provide the Board with such personnel and facilities as the Secretary may determine to be required by the Board for the performance of its functions.
Research and Development Board

Sec. 214.

(a) There is hereby established in the National Military Establishment a Research and Development Board (hereafter in this section referred to as the "Board"). The Board shall be composed of a Chairman, who shall be the head thereof, and two representatives from each of the Departments of the Army, Navy, and Air Force, to be designated by the Secretaries of their respective Departments. The Chairman shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $14,000 a year. The purpose of the Board shall be to advise the Secretary of Defense as to the status of scientific research relative to the national security, and to assist him in assuring adequate provision for research and development on scientific problems relating to the national security.

(b) It shall be the duty of the Board, under the direction of the Secretary of Defense—

(1) to prepare a complete and integrated program of research and development for military purposes;

(2) to advise with regard to trends in scientific research relating to national security and the measures necessary to assure continued and increasing progress;

(3) to recommend measures of coordination of research and development among the military departments, and allocation among them of responsibilities for specific programs of joint interest;

(4) to formulate policy for the National Military Establishment in connection with research and development matters involving agencies outside the National Military Establishment;

(5) to consider the interaction of research and development and strategy, and to advise the Joint Chiefs of Staff in connection therewith; and

(6) to perform such other duties as the Secretary of Defense may direct.

(c) When the Chairman of the Board first appointed has taken office, the Joint Research and Development Board shall cease to exist and all its records and personnel shall be transferred to the Research and Development Board.

TITLE III—MISCELLANEOUS

Compensation of Secretaries

Sec. 301.

(a) The Secretary of Defense shall receive the compensation prescribed by law for heads of executive departments.

(b) The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force shall each receive the compensation prescribed by law for heads of executive departments.
Under Secretaries and Assistant Secretaries
Sec. 302. The Under Secretaries and Assistant Secretaries of the Army, the Navy, and the Air Force shall each receive compensation at the rate of $10,000 a year and shall perform such duties as the Secretaries of their respective departments may prescribe.

Advisory Committees and Personnel
Sec. 303.
(a) The Secretary of Defense, the Chairman of the National Security Resources Board, and the Director of Central Intelligence are authorized to appoint such advisory committees and to employ, consistent with other provisions of this Act, such part-time advisory personnel as they may deem necessary in carrying out their respective functions and the functions of agencies under their control. Persons holding other offices or positions under the United States for which they receive compensation while serving as members of such committees shall receive no additional compensation for such service. Other members of such committees and other part-time advisory personnel so employed may serve without compensation or may receive compensation at a rate not to exceed $35 for each day of service, as determined by the appointing authority.

(b) Service of an individual as a member of any such advisory committee, or in any other part-time capacity for a department or agency hereunder, shall not be considered as service bringing such individual within the provisions of section 1089 or 113 of the Criminal Code (U.S.C., 1940 edition, title 18, secs. 198 and 203), or section 19 (e) of the Contract Settlement Act of 1944, unless the act of such individual, which by such section is made unlawful when performed by an individual referred to in such section, is with respect to any particular matter which directly involves a department or agency which such person is advising or in which such department or agency is directly interested.

Status of Transferred Civilian Personnel
Sec. 304. All transfers of civilian personnel under this Act shall be without change in classification or compensation, but the head of any department or agency to which such a transfer is made is authorized to make such changes in the titles and designations and prescribe such changes in the duties of such personnel commensurate with the classification as he may deem necessary and appropriate.

Saving Provisions
Sec. 305.
(a) All laws, orders, regulations, and other actions applicable with respect to any function, activity, personnel, property, records, or other thing transferred under this Act, or with respect to any officer, department, or agency, from which such transfer is made, shall, except to the extent rescinded, modified, superseded, terminated, or made inapplicable by or under authority of law, have the same effect as if such transfer had not been made; but, after any such transfer, any such law, order, regulation, or other action which vested functions in or otherwise related to any officer, department, or agency from which such transfer was made shall, insofar as applicable with respect to the function, activity, personnel, property, records or other thing transferred and to the extent not
inconsistent with other provisions of the Act, be deemed to have vested such function in or related to the officer, department, or agency to which the transfer was made.

(b) No suit, action, or other proceeding lawfully commenced by or against the head of any department or agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of the taking effect of any transfer or change in title under the provisions of the Act; and, in the case of any such transfer, such suit, action, or other proceeding may be maintained by or against the successor of such head or other officer under the transfer, but only if the court shall allow the same to be maintained on motion or supplemental petition filed within twelve months after such transfer takes effect, showing a necessary for the survival of such suit, action, or other proceeding to obtain settlement of the questions involved.

(c) Notwithstanding the provisions of the second paragraph of section 5 of title I of the First War Powers Act, 1941, the existing organization of the War Department under the provisions of Executive Order Numbered 9082 of February 28, 1942, as modified by Executive Order Numbered 9722 of May 13, 1946, and the existing organization of the Department of the Navy under the provisions of Executive Order Numbered 9635 of September 29, 1945, including the assignment of functions to organizational units within the War and Navy Departments, may, to the extent determined by the Secretary of Defense, continue in force for two years following the date of enactment of this Act except to the extent modified by the provisions of this Act or under the authority of law.

Transfers of Funds

Sec. 306. All unexpended balances of appropriations, allocations, nonappropriated funds, or other funds available or hereafter made available for use by or on behalf of the Army Air Forces or officers thereof, shall be transferred to the Department of the Air Force for use in connection with the exercise of its functions. Such other unexpended balances of appropriations, allocations, nonappropriated funds, or other funds available or hereafter made available for use by the Department of War or the Department of the Army in exercise of functions transferred to the Department of the Air Force under this Act, as the Secretary of Defense shall determine, shall be transferred to the Department of the Air Force for use in connection with the exercise of its functions. Unexpended balances transferred under this section may be used for the purposes for which the appropriations, allocations, or other funds were originally made available, or for new expenditures occasioned by the enactment of the Act. The transfers herein authorized may be made with or without warrant action as may be appropriate form time to time from any appropriation covered by this section to any other such appropriation or to such new accounts established on the books of the Treasury as may be determined to be necessary to carry into effect provisions of this Act.

Authorization for Appropriations

Sec. 307. There are hereby authorized to be appropriate such sums as may be necessary and appropriate to carry out the provisions and purpose of this Act.
Definitions

Sec. 308.

(a) As used in the Act, the term “function” includes functions, powers, and duties.

(b) As used in this Act, the term “budget program” refers to recommendations as to the apportionment, to the allocation, and to the review of allotments of appropriate funds.

Separability

Sec. 309. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

Effective Date

Sec. 310.

(a) The first sentence of section 202 (a) and sections 1, 2, 307, 308, and 310 shall take effect immediately upon enactment of this Act.

(b) Except as provided in subsection (a), the provisions of this Act shall take effect on whichever of the following days is the earlier: The day after the day upon which the Secretary of Defense first appointed takes office, or the sixtieth day after the date of the enactment of this Act.

Succession to the Presidency

Sec. 311. Paragraph (1) of subsection (d) of section 1 of the Act entitled “An Act to provide for the performance of the duties of the office of President in case of the removal, resignation, death, or inability both of the President and Vice President”, approved July 18, 1947, is amended by striking out “Secretary of War” and inserting in lieu thereof “Secretary of Defense”, and by striking out “Secretary of the Navy”.

Approved July 26, 1947.
Executive Order 13470 of July 30, 2008

Further Amendments to Executive Order 12333, United States Intelligence Activities

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108–458), and in order to update and clarify Executive Order 13355 of August 27, 2004, Executive Order 12333 of December 4, 1981, as amended, is hereby further amended as follows:

Section 1. The Preamble to Executive Order 12333, as amended, is further amended by:

(a) Striking “and” and inserting in lieu thereof a comma before the word “accurate”, and inserting “, and insightful” after the word “accurate” in the first sentence;
(b) Striking “statutes” and inserting in lieu thereof “the laws” before “of the United States of America” in the third sentence; and
(c) Striking “the” before “United States intelligence activities” in the third sentence.

Sec. 2. Executive Order 12333, as amended, is further amended by striking Part 1 in its entirety and inserting in lieu thereof the following new part:

PART 1 Goals, Directions, Duties, and Responsibilities with Respect to United States Intelligence Efforts

1.1 Goals. The United States intelligence effort shall provide the President, the National Security Council, and the Homeland Security Council with the necessary information on which to base decisions concerning the development and conduct of foreign, defense, and economic policies, and the protection of United States national interests from foreign security threats. All departments and agencies shall cooperate fully to fulfill this goal.

(a) All means, consistent with applicable Federal law and this order, and with full consideration of the rights of United States persons, shall be used to obtain reliable intelligence information to protect the United States and its interests.

(b) The United States Government has a solemn obligation, and shall continue in the conduct of intelligence activities under this order, to protect fully the legal rights of all United States persons, including freedoms, civil liberties, and privacy rights guaranteed by Federal law.

(c) Intelligence collection under this order should be guided by the need for information to respond to intelligence priorities set by the President.

(d) Special emphasis should be given to detecting and countering:

(1) Espionage and other threats and activities directed by foreign powers or their intelligence services against the United States and its interests;

(2) Threats to the United States and its interests from terrorism; and

(3) Threats to the United States and its interests from the development, possession, proliferation, or use of weapons of mass destruction.

(e) Special emphasis shall be given to the production of timely, accurate, and insightful reports, responsive to decisionmakers in the executive branch, that draw on all appropriate sources of information, including open source
information, meet rigorous analytic standards, consider diverse analytic viewpoints, and accurately represent appropriate alternative views.

(f) State, local, and tribal governments are critical partners in securing and defending the United States from terrorism and other threats to the United States and its interests. Our national intelligence effort should take into account the responsibilities and requirements of State, local, and tribal governments and, as appropriate, private sector entities, when undertaking the collection and dissemination of information and intelligence to protect the United States.

(g) All departments and agencies have a responsibility to prepare and to provide intelligence in a manner that allows the full and free exchange of information, consistent with applicable law and presidential guidance.

1.2 The National Security Council.

(a) Purpose. The National Security Council (NSC) shall act as the highest ranking executive branch entity that provides support to the President for review of, guidance for, and direction to the conduct of all foreign intelligence, counterintelligence, and covert action, and attendant policies and programs.

(b) Covert Action and Other Sensitive Intelligence Operations. The NSC shall consider and submit to the President a policy recommendation, including all dissents, on each proposed covert action and conduct a periodic review of ongoing covert action activities, including an evaluation of the effectiveness and consistency with current national policy of such activities and consistency with applicable legal requirements. The NSC shall perform such other functions related to covert action as the President may direct, but shall not undertake the conduct of covert actions. The NSC shall also review proposals for other sensitive intelligence operations.

1.3 Director of National Intelligence. Subject to the authority, direction, and control of the President, the Director of National Intelligence (Director) shall serve as the head of the Intelligence Community, act as the principal adviser to the President, to the NSC, and to the Homeland Security Council for intelligence matters related to national security, and shall oversee and direct the implementation of the National Intelligence Program and execution of the National Intelligence Program budget. The Director will lead a unified, coordinated, and effective intelligence effort. In addition, the Director shall, in carrying out the duties and responsibilities under this section, take into account the views of the heads of departments containing an element of the Intelligence Community and of the Director of the Central Intelligence Agency.

(a) Except as otherwise directed by the President or prohibited by law, the Director shall have access to all information and intelligence described in section 1.5(a) of this order. For the purpose of access to and sharing of information and intelligence, the Director:

1. Is hereby assigned the function under section 3(5) of the Act, to determine that intelligence, regardless of the source from which derived and including information gathered within or outside the United States, pertains to more than one United States Government agency; and

2. Shall develop guidelines for how information or intelligence is provided to or accessed by the Intelligence Community in accordance with section 1.5(a) of this order, and for how the information or intelligence may be used and shared by the Intelligence Community. All guidelines developed in accordance with this section shall be approved by the Attorney General and, where applicable, shall be consistent with guidelines issued pursuant to section 1016 of the Intelligence Reform and Terrorism Protection Act of 2004 (Public Law 108-458) (IRTPA).

(b) In addition to fulfilling the obligations and responsibilities prescribed by the Act, the Director:

1. Shall establish objectives, priorities, and guidance for the Intelligence Community to ensure timely and effective collection, processing, analysis,
(4) Conduct administrative and technical support activities within and outside the United States as necessary for cover and proprietary arrangements;

(5) Conduct foreign defense intelligence liaison relationships and defense intelligence exchange programs with foreign defense establishments, intelligence or security services of foreign governments, and international organizations in accordance with sections 1.3(b)(4), 1.7(a)(6), and 1.10(i) of this order;

(6) Manage and coordinate all matters related to the Defense Attaché system; and

(7) Provide foreign intelligence and counterintelligence staff support as directed by the Secretary of Defense.

(c) THE NATIONAL SECURITY AGENCY. The Director of the National Security Agency shall:

(1) Collect (including through clandestine means), process, analyze, produce, and disseminate signals intelligence information and data for foreign intelligence and counterintelligence purposes to support national and departmental missions;

(2) Establish and operate an effective unified organization for signals intelligence activities, except for the delegation of operational control over certain operations that are conducted through other elements of the Intelligence Community. No other department or agency may engage in signals intelligence activities except pursuant to a delegation by the Secretary of Defense, after coordination with the Director;

(3) Control signals intelligence collection and processing activities, including assignment of resources to an appropriate agent for such periods and tasks as required for the direct support of military commanders;

(4) Conduct administrative and technical support activities within and outside the United States as necessary for cover arrangements;

(5) Provide signals intelligence support for national and departmental requirements and for the conduct of military operations;

(6) Act as the National Manager for National Security Systems as established in law and policy, and in this capacity be responsible to the Secretary of Defense and to the Director;

(7) Prescribe, consistent with section 102A(g) of the Act, within its field of authorized operations, security regulations covering operating practices, including the transmission, handling, and distribution of signals intelligence and communications security materials within and among the elements under control of the Director of the National Security Agency, and exercise the necessary supervisory control to ensure compliance with the regulations; and

(8) Conduct foreign cryptologic liaison relationships in accordance with sections 1.3(b)(4), 1.7(a)(6), and 1.10(i) of this order.

(d) THE NATIONAL RECONNAISSANCE OFFICE. The Director of the National Reconnaissance Office shall:

(1) Be responsible for research and development, acquisition, launch, deployment, and operation of overhead systems and related data processing facilities to collect intelligence and information to support national and departmental missions and other United States Government needs; and

(2) Conduct foreign liaison relationships relating to the above missions, in accordance with sections 1.3(b)(4), 1.7(a)(6), and 1.10(i) of this order.

(e) THE NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY. The Director of the National Geospatial-Intelligence Agency shall:

(1) Collect, process, analyze, produce, and disseminate geospatial intelligence information and data for foreign intelligence and counterintelligence purposes to support national and departmental missions;
(f) Disseminate information or intelligence to foreign governments and international organizations under intelligence or counterintelligence arrangements or agreements established in accordance with section 1.3(b)(4) of this order;

(g) Participate in the development of procedures approved by the Attorney General governing production and dissemination of information or intelligence resulting from criminal drug intelligence activities abroad if they have intelligence responsibilities for foreign or domestic criminal drug production and trafficking; and

(h) Ensure that the inspectors general, general counsels, and agency officials responsible for privacy or civil liberties protection for their respective organizations have access to any information or intelligence necessary to perform their official duties.

1.7 Intelligence Community Elements. Each element of the Intelligence Community shall have the duties and responsibilities specified below, in addition to those specified by law or elsewhere in this order. Intelligence Community elements within executive departments shall serve the information and intelligence needs of their respective heads of departments and also shall operate as part of an integrated Intelligence Community, as provided in law or this order.

(a) THE CENTRAL INTELLIGENCE AGENCY. The Director of the Central Intelligence Agency shall:

(1) Collect (including through clandestine means), analyze, produce, and disseminate foreign intelligence and counterintelligence;

(2) Conduct counterintelligence activities without assuming or performing any internal security functions within the United States;

(3) Conduct administrative and technical support activities within and outside the United States as necessary for cover and proprietary arrangements;

(4) Conduct covert action activities approved by the President. No agency except the Central Intelligence Agency (or the Armed Forces of the United States in time of war declared by the Congress or during any period covered by a report from the President to the Congress consistent with the War Powers Resolution, Public Law 93-148) may conduct any covert action activity unless the President determines that another agency is more likely to achieve a particular objective;

(5) Conduct foreign intelligence liaison relationships with intelligence or security services of foreign governments or international organizations consistent with section 1.3(b)(4) of this order;

(6) Under the direction and guidance of the Director, and in accordance with section 1.3(b)(4) of this order, coordinate the implementation of intelligence and counterintelligence relationships between elements of the Intelligence Community and the intelligence or security services of foreign governments or international organizations; and

(7) Perform such other functions and duties related to intelligence as the Director may direct.

(b) THE DEFENSE INTELLIGENCE AGENCY. The Director of the Defense Intelligence Agency shall:

(1) Collect (including through clandestine means), analyze, produce, and disseminate foreign intelligence and counterintelligence to support national and departmental missions;

(2) Collect, analyze, produce, or, through tasking and coordination, provide defense and defense-related intelligence for the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, combatant commanders, other Defense components, and non-Defense agencies;

(3) Conduct counterintelligence activities;
(d) Provide, to the maximum extent permitted by law, subject to the availability of appropriations and not inconsistent with the mission of the department or agency, such further support to the Director as the Director may request, after consultation with the head of the department or agency, for the performance of the Director’s functions;

(e) Respond to advisory tasking from the Director under section 1.3(b)(18) of this order to the greatest extent possible, in accordance with applicable policies established by the head of the responding department or agency;

(f) Ensure that all elements within the department or agency comply with the provisions of Part 2 of this order, regardless of Intelligence Community affiliation, when performing foreign intelligence and counterintelligence functions;

(g) Deconflict, coordinate, and integrate all intelligence activities in accordance with section 1.3(b)(20), and intelligence and other activities in accordance with section 1.3(b)(21) of this order;

(h) Inform the Attorney General, either directly or through the Federal Bureau of Investigation, and the Director of clandestine collection of foreign intelligence and counterintelligence activities inside the United States not coordinated with the Federal Bureau of Investigation;

(i) Pursuant to arrangements developed by the head of the department or agency and the Director of the Central Intelligence Agency and approved by the Director, inform the Director and the Director of the Central Intelligence Agency, either directly or through his designee serving outside the United States, as appropriate, of clandestine collection of foreign intelligence collected through human sources or through human-enabled means outside the United States that has not been coordinated with the Central Intelligence Agency; and

(j) Inform the Secretary of Defense, either directly or through his designee, as appropriate, of clandestine collection of foreign intelligence outside the United States in a region of combat or contingency military operations designated by the Secretary of Defense, for purposes of this paragraph, after consultation with the Director of National Intelligence.

1.6 Heads of Elements of the Intelligence Community. The heads of elements of the Intelligence Community shall:

(a) Provide the Director access to all information and intelligence relevant to the national security or that otherwise is required for the performance of the Director’s duties, to include administrative and other appropriate management information, except such information excluded by law, by the President, or by the Attorney General acting under this order at the direction of the President;

(b) Report to the Attorney General possible violations of Federal criminal laws by employees and of specified Federal criminal laws by any other person as provided in procedures agreed upon by the Attorney General and the head of the department, agency, or establishment concerned, in a manner consistent with the protection of intelligence sources and methods, as specified in those procedures;

(c) Report to the Intelligence Oversight Board, consistent with Executive Order 13462 of February 29, 2008, and provide copies of all such reports to the Director, concerning any intelligence activities of their elements that they have reason to believe may be unlawful or contrary to executive order or presidential directive;

(d) Protect intelligence and intelligence sources, methods, and activities from unauthorized disclosure in accordance with guidance from the Director;

(e) Facilitate, as appropriate, the sharing of information or intelligence, as directed by law or the President, to State, local, tribal, and private sector entities;
(3) Nothing in this subsection shall be construed to limit or otherwise affect the authority of the President to nominate, appoint, assign, or terminate the appointment or assignment of any individual, with or without a consultation, recommendation, or concurrence.

1.4 *The Intelligence Community.* Consistent with applicable Federal law and with the other provisions of this order, and under the leadership of the Director, as specified in such law and this order, the Intelligence Community shall:

(a) Collect and provide information needed by the President and, in the performance of executive functions, the Vice President, the NSC, the Homeland Security Council, the Chairman of the Joint Chiefs of Staff, senior military commanders, and other executive branch officials and, as appropriate, the Congress of the United States;

(b) In accordance with priorities set by the President, collect information concerning, and conduct activities to protect against, international terrorism, proliferation of weapons of mass destruction, intelligence activities directed against the United States, international criminal drug activities, and other hostile activities directed against the United States by foreign powers, organizations, persons, and their agents;

(c) Analyze, produce, and disseminate intelligence;

(d) Conduct administrative, technical, and other support activities within the United States and abroad necessary for the performance of authorized activities, to include providing services of common concern for the Intelligence Community as designated by the Director in accordance with this order;

(e) Conduct research, development, and procurement of technical systems and devices relating to authorized functions and missions or the provision of services of common concern for the Intelligence Community;

(f) Protect the security of intelligence related activities, information, installations, property, and employees by appropriate means, including such investigations of applicants, employees, contractors, and other persons with similar associations with the Intelligence Community elements as are necessary;

(g) Take into account State, local, and tribal governments' and, as appropriate, private sector entities' information needs relating to national and homeland security;

(h) Deconflict, coordinate, and integrate all intelligence activities and other information gathering in accordance with section 1.3(b)(20) of this order; and

(i) Perform such other functions and duties related to intelligence activities as the President may direct.

1.5 *Duties and Responsibilities of the Heads of Executive Branch Departments and Agencies.* The heads of all departments and agencies shall:

(a) Provide the Director access to all information and intelligence relevant to the national security or that otherwise is required for the performance of the Director's duties, to include administrative and other appropriate management information, except such information excluded by law, by the President, or by the Attorney General acting under this order at the direction of the President;

(b) Provide all programmatic and budgetary information necessary to support the Director in developing the National Intelligence Program;

(c) Coordinate development and implementation of intelligence systems and architectures and, as appropriate, operational systems and architectures of their departments, agencies, and other elements with the Director to respond to national intelligence requirements and all applicable information sharing and security guidelines, information privacy, and other legal requirements;
of the Director, the NSC, or the President for resolution in a manner that respects and does not abrogate the statutory responsibilities of the heads of the departments.

(d) Appointments to certain positions.

(1) The relevant department or bureau head shall provide recommendations and obtain the concurrence of the Director for the selection of: the Director of the National Security Agency, the Director of the National Reconnaissance Office, the Director of the National Geospatial-Intelligence Agency, the Under Secretary of Homeland Security for Intelligence and Analysis, the Assistant Secretary of State for Intelligence and Research, the Director of the Office of Intelligence and Counterintelligence of the Department of Energy, the Assistant Secretary for Intelligence and Analysis of the Department of the Treasury, and the Executive Assistant Director for the National Security Branch of the Federal Bureau of Investigation. If the Director does not concur in the recommendation, the department head may not fill the vacancy or make the recommendation to the President, as the case may be. If the department head and the Director do not reach an agreement on the selection or recommendation, the Director and the department head concerned may advise the President directly of the Director’s intention to withhold concurrence.

(2) The relevant department head shall consult with the Director before appointing an individual to fill a vacancy or recommending to the President an individual be nominated to fill a vacancy in any of the following positions: the Under Secretary of Defense for Intelligence; the Director of the Defense Intelligence Agency; uniformed heads of the intelligence elements of the Army, the Navy, the Air Force, and the Marine Corps above the rank of Major General or Rear Admiral; the Assistant Commandant of the Coast Guard for Intelligence; and the Assistant Attorney General for National Security.

(e) Removal from certain positions.

(1) Except for the Director of the Central Intelligence Agency, whose removal the Director may recommend to the President, the Director and the relevant department head shall consult on the removal, or recommendation to the President for removal, as the case may be, of: the Director of the National Security Agency, the Director of the National Geospatial-Intelligence Agency, the Director of the Defense Intelligence Agency, the Under Secretary of Homeland Security for Intelligence and Analysis, the Assistant Secretary of State for Intelligence and Research, and the Assistant Secretary for Intelligence and Analysis of the Department of the Treasury. If the Director and the department head do not agree on removal, or recommendation for removal, either may make a recommendation to the President for the removal of the individual.

(2) The Director and the relevant department or bureau head shall consult on the removal of: the Executive Assistant Director for the National Security Branch of the Federal Bureau of Investigation, the Director of the Office of Intelligence and Counterintelligence of the Department of Energy, the Director of the National Reconnaissance Office the Assistant Commandant of the Coast Guard for Intelligence, and the Under Secretary of Defense for Intelligence. With respect to an individual appointed by a department head, the department head may remove the individual upon the request of the Director; if the department head chooses not to remove the individual, either the Director or the department head may advise the President of the department head’s intention to retain the individual. In the case of the Under Secretary of Defense for Intelligence, the Secretary of Defense may recommend to the President either the removal or the retention of the individual. For uniformed heads of the intelligence elements of the Army, the Navy, the Air Force, and the Marine Corps, the Director may make a recommendation for removal to the Secretary of Defense.
Government that are not elements of the Intelligence Community; and shall establish procedures, in consultation with affected heads of departments or agencies and subject to approval by the Attorney General, to implement this authority and to monitor or evaluate the responsiveness of United States Government departments, agencies, and other establishments;

(19) Shall fulfill the responsibilities in section 1.3(b)(17) and (18) of this order, consistent with applicable law and with full consideration of the rights of United States persons, whether information is to be collected inside or outside the United States;

(20) Shall ensure, through appropriate policies and procedures, the deconfliction, coordination, and integration of all intelligence activities conducted by an Intelligence Community element or funded by the National Intelligence Program. In accordance with these policies and procedures:

(A) The Director of the Federal Bureau of Investigation shall coordinate the clandestine collection of foreign intelligence collected through human sources or through human-enabled means and counterintelligence activities inside the United States;

(B) The Director of the Central Intelligence Agency shall coordinate the clandestine collection of foreign intelligence collected through human sources or through human-enabled means and counterintelligence activities outside the United States;

(C) All policies and procedures for the coordination of counterintelligence activities and the clandestine collection of foreign intelligence inside the United States shall be subject to the approval of the Attorney General; and

(D) All policies and procedures developed under this section shall be coordinated with the heads of affected departments and Intelligence Community elements;

(21) Shall, with the concurrence of the heads of affected departments and agencies, establish joint procedures to deconflict, coordinate, and synchronize intelligence activities conducted by an Intelligence Community element or funded by the National Intelligence Program, with intelligence activities, activities that involve foreign intelligence and security services, or activities that involve the use of clandestine methods, conducted by other United States Government departments, agencies, and establishments;

(22) Shall, in coordination with the heads of departments containing elements of the Intelligence Community, develop procedures to govern major system acquisitions funded in whole or in majority part by the National Intelligence Program;

(23) Shall seek advice from the Secretary of State to ensure that the foreign policy implications of proposed intelligence activities are considered, and shall ensure, through appropriate policies and procedures, that intelligence activities are conducted in a manner consistent with the responsibilities pursuant to law and presidential direction of Chiefs of United States Missions; and

(24) Shall facilitate the use of Intelligence Community products by the Congress in a secure manner.

(c) The Director's exercise of authorities in the Act and this order shall not abrogate the statutory or other responsibilities of the heads of departments of the United States Government or the Director of the Central Intelligence Agency. Directives issued and actions taken by the Director in the exercise of the Director's authorities and responsibilities to integrate, coordinate, and make the Intelligence Community more effective in providing intelligence related to national security shall be implemented by the elements of the Intelligence Community, provided that any department head whose department contains an element of the Intelligence Community and who believes that a directive or action of the Director violates the requirements of section 1018 of the IRTPA or this subsection shall bring the issue to the attention
sources, methods, and activities. The Director may only delegate this authority to the Principal Deputy Director of National Intelligence;

(11) May establish, operate, and direct one or more national intelligence centers to address intelligence priorities;

(12) May establish Functional Managers and Mission Managers, and designate officers or employees of the United States to serve in these positions.

(A) Functional Managers shall report to the Director concerning the execution of their duties as Functional Managers, and may be charged with developing and implementing strategic guidance, policies, and procedures for activities related to a specific intelligence discipline or set of intelligence activities; set training and tradecraft standards; and ensure coordination within and across intelligence disciplines and Intelligence Community elements and with related non-intelligence activities. Functional Managers may also advise the Director on: the management of resources; policies and procedures; collection capabilities and gaps; processing and dissemination of intelligence; technical architectures; and other issues or activities determined by the Director.

(i) The Director of the National Security Agency is designated the Functional Manager for signals intelligence;

(ii) The Director of the Central Intelligence Agency is designated the Functional Manager for human intelligence; and

(iii) The Director of the National Geospatial-Intelligence Agency is designated the Functional Manager for geospatial intelligence.

(B) Mission Managers shall serve as principal substantive advisors on all or specified aspects of intelligence related to designated countries, regions, topics, or functional issues;

(13) Shall establish uniform criteria for the determination of relative priorities for the transmission of critical foreign intelligence, and advise the Secretary of Defense concerning the communications requirements of the Intelligence Community for the transmission of such communications;

(14) Shall have ultimate responsibility for production and dissemination of intelligence produced by the Intelligence Community and authority to levy analytic tasks on intelligence production organizations within the Intelligence Community, in consultation with the heads of the Intelligence Community elements concerned;

(15) May establish advisory groups for the purpose of obtaining advice from within the Intelligence Community to carry out the Director's responsibilities, to include Intelligence Community executive management committees comprised of senior Intelligence Community leaders. Advisory groups shall consist of representatives from elements of the Intelligence Community, as designated by the Director, or other executive branch departments, agencies, and offices, as appropriate;

(16) Shall ensure the timely exploitation and dissemination of data gathered by national intelligence collection means, and ensure that the resulting intelligence is disseminated immediately to appropriate government elements, including military commands;

(17) Shall determine requirements and priorities for, and manage and direct the tasking, collection, analysis, production, and dissemination of, national intelligence by elements of the Intelligence Community, including approving requirements for collection and analysis and resolving conflicts in collection requirements and in the tasking of national collection assets of Intelligence Community elements (except when otherwise directed by the President or when the Secretary of Defense exercises collection tasking authority under plans and arrangements approved by the Secretary of Defense and the Director);

(18) May provide advisory tasking concerning collection and analysis of information or intelligence relevant to national intelligence or national security to departments, agencies, and establishments of the United States
and dissemination of intelligence, of whatever nature and from whatever source derived;

(2) May designate, in consultation with affected heads of departments or Intelligence Community elements, one or more Intelligence Community elements to develop and to maintain services of common concern on behalf of the Intelligence Community if the Director determines such services can be more efficiently or effectively accomplished in a consolidated manner;

(3) Shall oversee and provide advice to the President and the NSC with respect to all ongoing and proposed covert action programs;

(4) In regard to the establishment and conduct of intelligence arrangements and agreements with foreign governments and international organizations:

(A) May enter into intelligence and counterintelligence arrangements and agreements with foreign governments and international organizations;

(B) Shall formulate policies concerning intelligence and counterintelligence arrangements and agreements with foreign governments and international organizations; and

(C) Shall align and synchronize intelligence and counterintelligence foreign relationships among the elements of the Intelligence Community to further United States national security, policy, and intelligence objectives;

(5) Shall participate in the development of procedures approved by the Attorney General governing criminal drug intelligence activities abroad to ensure that these activities are consistent with foreign intelligence programs;

(6) Shall establish common security and access standards for managing and handling intelligence systems, information, and products, with special emphasis on facilitating:

(A) The fullest and most prompt access to and dissemination of information and intelligence practicable, assigning the highest priority to detecting, preventing, preempting, and disrupting terrorist threats and activities against the United States, its interests, and allies; and

(B) The establishment of standards for an interoperable information sharing enterprise that facilitates the sharing of intelligence information among elements of the Intelligence Community;

(7) Shall ensure that appropriate departments and agencies have access to intelligence and receive the support needed to perform independent analysis;

(8) Shall protect, and ensure that programs are developed to protect, intelligence sources, methods, and activities from unauthorized disclosure;

(9) Shall, after consultation with the heads of affected departments and agencies, establish guidelines for Intelligence Community elements for:

(A) Classification and declassification of all intelligence and intelligence-related information classified under the authority of the Director or the authority of the head of a department or Intelligence Community element; and

(B) Access to and dissemination of all intelligence and intelligence-related information, both in its final form and in the form when initially gathered, to include intelligence originally classified by the head of a department or Intelligence Community element, except that access to and dissemination of information concerning United States persons shall be governed by procedures developed in accordance with Part 2 of this order;

(10) May, only with respect to Intelligence Community elements, and after consultation with the head of the originating Intelligence Community element or the head of the originating department, declassify, or direct the declassification of, information or intelligence relating to intelligence
(2) Provide geospatial intelligence support for national and departmental requirements and for the conduct of military operations;

(3) Conduct administrative and technical support activities within and outside the United States as necessary for cover arrangements; and

(4) Conduct foreign geospatial intelligence liaison relationships, in accordance with sections 1.3(b)(4), 1.7(a)(6), and 1.10(i) of this order.

(f) THE INTELLIGENCE AND COUNTERINTELLIGENCE ELEMENTS OF THE ARMY, NAVY, AIR FORCE, AND MARINE CORPS. The Commanders and heads of the intelligence and counterintelligence elements of the Army, Navy, Air Force, and Marine Corps shall:

1. Collect (including through clandestine means), produce, analyze, and disseminate defense and defense-related intelligence and counterintelligence to support departmental requirements, and, as appropriate, national requirements;

(2) Conduct counterintelligence activities;

(3) Monitor the development, procurement, and management of tactical intelligence systems and equipment and conduct related research, development, and test and evaluation activities; and

(4) Conduct military intelligence liaison relationships and military intelligence exchange programs with selected cooperative foreign defense establishments and international organizations in accordance with sections 1.3(b)(4), 1.7(a)(6), and 1.10(i) of this order.

(g) INTELLIGENCE ELEMENTS OF THE FEDERAL BUREAU OF INVESTIGATION. Under the supervision of the Attorney General and pursuant to such regulations as the Attorney General may establish, the intelligence elements of the Federal Bureau of Investigation shall:

(1) Collect (including through clandestine means), analyze, produce, and disseminate foreign intelligence and counterintelligence to support national and departmental missions, in accordance with procedural guidelines approved by the Attorney General, after consultation with the Director;

(2) Conduct counterintelligence activities; and

(3) Conduct foreign intelligence and counterintelligence liaison relationships with intelligence, security, and law enforcement services of foreign governments or international organizations in accordance with sections 1.3(b)(4) and 1.7(a)(6) of this order.

(h) THE INTELLIGENCE AND COUNTERINTELLIGENCE ELEMENTS OF THE COAST GUARD. The Commandant of the Coast Guard shall:

(1) Collect (including through clandestine means), analyze, produce, and disseminate foreign intelligence and counterintelligence including defense and defense-related information and intelligence to support national and departmental missions;

(2) Conduct counterintelligence activities;

(3) Monitor the development, procurement, and management of tactical intelligence systems and equipment and conduct related research, development, and test and evaluation activities; and

(4) Conduct foreign intelligence liaison relationships and intelligence exchange programs with foreign intelligence services, security services or international organizations in accordance with sections 1.3(b)(4), 1.7(a)(6), and, when operating as part of the Department of Defense, 1.10(i) of this order.

(i) THE BUREAU OF INTELLIGENCE AND RESEARCH, DEPARTMENT OF STATE; THE OFFICE OF INTELLIGENCE AND ANALYSIS, DEPARTMENT OF THE TREASURY; THE OFFICE OF NATIONAL SECURITY INTELLIGENCE, DRUG ENFORCEMENT ADMINISTRATION; THE OFFICE OF INTELLIGENCE AND ANALYSIS, DEPARTMENT OF HOMELAND SECURITY; AND THE OFFICE OF INTELLIGENCE AND COUNTERINTELLIGENCE, DEPARTMENT OF ENERGY. The heads of the Bureau of Intelligence and
Research, Department of State; the Office of Intelligence and Analysis, Department of the Treasury; the Office of National Security Intelligence, Drug Enforcement Administration; the Office of Intelligence and Analysis, Department of Homeland Security; and the Office of Intelligence and Counterintelligence, Department of Energy shall:

1. Collect (overtly or through publicly available sources), analyze, produce, and disseminate information, intelligence, and counterintelligence to support national and departmental missions; and

2. Conduct and participate in analytic or information exchanges with foreign partners and international organizations in accordance with sections 1.3(b)(4) and 1.7(a)(6) of this order.

(j) THE OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE. The Director shall collect (overtly or through publicly available sources), analyze, produce, and disseminate information, intelligence, and counterintelligence to support the missions of the Office of the Director of National Intelligence, including the National Counterterrorism Center, and to support other national missions.

1.8 The Department of State. In addition to the authorities exercised by the Bureau of Intelligence and Research under sections 1.4 and 1.7(i) of this order, the Secretary of State shall:

(a) Collect (overtly or through publicly available sources) information relevant to United States foreign policy and national security concerns;

(b) Disseminate, to the maximum extent possible, reports received from United States diplomatic and consular posts;

(c) Transmit reporting requirements and advisory taskings of the Intelligence Community to the Chiefs of United States Missions abroad; and

(d) Support Chiefs of United States Missions in discharging their responsibilities pursuant to law and presidential direction.

1.9 The Department of the Treasury. In addition to the authorities exercised by the Office of Intelligence and Analysis of the Department of the Treasury under sections 1.4 and 1.7(i) of this order the Secretary of the Treasury shall collect (overtly or through publicly available sources) foreign financial information and, in consultation with the Department of State, foreign economic information.

1.10 The Department of Defense. The Secretary of Defense shall:

(a) Collect (including through clandestine means), analyze, produce, and disseminate information and intelligence and be responsive to collection tasking and advisory tasking by the Director;

(b) Collect (including through clandestine means), analyze, produce, and disseminate defense and defense-related intelligence and counterintelligence, as required for execution of the Secretary's responsibilities;

(c) Conduct programs and missions necessary to fulfill national, departmental, and tactical intelligence requirements;

(d) Conduct counterintelligence activities in support of Department of Defense components and coordinate counterintelligence activities in accordance with section 1.3(b)(20) and (21) of this order;

(e) Act, in coordination with the Director, as the executive agent of the United States Government for signals intelligence activities;

(f) Provide for the timely transmission of critical intelligence, as defined by the Director, within the United States Government;

(g) Carry out or contract for research, development, and procurement of technical systems and devices relating to authorized intelligence functions;

(h) Protect the security of Department of Defense installations, activities, information, property, and employees by appropriate means, including such investigations of applicants, employees, contractors, and other persons with similar associations with the Department of Defense as are necessary;
(i) Establish and maintain defense intelligence relationships and defense intelligence exchange programs with selected cooperative foreign defense establishments, intelligence or security services of foreign governments, and international organizations, and ensure that such relationships and programs are in accordance with sections 1.3(b)(4), 1.3(b)(21) and 1.7(a)(6) of this order;

(j) Conduct such administrative and technical support activities within and outside the United States as are necessary to provide for cover and proprietary arrangements, to perform the functions described in sections (a) through (i) above, and to support the Intelligence Community elements of the Department of Defense; and

(k) Use the Intelligence Community elements within the Department of Defense identified in section 1.7(b) through (f) and, when the Coast Guard is operating as part of the Department of Defense, (h) above to carry out the Secretary of Defense’s responsibilities assigned in this section or other departments, agencies, or offices within the Department of Defense, as appropriate, to conduct the intelligence missions and responsibilities assigned to the Secretary of Defense.

1.11 The Department of Homeland Security. In addition to the authorities exercised by the Office of Intelligence and Analysis of the Department of Homeland Security under sections 1.4 and 1.7(l) of this order, the Secretary of Homeland Security shall conduct, through the United States Secret Service, activities to determine the existence and capability of surveillance equipment being used against the President or the Vice President of the United States, the Executive Office of the President, and, as authorized by the Secretary of Homeland Security or the President, other Secret Service protectees and United States officials. No information shall be acquired intentionally through such activities except to protect against use of such surveillance equipment, and those activities shall be conducted pursuant to procedures agreed upon by the Secretary of Homeland Security and the Attorney General.

1.12 The Department of Energy. In addition to the authorities exercised by the Office of Intelligence and Counterintelligence of the Department of Energy under sections 1.4 and 1.7(l) of this order, the Secretary of Energy shall:

(a) Provide expert scientific, technical, analytic, and research capabilities to other agencies within the Intelligence Community, as appropriate;

(b) Participate in formulating intelligence collection and analysis requirements where the special expert capability of the Department can contribute; and

(c) Participate with the Department of State in overtly collecting information with respect to foreign energy matters.

1.13 The Federal Bureau of Investigation. In addition to the authorities exercised by the intelligence elements of the Federal Bureau of Investigation of the Department of Justice under sections 1.4 and 1.7(g) of this order and under the supervision of the Attorney General and pursuant to such regulations as the Attorney General may establish, the Director of the Federal Bureau of Investigation shall provide technical assistance, within or outside the United States, to foreign intelligence and law enforcement services, consistent with section 1.3(b)(20) and (21) of this order, as may be necessary to support national or departmental missions.

Sec. 3. Part 2 of Executive Order 12333, as amended, is further amended by:

(a) In section 2.1, striking the first sentence and inserting in lieu thereof: “Timely, accurate, and insightful information about the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons, and their agents, is essential to informed decisionmaking in the areas of national security, national defense, and foreign relations.”;

(b) In section 2.1, inserting a comma after “innovative”;
(c) In section 2.2, inserting ", the spread of weapons of mass destruction," after "international terrorist activities" in the first sentence;

(d) In the first sentence of section 2.3, striking "Agencies within the" and inserting in lieu thereof "Elements of the", inserting a comma after "retain", striking "agency" and inserting in lieu thereof "Intelligence Community element", and inserting "or by the head of a department containing such element" after "concerned";

(e) In section 2.3, inserting ", after consultation with the Director" preceding the period at the end of the first sentence;

(f) In section 2.3, inserting a comma after "retention" in the second sentence;

(g) In section 2.3(b), striking "FBI" and inserting in lieu thereof "Federal Bureau of Investigation (FBI);"

(h) In section 2.3(b), striking "agencies" and inserting in lieu thereof "elements" each time it appears;

(i) In section 2.3(c), striking "narcotics" and inserting in lieu thereof "drug,;"

(j) In section 2.3(d), inserting a comma after "victims";

(k) In section 2.3(e), striking "sources or methods" and inserting in lieu thereof "sources, methods, and activities";

(l) In section 2.3(e), striking "agencies" and inserting in lieu thereof "elements" and striking "agency" and inserting in lieu thereof "element";

(m) In section 2.3(g), inserting a comma after "physical";

(n) In section 2.3(h), striking "and;"

(o) In section 2.3(i), striking "federal" and inserting in lieu thereof "Federal" and inserting a comma after "local";

(p) In the last sentence of section 2.3, striking "agencies within" and inserting in lieu thereof "elements of", striking ", other than information derived from signals intelligence," striking "agency" and inserting in lieu thereof "element" in both instances and inserting immediately before the period: ", except that information derived from signals intelligence may only be disseminated or made available to Intelligence Community elements in accordance with procedures established by the Director in coordination with the Secretary of Defense and approved by the Attorney General;"

(q) In the first three sentences of section 2.4, striking "Agencies within" and inserting in lieu thereof "Elements of"; striking "Agencies" and inserting in lieu thereof "Elements of the Intelligence Community"; and striking "agency" and inserting in lieu thereof "Intelligence Community element concerned or the head of a department containing such element";

(r) In the second sentence of section 2.4, inserting ", after consultation with the Director" after "Attorney General";

(s) In section 2.4(a), striking "CIA" and inserting in lieu thereof "Central Intelligence Agency (CIA);"

(t) In section 2.4(b) and (c), striking "agencies" and inserting in lieu thereof "elements of the Intelligence Community".

(u) In section 2.4(b)(2), striking the period and inserting in lieu thereof a semicolon;

(v) In section 2.4(c)(1), striking "agency" and inserting in lieu thereof "element";

(w) In section 2.4(c)(2), striking the period and inserting in lieu thereof "; and;"

(x) In section 2.4(d) striking "than" and inserting in lieu thereof "that";

(y) In section 2.5, striking the final sentence and inserting in lieu thereof "The authority delegated pursuant to this paragraph, including the authority
to approve the use of electronic surveillance as defined in the Foreign Intelligence Surveillance Act of 1978, as amended, shall be exercised in accordance with that Act.

(z) In section 2.6, inserting "and other Civil" before "Authorities" in the caption and striking "Agencies within" and inserting in lieu thereof "Elements of";

(aa) In section 2.6(a), inserting a comma after "property" and striking "agency" and inserting in lieu thereof "element";

(bb) In section 2.6(c), striking "General Counsel" and inserting in lieu thereof "general counsel", and striking "agency" and inserting in lieu thereof "element or department" in the second sentence;

(cc) In section 2.6(d), inserting "or other civil" before "authorities";

(dd) In section 2.7, striking "Agencies within" and inserting in lieu thereof "Elements of";

(ee) In section 2.9, striking "agencies within" and inserting in lieu thereof "elements of", and striking "agency within" and inserting in lieu thereof "element of" the first time it appears and "Intelligence Community element" the second and third times it appears;

(ff) In section 2.9, striking "his" and inserting in lieu thereof "such person's";

(gg) In section 2.9, inserting "or the head of a department containing such element" before "and approved by the Attorney General", and inserting ", after consultation with the Director" after "the Attorney General";

(hh) In section 2.10, striking "agency within" and inserting in lieu thereof "element of", and inserting a comma after "contract for";

(ii) In section 2.12, striking "agency" and inserting in lieu thereof "element";

and

(jj) At the end of Part 2, inserting a new section 2.13 as follows: "2.13 Limitation on Covert Action. No covert action may be conducted which is intended to influence United States political processes, public opinion, policies, or media."

Sec. 4. Part 3 of Executive Order 12333, as amended, is further amended by:

(a) In section 3.1, striking "of Central Intelligence"; inserting "elements," after "agencies,"; and striking "special" and inserting in lieu thereof "covert action";

(b) Striking section 3.2 and inserting in lieu thereof: "3.2 Implementation. The President, supported by the NSC, and the Director shall issue such appropriate directives, procedures, and guidance as are necessary to implement this order. Heads of elements within the Intelligence Community shall issue appropriate procedures and supplementary guidance consistent with this order. No procedures to implement Part 2 of this order shall be issued without the Attorney General's approval, after consultation with the Director. The Attorney General shall provide a statement of reasons for not approving any procedures established by the head of an element in the Intelligence Community (or the head of the department containing such element) other than the FBI. In instances where the element head or department head and the Attorney General are unable to reach agreements on other than constitutional or other legal grounds, the Attorney General, the head of department concerned, or the Director shall refer the matter to the NSC.");

(c) Striking section 3.3 and inserting in lieu thereof: "3.3 Procedures. The activities herein authorized that require procedures shall be conducted in accordance with existing procedures or requirements established under Executive Order 12333. New procedures, as required by Executive Order 12333, as further amended, shall be established as expeditiously as possible. All new procedures promulgated pursuant to Executive Order 12333, as amended, shall be made available to the Select Committee on Intelligence
of the Senate and the Permanent Select Committee on Intelligence of the
House of Representatives.

(d) Inserting after section 3.3 the following new section: “3.4 References
and Transition. References to “Senior Officials of the Intelligence
Community” or “SOICs” in executive orders or other Presidential guidance, shall
be deemed references to the heads of elements in the Intelligence Community,
unless the President otherwise directs; references in Intelligence Community
or Intelligence Community element policies or guidance, shall be deemed
to be references to the heads of elements of the Intelligence Community,
unless the President or the Director otherwise directs.”

(e) Striking “3.4 Definitions” and inserting in lieu thereof “3.5 Definitions”;

(f) Amending the definition of “Counterintelligence” in section 3.5(a), as
renumbered, by inserting “identify, deceive, exploit, disrupt, or” before “pro-
tect against espionage”, inserting “or their agents,” after “persons.”, inserting
“organizations or activities” after terrorist, and striking “activities, but not
including personnel, physical, document or communications security pro-
grams”;

(g) Striking section 3.5(b)-(h), as renumbered, and inserting in lieu thereof:
“(b) Covert action means an activity or activities of the United States
Government to influence political, economic, or military conditions abroad,
where it is intended that the role of the United States Government will
not be apparent or acknowledged publicly, but does not include:

1. Activities the primary purpose of which is to acquire intelligence,
traditional counterintelligence activities, traditional activities to im-
prove or maintain the operational security of United States Govern-
ment programs, or administrative activities;

2. Traditional diplomatic or military activities or routine support to
such activities;

3. Traditional law enforcement activities conducted by United States
Government law enforcement agencies or routine support to such ac-
thetics;

4. Activities to provide routine support to the overt activities (other
than activities described in paragraph (1), (2), or (3)) of other United
States Government agencies abroad.

(c) Electronic surveillance means acquisition of a nonpublic communication
by electronic means without the consent of a person who is a party
to an electronic communication or, in the case of a nonelectronic commu-
nication, without the consent of a person who is visibly present at the
place of communication, but not including the use of radio direction-
finding equipment solely to determine the location of a transmitter.

(d) Employee means a person employed by, assigned or detailed to, or
acting for an element within the Intelligence Community.

(e) Foreign intelligence means information relating to the capabilities, inten-
tions, or activities of foreign governments or elements thereof, foreign
organizations, foreign persons, or international terrorists.

(f) Intelligence includes foreign intelligence and counterintelligence.

(g) Intelligence activities means all activities that elements of the Intel-
ligence Community are authorized to conduct pursuant to this order.

(h) Intelligence Community and elements of the Intelligence Community
refers to:

1. The Office of the Director of National Intelligence;
2. The Central Intelligence Agency;
3. The National Security Agency;
4. The Defense Intelligence Agency;
5. The National Geospatial-Intelligence Agency;
6. The National Reconnaissance Office;
7. The other offices within the Department of Defense for the collect-
ion of specialized national foreign intelligence through reconnaissance
programs;
(8) The intelligence and counterintelligence elements of the Army, the Navy, the Air Force, and the Marine Corps;
(9) The intelligence elements of the Federal Bureau of Investigation;
(10) The Office of National Security Intelligence of the Drug Enforcement Administration;
(11) The Office of Intelligence and Counterintelligence of the Department of Energy;
(12) The Bureau of Intelligence and Research of the Department of State;
(13) The Office of Intelligence and Analysis of the Department of the Treasury;
(14) The Office of Intelligence and Analysis of the Department of Homeland Security;
(15) The intelligence and counterintelligence elements of the Coast Guard; and
(16) Such other elements of any department or agency as may be designated by the President, or designated jointly by the Director and the head of the department or agency concerned, as an element of the Intelligence Community.

(i) National Intelligence and Intelligence Related to National Security means all intelligence, regardless of the source from which derived and including information gathered within or outside the United States, that pertains, as determined consistent with any guidance issued by the President, or that is determined for the purpose of access to information by the Director in accordance with section 1.3(a)(1) of this order, to pertain to more than one United States Government agency; and that involves threats to the United States, its people, property, or interests; the development, proliferation, or use of weapons of mass destruction; or any other matter bearing on United States national or homeland security.

(j) The National Intelligence Program means all programs, projects, and activities of the Intelligence Community, as well as any other programs of the Intelligence Community designated jointly by the Director and the head of a United States department or agency or by the President. Such term does not include programs, projects, or activities of the military departments to acquire intelligence solely for the planning and conduct of tactical military operations by United States Armed Forces."

(h) Redesignating the definition of “United States Person” as section 3.5(k) and therein striking “agency” and inserting in lieu thereof “element”;

(i) Striking section 3.5;

(j) In section 3.6, striking “Order No. 12036 of January 24, 1978, as amended, entitled “United States Intelligence Activities,” is” and inserting in lieu thereof “Orders 13354 and 13355 of August 27, 2004, are”, and inserting before the period “; and paragraphs 1.3(b)(9) and (10) of Part 1 supersede provisions within Executive Order 12958, as amended, to the extent such provisions in Executive Order 12958, as amended, are inconsistent with this Order”; and

(k) Inserting the following new section 3.7 to read as follows:

“3.7 General Provisions.

(a) Consistent with section 1.3(c) of this order, nothing in this order shall be construed to impair or otherwise affect:

(1) Authority granted by law to a department or agency, or the head thereof; or

(2) Functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any
right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies or entities, its officers, employees, or agents, or any other person.”.

Sec. 5. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable by any party at law or in equity against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
July 30, 2008
One Hundred Seventh Congress
of the
United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Wednesday, the third day of January, two thousand and one

An Act

To deter and punish terrorism acts in the United States and abroad, to enhance law enforcement investigative tools, and for other purposes.

SEC. 1. SHORT TITLE AND TABLE OF CONTENTS.
(a) Short Title.—This Act may be cited as the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.”

(b) Table of Contents.—The following table of contents for this Act is in order:

Sec. 1. Short title and table of contents.
Sec. 2. Construction; reenactment.

TITLE I—ENHANCING DOMESTIC SECURITY AGAINST TERRORISM

Sec. 101. Counterterrorism fund.
Sec. 102. State and local antiterrorism assistance program.
Sec. 103. Increased funding for the technical support center.
Sec. 104. Requests for military assistance to enforce prohibitions in certain emergencies.
Sec. 106. Presidential authorities.

TITLE II—ENHANCED SURVEILLANCE PROCEDURES

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Sec. 345. Financial crimes enforcement network.
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Sec. 601. Crime victims fund.
Sec. 602. Crime victims compensation.
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Sec. 701. Expansion of regional information sharing system to facilitate Federal-State-local law enforcement response related to terrorist attacks.

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TITLE IX—DEPLOYED INTELLIGENCE

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Sec. 902. Delegation of intelligence gathering activities involving agents of foreign intelligence services.
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TITLE X—MISCELLANEOUS

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SEC. 2. CONSTRUCTION; SEVERABILITY.

Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give the maximum effect permitted by law to the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed
severable from this Act and shall not affect the remainder thereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

TITLE I—ENHANCING DOMESTIC SECURITY AGAINST TERRORISM

SEC. 101. COUNTERTERRORISM FUND.
(a) ESTABLISHMENT; AVAILABILITY.—There is hereby established in the Treasury of the United States a separate fund to be known as the ‘Counterterrorism Fund’, amounts in which shall remain available without fiscal year limitation—
(1) to reimburse any Department or agency of the United States for any costs incurred in connection with—
(A) re-establishing the operational capability of an office or facility that has been damaged or destroyed as the result of any domestic or international terrorism incident;
(B) providing support to counter, investigate, or prosecute domestic or international terrorism, including, without limitation, paying rewards in connection with these activities; and
(C) conducting terrorism threat assessments of Federal agencies and their facilities; and
(2) to reimburse any department or agency of the Federal Government for any costs incurred in connection with detaining in foreign countries of which an individual accused of acts of terrorism that violate the laws of the United States.
(b) NO EFFECT ON PRIOR APPROPRIATIONS.—Subsection (a) shall not be construed to affect the amount or availability of any appropriation to the Counterterrorism Fund made before the date of the enactment of this Act.

SEC. 102. SENSE OF CONGRESS CONDEMNIGN DISCRIMINATION AGAINST ARAB AND MUSLIM AMERICANS.
(a) FINDINGS.—Congress makes the following findings:
(1) Arab Americans, Muslim Americans, and Americans from South Asia play a vital role in our Nation and are entitled to nothing less than the full rights of every American.
(2) The acts of violence that have been taken against Arab and Muslim Americans since September 11, 2001, attacks against the United States should be and are condemned by all Americans who value freedom.
(3) The concept of individual responsibility for wrongdoing in accordance with American society, and applies equally to all religious, racial, and ethnic groups.
(4) When Arab and Muslim Americans commit acts of violence against those who are, or are perceived to be, of Arab or Muslim descent, they should be punished to the full extent of the law.
(5) Many Arab Americans and Muslim Americans have become so fearful of harassment that many Muslim women are changing the way they dress to avoid becoming targets.
(b) PROHIBITION AGAINST VIOLENT ACTS AGAINST ARAB AMERICANS AND MUSLIM AMERICANS.—It is the sense of Congress that—
(1) the civil and human rights and civil liberties of all Americans, including Arab Americans, Muslim Americans, and Americans from South Asia, must be protected, and that every effort must be taken to protect their safety;
(2) any acts of violence or discrimination against any Americans be condemned; and
(3) the Nation is called upon to recognize the patriotism of fellow citizens from all ethnic, racial, and religious backgrounds.

SEC. 103. INCREASED FUNDING FOR THE TECHNICAL SUPPORT CENTER AT THE FEDERAL BUREAU OF INVESTIGATION.
There are authorized to be appropriated for the Technical Support Center established in section 611 of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104–132) to help meet the demands for activities to combat terrorism and support and enhance the technical support and tactical operations of the FBI, $200,000,000 for each of the fiscal years 2002, 2003, and 2004.

SEC. 104. REQUESTS FOR MILITARY ASSISTANCE TO ENFORCE PROHIBITION IN CERTAIN EMERGENCIES.
Section 2332a of title 10, United States Code, is amended—
(1) by striking “2332a” and inserting “2332a;” and
(2) by striking “chemical”.

SEC. 105. EXPANSION OF NATIONAL ELECTRONIC CRIME TASK FORCE INITIATIVE.
The Director of the United States Secret Service shall take appropriate actions to develop a national network of electronic crime task forces, based on the New York Electronic Crimes Task Force Model, throughout the United States, for the purpose of preventing, detecting, and investigating various forms of electronic crimes, including potential terrorist attacks against critical infrastructure and financial payment systems.

SEC. 106. PRESIDENTIAL AUTHORITY.
Section 203 of the International Emergency Powers Act (50 U.S.C. 1702) is amended—
(1) in subsection (a)(1)—
(A) at the end of subparagraph (A) (Flush to that subparagraph), by striking “; and” and inserting a comma and the following:
“by any person, or with respect to any property, subject to the jurisdiction of the United States;”;
(B) in subparagraph (B)—
(i) by inserting “, block during the pendency of an investigation” after “investigate”; and
(ii) by striking “interest” and inserting “interest by any person, or with respect to any property, subject to the jurisdiction of the United States;”;
(C) by striking “by any person, or with respect to any property, subject to the jurisdiction of the United States;” and
(3) by inserting at the end the following:
"(C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and (d) right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes;" and
(b) classified information.—In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act) such information may be submitted to the reviewing court ex parte and in camera. This subsection does not confer or imply any right to judicial review.

**TITLE II—ENHANCED SURVEILLANCE PROCEDURES**

SEC. 201. AUTHORITY TO INTERCEPT WIRE, ORAL, AND ELECTRONIC COMMUNICATIONS RELATING TO TERRORISM.

Section 2516(1) of title 18, United States Code, is amended—

(1) by redesignating by section 4342 of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104–132, 110 Stat. 1274) as paragraph (2); and

(2) by inserting after paragraph (2) an additional paragraph (3) which redesignates section 201(3)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Division C of Public Law 104–208, 110 Stat. 3009–565) as the following new paragraph:

(3) any criminal violation of section 229 (relating to chemical weapons) or sections 2532, 2532a, 2532b, 2533a, 2533b, or 2533c of this title (relating to terrorism); or

SEC. 202. AUTHORITY TO INTERCEPT WIRE, ORAL, AND ELECTRONIC COMMUNICATIONS RELATING TO COMPUTER FRAUD AND ABUSE OFFENSES.

Section 2516(1) of title 18, United States Code, is amended by striking "and section 1341 (relating to mail fraud);" and inserting "section 1341 (relating to mail fraud); a felony violation of section 1030 (relating to computer fraud and abuse);".

SEC. 203. AUTHORITY TO SHARE CRIMINAL INVESTIGATIVE INFORMATION.

(a) AUTHORITY TO SHARE GRAND JURY INFORMATION.

(1) IN GENERAL.—Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure is amended as follows:

"(C)(i) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(1) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(II) when permitted by a court at the request of the defendant, after showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(III) when the disclosure is made by an attorney for the government to another Federal grand jury;

(IV) when permitted by a court at the request of the defendant, after showing that such matters may disclose a violation of State criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such law;

(V) when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401(a)) or foreign intelligence information (as defined in clause (vi) of this subparagraph) to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties;

(ii) If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(iii) Any Federal official to whom information is disclosed pursuant to clause (i)(V) of this subparagraph may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed, and the department, agencies, or entities to which the disclosure was made.

(iv) In clause (i)(V) of this subparagraph, the term "foreign intelligence information" means—

(1) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—

"(a) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;"

"(b) sabotage or international terrorism by a foreign power or an agent of a foreign power; or"

"(c) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or"
(1) LAW ENFORCEMENT.—Section 2517 of title 18, United States Code, is amended by inserting at the end the following:

"(6) Any investigative or law enforcement officer, or attorney for the Government, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official to the extent that such contents include foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in subsection (9) of section 2510 of this title), to assist the official who is to receive that information in the performance of his official duties. Any Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information."

(2) DEFINITION.—Section 2510 of title 18, United States Code, is amended by—

(A) in paragraph (17), by striking "and" after the semicolon;

(B) in paragraph (18), by striking the period and inserting "; and"; and

(C) by inserting at the end the following:

"(19) Foreign intelligence information means—

(A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—

(i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power;

(B) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—

(i) the national defense or the security of the United States; or

(ii) the conduct of the foreign affairs of the United States; or

(C) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—

(i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(H) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—

(i) the national defense or the security of the United States; or

(ii) the conduct of the foreign affairs of the United States; or

(iii) the conduct of the foreign affairs of the United States."
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(c) REPORT.—The Attorney General shall report to the Committees on the Judiciary of the House of Representatives and the Senate on—
(1) the number of translators employed by the FBI and other components of the Department of Justice;
(2) any legal or practical impediments to using translators employed by other Federal, State, or local agencies, on a full, part-time, or shared basis; and
(3) the needs of the FBI for specific translation services in certain languages, and recommendations for meeting those needs.


Section 105(c)(2)(B) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(c)(2)(B)) is amended by inserting in or in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person, such other persons, after “specified person”.

SEC. 207. DURATION OF FISA SURVEILLANCE OF NON-UNITED STATES PERSONS WHO ARE AGENTS OF A FOREIGN POWER.

(a) DURATION.—
(1) SURVEILLANCE.—Section 105(c)(1) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(c)(1)) is amended by—
(A) inserting “A” after “except that”;
(B) inserting before the period the following: “and”;
(C) an order under this Act for a surveillance targeted against an agent of a foreign power, as defined in section 101(b)(1)(A) may be for the period specified in the application or for 120 days, whichever is less”.

(b) PHYSICAL SEARCH.—Section 104(d)(1) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1804(d)(1)) is amended by—
(A) striking “forty-five” and inserting “90”;
(B) inserting “A” after “except that”;
(C) inserting before the period the following: “and”;

(b) EXTENSION.—
(1) IN GENERAL.—Section 105(d)(2) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(d)(2)) is amended by—
(A) inserting “A” after “except that”;
(B) inserting before the period the following: “and”;

(b) DEFINED TERM.—Section 104(d)(2) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1804(d)(2)) is amended by inserting after “not a United States person,” the following: “or against an agent of a foreign power as defined in section 101(b)(1)(A)”.

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SEC. 208. DESIGNATION OF JUDGES.

Section 109(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803(a)) is amended by—
(1) striking “seven district court judges” and inserting “11 district court judges”;
(2) inserting “of whom no fewer than 3 shall reside within 20 miles of the District of Columbia” after “circuit”.

SEC. 209. SEIZURE OF VOICE-MAIL MESSAGES PURSUANT TO WARRANTS.

Title 18, United States Code, is amended—
(1) in section 2709—
(A) in paragraph (1), by striking beginning with “and such” and all that follows through “communication”;
(B) in paragraph (14), by inserting “wire or” after “transmission of”;
(2) in subsections (a) and (b) of section 2703—
(A) by striking “CONTENTS OF ELECTRONIC” and inserting “CONTENTS OF WIRE OR ELECTRONIC” each place it appears;
(B) by striking “contents of an electronic device” and inserting “contents of a wire or electronic device” each place it appears;
(C) by striking “any electronic device” and inserting “any wire or electronic device” each place it appears.

SEC. 210. SCOPE OF SUBPOENAS FOR RECORDS OF ELECTRONIC COMMUNICATIONS.

Section 2703(c)(2) of title 18, United States Code, as redesignated by section 212, is amended—
(1) by striking “entity the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity, and length of service of a subscriber” and inserting the following entity the—
(A) name;
(B) address;
(C) local and long distance telephone connection records, or records of session times and durations;
(D) length of service (including start date) and types of service utilized;
(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and
(F) means and source of payment for such service (including any credit card or bank account number), of a subscriber; and
(2) by striking “and the types of services the subscriber or customer utilized.”.

SEC. 211. CLARIFICATION OF SCOPE.

Section 611 of the Communications Act of 1934 (47 U.S.C. 551) is amended—
(1) in subsection (a)(2)—
(A) in subparagraph (B), by striking “or”;
(B) in subparagraph (C), by striking the period at the end and inserting “or”;
(C) by inserting at the end the following:
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“(D) to a government entity as authorized under chapters 119, 121, or 206 of title 18, United States Code, except that such disclosure shall not include records revealing cable subscriber selection of video programming from a cable operator;”;

and

(2) in subsection (b), by striking “A governmental entity” and inserting “Except as provided in subsection (c)(2)(D), a governmental entity”.

SEC. 212. EMERGENCY DISCLOSURE OF ELECTRONIC COMMUNICATIONS TO PROTECT LIFE AND LIMB.

(a) DISCLOSURE OF CONTENTS.—

(1) IN GENERAL.—Section 2702 of title 18, United States Code, is amended—

(A) by striking the section heading and inserting the following:

“§2702. Voluntary disclosure of customer communications or records;”;

(B) in subsection (a)—

(i) in paragraph (2)(A), by striking “and” at the end;

(ii) in paragraph (2)(B), by striking the period and inserting “; and”;

and

(iii) by inserting after paragraph (2) the following:

“(3) A provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (3)) to any governmental entity;”;

(C) in subsection (b), by striking “EXCEPTIONS—A person or entity” and inserting “EXCEPTIONS FOR DISCLOSURE OF COMMUNICATIONS.—A provider described in subsection (a)”;

(D) in subsection (b)(1)—

(i) in subparagraph (A)(ii), by striking “or”;

(ii) in subparagraph (B), by striking the period and inserting “; or”;

and

(iii) by adding after subparagraph (B) the following:

“(C) if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay;”;

and

(E) by inserting after subsection (b) the following:

“(c) EXCEPTIONS FOR DISCLOSURE OF CUSTOMER RECORDS.—A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))

(1) as otherwise authorized in section 2703;

(2) with the lawful consent of the customer or subscriber;

(3) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(4) to a government entity, if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of the information; or

(5) to any person other than a governmental entity.”;

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 121 of title 18, United States Code, is amended by striking the item relating to section 2702 and inserting the following:

“2702. Voluntary disclosure of customer communications or records.”;

(b) REQUIREMENTS FOR GOVERNMENT ACCESS—

(1) IN GENERAL.—Section 2703 of title 18, United States Code, is amended—

(A) by striking the section heading and inserting the following:

“§2703. Required disclosure of customer communications or records;”;

(B) in subsection (c) by redesigning paragraph (2) as paragraph (5); and

(C) in subsection (c)(1)—

(i) by striking “(A) Except as provided in subparagraph (B), a provider of electronic communication service or remote computing service may” and inserting “A governmental entity may require a provider of electronic communication service or remote computing service to”;

(ii) by striking “covered by subsection (a) or (b) of this section” and inserting “any person other than a governmental entity”;

(iii) by redesigning subparagraph (D) as paragraph (1);”;

(iv) by redesigning clauses (i), (ii), (iii), and (iv) as subparagraphs (A), (B), (C), (D), respectively;

(v) in subparagraph (D) (as redesignated) by striking the period and inserting “; or”;

and

(vi) by inserting after subparagraph (D) (as redesignated) the following:

“(E) seeks information under paragraph (2);”;

and

(D) in paragraph (2) (as redesignated) by striking “subparagraph (B)” and insert “paragraph (1);”;

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 121 of title 18, United States Code, is amended by striking the item relating to section 2703 and inserting the following:

“2703. Required disclosure of customer communications or records.”;

SEC. 313. AUTHORITY FOR DELAYING NOTICE OF THE EXECUTION OF A WARRANT.

Section 3106a of title 18, United States Code, is amended—
SEC. 214. PEN REGISTER AND TRAP AND TRACE AUTHORITY UNDER FISA.

(a) APPLICATIONS AND ORDERS.—Section 402 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1802) is amended—

(1) by inserting "(a) IN GENERAL.—" before "In addition";

and

(2) by adding at the end the following:—

"(b) DELAY.—With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if—"

"(1) the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 702);"

"(2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication (as defined in section 3510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and"

"(3) the warrant provides for the giving of such notice within a reasonable period of its issuance, which period may thereafter be extended by the court for good cause shown.

SEC. 215. ACCESS TO RECORDS AND OTHER ITEMS UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT.

Title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861 et seq.) is amended by striking sections 501 through 503 and inserting the following:

"SEC. 501. ACCESS TO CERTAIN BUSINESS RECORDS FOR FOREIGN INTELLIGENCE AND INTERNATIONAL TERRORISM INVESTIGATIONS.

"(a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible thing (including books, records, papers, documents, and other data) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is conducted solely upon the basis of activities protected by the first amendment to the Constitution.

"(2) An investigation conducted under this section shall—"

"(A) be conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order); and"

"(B) not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution.

"(b) Each application under this section—"

"(1) shall be made to—"

"(A) a judge of the court established by section 103(a); or"

"(B) a United States Magistrate Judge under chapter 43 of title 18, United States Code, who is publicly designated by the Chief Justice of the United States to have the power to hear applications and grant orders for the production of tangible things under this section on behalf of a judge of that court; and"
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"(2) shall specify that the records concerned are sought for an authorized investigation conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

"(a)(1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section.

"(2) An order under this subsection shall not disclose that it is issued for purposes of an investigation described in subsection (a).

"(c)(1) No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.

"(e) A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production. Such production shall not be deemed to constitute a waiver of any privilege in any other proceeding or context.

"SEC. 302. CONGRESSIONAL OVERTHen.

"(a) On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate concerning all requests for the production of tangible things under section 402.

"(b) On a semiannual basis, the Attorney General shall provide to the Committees on Appropriations of the House of Representatives and the Senate a report setting forth with respect to the preceding 6-month period—

"(1) the total number of applications made for orders approving requests for the production of tangible things under section 402; and

"(2) the total number of such orders either granted, modified, or denied.

"SEC. 315. MODIFICATION OF AUTHORITIES RELATING TO USE OF PEN REGISTERS AND TRAP AND TRACE DEVICES.

"(a) General Limitations.—Section 3123(a) of title 18, United States Code, is amended—

"(1) by inserting "or trap and trace device" after "pen register";

"(2) by inserting "or, routing, addressing," after "dialing," and

"(3) by striking "call processing" and inserting "the processing and transmitting of wire or electronic communications so as not to include the contents of any wire or electronic communications.

"(b) Issuance of Orders.—

"(1) In General.—Section 3123(a) of title 18, United States Code, is amended to read as follows:

"(a) In General—

"(1) ATTORNEY FOR THE GOVERNMENT.—Upon an application made under section 3122(a)(1), the court shall enter an ex parte order authorizing the installation and use of a pen register or trap and trace device anywhere within the United States, if the court finds that the attorney for the Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation. The order, upon service of that order, shall apply to any person or entity providing wire or electronic communication service in the United States whose assistance may facilitate the execution of the order. Whenever such an order is served on any person or entity not specifically named in the order, upon request of such person or entity, the attorney for the Government or law enforcement or investigative officer that is serving the order shall provide written or electronic certification that the order applies to the person or entity being served.

"(2) STATE INVESTIGATIVE OR LAW ENFORCEMENT OFFICER.—

"(c)(1) Upon an application made under section 3122(a)(2), the court shall enter an ex parte order authorizing the installation and use of a pen register or trap and trace device within the jurisdiction of the court, if the court finds that the State law enforcement or investigative officer has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.

"(d)(A) Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public, the agency shall ensure that a record will be maintained which will identify—

"(i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the record;

"(ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device was accessed to obtain information;

"(iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and

"(iv) any information which has been collected by the device.

"(2) CONFORMITY OF ORDER.—Section 3122(b)(1) of title 18, United States Code, is amended—

"(A) in subparagraph (A)—

"(i) by inserting "or other facility" after "telephone line"; and

"(ii) by inserting before the semicolon at the end "as applied"; and

"(B) by striking subparagraph (C) and inserting the following:
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(C) the attributes of the communications to which the order applies, including the number or other identifier and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied, and, in the case of an order authorizing installation and use of a trap and trace device under subsection (a)(2), the geographic limits of the order; and

(2) NONDISCLOSURE REQUIREMENTS.—Section 3122(d)(2) of title 18, United States Code, is amended—

(A) by striking "or other facility" after "the line"; and

(B) by striking ", or who has been ordered by the court," and inserting "or applied, or who is obligated by the order". 

(c) DEFINITIONS.—

(1) COURT OF COMPETENT JURISDICTION.—Section 3127(2) of title 18, United States Code, is amended by striking subparagraph (A) and inserting the following:

"(A) any district court of the United States (including a magistrate judge of such a court) or any United States court of appeals having jurisdiction over the offense being investigated; or"

(2) PEN REGISTER.—Section 3127(3) of title 18, United States Code, is amended—

(A) by striking "electronic or other impulses" and all that follows through "in the course of" and inserting "as a result of"; and

(B) by striking "any said device" and inserting "any device".

(3) TRAP AND TRACE DEVICE.—Section 3127(4) of title 18, United States Code, is amended—

(A) by striking "an instrument" and all that follows through "telephone line" and inserting "the wire or"; and

(B) by inserting "a device" after "the line".

(4) CONFIRMING AMENDMENT.—Section 3127(1) of title 18, United States Code, is amended—

(A) by striking "and"; and

(B) by striking ", and the contents of any communications;" and inserting "the wire or electronic communication service;".

(5) TECHNICAL AMENDMENT.—Section 3124(d) of title 18, United States Code, is amended by striking ", and the contents of any communications;" and inserting "the wire or electronic communication service;".

SEC. 217. INTERCEPTION OF COMPUTER TRESPASSER COMMUNICATIONS.

Chapter 119 of title 18, United States Code, is amended—

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(1) in section 2510—

(A) in paragraph (18), by striking "and" at the end; and

(B) in paragraph (19), by inserting the period and inserting a semicolon; and

(C) by inserting after paragraph (19) the following:

"(20) "protected computer" has the meaning set forth in section 1030; and"

(21) "computer trespasser"—

"(A) means a person who accesses a computer without authorization and thus has no reasonable expectation of privacy in any communication transmitted to, through, or from the computer; and"

(B) does not include a person known by the owner or operator of the computer to be using the computer without authorization; and

(2) in section 2511(2), by inserting at the end the following:

"(i) It shall not be unlawful under this chapter for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser transmitted to, through, or from the protected computer, if—"

"(1) the owner or operator of the protected computer authorizes the interception of the computer trespasser's communications on the protected computer;"

"(2) the person acting under color of law is lawfully engaged in an investigation;"

"(3) the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser's communications will be relevant to the investigation; and"

"(4) such interception does not disclose communications other than those transmitted to or from the computer trespasser.".

SEC. 218. FOREIGN INTELLIGENCE INFORMATION.

Sections 104(a)(7)(B) and section 203(a)(7)(B) (50 U.S.C. 1804(a)(7)(B) and 1826(a)(7)(B)) of the Foreign Intelligence Surveillance Act of 1978 are each amended by striking "the purpose" and inserting "a significant purpose".

SEC. 219. SINGLE-JURISDICTION SEARCH WARRANTS FOR TERRORISM.

Rule 41(a) of the Federal Rules of Criminal Procedure is amended by inserting after "exercised" the following: "and (3) in an investigation of domestic terrorism or international terrorism (as defined in section 2331 of title 18, United States Code), by a Federal magistrate judge in any district in which activities related to the terrorism may have occurred, for a search of property or for a person within or outside the district."

SEC. 220. NATIONWIDE SERVICE OF SEARCH WARRANTS FOR ELECTRONIC EVIDENCE.

(a) IN GENERAL.—Chapter 121 of title 18, United States Code, is amended—

(1) in section 3703, by striking "under the Federal Rules of Criminal Procedure" every place it appears and inserting "using the procedures described in the Federal Rules of
(a) IN GENERAL.—The Trade Sanctions Reform and Export Enhancement Act of 2000 (Public Law 106–387; 114 Stat. 1549A–67) is amended—

(1) by amending section 904(2)(C) to read as follows:

"(C) used to facilitate the design, development, or production of chemical or biological weapons, missiles, or weapons of mass destruction;"

(2) in section 906(a)(3), by inserting "the Taliban or the territory of Afghanistan controlled by the Taliban, after "Cuba"; "

(3) in section 906(a)(6), by inserting "or to any other entity in Syria or North Korea, after "Korea.""

(b) APPLICATION OF THE SANCTIONS REFORM AND EXPORT ENHANCEMENT ACT.—Nothing in the Trade Sanctions Reform and Export Enhancement Act of 2000 shall limit the applicability or scope of any law establishing criminal or civil penalties, including any Executive order or regulation promulgated pursuant to such laws (or similar or successor laws), for the unlawful export of any agriculture commodity, medicine, or medical device to—

(1) a foreign government, group, or person designated pursuant to Executive Order No. 13224 of January 31, 2001, as amended;

(2) a Foreign Terrorist Organization pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104–132);

(3) any organization, group, or person subject to any restriction for its involvement in weapons of mass destruction or missile proliferation.

SECTION 321. ASSISTANCE TO LAW ENFORCEMENT AGENCIES.

Nothing in this Act shall impose any additional technical obligation or requirement on a provider of a wire or electronic communication service or other person to furnish facilities or technical assistance. A provider of a wire or electronic communication service, landlord, custodian, or other person who furnishes facilities or technical assistance pursuant to section 216 shall be reasonably compensated for such reasonable expenditures incurred in providing such facilities or assistance.

SECTION 322. CIVIL LIABILITY FOR CERTAIN UNAUTHORIZED DISCLOSURES.

(a) Section 2520 of title 18, United States Code, is amended—

(1) in subsection (a), after "entity," by inserting "other than the United States;"

(2) by adding at the end the following:

"(d) ADMINISTRATIVE DISCIPLINE.—If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination."

(3) by adding a new subsection (g), as follows:

"(g) IMPROPER DISCLOSURE OR VIOLATION.—Any willful disclosure or use by an investigative or law enforcement officer or governmental entity of information beyond the extent permitted by section 2517 is a violation of this chapter for purposes of section 2503(a).

(b) Section 2507 of title 18, United States Code, is amended—

(1) in subsection (a), after "entity," by inserting "other than the United States;"

(2) by striking subsection (d) and inserting the following:

"(d) ADMINISTRATIVE DISCIPLINE.—If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination."

(3) by adding a new subsection (g), as follows:

"(g) IMPROPER DISCLOSURE.—Any willful disclosure of a "record", as that term is defined in section 5(2)(c) of Title 5, United States Code, obtained by an investigative or law enforcement officer, or a governmental entity, pursuant to section 2103 of this title, or
from a device installed pursuant to section 3123 or 3125 of this title, that is not a disclosure made in the proper performance of the official functions of the officer or governmental entity making the disclosure, is a violation of this chapter. This provision shall not apply to information previously lawfully disclosed (prior to the commencement of any civil or administrative proceeding under this chapter) to the public by a Federal, State, or local governmental entity or by the plaintiff in a civil action under this chapter.”

(c) Chapter 121 of title 18, United States Code, is amended by adding at the end the following:

“§ 2712. Civil actions against the United States

(a) IN GENERAL.—Any person who is aggrieved by any willful violation of this chapter or of chapter 119 of this title or of sections 1066(a), 306(a), or 307(a) of the Freedom of Information Act of 1974 (50 U.S.C. 1901 et seq.) may commence an action in an appropriate United States District Court against the United States to recover money damages. In any such action, if a person who is aggrieved successfully establishes such a violation of this chapter or of chapter 119 of this title or of the above specific provisions of title 50, the Court may assess as damages—

1. actual damages, but not less than $10,000, whichever amount is greater; and

2. litigation costs, reasonably incurred.

(b) PROCEDURES.—(1) Any action against the United States under this section may be commenced only after a claim is presented to the appropriate department or agency under the procedures of the Federal Tort Claims Act, as set forth in title 28, United States Code.

(2) Any action against the United States under this section shall be forever barred unless it is presented in writing to the appropriate department or agency within 2 years after such claim accrues or unless action is begun within 6 months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented. The claim shall accrue on the date upon which the claimant first has a reasonable opportunity to discover the violation.

(c) Any action under this section shall be tried to the court without a jury.

(d) Notwithstanding any other provision of law, the procedures set forth in sections 1066(b), 306(a), or 307(a) of the Freedom of Information Act of 1974 (50 U.S.C. 1901 et seq.) shall be the exclusive means by which materials governed by those sections may be reviewed.

(e) An amount equal to any award against the United States under this section shall be reimbursed by the department or agency concerned to the fund described in section 1394 of title 31, United States Code, out of any appropriation, fund, or other account (excluding any part of such appropriation, fund, or account that is available for the enforcement of any Federal law) that is available for the operating expenses of the department or agency concerned.

(f) ADMINISTRATIVE—If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted.

If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

(g) EXCLUSIVE REMEDY—Any action against the United States under the subsection shall be the exclusive remedy against the United States for any claims within the purview of this section.

(h) STAY OF PROCEEDINGS.—(1) Upon the motion of the United States, the court shall stay any action commenced under this section if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related investigation or the prosecution of a related criminal case. Such a stay shall toll the limitations periods of subsection (b).

(2) In this subsection, the terms ‘related criminal case’ and ‘related investigation’ mean an actual prosecution or investigation in progress at the time at which the request for the stay or any subsequent motion to lift the stay is made. In determining whether an investigation or a criminal case is related to an action commenced under this section, the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in the 2 proceedings, without requiring that any one or more factors be identical.

(3) In requesting a stay under paragraph (1), the Government may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter that may adversely affect a related investigation or a related criminal case. If the Government makes such an ex parte submission, the court may give the party an opportunity to make a submission to the court, not ex parte, and the court may, in its discretion, request further information from either party upon which the court may base its decision to grant or deny the stay.

(4) The table of sections at the beginning of chapter 121 is amended to read as follows:

"§ 2712. Civil action against the United States.”

SEC. 234. SUNSET.

(a) In General.—Except as provided in subsection (b), this title and the amendments made by this title (other than sections 208(o), 208(r), 205, 208, 210, 211, 213, 218, 219, 231, 221, 220, 230, 232, and the amendments made by those sections) shall cease to have effect on December 31, 2005.

(b) Exception.—With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect.

SEC. 235. IMMUNITY FOR COMPLIANCE WITH FISA WIRETAP.

Section 105 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805) is amended by inserting after subsection (g) the following:

"(g) The term ‘FISA wiretap’ means any interception by government—"
"(b) No cause of action shall lie in any court against any provider of a wire or electronic communication service, landlord, custodian, or other person (including any officer, employee, agent, or other specified person thereof) that furnishes any information, facilities, or technical assistance in accordance with a court order or request for emergency assistance under this Act.".

TITLE III— INTERNATIONAL MONEY LAUNDERING ABATEMENT AND ANTI-TERRORIST FINANCING ACT OF 2001

SEC. 301. SHORT TITLE.
This title may be cited as the "International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001".

SEC. 302. FINDINGS AND PURPOSES.
(a) FINDINGS.—The Congress finds that—
(1) money laundering, estimated by the International Monetary Fund to amount to between 2 and 5 percent of global gross domestic product, which is at least $600,000,000,000 annually, provides the financial fuel that permits international criminal enterprises to conduct and expand their operations to the detriment of the safety and security of American citizens;
(2) money laundering, and the defects in financial transparency on which money launderers rely, are critical to the financing of global terrorism and the provision of funds for terrorist attacks;
(3) money launderers subvert legitimate financial mechanisms and banking relationships by using them as protective cover for the movement of criminal proceeds and the financing of crime and terrorism, and, by so doing, can threaten the safety of United States citizens and undermine the integrity of United States financial institutions and of the global financial and trading systems upon which prosperity and growth depend;
(4) certain jurisdictions outside of the United States that offer "offshore" banking and related facilities designed to provide anonymity, coupled with weak financial supervisory and enforcement regimes, provide essential tools to mask ownership and movement of criminal funds, derived from, or used to commit, offenses ranging from narcotics trafficking, terrorism, arms smuggling, and trafficking in human beings, to financial frauds that prey on law-abiding citizens;
(5) transactions involving such offshore jurisdictions make it difficult for law enforcement officials and regulators to follow the trail of money earned by criminals, organized international criminal enterprises, and global terrorist organizations;
(6) correspondent banking facilities are one of the banking mechanisms susceptible in some circumstances to manipulation by foreign banks to permit the laundering of funds by hiding the identity of real parties in interest to financial transactions;
(7) correspondent banking facilities are vulnerable to manipulation by money launderers, for example corrupt foreign government officials, particularly if those services include the creation of offshore accounts and facilities for large personal funds transfers to channel funds into accounts around the globe;

SEC. 303. SHORT TITLE.
This title may be cited as the "International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001".

SEC. 304. FINDINGS AND PURPOSES.
(a) FINDINGS.—The Congress finds that—
(1) United States anti-money laundering efforts are impeded by outdated and inadequate statutory provisions that make investigations, prosecutions, and forfeitures more difficult, particularly in cases in which money laundering involves foreign persons, foreign banks, or foreign countries;
(2) the ability to mount effective countermeasures to international money laundering requires national, as well as bilateral and multilateral, action, using tools specially designed for that effort; and
(3) the House Committee on Banking and Financial Services and the Financial Action Task Force on Money Laundering, of both of which the United States is a member, have adopted international anti-money laundering principles and recommendations.

(b) PURPOSES.—The purposes of this title are—
(1) to increase the strength of United States measures to prevent, detect, and prosecute international money laundering and the financing of terrorism;
(2) to ensure that—
(A) banking transactions and financial relationships and the conduct of such transactions and relationships, do not contravene the purposes of subchapter V of chapter 33 of title 31, United States Code, section 21 of the Federal Deposit Insurance Act, or chapter 2 of title 1 of Public Law 91–508 (84 Stat. 1110), or facilitate the evasion of any such provision; and
(B) the purposes of such provisions of law continue to be fulfilled, and such provisions of law are effectively and efficiently administered;
(3) to strengthen the provisions put into place by the Money Laundering Control Act of 1986 (18 U.S.C. 601 note); especially with respect to crimes by non-United States nationals and foreign financial institutions;
(4) to provide a clear national mandate for subjecting to special scrutiny those foreign jurisdictions, financial institutions operating outside of the United States, and classes of international transactions or types of accounts that pose particular, identifiable opportunities for criminal abuse;
(5) to provide the Secretary of the Treasury (in this title referred to as the "Secretary") with broad discretion, subject to the safeguards provided by the Administrative Procedure Act, to take measures tailored to the particular money laundering problems presented by specific foreign jurisdictions, financial institutions operating outside of the United States, and classes of international transactions or types of accounts;
(6) to ensure that the employment of such measures by the Secretary permits appropriate opportunity for comment by affected financial institutions;
(7) to provide guidance to domestic financial institutions on particular foreign jurisdictions, financial institutions operating outside of the United States, and classes of international transactions that are of primary money laundering concern to the United States Government;
(8) to ensure that the forfeiture of any assets in connection with the anti-terrorism efforts of the United States permits
for adequate challenge consistent with providing due process rights;
(9) to clarify the terms of the safe harbor from civil liability for filing suspicious activity reports;
(10) to strengthen the authority of the Secretary to issue and administer geographic targeting orders, and to clarify that violations of such orders or any other requirement imposed under the authority contained in chapter 2 of title I of Public Law 97–568 and subsections II and III of chapter 53 of title 31, United States Code, may result in criminal and civil penalties;
(11) to ensure that all appropriate elements of the financial services industry are subject to appropriate requirements to report potential money laundering transactions to proper authorities, and that jurisdictional disputes do not hinder examination of compliance by financial institutions with relevant reporting requirements;
(12) to strengthen the ability of financial institutions to maintain the integrity of their employee population; and
(13) to strengthen measures to prevent the use of the United States financial system for personal gain by corrupt foreign officials and to facilitate the repatriation of any stolen assets to the citizens of countries to whom such assets belong.

SEC. 204. 4-YEAR CONGRESSIONAL REVIEW, EXPEDITED CONSIDERATION.

(a) In General.—Effective on and after the first day of fiscal year 2006, the provisions of this title and the amendments made by this title shall terminate if the Congress enacts a joint resolution, the text of the resolving clause of which is as follows: "That provisions of the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, and the amendments made thereby, shall no longer have the force of law."

(b) EXPEDITED CONSIDERATION.—Any joint resolution submitted pursuant to this section should be considered by the Congress expeditiously. In particular, it shall be considered in the Senate in accordance with the provisions of section 631(b) of the International Security Assistance and Arms Control Act of 1978.

Subtitle A—International Counter Money Laundering and Related Measures

SEC. 311. SPECIAL MEASURES FOR JURISDICTIONS, FINANCIAL INSTITUTIONS, OR INTERNATIONAL TRANSACTIONS OF PRIMARY MONEY LAUNDERING CONCERN.

(a) In General.—Subchapter II of chapter 53 of title 31, United States Code, is amended by inserting after section 5318 the following new section:

"§ 5318A. Special measures for jurisdictions, financial institutions, or international transactions of primary money laundering concern.

(a) INTERNATIONAL COUNTER-MONEY LAUNDERING REQUIREMENTS—

(1) In General.—The Secretary of the Treasury may require domestic financial institutions and domestic financial agencies to take 1 or more of the special measures described in subsection (b) if the Secretary finds that reasonable grounds exist for concluding that a jurisdiction outside of the United States, 1 or more financial institutions operating outside of the United States, 1 or more classes of transactions within, or involving, a jurisdiction outside of the United States, or 1 or more types of accounts is of primary money laundering concern, in accordance with subsection (c).

(2) FORM OF REQUIREMENT.—The special measures described in—

(A) subsection (b) may be imposed in each such sequence or combination as the Secretary shall determine;

(B) paragraphs (1) through (4) of subsection (b) may be imposed by regulation, order, or otherwise as permitted by law; and

(C) subsection (b)(5) may be imposed only by regulation.

(3) DURATION OF ORDERS, RULEMAKING.—Any order by which a special measure described in paragraphs (1) through (4) of subsection (b) is imposed (other than an order described in section 5320)—

(A) shall be issued together with a notice of proposed rulemaking relating to the imposition of such special measure and

(B) may not remain in effect for more than 120 days, except pursuant to a rule promulgated on or before the end of the 120-day period beginning on the date of issuance of such order.

(4) PROCESS FOR SELECTING SPECIAL MEASURES.—In selecting which special measure or measures to take under this subsection, the Secretary of the Treasury—

(A) shall consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, as defined in section 3 of the Federal Deposit Insurance Act, the Secretary of the Treasury, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the National Credit Union Administration Board, and in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate; and

(B) shall consider—

(i) whether similar action has been or is being taken by other nations or multilateral groups;

(ii) whether the imposition of any particular special measure would create a significant competitive disadvantage, including any undue cost or burden associated with compliance, for financial institutions organized or licensed in the United States;

(iii) the extent to which the action would have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on legitimate business activities involving the particular jurisdiction, institution, or class of transactions; and

(iv) the effect of the action on United States national security and foreign policy.
(5) No limitation on other authority.—This section shall not be construed as superseding or otherwise restricting any other authority granted to the Secretary, or to any other agency, by this subchapter or otherwise.

(6) Special measures.—The special measures referred to in subsection (a), with respect to a jurisdiction outside of the United States, financial institution operating outside of the United States, class of transaction within, or involving, a jurisdiction outside of the United States, or 1 or more types of accounts are as follows:

(1) Reconnaissance and reporting of certain financial transactions—

(A) In general.—The Secretary of the Treasury may require any domestic financial institution or domestic financial agency to maintain records, file reports, or both, concerning the aggregate amount of transactions, or concerning each transaction, with respect to a jurisdiction outside of the United States, 1 or more financial institutions operating outside of the United States, 1 or more classes of transactions within, or involving, a jurisdiction outside of the United States, or 1 or more types of accounts if the Secretary finds any such jurisdiction, institution, or class of transactions to be of primary money laundering concern.

(B) Form of records and reports.—Such records and reports shall be made and retained at such time, in such manner, and for such period of time, as the Secretary shall determine, and shall include such information as the Secretary may determine, including—

(i) the identity and address of the participants in a transaction or relationship, including the identity of the originator of any funds transfer;

(ii) the legal capacity in which a participant in any transaction is acting;

(iii) the identity of the beneficial owner of the funds involved in any transaction, in accordance with such procedures as the Secretary determines to be reasonable and practicable to obtain and retain the information; and

(iv) a description of any transaction.

(2) Information relating to beneficial ownership.—In addition to any other requirement under any other provision of law, the Secretary may require any domestic financial institution or domestic financial agency to take such steps as the Secretary may determine to be reasonable and practicable to obtain and retain information concerning the beneficial ownership of any account opened or maintained in the United States by a foreign person (other than a foreign entity whose shares are subject to public reporting requirements or are listed and traded on a regulated exchange or trading market), or a representative of such a foreign person, that involves a jurisdiction outside of the United States, 1 or more financial institutions operating outside of the United States, 1 or more classes of transactions within, or involving, a jurisdiction outside of the United States, or 1 or more types of accounts if the Secretary finds any such jurisdiction, institution, or transaction or type of account to be of primary money laundering concern.

(3) Information relating to certain payable-through accounts.—If the Secretary finds a jurisdiction outside of the United States, 1 or more financial institutions operating outside of the United States, 1 or more classes of transactions within, or involving, a jurisdiction outside of the United States to be of primary money laundering concern, the Secretary may require any domestic financial institution or domestic financial agency that opens or maintains a payable-through account in the United States for a foreign financial institution involving any such jurisdiction or any such financial institution operating outside of the United States, or a payable through account through which any such transaction may be conducted, as a condition of opening or maintaining such account—

(A) to identify each customer (and representative of such customer) of such financial institution who is permitted to use, or whose transactions are routed through, such payable-through account; and

(B) to obtain, with respect to each such customer (and each such representative) information that is substantially comparable to that which the depository institution obtains in the ordinary course of business with respect to its customers residing in the United States.

(4) Information relating to certain correspondent accounts.—If the Secretary finds a jurisdiction outside of the United States, 1 or more financial institutions operating outside of the United States, 1 or more classes of transactions within, or involving, a jurisdiction outside of the United States to be of primary money laundering concern, the Secretary may require any domestic financial institution or domestic financial agency that opens or maintains a correspondent account in the United States for a foreign financial institution involving any such jurisdiction or any such financial institution operating outside of the United States, or a correspondent account through which any such transaction may be conducted, as a condition of opening or maintaining such account—

(A) to identify each customer (and representative of such customer) of such financial institution who is permitted to use, or whose transactions are routed through, such correspondent account; and

(B) to obtain, with respect to each such customer (and each such representative) information that is substantially comparable to that which the depository institution obtains in the ordinary course of business with respect to its customers residing in the United States.

(5) Prohibitions or conditions on opening or maintaining certain correspondent or payable-through accounts.—If the Secretary finds a jurisdiction outside of the United States, 1 or more financial institutions operating outside of the United States, 1 or more classes of transactions within, or involving, a jurisdiction outside of the United States to be of primary money laundering concern, in consultation with the Secretary of State, the Attorney General, and the Chairman of the Board of Governors of the Federal Reserve System, may prohibit, or impose conditions upon, the opening or maintaining in the United States of a correspondent account or payable-through account by any domestic financial institution or domestic financial agency for or on behalf of
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a foreign banking institution, if such correspondent account or payable-through account involves any such jurisdiction or institution, or if any such transaction may be conducted through such correspondent account or payable-through account.

"3) Consultations and information to be considered in finding jurisdictions, institutions, types of accounts, or transactions to be of primary money laundering concern.

"(1) In general.—In making a finding that reasonable grounds exist for concluding that a jurisdiction outside of the United States, a financial institution operating outside of the United States, or a person, or more financial institutions operating outside of the United States, or more classes of transactions within, or involving, a jurisdiction outside of the United States, or 1 or more types of accounts is of primary money laundering concern so as to authorize the Secretary of the Treasury to take 1 or more of the special measures described in subsection (b), the Secretary shall consult with the Secretary of State and the Attorney General.

"(2) Additional considerations.—In making a finding described in paragraph (1), the Secretary shall consider in addition such information as the Secretary determines to be relevant, including the following potentially relevant factors:

(A) JURISDICTIONAL FACTORS.—In the case of a particular jurisdiction:

(i) evidence that organized criminal groups, international terrorists, or both, have transacted business in that jurisdiction;

(ii) the extent to which that jurisdiction or financial institutions operating in that jurisdiction offer bank secrecy or special regulatory advantages to nonresident or non-domiciliaries of that jurisdiction;

(iii) the substance and quality of administration of the bank supervisory and counter-money laundering laws of that jurisdiction;

(iv) the relationship between the volume of financial transactions occurring in that jurisdiction and the size of the economy of the jurisdiction;

(v) the extent to which that jurisdiction is characterized as an offshore banking or secrecy haven by credible international organizations or multilateral expert groups;

(vi) whether the United States has a mutual legal assistance treaty with that jurisdiction, and the experience of United States law enforcement officials and regulatory officials in obtaining information about transactions originating in or routed through or to such jurisdiction; and

(B) INSTITUTIONAL FACTORS.—In the case of a decision to apply 1 or more of the special measures described in subsection (b) to a financial institution or institutions, or to a transaction or class of transactions, or to a type of account, or to all 3, within or involving a particular jurisdiction:

(i) the extent to which such financial institutions, transactions, or types of accounts are used to facilitate

or promote money laundering in or through the jurisdiction;

(ii) the extent to which such institutions, transactions, or types of accounts are used for legitimate business purposes in the jurisdiction; and

(iii) the extent to which such action is sufficient to ensure, with respect to transactions involving the jurisdiction and institutions operating in the jurisdiction, that the purposes of this subchapter continue to be fulfilled, and to guard against international money laundering and other financial crimes.

"(d) Notification of special measures inquired by the Secretary.—Not later than 10 days after the date of any action taken by the Secretary of the Treasury under subsection (a)(1), the Secretary shall notify, in writing, the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate of any such action.

"(e) Definitions.—Notwithstanding any other provision of this subchapter, for purposes of this section and subsections (i) and (j) of section 5318, the following definitions shall apply:

(1) Bank definitions.—The following definitions shall apply with respect to any bank:

(A) Account.—The term 'account' includes any account, including a transaction account (as defined in section 1956(f)(1) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a correspondent, in banking activities usual in connection with the business of banking in the United States.

(B) CORRESPONDENT ACCOUNT.—The term 'correspondent account' means an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution.

(C) PAYABLE-THROUGH ACCOUNT.—The term 'payable-through account' means an account, including a transaction account (as defined in section 1956(f)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a correspondent, in banking activities usual in connection with the business of banking in the United States.

DEFINITIONS APPLICABLE TO INSTITUTIONS OTHER THAN BANKS.—With respect to any financial institution other than a bank, the Secretary shall, after consultation with the appropriate Federal financial regulatory agencies (as defined in section 5309 of the Gramm-Leach-Bliley Act), define by regulation the term 'account', and shall include within the meaning of that term, to the extent, if any, that the Secretary deems appropriate, arrangements similar to payable-through and correspondent accounts.

DEFINITION OF BENEFICIAL OWNERSHIP.—The Secretary shall promulgate regulations defining beneficial ownership of an account for purposes of this section and subsections (i) and (j) of section 5318. Such regulations shall address issues related to an individual's authority to fund,
direct, or manage the account (including, without limitation, the power to direct payments into or out of the account), and an individual's material interest in the income or corpus of the account, and shall ensure that the identification of individuals under this section does not extend to any individual whose beneficial interest in the income or corpus of the account is immaterial.

(4) OTHER TERMS.—The Secretary may, by regulation, further define the terms in paragraphs (1), (2), and (3), and define other terms for the purposes of this section, as the Secretary deems appropriate.

(b) CLERICAL AMENDMENT.—The table of sections for subchapter II of chapter 53 of title 31, United States Code, is amended by inserting after the item relating to section 5318 the following new item:

""SEC. 5319. Special measures for jurisdictions, financial institutions, or international transactions of primary money laundering concern.""

SEC. 102. SPECIAL DUE DILIGENCE FOR CORRESPONDENT ACCOUNTS AND PRIVATE BANKING ACCOUNTS.

(a) In General.—Section 5318 of title 31, United States Code, is amended by adding at the end the following:

""(1) In general.—Each financial institution that establishes, maintains, administers, or manages a private banking account or a correspondent account in the United States for a non-United States person, including a foreign individual visiting the United States, or a representative of a non-United States person shall establish appropriate, specific, and, where necessary, enhanced, due diligence policies, procedures, and controls that are reasonably designed to detect and report instances of money laundering through those accounts.

(2) ADDITIONAL STANDARDS FOR CERTAIN CORRESPONDENT ACCOUNTS.—

(A) In general.—Subparagraph (B) shall apply if a correspondent account is requested or maintained by, or on behalf of, a foreign bank operating—

(i) under an offshore banking license; or

(ii) under a banking license issued by a foreign country that has been designated—

(I) as noncooperative with international anti-money laundering principles or procedures by an intergovernmental group or organization of which the United States is a member, with which designation the United States deems to extend to the group or organization concerned; or

(II) by the Secretary of the Treasury as warranting special measures due to money laundering concerns.

(B) POLICIES, PROCEDURES, AND CONTROLS.—The enhanced due diligence policies, procedures, and controls required under paragraph (1) shall, at a minimum, ensure that the financial institution in the United States takes reasonable steps—

(i) to ascertain for any such foreign bank, the shares of which are not publicly traded, the identity of each of the owners of the foreign bank, and the nature and extent of the ownership interest of each such owner; and

(ii) to conduct enhanced scrutiny of such account to guard against money laundering and report any suspicious transactions under subsection (g); and

(iii) to ascertain whether such foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information, as appropriate under paragraph (1).

(3) MINIMUM STANDARDS FOR PRIVATE BANKING ACCOUNTS.—If a private banking account is requested or maintained by, or on behalf of, a non-United States person, then the due diligence policies, procedures, and controls required under paragraph (1) shall, at a minimum, ensure that the financial institution takes reasonable steps—

(A) to ascertain the identity of the individual and beneficial owners of, and the source of funds deposited into, such account as needed to guard against money laundering and report any suspicious transactions under subsection (g); and

(B) to conduct enhanced scrutiny of any such account that is requested or maintained by, or on behalf of, a senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure that is reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption.

(4) DEFINITION.—For purposes of this subsection, the following definitions shall apply:

(A) OFFSHORE BANKING LICENSE.—The term "offshore banking license" means a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country in which issued the license.

(B) PRIVATE BANKING ACCOUNT.—The term "private banking account" means an account (or any combination of accounts) that—

(i) requires a minimum aggregate deposits of funds or other assets of not less than $1,000,000;

(ii) is established on behalf of 1 or more individuals who have a direct or beneficial ownership interest in the account; and

(iii) is assigned to, or is administered or managed by, in whole or in part, an officer, employee, or agent of a financial institution acting as a liaison between the financial institution and the direct or beneficial owner of the account.

(b) REGULATORY AUTHORITY AND EFFECTIVE DATE.—

(1) REGULATORY AUTHORITY.—Not later than 180 days after the date of enactment of this Act, the Secretary, in consultation with the appropriate Federal functional regulators (as defined in section 509 of the Gramm-Leach-Bliley Act of the affected financial institutions, shall further delineate, by regulation, the due diligence policies, procedures, and controls required
under section 5318(b)(1) of title 31, United States Code, as added by this section.

(2) EFFECTIVE DATE.—Section 5318(i) of title 31, United States Code, as added by this section, shall take effect 370 days after the date of enactment of this Act, whether or not final regulations are issued under paragraph (1), and the failure to issue such regulations shall in no way affect the enforceability of this section or the amendments made by this section. Section 5318(i) of title 31, United States Code, as added by this section, shall apply with respect to accounts covered by that section (5318(i)), that are opened before, on, or after the date of enactment of this Act.

SEC. 313. PROHIBITION ON UNITED STATES CORRESPONDENT ACCOUNTS WITH FOREIGN SHELL BANKS.

(a) In GENERAL.—Section 5318 of title 31, United States Code, as amended by this title, is amended by adding at the end the following:

"(i) PROHIBITION ON UNITED STATES CORRESPONDENT ACCOUNTS WITH FOREIGN SHELL BANKS.—

"(1) In GENERAL.—A financial institution described in subparagraphs (A) through (D) of section 5312(a)(2) in this subsection, referred to as a 'covered financial institution' shall not establish, maintain, administer, or manage a correspondent account in the United States for, or on behalf of, a foreign bank that does not have a physical presence in any country.

"(2) Prevention of Interest Service to Foreign Shell Banks.—A covered financial institution shall take reasonable steps to ensure that any correspondent account established, maintained, administered, or managed by that covered financial institution in the United States for a foreign bank is not being used by that foreign bank to indirectly provide banking services to another foreign bank that does not have a physical presence in any country. The Secretary of the Treasury shall, by regulation, delineate the reasonable steps necessary to comply with this paragraph.

"(3) Exceptions.—Paragraphs (1) and (2) do not prohibit a covered financial institution from providing a correspondent account to a foreign bank if the foreign bank—

"(A) is an affiliate of a depository institution, credit union, or foreign bank that maintains a physical presence in the United States or a foreign country, as applicable; and

"(B) is subject to supervision by a banking authority in the country regulating the affiliated depository institution, credit union, or foreign bank described in subparagraph (A), as applicable.

"(4) Definitions.—For purposes of this subsection—

"(A) the term 'affiliate' means a foreign bank that is controlled by or is under common control with a depository institution, credit union, or foreign bank; and

"(B) the term 'physical presence' means a place of business that—

"(i) is maintained by a foreign bank;

"(ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank—

"(I) employs 1 or more individuals on a full-time basis; and

"(II) maintains operating records related to its banking activities; and

"(iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities.

"(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect at the end of the 60-day period beginning on the date of enactment of this Act.

SEC. 314. COOPERATIVE EFFORTS TO DETEER MONEY LAUNDERING.

(a) COOPERATION AMONG FINANCIAL INSTITUTIONS, REGULATORY AUTHORITIES, AND LAW ENFORCEMENT AUTHORITIES.—

"(1) Regulations.—The Secretary shall, within 120 days after the date of enactment of this Act, adopt regulations to encourage further cooperation among financial institutions, their regulatory authorities, and law enforcement authorities, with the specific purpose of encouraging regulatory authorities and law enforcement authorities to share with financial institutions information regarding individuals, entities, and organizations engaged in or reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities.

"(2) Cooperation and Information Sharing Procedures.—The regulations adopted under paragraph (1) may include or create procedures for cooperation and information sharing focusing on—

"(A) matters specifically related to the finances of terrorist groups, the assets by which terrorist groups transfer funds around the world and within the United States, including through the use of charitable organizations, nonprofit organizations, and nongovernmental organizations, and the extent to which financial institutions in the United States are uninvolved in such finances and the extent to which such institutions are at risk as a result; (B) the relationship, particularly the financial relationship, between international narcotics traffickers and foreign terrorist organizations, the extent to which their membership overlaps and engage in joint activities, and the extent to which they cooperate with each other in raising and transferring funds for their respective purposes; and

"(C) means of facilitating the identification of accounts and transactions involving terrorist groups and facilitating the exchange of information concerning such accounts and transactions between financial institutions and law enforcement organizations.

"(b) CONTENTS.—The regulations adopted pursuant to paragraph (1) may—

"(A) require that each financial institution designate 1 or more persons to receive information concerning, and to monitor accounts of individuals, entities, and organizations identified, pursuant to paragraph (1) and

"(B) further establish procedures for the protection of the shared information, consistent with the capacity, size,
and nature of the institution to which the particular procedures apply.

(a) RULE OF CONSTRUCTION.—The receipt of information by a financial institution pursuant to this section shall not relieve or otherwise modify the obligations of the financial institution with respect to any other person or account.

(b) USE OF INFORMATION.—Information received by a financial institution pursuant to this section shall not be used for any purpose other than identifying and reporting on activities that may involve terrorist acts or money laundering activities.

(c) COOPERATION AMONG FINANCIAL INSTITUTIONS.—Upon notice provided to the Secretary, 2 or more financial institutions and any association of financial institutions may share information with one another regarding individuals, entities, organizations, and countries suspected of possible terrorist or money laundering activities. A financial institution or association that transmits, receives, or shares such information for the purposes of identifying and reporting activities that may involve terrorist acts or money laundering activities shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision thereof, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure, or any other person identified in the disclosure, except where such transmission, receipt, or sharing violates this section or regulations promulgated pursuant to this section.

(d) RULE OF CONSTRUCTION.—Compliance with the provisions of this title requiring or allowing financial institutions and any association of financial institutions to disclose or share information regarding individuals, entities, and organizations engaged in or suspected of engaging in terrorist acts or money laundering activities shall not constitute a violation of the provisions of title V of the Gramm-Leach-Bliley Act (Public Law 106-102).

(e) REPORTS TO THE FINANCIAL SERVICES INDUSTRY ON SUSPICIOUS FINANCIAL ACTIVITIES.—At least semiannually, the Secretary shall:

(1) publish a report containing a detailed analysis identifying patterns of suspicious activity and other investigative insights derived from suspicious activity reports and investigations conducted by Federal, State, and local law enforcement agencies to the extent appropriate; and

(2) distribute such report to financial institutions (as defined in section 5312 of title 31, United States Code).

SEC. 315. INCLUSION OF FOREIGN CORRUPTION OFFENSES AS MONEY LAUNDERING CRIMES.

Section 1956(c)(7) of title 18, United States Code, is amended—

(1) in subparagraph (B),—

(A) in clause (i), by striking "or destruction of property by means of explosive or fire" and inserting "destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);"

(B) in clause (iii), by striking "1976" and inserting "1978"; and

(C) by adding at the end the following:

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"(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving—

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774); or

(III) an offense with respect to which the United States would be obligated by a multilateral treaty, other to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States; and

(2) in subparagraph (D)—

(A) by inserting "section 541 (relating to goods falsely classified)" before "section 547;"

(B) by inserting "section 522(1) (relating to the unlawful importation of firearms), section 524(c) (relating to firearms trafficking)," before "section 996;"

(C) by inserting "section 1886 relating to computer fraud and abuse," before "1033;" and

(D) by inserting "any felony violation of the Foreign Agents Registration Act of 1938," before "or any felony violation of the Foreign Corrupt Practices Act."
(C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the "Administrative Procedure Act").

(2) SAVINGS CLAUSE.—Nothing in this section shall limit or otherwise affect any other remedies that may be available to an owner of property under section 963 of title 18, United States Code, or any other provision of law.

(d) TECHNICAL CORRECTION.—Section 983(i)(2)(D) of title 18, United States Code, is amended by inserting "or the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. 1701 et seq.)" before the semicolon.

SEC. 317. LONG-ARM JURISDICTION OVER FOREIGN MONEY LAUNDERERS.

Section 1956(b) of title 18, United States Code, is amended—

(1) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively, and moving the margins 2 ems to the right;

(2) by inserting after "(b)" the following: "Penalties.—"

"(1) IN GENERAL.—;"

(3) by inserting "or section 1957 after "or (a)(3);" ; and

(4) by adding at the end the following:

"(2) JURISDICTION OVER FOREIGN PERSONS.—For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest because of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) COURT AUTHORITY OVER ASSETS.—A court described in paragraph (2) may issue a provisional restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) FEDERAL RECEIVER.—

(A) IN GENERAL.—A court described in paragraph (2) may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

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"(k) INTERRANK ACCOUNTS.—"

"(A) IN GENERAL.—For the purpose of a forfeiture under this section or under the Controlled Substances Act (21 U.S.C. 801 et seq.), if funds are deposited into an account at a foreign bank, and that foreign bank has an interbank account in the United States with a covered financial institution (as defined in section 5318(x)(1) of title 31), the funds shall be deemed to have been deposited into the interbank account in the United States, and any restraining order, seizure warrant, or arrest warrant in respect of the funds may be served on the covered financial institution, and funds in the interbank account, up to the value of the funds deposited into the account at the foreign bank, may be restrained, seized, or arrested.

(B) AUTHORITY TO SUSPEND.—The Attorney General, in consultation with the Secretary of the Treasury, may suspend or terminate a forfeiture under this section if the Attorney General determines that a conflict of law exists between the laws of the jurisdiction in which the foreign bank is located and the laws of the United States.
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with respect to liabilities arising from the restraint, seizure, or arrest of such funds, and that such suspension or termination would be in the interest of justice and would not harm the national interests of the United States.

(2) No requirement for government to track funds.—If a forfeiture action is brought against funds that are restrained, seized, or arrested under paragraph (1), it shall not be necessary for the Government to establish that the funds are directly traceable to the funds that were deposited into the foreign bank, nor shall it be necessary for the Government to rely on the application of section 984.

(3) Claims brought by owner of the funds.—If a forfeiture action is instituted against funds restrained, seized, or arrested under paragraph (1), the owner of the funds deposited into the account at the foreign bank may contest the forfeiture by filing a claim under section 963.

(4) Definitions.—For purposes of this subsection, the following definitions shall apply:

(A) Interbank account.—The term 'interbank account' has the same meaning as in section 984(c)(2)(B).

(B) Owner.—

(i) In general.—Except as provided in clause (ii), the term 'owner'—

(I) means the person who was the owner, as that term is defined in section 963(a)(3), of the funds that were deposited into the foreign bank at the time such funds were deposited; and

(II) does not include either the foreign bank or any financial institution acting as an intermediary in the transfer of the funds into the interbank account.

(ii) Exception.—The foreign bank may be considered the owner of the funds (and no other person shall qualify as the owner of such funds) only if—

(I) the basis for the forfeiture action is wrongfully committed by the foreign bank; or

(II) the foreign bank establishes, by a preponderance of the evidence, that prior to the restraint, seizure, or arrest of the funds, the foreign bank had discharged all or part of its obligation to the prior owner of the funds, in which case the foreign bank shall be deemed the owner of the funds to the extent of such discharged obligation.

(b) Bank Records.—Section 5318 of title 31, United States Code, as amended by this title, is amended by adding at the end the following:

(c) Bank Records Related to Anti-Money Laundering Program.—

(1) Definitions.—For purposes of this subsection, the following definitions shall apply:

(A) Appropriate Federal banking agency.—The term 'appropriate Federal banking agency' has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(B) Incorporated firm.—The term 'correspondent account' has the same meaning as in section 5318A(f)(1)(B).

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(2) 120-Hour Rule.—Not later than 120 hours after receiving a request by an appropriate Federal banking agency for information related to anti-money laundering compliance by a covered financial institution or a customer of such institution, a covered financial institution shall provide to the appropriate Federal banking agency, or make available at a location specified by the representative of the appropriate Federal banking agency, information and account documentation for any account opened, maintained, administered, or managed in the United States by the covered financial institution.

(3) Foreign Bank Records.—

(A) Summons or Subpoena of Records.—

(i) In general.—The Secretary of the Treasury or the Attorney General may issue a summons or subpoena to any foreign bank that maintains a correspondent account in the United States and request records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank.

(ii) Service of Summons or Subpoena.—A summons or subpoena referred to in clause (i) may be served on the foreign bank in the United States if the foreign bank has a representative in the United States, or in a foreign country pursuant to any mutual legal assistance treaty, multilateral agreement, or other request for international law enforcement assistance.

(B) Acceptance of Service.—

(i) Maintaining Records in the United States.—Any covered financial institution which maintains a correspondent account in the United States for a foreign bank shall maintain records in the United States for identifying the owners of such foreign bank and the name and address of a person who resides in the United States and is authorized to accept service of legal process for records regarding the correspondent account.

(ii) Law Enforcement Request.—Upon receipt of a written request from a Federal law enforcement officer for information required to be maintained under this paragraph, the covered financial institution shall provide the information to the requesting officer not later than 7 days after receipt of the request.

(C) Termination of Correspondent Relationship.—

(i) Termination Upon Receipt of Notice.—A covered financial institution shall terminate any correspondent relationship with a foreign bank not later than 10 business days after receipt of written notice from the Secretary or the Attorney General (in such case, after consultation with the other) that the foreign bank has failed—

(I) to comply with a summons or subpoena issued under subparagraph (A) or

(II) to initiate proceedings in a United States court contesting such summons or subpoena.
"(ii) Limitation on liability.—A covered financial institution shall not be liable to any person in any court or arbitration proceeding for terminating a correspondent relationship in accordance with this subsection.

"(iii) Failure to terminate relationship.—Failure to terminate a correspondent relationship in accordance with this subsection shall render the covered financial institution liable for a civil penalty of up to $10,000 per day until the correspondent relationship is so terminated.

"(c) Grace period.—Financial institutions shall have 60 days from the date of enactment of this Act to comply with the provisions of section 5313(c) of title 21, United States Code, as added by this section.

"(d) Authority to order convicted criminal to return property located abroad.—

Section 423(p) of the Controlled Substances Act (21 U.S.C. 848) is amended to read as follows:

"(p) FORFEITURE OF SUBSTITUTE PROPERTY.—

"(1) IN GENERAL.—Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant—

"(A) cannot be located upon the exercise of due diligence;

"(B) has been transferred or sold to, or deposited with, a third party;

"(C) has been placed beyond the jurisdiction of the court;

"(D) has not been substantially diminished in value; or

"(E) has been commingled with other property which cannot be divided without difficulty.

"(2) SUBSTITUTE PROPERTY.—In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

"(3) RETURN OF PROPERTY TO JURISDICTION.—In the case of property described in paragraph (1), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

"(2) PROTECTIVE ORDERS.—Section 423(p) of the Controlled Substances Act (21 U.S.C. 848) is amended by adding at the end the following:

"(a) ORDER TO SURRENDER AND DEPOSIT.—

"(1) IN GENERAL.—Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repropagate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshal Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

"(2) FAILURE TO COMPLY.—Failure to comply with an order under this subsection, or an order to repropagate property under subsection (p), shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

SEC. 232. PROCEDURES OF FOREIGN CRIMINALS.

Section 581(a)(1)(B) of title 18, United States Code, is amended to read as follows:

"(B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation, or any property used to facilitate such an offense, if the offense—

"(1) involves the manufacture, importation, sale, or distribution of a controlled substance (as that term is defined for purposes of the Controlled Substances Act, or any other conduct described in section 1956c(a)(1)(B);

"(2) would be punishable within the jurisdiction of the foreign nation by death or imprisonment for a term exceeding 1 year; and

"(3) would be punishable under the laws of the United States by imprisonment for a term exceeding 1 year, if the act or activity constituting the offense had occurred within the jurisdiction of the United States.

SEC. 233. FINANCIAL INSTITUTIONS SPECIFIED IN SUBCHAPTER II OF CHAPTER 38 OF TITLE 31, UNITED STATES CODE.

(a) CREDIT UNIONS.—Paragraph (2) of section 3812(b) of title 31, United States Code, is amended to read as follows:

"(2) any credit union;

(b) CREDIT COMMISSION MERCHANT COMMODITY TRADING ADVISOR; COMMODITY POOL OPERATOR.—Section 3812 of title 31, United States Code, is amended by adding at the end the following:

"(c) ADDITIONAL DEFINITIONS.—For purposes of this subchapter, the following definitions shall apply:

"(1) CREDIT INSTITUTION included in definition.—The term 'financial institution' (as defined in subsection (a)(1)) includes the following:

"(A) Any futures commission merchant, commodity trading advisor, or commodity pool operator registered, or required to register, under the Commodity Exchanges Act.

"(B) CFTC includes.—For purposes of this Act and any amendment made by this Act to any other provision of law, the term "Federal functional regulator" includes the Commodity Futures Trading Commission.

SEC. 235. CORPORATION REPRESENTED BY A FUGITIVE.

Section 2466 of title 18, United States Code, is amended by designating the present matter as subsection (a), and adding at the end the following:

"(b) Subsection (a) may be applied to a claim filed by a corporation if any majority shareholder, or individual filing the claim on behalf of the corporation is a person to whom subsection (a) applies.

SEC. 236. ENFORCEMENT OF FOREIGN JUDGMENTS.

Section 2467 of title 38, United States Code, is amended—
SEC. 323. CONCENTRATION ACCOUNTS AT FINANCIAL INSTITUTIONS.

Section 5318(b) of title 31, United States Code, as amended by section 202 of this title, as amended by adding at the end the following:

"(3) CONCENTRATION ACCOUNTS.—The Secretary may prescribe regulations under this subsection that govern maintenance of concentration accounts by financial institutions, in order to ensure that such accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner, which regulations shall, at a minimum—

(A) prohibit financial institutions from allowing clients to direct transactions that move their funds into, out of, or through the concentration accounts of the financial institution;

(B) prohibit financial institutions and their employees from informing customers of the existence of, or the means of identifying, the concentration accounts of the institution; and

(C) require each financial institution to establish written procedures governing the documentation of all transactions involving a concentration account, which procedures shall ensure that, any time a transaction involving a concentration account commingles funds belonging to 2 or more customers, the identity of, and specific amount belonging to, each customer is documented."

SEC. 328. VERIFICATION OF IDENTIFICATION.

(a) In General.—Section 5318 of title 31, United States Code, as amended by this title, is amended by adding at the end the following:

"(1) IDENTIFICATION AND VERIFICATION OF ACCOUNTHOLDERS.—

"(A) in General.—Subject to the requirements of this subsection, the Secretary of the Treasury shall prescribe regulations setting forth the minimum standards for financial institutions and their customers regarding the identity of the customer that shall apply in connection with the opening of an account as a financial institution.

"(2) MINIMUM REQUIREMENTS.—The regulations shall, at a minimum, require financial institutions to implement, and customers (after being given adequate notice) to comply with, reasonable procedures for—

"(A) verifying the identity of any person seeking to open an account to the extent reasonable and practicable;

"(B) maintaining records of the information used to verify a person's identity, including name, address, and other identifying information; and

"(C) consulting lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency to determine whether a person seeking to open an account appears on any such list.

"(3) FACTORS TO BE CONSIDERED.—In prescribing regulations under this subsection, the Secretary shall take into consideration the various types of accounts maintained by various types of financial institutions, the various methods of opening
accounts, and the various types of identifying information available.

(a) Certain Financial Institutions.—In the case of any financial institution the business of which is engaging in financial activities described in section 4(a) of the Bank Holding Company Act of 1956 (including financial activities subject to the jurisdiction of the Commodity Futures Trading Commission), the regulations prescribed by the Secretary under paragraph (1) shall be prescribed jointly with such Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act, including the Commodity Futures Trading Commission) appropriate for such financial institution.

(b) Exemptions.—The Secretary (and, in the case of any financial institution described in paragraph (1), any Federal agency described in such paragraph) may, by regulation or order, exempt any financial institution or type of account from the requirements of any regulation prescribed under this subsection in accordance with such standards and procedures as the Secretary may prescribe.

(c) Effective Date.—Final regulations prescribed under this subsection shall take effect before the end of the 1-year period beginning on the date of enactment of the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001.

(d) Study and Report Required.—Within 6 months after the date of enactment of this Act, the Secretary, in consultation with the Federal functional regulators (as defined in section 509 of the Gramm-Leach-Bliley Act) and other appropriate Government agencies, shall submit a report to the Congress containing recommendations for—

(1) determining the most timely and effective way to require foreign nationals to provide domestic financial institutions and agencies with appropriate and accurate information, comparable to that which is required of United States nationals, concerning the identity, address, and other related information about such foreign nationals necessary to enable such institutions and agencies to comply with the requirements of this section;

(2) requiring foreign nationals to apply for and obtain, before opening an account with a domestic financial institution, an identification number which would function similarly to a Social Security number or tax identification number; and

(3) establishing a system for domestic financial institutions and agencies to review information maintained by relevant Government agencies for purposes of verifying the identities of foreign nationals seeking to open accounts at those institutions and agencies.

SEC. 327. Consideration of Anti-Money Laundering Record.

(a) Bank Holding Company Act of 1956.—

(1) In General.—Section 36(c) of the Bank Holding Company Act of 1956 (12 U.S.C. 1842(c)) is amended by adding at the end the following new paragraph:

"(d) Money Laundering.—In every case, the Board shall take into consideration the effectiveness of the company or companies in combating money laundering activities, including in overseas branches."

(b) Members Subject to Review Under Federal Deposit Insurance Act.—

(1) In General.—Section 18 of the Federal Deposit Insurance Act (12 U.S.C. 1818) is amended—

(A) by redesignating paragraph (1) as paragraph (12); and

(B) by inserting after paragraph (10), the following new paragraph:

"(11) Money Laundering.—In every case, the responsible agency shall take into consideration the effectiveness of any insured depository institution involved in the proposed merger transaction in combating money laundering activities, including in overseas branches."

(2) Scope of Application.—The amendment made by paragraph (1) shall apply with respect to any application submitted to the Board of Governors of the Federal Reserve System under section 3 of the Bank Holding Company Act of 1956 as amended December 31, 2001, which has not been approved by the Board before the date of enactment of this Act.


The Secretary shall—

(1) in consultation with the Attorney General and the Secretary of State, take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the United States and other countries, with the information to remain with the transfer from its origination until the point of disbursement; and

(2) report annually to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate on—

(A) progress toward the goal enumerated in paragraph (1), as well as impediments to implementation and an estimated compliance rate; and

(B) impediments to instituting a regime in which all appropriate identification, as defined by the Secretary, about wire transfer recipients shall be included with wire transfers from their point of origination until disbursement.

SEC. 329. Criminal Penalties.

Any person who is an official or employee of any department, agency, bureau, office, commission, or other entity of the Federal Government, and any other person who is acting for or on behalf of any such entity, who, directly or indirectly, in connection with the administration of this title, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for—

(1) being influenced in the performance of any official act;
(2) being influenced to commit or aid in the committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
(3) being induced to do or omit to do any act in violation of the official duty of such official or person, shall be fined in an amount not more than 3 times the monetary equivalent of the thing of value, or imprisoned for not more than 15 years, or both. A violation of this section shall be subject to chapter 227 of title 18, United States Code, and the provisions of the United States Sentencing Guidelines.

SEC. 336. INTERNATIONAL COOPERATION IN INVESTIGATIONS OF MONEY LAUNDERING, FINANCIAL CRIMES, AND THE FINANCES OF TERRORIST GROUPS.

(a) USSR.—It is the sense of the Congress that the President should direct the Secretary of State, the Attorney General, or the Secretary of the Treasury, as appropriate, and in consultation with the Board of Governors of the Federal Reserve System, to enter into negotiations with the appropriate financial supervisory agencies and other officials of any foreign country the financial institutions of which do business with United States financial institutions or which may be utilized by any foreign terrorist organization (as designated under section 219 of the Immigration and Nationality Act, any person who is a member or representative of any such organization, or any person engaged in money laundering or financial or other crimes.

(b) PROHIBITION ON USE OF FINANCES.—It is the sense of the Congress that, in carrying out any negotiations described in paragraph (1), the President should direct the Secretary of State, the Attorney General, or the Secretary of the Treasury, as appropriate, to seek to enter into and further cooperate with, voluntary information exchanges, the use of letters rogatory, mutual legal assistance treaties, and international agreements to—

(1) ensure that foreign banks and other financial institutions maintain adequate records of transactions and account information relating to any foreign terrorist organization (as designated under section 219 of the Immigration and Nationality Act, any person who is a member or representative of any such organization, or any person engaged in money laundering or financial or other crimes.

(2) establish a mechanism whereby such records may be made available to United States law enforcement officials and domestic financial institution supervisors, when appropriate.

Subtitle B—Bank Secrecy Act Amendments and Related Improvements

SEC. 351. AMENDMENTS RELATING TO REPORTING OF SUSPICIOUS ACTIVITIES.

(a) AMENDMENT RELATING TO CIVIL LIABILITY IMMUNITY FOR DISCLOSURES.—Section 5318G(3) of title 31, United States Code, is amended to read as follows:

(3) LIABILITY FOR DISCLOSURES.—

(A) IN GENERAL.—Any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure, shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure.

(B) RULE OF CONSTRUCTION.—Subparagraph (A) shall not be construed as creating

(i) any inference that the term ‘person’, as used in such subparagraph, may be construed more broadly than its ordinary usage so as to include any government or agency of government, or

(ii) any immunity against, or otherwise affecting, any civil or criminal action brought by any government or agency of government to enforce any constitution, law, or regulation of such government or agency.

(b) DISCLOSURES IN CERTAIN EMPLOYMENT REFERENCES.—

(i) RULE OF CONSTRUCTION.—Notwithstanding the application of subparagraph (A) in any other context, subparagraph (A) shall not be construed as prohibiting any financial institution, or any director, officer, employee, or agent of such institution, from including information that was included in a report to which subparagraph (A) applies—

(I) in a written employment reference that is provided in accordance with section 18w of the Federal Deposit Insurance Act in response to a request from another financial institution; or

(II) in a written termination notice or employment reference that is provided in accordance with
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the rules of a self-regulatory organization registrated with the Securities and Exchange Commission, or the Commodity Futures Trading Commission, except that such written reference or notice may not disclose that such information was also included in any such report, or that such report was made:

(ii) Information not required.—Clause (i) shall not be construed, by itself, to create any affirmative duty to include any information described in clause (i) in any employment reference or termination notice referred to in clause (i)."

SEC. 352. ANTI-MONEY LAUNDERING PROGRAMS.

(a) In general.—Section 5318(b) of title 31, United States Code, is amended to read as follows:

"(b) ANTI-MONEY LAUNDERING PROGRAMS.—

"(1) In general.—In order to guard against money laundering through financial institutions, each financial institution shall establish anti-money laundering programs, including, at a minimum:

"(A) the development of internal policies, procedures, and controls;

"(B) the designation of a compliance officer;

"(C) an ongoing employee training program; and

"(D) an independent audit function to test programs.

"(2) Regulations.—The Secretary of the Treasury, after consultation with the appropriate Federal functional regulator (as defined in section 609 of the Gramm-Leach-Bliley Act), may prescribe minimum standards for programs established under paragraph (1), and may exempt from the application of those standards any financial institution that is not subject to the provisions of the rules contained in part 330 of title 12, of the Code of Federal Regulations, or any successor rule thereto, for so long as such financial institution is not subject to the provisions of such rules.

"(b) Effective date.—The amendment made by subsection (a) shall take effect at the end of the 180-day period beginning on the date of enactment of this Act.

(c) Date of application of regulations factors to be taken into account.—Before the end of the 180-day period beginning on the date of enactment of this Act, the Secretary shall prescribe regulations that consider the extent to which the requirements imposed under this section are commensurate with the size, location, and activities of the financial institutions to which such regulations apply.

SEC. 353. PENALTIES FOR VIOLATIONS OF GEOGRAPHIC TARGETING ORDERS AND CERTAIN RECORDKEEPING REQUIREMENTS, AND LENIENTING EFFECTIVE PERIOD OF GEOGRAPHIC TARGETING ORDERS.

(a) Civil penalty for violation of targeting order.—Section 5326(a)(11) of title 31, United States Code, is amended—

"(1) by inserting "or order issued" after "subchapter or a regulation prescribed"; and

"(2) by inserting a comma after "shall";

"(b) Data regarding funding of terrorism.—Data concerning money laundering efforts related to the funding of acts of international terrorism, and efforts directed at the prevention, detection, and prosecution of such funding.

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or section 123 of Public Law 91-508, after "sections 5314 and 5315.

(b) Criminal penalties for violation of targeting order.—Section 5322 of title 31, United States Code, is amended—

"(1) in subsection (a)—

"(2) in subsection (b)—

"(A) by inserting "or order issued" after "willfully violating this subchapter or a regulation prescribed"; and

"(B) by inserting a comma after "shall";

"(c) Structuring transactions to evade targeting order or certain recordkeeping requirements.—Section 5334(a) of title 31, United States Code, is amended—

"(1) by inserting a comma after "shall";

"(2) by striking "section" and inserting "section the reporting or recordkeeping requirements imposed by any order issued under section 5326, or the recordkeeping requirements imposed by any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508, after "under section 5315 or 5324.

"(b) Structuring transactions to evade targeting order or certain recordkeeping requirements.—Section 5334(a) of title 31, United States Code, is amended—

"(1) by inserting a comma after "shall";

"(2) by striking "section the reporting or recordkeeping requirements imposed by any order issued under section 5326, or the recordkeeping requirements imposed by any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508, after "under section 5315 or 5324.

"(3) by inserting a comma after "shall";

"(4) by striking "section" and inserting "section the reporting or recordkeeping requirements imposed by any order issued under section 5326, or the recordkeeping requirements imposed by any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508, after "under section 5315 or 5324.

"(d) Lenienting effective period of geographic targeting orders.—Section 5326(b) of title 31, United States Code, is amended by striking "more than 60" and inserting "more than 180."
SEC. 356. AUTHORIZATION TO INCLUDE SUSPICIONS OF ILLEGAL ACTIVITY IN WRITTEN EMPLOYMENT REFERENCES.

Section 18 of the Federal Deposit Insurance Act (12 U.S.C. 1828) is amended by adding at the end the following:

"(w) WRITTEN EMPLOYMENT REFERENCES MAY CONTAIN SUSPICIONS OF INVOLVEMENT IN ILLEGAL ACTIVITY.—

(1) AUTHORITY TO DISCLOSE INFORMATION.—Notwithstanding any other provision of law, any insured depository institution, and any director, officer, employee, or agent of such institution, may disclose in any written employment reference relating to a current or former institution-affiliated party of such institution which is provided to another insured depository institution in response to a request from such other institution, information concerning the possible involvement of such institution-affiliated party in potentially unlawful activity.

(2) INFORMATION NOT REQUIRED.—Nothing in paragraph (1) shall be construed, by itself, to create any affirmative duty to include any information described in paragraph (1) in any employment reference referred to in paragraph (1).

(3) MALICIOUS INTENT.—Notwithstanding any other provision of this subsection, voluntary disclosure made by an insured depository institution, and any director, officer, employee, or agent of such institution under this subsection concerning potentially unlawful activity that is made with malicious intent, shall not be shielded from liability from the person identified in the disclosure.

(4) DEFINITION.—For purposes of this subsection, the term "insured depository institution" includes any uninsured branch or agency of a foreign bank."

SEC. 356. REPORTING OF SUSPICIOUS ACTIVITIES BY SECURITIES BROKERS AND DEALERS; INVESTMENT COMPANY STUDY.

(a) DEADLINES FOR SUSPICIOUS ACTIVITY REPORTING REQUIREMENTS FOR REGISTERED BROKERS AND DEALERS.—The Secretary, after consultation with the Securities and Exchange Commission and the Board of Governors of the Federal Reserve System, shall publish proposed regulations in the Federal Register before January 1, 2002, requiring brokers and dealers registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 to submit suspicious activity reports under section 5318(g) of title 31, United States Code. Such regulations shall be published in final form not later than July 1, 2002.

(b) SUSPICIOUS ACTIVITY REPORTING REQUIREMENTS FOR FUTURES COMMISSION MERCHANTS, COMMODITY TRADING ADVISORS, AND COMMODITY POOL OPERATORS.—The Secretary, in consultation with the Commodity Futures Trading Commission, may prescribe regulations requiring futures commission merchants, commodity trading advisors, and commodity pool operators registered under the Commodity Exchange Act to submit suspicious activity reports under section 5318(g) of title 31, United States Code.

(c) REPORT ON INVESTMENT COMPANIES.—

(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Secretary, the Board of Governors of the Federal Reserve System, and the Securities and Exchange Commission shall jointly submit a report to the Congress on recommendations for effective regulations to apply the requirements of subchapter II of chapter 53 of title 31, United States Code, to investment companies pursuant to section 5312(a)(2)(D) of title 31, United States Code.

(2) DEFINITION.—For purposes of this subsection, the term "investment company" means as in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3); and

(3) INCLUSION.—The report required by paragraph (1) may include different recommendations for different types of entities covered by this subsection.

(4) BENEFICIAL OWNERSHIP OF PERSONAL HOLDING COMPANIES.—The report described in paragraph (1) shall also include recommendations as to whether the Secretary should promulgate regulations to treat any corporation or business or other group trust whose assets are predominately securities, bank certificates of deposit, or other securities or investment instruments (other than such as relate to operating subsidiaries of such corporation or trust) and that has 5 or fewer common shareholders or holders of beneficial or other equity interest, as a financial institution within the meaning of that phrase in section 5312(a)(2)(D) and whether to require such corporations or trusts to disclose their beneficial owners when opening accounts or initiating funds transfers at any domestic financial institution.

SEC. 357. SPECIAL REPORT ON ADMINISTRATION OF BANK SECRECY ACT PROVISIONS.

(a) REPORT REQUIRED.—Not later than 6 months after the date of enactment of this Act, the Secretary shall submit a report to the Congress relating to the role of the Internal Revenue Service in the administration of subchapter II of chapter 53 of title 31, United States Code (commonly known as the "Bank Secrecy Act").

(b) CONTENTS.—The report submitted by subsection (a)—

(1) shall specifically address, and contain recommendations concerning, the following:

(A) whether it is advisable to shift the processing of information reporting and record-keeping programs and federal tax administration, for the Internal Revenue Service to retain authority and responsibility for audit and examination of the compliance of money services businesses and gaming institutions with those Bank Secrecy Act provisions; and

(B) whether it remains reasonable and efficient, in light of the objective of both anti-money-laundering programs and Federal tax administration, for the Internal Revenue Service to retain authority and responsibility for audit and examination of the compliance of money services businesses and gaming institutions with those Bank Secrecy Act provisions; and

(2) shall, if the Secretary determines that the information processing responsibility or the audit and examination responsibility of the Internal Revenue Service, or both, with respect to those Bank Secrecy Act provisions should be transferred to other agencies, include the specific recommendations of the Secretary regarding the agency or agencies to which such function should be transferred, complete with a budgetary and resources plan for expeditiously accomplishing the transfer.
SEC. 510. BANK SECRECY PROVISIONS AND ACTIVITIES OF UNITED STATES INTELLIGENCE AGENCIES TO FIGHT INTERNATIONAL TERRORISM.

(a) Amendment Relating to the Purposes of Chapter 53 of Title 31, United States Code—Section 5311 of title 31, United States Code, is amended by inserting before the period at the end the following: "...in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.

(b) Amendment Relating to Reporting of Suspicious Activities—Section 5318(h)(4)(B) of title 31, United States Code, is amended by striking "or supervisory agency" and inserting "supervisory agency, or United States intelligence agency for use in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism."

(c) Amendment Relating to Availability of Reports—Section 5319 of title 31, United States Code, is amended to read as follows:

"SEC. 5319. Availability of reports. "The Secretary of the Treasury shall make information in a report filed under this subchapter available to an agency, including any State financial institutions supervisory agency, United States intelligence agency or self-regulatory organization registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission, upon request of the head of the agency or organization. The report shall be available for a purpose that is consistent with this subchapter. The Secretary may only require reports on the use of such information by any State financial institutions supervisory agency for other than supervisory purposes or by United States intelligence agencies. However, a report and records of reports are exempt from disclosure under section 532 of title 31."

(d) Amendment Relating to the Purposes of the Bank Secrecy Act Provisions—Section 251(a) of the Federal Deposit Insurance Act (12 U.S.C. 1814a(a)) is amended to read as follows:

"(a) Congressional Findings and Declaration of Purpose—"(1) Findings.—Congress finds that—

(A) adequate records maintained by insured depository institutions have a high degree of usefulness in criminal, tax, and regulatory investigations or proceedings, and that, given the threat posed to the security of the Nation and the terrorist attacks against the United States on September 11, 2001, such records may also have a high degree of usefulness in the conduct of intelligence or counterintelligence activities, including analysis, to protect against domestic and international terrorism; and

(B) microfilm or other reproductions and other records made by insured depository institutions of checks, as well as records kept by such institutions, of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in proceedings described in subparagraph (A).

(2) Purpose.—It is the purpose of this section to require the maintenance of appropriate types of records by insured depository institutions in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, recognizes that, given the threat posed to the security of the Nation and after the terrorist attacks against the United States on September 11, 2001, such records may also have a high degree of usefulness in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism."

(e) Amendment Relating to the Purpose of the Bank Secrecy Act—Section 122(a) of Public Law 89-560 (12 U.S.C. 1955(a)) is amended to read as follows:

"(a) Regulations.—If the Secretary determines that the maintenance of appropriate records and procedures by any insured bank or uninsured institution, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b), has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, and that, given the threat posed to the security of the Nation on and after the terrorist attacks against the United States on September 11, 2001, such records may also have a high degree of usefulness in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism, he may by regulation require such bank, institution, or person..."

(II) AMENDMENT TO THE RIGHT TO FINANCIAL PRIVACY ACT—The Right to Financial Privacy Act of 1978 is amended—

(1) in section 311(a) (12 U.S.C. 3412(a))—by inserting "...or intelligence or counterintelligence activity, investigation or analysis related to international terrorism..." after "legitimate law enforcement inquiry."

(2) in section 1114(a)(1) (12 U.S.C. 3414(a)(1))—by inserting "...or, or for a purpose authorized by section 1112(a)..." before the semicolon at the end of the section following paragraph (A).

(III) AMENDMENT TO THE FAIR CREDIT REPORTING ACT—The Fair Credit Reporting Act (15 U.S.C. 1681 et seq.) is amended—

(1) by redesignating the second of the 2 sections designated as section 624 (15 U.S.C. 1681a (relating to disclosures to FBI for counterintelligence purposes)) as section 625; and

(2) by adding at the end the following new section:

"626. Disclosures to governmental agencies for counterterrorism purposes

(1) Disclosure.—Notwithstanding section 604 or any other provision of this title, a consumer reporting agency shall furnish a consumer report of a consumer and all other information in a consumer file to a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism when presented with..."
a written certification by any government agency that such information is necessary for the agency's conduct or such investigation, activity or analysis.

(b) Form of Certification—The certification described in subsection (a) shall be signed by a supervisory officer designated by the head of a Federal agency or an officer of a Federal agency whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate.

(c) Confidentiality—No consumer reporting agency, or officer, employee, or agent of such consumer reporting agency, shall disclose to any person, or specify in any consumer report, that a government agency has sought or obtained access to information under subsection (a).

(d) Rule of Construction—Nothing in section 625 shall be construed to limit the authority of the Director of the Federal Bureau of Investigation under this section.

(e) Safe Harbor—Notwithstanding any other provision of this title, any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or other information pursuant to this section in good faith reliance upon a certification of a governmental agency pursuant to the provisions of this section shall not be liable to any person for such disclosure under this subchapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(2) CLERICAL AMENDMENTS—The table of sections for the
Fair Credit Reporting Act (15 U.S.C. 1681 et seq.) is amended—
(A) by redesignating the second of the 5 items designated as section 624 as section 625; and
(B) by inserting after the item relating to section 625 (as so redesignated) the following new item:

"625. Disclosure to governmental agencies for counterterrorism purposes."

(b) Application of Amendments—The amendments made by this section shall apply with respect to reports filed or records maintained on, before, or after the date of enactment of this Act.

SEC. 369. REPORTING OF SUSPICIOUS ACTIVITIES BY UNDERGROUND BANKING SYSTEMS.

(a) Definition for Subchapter.—Section 5312(a)(2)(B) of title 31, United States Code, is amended to read as follows:

"(B) A licensed money order or another person who engages as a business in the transmission of funds, including any person who engages as a business in an underground banking system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system;"

(b) Money Transmitting Business.—Section 5312(a)(1)(A) of title 31, United States Code, is amended by inserting before the semicolon the following: "or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an underground banking system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system;"

(c) Application of Rules.—Section 5318 of title 31, United States Code, as amended by this title, is amended by adding at the end the following:

"(a) In General.—If the President determines that a particular foreign country has taken or has committed to take actions that contribute to the efforts of the United States to respond to, deter, or prevent acts of international terrorism, the Secretary may, consistent with other applicable provisions of law, instruct the United States Executive Director of each international financial institution to use the voice and vote of the Executive Director to support any loan or other utilization of the funds of respective institutions for such country, or any public or private entity within such country.

(b) Use of Voice and Vote.—The Secretary may instruct the United States Executive Director of each international financial institution to use the voice and vote of the Executive Director to support any loan or other utilization of the funds of respective institutions for such country, or any public or private entity within such country.

(c) Designation.—For purposes of this section, the term "international financial institution" means an institution described in section 1701(i)(2) of the International Financial Institutions Act (22 U.S.C. 265c(i)(2)).

SEC. 361. FINANCIAL CRIMES ENFORCEMENT NETWORK.

(a) In General.—Subchapter I of chapter 5 of title 31, United States Code, is amended—

(1) by redesignating subsection 310 as section 311; and

(2) by inserting after section 309 the following new section:

"310. Financial Crimes Enforcement Network

(a) In General.—The Financial Crimes Enforcement Network established by order of the Secretary of the Treasury (Treasury Order Numbered 105-98, in this section referred to as "FinCEN") on April 28, 1998, shall be a bureau in the Department of the Treasury.

(b) Director.—
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ILD APPOINTMENT.—The head of FinCEN shall be the Director, who shall be appointed by the Secretary of the Treasury.

(2) DUTIES AND POWERS.—The duties and powers of the Director are as follows:

(A) Advise and make recommendations on matters relating to financial intelligence, financial criminal activities, and other financial activities to the Under Secretary of the Treasury for Enforcement.

(B) Maintain a government-wide data access service, with access, in accordance with applicable legal requirements, to the following:

(i) Information collected by the Department of the Treasury, including report information filed under subchapter II of chapter 53 of this title (such as reports on cash transactions, foreign financial agency transactions and relationships, foreign currency transactions, including those involving monetary instruments and suspicious activities), chapter 2 of title 1 of Public Law 91-508, and section 21 of the Federal Deposit Insurance Act;

(ii) Information regarding national and international currency flows;

(iii) Other records and data maintained by other Federal, State, local, and foreign agencies, including financial and other records developed in specific cases;

(iv) Other privately and publicly available information.

(C) Analyze and disseminate the available data in accordance with applicable legal requirements and policies and guidelines established by the Secretary of the Treasury and the Under Secretary of the Treasury for Enforcement to:

(i) Identify possible criminal activity to appropriate Federal, State, local, and foreign law enforcement agencies;

(ii) Support ongoing criminal financial investigations and prosecutions and related proceedings, including civil and criminal tax and forfeiture proceedings.

(D) Identify possible instances of noncompliance with subchapter II of chapter 53 of this title, chapter 2 of title 1 of Public Law 91-508, and section 21 of the Federal Deposit Insurance Act to Federal agencies with statutory responsibility for enforcing compliance with such provisions and other appropriate Federal regulatory agencies;

(E) Evaluate and recommend possible uses of special currency reporting requirements under section 5326;

(F) Determine emerging trends and methods in money laundering and other financial crimes;

(G) Support the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism; and

(H) Support government initiatives against money laundering.

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(1) Establish and maintain a financial crimes communications center to furnish law enforcement authorities with intelligence information related to emerging or ongoing investigations and undercover operations.

(2) Furnish research, analytical, and informational services to financial institutions, appropriate Federal regulatory agencies with regard to financial institutions, and appropriate Federal, State, local, and foreign law enforcement authorities, in accordance with policies and guidelines established by the Secretary of the Treasury or the Under Secretary of the Treasury for Enforcement, in the interest of detection, prevention, and prosecution of terrorism, organized crime, money laundering, and other financial crimes.

(3) Assist Federal, State, local, and foreign law enforcement and regulatory authorities in combating the use of informal, nonbank networks and payment and barter system mechanisms that permit the transfer of funds or the equivalent of funds without records and without compliance with criminal and tax laws.

(4) Provide computer and data support and data analysis to the Secretary of the Treasury for tracking and controlling foreign assets.

(5) Coordinate with financial intelligence units in other countries on anti-terrorism and anti-money laundering initiatives, and similar efforts.

(6) Administer the requirements of subchapter II of chapter 53 of this title, chapter 2 of title 1 of Public Law 91-508, and section 21 of the Federal Deposit Insurance Act, to the extent delegated such authority by the Secretary of the Treasury.

(7) Such other duties and powers as the Secretary of the Treasury may delegate or prescribe.

C. REQUIREMENTS RELATING TO MAINTENANCE AND USE OF DATA BASES.—The Secretary of the Treasury shall establish and maintain operating procedures with respect to the government-wide data access service and the financial crimes communications center maintained by FinCEN which provide—

(A) The coordinated and efficient transmission of information to, entry of information into, and withdrawal of information from, the data maintenance system maintained by the Network, including—

(i) The submission of reports through the Internet or other secure network, whenever possible;

(ii) The cataloging of information in a manner that facilitates rapid retrieval by law enforcement personnel of meaningful data; and

(iii) A procedure that provides for a prompt initial review of suspicious activity reports and other reports, or such other means as the Secretary may provide, to identify information that warrants immediate action; and

(B) In accordance with section 502a of title 5 and the Right to Financial Privacy Act of 1978, appropriate standards and guidelines for determining—

(A) Who is to be given access to the information maintained by the Network;

(B) What limits are to be imposed on the use of such information; and
SEC. 302. ESTABLISHMENT OF HIGHLY SECURE NETWORK.

(a) In General.—The Secretary shall establish a highly secure network in the Financial Crimes Enforcement Network that—

(1) allows financial institutions to file reports required under subsection (I) or III of chapter 53 of title 31, United States Code, that section 21 of the Federal Deposit Insurance Act through the secure network;

and

(b) EXPEDITED DEVELOPMENT.—The Secretary shall take such action as may be necessary to ensure that the secure network required under subsection (a) is fully operational before the end of the 6-month period beginning on the date of enactment of this Act.

SEC. 303. INCREASE IN CIVIL AND CRIMINAL PENALTIES FOR MONEY LAUNDERING.

(a) Civil Penalties.—Section 5331(a) of title 31, United States Code, is amended by adding at the end the following:

"(7) Penalties for international counter money laundering violations.—The Secretary may impose a civil money penalty in an amount equal to not less than 2 times the amount of the transaction, but not more than $1,000,000, on any financial institution or agency that violates any provision of subsection (i) or (j) of section 5318 or any special measures imposed under section 5318A;"

(b) Criminal Penalties.—Section 5322 of title 31, United States Code, is amended by adding at the end the following:

"(8) any financial institution or agency that violates any provision of subsection (i) or (j) of section 5318, or any special measures imposed under section 5318A, or any regulation prescribed under subsection (i) or (j) of section 5318 or section 5318A, shall be fined in an amount equal to not less than 2 times the amount of the transaction, but not more than $1,000,000."
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Enforcement Network at such time and in such manner as the Secretary may, by regulation, prescribe.

"(b) FORM AND MANNER OF REPORTS.—A report is described in this subsection if such report—

(1) is in such form as the Secretary may prescribe;

(2) contains—

(A) the name and address, and such other identification information as the Secretary may require, of the person from whom the coins or currency was received;

(B) the amount of coins or currency received;

(C) the date and nature of the transaction; and

(D) such other information, including the identification of the person filing the report, as the Secretary may prescribe.

"(c) EXCEPTIONS.—

(1) AMOUNTS RECEIVED BY FINANCIAL INSTITUTIONS.—Subsection (a) shall not apply to amounts received in a transaction reported under section 5313 and regulations prescribed under such section.

(2) TRANSACTIONS OCCURRING OUTSIDE THE UNITED STATES.—Except to the extent provided in regulations prescribed by the Secretary, subsection (a) shall not apply to any transaction if the entire transaction occurs outside the United States.

(d) CURRENCY INCLUDES FOREIGN CURRENCY AND CERTAIN MONETARY INSTRUMENTS.—

(1) IN GENERAL.—For purposes of this section, the term 'currency' includes—

(A) foreign currency; and

(B) to the extent provided in regulations prescribed by the Secretary, any monetary instrument (whether or not in bearer form) with a face amount of not more than $10,000.

(2) SCOPE OF APPLICATION.—Paragraph (1)(B) shall not apply to any check drawn on the account of the writer in a financial institution referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), (H), (I), (K), (L), or (Q) of section 5312(a)(2)."

"(h) PROHIBITION ON STRUCTURING TRANSACTIONS.—

(1) IN GENERAL.—Section 5324 of title 31, United States Code, is amended—

(A) by redesignating paragraphs (4) and (5) as paragraphs (5) and (6), respectively; and

(B) by inserting after paragraph (3) the following new paragraph:

"(4) NONFINANCIAL TRADE OR BUSINESS.—The term 'nonfinancial trade or business' means any trade or business other than a financial institution that is subject to the reporting requirements of section 5313 and regulations prescribed under such section.

(2) TECHNICAL AND CONFORMING AMENDMENTS.—

(A) Section 5312(a)(2)(C) of title 31, United States Code, is amended by inserting "involving financial institutions" after "transactions."

(B) Section 5317(c) of title 31, United States Code, is amended by striking "332(b)" and inserting "332(c)."

(c) DEFINITION OF NONFINANCIAL TRADE OR BUSINESS.—

(1) IN GENERAL.—Section 332(a)(3) of title 31, United States Code, is amended—

(A) by redesignating paragraphs (4) and (5) as paragraphs (5) and (6), respectively; and

(B) by inserting after paragraph (3) the following new paragraph:

"(4) NONFINANCIAL TRADE OR BUSINESS.—The term 'nonfinancial trade or business' means any trade or business other than a financial institution that is subject to the reporting requirements of section 5313 and regulations prescribed under such section.

(2) TECHNICAL AND CONFORMING AMENDMENTS.—

(A) Section 5312(a)(2)(C) of title 31, United States Code, is amended by inserting "involving financial institutions" after "transactions."

(B) Subsections (a) through (f) of section 5318 of title 31, United States Code, and sections 3321, 3326, and 3328 of such title are each amended—

(i) by inserting "or nonfinancial trade or business" after "financial institution" each place such term appears; and

(ii) by inserting "or nonfinancial trade or business" after "financial institutions" each place such term appears.

(e) GENERAL AMENDMENT.—The table of sections for chapter 53 of title 31, United States Code, is amended by inserting after the item relating to section 5322 (as added by section 112 of this title) the following new item:

"3321. Reports relating to coins and currency received in nonfinancial trade or business."

(f) REGULATIONS.—Regulations which the Secretary determines are necessary to implement this section shall be published in final form before the end of the 6-month period beginning on the date of enactment of this Act.

SEC. 366. EFFICIENT USE OF CURRENCY TRANSACTION REPORT SYSTEM.

(a) FINDINGS.—The Congress finds the following:

(1) The Congress established the currency transaction reporting requirements in 1970 because the Congress found then that such reports have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings and the usefulness of such reports has only increased in the years since the requirements were established.

(2) In 1994, in response to reports and testimony that excess amounts of currency transaction reports were interfering
with effective law enforcement, the Congress reformed the currency transaction report exemption requirements to provide—

(A) mandatory exemptions for certain reports that had little usefulness for law enforcement, such as cash transfers between depository institutions and cash deposits from government agencies; and

(B) discretionary authority for the Secretary of the Treasury to provide exemptions, subject to criteria and guidelines established by the Secretary, for financial institutions with regard to regular business customers that maintain accounts at an institution into which frequent cash deposits are made.

(3) Today there is evidence that some financial institutions are not utilizing the exemption system, or are filing reports even if there is an exemption in effect, with the result that the volume of currency transaction reports is once again interfering with effective law enforcement.

(b) STUDY AND REPORT—

(1) STUDY REQUIRED.—The Secretary shall conduct a study a. —

(A) the possible expansion of the statutory exemption system in effect under section 5315 of title 31, United States Code; and

(B) methods for improving financial institution utilization of the statutory exemption provisions as a way of reducing the submission of currency transaction reports that have little or no value for law enforcement purposes, including improvements in the systems in effect at financial institutions for regular review of the exemption procedures used at the institution and the training of personnel in its effective use.

(2) REPORT REQUIRED.—The Secretary of the Treasury shall submit: a report to the Congress before the end of the 1-year period beginning on the date of enactment of this Act containing the findings and conclusions of the Secretary with regard to the study required under subsection (a), and such recommendations for legislative or administrative action as the Secretary determines to be appropriate.

Subtitle C—Currency Crimes and Protection

SEC. 371. BULK CASH SMUGGLING INTO OR OUT OF THE UNITED STATES.

(a) Definitions.—The Congress finds the following:

(1) Effective enforcement of the currency reporting requirements of subsection II of chapter 53 of title 31, United States Code, and the regulations prescribed under such subsection, has forced drug dealers and other criminals engaged in cash-based businesses to avoid using traditional financial institutions.

(2) In their effort to avoid using traditional financial institutions, drug dealers and other criminals are forced to move large quantities of currency in bulk form to and through the airports, border crossings, and other points of entry where the currency can be smuggled out of the United States and placed in a foreign financial institution or sold on the black market.

(b) Protection.—The transportation and smuggling of cash in bulk form may now be the most common form of money laundering, and the movement of large sums of cash is one of the most reliable warning signs of drug trafficking, terrorism, money laundering, racketeering, tax evasion and similar crimes.

(4) The intentional transportation into or out of the United States of large amounts of currency or monetary instruments, in a manner designed to circumvent the mandatory reporting provisions of subsection II of chapter 53 of title 31, United States Code, is the equivalent of, and creates the same harm as, the smuggling of goods.

(5) The arrest and prosecution of bulk cash smugglers are important parts of law enforcement’s effort to stop the laundering of criminal proceeds, but the couriers who attempt to smuggle the cash out of the United States are typically low-level employees of large criminal organizations, and thus are easily replaced. Accordingly, only the confiscation of the smuggled bulk cash can effectively break the cycle of criminal activity of which the laundering of the bulk cash is a critical part.

(6) The current penalties for violations of the currency reporting requirements are insufficient to provide a deterrent to the laundering of criminal proceeds. In particular, in cases where the only criminal violation under current law is a reporting offense, the law does not adequately provide for the confiscation of smuggled currency. In contrast, if the smuggling of bulk cash were itself an offense, the cash could be confiscated as the corpus delicti of the smuggling offense.

(7) PURPOSES.—The purposes of this section are—

(a) to make the act of smuggling bulk cash itself a criminal offense;

(b) to authorize forfeiture of any cash or instruments of the smuggling offense; and

(c) to emphasize the seriousness of the act of bulk cash smuggling.

(b) ENACTMENT OF BULK CASH SMUGGLING OFFENSE.—Subchapter II of chapter 53 of title 31, United States Code, is amended by adding at the end the following:

"5332. Bulk cash smuggling into or out of the United States."

(a) CRIMINAL OFFENSE.—

(1) IN GENERAL.—Whosoever, with the intent to evade a currency reporting requirement under section 5316, knowingly conceals more than $10,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, and transports or transfers or attempts to transport or transfer such currency or monetary instruments from a place within the United States to a place outside of the United States, or from a place outside the United States to a place within the United States, shall be guilty of a currency smuggling offense and subject to punishment pursuant to subsection (b).

(2) CONCEALMENT ON PERSON.—For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn
by the individual or in any luggage, backpack, or other container worn or carried by such individual.

(d) PENALTY—

1. Term of Imprisonment.—A person convicted of a currency smuggling offense under subsection (a), or a conspiracy to commit such offense, shall be imprisoned for not more than 5 years.

2. Forfeiture.—In addition, the court, in imposing sentence under paragraph (1), shall order that the defendant forfeit to the United States, any property, real or personal, involved in the offense, and any property traceable to such property, subject to subsection (d) of this section.

3. Procedure.—The seizure, restraint, and forfeiture of property under this section shall be governed by section 413 of the Controlled Substances Act.

4. Personal Money Judgment.—If the property subject to forfeiture under paragraph (2) is unavailable, and the defendant has insufficient substitute property that may be forfeited pursuant to section 413(p) of the Controlled Substances Act, the court shall enter a personal money judgment against the defendant for the amount that would be subject to forfeiture.

(c) CIVIL FORFEITURE—

1. In General.—Any property involved in a violation of subsection (a), or a conspiracy to commit such violation, and any property traceable to such violation or conspiracy, may be seized and, subject to subsection (d) of this section, forfeited to the United States.

2. Procedure.—The seizure and forfeiture shall be governed by the procedures governing civil forfeitures in money laundering cases pursuant to section 981(a)(18)(A) of title 18, United States Code.

3. Treatment of Certain Property as Involved in the offense.—For purposes of this subsection and subsection (b), any currency or other monetary instrument that is concealed or intended to be concealed in violation of subsection (a) or a conspiracy to commit such violation, any article, container, or conveyance used, or intended to be used, to conceal or transport the currency or other monetary instrument, and any other property used, or intended to be used, to facilitate the offense, shall be considered property involved in the offense.

(d) CLERICAL AMENDMENT.—The table of sections for subchapter II of chapter 33 of title 31, United States Code, is amended by inserting after the item relating to section 5317, as added by this Act, the following new item:

"§3312. Bulk cash smuggling into or out of the United States."

SEC. 373. FORFEITURE IN CURRENCY REPORTING CASES.

(a) In General.—Subsection (c) of section 5317 of title 31, United States Code, is amended to read as follows:

1. Criminal Forfeiture—

(A) By general.—The court in imposing sentence for any violation of section 5313, 5316, or 5320 of this title, or any conspiracy to commit such violation, shall order the defendant to forfeit all property, real or personal, involved in the offense and any property traceable thereto.

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"(B) Procedure.—Forfeitures under this paragraph shall be governed by the procedures established in section 413 of the Controlled Substances Act.

2. Civil Forfeiture.—Any property involved in a violation of section 5313, 5316, or 5320 of this title, or any conspiracy to commit any such violation, and any property traceable to any such violation or conspiracy, may be seized and forfeited to the United States in accordance with the procedures governing civil forfeitures in money laundering cases pursuant to section 981(a)(18)(A) of title 18, United States Code.

5. CONFORMING AMENDMENTS.—

1. Section 981(a)(18)(A) of title 18, United States Code, is amended—

(A) by striking "of section 5313(a) or 5324(a) of title 31", and

(B) by striking "and all that follows through the end of the subparagraph.

2. Section 981(a)(1) of title 18, United States Code, is amended—

(A) by striking "of section 5313(a), 5316, or 5324 of title 31", and

(B) by striking "and all that follows through the end of the paragraph.

SEC. 373. ILLEGAL MONEY TRANSMITTING BUSINESSES.

(a) SCIENTER REQUIREMENT FOR SECTION 1960 VIOLATION.—

Section 1960 of title 18, United States Code, is amended to read as follows:


(1) Whoever knowingly conducts, controls, supervises, directs, or owns all or part of an unlicensed money transmitting business shall be fined in accordance with this title or imprisoned not more than 5 years, or both.

As used in this section—

(A) the term 'unlicensed money transmitting business' means a money transmitting business which affects interstate or foreign commerce in any manner or degree and—

(1) is operated without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or a felony under State law;

(2) is operated without an appropriate money transmitting license in a State where such operation is punishable as a felony under State law;

(3) is operated without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or felony under State law;

(4) is operated without an appropriate money transmitting license in a State where such operation is punishable under State law; or

(5) otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity;

(2) The term 'money transmitting' includes transferring funds on behalf of the public by any means including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile, or courier; and
"(3) the term 'State' means any State of the United States, the District of Columbia, the Northern Mariana Islands, and any commonwealth, territory, or possession of the United States."

(b) SEIZURE OF ILLICITLY TRANSMITTED FUNDS.—Section 981(a)(1)(A) of title 18, United States Code, is amended by striking "or 1977" and inserting ", 1977 or 19866.

(c) CHAMBERY AMENDMENT.—The table of sections for chapter 55 of title 18, United States Code, is amended in the item relating to section 1980 by striking "illegal" and inserting "unlicensed".

SEC. 374. COUNTERFEITING DOMESTIC CURRENCY AND OBLIGATIONS.

(a) COUNTERFEIT ACTS COMMITTED OUTSIDE THE UNITED STATES.—Section 470 of title 18, United States Code, is amended—

(1) in paragraph (2), by inserting "analogue, digital, or electronic image," after "plate, stone,"; and

(2) by striking "shall be fined under this title, imprisoned not more than 20 years, or both" and inserting "shall be punished as is provided for the like offense within the United States".

(b) OBLIGATIONS OR SECURITIES OF THE UNITED STATES.—Section 471 of title 18, United States Code, is amended by striking "fifteen years" and inserting "20 years".

(c) UTTERING COUNTERFEIT OBLIGATIONS OR SECURITIES.—Section 472 of title 18, United States Code, is amended by striking "ten years" and inserting "20 years".

(d) DEALING IN COUNTERFEIT OBLIGATIONS OR SECURITIES.—Section 473 of title 18, United States Code, is amended by striking "ten years" and inserting "20 years".

(e) PLATES, STONES, OR ANALOG, DIGITAL, OR ELECTRONIC IMAGES FOR COUNTERFEITING OBLIGATIONS OR SECURITIES.

(1) IN GENERAL.—Section 474(a) of title 18, United States Code, is amended by inserting after the second paragraph the following new paragraph:

"Whoever, with intent to defraud, makes, executes, acquires, bears, or has in his possession, a note, a check, a bond, or any other obligation of the United States, or any other security of the United States, shall be fined not more than $5,000 or imprisoned not more than two years, or both.""

(2) AMENDMENT TO DEFINITION.—Section 474(b) of title 18, United States Code, is amended by striking the first sentence and inserting the following new sentence: "For purposes of this section, the term 'analogue, digital, or electronic image' includes any analogue, digital, or electronic method used for the making, execution, acquisition, scanning, capturing, recording, retrieval, transmission, or reproduction of any obligation or security, unless such use is authorized by the Secretary of the Treasury."

(3) TECHNICAL AND CONFORMING AMENDMENTS.—The heading for section 474 of title 18, United States Code, is amended by striking "or stones" and inserting ", stones, or analog, digital, or electronic images".

(4) CHAMBERY AMENDMENT.—The table of sections for chapter 35 of title 18, United States Code, is amended in the item relating to section 474 by striking "or stones" and inserting ", stones, or analog, digital, or electronic images".

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SEC. 375. COUNTERFEITING FOREIGN CURRENCY AND OBLIGATIONS.

(a) FOREIGN OBLIGATIONS OR SECURITIES.—Section 478 of title 18, United States Code, is amended by striking "five years" and inserting "20 years".

(b) UTTERING COUNTERFEIT FOREIGN OBLIGATIONS OR SECURITIES.—Section 479 of title 18, United States Code, is amended by striking "ten years" and inserting "20 years".

(c) COUNTERFEITING FOREIGN CURRENCY OBLIGATIONS OR SECURITIES.—Section 480 of title 18, United States Code, is amended by striking "three years" and inserting "20 years".

(d) PLATES, STONES, OR ANALOG, DIGITAL, OR ELECTRONIC IMAGES FOR COUNTERFEITING FOREIGN OBLIGATIONS OR SECURITIES.

(1) IN GENERAL.—Section 481 of title 18, United States Code, is amended by inserting after the second paragraph the following new paragraph:

"Whoever, with intent to defraud, makes, executes, acquires, bears, or has in his possession, a note, a check, a bond, or any other obligation of the United States, or any other security of the United States, refuses to pay, lawfully issued by such foreign government and intended to circulate as money, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

(2) INCREASED SENTENCE.—The last paragraph of section 481 of title 18, United States Code, is amended by striking "five years" and inserting "20 years".

(3) TECHNICAL AND CONFORMING AMENDMENT.—The heading for section 483 of title 18, United States Code, is amended by striking "or stones" and inserting ", stones, or analog, digital, or electronic images".

(4) CHAMBERY AMENDMENT.—The table of sections for chapter 35 of title 18, United States Code, is amended in the item relating to section 481 by striking "or stones" and inserting ", stones, or analog, digital, or electronic images".
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(e) FOREIGN BANK NOTES—Section 482 of title 18, United States Code, is amended by striking "two years" and inserting "20 years".

(f) UTHERING COUNTERFEIT FOREIGN BANK NOTES.—Section 483 of title 18, United States Code, is amended by striking "one year" and inserting "20 years".

SEC. 367. LAUNDERING THE PROCEEDS OF TERRORISM.

Section 1956(c)(1)(D) of title 18, United States Code, is amended by inserting "or 2339A" after "2339A.

SEC. 367. EXTRATERRITORIAL JURISDICTION.

Section 1029 of title 18, United States Code, is amended by adding at the end the following:

(8) Any person who, outside the jurisdiction of the United States, engages in any act that, if committed within the jurisdiction of the United States, would constitute an offense under subsection (a) or (b) of this section, shall be subject to the fines, penalties, imprisonment, and forfeiture provided in this title if—

(1) the offense involves an access device issued, owned, managed, or controlled by a financial institution, account issuer, credit card system member, or other entity within the jurisdiction of the United States; and

(2) the person transports, delivers, conveys, transfers to or through, or otherwise stores, secrets, or holds within the jurisdiction of the United States, any article used to assist in the commission of the offense or the proceeds of such offense or property derived therefrom.

TITLE IV—PROTECTING THE BORDER

Subtitle A—Protecting the Northern Border

SEC. 401. ENSURING ADEQUATE PERSONNEL ON THE NORTHERN BORDER.

The Attorney General is authorized to waive any FTE cap on personnel assigned to the Immigration and Naturalization Service on the Northern Border.

SEC. 402. NORTHERN BORDER PERSONNEL.

There are authorized to be appropriated—

(1) such sums as may be necessary to triple the number of Border Patrol personnel (from the number authorized under current law), and the necessary personnel and facilities to support such personnel, in each State along the Northern Border;

(2) such sums as may be necessary to triple the number of Customs Service personnel (from the number authorized under current law), and the necessary personnel and facilities to support such personnel, at ports of entry in each State along the Northern Border;

(3) such sums as may be necessary to triple the number of INS inspectors (from the number authorized on the date of the enactment of this Act), and the necessary personnel and facilities to support such personnel, at ports of entry in each State along the Northern Border; and

(4) such sums as may be necessary to triple the number of INS inspectors (from the number authorized on the date of the enactment of this Act), and the necessary personnel and facilities to support such personnel, at ports of entry in each State along the Northern Border; and

(5) an additional $50,000,000 each to the Immigration and Naturalization Service and the United States Customs Service for purposes of making improvements in technology for monitoring the Northern Border and acquiring additional equipment at the Northern Border.

SEC. 403. ACCESS BY THE DEPARTMENT OF STATE AND THE INS TO CERTAIN IDENTIFYING INFORMATION IN THE CRIMINAL HISTORY RECORDS OF VISA APPLICANTS AND APPLICANTS FOR ADMISSION TO THE UNITED STATES.

(a) AMENDMENT OF THE IMMIGRATION AND NATIONALITY ACT.—Section 105 of the Immigration and Nationality Act (8 U.S.C. 1103) is amended—

(1) in the section heading, by inserting "; DATA EXCHANGE" after "SECURITY OFFICERS";

(2) by inserting "(a)" after "Sec. 105.");

(3) in subsection (a), by inserting "and border" after "internal" the second place it appears; and

(4) by adding at the end the following:

"(b)(1) The Attorney General and the Director of the Federal Bureau of Investigation shall provide the Department of State and the Service access to the criminal history record information contained in the National Crime Information Center's Interstate Identification Index (NCIC-III), Wanted Persons File, and to any other files maintained by the National Crime Information Center that may be mutually agreed upon by the Attorney General and the agency receiving the access, for the purpose of determining whether or not a visa applicant or applicant for admission has a criminal history record (index in any such file).

(2) Such access shall be provided by means of extracts of the records for placement in the automated visa lookout or other appropriate database, and shall be provided without any fee or charge.

(3) The Federal Bureau of Investigation shall provide periodic updates of the extracts at intervals mutually agreed upon with the agency receiving the access. Upon receipt of each updated extract, the receiving agency shall make corresponding updates to its database and destroy previously provided extracts.

(4) Access to an extract does not entitle the Department of State to obtain the full content of the corresponding automated criminal history record. To obtain the full content of a criminal history record, the Department of State shall submit the applicant's fingerprints and any appropriate fingerprint processing fee authorized by law to the Criminal Justice Information Services Division of the Federal Bureau of Investigation.

(c) The provisions of the extracts described in subsection (b) may be reconsidered by the Attorney General and the receiving agency upon the development and deployment of a more cost-effective and efficient means of sharing the information.

(d) For purposes of administering this section, the Department of State shall, prior to receiving access to NCIC data but not later than 4 months after the date of enactment of this subsection, promulgate final regulations—

(1) to implement procedures for the taking of fingerprints; and

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(2) to establish the conditions for the use of the information received from the Federal Bureau of Investigation, in order—

(a) to limit the dissemination of such information;

(b) to ensure that such information is used solely to determine whether or not to issue a visa to an alien or to admit an alien to the United States;

(c) to ensure the security, confidentiality, and destruction of such information; and

(d) to protect any privacy rights of individuals who are subjects of such information.

(b) REPORTING REQUIREMENT.—Not later than 2 years after the date of enactment of this Act, the Attorney General and the Secretary of State shall report to Congress on the implementation of the amendments made by this section.

(c) TECHNOLOGY STANDARDS TO CONFIRM IDENTITIES.—(1) IN GENERAL.—The Attorney General and the Secretary of State shall jointly, through the National Institute of Standards and Technology (NIST), and in consultation with the Secretary of the Treasury and other Federal law enforcement and intelligence agencies, develop technology standards that can be used in the United States to verify the identity of persons applying for a United States visa or persons seeking to enter the United States pursuant to a visa for the purposes of conducting background checks, confirming identity, and ensuring that a person has not received a visa under a different name or in whose name a visa is sought to enter the United States pursuant to a visa.

(2) IMPLEMENTATION.—The technology standards developed pursuant to paragraph (1) shall be the technological basis for a cross-agency, cross-platform system that is cost-effective, efficient, fully integrated, and allows for the development of a system that can verify the identity of persons applying for a United States visa or seeking to enter the United States pursuant to a visa.

(3) ACCESSIBILITY.—The electronic system described in paragraph (2) shall be readily and easily accessible to—

(A) all consular officers responsible for the issuance of visas;

(B) all Federal inspection agents at all United States ports of entry;

(C) all law enforcement and intelligence officers as determined by regulation to be responsible for determining the identity of aliens admitted to the United States pursuant to a visa.

(d) REPORT.—Not later than 18 months after the date of the enactment of this Act, and every 2 years thereafter, the Attorney General and the Secretary of State shall jointly, in consultation with the Secretary of Treasury, report to Congress describing the development, implementation, efficiency, and privacy implications of the technology standard and electronic database system described in this subsection.

(e) FUNDS.—There is authorized to be appropriated to the Secretary of State, the Attorney General, and the Director

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of the National Institute of Standards and Technology such sums as may be necessary to carry out the provisions of this subsection.

(d) STATUTORY CONSTRUCTION.—Nothing in this section, or in any other law, shall be construed to limit the authority of the Attorney General or the Director of the Federal Bureau of Investigation to provide access to the criminal history record information contained in the interface of Identification Index (NCIC-III), or to any other information maintained by the NCIC, to any Federal agency or officer authorized to enforce or administer the immigration laws of the United States, for the purpose of such enforcement or administration, upon terms that are consistent with the National Crime Prevention and Privacy Act of 1988 (subtitle A of title II of Public Law 103-251; 42 U.S.C. 14601–14602) and section 5602 of title 5, United States Code.

SEC. 404. LIMITED AUTHORITY TO PAY OVERTIME.

The matter under the headings "Immigration and Naturalization Service: Salaries and Expenses, Enforcement and Border Affairs" and "Immigration and Naturalization Service: Salaries and Expenses, Citizenship and Border Protection, Immigration and Program Direction" in the Department of Justice Appropriations Act, 2001 (as enacted into law by Appendix B (H.R. 5548) of Public Law 106-553 (114 Stat. 2762A-56 to 2762A-69)) is amended by striking the following section 8155 which it occurs: "Provided, That none of the funds available to the Immigration and Naturalization Service shall be paid to any employee overtime pay in an amount in excess of $30,000 during the calendar year beginning January 1, 2002."

SEC. 405. REPORT ON THE INTEGRATED AUTOMATED FINGERPRINT IDENTIFICATION SYSTEM FOR PORTS OF ENTRY AND OVERTIME CONSULTANT POSTS.

(a) IN GENERAL.—The Attorney General, in consultation with the appropriate heads of other Federal agencies, including the Secretary of State, the Secretary of the Treasury, and the Secretary of Transportation, shall report to Congress on the feasibility of enhancing the Integrated Automated Fingerprint Identification System (IAFIS) of the Federal Bureau of Investigation and other identification systems in order to better identify a person who holds a foreign passport or a visa and may be wanted in connection with a criminal investigation in the United States or abroad, before the issuance of a visa to that person or the entry or exit from the United States by that person.

(b) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated not less than $500,000 to carry out this section.

Subtitles B—Enhanced Immigration Provisions

SEC. 411. DEFINITIONS RELATING TO TERRORISM.

(a) GROUND OF INADMISSIBILITY.—Section 212(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)) is amended—

(1) in subparagraph (B)—

(A) in clause (i)—

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(i) by amending subclause (IV) to read as follows:

"(IV) is a representative (as defined in clause (v) of—

(a) a foreign terrorist organization, as designated by the Secretary of State under section 219, or

(b) a critical, current, or other similar group whose public endorsement of acts of terrorism and the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities."

(ii) in subclause (V), by inserting "or" after "section 219," and

(iii) by adding at the end the following new subclause:

"(VI) has used the alien's position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity to undermine or pressure the United States to reduce or eliminate terrorist activities, or

(VII) the spouse or child of an alien who is inadmissible under this section, if the activity causing the alien to be found inadmissible occurred within the last 5 years."

(iii) by redesignating clauses (iii), (iv), and (v) as clauses (iii), (iv), and (v), respectively;

(C) in clause (iii), by striking "clause (iii)" and inserting "clause (iv)";

(D) by inserting after clause (i) the following:

"(ii) EXCEPTION.—Subclause (VII) of clause (i) does not apply to a spouse or child—

(1) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(2) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section."

(E) in clause (iii) (as redesignated by subparagraph (B)(i)) to read as follows:

"(iii) ENGAGE IN TERRORIST ACTIVITY DEFINED.—As used in this chapter, the term 'engage in terrorist activity' means, in an individual capacity or as a member of an organization—

(1) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; or

(2) to prepare or plan a terrorist activity;"
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"[i] designated under section 219;
[ii] otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General, as a terrorist organization, after finding that the organization engages in the activities described in subclause (i), (ii), or (iii) of clause (iv), or the organization provides material support to further terrorist activity; or
[iii] that is a group of two or more individuals, whether organized or not, which engages in the activities described in subclause (i), (ii), or (iii) of clause (iv); and
(2) by adding at the end the following new subparagraph:
(F) ASSOCIATION WITH TERRORIST ORGANIZATIONS—Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.
(b) CONFORMING AMENDMENTS—
(ii) Section 208(b)(2)(A)(i)(I) of the Immigration and Nationality Act (8 U.S.C. 1158(b)(2)(A)(i)) is amended by striking "or IV" and inserting "IV, or VI".
(c) RETROACTIVE APPLICATION OF AMENDMENTS—
(1) IN GENERAL—Except as otherwise provided in this subsection, the amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to—
(A) actions taken by an alien before, on, or after such date;
(B) all aliens, without regard to the date of entry or attempted entry into the United States—
(i) in removal proceedings on or after such date (except for proceedings in which there has been a final administrative decision before such date); or
(ii) seeking admission to the United States on or after such date.
(2) SPECIAL RULE FOR ALIENS IN EXCLUSION OR DEPORTATION PROCEEDINGS—Notwithstanding any other provision of law, sections 212(a)(3)(B) and 237(a)(4)(B) of the Immigration and Nationality Act, as amended by this Act, shall apply to all aliens in exclusion or deportation proceedings on or after the date of the enactment of this Act (except for proceedings in which there has been a final administrative decision before such date) as if such proceedings were removal proceedings.
(3) SPECIAL RULE FOR SECTION 219 ORGANIZATIONS AND ORGANIZATIONS DESIGNATED UNDER SECTION 212(a)(3)(B)(IV)(II)—
(A) IN GENERAL—Notwithstanding paragraphs (1) and (2), no alien shall be considered inadmissible under section 212(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)), or deportable under section 237(a)(4)(B) of such Act (8 U.S.C. 1227(a)(4)(B)), by reason of the amendments made by subsection (a), on the ground that the alien engaged in a terrorist activity described in subclause (IV)(B), (IV)(b), or (IV)(c) of section 212(a)(3)(B)(iv) of such Act (as so amended) with respect to a group at any time when the group was not a terrorist organization designated by the Secretary of State under section 219 of such Act (8 U.S.C. 1188) or otherwise designated under section 212(a)(3)(B)(IV)(II) of such Act (as so amended).
(B) STATUTORY CONSTRUCTION—Subparagraph (A) shall not be construed to prevent an alien from being considered inadmissible or deportable for having engaged in a terrorist activity—
(i) described in subclause (IV)(B), (IV)(b), or (IV)(c) of section 212(a)(3)(B)(iv) of such Act (as so amended) with respect to a terrorist organization at any time when such organization was designated by the Secretary of State under section 219 of such Act or otherwise designated under section 212(a)(3)(B)(IV)(II) of such Act (as so amended); or
(ii) described in subclause (IV)(c), (IV)(c), or (IV)(c) of section 212(a)(3)(B)(iv) of such Act (as so amended) with respect to a terrorist organization described in section 212(a)(3)(B)(IV)(II) of such Act (as so amended).
(4) EXCEPTION—The Secretary of State, in consultation with the Attorney General, may determine that the amendments made by this section shall not apply with respect to actions by an alien taken outside the United States before the date of the enactment of this Act upon the recommendation of a consular officer who has concluded that there is no reasonable ground to believe that the alien knew or reasonably should have known that the actions would further a terrorist activity.
(c) DESIGNATION OF FOREIGN TERRORIST ORGANIZATIONS—
(1) IN GENERAL—The Secretary of State shall, by rule published in the Federal Register, designate as a foreign terrorist organization—
(A) to whom paragraph (1)(B), (IV)(B), (IV)(B), or (IV)(c) of section 212(a)(3)(B)(iv) of such Act (as so amended) with respect to a group at any time when the group was not a terrorist organization designated by the Secretary of State under section 219 of such Act (8 U.S.C. 1188) or otherwise designated under section 212(a)(3)(B)(IV)(II) of such Act (as so amended).
(B) NOTICE—
(1) TO CONGRESSIONAL LEADERS—Seven days before making a designation under this subsection, the Secretary shall, by classified communication, notify the Speaker and Minority Leader of the House of Representatives, the President pro tempore, the Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees of the House of Representatives and the Senate, in writing, of the
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intend to designate an organization under this subsection, together with the findings made under paragraph (1) with respect to that organization, and the factual basis therefor.

SEC. 3162A. (a) DETENTION OF SUSPECTED TERRORISTS; HABEAS CORPUS; JUDICIAL REVIEW

"Mandatory detention of suspected terrorists; habeas corpus; judicial review

"SEC. 236A. (a) Detention of terrorist aliens—

(1) Custody—The Attorney General shall take into custody any alien who is certified under paragraph (b).

(b) Release—Except as provided in paragraphs (2) and (3), the Attorney General shall maintain custody of such an alien until the alien is removed from the United States. Except as provided in paragraph (2), such custody shall be maintained irrespective of any request for removal for which the alien may be entitled to, or any relief from removal granted to the alien, until the Attorney General determines that the alien is no longer an alien who may be certified under paragraph (3). If the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate.

(c) Certification—The Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien—

(1) is described in section 212(a)(3)(B)(i), 212(a)(3)(B)(ii), 212(a)(3)(B)(iii), or 237(a)(4)(B); or

(2) is engaged in any activity that endangers the national security of the United States.

(2) Nondelegation—The Attorney General may delegate the authority provided under paragraph (3) only to the Deputy Attorney General. The Deputy Attorney General may not delegate such authority.

(d) Commencement of proceedings—The Attorney General shall place an alien detained under paragraph (3) in removal proceedings, or shall charge the alien with a criminal offense. If the alien is not detained under this section, or if the alien is released, the Attorney General shall release the alien.

(3) Limitation on indefinite detention—An alien detained solely under paragraph (3) who has not been removed under section 241(a)(10), or whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.

(4) Review of certification—The Attorney General shall review the certification made under paragraph (3) every 6 months. If the Attorney General determines, in the Attorney General's discretion, that the certification should be revoked, the alien may be released on conditions as the Attorney General deems appropriate, unless such release is otherwise prohibited by law. The alien may request each 6 months in writing that the Attorney General reconsider the certification and may submit documents or other evidence in support of that request.

(5) HABEAS CORPUS; JUDICIAL REVIEW—

(1) Judicial review of any action or decision relating to this section (including judicial review of the merits of a determination made under subsection (a)(3) or (a)(4)) is available exclusively in habeas corpus proceedings consistent
with this subsection. Except as provided in the preceding sentence, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision.

(2) APPLICATION.—

(A) IN GENERAL.—Notwithstanding any other provision of law, including section 2241(a) of title 28, United States Code, habeas corpus proceedings described in paragraph (1) may be initiated only by an application filed with—

(i) the Supreme Court;

(ii) any justice of the Supreme Court;

(iii) any circuit judge of the United States Court of Appeals for the District of Columbia Circuit; or

(iv) any district court otherwise having jurisdiction to entertain it.

(B) APPLICATION TRANSFER.—Section 2241(b) of title 28, United States Code, shall apply to an application for a writ of habeas corpus described in subparagraph (A).

(3) APPEALS.—Notwithstanding any other provision of law, including section 2263 of title 28, in habeas corpus proceedings described in paragraph (1) before a circuit or district judge, the final order shall be subject to review, on appeal, by the United States Court of Appeals for the District of Columbia Circuit. There shall be no right of appeal in such proceedings to any other circuit court of appeals.

(4) RULE OF DECISION.—The law applied by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit shall be regarded as the rule of decision in habeas corpus proceedings described in paragraph (1).

(a) STATUTORY CONSTRUCTION.—The provisions of this section shall not be applicable to any other provision of this Act.

(b) CLERICAL AMENDMENT.—The table of contents of the Immigration and Nationality Act is amended by inserting after the item relating to section 236 the following:

"236A. Mandatory detention of suspected terrorist; habeas corpus; judicial review."

(c) REPORTS.—Not later than 6 months after the date of the enactment of this Act, and every 6 months thereafter, the Attorney General shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate, with respect to the reporting period, on—

(1) the number of aliens certified under section 236A(a)(3) of the Immigration and Nationality Act, as added by subsection (a);

(2) the grounds for such certifications;

(3) the nationalities of the aliens so certified;

(4) the length of the detention for each alien so certified; and

(5) the number of aliens so certified who—

(A) were granted any form of relief from removal;

(B) were removed;

(C) the Attorney General has determined are no longer aliens who may be so certified; or

(D) were released from detention.

SEC. 413. MULTILATERAL COOPERATION AGAINST TERRORISTS.

Section 223(b) of the Immigration and Nationality Act (8 U.S.C. 1320a(b)) is amended—

(1) by striking "except that in the discretion of" and inserting the following: "except that—

"(1) in the discretion of; and"

(2) by adding at the end the following:

"and (3) the Secretary of State, in the Secretary's discretion and on the basis of reciprocity, may provide to a foreign government, information in the Department of State's computerized visa lookout database and, when necessary and appropriate, other records covered by this section related to information in the database—

(A) with regard to individual aliens, at any time on a case-by-case basis for the purpose of preventing, investigating, or punishing acts that would constitute a crime in the United States, including, but not limited to, terrorism or trafficking in controlled substances, persons, or illicit weapons; or

(B) with regard to any or all aliens in the database, pursuant to such conditions as the Secretary of State shall establish in an agreement with the foreign government in which that government agrees to use such information and records for the purposes described in subparagraph (A) or to deny visas to persons who would be inadmissible to the United States.

SEC. 414. VISA INTEGRITY AND SECURITY.

(a) SENSE OF CONGRESS REGARDING THE NEED TO EXPEDITE IMPLEMENTATION OF INTEGRATED ENTITY AND EXIT DATA SYSTEM.—

(1) SENSE OF CONGRESS.—In light of the terrorist attacks perpetrated against the United States on September 11, 2001, it is the sense of the Congress that—

(A) the Attorney General, in consultation with the Secretary of State, should fully implement the integrated entry and exit data system for airports, seaports, and land border ports of entry, as specified in section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1366a), with all deliberate speed and as expeditiously as practicable; and

(B) the Attorney General, in consultation with the Secretary of State, should immediately begin establishing the Integrated Entry and Exit Data System Task Force, as described in section 5 of the Immigration and Naturalization Service Data Management Improvement Act of 2000 (Public Law 106–213).

(b) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated such sums as may be necessary to fully implement the system described in paragraph (1)(A).

(c) DEVELOPMENT OF THE SYSTEM.—In the development of the integrated entry and exit data system under section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1366a), the Attorney General and the Secretary of State shall particularly focus on—

(1) the utilization of biometric technology; and
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(2) the development of tamper-resistant documents read-
able at ports of entry.

c. INTERFACE WITH LAW ENFORCEMENT DATABASES.—The
entry and exit data system described in this section shall be able
the Federal law enforcement to identify and detain individuals who pose a
threat to the national security of the United States.

d. REPORT ON SCREENING INFORMATION.—Not later than 12
months after the date of enactment of this Act, the Office of Home-
land Security shall submit a report to Congress on the information
that is needed from any United States agency to effectively screen
visa applicants and applicants for admission to the United States
to identify those affiliated with terrorist organizations or those
that pose any threat to the safety or security of the United States,
including the type of information currently received by United
States agencies and the regularity with which such information is
transmitted to the Secretary of State and the Attorney General.

SEC. 416. FOREIGN STUDENT MONITORING PROGRAM.

(a) FULL IMPLEMENTATION AND EXPANSION OF FOREIGN
STUDENT VISAS MONITORING PROGRAM REQUIRED.—The Attorney
General, in consultation with the Secretary of State, shall fully imple-
ment and expand the program established by section 641(a) of the
Illegal Immigration Reform and Immigrant Responsibility Act of 1996
(8 U.S.C. 1327(a)).

(b) INCLUSION WITH PORT OF ENTRY INFORMATION.—For each
alien with respect to whom information is collected under section 641
of the Illegal Immigration Reform and Immigrant Responsibility
Act of 1996 (8 U.S.C. 1327), the Attorney General, in consultation
with the Secretary of State, shall include information on the date
of entry and port of entry.

c. EXPANSION OF SYSTEM TO INCLUDE OTHER APPROVED
EDUCATIONAL INSTITUTIONS.—Section 641 of the Illegal Immi-
is amended—

(1) in subsection (a)(1), subsection (c)(4)(A), and subsection
(d)(1) in the text above subparagraph (A), by inserting "or other
approved educational institution," after "higher edu-
cation," each place it appears;

(2) in subsections (c)(1)(C), (c)(1)(D), and (d)(1)(A), by inserting
"or other approved educational institution," after "higher edu-
cation" each place it appears;

(3) in subsections (d)(2), (e)(1), and (e)(3), by inserting
"or other approved educational institution," after "higher edu-
cation" each place it appears; and

(4) in subsection (b), by adding at the end the following
new paragraph:

"(5) OTHER APPROVED EDUCATIONAL INSTITUTION.—The
term "other approved educational institution" includes any
air flight school, language training school, or vocational school,

SEC. 417. MACHINE READABLE PASSPORTS.

(a) AUDITS.—The Secretary of State shall, each fiscal year until
September 30, 2007—

(1) perform annual audits of the implementation of section
1187a(a)(3)(B));

(2) check for the implementation of precautionary measures
to prevent the counterfeiting and theft of passports; and

(3) ascertain that countries designated under the visa
waiver program have established a program to develop tamper-
resistant passports.

(b) PERIODIC REPORTS.—Beginning one year after the date of
enactment of this Act, and every year thereafter until 2007, the
Secretary of State shall submit a report to Congress setting forth
the findings of the most recent audit conducted under subsection
(a)(1).

(c) ADVANCE NOTICE FOR SATISFACTION OF REQUIRE-
MENTS.—Section 217(a)(3) of the Immigration and Nationality
Act (8 U.S.C. 1187a(a)(3)) is amended by striking "2007" and inserting
"2003."

(d) WAIVERS.—Section 217(a)(3) of the Immigration and Nationality
Act (8 U.S.C. 1187a(a)(3)) is amended—

(A) IN GENERAL.—Except as provided in subparagraph
(B), or on or after

(B) LIMITED WAIVER AUTHORITY.—For the period
beginning October 1, 2008, and ending September 30, 2007,
the Secretary of State may waive the requirement of
subsection (A) with respect to nationals of a program
country designated under subsection (c), if the Sec-

...
Subtitle C—Preservation of Immigration Benefits for Victims of Terrorism

SEC. 651. SPECIAL IMMIGRANT STATUS.

(a) IN GENERAL.—For purposes of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), the Attorney General may provide an alien described in subsection (b) with the status of a special immigrant under section 101(a)(27) of such Act (8 U.S.C. 1101(a)(27)), if the alien—

(1) files with the Attorney General a petition under section 204 of such Act (8 U.S.C. 1154) for classification under section 203(b)(4) of such Act (8 U.S.C. 1153(b)(4)); and

(2) is otherwise admissible to the United States for permanent residence, except in determining such admissibility, the grounds for inadmissibility specified in section 212(a)(4) of such Act (8 U.S.C. 1182(a)(4)) shall not apply.

(b) ALIENS DESCRIBED.—

(1) PRINCIPAL ALIENS.—An alien is described in this subsection if—

(A) the alien was the beneficiary of—

(i) a petition that was filed with the Attorney General on or before September 10, 2001—

(I) under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) to classify the alien as a family-sponsored immigrant under section 203(a) of such Act (8 U.S.C. 1153(a)) or as an employment-based immigrant under section 203(b) of such Act (8 U.S.C. 1153(b)); or

(II) under section 214(d) (8 U.S.C. 1184(d)) of such Act to authorize the issuance of a non-immigrant visa to the alien under section 101(a)(15)(C) of such Act (8 U.S.C. 1101(a)(15)(C));

or

(ii) an application for labor certification under section 212(a)(3)(A) of such Act (8 U.S.C. 1153(a)(3)(A)) that was filed under regulations of the Secretary of Labor on or before such date; and

(B) such petition or application was revoked or terminated (or otherwise rendered null), either before or after its approval, due to a specified terrorist activity that directly resulted in—

(i) the death or disability of the petitioner, applicant, or alien beneficiary; or

(ii) loss of employment due to physical damage to, or destruction of, the business of the petitioner or applicant.

(2) SPOUSES AND CHILDREN.—

(A) IN GENERAL.—An alien is described in this subsection if—

(i) the alien was, on September 10, 2001, the spouse or child of a principal alien described in paragraph (1); and

(ii) the alien—

(I) is accompanying such principal alien; or

(II) is following to join such principal alien not later than September 11, 2003.

(B) CONSTRUCTION.—For purposes of construing the terms ‘accompanying’ and ‘following to join’ in subparagraph (A)(i), any death of a principal alien that is described in paragraph (1)(B)(3) shall be disregarded.

(3) GRANDPARENTS OF CHILDREN.—An alien is described in this subsection if the alien is a grandparent of a child, both of whose parents died as a direct result of a specified terrorist activity, if either of such deceased parents was, on September 10, 2001, a citizen or national of the United States or an alien lawfully admitted for permanent residence in the United States.

(c) PRIORITY DATE.—Immigrant visas made available under this section shall be issued to aliens in the order in which a petition on behalf of such alien is filed with the Attorney General under subsection (a)(1), except that if an alien was assigned a priority date with respect to a petition described in subsection (b)(1)(A), the alien may maintain that priority date.

(d) NUMERICAL LIMITATIONS.—For purposes of the application of sections 201 through 203 of the Immigration and Nationality Act (8 U.S.C. 1151–1153) in any fiscal year, aliens eligible to be provided status under this section shall be treated as special immigrants described in section 101(a)(27) of such Act (8 U.S.C. 1101(a)(27)) who are not described in subparagraph (A), (B), (C), or (K) of such section.

SEC. 652. EXTENSION OF FILING OR REENTRY DEADLINES.

(a) AUTOMATIC EXTENSION OF NONIMMIGRANT STATUS.—

(A) IN GENERAL.—Notwithstanding section 214 of the Immigration and Nationality Act (8 U.S.C. 1154), in the case of an alien described in paragraph (2) who was lawfully present in the United States as a nonimmigrant on September 10, 2001, the alien may remain lawfully in the United States in the same nonimmigrant status until the later of—

(A) the date such lawful nonimmigrant status otherwise would have terminated if this subsection had not been enacted; or

(B) 1 year after the death or onset of disability described in paragraph (2).

(2) ALIENS DESCRIBED.—

(A) PRINCIPAL ALIENS.—An alien is described in this paragraph if the alien was disabled as a direct result of a specified terrorist activity.

(B) SPOUSES AND CHILDREN.—An alien is described in this paragraph if the alien was, on September 10, 2001, the spouse or child of—

(i) a principal alien described in subparagraph (A); or

(ii) an alien who died as a direct result of a specified terrorist activity.
(3) AUTHORIZED EMPLOYMENT.—During the period in which a principal alien or alien spouse is in lawful nonimmigrant status under paragraph (1), the alien shall be provided an "employment authorized" endorsement or other appropriate document signifying authorization of employment not later than 30 days after the alien requests such authorization.

(b) NEW DEADLINES FOR EXTENSION OR CHANGE OF NON-IMMIGRANT STATUS.—

(1) FILING DELAYS.—In the case of an alien who was lawfully present in the United States as a nonimmigrant on September 10, 2001, if the alien was prevented from filing a timely application for an extension or change of nonimmigrant status as a direct result of a specified terrorist activity, the alien's application shall be considered timely filed if it is filed not later than 60 days after it otherwise would have been due.

(2) DEPARTURE DELAYS.—In the case of an alien who was lawfully present in the United States as a nonimmigrant on September 10, 2001, if the alien is unable timely to depart the United States as a direct result of a specified terrorist activity, the alien shall not be considered to have been unlawfully present in the United States during the period beginning on September 11, 2001, and ending on the date of the alien's departure, if such departure occurs on or before November 11, 2001.

(3) SPECIAL RULE FOR ALIENS UNABLE TO RETURN FROM ABROAD.—

(A) PRINCIPAL ALIENS.—In the case of an alien who was in a lawful nonimmigrant status on September 10, 2001, but who was not present in the United States on such date, if the alien was prevented from returning to the United States in order to file a timely application for an extension of nonimmigrant status as a direct result of a specified terrorist activity,

(i) the alien's application shall be considered timely filed if it is filed not later than 60 days after it otherwise would have been due; and

(ii) the alien's lawful nonimmigrant status shall be considered to continue until the later of—

(A) the date such status otherwise would have terminated if this subparagraph had not been enacted; or

(B) the date that is 60 days after the date on which the application described in clause (i) otherwise would have been due.

(B) SPOUSES AND CHILDREN.—In the case of an alien who is the spouse or child of a principal alien described in subparagraph (A), if the spouse or child was in a lawful nonimmigrant status on September 10, 2001, the spouse or child may remain lawfully in the United States in the same nonimmigrant status until the later of—

(i) the date such lawful nonimmigrant status otherwise would have terminated if this subparagraph had not been enacted; or

(ii) the date that is 60 days after the date on which the application described in subparagraph (A) otherwise would have been due.

(4) CIRCUMSTANCES PREVENTING TIMELY ACTION.—

(4) CIRCUMSTANCES PREVENTING TIMELY ACTION.—

(A) CIRCUMSTANCES PREVENTING TIMELY ACTION.—For purposes of paragraph (1), circumstances preventing an alien from timely acting are—

(i) office closures;

(ii) mail or courier service cessations or delays; and

(iii) other closures, cessations, or delays affecting case processing or travel necessary to satisfy legal requirements.

(B) CIRCUMSTANCES PREVENTING TIMELY ACTION.—For purposes of paragraphs (2) and (3), circumstances preventing an alien from timely acting are—

(i) office closures;

(ii) airline flight cessations or delays; and

(iii) other closures, cessations, or delays affecting case processing or travel necessary to satisfy legal requirements.

(c) DIVERSITY IMMIGRANTS.—

(1) WAIVER OF FISCAL YEAR LIMITATION.—Notwithstanding section 205(e)(2) of the Immigration and Nationality Act (8 U.S.C. 1153(e)(2)), an immigrant visa number issued to an alien under section 203(c) of such Act for fiscal year 2001 may be used by the alien during the period beginning on October 1, 2001, and ending on April 3, 2002, if the alien establishes that the alien was prevented from using it during fiscal year 2001 as a direct result of a specified terrorist activity.

(2) WORLDWIDE LEVEL.—In the case of an alien entering the United States as a lawful permanent resident, or adjusting to that status, under paragraph (1) or (3), the alien shall be counted as a diversity immigrant for fiscal year 2001 for purposes of section 201(e) of the Immigration and Nationality Act (8 U.S.C. 1153(a)), unless the worldwide level under such section for such year has been exceeded, in which case the alien shall be counted as a diversity immigrant for fiscal year 2002.

(d) TREATMENT OF FAMILY MEMBERS OF CERTAIN ALIENS.—

In the case of a principal alien issued an immigrant visa number under section 203(c) of the Immigration and Nationality Act (8 U.S.C. 1153(c)) for fiscal year 2001, if such principal alien died as a direct result of a specified terrorist activity, the alien who was, on September 10, 2001, the spouse and children of such principal alien shall, until June 30, 2002, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of section 203 of such Act, be entitled to the same status, and the same order of consideration, that would have been provided to such alien spouse and child under section 203(d) of such Act as if the principal alien were not deceased and as if the spouse or child's visa application had been adjudicated by September 10, 2001.

(4) CIRCUMSTANCES PREVENTING TIMELY ACTION.—For purposes of paragraph (1), circumstances preventing an alien from using an immigrant visa number during fiscal year 2001 are—

(A) office closures;

(B) mail or courier service cessations or delays;

(C) airline flight cessations or delays; and

(D) other closures, cessations, or delays affecting case processing or travel necessary to satisfy legal requirements.
(d) Extention of Expiration of Immigrant Visas.—

(1) In General.—Notwithstanding the limitations under section 232(c) of the Immigration and Nationality Act (8 U.S.C. 1221(c)), in the case of any immigrant visa issued to an alien that expires or expires before December 31, 2001, if the alien was unable to effect entry into the United States as a direct result of a specified terrorist activity, then the period of validity of the visa is extended until December 31, 2001, unless a longer period of validity is otherwise provided under this subtitle.

(2) Circumstances Preventing Entry.—For purposes of this subsection, circumstances preventing an alien from affecting entry into the United States are—

(A) office closures;

(B) airline flight cancellations or delays; and

(C) other closures, casualties, or delays affecting case processing or travel necessary to satisfy legal requirements.

(a) Grants of Parole Extended.—

(1) In General.—In the case of any parole granted by the Attorney General under section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)) that expires on a date on or after September 11, 2001, if the alien beneficiary of the parole was unable to return to the United States prior to the expiration date as a direct result of a specified terrorist activity, the parole is deemed extended for an additional 90 days.

(b) Circumstances Preventing Return.—For purposes of this subsection, circumstances preventing an alien from timely returning to the United States are—

(A) office closures;

(B) airline flight cancellations or delays; and

(C) other closures, casualties, or delays affecting case processing or travel necessary to satisfy legal requirements.

(b) Volunteer Departure.—Notwithstanding section 240B of the Immigration and Nationality Act (8 U.S.C. 1225b), if a period for voluntary departure under such section expired during the period beginning on September 11, 2001, and ending on October 11, 2001, such voluntary departure period is deemed extended for an additional 30 days.

SEC. 421. Humanitarian Relief for Certain Surviving Spouses and Children.

(a) Treatment as Immediate Relatives.—

(1) Spouses.—Notwithstanding the second sentence of section 201(b)(2)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i)), in the case of an alien who was the spouse of a citizen of the United States at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, if the alien died as a direct result of a specified terrorist activity, the alien (and each child of the alien) shall be considered, for purposes of section 201(b) of such Act, to remain an immediate relative after the date of the citizen's death, but only if the alien files a petition under section 204(a)(1)(A)(ii) of such Act within 2 years after such date and only until the date the alien remarries. For purposes of such section 204(a)(1)(A)(ii), an alien granted relief under the preceding sentence shall be considered an alien described in the second sentence of section 201(b)(2)(A)(i) of such Act.

(2) Children.—

(a) In General.—In the case of an alien who was the child of a citizen of the United States at the time of the citizen's death, if the citizen died as a direct result of a specified terrorist activity, the alien shall be considered, for purposes of section 201(b) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)), to remain an immediate relative after the date of the citizen's death (regardless of changes in age or marital status thereafter), but only if the alien files a petition under subparagraph (B) within 2 years after such date.

(b) Petition.—An alien described in paragraph (4) may file a petition with the Attorney General for classification of the alien under section 203(b)(2)(A)(ii) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(2)(A)(ii)). For purposes of such Act, such a petition shall be considered a petition filed under section 204(a)(1)(A) of such Act (8 U.S.C. 1154(a)(1)(A)).

(c) Spouses, Children, Unmarried Sons and Daughters of Lawful Permanent Resident Aliens.—

(1) In General.—Any spouse, child, or unmarried son or daughter of an alien described in paragraph (8) who is included in a petition for classification as a family-sponsored immigrant under section 203(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(2)) that was filed by such alien before September 11, 2001, shall be considered (if the spouse, child, son, or daughter has not been admitted or approved for lawful permanent residence by such date) a valid petitioner for preference status under such section with the same priority date as that assigned prior to the date described in paragraph (3)(A). No new petition shall be required to be filed. Such spouse, child, son, or daughter may be eligible for deferred-action and work authorization.

(2) Self-Petition.—Any spouse, child, or unmarried son or daughter of an alien described in paragraph (8) who is not a beneficiary of a petition for classification as a family-sponsored immigrant under section 203(a)(2) of the Immigration and Nationality Act may file a petition for such classification with the Attorney General, if the spouse, child, son, or daughter was present in the United States on September 11, 2001. Such spouse, child, son, or daughter may be eligible for deferred-action and work authorization.

(d) Aliens Described.—An alien is described in this paragraph if the alien—

(A) died as a direct result of a specified terrorist activity; and

(B) on the day of such death, was lawfully admitted for permanent residence in the United States.

(e) Application for Adjustment of Status by Surviving Spouses and Children of Employment-Based Immigrants.—

(1) In General.—Any alien who was, on September 10, 2001, the spouse or child of an alien described in paragraph (2), and who applied for adjustment of status prior to the date described in paragraph (2)(A), may have such application adjudicated as if such death had not occurred.
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(2) ALIENS DESCRIBED.—An alien is described in this paragraph if the alien—
(A) died as a direct result of a specified terrorist activity; and
(B) on the day before such death, was—
(i) an alien lawfully admitted for permanent residence in the United States by reason of having been allotted a visa under section 203(b) of the Immigration and Nationality Act (8 U.S.C. 1153(b)); or
(ii) an applicant for adjustment of status to that of an alien described in clause (i), and admissible to the United States for permanent residence.

d. WAIVER OF PUBLIC CHARGE GROUNDS.—In determining the admissibility of any alien accorded an immigration benefit under this section, the grounds for inadmissibility specified in section 212(a)(4) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(4)) shall not apply.

SEC. 404. "ACE-OUT" PROTECTION FOR CHILDREN.

For purposes of the administration of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), in the case of an alien—
(1) whose 21st birthday occurs in September 2001, and who is the beneficiary of a petition or application filed under such Act on or before September 11, 2001, the alien shall be considered to be a child for 90 days after the alien’s 21st birthday for purposes of adjudicating such petition or application; and
(2) whose 21st birthday occurs after September 2001, and who is the beneficiary of a petition or application filed under such Act on or before September 11, 2001, the alien shall be considered to be a child for 45 days after the alien’s 21st birthday for purposes of adjudicating such petition or application.

SEC. 405. TEMPORARY ADMINISTRATIVE RELIEF.

The Attorney General, for humanitarian purposes or to ensure family unity, may provide temporary administrative relief to any alien who—
(1) was lawfully present in the United States on September 10, 2001;
(2) was on such date the spouse, parent, or child of an individual who died or was disabled as a direct result of a specified terrorist activity; and
(3) is not otherwise entitled to relief under any other provision of this subtitle.

SEC. 406. EVIDENCE OF DEATH, DISABILITY, OR LOSS OF EMPLOYMENT.

(a) IN GENERAL.—The Attorney General shall establish appropriate standards for evidence demonstrating, for purposes of this subtitle, that any of the following occurred as a direct result of a specified terrorist activity:
(1) Death.
(2) Disability.
(3) Loss of employment due to physical damage to, or destruction of, a business.
(b) WAIVER OF REGULATIONS.—The Attorney General shall carry out subsection (a) as expeditiously as possible. The Attorney General

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is not required to promulgate regulations prior to implementing this subtitle.

SEC. 407. NO BENEFITS TO TERRORISTS OR FAMILY MEMBERS OF TERRORISTS.

Notwithstanding any other provision of this subtitle, nothing in this subtitle shall be construed to provide any benefit or relief to—
(1) any individual culpable for a specified terrorist activity; or
(2) any family member of any individual described in paragraph (1).

SEC. 408. DEFINITIONS.

(a) APPLICATION OF IMMIGRATION AND NATIONALITY ACT PROVISIONS.—Except as otherwise specifically provided in this subtitle, the definitions used in the Immigration and Nationality Act (excluding the definitions applicable exclusively to title III of such Act) shall apply in the administration of this subtitle.
(b) SPECIFIED TERRORIST ACTIVITY.—For purposes of this subtitle, the term "specified terrorist activity" means any terrorist activity conducted against the Government or the people of the United States on September 11, 2001.

TITLE V—REMOVING OBSTACLES TO INVESTIGATING TERRORISM

SEC. 501. ATTORNEY GENERAL'S AUTHORITY TO PAY REWARDS TO COMBAT TERRORISM.

(a) PAYMENT OF REWARDS TO COMBAT TERRORISM.—Funds available to the Attorney General may be used for the payment of rewards pursuant to public advertisements for assistance to the Department of Justice to combat terrorism and defend the Nation against terrorist acts, in accordance with procedures and regulations established or issued by the Attorney General.
(b) CONDITIONS.—In making rewards under this section—
(1) no such reward of $250,000 or more may be made or offered without the personal approval of either the Attorney General or the President;
(2) the Attorney General shall give written notice to the Chairman and ranking minority members of the Committee on Appropriations and the Judiciary of the Senate and the House of Representatives not later than 30 days after the approval of a reward under paragraph (1); and
(3) any executive agency or military department (as defined, respectively, in sections 101 and 102 of title 5, United States Code) may provide the Attorney General with funds for the payment of rewards.
(c)Neither the failure of the Attorney General to authorize a payment nor the amount authorized shall be subject to judicial review; and
(d) no such reward shall be subject to any per- or aggregate reward spending limitation established by law, unless that law expressly refers to this section, and no reward paid pursuant to any such order shall count toward any such aggregate reward spending limitation.
SEC. 002. SECRETARY OF STATE'S AUTHORITY TO PAY REWARDS.

Section 106 of the State Department Basic Authorities Act of 1966 (Public Law 895, August 1, 1966; 22 U.S.C. 2708) is amended—

(1) in subsection (b),

(A) in paragraph (4) by striking "or" at the end;

(B) in paragraph (5), by striking the period at the end and inserting "including by dismantling an organization in whole or significant part or", and

(C) by adding at the end the following:

"(6) the identification or location of an individual who holds a key leadership position in a terrorist organization;"

(2) in subsection (d), by striking paragraphs (2) and (3) and redesignating paragraph (4) as paragraph (3); and

(3) in subsection (e)(1), by inserting "except as personally authorized by the Secretary of State if he determines that offer or payment of an award of a larger amount is necessary to combat terrorism or defend the Nation against terrorist acts," after "$5,000,000".

SEC. 003. DNA IDENTIFICATION OF TERRORISTS AND OTHER VIOLENT OFFENDERS.

Section 9(d)(2) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a(d)(2)) is amended to read as follows:

"(2) In addition to the offenses described in paragraph (1), the following offenses shall be treated for purposes of this section as qualifying Federal offenses, as determined by the Attorney General:

(A) any offense listed in section 2332d(g)(5)(B) of title 18, United States Code;

(B) any crime of violence (as defined in section 16 of title 18, United States Code); and

(C) any attempt or conspiracy to commit any of the above offenses."

SEC. 004. COORDINATION WITH LAW ENFORCEMENT.

(a) INFORMATION ACQUIRED FROM AN ELECTRONIC SURVEILLANCE.—Section 102 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1808), as amended by adding at the end the following:

"(4) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.

(2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.

(b) INFORMATION ACQUIRED FROM A PHYSICAL SEARCH.—Section 305 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1825) is amended by adding at the end the following:

"(4)(B) Federal officers who conduct physical searches to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.

(2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 304(a)(7)(B) or the entry of an order under section 310.

SEC. 005. MISCELLANEOUS NATIONAL SECURITY AUTHORIZATIONS.

(a) TELEPHONE, TOLL AND TRANSACTIONAL RECORDS.—Section 2709(b) of title 18, United States Code, is amended—

(1) in the matter preceding paragraph (1), by inserting "at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director after Assistant Director"

(2) in paragraph (1)—

(A) by striking "in a position not lower than Deputy Assistant Director" and

(B) by striking "made that" and all that follows and inserting the following: "made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution of the United States;", and

(3) in paragraph (2)—

(A) by striking "in a position not lower than Deputy Assistant Director" and

(B) by striking "made that" and all that follows and inserting the following: "made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution of the United States;".

(b) FINANCIAL RECORDS.—Section 1114(a)(5)(A) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414(a)(5)(A)) is amended—

(1) by inserting "in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director after Assistant Director" after "designed"; and

(2) by striking "sought" and all that follows and inserting "sought for foreign counterintelligence purposes to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States
person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(c) Consumer Reports.—Section 624 of the Fair Credit Reporting Act (15 U.S.C. 1681a) is amended—

(1) in subsection (a),__—

(A) by inserting "in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director" after "designee the first place it appears; and

(B) by striking "in writing that" and all that follows through the end and inserting the following: "in writing, that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States;"

(2) in subsection (b),—

(A) by inserting "in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director" after "designee the first place it appears; and

(B) by striking "in writing that" and all that follows through the end and inserting the following: "in writing that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States;"

(3) in subsection (c),—

(A) by inserting "in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director" after "designee the first place it appears; and

(B) by striking "in writing that" and all that follows through "States," and inserting the following: "in writing that the consumer report sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States;"

SEC. 506. EXTENSION OF SECRET SERVICE JURISDICTION.

(a) Concurrent Jurisdiction Under 18 U.S.C. 1030.—Section 1030(e) of title 18, United States Code, is amended to read as follows:

"(1) The United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under this section.

(2) The Federal Bureau of Investigation shall have primary authority to investigate offenses under subsection (a)(1) for any cases involving espionage, foreign counterintelligence, information protected against unauthorized disclosure for reasons of national defense or foreign relations, or Restricted Data (as that term is defined in section 712 of the Atomic Energy Act of 1954 (42 U.S.C. 2014)), except for offenses affecting the duties of the United States Secret Service pursuant to section 3059(a) of this title.

(3) Such authority shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

(b) REALIGNMENT OF JURISDICTION UNDER 18 U.S.C. 1344.—Section 3056(b)(3) of title 18, United States Code, is amended by striking "credit and debit card frauds, and false identification documents or devices and inserting "access device frauds, false identification documents or devices, and any fraud or other criminal or unlawful activity in or against any federally insured financial institution".

SEC. 507. DISCLOSURE OF EDUCATIONAL RECORDS.

Section 444 of the General Education Provisions Act (20 U.S.C. 1232g), is amended by adding after subsection (i) a new subsection (ix) to read as follows:

"(ix) INVESTIGATION AND PROSECUTION OF TERRORISM—

(1) IN GENERAL.—Notwithstanding subsections (a) through (i), or any provision of State law, the Attorney General (or any Federal, officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may permit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to—

(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332a(b)(5)(B) of title 18 United States Code, or an act of domestic or international terrorism as defined in section 2331 of that title; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) APPLICATION AND APPROVAL.—

(A) IN GENERAL.—An application under paragraph (1) shall be made to the District Court of the District of Columbia in accordance with paragraph (1). The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).
under this subsection shall not be liable to any person for that production.

(4) Record-keeping.—Subsection (b)(4) does not apply to education records subject to a court order under this subsection.

SEC. 509. DISCLOSURE OF INFORMATION FROM NCES SURVEYS.

Section 408 of the National Education Statistics Act of 1994 (20 U.S.C. 9027), is amended by adding after subsection (b) a new subsection (c) to read as follows:

"(c) INVESTIGATION AND PROSECUTION OF TERRORISM.—
(1) IN GENERAL.—Notwithstanding subsections (a) and (b), the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring the Secretary to permit the Attorney General (or his designee) to—
(A) collect reports, records, and information (including individually identifiable information) in the possession of the center that are relevant to an authorized investigation or prosecution of an offense listed in section 5332(b)(5)(B) of title 18, United States Code, or an act of domestic or international terrorism as defined in section 2331 of that title; and
(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such information, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.
(2) APPLICATION AND APPROVAL.—
(A) IN GENERAL.—An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the information sought is described in paragraph (1)(A).
(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(3) PROTECTION.—An officer or employee of the Department who, in good faith, produces information in accordance with an order issued under this subsection does not violate subsection (b)(2) and shall not be liable to any person for that production.

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TITLE VI—PROVIDING FOR VICTIMS OF TERRORISM, PUBLIC SAFETY OFFICERS, AND THEIR FAMILIES

Subtitle A—Aid to Families of Public Safety Officers

SEC. 611. EXPEDITED PAYMENT FOR PUBLIC SAFETY OFFICERS INVOLVED IN THE PREVENTION, INVESTIGATION, RESCUE, OR RECOVERY EFFORTS RELATED TO A TERRORIST ATTACK.

(a) IN GENERAL.—Notwithstanding the limitations of subsection (b) of section 1201 or the provisions of subsections (c), (d), and (e) of such section or section 13202 of title 1 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796, 3796a), upon certification (containing identification of all eligible payees of benefits pursuant to section 1201 of such Act) by a public agency that a public safety officer employed by such agency was killed or suffered a catastrophic injury producing permanent and total disability as a direct and proximate result of a personal injury sustained in the line of duty as described in section 1201 of such Act in connection with prevention, investigation, rescue, or recovery efforts related to a terrorist attack, the Director of the Bureau of Justice Assistance shall authorize payment to qualified beneficiaries, said payment to be made not later than 30 days after receipt of such certification, benefits described under subpart 1 of part 1 of such Act (42 U.S.C. 3796 et seq.).

(b) DEFINITIONS.—For purposes of this section, the term "catastrophic injury," "public agency," and "public safety officer" have the same meanings given such terms in section 1204 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796b).

SEC. 612. TECHNICAL CORRECTION WITH RESPECT TO EXPEDITED PAYMENTS FOR FEDERAL PUBLIC SAFETY OFFICERS.

Section 1 of Public Law 107-37 (an Act to provide for the expedited payment of certain benefits for a public safety officer who was killed or suffered a catastrophic injury as a direct and proximate result of a personal injury sustained in the line of duty in connection with the terrorist attacks of September 11, 2001) is amended by—

(1) inserting before "by a" the following: "containing identification of all eligible payees of benefits pursuant to section 1201;"
(2) inserting "producing permanent and total disability after suffering a catastrophic injury" after "suffered a catastrophic injury"; and
(3) striking "1201(a)" and inserting "1201".

SEC. 613. PUBLIC SAFETY OFFICERS BENEFIT PROGRAM PAYMENT INCREASE.

(a) PAYMENTS.—Section 1201(a) of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796) is amended by striking "$100,000" and inserting "$250,000".
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(b) APPLICABILITY.—The amendment made by subsection (a) shall apply to any death or disability occurring on or after January 1, 2001.

SEC. 64. OFFICE OF JUSTICE PROGRAMS.

Section 112 of title I of division A of Public Law 106–27 which is section 108(a) of appendix A of Public Law 106–27 and section 110(a) of appendix A of Public Law 106–113 (113 Stat. 1301A–20) are amended—

(1) after "that Office", each place it occurs, by inserting "including, notwithstanding any contrary provision of law (unless the same should expressly refer to this section), any organization that administers any program established in title 1 of Public Law 90–284; and"

(2) by inserting "functions, including any" after "all".

Subtitle B—Amendments to the Victims of Crime Act of 1984

SEC. 621. CRIME VICTIM FUND.

(a) DEPOSIT OF GIFTS IN THE FUND.—Section 1402(b) of the Victims of Crime Act of 1984 (42 U.S.C. 10601(b)) is amended—

(1) in paragraph (3), by striking "and at the end;"

(2) in paragraph (4), by striking the period at the end and inserting "; and"

(3) by adding at the end the following:

"(d) any gifts, bequests, or donations to the Fund from private entities or individuals;"

(b) FORMULA FOR FUND DISTRIBUTIONS.—Section 1402(c) of the Victims of Crime Act of 1984 (42 U.S.C. 10601(c)) is amended to read as follows:

"(c) FUND DISTRIBUTION: RESTRICTION OF SUMS IN FUND AVAILABLE FOR EXPENDITURE WITHOUT FISCAL YEAR LIMITATION.—

(1) Subject to the availability of money in the Fund, in each fiscal year, beginning with fiscal year 2003, the Director shall distribute not less than 90 percent nor more than 110 percent of the amount distributed from the Fund in the previous fiscal year, except the Director may distribute up to 120 percent of the amount distributed in the previous fiscal year in any fiscal year that the total amount available in the Fund is more than 1.5 times the amount distributed in the previous fiscal year.

(2) In each fiscal year, the Director shall distribute amounts from the Fund in accordance with subsection (d). All sums not distributed during a fiscal year shall remain in reserve in the Fund to be distributed during a subsequent fiscal year. Notwithstanding any other provision of law, all sums deposited in the Fund that are not distributed shall remain in reserve in the Fund for obligation in future fiscal years, without fiscal year limitation.

(c) ALLOCATION OF FUNDS FOR COSTS AND GRANTS.—Section 1409(d) of the Victims of Crime Act of 1984 (42 U.S.C. 10603(d)) is amended—

(1) by striking "deposited in" and inserting "to be distributed from";

(2) in subparagraph (A), by striking "48.5" and inserting "47.5";

(3) in subparagraph (B), by striking "48.5" and inserting "47.5" and inserting "and" and inserting "; and";

(4) in subparagraph (C), by striking "3.0" and inserting "4.0";

(d) ANTI-TERRORISM EMERGENCY RESERVE.—Section 1409(e) of the Victims of Crime Act of 1984 (42 U.S.C. 10603(e)) is amended to read as follows:

"(e) In addition to the amounts distributed under paragraphs (2), (3), and (4), the Director may set aside up to $50,000,000 from the amounts transferred to the Fund in response to the terrorist attacks and other acts that occurred on September 11, 2001, as an anti-terrorism emergency reserve. The Director may replenish any amounts expended from such reserve in subsequent fiscal years by setting aside up to 5 percent of the amounts remaining in the Fund in any fiscal year after distributing amounts under paragraphs (2), (3) and (4). Such reserve shall not exceed $50,000,000.

"(f) The anti-terrorism emergency reserve referred to in subparagraph (A) may be used for supplemental grants under section 1404(b) and to provide compensation to victims of international terrorism under section 1404(c).

"(g) Amounts in the anti-terrorism emergency reserve established pursuant to subparagraph (A) may be carried over from fiscal year to fiscal year. Notwithstanding subsection (c) and section 619 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001 (and any similar limitation on Fund obligations in any future Act, unless the same should expressly refer to this section), any such amounts carried over shall not be subject to any limitation on obligations for amounts deposited or available in the Fund.

"(h) VICTIMS OF SEPTEMBER 11, 2001.—Amounts transferred to the Crime Victims Fund for use in responding to the terrorist attacks and other acts that occurred on September 11, 2001, shall be subject to any limitation on obligations for amounts deposited or available in the Fund, notwithstanding section 619 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001, and any similar limitation on Fund obligations in any future Act, unless the same should expressly refer to this section.

SEC. 622. CRIME VICTIM COMPENSATION.

(a) ALLOCATION OF FUNDS FOR COMPENSATION AND ASSISTANCE.—Paragraphs (1) and (2) of section 1405(a) of the Victims of Crime Act of 1984 (42 U.S.C. 10605(a)) are amended by inserting "in fiscal year 2002 and of 60 percent in subsequent fiscal years after 2002.";

(b) LOCATION OF COMPENSABLE CRIME.—Section 1409(b)(6)(B) of the Victims of Crime Act of 1984 (42 U.S.C. 10602(b)(6)(B)) is amended by striking "are outside the United States (if the compensable crime is terrorism, as defined in section 3331 of title 18)";

(c) RELATIONSHIP OF CRIME VICTIM COMPENSATION TO MEANSTESTED FEDERAL BENEFIT PROGRAMS.—Section 1405 of the Victims...
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of Crime Act of 1984 (42 U.S.C. 10602) is amended by inserting the following:

(c) EXCLUSION FROM INCOME, RESOURCES, AND ASSETS FOR PURPOSES OF MEANS TESTS.—Notwithstanding any other law other than title IV of Public Law 107-42, for the purpose of any maximum allowed income, resource, or asset eligibility requirement in any Federal, State, or local government program using Federal funds that provides medical or other assistance (or payment or reimbursement of the cost of such assistance), any amount of crime victim compensation that the applicant receives through a crime victim compensation program under this section shall not be included in the income, resources, or assets of the applicant, nor shall amount reduce the amount of the assistance available to the applicant from Federal, State, or local government programs using Federal funds, unless the total amount of assistance that the applicant receives from all such programs is sufficient to fully compensate the applicant for losses suffered as a result of the crime.

(d) DEFINITIONS OF "COMPENSABLE CRIME" AND "STATE".—Section 1404(d) of the Victims of Crime Act of 1984 (42 U.S.C. 10602(d)) is amended—

(1) in paragraph (3), by striking "crimes involving terrorism;"); and

(2) in paragraph (4), by inserting "the United States Virgin Islands," after "the Commonwealth of Puerto Rico.",

(e) RELATIONSHIP OF ELIGIBLE CRIME VICTIM COMPENSATION PROGRAMS TO THE SEPTEMBER 11TH VICTIM COMPENSATION FUND.—

(3) in general.—Section 1003(e) of the Victims of Crime Act of 1984 (42 U.S.C. 10603(e)) is amended by inserting "including the program established under title IV of Public Law 107-42, after "Federal program."

(2) COMPENSATION.—With respect to any compensation payable under title IV of Public Law 107-42, the failure of a crime victim compensation program, after the effective date of final regulations issued pursuant to section 407 of Public Law 107-42, to provide compensation otherwise required pursuant to section 1403 of the Victims of Crime Act of 1984 (42 U.S.C. 10603) shall not render that program ineligible for future grants under the Victims of Crime Act of 1984.

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SEC. 804. VICTIMS OF TERRORISM.

(a) COMPENSATION AND ASSISTANCE TO VICTIMS OF DOMESTIC TERRORISM.—Section 1404(b) of the Victims of Crime Act of 1984 (42 U.S.C. 10603(b)) is amended to read as follows:

"(b) VICTIMS OF TERRORISM WITHIN THE UNITED STATES.—The Director may make supplemental grants as provided in section 1403(a)(1) to States for eligible crime victim compensation and assistance programs, and to victim service organizations, public agencies (including Federal, State, or local governments) and non-governmental organizations that provide assistance to victims of crime, which shall be used to provide emergency relief, including crisis response efforts, assistance, compensation, training and technical assistance, and ongoing assistance, including during any investigation or prosecution, to victims of terrorist acts or mass violence occurring within the United States.

(b) VICTIMS OF INTERNATIONAL TERRORISM.—Section 1404(b)(1) of the Victims of Crime Act of 1984 (42 U.S.C. 10603(b)(1)) is amended by striking "who are not persons eligible for compensation under title VII of the Omnibus Diplomatic Security and Antiterrorism Act of 1986,""

(c) COMPENSATION TO VICTIMS OF INTERNATIONAL TERRORISM.—Section 1404(b)(2) of the Victims of Crime Act of 1984 (42 U.S.C. 10603(b)(2)) is amended by adding at the end the following: "The amount of compensation awarded to a victim under this subsection
TITLE VII—INCREASED INFORMATION SHARING FOR CRITICAL INFRA-STRUCTURE PROTECTION

SEC. 701. EXPANSION OF REGIONAL INFORMATION SHARING SYSTEM TO FACILITATE FEDERAL-STATE-LOCAL LAW ENFORCEMENT RESPONSE RELATED TO TERRORIST ATTACKS.

Section 13601 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796b) is amended—

(1) in subsection (a), by inserting "and terrorist conspiracies and activities" after "activities";

(2) in subsection (b)—

(A) in paragraph (3), by striking "and" after the semicolon;

(B) by redesignating paragraph (4) as paragraph (5); and

(C) by inserting the following:

"(4) establishing and operating secure information sharing systems to enhance the investigation and prosecution abilities of participating enforcement agencies in addressing multi-jurisdictional terrorist conspiracies and activities;" and

(3) by inserting at the end the following:

"(d) AUTHORIZATION OF APPROPRIATION TO THE BUREAU OF JUSTICE ASSISTANCE.—There are authorized to be appropriated to the Bureau of Justice Assistance to carry out this section $50,000,000 for fiscal year 2002 and $100,000,000 for fiscal year 2003.".

TITLE VIII—STRENGTHENING THE CRIMINAL LAWS AGAINST TERRORISM

SEC. 801. TERRORIST ATTACKS AND OTHER ACTS OF VIOLENCE AGAINST MASS TRANSPORTATION SYSTEMS.

Chapter 97 of title 28, United States Code, is amended by adding at the end the following:

"* 1993, Terrorist attacks and other acts of violence against mass transportation systems

(a) GENERAL PROHIBITIONS.—Whoever willfully—

(1) wrecks, derails, sets fire to, or disables a mass transportation vehicle or ferry;

(2) places or causes to be placed any biological agent or toxic for use as a weapon, destructive substance, or destructive device in, upon, or near a mass transportation vehicle or ferry, without previously obtaining the permission of the mass transportation provider, and with intent to endanger the safety of any passenger or employee of the mass transportation provider, or with a reckless disregard for the safety of human life;

(3) sets fire to, or places any biological agent or toxic for use as a weapon, destructive substance, or destructive device

in, upon, or near any garage, terminal, structure, supply, or facility used in the operation of, or in support of the operation of, a mass transportation vehicle or ferry, without previously obtaining the permission of the mass transportation provider, and knowing or having reason to know such activity would likely derail, disable, or wreck a mass transportation vehicle or ferry used, operated, or employed by the mass transportation provider;

(4) removes appurtenances from, damages, or otherwise impairs the operation of a mass transportation signal system, including a train control system, centralized dispatching system, or rail grade crossing warning signal without authorization from the mass transportation provider;

(5) interferes with, disables, or incapacitates any dispatcher, driver, captain, or person while they are employed in dispatching, operating, or maintaining a mass transportation vehicle or ferry, with intent to endanger the safety of any passenger or employee of the mass transportation provider, or with a reckless disregard for the safety of human life;

(6) commits an act, including the use of a dangerous weapon, with the intent to cause death or serious bodily injury to an employee or passenger of a mass transportation provider or any other person while any of the foregoing acts are on the property of a mass transportation provider;

(7) conveys or causes to be conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this subsection; or

(8) attempts, threatens, or conspires to do any of the aforesaid acts, shall be fined under this title or imprisoned not more than twenty years, or both, if such act is committed, or in the case of a threat or conspiracy such act would be committed, on, against, or affecting a mass transportation provider engaged in or affecting interstate or foreign commerce, or if in the course of committing such act, that person travels or communicates across a State line in order to commit such act, or transports materials across a State line in aid of the commission of such act.

(b) AGGRAVATED OFFENSE.—Whoever commits an offense under subsection (a) in a circumstance in which—

(1) the mass transportation vehicle or ferry was carrying a passenger at the time of the offense; or

(2) the offense has resulted in the death of any person, shall be guilty of an aggravated form of the offense and shall be fined under this title or imprisoned for a term of years or for life, or both.

(c) DEFINITIONS.—In this section—

(1) the term "biological agent" has the meaning given to that term in section 7(q) of title 18 of this title;

(2) the term "dangerous weapon" has the meaning given to that term in section 921(a)(1) of this title;

(3) the term "destructive device" has the meaning given to that term in section 921(a)(4) of this title;

(4) the term "destructive substance" has the meaning given to that term in section 5802(b)(7) of title 49, United States...
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Code, except that the term shall include schoolbus, charter, and sightseeing transportation,

(a) the term 'serious bodily injury' has the meaning given to that term in section 1365 of this title;

(b) the term 'State' has the meaning given to that term in section 2236 of this title; and

(c) the term 'Act' has the meaning given to that term in section 1783(2) of this title.

I CONFORMING AMENDMENT.—The analysis of chapter 97 of title 18, United States Code, is amended by adding at the end:

"3308. Harboring or concealing terrorists."

SEC. 803. PROHIBITION AGAINST HARBOURING TERRORISTS.

(a) In General.—Chapter 113B of title 18, United States Code, is amended by adding after section 2339 the following new section:

"§ 2339. Harboring or concealing terrorists

"(a) Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe, has committed, or is about to commit, an offense under section 33 of title 18 (relating to the destruction of aircraft or aircraft facilities), section 175 (relating to biological weapons), section 438 (relating to chemical weapons), section 841 (relating to nuclear materials), paragraph (3) of section 844(f) (relating to arson and bombing of government property resulting in injury or death), section 1988(a) (relating to the destruction of an energy facility), section 2280 (relating to violence against maritime navigation), section 2332a (relating to weapons of mass destruction), or section 2332b (relating to acts of terrorism transcending national boundaries) of this title, section 236(a) (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2284(a)), or section 46502 (relating to aircraft piracy) of title 49, shall be fined under this title or imprisoned not more than ten years, or both.

(b) A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

(c) TECHNICAL AMENDMENT.—The chapter analysis for chapter 113B of title 18, United States Code, is amended by inserting after the item for section 2339 the following:

"3308. Harboring or concealing terrorists."

SEC. 804. JURISDICTION OVER CRIMES COMMITTED AT U.S. FACILITIES ABROAD.

Section 7 of title 18, United States Code, is amended by adding at the end the following:

"(9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act—

(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and

(B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities. Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title.

SEC. 805. MATERIAL SUPPORT FOR TERRORISM.

(a) In General.—Section 2339A of title 18, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "within the United States;";

(B) by inserting "after "1993,"");

(C) by inserting "of this title";

(D) by inserting ", section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284(a))," after "of this title;"

(E) by inserting at the end the following: "A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

(2) in subsection (b)—

(A) by striking "or other financial securities" and inserting "or monetary instruments or financial securities";

(B) by inserting "expert advice or assistance," after "training,"
SEC. 806. DEFINITION OF FEDERAL CRIME OF TERRORISM.

Section 339B(b) of title 18, United States Code, as amended—
(1) in subsection (b), by inserting "and to an act of international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, acquiring any person a source of influence over any such entity or organization;"
and
(2) in subsection (g)(2)(B), by striking clauses (i) through (iii) and inserting the following:
"(ii) section 2332c (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to acts within special maritime and territorial jurisdiction), 170 or 170b (relating to destruction of warships or warships), paragraph (a)(1)(B), (b), (c), or (d) of section 351 (relating to weapons facilities or weapons facilities), 138 (relating to nuclear materials), 843(m) or (n) (relating to plastic explosives), 844(f) or (3) (relating to arson and bombing of Government property resulting in death), 844(i) (relating to the use of a destructive device in a public place), 844(n)(1)(D) (relating to a nuclear facility), 956(a)(2) (relating to providing support to certain organizations), 956(b)(3) (relating to providing support to certain organizations), or 957 (relating to providing support to certain organizations) shall be considered to limit or otherwise affect sections 2339A or 2339B of title 18, United States Code.

SEC. 807. TECHNICAL CLARIFICATION RELATING TO PROVISION OF MATERIAL SUPPORT TO TERRORISM.

No provision of the Trade Sanctions Reform and Export Enhancement Act of 2000 (title IX of Public Law 106-387) shall be construed to limit or otherwise affect section 2339A or 2339B of title 18, United States Code.

SEC. 808. NO STATUTE OF LIMITATION FOR CERTAIN TERRORISM OFFENSES.

(a) In General.—Section 3286 of title 18, United States Code, is amended to read as follows:

"§ 3286. Extension of statute of limitation for certain terrorism offenses.

(a) Six-Year Limitation.—Notwithstanding section 3286, no person shall be proceeded, tried, or punished for any capital offense involving a violation of any provision listed in section 2339B(g)(10)(B), or a violation of section 112, 335(e), 1361, or 1761(e) of this title, or section 6604, 6604, or 6606 of title 49, unless
the indictment is found or the information is instituted within 8 years after the offense was committed. Notwithstanding the preceding sentence, offenses listed in section 3238 are subject to the statute of limitations set forth in that section.

(b) No Limitation.—Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense listed in section 3238(a)(5)(B), if the commission of such offense resulted in, or created a foreseeable risk of, death or serious bodily injury to another person.

(b) Application.—The amendments made by this section shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this section.

SEC. 80. ALTERNATE MAXIMUM PENALTIES FOR TERRORISM OFFENSES.

(a) ADDISION.—Section 81 of title 18, United States Code, is amended in the second undesignated paragraph by striking “not more than twenty years” and inserting “for any term of years or for life”.

(b) DESTRUCTION OF AN ENERGY FACILITY.—Section 1966 of title 18, United States Code, is amended—

(1) in subsection (a), by striking “ten” and inserting “20”, and

(2) by adding, at the end thereof:

(d) Whoever is convicted of a violation of subsection (a) or (b) that has resulted in the death of any person shall be subject to imprisonment for any term of years or life.

(c) MATERIAL SUPPORT TO TERRORISTS.—Section 2339A(a) of title 18, United States Code, is amended—

(1) by striking “10” and inserting “15”, and

(2) by adding, at the end thereof:

(d) Whoever is convicted of a violation of subsection (a) or (b) that has resulted in the death of any person shall be subject to imprisonment for any term of years or life.

(d) MATERIAL SUPPORT TO DESIGNATED FOREIGN TERRORIST ORGANIZATIONS.—Section 2339A(b)(1) of title 18, United States Code, is amended—

(1) by striking “10” and inserting “15”, and

(2) by striking the period after “or both” and inserting “, and, if the death of any person results, shall be imprisoned for any term of years or for life.”

(e) DISTRIBUTION OF NATIONAL-DEFENSE MATERIALS.—Section 2155(a) of title 18, United States Code, is amended—

(1) by striking “ten” and inserting “20”, and

(2) by striking the period at the end and inserting “, and, if death results to any person, shall be imprisoned for any term of years or for life.”

(f) SABOTAGE OF NUCLEAR FACILITIES OR FUEL.—Section 226 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), is amended—

(1) by striking “ten” each place it appears and inserting “99”,

(2) in subsection (a), by striking the period at the end and inserting “, and, if death results to any person, shall be imprisoned for any term of years or for life.”

(3) in subsection (b), by striking the period at the end and inserting “, and, if death results to any person, shall be imprisoned for any term of years or for life.”

(g) SPECIAL AIRCRAFT JURISDICTION OF THE UNITED STATES.—Section 6650(c) of title 49, United States Code, is amended—

(1) by striking “15” and inserting “20”, and

(2) by striking the period at the end and inserting “, and, if death results to any person, shall be imprisoned for any term of years or for life.”

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(1) by striking “20” and

(2) by striking the period at the end and inserting “, and, if death results to any person, shall be imprisoned for any term of years or for life.”

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SEC. 81. PENALTIES FOR TERRORISM CONSPIRACY.

(a) ADDITION.—Section 81 of title 18, United States Code, is amended in the first undesignated paragraph—

(1) by striking “, or attempts to set fire or to burn”; and

(2) by inserting “or attempts to conspire to do such an act, before “shall be imprisoned”;

(b) KILLING IN FEDERAL FACILITIES.—Section 930(c) of title 18, United States Code, is amended—

(1) by striking “or attempts to kill”,

(2) by inserting “or attempts to conspire to do such an act, before “shall be punished”, and

(3) by striking “and 1117” and inserting “1119, and 1117.”

(c) COMMUNICATIONS LINES, STATIONS, OR SYSTEMS.—Section 1362 of title 18, United States Code, is amended in the first undesignated paragraph—

(1) by striking “or attempts willfully or maliciously to injure or destroy”; and

(2) by inserting “or attempts or conspire to do such an act, before “shall be fined”;

(d) BUILDINGS OR PROPERTY WITHIN SPECIAL MARITIME AND TERRITORIAL JURISDICTION.—Section 1383 of title 18, United States Code, is amended—

(1) by striking “or attempts to destroy or injury”, and

(2) by inserting “or attempts or conspire to do such an act, before “shall be fined” and the first place it appears煀.

(e) ILLEGITIMATE TRADES.—Section 1962 of title 18, United States Code, is amended by adding at the end thereof:

A person who conspires to commit any offense defined in this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

(f) MATERIAL SUPPORT TO TERRORISTS.—Section 2339A of title 18, United States Code, is amended by inserting “or attempts or conspire to do such an act, before “shall be fined” and the first place it appears.

(g) TERRORISM.—Section 2340 of title 18, United States Code, is amended by adding at the end thereof:

(1) by striking “, or attempts to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.”

(2) by inserting “or attempts to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.”

(3) by inserting “or attempts to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.”

(4) by inserting “or attempts to conspire to do such an act, before “shall be fined”, and

(5) by striking “and 1117” and inserting “1119, and 1117.”
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(A) by striking "or who intentionally and willfully attempts to destroy or cause physical damage to";
(B) in paragraph (4), by striking the period at the end and inserting a comma and;
(C) by inserting "or attempts or conspires to do such an act," before "shall be fined"; and
(2) in subsection (b)—
(A) by striking "or attempts to cause"; and
(B) by inserting "or attempts or conspires to do such an act," before "shall be fined".

(i) INTERPRETATION WITH FLIGHT CREW MEMBERS AND ATTENDANTS.—Section 45804 of title 49, United States Code, is amended by inserting "or attempts or conspires to do such an act," before "shall be fined".

(ii) SPECIAL AIRCRAFT JURISDICTION OF THE UNITED STATES.—Section 60006 of title 49, United States Code, is amended by adding at the end the following:

"(e) CONSPIRACY.—If two or more persons conspire to violate subsection (b) or (c), and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as provided in such subsection."

(k) DAMAGE OR DESTROYING AN INTERSTATE GAS OR HAZARDOUS LIQUID PIPELINE FACILITY.—Section 6013(b) of title 49, United States Code, is amended—

(1) by striking "or attempting to damage or destroy;"; and
(2) by inserting "or attempting or conspiring to do such an act," before "shall be fined".

SEC. 812. POST-RELEASE SUPERVISION OF TERRORISTS.

Section 2642 of title 18, United States Code, is amended by adding at the end the following:

"(j) SUPERVISED RELEASE TERMS FOR TERRORISM PRECIPITANTS.—Notwithstanding subsection (h), the maximum term of supervised release for any offense listed in section 2553(b)(6)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person, is any term of years or life.

SEC. 813. INCLUSION OF ACTS OF TERRORISM AS RACKETEERING ACTIVITY.

Section 1963(1) of title 18, United States Code, is amended—

(1) by striking "or (f)" and inserting "or (f)"; and
(2) by inserting before the semicolon at the end the following: "; or (G) any act that is indictable under any provision listed in section 2553(b)(6)(B)."

SEC. 814. DETERRENCE AND PREVENTION OF CYBERTERRORISM.

(a) CLASSIFICATION OF PROTECTION OF PROTECTED COMPUTERS.—Section 1030(a)(5) of title 18, United States Code, is amended—

(1) by inserting "(i)" after "(A)";
(2) by redesignating subparagraphs (B) and (C) as clauses (ii) and (iii), respectively;
(3) by adding "and" at the end of clause (iii), as so redesignated; and
(4) by adding at the end the following:

"(B) by conduct described in clause (i), (ii), or (iii) of subparagraph (A), caused (or, in the case of an attempted offense, would, if completed, have caused)—

"(i) loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value;

"(ii) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;

"(iii) physical injury to any person;

"(iv) a threat to public health or safety;

"(v) damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security;"

(b) PROTECTION FROM EXTORTION.—Section 1030(a)(7) of title 18, United States Code, is amended by striking "firm, association, educational institution, financial institution, government entity, or other legal entity.

(c) PENALTIES.—Section 1030(c) of title 18, United States Code, is amended—

(1) in paragraph (2)—

(A) in subparagraph (A)—

(i) by inserting "except as provided in subparagraph (B)," before "a fine;" and

(ii) by striking "(4)(C)" and inserting "(4)(C)");

(iii) by striking "and" at the end;

(B) in paragraph (B), by inserting "or an attempt to commit an offense punishable under this subparagraph," after "subsection (a)(3)," in the matter preceding clause (i); and

(C) in subparagraph (C), by striking "and" at the end;

(2) in paragraph (3)—

(A) by striking ", (a)(5)(A), (a)(5)(B)," both places it appears;

(B) by striking "(a)(5)(C)" and inserting "(a)(5)(A)(i)";

and

(3) by adding at the end the following:

"(a)(5)(A) a fine under this title, imprisonment for not more than 10 years, or both, in the case of a first offense, or a first offense punishable under this title; or

"(B) a fine under this title, imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(6)(A), or an attempt to commit an offense punishable under this subparagraph; or

"(C) a fine under this title, imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(6)(A)(i) or (a)(6)(A)(ii), or an attempt to commit an offense punishable under either subsection, that occurs after a conviction for another offense under this section."
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(d) DEFINITIONS.—Section 1639(e) of title 18, United States Code is amended—
(1) in paragraph (2)(B), by inserting "*", including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States* before the semicolon;
(2) in paragraph (7), by striking "and" at the end;
(3) by striking paragraph (8) and inserting the following:
"(8) the term ‘damage’ means any impairment to the integrity or availability of data, a program, a system, or information;"
(4) in paragraph (9), by striking the period at the end and inserting a semicolon; and
(5) by adding at the end the following:
"(10) the term ‘conviction’ shall include a conviction under the law of any State for a crime punishable by imprisonment for more than 1 year, an element of which is unauthorized access, or exceeding authorized access, to a computer;
(11) the term ‘loss’ means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service; and
(12) the term ‘person’ means any individual, firm, corporation, educational institution, financial institution, governmental entity, or legal or other entity."

(a) DAMAGES IN CIVIL ACTIONS.—Section 1000(g) of title 18, United States Code is amended—
(1) by striking the second sentence and inserting the following:
"A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in clause (i), (ii), (iii), (iv), or (v) of subsection (a)(4)(B). Damages for a violation involving only conduct described in subsection (a)(4)(B) are limited to economic damages.", and
(2) by adding at the end the following:
"No action may be brought under this subsection for the negligent design or manufacture of computer hardware, computer software, or firmware.

(i) AMENDMENT OF SENTENCING GUIDELINES RELATING TO CERTAIN COMPUTER FRAUD AND ABUSE.—Pursuant to its authority under section 994(p) of title 28, United States Code, the United States Sentencing Commission shall amend the Federal sentencing guidelines to ensure that any individual convicted of a violation of section 1030 of title 18, United States Code, can be subjected to appropriate penalties, without regard to any mandatory minimum term of imprisonment.

SEC. 815. ADDITIONAL DEFENSE TO CIVIL ACTIONS RELATING TO PRESERVING RECORDS IN RESPONSE TO GOVERNMENT REQUESTS.

Section 2703(e)(1) of title 18, United States Code, is amended by inserting after "or statutory authorization" the following: "including a request of a governmental entity under section 2703(d) of this title".

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SEC. 816. DEVELOPMENT AND SUPPORT OF CYBERSECURITY FORENSIC CAPABILITIES.

(a) IN GENERAL.—The Attorney General shall establish such regional computer forensic laboratories as the Attorney General considers appropriate, and provide support to existing computer forensic laboratories, in order that all such computer forensic laboratories have the capability—
(1) to provide forensic examinations with respect to seized or intercepted computer evidence relating to criminal activity (including cyberterrorism);
(2) to provide training and education for Federal, State, and local law enforcement personnel and prosecutors regarding investigations, forensic analyses, and prosecutions of computer-related crimes (including cyberterrorism);
(3) to assist Federal, State, and local law enforcement in enforcing Federal, State, and local criminal laws relating to computer-related crimes;
(4) to facilitate and promote the sharing of Federal law enforcement expertise and information about the investigation, analysis, and prosecution of computer-related crime with State and local law enforcement personnel and prosecutors, including the use of jurisdictional task forces; and
(5) to carry out such other activities as the Attorney General considers appropriate.

(b) AUTHORIZATION OF APPROPRIATIONS.—

(1) AUTHORIZATION.—There is hereby authorized to be appropriated in each fiscal year $50,000,000 for purposes of carrying out this section.

(2) AVAILABILITY.—Amounts appropriated pursuant to the authorization of appropriations in paragraph (1) shall remain available until expended.

SEC. 817. EXPANSION OF THE BIOLOGICAL WEAPONS STATUTE.

Chapter 10 of title 18, United States Code, is amended—
(1) in section 1721—
(A) in subsection (b),
(i) by striking "does not include" and inserting "includes";
(ii) by inserting "other than" after "system for";
and
(iii) by inserting "bona fide research" after "protective;"
and
(B) by redesignating subsection (b) as subsection (c);
and
(C) by inserting after subsection (a) the following:
"(b) ADDITIONAL OFFENSE.—Whoever knowingly possesses any biological agent, toxin, or delivery system of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective, bona fide research, or other peaceful purpose, shall be fined under this title, imprisoned not more than 10 years, or both. In this subsection, the terms ‘biological agent’ and ‘toxin’ do not encompass any biological agent or toxin that is in its naturally occurring environment, if the biological agent or toxin has not been cultivated, collected, or otherwise extracted from its natural source.

(2) by inserting after section 170a the following:
*SEC. 175b. POSSESSION BY RESTRICTED PERSONS.

(a) No restricted person described in subsection (b) shall ship or transport interstate or foreign commerce, or possess in or affecting commerce, any biological agent or toxin, or receive any biological agent or toxin that has been shipped or transported in interstate or foreign commerce, if the biological agent or toxin is listed as a select agent in section (1) of section 72.6 of title 42, Code of Federal Regulations, pursuant to section 511(d)(1) of the Anti-terrorism and Effective Death Penalty Act of 1996 (Public Law 104–132), and is not exempted under subsection (b) of such section 72.6, or appendix A or part 72 of the Code of Regulations.

(b) In this section:

(1) The term "select agent" does not include any such biological agent or toxin that is in its naturally-occurring environment, if the biological agent or toxin has not been cultivated, collected, or otherwise extracted from its natural source.

(2) The term "restricted person" means an individual who—

(A) is under indictment for a crime punishable by imprisonment for a term exceeding 1 year;

(B) has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year;

(C) is a fugitive from justice;

(D) is an unlawful user of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(E) is an alien illegally or unlawfully in the United States;

(F) has been adjudicated as a mental defective or has been committed to any mental institution;

(G) is an alien other than an alien lawfully admitted for permanent residence who is a national of a country as to which the Secretary of State, pursuant to section 6(a)(1) of the Export Administration Act of 1979 (22 U.S.C. App. 2405(b)), section 606(a) of chapter 1 of part M of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), or section 440 of chapter 3 of the Arms Export Control Act (22 U.S.C. 2760(d)), has made a determination (that remains in effect) that such country has repeatedly provided support for acts of international terrorism; or

(H) has been discharged from the Armed Services of the United States under dishonorable conditions.

(3) The term "alien" has the same meaning as in section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)).

(4) The term "lawfully admitted for permanent residence" has the same meaning as in section 101(a)(10) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(10)).

(5) "Whoever knowingly violates this section shall be fined as provided in this title, imprisoned not more than 10 years, or both, but the prohibition contained in this section shall not apply with respect to any duty authorized United States governmental activity.

*175b. Possession by restricted persons.*
to Congress of any covered intelligence report under the jurisdiction of such official until February 1, 2002.

(b) COVERED INTELLIGENCE REPORT.—Except as provided in subsection (c), for purposes of subsection (a), a covered intelligence report is as follows:

(1) Any report on intelligence or intelligence-related activities of the United States Government that is required to be submitted to Congress by an element of the intelligence community during the effective period of this section.

(2) Any report or other matter that is required to be submitted to the Select Committee on Intelligence of the Senate and Permanent Select Committee on Intelligence of the House of Representatives by the Department of Defense or the Department of Justice during the effective period of this section.

(c) EXCEPTION FOR CERTAIN REPORTS.—For purposes of subsection (a), any report required by section 502 or 503 of the National Security Act of 1947 (50 U.S.C. 413a, 413b) is not a covered intelligence report.

(d) NOTICE TO CONGRESS.—Upon deferring the date of submittal to Congress of a covered intelligence report under subsection (a), the official deferring the date of submittal of the covered intelligence report shall submit to Congress notice of the deferral. Notice of deferral of a report shall specify the provision of law, if any, under which the report would otherwise be submitted to Congress.

(i) EXTENSION OF DEFERRAL.—(1) Each official specified in subsection (a) may defer the date of submittal to Congress of a covered intelligence report under the jurisdiction of such official to a date after February 1, 2002, if such official submits to the committees of Congress specified in subsection (b)(2) before February 1, 2002, a certification that preparation and submittal of the covered intelligence report on February 1, 2002, will impede the work of officers or employees who are engaged in counterterrorism activities.

(2) A certification under paragraph (1) with respect to a covered intelligence report shall specify the date on which the covered intelligence report will be submitted to Congress.

(f) EFFECTIVE PERIOD.—The effective period of this section is the period beginning on the date of enactment of this Act and ending on February 1, 2002.

(ii) ELEMENT OF THE INTELLIGENCE COMMUNITY DEFINED.—In this section, the term "element of the intelligence community" means any element of the intelligence community specified or designated under section 304 of the National Security Act of 1947 (50 U.S.C. 401a(4)).

SEC. 905. DISCLOSURE TO DIRECTOR OF CENTRAL INTELLIGENCE OF FOREIGN INTELLIGENCE-RELATED INFORMATION WITH RESPECT TO CRIMINAL INVESTIGATIONS.

(a) IN GENERAL.—Title I of the National Security Act of 1947 (50 U.S.C. 402 et seq.) is amended—

(1) by redesignating subsection 106B as section 106C; and

(2) by inserting after section 106A the following new section 106B:

"SEC. 106B. (a) DISCLOSURE OF FOREIGN INTELLIGENCE ACQUIRED IN CRIMINAL INVESTIGATIONS NOTICE OF CRIMINAL INVESTIGATIONS OF FOREIGN INTELLIGENCE SOURCES

"SEC. 106B. (a) DISCLOSURE OF FOREIGN INTELLIGENCE.—(1) Except as otherwise provided by law and subject to paragraph (2), the Attorney General, or the head of any other department or agency of the Federal Government with law enforcement responsibilities, shall expeditiously disclose to the Director of Central Intelligence, pursuant to guidelines developed by the Attorney General in consultation with the Director, foreign intelligence acquired by an element of the Department of Justice or an element of such department or agency, as the case may be, in the course of a criminal investigation.

"(2) The Attorney General by regulation and in consultation with the Director of Central Intelligence may provide for exceptions to the applicability of paragraph (1) for one or more classes of foreign intelligence, or foreign intelligence with respect to one or more targets or matters, if the Attorney General determines that disclosure of such foreign intelligence under that paragraph would jeopardize an ongoing law enforcement investigation or impair other significant law enforcement interests.

"(b) PROCEDURES FOR NOTICE OF CRIMINAL INVESTIGATIONS.—Not later than 180 days after the date of enactment of this section, the Attorney General, in consultation with the Director of Central Intelligence, shall develop guidelines to ensure that after receipt of a report from an element of the intelligence community of activity of a foreign intelligence source or potential foreign intelligence source that may warrant investigation as criminal activity, the Attorney General provides notice to the Director of Central Intelligence, within a reasonable period of time, of his intention to commence, or decline to commence, a criminal investigation of such activity.

"(c) PROCEDURES.—The Attorney General shall develop procedures for the administration of this section, including the disclosure of foreign intelligence by elements of the Department of Justice, and elements of other departments and agencies of the Federal Government, under subsection (a) and the provision of notice with respect to criminal investigations under subsection (b).

(i) CLERICAL AMENDMENT.—The table of contents in the first section of this Act is amended by striking the item relating to section 106B and inserting the following new item:

"Sec. 106B. Disclosure of foreign intelligence acquired in criminal investigations; notice of criminal investigations of foreign intelligence sources.

"Sec. 106C. Protection of the operational files of the National Imagery and Mapping Agency.

SEC. 906. FOREIGN TERRORIST ASSET TRACKING CENTER.

"(a) REPORT ON RECONFIGURATION.—Not later than February 1, 2002, the Attorney General, the Director of Central Intelligence, and the Secretary of the Treasury shall jointly submit to Congress a report on the feasibility and desirability of reconfiguring the Foreign Terrorist Asset Tracking Center and the Office of Foreign Assets Control of the Department of the Treasury in order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.
of the intelligence community specified or designated under section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

SEC. 293. TRAINING OF GOVERNMENT OFFICIALS REGARDING IDENTIFICATION AND USE OF FOREIGN INTELLIGENCE.

(a) PROGRAM REQUIREMENTS.—The Attorney General shall, in consultation with the Director of Central Intelligence, carry out a program to provide appropriate training to officials described in subsection (b) in order to assist such officials in—

(1) identifying foreign intelligence information in the course of their duties; and

(2) utilizing foreign intelligence information in the course of their duties, to the extent that the utilization of such information is appropriate for such duties.

(b) OFFICIALS.—The officials provided training under subsection (a) are, at the discretion of the Attorney General and the Director, the following:

(1) Officials of the Federal Government who are not ordinarily engaged in the collection, dissemination, and use of foreign intelligence in the performance of their duties;

(2) Officials of State and local governments who encounter, or may encounter in the course of a terrorist event, foreign intelligence in the performance of their duties;

(c) AUTHORIZATION OF APPROPRIATIONS.—There is hereby authorized to be appropriated for the Department of Justice such sums as may be necessary for purposes of carrying out the program required by subsection (a).

TITLE X—MISCELLANEOUS

SEC. 1001. REVIEW OF THE DEPARTMENT OF JUSTICE.

The Inspector General of the Department of Justice shall designate one official who shall—

(1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice;

(2) make public through the Internet, radio, television, and newspaper advertisements information on the responsibilities and functions of, and how to contact, the official; and

(3) submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report on the implementation of this subsection and detailing any abuses described in paragraphs (1), including a description of the use of funds appropriated used to carry out this subsection.

SEC. 1002. SENSE OF CONGRESS.

(a) FINDINGS.—Congress finds that—

(1) all Americans are united in condemning, in the strongest possible terms, the terrorists who planned and carried out the attacks against the United States on September 11, 2001, and in pursuing all those responsible for those attacks and their sponsors until they are brought to justice;

(2) Sikh-Americans form a vibrant, peaceful, and law-abiding part of America’s people;
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(3) approximately 500,000 Sikhs reside in the United States and are a vital part of the Nation;
(4) Sikhs-Americans stand resolutely in support of the commitment of our Government to bring the terrorists and those that harbor them to justice;
(5) the Sikh faith is a distinct religion with a distinct religious and ethnic identity that has its own places of worship and a distinct holy text and religious tenets;
(6) many Sikhs-Americans, who are easily recognizable by their turbans and beards, which are required articles of their faith, have suffered both verbal and physical assaults as a result of misguided anger toward Arab-Americans and Muslim-Americans in the wake of the September 11, 2001 terrorist attack;
(7) Sikhs-Americans, as do all Americans, condemn acts of prejudice against any American; and
(8) Congress is seriously concerned by the number of crimes against Sikhs-Americans and other Americans all across the Nation that have been reported in the wake of the tragic events that unfolded on September 11, 2001.

SEC. 1005. FIRST RESPONDERS ASSISTANCE ACT.

SEC. 1005. FIRST RESPONDERS ASSISTANCE ACT.

(a) GRANT AUTHORIZATION.—The Attorney General shall make grants described in subsections (b) and (c) to States and units of local government to improve the ability of State and local law enforcement, fire department and first responders to respond to and prevent acts of terrorism.

(b) TERRORISM PREVENTION GRANTS.—Terrorism prevention grants under this subsection may be used for programs, projects, and other activities to—

(1) hire additional law enforcement personnel dedicated to intelligence gathering and analysis functions, including the formation of full-time intelligence and analysis units;
(2) purchase technology and equipment for intelligence gathering and analysis functions, including wire-tap, pen links, cameras, and computer hardware and software;
(3) purchase equipment for responding to a critical incident, including protective equipment for patrol officers such as quick masks;
(4) purchase equipment for managing a critical incident, such as communications equipment for improved interoperability among surrounding jurisdictions and mobile command posts for overall scene management; and
(5) fund technical assistance programs that emphasize coordination among neighboring law enforcement agencies for sharing resources, and resource coordination among law enforcement agencies forcombining intelligence gathering and analysis functions, and the development of policy, procedures, memorandums of understanding, and other best practices.

(c) ANTITERRORISM TRAINING GRANTS.—Antiterrorism training grants under this subsection may be used for programs, projects, and other activities to address—

(1) intelligence gathering and analytic techniques;
(2) community engagement and outreach;
(3) critical incident management for all forms of terrorist attack;
(4) threat assessment capabilities;
(5) conducting follow-up investigations; and
(6) stabilizing a community after a terrorist incident.

(d) APPLICATION.—

(1) IN GENERAL.—Each eligible entity that desires to receive a grant under this section shall submit an application to the Attorney General, at such time, in such manner, and accompanied by such additional information as the Attorney General may reasonably require.

(2) CONTENTS.—Each application submitted pursuant to paragraph (1) shall—

(A) describe the activities for which assistance under this section is sought; and
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(B) provide such additional assurances as the Attorney General determines to be essential to ensure compliance with the requirements of this section.

c. MINIMUM AMOUNT.—If all applications submitted by a State or units of local government within that State have not been funded under this section in any fiscal year, that State, if it qualifies, and the units of local government within that State, shall receive in that fiscal year not less than 0.5 percent of the total amount appropriated in that fiscal year for grants under this section.

4. AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $25,000,000 for each of the fiscal years 2003 through 2007.

SEC. 1006. INADMISSIBILITY OF ALIENS ENGAGED IN MONEY LAUNDERING.

(a) AMENDMENT TO IMMIGRATION AND NATIONALITY ACT.—Section 212(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(2)) is amended by adding at the end the following:

"(ii) who has consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1967 of title 18, United States Code (relating to laundering of monetary instruments); or"

"(iii) who is a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1967 of title 18, United States Code (relating to laundering of monetary instruments);"

(b) MONEY LAUNDERING WATCHLIST.—Not later than 90 days after the date of enactment of this Act, the Attorney General shall report to Congress that there has been established a money laundering watchlist, which identifies individuals worldwide who are known or suspected of money laundering, which is readily accessible to, and shall be checked by, consular or other Federal officials prior to the issuance of a visa or admission to the United States. The Secretary shall develop and periodically update the watchlist in coordination with the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence.

SEC. 1007. AUTHORIZATION OF FUNDS FOR DEA POLICE TRAINING.

In addition to amounts otherwise available to carry out section 481 of the Foreign Assistance Act of 1961 (22 U.S.C. 2391), there is authorized to be appropriated to the President not less than $5,000,000 for fiscal year 2002 for regional antidrug training in the Republic of Turkey by the Drug Enforcement Administration for police, as well as increased precursor chemical control efforts in the South and Central Asia region.

SEC. 1006. FEASIBILITY STUDY ON USE OF BIOMETRIC IDENTIFIER SCANNING SYSTEM WITH ACCESS TO THE FBI INTEGRATED AUTOMATED FINGERPRINT IDENTIFICATION SYSTEM AT OCEANFRONT CONCESSIONS AND POINTS OF ENTRY TO THE UNITED STATES.

(a) IN GENERAL.—The Attorney General, in consultation with the Secretary of State and the Secretary of Transportation, shall conduct a study on the feasibility of utilizing a biometric identifier (fingerprint) scanning system, with access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System, at oceanfront offices and at points of entry into the United States to enhance the ability of State Department and immigration officials to identify aliens who may be wanted in connection with criminal or terrorist investigations in the United States or abroad prior to the issuance of visas or entry into the United States.

(b) REPORT TO CONGRESS.—Not later than 90 days after the date of enactment of this Act, the Attorney General shall submit a report summarizing the findings of the study authorized under subsection (a) to the Committee on International Relations and the Committee on the Judiciary of the Senate.

SEC. 1009. STUDY OF ACCESS.

(a) IN GENERAL.—Not later than 120 days after enactment of this Act, the Federal Bureau of Investigation shall study and report to Congress on the feasibility of providing to airlines access via computer to the names of passengers who are suspected of terrorist activity by Federal officials.

(b) AUTHORIZATION.—There are authorized to be appropriated not more than $250,000 to carry out subsection (a).

SEC. 1010. TEMPORARY AUTHORITY TO CONTRACT WITH LOCAL AND STATE GOVERNMENTS FOR PERFORMANCE OF SECURITY FUNCTIONS AT UNITED STATES MILITARY INSTALLATIONS.

(a) IN GENERAL.—Notwithstanding section 2465 of title 10, United States Code, during the period of time that United States armed forces are engaged in Operation Enduring Freedom, and for the period of 180 days thereafter, funds appropriated to the Department of Defense may be obligated and expended for the purpose of entering into contracts or other agreements for the performance of security functions at any military installation in the United States with a government that the Secretary of Defense determines is capable of performing such functions.

(b) CONTRACTS.—Any contract or agreement entered into under this section shall provide for the training and qualifications of personnel who perform security functions under this section in accordance with criteria established by the Secretary of Defense.

(c) REPORT.—One year after the date of enactment of this Act, the Secretary shall submit to Congress a report on the status of the program under this section.
this section and the use by the Department of Defense of other means to improve the performance of security functions on military installations and facilities located within the United States.

SEC. 1011. CRIMES AGAINST CHARITABLE AMERICANS.

(a) SHORT TITLE.—This section may be cited as the "Crimes Against Charitable Americans Act of 2013".

(b) TELEMARKETING AND CONSUMER FRAUD ABUSE.—The Telemarketing and Consumer Fraud Abuse Prevention Act (35 U.S.C. 6101 et seq.) is amended—

(1) in section 3(b)(2), by inserting after "practices" the second place it appears the following: "which shall include fraudulent charitable solicitations, and";

(2) in section 3(a)(2)—

(A) in subparagraph (B), by striking "and" at the end; and

(B) in subparagraph (C), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following:

"(D) a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made,

and

(3) in section 7(a), by inserting ", or a charitable contribution, donation, or gift of money or any other thing of value," after "services".

(c) RED CROSS MEMBERS OR AGENTS.—Section 917 of title 18, United States Code, is amended by striking "one year" and inserting "9 years".

(d) TELEMARKETING FRAUD.—Section 2335(c) of title 18, United States Code, is amended—

(1) in subparagraph (A), by striking "or" at the end;

(2) in subparagraph (B), by striking the comma at the end and inserting "; or";

(3) by inserting after subparagraph (B) the following:

"(C) a charitable contribution, donation, or gift of money or any other thing of value,"; and

(4) in the flush language, by inserting "or charitable contributor, or donor" after "participant".

SEC. 1012. LIMITATION ON ISSUANCE OF HAZMAT LICENSES.

(a) LIMITATION.—

(1) IN GENERAL.—Chapter 51 of title 49, United States Code, is amended by inserting after section 5103 the following new section:

"5103a. Limitation on issuance of hazmat licenses

"(a) LIMITATION.—

"(1) ISSUANCE OF LICENSES.—A State may not issue to any individual a license to operate a motor vehicle transporting in commerce a hazardous material unless the Secretary of Transportation has first determined, upon receipt of a notification under subsection (b)(1)(B) of the individual does not pose a security risk warranting denial of the license.

"(b) RENEWALS INCLUDED.—For the purposes of this section, the term "issue", with respect to a license, includes renewal of the license.

"(c) HAZARDOUS MATERIALS DESCRIBED.—The limitation in subsection (a) shall apply with respect to—

"(1) any material defined as a hazardous material by the Secretary of Transportation; and

"(2) any chemical or biological material or agent determined by the Secretary of Health and Human Services or the Attorney General as being a threat to the national security of the United States.

"(d) BACKGROUND RECORDS CHECK.—

"(1) IN GENERAL.—Upon the request of a State regarding issuance of a license described in subsection (a)(1) to an individual, the Attorney General—

"(A) shall carry out a background records check regarding the individual; and

"(B) upon completing the background records check, shall notify the Secretary of Transportation of the completion and results of the background records check.

"(2) SCOPE.—A background records check regarding an individual under this subsection shall consist of the following:

"(A) A check of the relevant criminal history data bases.

"(B) In the case of an alien, a check of the relevant data bases to determine the status of the alien under the immigration laws of the United States.

"(C) As appropriate, a check of the relevant international data bases through Interpol-U.S. National Central Bureau or other appropriate means.

"(e) REPORTING REQUIREMENT.—Each State shall submit to the Secretary of Transportation, at such time and in such manner as the Secretary may prescribe, the name, address, and such other information as the Secretary may require, concerning—

"(1) each alien, to whom the State issues a license described in subsection (a); and

"(2) each other individual to whom such a license is issued, as the Secretary may require.

"(f) ALIEN DEFINED.—In this section, the term 'alien' has the meaning given the term in section 101(a)(3) of the Immigration and Nationality Act.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 5103 the following new item:

"5103a. Limitation on issuance of hazmat licenses.".

(b) REGULATION OF DRIVER FITNESS.—Section 31305(a)(5) of title 49, United States Code, is amended—

(1) by striking "and" at the end of subparagraph (A); and

(2) by adding at the end the following new subparagraph:

"(C) is licensed by a State to operate the vehicle after having first been determined under section 5103a of this title as not posing a security risk warranting denial of the license."
SEC. 1013. EXPRESSING THE SENSE OF THE SENATE CONCERNING THE PROVISION OF FUNDING FOR BIOTERRORISM PREPAREDNESS AND RESPONSE.

(a) FINDINGS.—The Senate finds the following:

(1) Additional steps must be taken to better prepare the United States to respond to potential bioterrorism attacks.

(2) The threat of a bioterrorist attack is still remote, but is increasing for a variety of reasons, including—

(A) public pronouncements by Osama bin Laden that it is his religious duty to acquire weapons of mass destruction, including chemical and biological weapons;

(B) the calumet disregard for innocent human life as demonstrated by the terrorists' attacks of September 11, 2001;

(C) the resources and motivation of known terrorists and their sponsors and supporters to use biological warfare;

(D) recent scientific and technological advances in agent delivery technology such as aerosolization that have made weaponization of certain microbes much easier; and

(E) the increasing access to the technologies and expertise necessary to construct and deploy chemical and biological weapons of mass destruction.

(3) Coordination of Federal, State, and local terrorism research, preparedness, and response programs must be improved.

(4) States, local areas, and public health officials must have enhanced resources and expertise in order to respond to a potential bioterrorist attack.

(5) National, State, and local communication capacities must be increased to combat the spread of chemical and biological illnesses.

(6) Greater resources must be provided to increase the capacity of hospitals and local health care workers to respond to public health threats.

(7) Health care professionals must be better trained to recognize, diagnose, and treat illnesses arising from biochemical attacks.

(8) Additional supplies may be essential to increase the readiness of the United States to respond to a bio-attack.

(9) Improvements must be made in ensuring the safety of the food supply.

(10) New vaccines and treatments are needed to assure that we have an adequate response to a biochemical attack.

(11) Government research, preparedness, and response programs need to utilize private sector expertise and resources.

(12) Now is the time to strengthen our public health system and ensure that the United States is adequately prepared to respond to potential bioterrorist attacks, natural infectious disease outbreaks, and other challenges and potential threats to the public health.

(b) SENSE OF THE SENATE.—It is the sense of the Senate that the United States should make a substantial new investment this year toward the following:

(1) Improving State and local preparedness capabilities by upgrading State and local surveillance epidemiology, assisting in the development of response plans, ensuring adequate staffing and training of health professionals to diagnose and care for victims of bioterrorism, extending the electronic communications networks and training personnel, and improving public health laboratories.

(2) Improving hospital response capabilities by assisting hospitals in developing plans for a bioterrorist attack and improving the surge capacity of hospitals.

(3) Upgrading the bioterrorism capabilities of the Centers for Disease Control and Prevention through improving rapid identification and health early warning systems.

(4) Improving disaster response medical systems, such as the National Disaster Medical System and the Metropolitan Medical Response System and Epidemic Intelligence Service.

(5) Targeting research to assist with the development of appropriate therapeutics and vaccines for likely bioterrorist agents and assisting with expedited drug and device review through the Food and Drug Administration.

(6) Improving the National Pharmaceutical Stockpile Program by increasing the amount of necessary therapies (including smallpox vaccines and other post-exposure vaccines) and ensuring the appropriate deployment of stockpiles.

(7) Targeting activities to increase food safety at the Food and Drug Administration.

(8) Increasing international cooperation to secure dangerous biological agents, increase surveillance, and retrain biological warfare specialists.

SEC. 1014. GRANT PROGRAM FOR STATE AND LOCAL DOMESTIC PREPAREDNESS SUPPORT.

(a) IN GENERAL.—The Office for State and Local Domestic Preparedness Support of the Office of Justice Programs shall make a grant to each State, which shall be used by the State, in conjunction with units of local government, to enhance the capability of State and local jurisdictions to prepare for and respond to acts (including acts of terrorism involving weapons of mass destruction and biological, nuclear, radiological, incendiary, chemical, and explosive devices).

(b) USE OF GRANT AMOUNTS.—Grants under this section may be used to purchase needed equipment and to provide training and technical assistance to State and local first responders.

(c) AUTHORIZATION OF APPROPRIATIONS.—

(1) IN GENERAL.—There is authorized to be appropriated to carry out this section such sums as necessary for each of fiscal years 2003 through 2007.

(2) LIMITATIONS.—Of the amount made available to carry out this section in any fiscal year not more than 3 percent may be used by the Attorney General for salaries and administrative expenses.

(3) MINIMUM AMOUNT.—Each State shall be allocated in each fiscal year under this section not less than 0.75 percent of the total amount appropriated in the fiscal year for grants
pursuant to this section, except that the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands each shall be allocated 0.25 percent.

SEC. 1018. EXPANSION AND REAUTHORIZATION OF THE CRIME IDENTIFICATION TECHNOLOGY ACT FOR ANTITERRORISM GRANTS TO STATES AND LOCALITIES.

Section 103 of the Crime Identification Technology Act of 1998 (42 U.S.C. 14091) is amended—

(1) in subsection (b),—

(A) in paragraph (16), by striking "and" at the end;

(B) in paragraph (17), by striking the period and inserting "and"; and

(C) by adding at the end the following:

"(18) notwithstanding subsection (c), antiterrorism purposes as they relate to any other uses under this section or for other antiterrorism programs;";

and

(2) in subsection (e)(1), by striking "this section" and all that follows and inserting "this section $250,000,000 for each of fiscal years 2002 through 2007.";

SEC. 1019. CRITICAL INFRASTRUCTURES PROTECTION.

(a) SHORT TITLE.—This section may be cited as the "Critical Infrastructures Protection Act of 2002.";

(b) FINDINGS.—Congress makes the following findings:

(1) The information revolution has transformed the conduct of business and the operations of government as well as the infrastructure relied upon for the defense and national security of the United States;

(2) Private business, government, and the national security apparatus increasingly depend on an interdependent network of critical physical and information infrastructures, including telecommunications, energy, financial services, water, and transportation sectors;

(3) A continuous national effort is required to ensure the reliable provision of cyber and physical infrastructure services critical to maintaining the national defense, continuity of government, economic prosperity, and quality of life in the United States;

(4) This national effort requires extensive modeling and analytic capabilities for purposes of evaluating appropriate mechanisms to ensure the stability of these complex and interdependent systems, and to underpin policy recommendations, so as to achieve the continuous viability and adequate protection of the critical infrastructure of the Nation.

(c) POLICY OF THE UNITED STATES.—It is the policy of the United States—

(1) that any physical or virtual disruption of the operation of the critical infrastructures of the United States be rare, brief, geographically limited in effect, nationally sustainable, and minimally detrimental to the economy, human and government services, and national security of the United States;

(2) that actions necessary to achieve the policy stated in paragraph (1) be carried out in a public-private partnership involving corporate and non-governmental organizations; and

(3) in place a comprehensive and effective program to ensure the continuity of essential Federal Government functions under all circumstances.

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(4) ESTABLISHMENT OF NATIONAL COMPETENCE FOR CRITICAL INFRASTRUCTURE PROTECTION.

(1) SUPPORT OF CRITICAL INFRASTRUCTURE PROTECTION AND CONTINUITY BY NATIONAL INFRASTRUCTURE SIMULATION AND ANALYSIS CENTER.—There shall be established the National Infrastructure Simulation and Analysis Center (NISAC) to serve as a source of national competence to address critical infrastructure protection and continuity through support for activities related to counterrunnonal, threat assessment, and risk mitigation.

(2) PARTICULAR SUPPORT.—The support provided under paragraph (1) shall include the following:

(A) Modeling, simulation, and analysis of the systems comprising critical infrastructures, including cyber infrastructure, telecommunications infrastructure, and physical infrastructure, in order to enhance understanding of the large-scale complexity of such systems and to facilitate coordination of such systems to mitigate the threats to such systems and to critical infrastructures generally;

(B) Acquisition from State and local governments and the private sector of data necessary to create and maintain models of such systems and of critical infrastructures generally;

(C) Utilization of modeling, simulation, and analysis under subparagraph (A) to provide education and training to policymakers on matters relating to—

(i) the analysis conducted under that subparagraph;

(ii) the implications of unintended or unintentional disturbances to critical infrastructures; and

(iii) responses to incidents or crises involving critical infrastructures, including the continuity of government and private sector activities through and after such incidents or crises;

(D) Utilization of modeling, simulation, and analysis under subparagraph (A) to provide recommendations to policymakers, and to departments and agencies of the Federal Government and private sector persons and entities upon request, regarding means of enhancing the stability of, and preserving, critical infrastructures;

(E) RECIPIENT OF CERTAIN SUPPORT.—Modeling, simulation, and analysis provided under this subsection shall be provided, in particular, to relevant Federal, State, and local entities responsible for critical infrastructure protection and policy.

(e) CRITICAL INFRASTRUCTURE DEFINED.—In this section, the term "critical infrastructure" means systems and assets, whether physical or virtual, to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on society, national public health or safety, or any combination of those matters.
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(a) Authorization of Appropriations.—There is hereby authorized for the Department of Defense for fiscal year 2002, $20,000,000 for the Defense Threat Reduction Agency for activities of the National Infrastructure Simulation and Analysis Center under this section in that fiscal year.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.
UNITING AND STRENGTHENING AMERICA BY
FULFILLING RIGHTS AND ENSURING
EFFECTIVE DISCIPLINE OVER MONITORING
ACT OF 2015

Public Law 114-23
114th Congress
An Act
To reform the authorities of the Federal Government to require the production of certain business records, conduct electronic surveillance, use and register and keep and trace devices, and use other forms of information gathering for foreign intelligence, counterterrorism, and criminal purposes; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.
(a) SHORT TITLE.—This Act may be cited as the "UNITING AND STRENGTHENING AMERICA BY FULFILLING RIGHTS AND ENSURING EFFECTIVE DISCIPLINE OVER MONITORING ACT OF 2015" or the "USA FREEDOM Act of 2015".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

TITLE I—FISA BUSINESS RECORDS REFORM

Sec. 101. Additional requirements for call detail records.
Sec. 102. Emergency authority.
Sec. 103. Prohibition on bulk collection of tangible things.
Sec. 104. Judicial review.
Sec. 105. Liability protection.
Sec. 106. Authorization for assistance.
Sec. 107. Definitions.
Sec. 108. Inspector General reports on business records orders.
Sec. 109. Effective date.
Sec. 110. Rule of construction.

TITLE II—FISA PEN REGISTER AND TRAP AND TRACE DEVICE REFORM

Sec. 201. Prohibition on bulk collection.

TITLE III—FISA ACQUISITIONS TARGETING PERSONS OUTSIDE THE UNITED STATES REFORMS

Sec. 301. Limits on use of unreasonably obtained information.

TITLE IV—FOREIGN INTELLIGENCE SURVEILLANCE COURT REFORMS

Sec. 401. Appointment of security counsel.
Sec. 402. Declassification of decisions, orders, and opinions.

TITLE V—NATIONAL SECURITY LETTER REFORM

Sec. 501. Prohibition on bulk collection.
Sec. 502. Limitation on disclosure of national security letters.
Sec. 503. Judicial review.

TITLE VI—FISA TRANSPARENCY AND REPORTING REQUIREMENTS

Sec. 601. Additional reporting on orders requiring production of business records; business records compliance reports to Congress.
TITrLE VII—ENHANCED NATIONAL SECURITY PROVISIONS
Sec. 701. Provisions relating to non-U.S. persons traveling outside the United States.
Sec. 702. Provisions relating to non-U.S. persons traveling outside the United States as agents of foreign powers.
Sec. 703. Provisions relating to investigations of international proliferation of weapons of mass destruction.
Sec. 704. Provisions relating to material support of foreign terrorist organizations.
Sec. 705. Provisions relating to domestic terrorism.

TITrLE VIII—SAFETY OF MARITIME NAVIGATION AND NUCLEAR TERRORISM CONVENTIONS; IMPLEMENTATION

SEC. 801. Amendment to section 2380 of title 18, United States Code.

SEC. 802. Amendment to section 2380a of title 18, United States Code.

SEC. 803. Amendment to section 2383 of title 18, United States Code.

SEC. 804. Amendment to section 2383a of title 18, United States Code.

SEC. 805. Amendment to section 2384 of title 18, United States Code.

Subtitle B—Prevention of Nuclear Terrorism

SEC. 811. New section 2382 of title 18, United States Code.

SEC. 812. Amendment to section 2384 of title 18, United States Code.

SEC. 2. AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978.

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or a repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.).

TITrLE I—FISA BUSINESS RECORDS REFORMS

SEC. 101. ADDITIONAL REQUIREMENTS FOR CALL DETAIL RECORDS.

(a) APPLICATION.—Section 501(b)(2) (50 U.S.C. 1861(b)(2)) is amended—

(i) in subparagraph (A)—

(A) in the matter preceding clause (i), by striking "a statement" and inserting "in the case of an application other than an application described in subparagraph (C) of this section; or in the manner described in subparagraph (G), a statement;"

(B) in clause (iii), by striking "; and" and inserting a semicolon;

(ii) by redesignating subparagraphs (A) and (B) as subparagraphs (B) and (D), respectively, and

(iii) by inserting after subparagraph (B) (as so redesignated) the following new subparagraph:

(C) in the case of an application for the production on an ongoing basis of call detail records created before,
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"(1) destroy all call detail records produced under the order as prescribed by such procedures.".

SEC. 103. EMERGENCY AUTHORITY.

(a) AUTHORITY.—Section 501 (50 U.S.C. 1861) is amended by adding at the end the following new subsection:

"(1) EMERGENCY AUTHORITY FOR PRODUCTION OF TANGIBLE THINGS.—

"(1) Notwithstanding any other provision of this section, the Attorney General may require the emergency production of tangible things if the Attorney General—

"(A) reasonably determines that the situation requires the production of tangible things before an order authorizing such production can be delayed; and

"(B) reasonably determines that the factual basis for the issuance of an order under this section to approve such production of tangible things exists.

"(C) informs, either personally or through a designee, a judge having jurisdiction under this section at the time the Attorney General requires the emergency production of tangible things that the decision has been made to employ the authority under this subsection; and

"(D) makes an application in accordance with this section to a judge having jurisdiction under this section as soon as practicable, but not later than 7 days after the Attorney General requires the emergency production of tangible things under this subsection.

"(2) If the Attorney General requires the emergency production of tangible things under paragraph (1), the Attorney General shall require that the substantiation procedures required by this section for the issuance of a judicial order be followed.

"(3) In the absence of a judicial order approving the production of tangible things under this subsection, the production shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 7 days from the time the Attorney General begins requiring the emergency production of such tangible things, whichever is earlier.

"(4) A denial of the application made under this subsection may be reviewed as provided in section 103.

"(5) If such application for approval is denied, or in any other case where the production of tangible things is terminated and no order is issued approving the production, no information obtained or evidence derived from such production shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof, and no information concerning any United States person acquired from such production shall subsequently be used or disclosed in any other manner by Federal officials or employees without the consent of such person, except with the approval of the Attorney General, if the information indicates a threat of death or serious bodily harm to any person.

"(6) The Attorney General shall assess compliance with the requirements of paragraph (5).

"(b) CONFORMING AMENDMENT.—Section 501(d) (50 U.S.C. 1861(d)) is amended—

"(1) in paragraph (1)—

"(A) in the matter preceding subparagraph (A), by striking "pursuant to an order" and inserting "pursuant to an order issued or an emergency production required";

"(B) in subparagraph (B), by striking "and inserting "such order or such emergency production"; and

"(C) in subparagraph (B), by striking "the order" and inserting "the order or the emergency production";

"(2) in paragraph (2)—

"(A) in subparagraph (A), by striking "an order" and inserting "an order or emergency production"; and

"(B) in subparagraph (B), by striking "an order" and inserting "an order or emergency production".

SEC. 104. PROHIBITION ON BULK COLLECTION OF TANGIBLE THINGS.

(a) APPLICATION.—Section 501(b)(2) (50 U.S.C. 1861(b)(2)), as amended by section 101(a) of this Act, is further amended by inserting before subparagraph (B), as redesignated by such section 101(a) of this Act, the following new subparagraph:

"(A) A specific selection term to be used as the basis for the production of the tangible things sought;

"(B) ORDER.—Section 501(c) (50 U.S.C. 1861(c)) is amended—

"(1) in paragraph (2), by striking the semicolon and inserting ", including each specific selection term to be used as the basis for the production;"; and

"(2) by adding at the end the following new paragraph:

"(3) No order issued under this subsection may authorize the collection of tangible things without the use of a specific selection term that meets the requirements of subsection (b)(2)."

SEC. 104. JUDICIAL REVIEW.

(a) MINIMIZATION PROCEDURES.—

"(1) JUDICIAL REVIEW.—Section 501(c)(1) (50 U.S.C. 1861(c)(1)) is amended by inserting after subparagraphs (a) and (b) the following: "and that the minimization procedures submitted in accordance with subsection (b)(2)(D) meet the definition of minimization procedures under subsection (g)."

"(2) RULE OF CONSTRUCTION.—Section 501(g) (50 U.S.C. 1861(g)) is amended by adding at the end the following new paragraph:

"(3) RULE OF CONSTRUCTION.—Nothing in this subsection shall limit the authority of the court established under section 101(a) to impose additional particularized minimization procedures with regard to the production, retention, or dissemination of nonpublicly available information concerning unconsenting United States persons, including additional, particularized procedures related to the destruction of information within a reasonable time period.

"(b) TECHNICAL AND CONFORMING AMENDMENT.—Section 501(g)(1)(50 U.S.C. 1861(g)(1)) is amended—

"(A) by striking "not later than 180 days after the date of the enactment of the USA PATRIOT Improvement
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and Reauthorization Act of 2005, the" and inserting "the";

(B) by inserting after "adopt" the following: ";, and
update as appropriate,";

(b) ORDERS.—Section 501(x)(2) (50 U.S.C. 1862(x)(2)) is amended

(1) in subparagraph (A)—

(A) by striking "that order" and inserting "the production
order or any nondisclosure order imposed in connection
with the production order"; and

(B) by striking the second sentence; and

(2) in subparagraph (C)—

(A) by striking clause (ii); and

(B) by redesignating clause (iii) as clause (ii).

SEC. 106. LIABILITY PROTECTION.

Section 501(e) (50 U.S.C. 1861(e)) is amended to read as follows:

"(e) No cause of action shall lie in any court against a
person who—

(A) produces tangible things or provides information, facilities,
or technical assistance in accordance with an order issued
or an emergency production order under this section; or

(B) otherwise provides technical assistance to the Government
under this section or to implement the amendments made
to this section by the USA FREEDOM Act of 2015.

(2) A production or provision of information, facilities, or
technical assistance described in paragraph (1) shall not be deemed
to constitute a waiver of any privilege in any other proceeding
or context.

SEC. 107. COMPENSATION FOR ASSISTANCE.

Section 501 (50 U.S.C. 1861), as amended by section 102 of
this Act, is further amended by adding at the end the following
new subsection:

"(e) COMPENSATION.—The Government shall compensate a person
for reasonable expenses incurred for—

(1) producing tangible things or providing information,
facilities, or assistance in accordance with an order issued
with respect to an application described in subsection (b)(2) or
an emergency production order under subsection (b) that, to comply
with subsection (b)(1) (D), requires an application described in
subsection (b)(2) or

(2) otherwise providing technical assistance to the Government
under this section or to implement the amendments made
by the USA FREEDOM Act of 2015.

SEC. 108. DEFINITIONS.

Section 501 (50 U.S.C. 1861), as amended by section 106 of
this Act, is further amended by adding at the end the following
new subsection:

"(k) DEFINITIONS.—In this section:

(1) IN GENERAL.—The terms "foreign power", "agent of a
foreign power", "international terrorism", "foreign intelligence
information", "Attorney General", "United States person", "United
States", person, and "State" have the meanings provided those
terms in section 101.

(2) ADDRESS.—The term 'address' means a physical
address or electronic address, such as an electronic mail address
or temporarily assigned network address (including an Internet
protocol address).

(3) CALL DETAIL RECORD.—The term "call detail record"—

"(A) means session-identifying information (including
an originating or terminating telephone number, an Interna-
tional Mobile Subscriber Identity number, or an Interna-
tional Mobile Station Equipment Identity number), a
telephone calling card number, or the time or duration
of a call; and

"(B) does not include:

"(i) the contents (as defined in section 2510(b) of
title 18, United States Code) of any communication;

"(ii) the name, address, or financial information
of a subscriber or customer; or

"(iii) cell site location or global positioning system
information.

(4) SPECIFIC SELECTION TERM.—

"(A) TANGIBLE THINGS—

"(i) IN GENERAL.—Except as provided in subparagraph (B), a specific selection term—

"(I) is a term that specifically identifies a person,
account, address, or personal device, or any
other specific identifier; and

"(II) is used to limit, to the greatest extent
reasonably practicable, the scope of tangible things
sought consistent with the purpose for seeking
the tangible things.

"(ii) LIMITATION.—A specific selection term under
clause (i) does not include an identifier that does not
limit, to the greatest extent reasonably practicable,
the scope of tangible things sought consistent with
the purpose for seeking the tangible things, such as
an identifier that—

"(I) identifies an electronic communication
service provider (as that term is defined in section
701) or a provider of remote computing service
(as that term is defined in section 2711 of title
18, United States Code), when not used as part of
a specific identifier as described in clause (i),
unless the provider is itself the subject of an author-
ized investigation for which the specific selection
term is used as the basis for the production; or

"(II) identifies a broad geographic region,
including the United States, a city, a county, a
State, a zip code, or an area code, when not used
as part of a specific identifier as described in clause
(i).

(5) RULE OF CONSTRUCTION.—Nothing in this
paragraph shall be construed to preclude the use of
multiple terms or identifiers to meet the requirements
of clause (i).

(6) CALL DETAIL RECORD APPLICATIONS.—For purposes
of an application submitted under subsection (a), the
term 'specific selection term' means a term that
specifically identifies an individual, account, or personal device."
SEC. 108. INSPECTOR GENERAL REPORTS ON BUSINESS RECORDS ORDERS.

Section 106A of the USA PATRIOT Improvement and Reauthorization Act of 2005 (Public Law 109-177; 122 Stat. 200) is amended—

(1) in subsection (b)—

(A) in paragraph (2) by inserting "and calendar years 2012 through 2014" after "2006";

(B) by striking paragraphs (2) and (3);

(C) by redesignating paragraphs (4) and (5) as paragraphs (2) and (3), respectively; and

(D) in paragraph (3) (as so redesignated)—

(i) by striking subparagraph (C) and inserting the following new subparagraph:

"(C) with respect to calendar years 2012 through 2014, an examination of the minimization procedures used in relation to orders under section 601 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1601) and whether the minimization procedures adequately protect the constitutional rights of United States persons," and

(ii) in subparagraph (D), by striking "as such term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))";

(2) in subsection (c), by adding at the end the following new paragraph:

"(3) CALENDAR YEARS 2012 THROUGH 2014.—Not later than 1 year after the date of enactment of the USA FREEDOM Act of 2015, the Inspector General of the Department of Justice shall submit to the Committee on the Judiciary and the Select Committee on Intelligence of the Senate and the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives a report containing the results of the audit conducted under subsection (a) for calendar years 2012 through 2014;"

(3) by redesignating subsections (d) and (e) as subsections (e) and (f), respectively;

(4) by inserting after subsection (c) the following new subsection:

"(d) INTELLIGENCE ASSESSMENT.—

(1) IN GENERAL.—For the period beginning on January 1, 2013, and ending on December 31, 2014, the Inspector General of the Intelligence Community shall assess—

(A) the importance of the information acquired under title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1601 et seq.) to the activities of the intelligence community;

(B) the manner in which that information was collected, retained, analyzed, and disseminated by the intelligence community;

(C) the minimization procedures used by elements of the intelligence community under such title and whether the minimization procedures adequately protect the constitutional rights of United States persons; and

(D) any minimization procedures proposed by an element of the intelligence community under such title that were modified or denied by the court established under section 103(a) of such Act (50 U.S.C. 1803(a))."
TITLE III—FISA ACQUISITIONS TARGETING PERSONS OUTSIDE THE UNITED STATES REFORMS

SEC. 301. LIMITS ON USE OF UNLAWFULLY OBTAINED INFORMATION.

Section 702(b)(3) (50 U.S.C. 1881a(b)(3)) is amended by adding at the end the following new subparagraph:

"(D) LIMITATION ON USE OF INFORMATION.—

(i) IN GENERAL.—Except as provided in clause (ii), if the Attorney General has reason to believe that a person has acted inconsistently with an order under subparagraph (B), the Attorney General shall not use or disclose information derived pursuant to such an order to the extent that the Attorney General determines is necessary or appropriate to avoid such inconsistency.

(ii) EXCEPTION.—If the Attorney General determines that it is necessary or appropriate to avoid such inconsistency, the Attorney General shall not use or disclose information derived pursuant to such an order to the extent that the Attorney General determines is necessary or appropriate to avoid such inconsistency.

"(D) Nothing in this paragraph shall be construed to prohibit the use of multiple terms or identifiers to meet the requirements of subparagraph (A)."

SEC. 202. PRIVACY PROCEDURES.

(a) In General.—Section 402(b) (50 U.S.C. 1842(b)) is amended by adding at the end the following new subsection:

"(b) Privacy Procedures.—

(i) Notice to provider.—At the request of an attorney representing a party to the proceeding, the provider shall inform the party whether and to what extent the provider has received requests for the production of information, to the extent that the Attorney General determines is necessary or appropriate to avoid such inconsistency.

(ii) Flight risk.—If the Attorney General determines that it is necessary or appropriate to avoid such inconsistency, the Attorney General shall not use or disclose information derived pursuant to such an order to the extent that the Attorney General determines is necessary or appropriate to avoid such inconsistency.

"(D) Nothing in this paragraph shall be construed to prohibit the use of multiple terms or identifiers to meet the requirements of subparagraph (A)."
TITLE IV—FOREIGN INTELLIGENCE SURVEILLANCE COURT REFORMS

SEC. 401. APPOINTMENT OF AMICUS CURiae.

(a) General Provisions.

(b) Appointments of Amici Curiae.

(c) Legal Arguments or Information.

(d) Access to Information.

(e) Assistance to the Court.

(f) Review of FISA Court Decisions.
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the Fair Credit Reporting Act (15 U.S.C. 1681v(a)) is amended by striking "analysis," and inserting "analysis and that includes a term that specifically identifies a consumer or account to be used as the basis for the production of such information."

SEC. 502. LIMITATIONS ON DISCLOSURE OF NATIONAL SECURITY LETTERS.

(a) Counterintelligence Access to Telephone Toll and Transactional Records—Section 2709 of title 28, United States Code, is amended by striking subsection (c) and inserting the following new subsection:

"(c) Prohibition of Certain Disclosure—"

"(1) Prohibition—"

"(A) In general.—If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (d) is provided, no wire or electronic communication service provider that receives a request under subsection (b), or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.

"(B) Certification.—The requirements of subparagraph (A) shall apply if the Director of the Federal Bureau of Investigation, or a designee of the Director whose rank shall be no lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office, certifies that the absence of a prohibition of disclosure under this subsection may result in—"

"(i) a danger to the national security of the United States;

"(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

"(iii) interference with diplomatic relations; or

"(iv) danger to the life or physical safety of any person.

"(2) Exception.—"

"(A) In general.—A wire or electronic communication service provider that receives a request under subsection (b), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—"

"(i) those persons to whom disclosure is necessary in order to comply with the request;

"(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

"(iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.

"(B) Application.—A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request is issued under subsection (b) in the same manner as the person to whom the request is issued.

"(C) Notice.—Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall notify the person of the applicable nondisclosure requirement.

"(B) Identification of Disclosure Recipients.—At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (ii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request."


"(1) in subsection (a)(6), by striking subparagraph (D); and

"(2) by inserting after subsection (b) the following new subsection:

"(c) Prohibition of Certain Disclosure—"

"(1) Prohibition—"

"(A) In general.—If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (d) is provided, no financial institution that receives a request under subsection (a), or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under subsection (a).

"(B) Certification.—The requirements of subparagraph (A) shall apply if the Director of the Federal Bureau of Investigation, or a designee of the Director whose rank shall be no lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office, certifies that the absence of a prohibition of disclosure under this subsection may result in—"

"(i) a danger to the national security of the United States;

"(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

"(iii) interference with diplomatic relations; or

"(iv) danger to the life or physical safety of any person.

"(2) Exception.—"

"(A) In general.—A financial institution that receives a request under subsection (a), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—"

"(i) those persons to whom disclosure is necessary in order to comply with the request;

"(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

"(iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.

"(B) Application.—A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request is issued under subsection (a) in the same manner as the person to whom the request is issued.
"(C) Notice.—Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall inform the person of the applicable nondisclosure requirement.

(3) Identification of disclosure recipients.—At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (ii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure was made or to whom such disclosure will be made.

(e) Identity of financial institutions and credit reports.—Section 626 of the Fair Credit Reporting Act (15 U.S.C. 1681o) is amended by striking subsection (d) and inserting the following new subsection:

"(d) Production of certain disclosure.—

(1) Prohibition.—

(A) in general.—If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (e) is provided, no consumer reporting agency that receives a request under subsection (a) or (b) or an order under subsection (c), or officer, employee, or agent thereof, shall disclose or specify in any consumer report that the Federal Bureau of Investigation has sought or obtained access to information or records under subsection (a), (b), or (c).

(B) Certification.—The requirements of subparagraph (A) shall apply if the Director of the Federal Bureau of Investigation or a designee of the Director whose rank shall be no lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau Field Office, certifies that the absence of a prohibition of disclosure under this subsection may result in—

(i) a danger to the national security of the United States;

(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

(iii) interference with diplomatic relations; or

(iv) danger to the life or physical safety of any person.

(2) Exception.—

(A) in general.—A consumer reporting agency that receives a request under subsection (a) or (b) or an order under subsection (c), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—

(i) those persons to whom disclosure is necessary in order to comply with the request; or

(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

(iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.

(B) Application.—A person to whom disclosure is made under subparagraph (A) shall be subject to the non-disclosure requirements applicable to a person to whom a request under subsection (a) or (b) or an order under subsection (c) is issued in the same manner as the person to whom the request is issued.

(3) Notice.—Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall inform the person of the applicable nondisclosure requirement.

(4) Identification of disclosure recipients.—At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (ii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

"(d) Consumer report.—Section 627 of the Fair Credit Reporting Act (15 U.S.C. 1681s) is amended by striking subsection (c) and inserting the following new subsection:

"(c) Production of certain disclosure.—

(1) Prohibition.—

(A) in general.—If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (d) is provided, no consumer reporting agency that receives a request under subsection (a), or officer, employee, or agent thereof, shall disclose or specify in any consumer report that a government agency described in subsection (a) has sought or obtained access to information or records under subsection (a).

(B) Certification.—The requirements of subparagraph (A) shall apply if the head of the government agency described in subsection (a), or a designee, certifies that the absence of a prohibition of disclosure under this subsection may result in—

(i) a danger to the national security of the United States;

(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

(iii) interference with diplomatic relations; or

(iv) danger to the life or physical safety of any person.

(2) Exception.—

(A) in general.—A consumer reporting agency that receives a request under subsection (a), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—

(i) those persons to whom disclosure is necessary in order to comply with the request;

(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

(iii) other persons as permitted by the head of the government agency described in subsection (a) or a designee.

(B) Application.—A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request under subsection (a) is issued in the same manner as the person to whom the request is issued.
"(C) NOTICE.—Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall inform the person of the applicable nondisclosure requirement.

"(D) IDENTIFICATION OF DISCLOSURE RECIPIENTS.—At the request of the head of the government agency described in subsection (a) or a designee, any person making or intending to make a disclosure under clause (i) or (ii) of subparagraph (A) shall identify to the head or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request."

"(E) INVESTIGATIONS OF PERSONS WITH ACCESS TO CLASSIFIED INFORMATION.—Section 802 of the National Security Act of 1947 (50 U.S.C. 3122) is amended by striking subsection (b) and inserting the following new subsection:

"(b) PROHIBITION OF CERTAIN DISCLOSURE.—

"(1) PROHIBITION.—

"(A) IN GENERAL.—If a certification is issued under subparagraph (b) and notice of the right to judicial review under subsection (c) is provided, no governmental or private entity that receives a request under subsection (a), or officer, employee, or agent thereof, shall disclose to any person that an authorized investigative agency described in subsection (a) has sought or obtained access to information under subsection (a).

"(B) CERTIFICATION.—The requirements of subparagraph (b) shall apply if the head of an authorized investigative agency described in subsection (a), or a designee, certifies that the absence of a prohibition of disclosure under this subsection may result in—

"(i) a danger to the national security of the United States;

"(ii) interference with diplomatic relations; or

"(iii) danger to the life or physical safety of any person.

"(2) EXCEPTION.—

"(A) IN GENERAL.—A governmental or private entity that receives a request under subsection (a), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—

"(i) those persons to whom disclosure is necessary in order to comply with the request;

"(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

"(iii) other persons, as permitted by the head of the authorized investigative agency described in subsection (a) or a designee.

"(B) APPLICATION.—A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request is issued under subsection (a) in the same manner as the person to whom the request is issued.

"(D) TERMINATION PROCEDURES.—

"(1) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, the Attorney General shall adopt procedures with respect to nondisclosure requirements issued pursuant to section 2709 of title 18, United States Code, section 609 or 627 of the Fair Credit Reporting Act (15 U.S.C. 1681u and 1681v), section 1114 of the Right to Financial Privacy Act (15 U.S.C. 3414), or section 802 of the National Security Act of 1947 (50 U.S.C. 3122), as amended by this Act, to require—

"(i) the review at appropriate intervals of such a nondisclosure requirement to assess whether the facts supporting nondisclosure continue to exist;

"(ii) the termination of such a nondisclosure requirement if the facts no longer support nondisclosure; and

"(iii) appropriate notice to the recipient of the national security letter, or officer, employee, or agent thereof, subject to the nondisclosure requirement, and the applicable court as appropriate, that the nondisclosure requirement has been terminated.

"(2) REPORTING.—Upon adopting the procedures required under paragraph (1), the Attorney General shall submit the procedures to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.

"(E) JUDICIAL REVIEW.—Section 3611 of title 18, United States Code, is amended by striking subsection (b) and inserting the following new subsection:

"(b) NOTICE.—If a recipient of a request or order for a report, records, or other information under section 2709 of this title, section 609 or 627 of the Fair Credit Reporting Act (15 U.S.C. 1681u and 1681v), section 1114 of the Right to Financial Privacy Act (15 U.S.C. 3414), or section 802 of the National Security Act of 1947 (50 U.S.C. 3122), wishes to have a court review a nondisclosure requirement imposed in connection with the request or order, the recipient may notify the Government or file a petition for judicial review in any court described in subsection (a).

"(B) APPLICATION.—Not later than 30 days after the date of receipt of a notification under subparagraph (A), the Government shall apply for an order prohibiting the disclosure of the existence or contents of the relevant
request or order. An application under this subparagraph may be filed in the district court of the United States for the judicial district in which the recipient of the order is doing business or in the district court of the United States for any judicial district within which the authorized investigation that is the basis for the request is being conducted. The applicable nondisclosure requirement shall remain in effect during the pendency of proceedings relating to the requirement.

(3) CONSIDERATION.—A district court of the United States that receives a petition under subparagraph (A) or an application under subparagraph (B) shall rule expeditiously, and shall, subject to paragraph (3), issue a nondisclosure order that includes conditions appropriate to the circumstances.

(4) APPLICATION CONTENTS.—An application for a nondisclosure order or extension thereof or a response to a petition filed under paragraph (1) shall include a certification from the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the Federal Bureau of Investigation, or a designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, or in the case of a request by a department, agency, or instrumentality of the Federal Government other than the Department of Justice, the head or deputy head of the department, agency, or instrumentality, containing a statement of specific facts indicating that the absence of a prohibition of disclosure under this subsection may result in—

(A) a danger to the national security of the United States;

(B) interference with a criminal, counterterrorism, or counterintelligence investigation;

(C) interference with diplomatic relations; or

(D) danger to the life or physical safety of any person.

(5) STANDARD.—A district court of the United States shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in—

(A) a danger to the national security of the United States;

(B) interference with a criminal, counterterrorism, or counterintelligence investigation;

(C) interference with diplomatic relations; or

(D) danger to the life or physical safety of any person.

SEC. 560. JUDICIAL REVIEW.
(a) COUNTERINTELLIGENCE ACCESS TO TELEPHONE TOLL AND TRANSACTIONAL RECORDS.—Section 2709 of title 18, United States Code, is amended—

(1) by redesignating subsections (d), (e), and (f) as subsections (c), (d), and (e), respectively; and

(2) by inserting after subsection (c) the following new subsection:

"(d) JUDICIAL REVIEW—"

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"(1) IN GENERAL.—A request under subsection (b) or a nondisclosure requirement imposed in connection with such request under subsection (c) shall be subject to judicial review under section 3511.

"(2) NOTICE.—A request under subsection (b) shall include notice of the availability of judicial review described in paragraph (1).

"(c) ACCESS TO FINANCIAL RECORDS FOR CERTAIN INTELLIGENCE AND PROTECTIVE PURPOSES.—Section 1314 of the Right to Financial Privacy Act of 1979 (12 U.S.C. 3414) is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following new subsection:

"(d) JUDICIAL REVIEW—"

"(1) IN GENERAL.—A request under subsection (a) or a nondisclosure requirement imposed in connection with such request under subsection (c) shall be subject to judicial review under section 3511 of title 18, United States Code.

"(2) NOTICE.—A request under subsection (a) shall include notice of the availability of judicial review described in paragraph (1).

"(d) IDENTIFICATION OF FINANCIAL INSTITUTIONS AND CREDIT REPORTS.—Section 626 of the Fair Credit Reporting Act (15 U.S.C. 1681d) is amended—

(1) by redesignating subsections (a) through (g) as subsections (a) through (h), respectively; and

(2) by inserting after subsection (d) the following new subsection:

"(e) JUDICIAL REVIEW—"

"(1) IN GENERAL.—A request under subsection (a) or a nondisclosure requirement imposed in connection with such request under subsection (b) shall be subject to judicial review under section 3511 of title 18, United States Code.

"(2) NOTICE.—A request under subsection (a) shall include notice of the availability of judicial review described in paragraph (1).

"(e) INVESTIGATIONS OF PERSONS WITH ACCESS TO CLASSIFIED INFORMATION.—Section 802 of the National Security Act of 1947 (50 U.S.C. 3182) is amended—

(1) by redesignating subsections (c) through (f) as subsections (d) through (g), respectively; and

"(e) JUDICIAL REVIEW—"
(2) by inserting after subsection (b) the following new subsection:
"(c) Judicial Review—
"(1) In general.—A request under subsection (a) or a nondisclosure requirement imposed in connection with such request under subsection (b) shall be subject to judicial review under section 3511 of title 18, United States Code.
"(2) Notice.—A request under subsection (a) shall include notice of the availability of judicial review described in paragraph (1)."

**TITLE VI—FISA TRANSPARENCY AND REPORTING REQUIREMENTS**

**SEC. 601. ADDITIONAL REPORTING ON ORDERS REQUIRING PRODUCTION OF BUSINESS RECORDS, BUSINESS RECORDS COMPLIANCE REPORTS TO CONGRESS.**

(a) REPORTS SUBMITTED TO COMMITTEES.—Section 502(b) (50 U.S.C. 1862(b)) is amended—

(1) by redesignating paragraphs (1), (2), and (3) as paragraphs (6), (7), and (8), respectively; and

(2) by inserting before paragraph (6) (as so redesignated) the following new paragraphs:

"(1) a summary of all compliance reviews conducted by the Government for the production of tangible things under section 501;

"(2) the total number of applications described in section 501(b)(2)(B) made for orders approving requests for the production of tangible things;

"(3) the total number of such orders either granted, modified, or denied;

"(4) the total number of applications described in section 501(b)(2)(C) made for orders approving requests for the production of call detail records;

"(5) the total number of such orders either granted, modified, or denied;"

(b) REPORTING ON CERTAIN TYPES OF PRODUCTION.—Section 502(e)(3) (50 U.S.C. 1862(e)(3)) is amended—

(1) in subparagraph (A), by striking "and;

(2) in subparagraph (B), by striking the period at the end and inserting a semicolon; and

(3) by adding at the end the following new subparagraphs:

"(C) each total number of orders described in subparagraph (B) either granted, modified, or denied; and

"(D) with respect to orders described in subparagraph (D) that have been granted or modified, whether the court established under section 103 has directed additional, particularized minimization procedures beyond those adopted pursuant to section 501(g)."

**SEC. 602. ANNUAL REPORTS BY THE GOVERNMENT.**

(a) In General.—Title VI (50 U.S.C. 1871 et seq.), as amended by section 403 of this Act, is further amended by adding at the end the following new section:

"SEC. 605. ANNUAL REPORTS.

"(a) Report by Director of the Administrative Office of the United States Courts.—

"(1) Report required.—The Director of the Administrative Office of the United States Courts shall annually submit to the Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives and the Select Committee on Intelligence and the Committee on the Judiciary of the Senate, subject to a declassification review by the Attorney General and the Director of National Intelligence, a report that includes—

"(A) the number of applications or certifications for orders submitted under each of sections 105, 304, 402, 503, 702, 703, and 704;

"(B) the number of such orders granted under each of those sections;

"(C) the number of orders modified under each of those sections;

"(D) the number of applications or certifications denied under each of those sections;

"(E) the number of appointments of an individual to serve as amicus curiae under section 105, including the name of each individual appointed to serve as amicus curiae; and

"(F) the number of findings issued under section 108(g) that such appointment is not appropriate and the text of any such findings.

"(2) Publication.—The Director shall make the report required under paragraph (1) publicly available on an Internet Web site, except that the Director shall not make publicly available on an Internet Web site the findings described in subparagraph (F) of paragraph (1).

"(b) Mandatory Reporting by Director of National Intelligence.—Except as provided in subsection (d), the Director of National Intelligence shall annually make publicly available an Internet Web site a report that identifies, for the preceding 12-month period—

"(1) the total number of orders issued pursuant to titles I and III and sections 703 and 704 and a good faith estimate of the number of targets of such orders;

"(2) the total number of orders issued pursuant to section 702 and a good faith estimate of—

"(A) the number of search terms concerning a known United States person used to retrieve the unminimized contents of electronic communications or wire communications obtained through acquisitions authorized under such section, excluding the number of search terms used to prevent the return of information concerning a United States person; and

"(B) the number of queries concerning a known United States person of unminimized noncontent information
relating to electronic communications or wire communications obtained through acquisitions authorized under such section, excluding the number of queries containing information used to prevent the return of information concerning a United States person;

(2) the total number of orders issued pursuant to title IV and a good faith estimate of—

(A) the number of targets of such orders; and

(B) the number of unique identifiers used to communicate information collected pursuant to such orders;

(3) the total number of orders issued pursuant to applications made under section 501(b)(2)(B) and a good faith estimate of—

(A) the number of targets of such orders; and

(B) the number of unique identifiers used to communicate information collected pursuant to such orders;

(4) the total number of applications made under section 501(b)(2)(B) and a good faith estimate of—

(A) the number of targets of such orders; and

(B) the number of unique identifiers used to communicate information collected pursuant to such orders; and

(5) the total number of orders issued pursuant to applications made under section 501(b)(2)(C) and a good faith estimate of—

(A) the number of targets of such orders; and

(B) the number of unique identifiers used to communicate information collected pursuant to such orders; and

(C) the number of search terms that included information concerning a United States person that were used to query any database of call detail records obtained through the use of such orders; and

(6) the total number of national security letters issued and the number of requests for information contained within such national security letters.

(c) TIMING.—The annual reports required by subsections (a) and (b) shall be made publicly available during April of each year and include information relating to the previous calendar year.

(d) EXCEPTIONS.—

(1) STATEMENT OF NUMERICAL RANGE.—If a good faith estimate required to be reported under subparagraph (B) of any of paragraphs (3), (4), or (5) of subsection (b) is fewer than 500, it shall be expressed as a numerical range of fewer than 500 and shall not be expressed as an individual number.

(2) NONAPPLICABILITY TO CERTAIN INFORMATION.—

(A) FEDERAL BUREAU OF INVESTIGATION.—Paragraphs (2)(A), (2)(B), and (2)(C) of subsection (b) shall not apply to information or records held by, or queries conducted by, the Federal Bureau of Investigation.

(B) ELECTRONIC MAIL ADDRESS AND TELEPHONE NUMBERS.—Paragraph (3)(B) of subsection (b) shall not apply to orders resulting in the acquisition of information by the Federal Bureau of Investigation that does not include electronic mail addresses or telephone numbers.

(3) CERTIFICATION.—

(A) IN GENERAL.—If the Director of National Intelligence concludes that a good faith estimate required to be reported under subsection (b)(2)(B) cannot be determined accurately because some but not all of the relevant elements of the intelligence community are able to provide such good faith estimate, the Director shall—

(i) certify that conclusion in writing to the Select Committee on Intelligence and the Committee on the Judiciary of the Senate and the Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives;

(ii) report the good faith estimate for those relevant elements able to provide such good faith estimate;

(iii) explain when it is reasonably anticipated that such an estimate will be able to be determined fully and accurately; and

(iv) make such certification publicly available on an Internet Web site.

(B) FORM.—A certification described in subparagraph (A) shall be prepared in unclassified form, but may contain a classified annex.

(C) TIMING.—If the Director of National Intelligence continues to conclude that the good faith estimates described in this paragraph cannot be determined accurately, the Director shall annually submit a certification in accordance with this paragraph.

(e) DEFINITIONS.—In this section:

(1) CONTENTS.—The term 'contents' has the meaning given that term under section 2510 of title 18, United States Code.

(2) ELECTRONIC COMMUNICATION.—The term 'electronic communication' has the meaning given that term under section 2510 of title 18, United States Code.

(3) NATIONAL SECURITY LETTER.—The term 'national security letter' means a request for a report, records, or other information under—

(A) section 2709 of title 18, United States Code;

(B) section 1144(a)(5)(A) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3416(a)(5)(A));

(C) subsection (a) or (b) of section 626 of the Fair Credit Reporting Act (15 U.S.C. 1681(a)); or

(D) section 957(a) of the Fair Credit Reporting Act (15 U.S.C. 1681v(a)).

(D) UNITED STATES PERSON.—The term 'United States person' means a citizen of the United States or an alien lawfully admitted for permanent residence (as defined in section 101(a)(30) of the Immigration and Nationality Act (8 U.S.C. 1101(a))).

(5) WIRE COMMUNICATION.—The term 'wire communication' has the meaning given that term under section 2510 of title 18, United States Code.
(3) by inserting after paragraph (1) the following:

"(2) CONTENT.—

(A) IN GENERAL.—Except as provided in subparagraph (B), each report required under this subsection shall include a good faith estimate of the total number of requests described in paragraph (1) requiring disclosure of information concerning—

(i) United States persons; and

(ii) persons who are not United States persons.

(B) EXCEPTION.—With respect to the number of requests for subscriber information under section 2109 of title 16, United States Code, a report required under this subsection need not separate the number of requests into each of the categories described in subparagraph (A).

(d) STORED COMMUNICATIONS.—Section 2703(d) of title 18, United States Code, is amended—

(1) in paragraph (1), by striking ";" and inserting a semicolon; and

(2) in paragraph (2)(B), by striking the period and inserting ";";

and

(3) by adding at the end the following new paragraph:

"(3) the number of accounts from which the Department of Justice has received voluntary disclosures under subsection (c)(4)."

SEC. 603. PUBLIC REPORTING BY PERSONS SUBJECT TO FISA ORDERS.

(a) In general.—Title VII (50 U.S.C. 1871 et seq.), as amended by sections 402 and 602 of this Act, is further amended by adding at the end the following new section:

"SEC. 604. PUBLIC REPORTING BY PERSONS SUBJECT TO ORDERS.

(a) In general.—A person subject to a nondisclosure requirement accompanying an order or directive under this Act or a national security letter, or national security letter, publicly report the following information using one of the following structures:

(1) A semiannual report that aggregates the number of orders, directives, or national security letters with which the person was required to comply with separate categories of—

(A) the number of national security letters received, reported in bands of 1000 starting with 0-999;

(B) the number of customer selectors targeted by national security letters, reported in bands of 1000 starting with 0-999;

(C) the number of orders or directives received, combined, under this Act for contents, reported in bands of 1000 starting with 0-999;

(D) the number of customer selectors targeted under orders or directives received, combined, under this Act for contents, reported in bands of 1000 starting with 0-999;

(E) the number of orders received under this Act for noncontents, reported in bands of 1000 starting with 0-999;

(F) the number of customer selectors targeted under orders or directives received, combined, under this Act for noncontents, reported in bands of 1000 starting with 0-999; pursuant to—

(i) title IV;

(ii) title V with respect to applications described in section 505(b)(2)(B); and

(iii) title V with respect to applications described in section 503(b)(2)(C).

(2) A semiannual report that aggregates the number of orders, directives, or national security letters with which the person was required to comply into separate categories of—

(A) the number of national security letters received, reported in bands of 1000 starting with 0-999;

(B) the number of customer selectors targeted by national security letters, reported in bands of 1000 starting with 0-999;

(C) the number of orders or directives received, combined, under this Act for contents, reported in bands of 500 starting with 0-499;

(D) the number of customer selectors targeted under orders or directives received, combined, under this Act for contents, reported in bands of 500 starting with 0-499;

(E) the number of orders received under this Act for noncontents, reported in bands of 500 starting with 0-499;

(F) the number of customer selectors targeted under orders received under this Act for noncontents, reported in bands of 500 starting with 0-499;

(G) a semiannual report that aggregates the number of orders, directives, or national security letters with which the person was required to comply in the into separate categories of—

(A) the total number of all national security process received, including all national security letters, and orders or directives under this Act, combined, reported in bands of 250 starting with 0-249; and

(B) the total number of customer selectors targeted under all national security process received, including all national security letters, and orders or directives under this Act, combined, reported in bands of 250 starting with 0-249;

(3) An annual report that aggregates the number of orders, directives, and national security letters the person was required to comply with into separate categories of—

(A) the total number of all national security process received, including all national security letters, and orders or directives under this Act, combined, reported in bands of 100 starting with 0-99; and

(B) the total number of customer selectors targeted under all national security process received, including all national security letters, and orders or directives under this Act, combined, reported in bands of 100 starting with 0-99; and

(4) A report described in paragraph (3) or (2) of subsection (a) shall include only information—

(A) relating to national security letters for the previous 180 days; and

(B) relating to authorities under this Act for the 180-day period of time ending on the date that is not less than 180 days prior to the date of the publication of such
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and the Select Committee on Intelligence and the Committee on the Judiciary of the Senate.

(b) PHYSICAL SURVEILLANCE.—The matter preceding paragraph (1) of section 306 (50 U.S.C. 1826) is amended—

(1) in the first sentence, by striking “Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, and the Committee on the Judiciary of the Senate,” and inserting “Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives and the Select Committee on Intelligence and the Committee on the Judiciary of the Senate”; and

(2) in the second sentence, by striking “and the Committee on the Judiciary of the House of Representatives”.

(c) PEN REGISTERS AND TRAP AND TRACE DEVICES.—Section 406(b) (50 U.S.C. 1846b) is amended—

(1) in paragraph (2), by striking “; and” and inserting a semicolon;

(2) in paragraph (3), by striking the period and inserting a semicolon; and

(3) by adding at the end the following new paragraphs:

“(4) each department or agency on behalf of which the Attorney General or a designated attorney for the Government has made an application for an order authorizing or approving the installation and use of a pen register or trap and trace device under this title; and

“(5) for each department or agency described in paragraph (4), each number described in paragraphs (3)(1), (2), and (3)(1).”

(d) ACCESS TO CERTAIN BUSINESS RECORDS AND OTHER TANGIBLE THINGS.—Section 500a.5 (50 U.S.C. 1866a) is amended by striking “Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence and the Committee on the Judiciary of the Senate” and inserting “Permanent Select Committee on Intelligence and the Select Committee on Intelligence and the Committee on the Judiciary of the Senate”.

TITLE VII—ENHANCED NATIONAL SECURITY PROVISIONS

SEC. 701. EMERGENCIES INVOLVING NON-UNITED STATES PERSONS.

(a) IN GENERAL.—Section 105 (50 U.S.C. 1805) is amended—

(1) by redesignating subsections (f), (g), (h), and (i) as subsections (g), (h), (i), and (j), respectively;

(2) by inserting after subsection (a) the following:

“(f)(1) Notwithstanding any other provision of this Act, the lawfully authorized targeting of a non-United States person previously believed to be located outside the United States for the acquisition of foreign intelligence information may continue for a period not to exceed 72 hours from the time that the non-United States person is reasonably believed to be located inside the United States and the acquisition is subject to this title or to title III of this Act, provided that the head of an element of the intelligence community—

The text continues in a similar fashion, discussing various clauses and amendments to U.S. code sections related to national security and intelligence matters, including changes to provisions governing foreign surveillance and data collection.
"(A) reasonably determines that a lapse in the targeting of such non-United States person poses a threat of death or serious bodily harm to any person; 

"(B) promptly notifies the Attorney General of a determination under subparagraph (A); and 

"(C) requests, as soon as practicable, the employment of emergency electronic surveillance under subsection (e) or the employment of an emergency physical search pursuant to section 306(e), as warranted.

"(D) The authority under this subsection to continue the acquisition of foreign intelligence information is limited to a period not to exceed 72 hours and shall cease upon the earlier of the following: 

"(A) The employment of emergency electronic surveillance under subsection (e) or the employment of an emergency physical search pursuant to section 306(e), as warranted.

"(B) An issuance of a court order under this title or title III of this Act.

"(C) The Attorney General provides direction that the acquisition be terminated.

"(D) The head of the element of the intelligence community conducting the acquisition determines that a request under paragraph (1)(C) is not warranted.

"(E) When the threat of death or serious bodily harm to any person is no longer reasonably believed to exist.

"(F) Unreasonably available information concerning unconsenting United States persons acquired under this subsection shall not be disseminated during the 72 hour time period under paragraph (1) unless necessary to investigate, reduce, or eliminate the threat of death or serious bodily harm to any person.

"(G) If the Attorney General declines to authorize the employment of emergency electronic surveillance under subsection (e) or the employment of an emergency physical search pursuant to section 306(e), or a court order is not obtained under this title or title III of this Act, information obtained during the 72 hour acquisition time period under paragraph (1) shall not be retained, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person.

"(E) Paragraphs (D) and (F) of subsection (e) shall apply to this subsection.

"(F) NOTIFICATION OF EMERGENCY EMPLOYMENT OF ELECTRONIC SURVEILLANCE.—Section 106(e) (50 U.S.C. 1806(e)) is amended by striking "section 106(e)" and inserting "subsection (e) or (f) of section 106(e)".

"(G) REPORT TO CONGRESS.—Section 106(a)(2) (50 U.S.C. 1806(a)(2)) is amended—

"(I) in subparagraph (B), by striking "and" at the end of the paragraph (1) and inserting "; and", and 

"(II) by striking the period at the end of the paragraph (B), and inserting "; and";

or by striking at the end of the following:

"(D) the total number of authorizations under section 106(e) and the total number of subsequent emergency employment of electronic surveillance under section 106(e), or emergency physical searches pursuant to section 301(e),".

"(H) INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004.—Section 602(b)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 1801 note) is amended by striking "December 15, 2009" and inserting "December 15, 2010".

"(I) CONFORMING AMENDMENT.—Section 106(b)(1) of the USA PATRIOT Improvement and Reauthorization Act of 2005 (50 U.S.C. 1805 note) is amended by striking "sections 501, 509, and inserting "sections 501, 505, and section I and section II of this Act".

TITLE VIII.—SAFETY OF MARITIME NAVIGATION AND NUCLEAR TERRORISM CONVENTIONS IMPLEMENTATION

Subtitle A—Safety of Maritime Navigation

SEC. 850. AMENDMENT TO SECTION 2280 OF TITLE 18, UNITED STATES CODE

Section 2280 of title 18, United States Code, is amended—

(1) in subsection (b).—
(A) in paragraph (1)(A)(i), by striking "a ship flying the flag of the United States" and inserting "a vessel of the United States or a vessel subject to the jurisdiction of the United States (as defined in section 70502 of title 46);"

(B) in paragraph (1)(A)(ii), by inserting "the territorial seas" after "in the United States"; and

(C) in paragraph (1)(A)(iii), by inserting "by a United States corporation or legal entity," after "by a national of the United States";

(2) in subsection (c), by striking "section 2c" and inserting "section 1c;"

(b) by striking subsection (d);

(c) by striking subsection (e) and inserting after subsection (c) the following:

"(d) Definitions.—As used in this section, section 2280a, section 2281, and section 2281a, the term—"

"(1) 'applicable treaty' means—"

(1) the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970;

(2) the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971;

(3) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973;


(5) the Convention on the Physical Protection of Nuclear Material, done at Vienna on 30 October 1979;

(6) the Protocol for the Suppression of Unlawful Acts of Violence against Aircraft, done at Vienna on 18 November 1979;

(7) the Protocol for the Suppression of Unlawful Acts of Violence against Aircraft, done at Vienna on 30 October 1979;

(8) the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988;

(9) the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1982; and


(2) "armed conflict" does not include internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature;

(3) 'biological weapon' means—"

(A) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective, or other peaceful purposes; or
a party to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. Before delivering such person to the authorities of another country, the master shall notify in an appropriate manner the Attorney General of the United States of the alleged offense and obtain instructions from the Attorney General as to what action to take. When delivering the person to a country which is a state party to the Convention, the master shall, whenever practicable, and if possible before entering the territorial sea of such country, notify the authorities of such country of the master's intention to deliver such person and the reasons therefor. If the master delivers such person, the master shall furnish to the authorities of such country the evidence in the master's possession that pertains to the alleged offense.

§ 5. CIVIL FORFEITURE.—Any real or personal property used or intended to be used to commit or to facilitate the commission of a violation of this section, the gross proceeds of such violation, and any real or personal property traceable to such property or proceeds, shall be subject to forfeiture.

§ 6. APPLICABLE PROCEDURES.—Seizures and forfeitures under this section shall be governed by the provisions of chapter 46 of title 18, United States Code, relating to civil forfeitures, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in section 392(b) shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Secretary of Homeland Security, the Attorney General, or the Secretary of Defense.

SEC. 905. NEW SECTION 2280A OF TITLE 18, UNITED STATES CODE.
(a) IN GENERAL.—Chapter 111 of title 18, United States Code, is amended by adding after section 2280 the following new section:

§ 2280a. Violence against maritime navigation and maritime transport involving weapons of mass destruction

(a) Offense.—

(1) In General.—Subject to the exceptions in subsection (c), a person who unlawfully and intentionally—

(A) uses against or on a ship or discharge from a ship a weapon, weapon system, or weapon system component covered by section 2280, or a device, or a weapon, weapon system, or weapon system component in a manner that causes death to any person or serious injury or damage.

(b) Transportation.—Any person who uses a weapon, weapon system, or weapon system component against or on a ship, or on a ship or a floating object in a manner that causes death to any person or serious injury or damage.

d) The master of a vessel navigates the vessel in a manner that causes death to any person or serious injury or damage.

(d) Delivery of suspected offender.—(1) The master of a vessel shall deliver the suspected offender to the authorities of a country that is a party to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. Before delivering such person to the authorities of another country, the master shall notify in an appropriate manner the Attorney General of the United States of the alleged offense and obtain instructions from the Attorney General as to what action to take. When delivering the person to a country which is a state party to the Convention, the master shall, whenever practicable, and if possible before entering the territorial sea of such country, notify the authorities of such country of the master's intention to deliver such person and the reasons therefor. If the master delivers such person, the master shall furnish to the authorities of such country the evidence in the master's possession that pertains to the alleged offense.

§ 5. CIVIL FORFEITURE.—Any real or personal property used or intended to be used to commit or to facilitate the commission of a violation of this section, the gross proceeds of such violation, and any real or personal property traceable to such property or proceeds, shall be subject to forfeiture.

§ 6. APPLICABLE PROCEDURES.—Seizures and forfeitures under this section shall be governed by the provisions of chapter 46 of title 18, United States Code, relating to civil forfeitures, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in section 392(b) shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Secretary of Homeland Security, the Attorney General, or the Secretary of Defense.
or compelling a government, or an international organization to do or to abstain from doing any act;

(ii) any biological, chemical, or nuclear weapon or other nuclear explosive device, knowing it to be a biological, chemical, or nuclear weapon or other nuclear explosive device;

(iii) any source material, special fissileable material, or equipment or material especially designed or prepared for the processing, use, or production of special fissileable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an International Atomic Energy Agency comprehensive safeguards agreement, except where—

(i) such item is transported to or from the territory of, or otherwise under the control of, a Non-Proliferation Treaty State Party; and

(ii) the resulting transfer or receipt (including internal to a country) is not contrary to the obligations under the Non-Proliferation Treaty of the Non-Proliferation Treaty State Party from which, to the territory of which, or otherwise under the control of which such item is transferred;

(iv) any equipment, materials, or software or related technology that significantly contributes to the design or manufacture of a nuclear weapon or other nuclear explosive device, with the intention that it will be used for such purpose, except where—

(i) the country to which such item is transferred or under the control of which such item is transferred is a Nuclear Weapon State Party to the Non-Proliferation Treaty; and

(ii) the resulting transfer or receipt (including internal to a country) is not contrary to the obligations under the Non-Proliferation Treaty of a Non-Proliferation Treaty State Party from which, to the territory of which, or otherwise under the control of which such item is transferred;

(v) any equipment, materials, or software or related technology that significantly contributes to the delivery of a nuclear weapon or other nuclear explosive device, with the intention that it will be used for such purpose, except where—

(ii) such item is transported to or from the territory of, or otherwise under the control of, a Non-Proliferation Treaty State Party; and

(iii) such item is intended for the delivery system of a nuclear weapon or other nuclear explosive device of a Nuclear Weapon State Party to the Non-Proliferation Treaty; or

(iv) any equipment, materials, or software or related technology that significantly contributes to the design, manufacture, or delivery of a biological or chemical weapon, with the intention that it will be used for such purpose;

(C) transports another person on board a ship knowing that the person has committed an act that constitutes an offense under section 2280 or subparagraph (A), (B), (D), or (E) of this section or an offense set forth in an applicable treaty, as specified in section 2280(d)(1), and intending to assist that person to evade criminal prosecution;

(D) injures or kills any person in connection with the commission or the attempted commission of any of the offenses set forth in subparagraphs (A) through (C), or subsection (a)(2), to the extent that the subsection (a)(2) offense pertains to subparagraph (A); or

(E) attempts to do any act prohibited under subparagraph (A), (B), or (D), or conspires to do any act prohibited by subparagraphs (A) through (B) or subsection (a)(2), shall be fined under this title, imprisoned not more than 30 years, or both; and if the death of any person results from conduct prohibited by this paragraph, shall be imprisoned for any term of years or for life.

(2) THREATS.—A person who threatens, with apparent determination and intent to carry the threat into execution, to do any act prohibited under paragraph (1)(A) shall be fined under this title, imprisoned not more than 5 years, or both.

(b) JURISDICTION.—There is jurisdiction over the activity prohibited in subsection (a)—

(1) in the case of a covered ship, if—

(A) such activity is committed against or on board a vessel of the United States or a vessel subject to the jurisdiction of the United States (as defined in section 70002 of title 46) at the time the prohibited activity is committed;

(B) in the United States, including the territorial seas; or

(ii) by a national of the United States, by a United States corporation or legal entity, or by a stateless person whose habitual residence is in the United States;

(iii) during the commission of such activity, a national of the United States is seized, harassed, injured, or killed; or

(iv) the offender is later found in the United States after such activity is committed;

(2) in the case of a ship navigating or scheduled to navigate solely within the territorial sea or internal waters of a country other than the United States, if the offender is later found in the United States after such activity is committed; or

(3) in the case of any vessel, if such activity is committed in an attempt to compel the United States to do or abstain from doing any act.

(c) EXCEPTIONS.—This section shall not apply to—

(1) the activities of armed forces during an armed conflict, as those terms are understood under the law of war, which are governed by that law; or

(2) activities undertaken by military forces of a state in the exercise of their official duties.

(d)(1) CIVIL FORFEITURE.—Any real or personal property used or intended to be used to commit or to facilitate the commission of a violation of this section, the gross proceeds of such violation,
and any real or personal property traceable to such property or proceeds, shall be subject to forfeiture.

"(3) APPLICABLE PROCEDURES.—Seizures and forfeitures under this section shall be governed by the provisions of chapter 46 of title 18, United States Code, relating to civil forfeitures, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in section 986a(d) shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Secretary of Homeland Security, the Attorney General, or the Secretary of Defense."

(b) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 111 of title 18, United States Code, is amended by adding after the item relating to section 2280 the following new item:

"2281a. Violence against maritime navigation and maritime transport involving weapons of mass destruction;"

SEC. 803. AMENDMENTS TO SECTION 2281 OF TITLE 18, UNITED STATES CODE.

Section 2281 of title 18, United States Code, is amended—

(1) in subsection (a), by striking "section 3006(b)" and inserting "section 7006(b)";

(2) in subsection (d), by striking the definitions of "national" of the United States, "territorial sea of the United States," and "United States," and by inserting after subsection (d) the following:

"(e) EXCEPTIONS.—This section does not apply to—

"(1) the activities of armed forces during an armed conflict, as those terms are understood under the law of war, which are governed by law; or

"(2) activities undertaken by military forces of a state in the exercise of their official duties."

SEC. 804. NEW SECTION 2282A OF TITLE 18, UNITED STATES CODE.

(a) IN GENERAL.—Chapter 111 of title 18, United States Code, is amended by adding after section 2281 the following new section:

"2282a. Additional offenses against maritime fixed platforms.

(a) OFFENSES.—

(1) IN GENERAL.—A person who unlawfully and intentionally—

"(A) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act—

"(i) uses against or on a fixed platform or discharge from a fixed platform any explosive or radioactive material, biological, chemical, or nuclear weapon in a manner that causes or is likely to cause death or serious injury or damage; or

"(ii) discharges from a fixed platform oil, liquefied natural gas, or another hazardous or noxious substance that is not covered by clause (i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage;"

"(B) injures or kills any person in connection with the commission or the attempted commission of any of the offenses set forth in subparagraph (A); or

"(C) attempts or conspires to do anything prohibited under subparagraph (A) or (B), shall be fined under this title, imprisoned not more than 20 years, or both; and if death results to any person from conduct prohibited by this paragraph, shall be imprisoned for any term of years or for life.

"(2) THREAT TO SAFETY.—A person who threatens, with apparent determination and will to carry the threat into execution, to do any act prohibited under paragraph (1)(A), shall be fined under this title, imprisoned not more than 5 years, or both.

"(3) JURISDICTION.—There is jurisdiction over the activity prohibited in subsection (a)(1)—

"(I) such activity is committed against or on board a fixed platform—

"(A) that is located on the continental shelf of the United States;

"(B) that is located on the continental shelf of another country, by a national of the United States or by a stateless person whose habitual residence is in the United States; or

"(C) in an attempt to compel the United States to do or abstain from doing any act;

"(II) during the commission of such activity against or on board a fixed platform located on a continental shelf, a national of the United States is seized, threatened, injured, or killed; or

"(III) such activity is committed against or on board a fixed platform located outside the United States and beyond the continental shelf of the United States and the offender is later found in the United States.

"(e) EXCEPTIONS.—This section does not apply to—

"(1) the activities of armed forces during an armed conflict, as those terms are understood under the law of war, which are governed by law; or

"(2) activities undertaken by military forces of a state in the exercise of their official duties.

(b) DEFINITIONS.—In this section—

"(i) Continental shelf means the sea-bed and subsoil of the submarine areas that extend beyond a country's territorial sea to the limits provided by customary international law as reflected in Article 76 of the 1982 Convention on the Law of the Sea; and

"(ii) 'Fixed platform' means an artificial island, structure, or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes.

(b) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 111 of title 18, United States Code, is amended by adding after the item relating to section 2281 the following new item:

"2282a. Additional offenses against maritime fixed platforms."
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SEC. 805. ANNUAL MEASUREMENT.
Section 33132(b)(5)(B) of title 18, United States Code, is amended by inserting "2286(b)(relating to maritime safety)" before "2281", and by striking "2281" and inserting "2281 through 2281a".

Subtitle B—Prevention of Nuclear Terrorism

SEC. 411. NEW SECTION 2332B OF TITLE 18, UNITED STATES CODE.
(a) IN GENERAL.—Chapter 112B of title 18, United States Code, is amended by adding after section 2332b the following:

"§ 2332b. Acts of nuclear terrorism

(a) OFFENSES.—

(1) IN GENERAL.—Whoever knowingly and unlawfully—

(A) possesses, manufactures, imports, exports, transfers, delivers, or receives a device—

(i) with the intent to cause death or serious bodily injury; or

(ii) with the intent to cause substantial damage to property or the environment; or

(B) uses in any way radioactive material or a device, or uses or damages or interferes with the operation of a nuclear facility in a manner that causes the release of or increases the risk of the release of radioactive material, or causes radioactive contamination or exposure to radiation—

(i) with the intent to cause death or serious bodily injury or with the knowledge that such act is likely to cause death or serious bodily injury; or

(ii) with the intent to cause substantial damage to property or the environment or with the knowledge that such act is likely to cause substantial damage to property or the environment; or

(iii) with the intent to compel a person, an international organization or a country to do or refrain from doing an act, shall be punished as prescribed in subsection (c).

(2) TERRORISM.—Whoever, under circumstances in which the threat may reasonably be believed, threatens to commit an offense under paragraph (1) or conspires to commit an offense under subsection (a) or (b) shall be punished as prescribed in subsection (c).

(3) ATTEMPTS AND CONSPIRACIES.—Whoever attempts to commit an offense under paragraph (1) or (2) shall be punished as prescribed in subsection (c).

(b) JURISDICTION.—Conduct prohibited by subsection (a) is within the jurisdiction of the United States if—

(1) the prohibited conduct takes place in the United States or the special aircraft jurisdiction of the United States; and—

(2) the prohibited conduct takes place outside of the United States and—

(c) PENALTIES.—Whoever violates this section shall be fined not more than $2,000,000 and shall be imprisoned for any term of years or for life.

(d) NONAPPLICABILITY.—This section does not apply to—

(1) the activities of armed forces during an armed conflict, as those terms are understood under the law of war, which are conducted by or at the request of the United States or a United States person, and which are authorized by the President, United States Senate, or United States House of Representatives; or

(2) any military forces of a state that are organized, trained and equipped under its internal law for the purpose of national defense or security and which are acting in support of those armed forces who are under their formal command, control and responsibility.

(e) "nuclear capacity" means—

(1) any nuclear reactor, including reactors on vessels, vehicles, aircraft or space objects for use as an energy source in order to propel such vessels, vehicles, aircraft or space objects or for any other purpose;

(2) any plant or conveyance being used for the production, storage, processing or transmission of radioactive material; or

(3) any device used in the operation of a nuclear reactor.
"'(C) a facility (including associated buildings and equipment) in which nuclear material is produced, processed, used, handled, stored or disposed of, if damage to or interference with such facility could lead to the release of significant amounts of radiation or radioactive material;

'(7) ‘nuclear material’ has the meaning given that term in section 83101(b) of this title;

'(8) ‘radioactive material’ means nuclear material and other radioactive substances that contain nuclides that undergo spontaneous disintegration (a process accompanied by emission of one or more types of ionizing radiation, such as alpha, beta, neutron particles and gamma rays) and that may, owing to their radiological or fissile properties, cause death, serious bodily injury or substantial damage to property or to the environment;

'(9) ‘serious bodily injury’ has the meaning given that term in section 83101(a) of this title;

'(10) ‘state’ has the same meaning as that term has under international law, and includes all political subdivisions thereof;

'(11) ‘state or government facility’ has the meaning given that term in section 2332(f)(3) of this title;

'(12) ‘United States corporation or legal entity’ means any corporation or other entity organized under the laws of the United States or any State, Commonwealth, territory, possession or district of the United States;

'(13) ‘vessel’ has the meaning given that term in section 150210 of title 39; and

'(14) ‘vessel of the United States’ has the meaning given that term in section 70502 of title 46;"
CONSTITUTION OF THE UNITED STATES

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within
every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make tem-
porary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at
any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning
from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress
by their Adjournment prevent its Return, in which Case it shall not be a Law

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
To constitute Tribunals inferior to the supreme Court;
To define and punish Piracies and Felonies committed on
the high Seas, and Offences against the Law of Nations;
To declare War, grant Letters of Marque and Reprisal, and
make Rules concerning Captures on Land and Water;
To raise and support Armies, but no Appropriation of
Money to that Use shall be for a longer Term than two Years;
To provide and maintain a Navy;
To make Rules for the Government and Regulation of the
land and naval Forces;
To provide for calling forth the Militia to execute the Laws
of the Union, suppress Insurrections and repeal Invasions;
To provide for organizing, arming, and disciplining, the Mi-
litia, and for governing such Part of them as may be employed
in the Service of the United States, reserving to the States re-
spectively, the Appointment of the Officers, and the Authority
of training the Militia according to the discipline prescribed by
Congress;
To exercise exclusive Legislation in all Cases whatsoever,
over such District (not exceeding ten Miles square) as may, by
Cession of Particular States, and the Acceptance of Congress,
become the Seat of the Government of the United States, and
to exercise like Authority over all Places purchased by the Con-
sent of the Legislature of the State in which the Same shall be,
for the Erection of Forts, Magazines, Arsenals, dock-Yards and
other needful Buildings;—And
To make all Laws which shall be necessary and proper for
carrying into Execution the foregoing Powers and all other
Powers vested by this Constitution in the Government of the
United States, or in any Department or Officer thereof.
Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.
Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controll of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.
The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.
No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the
principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he 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.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.
Section. 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appel-
late Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.
No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by
Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.
Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

The Word, "the," being interlined between the seventh and eighth Lines of the first Page. The Word "Thirty" being partly written on an Erasure in the fifteenth Line of the first Page. The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names,

Gê. WASHINGTON—Presidê.
and deputy from Virginia

Attest WILLIAM JACKSON
Secretary

New Hampshire  JOHN LANGDON
                NICHOLAS GILMAN

Massachusetts  NATHANIEL GORHAM
                RUFUS KING

Connecticut  WM SAM'L JOHNSON
                ROGER SHERMAN

New York . . .  ALEXANDER HAMILTON

New Jersey  WIL: LIVINGSTON
                DAVID BREALEY.
                WM PATTERSON.
                JONA: DAYTON

Pennsylvania  B FRANKLIN
                THOMAS MIFFLIN
                ROBT MORRIS
                GEO. CLYMER
                THOS FITZSIMONS
                JARED INGERSOL
                JAMES WILSON
                GOUV MORRIS
Delaware
Geo: Read
Gunning Bedford Jun
John Dickinson
Richard Bassett
Jaco: Broom

Maryland
James McHenry
Dan of St Thos Jenifer
Danl Carroll

Virginia
John Blair—
James Madison Jr.

North Carolina
Wm Blount
Richd Dobbs Spaight
Hu Williamson
J. Rutledge

South Carolina
Charles Cotesworth Pinckney
Charles Pinckney
Pierce Butler

Georgia
William Few
Abr Baldwin
In Convention Monday, September 17th 1787.

Present

The States of

New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Resolved,

That the preceding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled. Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators
should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention

Geo. WASHINGTON—Presidt.

W. JACKSON Secretary.
PANEL II:

LEGAL ISSUES OF FUTURE WAR

MODERATOR:
MAJ. GEN. CHARLES DUNLAP, USAF (RET.)
Is the Kunduz hospital strike a war crime? 
Don’t jump to conclusions

October 7, 2015 12.58pm EDT

Candles outside the Medecins sans Frontieres HQ in Geneva Denis Balibouse/Reuters

Laurie R Blank
Clinical Professor of Law, Emory University

A hospital bombed in the midst of intense fighting. Patients and staff killed and wounded, the facility destroyed. An unspeakable tragedy – and unfortunately one seen before in recent and current conflicts.

The US airstrike that hit the Medecins Sans Frontieres (MSF) hospital in Kunduz, Afghanistan on Saturday was a horrible tragedy. But was it a war crime, as the organization immediately asserted?

Bombing a hospital and killing doctors and wounded or sick persons may seem, on first glance, to be an obvious war crime. If it isn’t, one might wonder, what is? MSF’s outrage is understandable and genuine.

However, the reality of both the law and the facts is significantly more complicated. This incident highlights not only the challenges and tragic consequences of war in populated areas, but also the dynamic interplay between media coverage of military operations and the legal regulation of armed conflict.

The law of war

The law of war – also called international humanitarian law or the law of armed conflict – governs the conduct of states, armed groups and individuals during armed conflict and seeks to minimize harm to civilians as much as possible.

War crimes are serious violations of the law of war. They include unlawful attacks on civilians and attacks on protected objects such as hospitals and religious or cultural property. Not all attacks that result in civilians dying or hospitals destroyed are automatically war crimes, however. The lawfulness of any attack will depend on both the intended target of the attack and the method of carrying it out.

So what do we know – or at least potentially know – right now about the incident in Kunduz?

The Kunduz case
News reports state that the US airstrikes were in response to requests from Afghan forces under fire from Taliban insurgents. They were aimed at those Taliban fighters, with several strikes mistakenly hitting the hospital in the course of those attacks.

Other reports from Afghan sources asserted that the Taliban was using the hospital grounds to plot and launch attacks, including “firing rocket-propelled grenades from the property,” and the airstrikes were aimed at the perimeter of the hospital property to stop the attacks.

The hospital building suffered several direct hits. Twenty-two people were killed and many more injured.

**Key issues**

The first question is whether the intended target of the airstrikes was a lawful target.

The law of war authorizes attacks against enemy soldiers, members of armed groups, civilians directly participating in hostilities and military objectives. Deliberate attacks on civilians or civilian objects (such as schools or residential buildings) are prohibited.

Zemairy, an Afghan boy, being treated in Kunduz hospital in June 2015, Reuters staff

Hospitals enjoy special protection under the law of war and are immune from attack. Using a hospital for military activities, personnel or equipment is prohibited. However, when a hospital is used for military purposes, it loses its protection from attack and can become a lawful military objective.

As fighters in the enemy armed group, the Taliban insurgents were legitimate targets. If the Taliban were using the MSF hospital to launch attacks, then the Taliban violated the law of war by using medical facilities to shield military objectives, namely their personnel and their rocket-launchers. In addition, the hospital would have lost its protection from attack after due warning to cease the military activity, becoming a legitimate target for attack.

If, as reports suggest, the airstrikes were aimed at Taliban fighters near the hospital or Taliban fighters and equipment using hospital property and facilities to shield their activities, then the choice of these targets would not run afoul of the law.
But that is not the end of the story.

The law does not focus only on the target of the attack, because prohibiting direct attacks against civilians and civilian objects can only go so far in protecting civilians. The law also mandates extensive steps to protect civilians and civilian objects from incidental harm during lawful military operations.

The two most important are precautions and proportionality.

The principle of precautions mandates additional steps to minimize harm to civilians from attacks. An attacking party must verify that the target is a lawful military objective, use weapons that will minimize incidental harm to civilians, avoid indiscriminate or disproportionate attacks and provide effective advance warning where feasible.

The principle of proportionality requires that an attacker refrain from any attack in which the expected civilian casualties will be excessive in light of the anticipated military gain from the attack. That is, an attack expected to cause excessive collateral damage is unlawful.

Proportionality is at once both simple and highly complex.

It is simple because the idea of maximizing protection of civilians by minimizing incidental harm from military operations is straightforward and sensible. It is complex, however, because it demands that one understand the military advantage of a particular attack, assess the likely expected civilian casualties and determine whether those casualties will be excessive in the circumstances at the time of the attack.

Outstanding questions

The airstrikes in Kunduz raise significant questions about precautions:

Did the Afghan forces calling for the strike and the US forces launching the strike establish the location of the hospital as a protected site?
Were the Taliban fighters indeed using the hospital?
If so, did either Afghan or US forces warn the hospital of the pending strike?
Were weapons chosen that could minimize harm to civilians?

The proportionality rule poses equally important questions:

What did the US forces know about the hospital and how many people were in it?
What damage to the hospital did they anticipate from the attacks?
What other options did they have to neutralize the Taliban threat?

In the end, only a comprehensive investigation – like those under way by the US, NATO and Afghanistan – can determine the cause and legality of the strike by examining these and other questions.

Most important, however, any legal analysis must examine these questions prospectively; that is, from the perspective of the US forces and what they knew at the time of the attack – not from the perspective of the hospital staff or from the retrospective view of the horrified observer or readers of the news after the fact.
Here lies perhaps the biggest challenge in the aftermath of a horrible tragedy: the suffering and horror are all too evident immediately after the incident, but the legality or illegality of an attack rests on the information available to the commander at the time, and the intent and reasonable judgment of the commander in launching that attack.

Real-time media coverage can do justice – in a sense – to the tragedy and suffering, but not to the question of legality without the information essential to and uncovered in the course of a thorough investigation.

Afghanistan
Taliban
NATO
Pentagon
War crimes
Guest Post: To Ban New Weapons or Regulate Their Use?

By Charles J. Dunlap, Jr.

Friday, April 3, 2015 at 12:24 PM

https://www.justsecurity.org/21766/guest-post-ban-weapons-regulate-use/

In January, I highlighted the apparent anomaly of international law’s ban on laser weapons that are “specifically designed … to cause permanent blindness” while permitting lasers that actually incinerate their human targets (so long as the law of armed conflict is otherwise observed). I argued that the centerpiece of ICRC’s justification for banning blinding lasers—that blinded persons are “virtually unable to work or to function independently” and that there could be “no recovery [from blindness] and no prosthetic device can replace sight”—was fundamentally flawed. At the core of this anomaly sits the question: is it wise for international law to ban a specific technology based on the science and emotions from a particular moment in history?

Counter to the ICRC’s view, I believe that the facts show that visually disabled persons can—and do—live productive, happy lives despite their infirmities and are continually breaking barriers as to what they can accomplish. Furthermore, today’s technologies are increasingly allowing recovery, and prosthetics like bionic eyes are no longer relegated to science fiction. Accordingly, I challenged the notion implicit in the ICRC’s out-of-date, if not heartless, rationale for banning blinding lasers where lethal ones are permitted by asking: is it really better to be dead than blind? Logic, of course, dictates the answer is “no,” but the law against blinding lasers indicates otherwise.

More specifically, I asked whether we are in a legal environment where belligerents are obliged to employ lethal (but lawful) weaponry when—but for the law’s prohibitions—today’s science could provide a less lethal (or nonlethal) means that the meets military needs? Indeed, are nations finding themselves obliged to use “lawful” weapons in circumstances where an “unlawful” weapons would actually would pose less risk to civilians?

My view is that conscientious adherence to the four core principles of the law of armed conflict—distinction, military necessity, the avoidance of unnecessary suffering, and proportionality—may not only obviate the need for most of the prohibitions of specific weaponry, but also
avoid the paradox that requires nations to use far more deadly (though lawful) means to wage war.

Part of the problem lies with the fact that international law may condemn a particular weapon based on a technological “snapshot in time” and cannot accommodate later advancements that may undermine the original scientific premise of reducing casualties. Certainly when chemical and were outlawed, it was not well understood that chemicals or even biologics might have battlefield uses that could quite dramatically reduce death and injury. For example, can we really say that microorganisms cannot be developed that could be employed in a targeted and self-limiting non-lethal anti-material mode to destroy military equipment and infrastructure without the risk of death or injury to humans that “legal” kinetic weapons pose?

A plainly frustrated Jonathan Alexander argues in an insightful essay in the *Harvard International Review* that “[w]ithout envisioning the possibility that some chemical and biological agents could actually be used to reduce casualties, emotionally based and broadly worded treaties were enacted to forbid the use of such agents” for low and nonlethal weapons development. He adds that “existing protocols leave no alternative to unnecessary killing” and concludes that existing “treaties often provide a false sense of security and can prevent prudent research.”

It is undoubtedly true that emotions — more than logic or science — were significant in achieving the bans on chemical and biological weapons that do not always make sense today. As just one illustration, riot control agents cannot be used in combat, but they are permitted in many law enforcement situations.

Thus, instead of being able to use tear gas to evict resisting troops from trenches, militaries must seek other means that are far more lethal and inhumane.

For example, in 1991, when US forces were confronted by Iraqi troops who “chose to stay in their trenches or behind obstacles and fight during the breaching operations,” American tanks were fitted with plows that — in a technique permissible under international humanitarian law (IHL) — were used to bury Iraqi infantrymen alive in their trenches. The result was a ghastly scene of a “bunch of buried trenches with people’s arms and legs sticking out of them.”

Is being buried alive somehow less horrific than being subjected to temporary incapacitation via chemical means? Existing law implies “yes,” though common sense loudly says “no.”

Why does emotionalism so often seem to dominate international lawmaking in this area? Writing in *The Week*, Harold Mass acknowledges that “[b]ombs, missiles, and other munitions achieve very similar results” as chemical weapons in terms of their physical destructiveness, but he also recognizes that “chemical weapons evoke a strong emotional response.” Quoting
historian Jonathan Tucker, Mass argues that the “chemical weapons taboo’ appears to have originated in the innate human aversion to poisonous substances.” No doubt this same sort of fear-of-poison emotionalism applies equally to biological weaponry.

Tucker adds another aspect to the emotionalism factor by asserting that “established nations also look at such [chemical] weapons as cowardly and ignoble — as a ‘duplicitous use of poison by the weak to defeat the strong without a fair physical fight’.” Of course, international law, qua law, is not to blame here as it assiduously tries to avoid favoring either the “strong” or the “weak” in armed conflicts, and does not (or should not) attempt to orchestrate some sort of “fair physical fight” that would rapidly delegitimize law in military thinking. As Mark Bowden puts it, “anyone who has ever been in combat will tell you, the last thing you want is a fair fight.” Still, Tucker does seem to have a point as to the real (but often illogical) thinking behind some weapons’ bans.

Enter Drones

Extending this anthropological elucidation might explain some of the often unreasoned hostility towards drones, even though Bowden (and many others) have concluded drones are typically far more protective of civilians than other methods of warfare. What is the source of the emotional enmity towards drones?

Here’s a possible answer: Rob Dunn points out that many of today’s greatest fears are rooted in “our legacy of ancient fears, the result of having spent millions of years running from predators.” He goes on to explain that our ancestors “[e]xposed and relatively defenseless … stood a good chance of being eaten by bigger, badder, species.” He adds that “our ability to spot predators or flee from them” has influenced millions of years of evolution, and that today the fear of being hunted still persists.

Given this background, it makes military sense for the US Air Force to call its primary armed drones “Predators” and “Reapers” because the systems are intended to not just destroy the enemy, but also to tap into their primordial fear of being relentlessly hunted. In light of the desperate measures to which terrorists are resorting to avoid drones, it is clear that the weapon system is having a real psychological effect. Nevertheless, to some observers they remain an anathema, despite being strongly supported by the American electorate — notwithstanding concerns about civilian casualties (which have, in fact, dwindled significantly in recent years).

What About Landmines?

Emotionalism, not technological truth, also triumphed in the campaign against anti-personnel landmines that resulted in what is commonly known as the Ottawa Convention. The US is not — and should not be — a party to this well-intentioned but counterproductive treaty. Of course,
everyone is horrified by the terrible results of “dumb” landmines that litter battlefields around the world. But such emotionalism aside, adherence to Protocol II of the Convention on Certain Conventional Weapons (CCW), together with the use of modern “smart” mine technology, make battlefields and their dangerous detritus (which goes far beyond landmines) as safe as can be expected without depriving military forces of a tool that can, ironically, save lives.

The Ottawa Convention is premised on what is, militarily speaking, yesterday’s technology (i.e., persistent, “dumb” anti-personnel landmines that are not self-destructing or self-neutralizing). While there are distinctions between the two treaties, for countries like the US that employ “smart” mines, and who comply with the CCW, the Ottawa Convention adds no protection for civilians. As David Koplow makes clear in his book, smart mines did not, do not, and would not cause the kind of unintended casualties that the Ottawa Convention intended to address. Yet it bars them.

Furthermore, it is simply inaccurate to suggest that “smart” anti-personnel landmines compliant with the CCW cannot be used in a way that is less destructive than other battlefield munitions. Additionally, they are a combat multiplier, a critical factor in an era of smaller militaries. It is simply wrong to deprive young Americans being sent in harms’ way of technologies that can comply with the core principles of IHL and facilitate mission accomplishment with less risk.

Also, as I’ve written elsewhere, parties to the Ottawa Convention can find themselves denied methodologies that could save civilian lives. For example, a CBU-89 is an air-dropped weapon that contains self-neutralizing anti-tank and anti-personnel mines. When used against an airfield, it can temporally deprive the enemy of its use, without long-term damage because the mines self-neutralize after a specified period. Parties to the Ottawa Convention, however, may have no other feasible option but to rupture the runway with high-explosives leaving it unavailable for post-conflict relief flights and economic re-constitution — both things that save lives in the real world.

**Other weapons**

Does the Ottawa Convention make war more humane than does the CCW? Don’t count on it. Consider the problem of enemy forces ensconced in caves. As I’ve explained before:

One solution would be to scatter mines around the entrances. Since that is foreclosed to parties of the Ottawa Convention, commanders from states who are parties to the Convention may need to entomb the caves’ occupants by blowing up the entrance — a disconcerting action not necessarily at odds with international law. Another solution, provided by science, is thermobaric weaponry. One description of how this weapon works says it is “among the most horrific weapons in any army’s collection: the thermobaric bomb, a fearsome explosive that sets fire to the air above its target, then sucks the oxygen out of anyone unfortunate enough to have
lived through the initial blast.” Again, this is merely to illustrate that when the focus of a treaty is on a certain weapon, as opposed to effects, the result can be unintended and a source concern.

Which is worse: a high-tech, self-neutralizing mine, or a thermobaric weapon? The law would suggest the former, but logic would again readily say the latter. Unfortunately, recent Administration policy decisions — which make no effort to distinguish between “smart” and “dumb” mine technology — will generally put US troops in much the same quandary as state parties to the Ottawa Convention.

This is in contrast to previous US government positions on weapons conventions that recognize military realities. For example, the US reservation to CCW’s Protocol III prohibitions on the use of incendiary devices in areas with concentrations of civilians acknowledges that incendiaries may need to be used where “it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons.” When would that be? Think of a biological weapons of mass destruction facility where high temperatures may be need to destroy deadly pathogens and where an attack with high-explosives might spew contaminates into the atmosphere, and the wisdom of the US reservation is evident.

Similarly, the US has rightly declined to become a party to the Convention on Cluster Munitions because cluster munitions can be employed in a way that reduces the risk to civilians more than other, “lawful” munitions might. As the US Department of Defense points out:

Cluster munitions are legitimate weapons with clear military utility in combat. They provide distinct advantages against a range of targets, where their use reduces risks to U.S. forces and can save U.S. lives. These weapons can also reduce unintended harm to civilians during combat, by producing less collateral damage to civilians and civilian infrastructure than unitary weapons. Because future adversaries will likely use civilian shields for military targets — for example by locating a military target on the roof of an occupied building — use of unitary weapons could result in more civilian casualties and damage than cluster munitions. Blanket elimination of cluster munitions is therefore unacceptable due not only to negative military consequences but also due to potential negative consequences for civilians. [Emphasis added.]

Regardless of the facts, it is unrealistic to expect that the international bans already in place will be modified so as to permit their use, even if employed (in full compliance with the core principles of IHL) in a way that could save lives and limbs. But shouldn’t we try to avoid neo-Ludditism as we look to the future?

The Future of War

We are on the cusp of new campaigns against high-technology weaponry that could produce results as flawed as those in the past. Consider Human Rights Watch’s uncharacteristically ill-
reasoned campaign against autonomous weapons. Mike Schmitt politely eviscerates their polemic, not just with erudite legal analysis, but also with reason and common sense informed by his practical experience as a military lawyer.

One wants to be optimistic about the upcoming UN meeting on autonomous weaponry as there are genuine legal and ethical issues worthy of examination, but I think that there is a real danger that this discussion — like that about drones — will be driven by emotions, not facts.

Likewise, in the aftermath of the Sony hack there has been plenty of hype — and emotionalism — about cyberthreats, including calls for a treaty banning the use of cyber for “warfare purposes.” While there are certainly arguments on both sides of this issue, my very strong view is that cyber techniques, if employed compliant with the norms of the law of armed conflict, have great potential to be an alternative to more violent and destructive means.

This is not to underestimate that potential costs and tribulations of cyberwar, but to suggest that more international law on this subject is likely not to reduce the human cost, but would merely operate more to disarm the parties who would have used the techniques properly in the first place than to curb abuses.

Gabrielle Blum has argued that “humanitarian zeal” has produced “the law’s current absolutist stance [that] prevents parties in conflict from lawfully pursuing actions that might lessen the harms of war.” I agree, and would underline that this zeal is too often based on emotions and fears inappropriate to the modern contexts to which they are applied in a distressingly undifferentiated manner.

Aiding and abetting this undesired outcome are lawyers and others who, however learned in the law, lack depth of understanding about the technologies they wish to regulate, or are ill-informed of the military techniques and strategies for employing them. Too often there is too little consideration of the unintended consequences of well-intended prohibitions. IHL must always be carefully evaluated and challenged — “red teamed” in military terms — in order to understand how an unscrupulous belligerent might exploit the law.

The solution to this problem is more than just better informed and appropriately dispassionate lawyers and policymakers: it must also include an abandonment of the effort to demonize specific technologies. We should emphasize effects rather than weapons, and we should insist on strict compliance with the core principles of IHL. In short, if a particular technology is used in compliance with those principles, it ought to be lawful.

Some readers no doubt will be understandably concerned about the proverbial slippery slope, but the slope of the perceived legitimacy of international law can get quite slippery when those
in the military — not to mention the body politic — find it barring technologies that can save civilians, along with combatant lives, on both sides.

Moreover, exactly who are we concerned about sliding down the slope? It ought to be sobering that neither the Ottawa Convention, nor any international treaty has even slightly diminished the use of mine-like weapons. Just look at the improvised explosive devices that have killed more than 2,500 Americans.

In a world in which the worst atrocities are typically committed with low-tech, “legal” weaponry, and where adversaries exist who burn prisoners alive and use “mentally challenged” children as suicide bombers, law-abiding nations need to be able to bring bear the most effective technologies available or can be developed, provided the weaponry can be used in conformance with the fundamentals of IHL. Denying such capabilities to nations because of prohibitions based on outdated science or unreasoning emotionalism could, paradoxically, promote the nefarious interests of those who would never respect IHL in the first place.

**About the Author**

Charles J. Dunlap, Jr. is currently a Professor of the Practice of Law and Executive Director, Center on Law, Ethics and National Security, at Duke Law School. He retired from the Air Force in 2010 as a Major General.
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Eric Talbot Jensen
Brigham Young University Law School

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ARTICLES

THE FUTURE OF THE LAW OF ARMED CONFLICT: OSTRICHES, BUTTERFLIES, AND NANOBOTS

Eric Talbot Jensen*

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Introduction
Increasingly, we find ourselves addressing twenty-first century challenges with twentieth-century laws.1

As Louise Doswald-Beck correctly stated in her 1998 article, “[a]ny attempt to look into the future is fraught with difficulty and the likelihood

*  Associate Professor, Brigham Young University Law School. The author spent twenty years in the U.S. military, including five as a Cavalry officer and the rest as a JAG officer, including deployments to Bosnia, Macedonia, Kosovo, and Iraq. His last job in the U.S. Army was as the Chief of International Law. He would like to thank the faculty of Brigham Young University Law School for their assistance as well as attendees at the Rocky Mountain Junior Scholars Forum. Additionally, Allison Arnold, Matthew Hadfield, Rebecca Hansen, SueAnn Johnson, Rachel LeCheminant, Bringham Udall, and Aaron Worthen provided excellent research and review assistance.

1. Harold Hongju Koh, The State Department Legal Adviser's Office: Eight Decades in Peace and War, 100 Geo. L.J. 1747, 1772 (2012); see also Al-Bihani v. Obama, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown, J., concurring) (“War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.”).
that much of it will be wrong.”2 This, in part, accounts for the military axiom that a nation is always preparing to fight the last war. In a study about future war, military historian and theorist Thomas Mackubin writes that research has shown “the United States has suffered a major strategic surprise on the average of once a decade since 1940.”3

If this inherent lag is true about the tactics and strategy of fighting wars, it is even more true concerning the law governing the fighting of wars. Michael Reisman writes that, “[b]ecause modern specialists in violence constantly seek new and unexpected ways of defeating adversaries, the codified body of the law of armed conflict always lags at least a generation behind.”4 This law lag was recently illustrated by those who have argued for new laws to govern the post-9/11 armed conflict paradigm.5

The historical fact that the law of armed conflict (LOAC) has always lagged behind current methods of warfare does not mean that it always must. This Article will argue that the underlying assumption that law must be reactive is not an intrinsic reality inherent in effective armed conflict governance. Rather, just as military practitioners work steadily to predict new threats and defend against them, LOAC practitioners need to focus on the future of armed conflict and attempt to be proactive in evolving the law to meet future needs.

In a recent article in The Atlantic, authors Andrew Hessel, Marc Goodman, and Steven Kotler propose a hypothetical in the year 2016 where an anonymous web personality known as Cap’n Capsid posts a competition to deliver a specific virus that, unbeknownst to the competitors, is linked to the DNA of the President of the United States. The virus eventually makes its way to Samantha, a sophomore majoring in govern-

2. Louise Doswald-Beck, Implementation of International Humanitarian Law in Future Wars, in 71 INT’L L. STUD., THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 39, 39 (1998); Stephen Peter Rosen, The Future of War and the American Military, HARV. MAG., May-June 2002, at 29, 29 (“The people who run the American military have to be futurists, whether they want to be or not. The process of developing and building new weapons takes decades, as does the process of recruiting and training new military officers. As a result, when taking such steps, leaders are making statements, implicitly or explicitly, about what they think will be useful many years in the future.”). Despite the difficulty, it is a vital requirement of militaries and one in which plenty of people are still willing to engage. See Frank Jacobs & Parag Khanna, The New World, N.Y. TIMES (Sep. 22, 2012), www.nytimes.com/interactive/2012/09/23/opinion/sunday/the-new-world.html.


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ment at Harvard University, who ingests it and comes down with the flu. Given her symptoms, she quickly spreads billions of virus particles, infecting many of her college friends who also get flu-like symptoms, but nothing very harmful.

This would change when the virus crossed paths with cells containing a very specific DNA sequence, a sequence that would act as a molecular key to unlock secondary functions that were not so benign. This secondary sequence would trigger a fast-acting neurodestructive disease that produced memory loss and, eventually, death. The only person in the world with this DNA sequence was the president of the United States, who was scheduled to speak at Harvard’s Kennedy School of Government later that week. Sure, thousands of people on campus would be sniffing, but the Secret Service probably wouldn’t think anything was amiss. It was December, after all—cold-and-flu season.6

This scenario may sound more like science fiction than like something you would read in a law review article. However, events like this seem inevitable as the technology of war progresses. Such events raise numerous legal issues both about the law of going to war, or *jus ad bellum*, and the LOAC, or *jus in bello*. Would this be considered a “use of force” in violation of the U.N. Charter? In relation to *jus ad bellum*, would it be considered an “armed attack,” giving the United States the right to exercise self-defense?8 How would these answers be affected if Cap’n Capsid were not a state actor, but a terrorist or an individual acting on his own? With respect to *jus in bello*, was this an attack, triggering the LOAC? If so, did it violate the principles of distinction or discrimination?9 Is a genetically coded virus a lawful weapon?


7. U.N. Charter art. 2, para. 4. Article 2, paragraph 4 has become the accepted paradigm restricting the use of force among states. Actions that amount to a threat or use of force are considered a violation of international law. However, the international community has very different views on what the language actually means and the Charter contains no definitions.

8. U.N. Charter art. 51. The definition of armed attack is controversial. There is no agreed definition of what equates to an armed attack. Despite this lack of clarity, states seem to agree that not all armed military actions equate to an armed attack. The ICIJ confirmed this in the Nicaragua case when it decided that Nicaragua’s provision of arms to the opposition in El Salvador was not an armed attack. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 195 (June 27). Additionally, there are unresolved questions about the application of new technologies, such as cyber operations, to armed attack. It is still unclear what level of offensive cyber operations against a state will constitute an armed attack.

Technological development in each of the areas highlighted in the scenario mentioned above is proceeding quickly, and not just in the United States but also amongst nations throughout the world. While much of the development is currently for peaceful purposes, there is no doubt that many, if not all, of these advances will be weaponized over time. Historically, few technologies throughout history that can be weaponized have not been.10

P.W. Singer, known scholar on advancing technologies and the law, has recently written,

Are we going to let the fact that these [new technologies] look like science fiction, sound like science fiction, feel like science fiction, keep us in denial that these are battlefield reality? Are we going to be like a previous generation that looked at another science fiction-like technology, the atomic bomb? The name “atomic bomb” and the concept come from an H.G. Wells short story. Indeed, the very concept of the nuclear chain reaction also came from that same sci-fi short story. Are we going to be like that past generation that looked at this stuff and said, “We don’t have to wrestle with all the moral, social, and ethical issues that come out of it until after Pandora’s box is open?”11

Pandora’s box is opening as new technologies are being developed. They will inevitably shape the future battlefield, affecting where conflicts are fought, by whom they are fought, and the means and methods used to fight.

The premise of this Article is that we are at a point in history where we can see into the future of armed conflict and discern some obvious points where future technologies and developments are going to stress the current LOAC. While the current LOAC will be sufficient to regulate the majority of future conflicts, we must respond to these discernible issues by anticipating how to evolve the LOAC in an effort to bring these future weapons under control of the law, rather than have them used with devastating effect before the lagging law can react.

Part I of this article will argue that the LOAC plays a vital signaling role in warfare that is especially needed at this time of technological innovation. Like these changing technologies, the LOAC must also evolve to face the new challenges of future armed conflict. Part II will project armed conflict into the future in three main categories—places, actors, and means and methods—and analyze how advancing technologies and techniques

The principle of discrimination requires each specific attack, including each weapon system, to be able to differentiate in the attack and only attack intended targets. Id., at 57.


will call into question the current LOAC’s ability to adequately regulate armed conflict. This Part will identify specific principles of the LOAC, the effectiveness of which will wane in the face of state practice, and suggest emerging concepts that will allow the LOAC to evolve and maintain its relevance and virulence in armed conflict. The Article will then conclude.

I. Ostriches or Butterflies

Warfare has always been an evolving concept. Throughout history, it has constantly been shaped and altered by the exigencies of nations and the moral sentiments of the global community. Yet, the paramount force behind this continual military evolution is not economic, social, or moral; rather, the greatest controlling factor has been the ever-changing limitations of wartime technology. For centuries, nations have searched for and sought ways to utilize technological advancements to overcome material deficiencies.12

We have all heard or read about how, when faced with danger or adversity, the ostrich buries its head in the sand, hoping the bad thing will pass and leave it unharmed. While this is a myth,13 it is also a powerful metaphor to describe a possible reaction to a threat. Compare that mythical reaction of the ostrich with the theory of the “coevolutionary arms race”14 in plants and animals, where a change in the genetic composition of one species is in response to a genetic change in another.15 For example, over time, the Heliconius butterfly has co-evolved with the passion vine through a series of changes and counter-changes that now link the two inextricably together. As the passion vine developed toxins to protect itself from overfeeding, the Heliconius developed the ability to internalize the toxin and then use it as a defense against its own predators. Similarly, while the Heliconius feeds on the passion vine, it also fertilizes the vine, ensuring the vine’s survival.16

The natural phenomenon of the co-evolutionary arms race between species is instructive in considering the LOAC and its relationship with

16. Interview with Charles Riley Nelson, Professor, Department of Biology, Brigham Young University, in Provo, Utah (Dec. 20, 2012) (explaining coevolutionary analysis using the example of the Heliconius and passion vine); see also Lawrence E. Gilbert, The Coevolution of a Butterfly and a Vine, 247 Sci. Am., Aug. 1982, at 110 (describing how species of Heliconius and passion vine have influenced each other’s evolution).
advancing technology. In response to advancing technologies that will undoubtedly affect the conduct of hostilities on the future battlefield, the LOAC can play the role of the ostrich and stick its head in the sand by saying that the current rules are sufficient and all technologies must mold themselves to current rules or not be used. Alternatively, the LOAC can play the role of the butterfly and respond to future developments (or even anticipate them) and adapt or evolve sufficiently to regulate these developments in a meaningful way.

A. Evolution

Predicting the future is very difficult, and fraught with the potential for serious error. Hence, the law of armed conflict has been mostly reactive throughout its history. The Fourth Geneva Convention of 1949 concerning the protection of civilians during armed conflicts did not come about until after the devastating attacks on civilians that occurred in World War II. Likewise, the Additional Protocols of 1977 did not extend protections to victims of non-international armed conflict until decades of lobbying by the International Committee of the Red Cross (ICRC).

The ICRC is engaged in a similar work now. During the recent sixty-year commemoration of the 1949 Geneva Conventions, the ICRC reported on a number of concerns looking at current and future armed conflicts where the law may need to evolve in order to address the needs of victims of armed conflict. Most of these suggestions are based on reactions to current conflicts, but they clearly denote that the international community cannot take the “ostrich’s” approach to impending problems. If the law is going to maintain its relevance and ability to adequately regu-


late armed conflict, it must take the “butterfly’s” approach and be adaptive and able to evolve in the face of difficulties.\textsuperscript{23}

Employing the ostrich’s approach and failing to infuse flexibility and adaptability into the LOAC will lead to an increase in the recent phenomenon known as lawfare, or “the use of law as a weapon of war.”\textsuperscript{24} Recent examples of this phenomenon abound\textsuperscript{25} and many LOAC scholars argue that the current LOAC regime in fact encourages non-compliance and incentivizes fighters to use the LOAC as a shield to give them an advantage when fighting LOAC-compliant forces.\textsuperscript{26}

\begin{quotation}


26. See, e.g., Dunlap, supra note 24, at 6 (“[T]here is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself.”); Owens, supra note 3, at 70 (“Thus these enemies will try to leverage ‘lawfare,’ the use of the rules of warfare against the United States (while ignoring these rules themselves), by, for example, taking refuge among the civilian population in an attempt to maximize civilian casualties. In turn, adversaries employing complex
Much of the recent lawfare discussion has centered on backward military opponents or non-state actors who need to use lawfare to overcome asymmetric disadvantages. However, a static and inflexible LOAC will incentivize even developed and powerful nations to use the law as a tool, rather than as a regulator. The Chinese already write of “three warfares” including “legal warfare,” which is defined as “arguing that one’s own side is obeying the law, criticizing the other side for violating the law, and making arguments for one’s own side in cases where there are also violations of the law.” This Chinese view portrays the law generally “as a means of enforcing societal (and state) control of the population.” Presumably, this would apply to both domestic and international law.

China is, of course, not alone in potentially using lawfare to gain an edge through future technologies. The United States has come under heavy criticism recently for its use of drones in fighting transnational terrorism. Though U.S. and Chinese perspectives on the law may be different, the danger of a static and inflexible approach to the LOAC as future technologies emerge is equally applicable to developed and undeveloped,

irregular warfare will take advantage of the fact that such casualties are magnified by the proliferation of media assets on the battlefield.”), Jason Vest, Fourth-Generation Warfare, THE ATLANTIC (Dec. 1, 2001), http://www.theatlantic.com/magazine/archive/2001/12/fourth-generation-warfare/302368/ (discussing Fourth-generation Warfare which includes a recognition of asymmetric operations “in which a vast mismatch exists between the resources and philosophies of the combatants, and in which the emphasis is on bypassing an opposing military force and striking directly at cultural, political, or population targets”).


29. Id. The report also states “[t]he strong tradition that held the law as a means of constraining authority itself ever developed in China.” Id. at 3.


31. See Cheng, supra note 28, at 6 (“The most important strategic difference between [the United States and China] is that there is little evidence that Chinese analysis and decision-makers see legal warfare as a misuse of the law. Given the much more instrumentalist view of the law in Chinese history, the idea that the law would be employed toward a given end (in support of higher military and national goals) would be consistent with Chinese culture but problematic, if not antithetical, from the Western perspective.”).
Western and non-Western nations. The international community needs to take the butterfly’s approach and not that of the ostrich. It is only through being proactive and recognizing the pressures that future developments will have on the LOAC (such as where conflicts are fought, by whom they are fought, and the means and methods used to fight) that the LOAC can evolve to avoid increasing lawfare and maintain its role as regulator on the conduct of armed conflict.

B. Signaling

The analogy of the ostrich and the butterfly is useful to illustrate the fate of non-evolving principles in the face of a changing technological environment. Indeed, the fate of organisms is often based on their ability to understand environmental signals that are occurring around them. In this way, the analogy would seem to argue that taking a reactive approach to changing circumstances would be sufficient, especially if the reaction comes quickly. In other words, the law need not be proactive, as this Article argues, but can remain reactive, particularly if the international community decreases the reaction time and makes changes quickly in response to technological developments.

This argument might appear to be especially true in the case of international law generally, and the LOAC specifically, since they are so heavily dependent on state practice and preferences. These areas of the law develop based mainly on consensual agreements between states and also on the activities of states, particularly when done through a sense of legal obligation. These twin sources of international law are complemented by other general principles of law recognized by civilized nations such as equity, judicial decisions, and the teachings of the most highly qualified publicists. As technologies develop, states will have time to consider their potential application to armed conflict and then deliberate on the best way to apply the law to changing circumstances. If nothing else, this approach will certainly maintain the maximum freedom to maneuver for states that are developing new technologies.

This approach would continue millennia of LOAC formulation where custom ripened over time. Increasing the speed with which actions ripen


1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
into customary international law would also be beneficial. However, relying solely on quick reaction to technological developments ignores the vital signaling role that the LOAC plays in the development of state practice.

The signaling value of the LOAC is clear from the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (GPI). Article 36 of GPI, titled “New weapons,” states:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.\(^{33}\)

This article requires every state that is contemplating developing a new technology or weaponizing an existing technology to ensure that such development complies with the LOAC. In other words, the LOAC signals to states what is permissible and what is not even at the stage of study and development of new weapons.\(^{34}\)

U.S. practice in this area is very clear. Even prior to GPI coming into effect, the United States required such a review,\(^{35}\) and it is now codified in Department of Defense Directive 5000.01, which states:

The acquisition and procurement of DoD weapons and weapon systems shall be consistent with all applicable domestic law and treaties and international agreements (for arms control agreements, see DoD Directive 2060.1 (Reference (Im)), customary international law, and the law of armed conflict (also known as the laws and customs of war). An attorney authorized to conduct such legal reviews in the Department shall conduct the legal review of the intended acquisition of weapons or weapon systems.\(^{36}\)

Each military service has an attorney designated to do such reviews.\(^{37}\)


\(^{37}\) For an example of a weapon review, see Corn, et al., supra note 35, at 228–31 (2012).
This requirement would clearly apply to all new and developing technologies that states may be considering. In such cases, the proposed weapon or means or method of warfare would be reviewed by a legal adviser who would determine its legality under the current law. In many cases, this review might be quite easy. However, it is here that Harold Koh’s quote from the beginning of this Article38 is most relevant. The legal adviser performing the review will look to the current LOAC for signals as to the legality of a proposed weapon, but that may prove difficult if the existing law does not adequately apply to the future weapon. In the absence of apparently applicable law, each legal adviser or nation is left to a discretionary decision that may lead to uneven application of LOAC constraints.

In addition to the legal review at the research and development stage, the law also requires a legal review at the point the weapon is employed. Article 82 of the same Protocol, titled “Legal Advisers in Armed Forces,” states:

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.39

It is clear from this provision that an otherwise lawful weapon can be employed in an unlawful way. Additionally, advanced technologies might provide tactical options that otherwise do not exist. In each case, the legal adviser must be available to the commander to provide legal advice, but the legal adviser will be looking to the LOAC for signals as to how to apply the LOAC in that specific situation. If the law is not specific to that potential employment or tactic, the legal adviser must be able to extrapolate existing rules to new technologies.

The recent development and deployment of cyber weapons demonstrates that applying existing rules to new technologies will present difficulties. Over the past decade, numerous statements and articles have been written on the application of the law to cyber operations, often coming out with different conclusions. Some have argued that existing law is sufficiently flexible to respond to new technologies such as cyber capabilities;40

38. Koh, supra note 1 (“Increasingly, we find ourselves addressing twenty-first century challenges with twentieth-century laws.”).

39. Protocol I, supra note 9, art. 86 (emphasis added).

while others argue that a whole new set of rules should be written to provide proper guidance.41

In response to this ongoing debate, a group of international LOAC experts embarked on a three-year process to determine how the LOAC applied to cyber operations.42 Headed by Michael N. Schmitt, a renowned cyber scholar,43 the experts found that they had to interpret or evolve the law in certain areas for it to sufficiently provide guidance to cyber operators. For example, most of the experts determined that the traditional definition of "attack" was insufficient to determine when the LOAC applied to cyber activities. Instead, a cyber action that affected the functionality of a cyber system might also be considered an attack.44

This example is representative of similar difficulties that will occur as new technologies are developed and used. For example, in the scenario quoted from The Atlantic at the beginning of this article, would the employing of the virus in the proposed way violate the principle of distinction, even though it was absolutely discriminating in the attack? Similar issues will be raised below.

There is no doubt that legal advisers have been extrapolating rules to new technologies throughout history. But as will be shown below, the kinds of technological advances in weapons and tactics will be unprecedented over the next few decades, applying tremendous stresses on the LOAC. Because of the important signaling role the LOAC plays in providing guidance to states and their legal advisers, particularly during research and development, the international community needs to begin now to analyze these future weapons and tactics and proactively provide guidance on the application of the LOAC to future armed conflict.

II. THE FUTURE OF THE LAW OF ARMED CONFLICT

The nature of armed conflict, and of the causes and consequences of such conflict, is continuing to evolve. IHL must evolve too.45

Jakob Kellenberger's statement above, as the president of the ICRC, reflects the fundamental need to evolve IHL to the changing nature of armed conflict. The ICRC's approach is not in disagreement with that of


42. THE TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE I (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL]. Note that the author was one of the participants in the formulation of the Manual.


44. TALLINN MANUAL, supra note 42, at 156–159.

45. Kellenberger, supra note 22.
the International Court of Justice (ICJ), as stated in the 1996 Nuclear Weapons Advisory Opinion:

However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present, and those of the future.46

The assumption that the “intrinsically humanitarian character of the legal principles” of the LOAC applies to future forms of warfare does not mean that the principles cannot evolve. Rather, the decision by the ICJ that the new technology of nuclear weapons continued to be regulated by the LOAC demonstrates that the ICJ views the law as adaptive to new weapon systems even on LOAC’s core fundamental principles.

Many commentators have discussed the need for change in various aspects of the laws applicable to the initiation and continuation of armed conflict,47 including the division of international law into *jus ad bellum* and

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46. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 259, ¶ 86 (July 8).

47. See Brooks, *supra* note 5, at 684 (“In the long run, the old categories and rules need to be replaced by a radically different system that better reflects the changed nature of twenty-first century conflict and threat.”); Interview with Peter W. Singer, Senior Fellow, the Brookings Institute, available at http://www.abc.net.au/lateline/content/2012/s3442876.htm (“I think the way to think about this is that when we look at the laws of war that are set for—that are supposed to guide us today, they date from a year when the most important invention was the 45 RPM vinyl record player. We don’t listen to music on vinyl record players anymore. I’m guessing a lot of the audience might never have listened to music on a vinyl record player anymore. And yet, the laws of war from that year, we still try and apply today. And so it doesn’t mean that the laws of war, you know, you need to throw them out, but it does mean that they’re having a real hard time.”); see also Sylvain Charat, *Three Weapons to Fight Terror*, WASH. TIMES (Sept. 9, 2004), http://www.washingtontimes.com/news/2004/sep/ 20040908-085545-9034r/. Judge George H. Aldrich identified “those aspects of the law that are most in need of further development in the early years of the next century” for international armed conflicts as:

(1) entitlement of those who take up arms to combatant and prisoner-of-war status;

(2) protection of noncombatants from the effects of hostilities; and

(3) compliance mechanisms, including external scrutiny, repression and punishment of offenses, and the right of reprisal; and

in other armed conflicts—

(1) the extent of regulation by international law when those conflicts are noninternational; and

(2) the applicability of international law when those conflicts are partly international and partly noninternational.
jus in bello,\textsuperscript{48} the evolution of law to accommodate potential need for preemptive self-defense,\textsuperscript{49} the bifurcation of the LOAC between international armed conflicts and non-international armed conflicts,\textsuperscript{50} the application of the law to state and non-state actors,\textsuperscript{51} and the geographic applicability and limitations of the LOAC to the “active conflict zone,”\textsuperscript{52} to name just a few. P.W. Singer framed the question nicely when he asked, “[h]ow do we catch up our twentieth century laws of war that are so old right now they qualify for Medicare to these twenty-first century technologies?”\textsuperscript{53}

The prescriptions for solving the current problem include calls for specific adjustments to discrete areas of the current LOAC, but Rosa Brooks has argued for “a radical reconceptualization of national security law and the international law of armed conflict.”\textsuperscript{54} If catching the law up to current technologies, strategies, and tactics requires a “radical reconceptualization” of the LOAC, it certainly behooves the international community to be proactive in anticipating the future evolution of the LOAC to accommodate changes in future armed conflict.

The next Part of this article will briefly analyze elements of the future battlefield, focusing on “places,” or where conflicts are fought; “actors,” or by whom they are fought; and “means and methods,” or how they are fought. The purpose of the analysis is to highlight areas of the LOAC that will struggle to deal with the future changes that are likely to occur, and to

\begin{footnotesize}
\begin{enumerate}
\item[51.] Kenneth Watkin, Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives, and Targeted Killing, 15 DUKE J. COMP. & INT’L L. 261, 281 (2005) (“The conduct of military operations at the commencement of the 21st century has also shone a bright spotlight on traditional tensions in humanitarian law, such as the application of that law to conflicts between state and non-state actors.”).
\item[53.] Singer, supra note 11.
\item[54.] Brooks, supra note 5, at 747. The author further states that “it is becoming more and more difficult to know how to characterize, as a matter of law, the kinds of threats that increasingly face the U.S. and other nations, and it is therefore becoming harder and harder to determine the appropriate legal responses to these threats. The old categories have lost their analytical and moral underpinnings, but we have not yet found alternative paradigms to replace them.” Id. at 744.
\end{enumerate}
\end{footnotesize}
begin a discussion on how the LOAC needs to evolve to maintain its ability to regulate armed conflict in the future.

A. Places

The traditional paradigm of armed conflict assumes that at any given time, it will be readily apparent where the armed conflict is taking place, and where it is not. To put it another way, the traditional paradigm assumes clear spatial boundaries between zones of war and zones of peace.\textsuperscript{55}

For the entire history of mankind, armed conflict has been confined to breathable air zones—the land, the surface of the ocean, and recently the air above the land in which land-based aircraft can fly. Additionally, the post-Westphalian system was built on the foundation of state sovereignty and the clear demarcation and control of borders.\textsuperscript{56} Armed conflicts occurred within specific spatial and temporal limits. As a result, the laws governing armed conflict have been built around certain presumptions about where armed conflict will occur. In the future, these presumptions will no longer be true. The LOAC will have to adjust to account for the emerging factors affecting where armed conflicts take place.

1. Emerging Factors

As technology advances, armed conflict will no longer be restricted to breathable air zones. Instead, it will occur without respect to national borders, underground, on the seabed, in space and on celestial bodies such as the moon, and across the newly recognized domain of cyberspace.\textsuperscript{57}

a. Global Conflict

The phenomena of global conflict has already begun to stress the LOAC\textsuperscript{58} as the United States has struggled to confront a transnational non-state terrorist actor that does not associate itself with geographic boundaries. As will be discussed in Subsection B, the ability to communicate globally through social media will likely produce organized (armed) groups that will not be bound by geographic boundaries and as such will not see themselves as representing a specific geographic collective. Rather, the boundaries will revolve around affiliations, interests, and ideologies. As Mack Owens has written:

Thus multidimensional war in the future is likely to be characterized by distributed, weakly connected battlefields; unavoidable urban battles and unavoidable collateral damage exploited by the

\textsuperscript{55} Id. at 720.

\textsuperscript{56} Jensen, supra note 21, at 707–09.


\textsuperscript{58} Mégret, supra note 52, at 132 (arguing that the “death of the battlefield significantly complicates the waging of war and may well herald the end of the laws of war as a way to regulate violence”).
adversary's strategic communication; and highly vulnerable rear areas. On such battlefields, friends and enemies are commingled, and there is a constant battle for the loyalty of the population.59

This issue is amply illustrated through the U.S. practice of drone strikes on terrorists associated with al-Qaeda but not located in Afghanistan.60 The focused outcry about U.S. reliance on authorities granted by the law of armed conflict even though outside the geographic confines of the recognized battlefield61 highlights the current paradigm’s assumptions about the LOAC’s applications to territory. As global communications allow participants in armed conflict to be more widely dispersed across the world, it is unlikely that states will allow themselves to be attacked by transnational actors because they are not located within a specific geographic region that has been designated as the “battlefield.”

b. Seabed

Currently the seabed and even non-surface waters have seen very little armed conflict.62 Submarine vessels have engaged surface vessels but there has been almost no conflict between submarines and none from the seabed. This is likely to change dramatically with technological improvements. For example, China has developed submersibles that can reach 99.8 percent of world’s seabed.63 As more and more underwater vehicles become unmanned, the need for breathable air dissipates. Underwater drones will almost certainly become armed and underwater engagements will quickly follow.

Similarly, the seabed will likely become militarized, once the need for air is erased. Not only could sensors be used to track surface and subsurface traffic, but also armaments will likely soon follow and the seabed will become another area where states will employ weapons systems.

59. Owens, supra note 3, at 71.


61. Daskal, supra note 52.


c. Subterranean

Similar to the seabed, the ability to place weapons systems underground and employ them effectively against an enemy is beginning to develop. Not only is it almost certain that underground weapons will attack surface targets, but it is also clear that they could be used to create surface effects through underground explosions and other means of manipulation. This will probably include the creation of earthquakes, tsunamis, and other surface effects that will severely affect an enemy. This portion of the earth is currently not weaponized, but it will be in the future.

d. Space and Celestial Bodies

Space and the free use of space have become vital to the functioning of the modern military. In fact, “[a] Government Accountability Office report . . . showed major Defense space acquisition programs have increased by about $11.6 billion—321 percent—from initial estimates for fiscal years 2011 through 2016.” U.S. Air Force Gen. William Shelton, who is the head of Space Command, recently stated that “[o]ur assured access to space and cyberspace is foundational to today’s military operations and to our ability to project power whenever and wherever needed across the planet.” Similarly, Army Lt. Gen. Richard Formica stated, “If the Army wants to shoot, move or communicate, it needs space.” Formica added that because of the Army’s dependency on these systems, they “have to be defended.”

These quotes refer mostly to the use of satellites, but despite current legal restrictions, it is very likely that the use of the moon and potentially other celestial bodies will soon follow. Space systems such as satellites

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67. Id.
68. Id.
69. Id.
70. The 1967 Outer Space Treaty limits military activities in outer space. Article IV states:

States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

The Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military per-
can be defended and attacked both from space and from the ground. Both China and the United States have conducted recent anti-satellite operations and established that both have that capability.\textsuperscript{71} Space has already begun to be weaponized\textsuperscript{72} and that trend will continue and increase in speed and lethality.

e. Cyberspace

Much has already been written about cyberspace. The Chinese have created a separate department of their military to handle the military aspects of cyberspace.\textsuperscript{73} The United States recently created Cyber Command to specifically plan and control U.S. military cyber operations.\textsuperscript{74} Army General Keith Alexander not only commands Cyber Command but also heads the National Security Agency.\textsuperscript{75} Currently, 140 nations either already have or are actively building cyber capabilities within their military,\textsuperscript{76} with Brazil being one of the most recent to make that decision.\textsuperscript{77}
Recent revelations concerning Stuxnet\textsuperscript{78} and Flame\textsuperscript{79} make it clear that nations are already using cyberspace to conduct military activities that cause harm similar to kinetic operations. Nations are also stealing technologies and trade secrets through cyber operations.\textsuperscript{80} These cyber thefts have not yet been equated with an attack but may be so treated in the future as the seriousness of the thefts continues and increases. Cyberspace has certainly been militarized by states and will continue to be so, and on an increasing basis.\textsuperscript{81}

One of the most important aspects of cyberspace is that, unlike the weaponization of space or the seabed, it does not require a nation to conduct “military” activities in cyberspace. There are numerous examples of private hackers, organized groups, and business organizations using the Internet to do great harm to both private and public entities.\textsuperscript{82} The accessibility of the militarization of cyberspace makes it somewhat unique in the future of armed conflict, which will be discussed below.

Most important for this discussion is the lack of boundaries in cyberspace. While the computer used to conduct the “attack” must be in one geographic location and work through a server in a specific geographic location, the lethal electrons will traverse many nations in their path to the requested destination. Further, to this point, states have been unwilling to take responsibility for cyber “attacks” that emanate from within their geographic boundaries,\textsuperscript{83} leaving only criminal process as the means of seeking redress for non-state-actor-sponsored attacks, a process that has seldom proven successful.\textsuperscript{84}

2. Emerging Law

The emerging factors discussed above will create stress on the current underpinnings and general principles of the LOAC. Fundamental ideas, such as territorial sovereignty, upon which the state-centric LOAC is based, will diminish in importance. The current doctrine of neutrality will


be impossible to apply. Certain specific international agreements that impact the LOAC will likely be ignored or abrogated as technological capabilities increase. As these stresses develop, the LOAC will need to adjust to maintain its relevance to future armed conflicts.

a. Territorial Sovereignty

Since the inauguration of the Westphalian system, one of the indicia of statehood is a designated territory. This was memorialized in the Montevideo Convention and has been part of recent discussions on statehood in both Kosovo and Palestine. Assumed in this attachment of territory to statehood is the authority and obligation to control that territory, including the use of force within designated borders and the use of force from within designated borders that will have effects outside the territory.

It is this assumption that led to the bifurcation of the LOAC into rules governing international armed conflicts (IACs) and separate rules governing non-international armed conflicts (NIACs). When the United States was faced with conducting an armed conflict with a transnational actor after the terrorist attacks of 9/11, it struggled to apply the appropriate rules. It seems clear that applying the NIAC rules to a transnational armed conflict was clearly outside the meaning of the Geneva Conventions as originally signed. Despite this, the U.S. Supreme Court eventually determined that certain LOAC provisions formed a minimum set of rights that applied to all armed conflicts, regardless of unbounded geography.

It is almost certain that armed conflicts in the future will continue to be carried out by organized groups who will be found outside a limited geographic scope. To the extent that the LOAC would prevent the applica-

tion of force in accordance with current U.S. practice, a reinterpretation of the LOAC will be necessary. Additionally, the specific application of LOAC provisions, such as non-movement of security detainees, would need to be reinterpreted in light of transnational groups during armed conflict.

Future conflicts will also raise questions about the ability of states to control the use of force from within their territory during armed conflicts in the same way as they currently do. For example, even now, during peacetime, nations have claimed that they cannot be responsible for cyber activities that emanate from within their borders. The obligation to prevent transboundary harm that was clearly articulated in the Trail Smelter Arbitration, and made applicable to situations of armed conflict in the Corfu Channel case, has not prevented states from disclaiming responsibility for cyber actions from within their borders during armed conflict.

As will be discussed below, the globalization of social networking will allow linkages between people of many different nationalities who might take forceful actions during armed conflict. These individuals will be acting not as citizens of any particular country but as members of transnational ideological groupings, and nations will find these individuals difficult to control. While the inability of a state to control all the actions of its individual residents is not new, the capability for those residents to readily harness state-level violence, such as cyber tools, and then direct that state-level violence across boundaries is relatively new and will only become more possible with technological advances.

The transnational nature of fighters and the decreasing ability of states to control the emanation of state-level violence from within their sovereign territory will likely frustrate the current understanding of the application of the LOAC. The idea of a geographically limited conflict is difficult to maintain when organized (social networking) groups are using state-level violence from multiple (neutral) states across the world.

93. Geneva Convention, supra note 18, art. 49.
b. Neutrality

As implied above, the doctrine of neutrality will also come under pressure in future conflicts where the geography of the battlefield is less confined. States that are not participants in armed conflict and that wish to maintain their neutrality will find it difficult to effectively do so when individuals’ actions from within their geographic borders will involve state-level violence. For example, assume a citizen of a neutral country decides to conduct a cyber attack against one of the belligerent countries. To maintain its neutrality, the neutral country must prevent such attacks. Alternatively, the attacked country may use self-help to stop the attacks. This is not new. However, what is new is the level of violence that individuals can readily muster and the global scale of organization and reach of these individual participants.

When individuals from eighty neutral countries can organize themselves to attack simultaneously and instantaneously with state-level violence at different targets in the belligerent state, the doctrine of neutrality and a belligerent’s ability to respond become almost meaningless. The belligerent state may not have time to determine the neutral state’s willingness or ability to intervene or stop the attack. Under the current LOAC doctrine of neutrality, such activities would likely lead to the belligerent declaring the neutral as a hostile party to the conflict.

Additionally, when an individual launches a cyber attack, the malware will inevitably flow through the infrastructure of neutral states. Under Article 8 of Hague V, “A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals.” This provision is one of the very few codified provisions in the LOAC that refer to neutrality and electronic communications. Yet, when considering Article 8 specifically, the group of experts who wrote the Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn Manual) could not agree on its specific applicability to cyber operations. The experts did agree that the provisions of the LOAC applicable to neutrality were difficult to apply in the context of cyber war and “need to be interpreted.”

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101. See COMMANDER’S HANDBOOK, supra note 100, at ch. 7.2.
103. TALLINN MANUAL, supra note 42.
Manual should signal to the international community the need to look more closely at the LOAC, at least within the context of cyberspace, and acknowledge that review and revision is necessary.

c. International Agreements

Finally, though not strictly a matter of the LOAC, there are numerous international agreements that affect the militarization of specific areas and the application of the LOAC to activities in these areas. For example, the Outer Space Treaty limits some military activities in space but has no specific provision prohibiting the use of conventional weapons (or for example, lasers) in outer space that may be used against targets in orbit, on celestial bodies, or on the Earth.105

Other treaties106 also limit or affect the use of Earth’s “places” for military purposes. However, these agreements, to the extent that states will continue to follow them in the future, serve only to limit states. As will be discussed below, the actors of armed conflict are going to dramatically change and increase, including a significant variety of non-state entities that will have no legal obligations under these international agreements and may or may not be effectively constrained by states. As emphasized below, the LOAC will have to reach out to these other actors to regulate Earth’s “places” during future armed conflict.

B. Actors

The potential range of ‘new actors’ whose actions have repercussions at the international level is of course vast. While many of these ‘new actors’ have in fact been around for some time, they have called into question—and will continue to call into question—some of the more traditional assumptions on which the international legal system is based.107

From the very beginnings of human conflict, fighters have created rules to govern their war-like conduct.108 As argued by Krauss and Lacey,


107. Kellenberger, supra note 22.

these were rules “written by the utilitarians for the warriors.”109 While the quality and content of these rules ebbed and flowed over time, this progression resulted in a definition of a combatant as an agent for a state that provided authorities for individuals to take part in otherwise illegal conduct (such as killing others) so long as that conduct was in compliance with rules established by the state.110 Because these rules were initially based on reciprocal application, they established strict qualifications for who could act with this impunity—rules that were codified in the 1899/1907 Hague Convention111 and in greater detail in the 1949 Geneva Convention for the Protection of Prisoners of War.112

Concurrently, the LOAC has developed rules for the treatment of those not acting as fighters but as the victims of armed conflict. The treatment has moved from a point where non-fighters were treated as the spoils of war,113 to a time when non-fighters were considered part of the targetable enemy,114 to the current paradigm where militaries are strictly prohibited from targeting civilians,115 so long as they do not “take a direct part in hostilities.”116

As a result of these provisions, actors on the battlefield are divided into either combatants or civilians and, in fact, are defined in relation to each other. As Article 50 of GPI states, “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3), and (6) of the Third Convention and in Article 43 of this Protocol.”117 This clean division between two types of battlefield actors is among the current LOAC principles that will be stressed in future armed conflict.

1. Emerging Factors

The seemingly clear bifurcation between combatants and civilians that was established in 1949 was already eroding in the armed conflicts leading up to the 1970s, causing the ICRC to recommend relaxing the require-

110.  Jensen, supra note 21, at 710–11.
112.  See Geneva Convention, supra note 18, at art. 4.
115.  Protocol I, supra note 9, arts. 51.2, 52.1.
116.  Id. at art. 51.3.
117.  Id. at art. 50.1.
ments for qualification of a combatant which was then codified in GPI.  
Recent armed conflicts have demonstrated the difficulty of determining when a civilian takes "a direct part in hostilities."  
Future armed conflict will undoubtedly increase the concern over defining actors on the battlefield. The differentiation between civilians and combatants will become more blurred as global technologies allow linkages and associations among people that were not possible in 1949 or 1977. The following sections analyze emerging factors that will stress LOAC understandings of civilians, organized armed groups, and combatants.

a. Civilians

The current LOAC is clear that "the civilian population as such, as well as individual civilians, shall not be the object of attack . . . unless and for such time as they take a direct part in hostilities."  Despite the seeming clarity of the rule, applying the rule to civilians on the future battlefield is surprisingly difficult.  This rule will be discussed in two parts below, the first dealing with the prohibition on attacking civilians and the second on the meaning of direct participation in hostilities.

i. Prohibition on Attacking Civilians

Future technologies, such as the virology discussed in the scenario at the beginning of this Article, will be enhanced or facilitated by using the civilian population to either spread or host the eventual weapon. Attackers who use viruses or nanotechnologies or genetic mutators will find their attacks facilitated by using the civilian population to propagate their weapons. The nanobot will be released generally into the population and then trigger its payload based on finding the correct DNA sequence or other similar marker.

Cyber attackers will find the same methodologies useful. They will create malware that spreads broadly throughout civilian systems until it finds the specific computer system it is designed to attack and then conduct its attack. The details on these means and methods will be discussed in greater detail below, but the important aspect of these attacks for this section is that they are facilitated or hosted by civilians or civilian objects.

These types of systems are unlike prior chemical or biological weapons because they do not necessarily have deleterious effects on the host and certainly don't take full effect on the host, but rather save their full

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118.  Id. at art. 44.3. Although there is no official statement on this point, it appears that this provision is one of the reasons that the United States has not ratified Protocol I.  See Michael J. Matheson, Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int'l L. & Pol'y 419 (1987).
119.  Protocol I, supra note 9, art. 51.3.
120.  Id. at arts. 51.2, 51.3.
effect for the target. Thus, the civilian or civilian object can facilitate the attack without feeling much, if any, of the effects. This approach to disseminating a weapon system will stress the LOAC as future technologies continue to develop.

ii. Direct Participation in Hostilities

Not all civilians enjoy complete protection from being attacked. As GPI states, civilians forfeit their protection from attack if they take a direct part in hostilities.\[122\] The actual meaning of these words and their practical application on the battlefield has been a matter of great debate.\[123\] In response to the debate, the ICRC issued its "Interpretive Guidance on the Notion of Direct Participation in Hostilities"\[124\] (DPH Guidance), which was intended to provide guidance on what actions by civilians rose to the level of direct participation. While this publication is not without controversy\[125\] and certainly does not purport to be a statement of the law, it provides an interesting basis for analysis.

The DPH Guidance lays out three cumulative criteria for a civilian to be directly participating.\[126\] The first is that there must be a certain threshold of harm.\[127\] The harm should "adversely affect the military operations or military capacity of a party to an armed conflict, or . . . inflict death, injury or destruction on persons or objects protected against direct attack."\[128\] The second criterion is that there must be direct causation.\[129\] The act must be designed to directly cause harm, or part of a concrete and coordinated military operation of which the act constitutes an integral part.\[130\] Finally, there must be a belligerent nexus between the act and the conflict.\[131\] In other words, the act must be designed to directly cause the required threshold of harm in support of a party to the conflict.\[132\]

However "direct participation" is defined, future weapons systems and tactics will likely increase the number of civilians who become actors on the battlefield, either intentionally or otherwise. Some examples follow.

\[122\] Protocol I, supra note 9, art. 51.3.


\[124\] Id. at 1006–09.


\[126\] Melzer, supra note 123, at 1016.

\[127\] Id.

\[128\] Id.

\[129\] Id. at 1019.

\[130\] Id. at 1019–25.

\[131\] Id. at 1025.

\[132\] Id. at 1026.
a) Tools

In the scenario from *The Atlantic* at the beginning of this Article, Samantha has no idea that she is playing a role in the attack on the President of the United States. She is undoubtedly an innocent instrumentality or tool in the attack plan. Nevertheless, she is a key component of the attack and her ingestion of the virus and subsequent spreading of the virus is vital to the operation. Is she directly participating in hostilities though she has no intention of taking part? Does her lack of intention make targeting her any less vital?

Many other future means and methods of warfare will use civilians as tools in the attack as well, including genomics and nanotechnologies. Cyber operations already struggle with this issue.\textsuperscript{133} The use of civilians as tools to facilitate advanced technological attacks requires a reconsideration of the rules on direct participation.

b) Transnational Communities of Interest

The rise of social networking and its ability to instantaneously link together individuals and groups from across the globe is just beginning to be explored as a social phenomenon. Negative aspects of this global linkage are already being felt across various levels of society, including the business world.\textsuperscript{134}

Jeffrey Walker has termed these groups “instantaneous transnational communities of interest” and argues that “It’s simply no longer necessary to have a state sponsor for an interested group of people to effect changes within the international community.”\textsuperscript{135} Anthony Lake, former National Security Advisor to President Clinton, described these instantaneous transnational communities of interest as “technology enabling local groups to forge vast alliances across borders, and ... a whole host of new actors challenging, confronting, and sometimes competing with governments on turf that was once their exclusive domain.”\textsuperscript{136}

Social networking’s effects on armed conflict have also already begun to surface\textsuperscript{137} and will only increase over time. As Philip Bobbitt has writ-

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\textsuperscript{136} Id. at 133, 330 (citing Anthony Lake, *6 Nightmares* 281–82 (2000)).

ten, "The internet enabled the aggregation of dissatisfied and malevolent persons into global networks."\textsuperscript{138}

Audrey Kurth Cronin likens social networking to the levée en masse and argues that it allows cyber mobilization of people across the entire globe on issues of common ideology.\textsuperscript{139} She writes:

The evolving character of communications today is altering the patterns of popular mobilization, including both the means of participation and the ends for which wars are fought... Today’s mobilization may not be producing masses of soldiers, sweeping across the European continent, but it is effecting an underground uprising whose remarkable effects are being played out on the battlefield every day.\textsuperscript{140}

As social networking continues to embed itself as a societal norm, people will begin to view themselves less as Americans, or Germans, or Iranians, and more as members of global ideologies created, maintained, and mobilized over social media.\textsuperscript{141}

Through social media, individuals will be able to recruit, provide financial support, collect intelligence, pass strategies and information, forward ideas and instructions for munitions, create and solidify plans of action, and coordinate attacks. These events will occur far from any existing battlefield but will have profound and immediate effects on hostilities, creating a global group of direct participants who will meet the legal criteria for targeting.

c) Hacktivists

The role of hacktivists has already been demonstrated in conflicts between Russia and Estonia\textsuperscript{142} and between Russia and Georgia.\textsuperscript{143} Though there has been no evidence to date to attribute these actions to states, David Hoffman argues that "States like China and Russia now encourage groups of freelance hackers to do their dirty work, allowing plausible deniability."\textsuperscript{144}

Additionally, other groups of hacktivists, which are clearly not state-sponsored or state-aligned, have been able to apply state-level force and create significant effects in armed conflicts. For example, the global collec-

\textsuperscript{138} Philip C. Bobbitt, Inter Arma Enim Non Silent Leges, 45 Suffolk U. L. Rev. 253, 259 (2012).

\textsuperscript{139} See, e.g., Audrey Kurth Cronin, Cyber-Mobilization: The New Levée en Masse, Parameters, Summer 2006, at 77, 77.

\textsuperscript{140} Id. at 84–85.

\textsuperscript{141} See Thomas J. Holt & Max Kilger, Examining Willingness to Attack Critical Infrastructure Online and Offline, 58 Crime & Delinquency 798 (2012).

\textsuperscript{142} Allan, supra note 133, at 59.

\textsuperscript{143} Id.

tive “Anonymous” has engaged in activities against states during armed conflict with the intent to influence government behavior.  

Because hacktivists participate along a spectrum of activities with varying associations, it is very difficult to determine each individual’s level of participation. Unless the collective work of a hacktivist group rises to the level of an organized armed group (see below), it is difficult to treat it as a collective when making targeting determinations. Many individuals, though part of the organization, may just be tools (see above) on any specific operation. 

In addition to groups, individuals often act alone in this capacity and can also cause great damage. One of the first monumental “hacks” in the United States was the “solar sunrise,” which ended up being the work of three individuals—a man in Israel and two teenagers in California.  

Hacktivism is unique to computer operations, but civilian activism is not. As the world progresses toward future armed conflict, activists and activist groups in other areas will certainly coalesce. Genomics and nanotechnology will have their own Cap’n Capsid and the international community will have to figure out how to deal with them under the LOAC. 

d) “Arms” Dealers 

As is discussed below in Section II(C), a wide variety of new means and methods of warfare will emerge as future technologies develop. Similar to computer malware from the hacktivists of the prior section and bioengineers from the scenario at the beginning of this article, some of these new technologies will not be limited to development by states. Some will be developed and marketed by individuals, organized groups, criminal organizations, and corporations. There is already a large market for cyber “arms” that is very lucrative and is sourced almost exclusively by non-state actors.  

Some of these arms dealers may also be users of the arms, which will make their legal classification simpler; but many will not be users, but mere producers. For them, this will be a business opportunity, just as it is for many contemporary arms dealers who deal in traditional arms. However, the spread of technology and the needs of future armed conflict will open this line of work to a much broader and previously innocuous group of individuals. At some point, do these creators of modern arms become


participants in the conflict? If not, can they assume that they can continue
to take these actions with relative impunity?

c) Nongovernmental Organizations

Nongovernmental organizations (NGOs) deserve mention here also. Though
they are unlikely to become actors on the future battlefield, they
are expanding their participation in international governance. One
need only look at their efforts in the area of anti-personnel landmines to
see how significant an effect NGOs can have in the formulation and alteration
of the LOAC. It seems likely that the trend of greater influence by
NGOs will increase and that as the international community struggles to
evolve the LOAC in response to future places, actors, and means and
methods of warfare, NGOs will have a seat at the table. Their involvement
in law formulation may provide a vehicle for the incorporation of each
NGO’s individual agenda, whatever that may be. While this may or may
not result in positive effects on LOAC development, the point is that
NGOs’ role is increasing which is likely to lead to different results than in
the past.

b. Organized “Armed” Groups

One of the great clarifications urged by the DPH Guidance is the recog-
nition that civilians often form themselves into organized armed groups
and that membership in these groups should result, to varying degrees, in a
forfeiture of civilian protections. These groups, in many varieties, are
likely to increase in future armed conflict. Some examples are discussed
below.

i. Non-traditional “Armed” Groups

One of the most important potential changes to the idea of organized
armed groups in the future is what it means to be armed. In the discussion
above, transnational communities of interest and hacktivist groups were
treated as individuals who might directly participate in hostilities. This was
based on a more traditional view of “armed,” meaning kinetic, weapons.
However, many future technologies will produce, as in the scenario at the
beginning of this article, weapons or things that can be used as weapons
that are very different than the traditional view of “arms.”

For example, is “Anonymous” an organized armed group? It possesses
state-level force with its ability to infiltrate and affect governmental
(and corporate) computer systems. Would a transnational community of
interest that has gathered DNA samples on world leaders and is willing to

148. Steve Charnovitz, Two Centuries of Participation: NGOs and International Gov-
150. For example, the ICRC’s DPH Guidance allows for targeting based on mem-
bership in an organized armed group when combined with a continuous combat function within
the organization. Maltzer, supra note 123, at 1006–09.
sell them to the highest bidder be an organized armed group? Or a group of individuals who work together to build a virus that will transport a gen- nomic mutator? Or a transnational group of concerned scientists who publish openly nanotechnology processes or offer their services so everyone can enjoy the benefits of nanotechnology?

The future is likely to present numerous groups of varying composition and intent that do not possess traditional arms, but control or create the means to do great harm. These groups will stress the current application of targeting law, including the determination of lawful targets (as will be discussed below), even with the clarification of organized armed groups.

ii. Traditional “Armed” Groups

In addition to the non-traditional armed groups, the types and activities of more traditional armed groups will also expand. Four examples are discussed briefly below.

a) Private Security Companies

Much has been written recently concerning the use of private contractors, and particularly private security companies (PSC). 151 The use of contractors in current military operations has added pressures to the definition of actors on the battlefield. 152 Private contractors are involved in providing a wide array of services 153 and according to the ICRC, the trend of militaries outsourcing traditional military functions to private contractors is “likely to increase in the years ahead.” 154


154. Kellenberger, supra note 22.
In response to abuses, good work is already being done in this area and more will continue to be done. However, this work is unlikely to constrain how these groups are used in the future. Governments will continue to hire PSCs to provide security to people and places on the battlefield. Even if not intentionally, the PSCs will continue to find themselves in the midst of situations requiring the use of force. It is quite possible that at some future point, some states will contract out their entire state armed forces and designate them as combatants representing the state. If this occurs, significant businesses will arise whose purpose is to provide state forces for hire. These groups of fighters, though likely compliant with the LOAC, will also be loyal to their paymaster rather than a specific state.

b) Corporate Participation and Armies

In addition to private armies for hire, corporations will do even more to provide their own security, especially in regions of instability. ExxonMobil in Indonesia and Talisman Energy in Sudan have already "hired" and controlled national military forces to protect their business interests. Past corporate involvement in armed conflict includes "unlawful taking of property, forced labor, displacement of populations, severe damage to the environment, and the manufacture and trading of prohibited weapons. Recent events where corporate assets were attacked and employees held hostage would increase and cause corporations to reconsider their protective posture.


Many corporations have far greater resources than the states in which they operate. The search for profit will drive them to protect their assets in areas where governments cannot control the territory. In many cases, this territory will be contested and in an area already enflamed by internal armed conflict. These corporate armies will be tasked with protecting corporate assets, employees, and resources, but will find themselves involved in the armed conflicts raging about them.

c) Global Criminal Enterprises

Another group that could also be discussed under “Organized Armed Groups” below is global criminal enterprises, such as the various organized narcotics organizations operating in Mexico and other parts of Central and South America. Reports place the number of armed fighters in Mexico alone at over 100,000, a number much larger than in most recent armed conflicts.

In addition to narcotics organizations, global criminal enterprises are involved in counterfeiting, money laundering, arms smuggling, and the sex trade to name just a few. Many of these criminal enterprises have links to armed conflict and even contain factions within their business whose role is to conduct military-type tasks necessary for the business enterprise. However, all of these global organizations are likely to appear on future battlefields in order to conduct their business.

d) State Paramilitaries

The large-scale operation of armed drones by the CIA portends a shift in the use of paramilitary organizations in the future. While the CIA has, from its inception, been involved in covert operations that resulted in military-type activities, the scale and openness of current operations is qualitatively different. There is very little difference between the drone strikes conducted by the U.S. military and those done by the CIA, except perhaps in their regulation by the LOAC.

These activities by the United States will likely set an example for other countries that also have similar agencies and will begin to use them more openly in similar ways. Future armed conflicts will undoubtedly involve intelligence and other paramilitary agencies operating openly and using military weapons and tactics.


c. State Forces

Significant changes will occur in future armed conflict even to recognized state forces. The changing methods of warfare will undermine the traditional criteria for combatants, and the incorporation of autonomous weapons into regular armed forces will diminish the role of humans in targeting decisions.

i. Combatant’s Traditional Criteria

Article 1 of the Annex to Hague Convention (IV) respecting the Laws and Customs of War on Land states that:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army.”

These qualifications for militias are repeated in the GPL. Though textually limited to militias and volunteer corps who are working with a party to

164. Hague Regulations, supra note 111, art. 1.
165. Article 4 states:

Art 4. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.

See Geneva Convention, supra note 18, at art. 4.
the conflict, the common understanding is that state forces will also meet these criteria.\textsuperscript{166} The difficulty with "armed groups" and these criteria has been alluded to above, but it also exists with traditional state forces.

States (and other organized groups) are employing weapons from great distances where the uniform of the targeter is indiscernible by the eventual target. The eventual target of malware launched from the National Security Agency in Maryland will be completely unaware of whether the person who launched the malware was wearing a uniform or civilian clothes. The development and employment of viruses or genomic mutators will likely be done far from the active battlefield.

Even if created and employed by uniformed personnel, when the virus, nanobot, or computer malware reaches its intended target, it will contain no marking that notifies the victim of the identity of the attacker. In fact, in many of these future weapons systems, anonymity is vital to the success of the operation. As future technologies develop, the issue of "having a fixed distinctive sign recognizable at a distance [and]... carrying arms openly"\textsuperscript{167} will pressure the LOAC to account for modern armed conflict practices.

ii. Autonomous Weapon Systems

Autonomous weapons have become a very important discussion in the area of the law governing future weapons systems. They include robots, unarmed and armed unmanned aerial and underwater vehicles,\textsuperscript{168} auto-response systems such as armed unmanned sentry stations,\textsuperscript{169} and a host of other developing weapon systems. The systems will be discussed in greater detail below as means and methods, but they are raised here because the more autonomous they become, the more like "actors" they appear.

\textsuperscript{166} According to 3 Geneva Conventions Commentary, supra note 113, at 52:

The drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of armed forces should have for purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians. The Convention does not provide for any reciprocal notification of uniforms or insignia, but merely assumes that such items will be well known and that there can be no room for doubt.

\textsuperscript{167} Hague Regulations, supra note 111, art. 1.


The military use of robots will sufficiently illustrate the point. It is clear that the general use of robots in armed conflict is increasing. According to Peter Singer, a well-known expert on the issue of robotics and armed conflict, "besides the U.S., there are 43 other nations that are also building, buying and using military robotics today." Remotely controlled armed robots entered action in Iraq in summer of 2007. This is a trend that will clearly continue. A report that the "Joint Forces Command drew up in 2005 . . . suggested autonomous robots on the battlefield will be the norm within 20 years," and a recent report written by the U.S. Department of Defense (DoD), titled *Unmanned Systems Integrated Roadmap FY2011-2036*, stated that it "envisions unmanned systems seamlessly operating with manned systems while gradually reducing the degree of human control and decision making required for the unmanned portion of the force structure."

It appears the intent is to increase the autonomy with which these weapon systems will function, causing Singer to point out that robotics is "changing not just the ‘how’ [of warfare] but the ‘who.’" Future robots may use "brain-machine interface technologies" or "whole brain emulation." The potentially autonomous nature of robots means that they will become actors on the battlefield, as well as means and methods of warfare. Singer describes this dramatically changing advance in robotic technology as a revolution:

Carrying forward, that means that our [robotic] systems . . . will be a billion times more powerful than today within 25 years. I’m not saying a billion in a sort of amorphous, meaningless, Austin-Powers’ one billion. I mean literally take the power of those systems and multiply them times 1 with 9 zeros behind it. What that means is that the kind of things people used to talk about only at science

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171. Singer is currently the director of the 21st Century Security and Intelligence and a senior fellow in foreign policy at Brookings. He has authored numerous articles and books on future weapons, with particular emphasis on robotics. See Peter W. Singer, BROOKINGS, [http://www.brookings.edu/experts/singerp (last visited Mar. 9, 2014)](http://www.brookings.edu/experts/singerp).


176. Singer, supra note 11, at 10.

177. Moreno, supra note 169.
fiction conventions like Comic-Con now need to be talked about by people like us, need to be talked about by people in the halls of power, need to be talked about in the Pentagon. We are experiencing a robots revolution.\textsuperscript{178}

In response to these advances, the DoD recently issued a Directive titled “Autonomy in Weapon Systems”\textsuperscript{179} that applies to the “design, development, acquisition, testing, fielding, and employment of autonomous and semi-autonomous weapon systems, including guided munitions that can independently select and discriminate targets.”\textsuperscript{180} The Directive states that “It is DoD policy that . . . [a]utonomous and semi-autonomous weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force.”\textsuperscript{181}

In the same week the DoD Directive was issued, Human Rights Watch issued a report\textsuperscript{182} calling for a multilateral treaty that would “prohibit the development, production and use of fully autonomous weapons.”\textsuperscript{183} The Directive and Report have sparked a great deal of discussion,\textsuperscript{184} much of which has revolved around the ability of an autonomous weapon to make decisions as required by the LOAC.\textsuperscript{185}

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178. Singer, supra note 11.
180. Dept. of Def., Directive, 3000.09, Autonomy in Weapon Systems ¶ 2a(2), (D.O.D. 2012). The Directive “[d]oes not apply to autonomous and semi-autonomous cyberspace systems for cyberspace operations; unarmed, unmanned platforms; unguided munitions; munitions manually guided by the operator (e.g. laser- or wire-guided munitions); mines; or unexploded explosive ordnance.” Id. ¶ 2b.
181. Id. ¶ 4a.
183. Id. at 46.
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Despite the DoD Directive, the international community must recognize that at some point, fully autonomous weapon systems will likely inhabit the battlefield (and may eventually become the predominant players) and will be making decisions that we now think of as requiring human intervention. This will stress our current understanding and application of the LOAC, and force an evolution in how we apply LOAC principles.

2. Emerging Law

The section above has touched only briefly on some of the emerging factors regarding actors on the battlefield that will place stresses on the LOAC in future armed conflicts. Anticipating these emerging factors, the law will need to evolve to respond to technological developments and signal appropriate regulation.

a. Attack

The proscription dealing with civilians is against making them the object of “attack.” The meaning of attack is defined in GPI as “acts of violence against the adversary, whether in offence or in defence.” The strict reading of this treaty language is that civilians are only protected from acts of violence. As clearly argued by Paul Walker, most cyber activities will not reach the threshold of an attack, meaning they are not proscribed. Cyber (and other) activities that cause mere inconvenience are legitimate, even when directed at the civilian population. This argument will arise again below under means and methods of warfare because there are any number of potential or future weapons that will likely fall under the threshold of an “act of violence.” If so, as a matter of targeting, civilians are not protected from these activities that do not amount to an attack.

For example, recalling the scenario from the beginning of the article, it is unclear whether the voluntary ingestion of a pill or even the inhalation of a nanobot would be considered an attack. Likewise, it is unclear that infection with a flu-like virus or even a viral gene alteration that had no effect on an individual would be considered an attack. Therefore, under the current LOAC, such activities may be permitted.

One might argue that Article 51 of GPI requires that “the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations,” and “military operations” is a category much broader than “attacks.” However, even Article 51 only pro-

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186. Anderson & Waxman, supra note 23.
187. Protocol I, supra note 9, at art. 49.1.
189. TALLINN Manual, supra note 42.
190. Protocol I, supra note 9, art. 51.1.
tects civilians against “dangers,” a term that is not clearly defined and might not include flu-like symptoms. Similarly, Article 57.1 states that “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”191 The commentary defines military operations as “any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat,”192 but does not explain what it means to “spare” the population or define “constant care.”193

With the future development of weapons that will undoubtedly fit below the attack threshold of “acts of violence,” it will be important to clarify the LOAC as it pertains to targeting of civilians as actors in armed conflict. If the LOAC is designed to protect civilians from the effects of armed conflict, more detail is necessary here.

b. Status and Conduct

Targeters justify attacking individuals based on either their status or their conduct. Combatants are targetable simply based on their status. The LOAC also allows targeting of members of the military wing or an organized armed group based on their status as members.194 Almost all others are targetable based solely on their conduct. In other words, the normal civilian has to do something to bring himself within the crosshairs of a targeter. As discussed above, future technologies will cause us to rethink how we currently understand both status and conduct.

Beginning with civilians, under the current DPH Guidance, it is unlikely that Samantha in the scenario that begins this article would be targetable. She is an unknowing facilitator of a uniquely lethal virus. Perhaps the virus could be targeted with lethal force, effectively amounting to the targeting of Samantha, but one can imagine a different scenario where Samantha might, instead of walking to the place where the U.S. President would be speaking, merely prepare food that was going to be served at a luncheon or package flowers that were going to be delivered to the White House. Does she become targetable once she has ingested the virus and remain targetable for the life of the virus, potentially for the rest of her life? The current LOAC does not seem to contemplate such a reading. One could argue that she does not directly participate at any point in her life (though she carries the virus) until she plans on coming into direct contact with the President, but the burden on targeters to maintain awareness of her until she decides to take direct part is overly burdensome, par-

191. Id. art. 57.1.


193. For a discussion on this issue relative to cyber operations, see TALLINN MANUAL, supra note 42; Eric Talbot Jensen, Cyber Attacks: Proportionality and Precaution in Attack, 89 INT’L L. STUD. 198, 202 (2013).

194. See, e.g., Melzer, supra note 123, at 1036.
ticularly once she has inadvertently passed the virus to others who now also presumably carry the threatening virus.

Similar difficulties arise from social networking and transnational communities of interest. As civilians attach themselves to causes, and then work through social media to forward that cause, do they become targetable? For example, are the tens of thousands of individuals targetable who forward a message trying to garner support for a rebel group? What if they are seeking information that might help the rebel group attack opposing forces?

In a variation on the same theme, can a state mobilize its citizens to accomplish national security goals through social media and not forfeit their protected status? Chris Ford proposes that the federal government use social networking methods to involve U.S. citizens “into a nation-wide program designed to address discrete security issues.” Would this make the citizens targetable?

Similarly with hacktivists, could Georgia have targeted the Russian hacktivists who were degrading the government’s ability to exercise command and control of their military forces? Whatever response Georgia would have contemplated would certainly be bound by the principle of proportionate response, but even the authority to target the hacktivists is unclear under the current application of the LOAC.

This prospect of using civilians as unwitting tools is an area where the LOAC is not fully developed. Many of the answers to these questions are undoubtedly fact-specific, but the use of these future technologies will force the international community to reconsider its application of LOAC immunity.

The same questions exist concerning civilian property. Collin Allan has highlighted the difficulties of the computer system that has been taken over remotely and acts as part of the attack but whose owner has not made any affirmative decision to participate in the attack. Perhaps that civilian property is transformed into a military objective, but if so, that would potentially implicate hundreds of thousands of computers that have been incorporated into powerful botnets and used for nefarious purposes.

This status and conduct difficulty will also be magnified as new “armed” groups, including PSCs, corporate armies, and paramilitaries, become more prominent on the battlefield. Presumably, the Taliban could target a member of the CIA who was flying an armed drone with the intent of attacking members of the Taliban, based on his conduct. Since the CIA now has a continuing program of targeting with armed drones, is the entire CIA (or even the portion who work with the drones) targetable?


196. Allan, supra note 133, at 78–81.

based on status, not conduct? Similar analysis would apply to PSCs or corporate armies.

In addition to the question of lawfully targeting corporate armies or PSCs, there is an issue of how the LOAC should respond to their increasing presence on the battlefield. Many will argue that holding to the current LOAC, which does not authorize them to participate with any status on the battlefield, is the right way to proceed. But the realities of future armed conflict and the prevalence of these actors may lead to a different conclusion.

And finally, in the area of status and conduct there is the traditional requirement of marking or wearing a uniform and carrying arms openly. This is an area that is ripe for LOAC evolution. Both Sean Watts and Rosa Brooks have written convincingly, challenging the value of the traditional requirements that combatants “have a fixed distinctive emblem recognizable at a distance,” and “carry arms openly” as being “detach[ed] from reality.” In an age where an ever-increasing number of weapons are initiated, launched, or activated from a time and place distant from the victim, wearing uniforms and carrying your weapon openly seems of little value.

Does it really matter to the victim if the individual launching the computer malware from his office in Maryland is wearing a uniform or not? Would it be much more meaningful if the malware itself was “marked” as coming from the United States? When the President collapses from ingesting the virus created in the scenario that begins this Article, would it do more to protect innocent victims of the armed conflict from the United States’ retaliation if the virus was somehow marked or if Cap’n Capsid was wearing a uniform while he took his actions in sending the virus to Samantha?

Each cruise missile launched by the United States is marked with a U.S. flag, though it is unlikely that anyone will ever see the flag as it flies toward its target. But the idea of marking the weapon may set the pattern for future “over the horizon” or “shoot and forget” weapons. One of the intents in originally requiring combatants to wear uniforms was to make clear that the attacker represented a sovereign. Accomplishing this with viruses, genomics, nanotechnology, and cyber attacks will force the international community to reexamine the traditional criteria for combatants.

c. “Human” Discretion

Much of the legal consternation over robotics and other autonomous weapons systems is the discomfort with non-human decision making in

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199. Brooks, supra note 5.
201. Watts, supra note 198, at 446.
armed conflict, or the “human-out-of-the-loop” weapons. The Human Rights Watch Report referenced above categorized autonomous weapons into three categories:

- **HUMAN-IN-THE-LOOP WEAPONS**: Robots that can select targets and deliver force only with a human command;
- **HUMAN-ON-THE-LOOP WEAPONS**: Robots that can select targets and deliver force under the oversight of a human operator who can override the robots’ actions; and
- **HUMAN-OUT-OF-THE-LOOP WEAPONS**: Robots that are capable of selecting targets and delivering force without any human input or interaction.203

Currently, it is unclear what having a human “in the loop” actually means204 and whether it will result in fewer targeting mistakes.205 What does seem to be clear is that having a human in the loop just makes the communication link between the robot and human the vulnerability.206

Despite this discomfort with a lack of legal precedent, technology continues to push forward, attempting to make robots more and more capable of independent decision making. Dyke Weatherington, DoD Deputy Director of Unmanned Warfare said, “I don’t see any program going down that path (yet). There are legal and ethical issues, and I just don’t think either the department or the technology is ready to do that.”207 Dr. Arkin, Director of the Mobile Robot Laboratory at Georgia Technical College, says that robots “will not have the full moral reasoning capabilities of humans, but I believe robots can—and this is hypothesis—perform better than humans.”208 There is certainly an argument to be made that a robot that is not subject to the emotions of the situation, dependence on inaccuracies and limitations of human sensory perception, and driven to make decisions based on frail human survivability will “perform better” and be less likely to engage an inappropriate target.

203. Human Rights Watch, supra note 182.
204. Singer, supra note 174.
205. Id.
206. Id.
208. Gary E. Marchant et al., International Governance of Autonomous Military Robots, 12 Colum. Sci. & Tech. L. Rev. 272, 279–80 (2011) (listing several reasons why autonomous robots may be able to outperform humans under combat conditions including: the ability to act conservatively, they can be used in a self-sacrificing manner if needed and appropriate without reservation by a commanding officer, and they can be designed without emotions that cloud their judgment); McKelvey, supra note 207; Cry Havoc, and Let Slip the Highly Ethical Robots of War, The AM. PROSPECT (Aug. 9, 2011), http://prospect.org/article/cry-havoc-and-let-slip-highly-ethical-robots-war.
Autonomous weapons on the battlefield will increase and the autonomy of those weapon systems will also increase, raising serious questions about how the LOAC can deal with these issues. As Jonathan Moreno has noted, "The various international agreements about weapons and warfare do not cover the convergence of neuroscience and robotic engineering." At what point do we determine that we have sufficiently programmed a weapon system such that it can legally respond to external information and stimuli in order to make a lethal decision? If the weapon acts incorrectly and unlawfully kills someone, who is responsible? Do we put the system on trial, its designer, its programmer, the soldier who set it up, or the commander who determined it could be used in that situation? As Vik Kanwar writes when reviewing Singer's Wired for War:

From the point of view of the international lawyer, the concern is not asymmetry of protection, but rather that one side might be shielded from legal consequences. For a series of partially coherent reasons, the "human element" is seen as "indispensable": for providing judgment, restraint, and ultimately responsibility for decisions.

All of these questions, and many more, raise legal issues that are as yet unresolved but will need to be resolved as technology propels us toward the greater use of autonomous weapons. It is unlikely that the international community will respond to Human Rights Watch’s call for an international agreement to ban autonomous weapons. History does not support that idea. Therefore, the international community needs to begin now to think of how the LOAC must evolve to respond.

C. Means and Methods

"Few weapons in the history of warfare, once created, have gone unused."

U.S. Deputy Defense Secretary William J. Lynn III

The quote above by William Lynn highlights the need to evolve the LOAC to regulate new technologies. Once developed, weaponized technologies almost inevitably find their way onto the battlefield. In the few instances where the technologies have not been used, or at least used in a

210. Moreno, supra note 169.
212. See Banusiewicz, supra note 10.
213. Anderson and Waxman make this argument very effectively concerning autonomous weapons in their article, Law and Ethics for Robot Soldiers. Anderson & Waxman, supra, note 23.
limited fashion, it has been largely based on legal restrictions.\textsuperscript{215} The means and methods discussed below will also require the international community to consider whether the current LOAC is sufficient to adequately regulate their use, and where not, consider what evolutions to the LOAC are necessary.

1. Emerging Factors

Weapons technology is always advancing. The means of conducting hostilities and the methods for employment of those means will continue to develop at an incredible pace over the next few decades. Many of these future technologies, some of which are discussed below,\textsuperscript{216} will spring from peaceful advances that greatly benefit the world at large, but when weaponized, create difficult regulatory and response problems.\textsuperscript{217}

a. Means

The means of armed conflict generally refers to the weapon used to engage a target, whether that weapon is a rifle fired by a fighter, an explosive round fired from an artillery tube, or a bomb dropped from an aircraft. Research continues to develop weapons that are more lethal, more accurate, more survivable, and less expensive. Future weapons will develop in response to perceived needs by the military, constrained by the LOAC. This section is certainly not comprehensive, but will discuss some


\textsuperscript{217} Hoffman, supra note 144, at 78 ("Both cyber and bio threats are embedded in great leaps of technological progress that we would not want to give up, enabling rapid communications, dramatic productivity gains, new drugs and vaccines, richer harvests, and more. But both can also be used to harm and destroy. And both pose a particularly difficult strategic quandary: A hallmark of cyber and bio attacks is their ability to defy deterrence and elude defenses.").
of the new weapons technologies that are being developed or researched to highlight some of the areas where the LOAC will need to evolve.

i. Drones

Drones are a quickly developing technology, and their use has been widely documented.218 In addition to the armed drones so often the topic of discussion in the media,219 the United States is using unmanned, unmarked turboprop aircraft in places like Africa to “record full-motion video, track infrared heat patterns, and vacuum up radio and cellphone signals.”220 Drones are now a component of local law enforcement and the U.S. Federal Aviation Administration is going to pass laws regulating the use of domestic airspace for drones,221 in anticipation of a dramatic increase in drone space requests.

As the technology continues to develop, not only would drone capabilities increase, but also drone size will significantly decrease. The United States is currently designing drones as small as caterpillars and moths that replicate flight mechanics so they can “hide in plain sight.”222 Eventually, drones will be measured in terms of nanometers and be capable of travel through the human body.223

In addition to decreasing the size of drones, the technology to arm these microscopic drones continues to increase. Through innovative weapons technologies,224 genomics,225 and other miniaturization advances, future nanodrones will be lethal and pervasive, amongst the population generally and continuously transmitting data back to the drone’s controllers. Singer describes them as a “game changer” on the level with the atomic bomb.226


219. Bergen & Tiedemann, supra note 218, at 17.

220. Whitlock, supra note 153.


223. See Blake & Imburgia, supra note 33, at 180.


225. See infra Part II.C.1.a.vii.

226. Interview with Peter W. Singer, supra note 47 (“I think the way to think about unmanned drones is they are a game-changer when it comes to both technology, but also war and the politics that surrounds war. This is an invention that’s on the level of gunpowder or the computer or the steam engine, the atomic bomb. It’s a game changer.”).
Technology will also make drones accessible to many more actors than states. Currently, “for about $1,000, you can build your own version of the Raven drone.” General access to miniaturized drones will soon follow. Eventually, a disgruntled adversary or disaffected civilian will not need Samantha to carry the virus to the President, but a microdrone with the ability to inject the virus into the President’s system.

ii. Cyber

In recent surveys by Foreign Policy, cyber capabilities were viewed as the most dangerous of emerging capabilities. Like drones, cyber operations have been written about extensively, including the new Tallinn Manual, which gives guidance on the application of LOAC to cyber operations in armed conflict. As mentioned above, many nations are developing cyber capabilities, and some speculate that cyber operations will become such a part of future conflict that “eventually, the Cyber Force will need to become a separate military branch because of cyberspace’s international use as a battlefield that directly affects households, corporations, universities, governments, military, and critical infrastructures.”

The increasing prevalence and complexity of cyber weapons is without dispute. The Stuxnet malware “infected about 100,000 computers worldwide, including more than 60,000 in Iran, more than 10,000 in Indo-

227. Singer, supra note 11.

228. Elizabeth Dickinson, The Future of War, FOREIGN POL’Y, Mar.-Apr. 2011, at 64, available at http://www.foreignpolicy.com/articles/2011/02/22/the_future_of_war (describing that out of sixty-two top professionals, policymakers, and thinkers in the military world, twenty-four reported drones and other unmanned technologies to be the most innovative in the last decade but the highest response for the most dangerous innovation was cyber warfare). In the 2012 survey, of seventy-six top professionals, policymakers, and thinkers in the military world, twenty-four (the majority by ten) thought that cyber operations was the area where the Chinese were catching up with U.S. capabilities the fastest. Margaret Slattery, The Future of War, FOREIGN POL’Y, Mar.-Apr. 2012, at 78, available at http://www.foreignpolicy.com/articles/2012/02/27/The_Future_of_War?print=yes&hidecomments=yes&page=full.


231. See supra Part II.A.1.e.


233. See generally Thabet, supra note 78.
nesia and more than 5,000 in India;"234 the recent Flame malware235 "exceeds all other known cyber menaces to date" according to Kapersky Lab and CrySys Lab which discovered the malware.236

One of the great allures of cyber weapons is their bloodless nature,237 but ethicists worry about the impact of that on armed conflict. "With cyberweapons, a war theoretically could be waged without casualties or political risk, so their attractiveness is great—maybe so irresistible that nations are tempted to use them before such aggression is justified."238

Another aspect of cyber means of armed conflict is its ready access to non-state actors. Individual hackers have been known to develop sophisticated malware and cause great damage.239 Particularly in cyber operations, one of the great dangers is reengineering or copycats.240 As reported by David Hoffman,

Langner [who first discovered the Stuxnet malware] warns that such malware can proliferate in unexpected ways: "Stuxnet's attack code, available on the Internet, provides an excellent blueprint and jump-start for developing a new generation of cyber warfare weapons." He added, "Unlike bombs, missiles, and guns, cyber weapons can be copied. The proliferation of cyber weapons cannot be controlled. Stuxnet-inspired weapons and weapon technology will soon be in the hands of rogue nation states, terrorists, organized crime, and legions of leisure hackers."241


235. See generally Full Analysis of Flame's Command and Control Servers, supra note 79.


241. Hoffman, supra note 144.
iii. Robots

Again, the use of robots has been well documented, along with many of the issues they create. Though the use of robotics has not progressed as far as that of drones and cyber operations, their use is increasing in armed conflict. As noted by Singer,

When the U.S. military went into Iraq in 2003, it had only a handful of robotic planes, commonly called “drones” but more accurately known as “unmanned aerial systems.” Today, we have more than 7,000 of these systems in the air, ranging from 48-foot-long Predators to micro-aerial vehicles that a single soldier can carry in a backpack. The invasion force used zero “unmanned ground vehicles,” but now we have more than 12,000, such as the lawn-mower-size Packbot and Talon, which help find and defuse deadly roadside bombs.

Singer further argues that “literally thousands of Americans are alive today because of [ground and air robotic systems]. They offer precision on the battlefield never imagined before, as well as remove many dangers to our forces.”

Robots will be used for both lethal and less than lethal operations. Bobby Chesney speculates on the potential use of robots in capturing as opposed to killing enemies on the battlefield. He admits this possibility is “far-fetched” now, but says he “would not be surprised to learn that a robotic descent/secure/ascent technology already is in development.”

Retired Army Colonel Thomas Adams argues that “Future Robotic weapons ‘will be too fast, too small, too numerous and will create an environment too complex for humans to direct.’ . . . Innovations with robots ‘are rapidly taking us to a place where we may not want to go, but probably are unable to avoid.’” Testing and development continue as robots take a more active role in hostilities.

243. P. W. Singer, We, Robot, SLATE (May 19, 2010), http://www.slate.com/articles/news_and_politics/war_stories/2010/05/we_robot.html; see also Bumiller & Shanker, supra note 222.
iv. Nanotechnology

Nanotechnology is “the understanding and control of matter at the nanoscale, at dimensions between approximately 1 and 100 nanometers, where unique phenomena enable novel applications.” As stated by Lieutenant Commander Thomas Vandermolen, “Nanoscience is in its infancy” and its “true practical potential is still being discovered.” It has already “exploded from a relatively obscure and narrow technical field to a scientific, economic and public phenomenon.”

The United States has embraced nanotechnology development. The National Nanotechnology Initiative is a federal interagency activity that was established in 2000. It is managed by the National Science and Technology Council and its goal is to “expedite[] the discovery, development and deployment of nanoscale science and technology to serve the public good, through a program of coordinated research and development aligned with the missions of the participating agencies.” Nanotechnology has already yielded amazing results including “a nanoparticle that has shown 100 percent effectiveness in eradicating the hepatitis C virus in laboratory testing.”

Because of its potential and its infancy, the U.S. Government has passed legislation concerning nanotechnology, creating a National Nanotechnology Program (NNP) and a National Nanotechnology Coordination Office (NNCO). The responsibilities of the NNCO are to

1. establish the goals, priorities, and metrics for evaluation for federal nanotechnology research, development, and other activities;

(2) invest in federal research and development programs in nanotechnology and related sciences to achieve those goals; and

(3) provide for interagency coordination of federal nanotechnology research, development, and other activities undertaken pursuant to the Program.\textsuperscript{255}

The legislation does not mention military uses of nanotechnology, but it does task the NNP with "ensuring that ethical, legal, environmental, and other appropriate societal concerns, including the potential use of nanotechnology in enhancing human intelligence and in developing artificial intelligence which exceeds human capacity, are considered during the development of nanotechnology."\textsuperscript{256}

Nanotechnology research is booming. The U.S. Government Accountability Office reports that:

From fiscal years 2006 to 2010, the National Science and Technology Council reported more than a doubling of National Nanotechnology Initiative member agencies’ funding for nanotechnology environmental, health, and safety (EHS) research—from approximately $38 million to $90 million. Reported EHS research funding also rose as a percentage of total na-


\textsuperscript{256} 15 U.S.C. § 7501(b)(10) (2006). In response to concerns about the ethics of nanotechnology, the President’s Council of Advisors on Science and Technology, in its report of April 2008 on nanotechnology, concluded:

[T]here are no ethical concerns that are unique to nanotechnology today. That is not to say that nanotechnology does not warrant careful ethical evaluation. As with all new science and technology development, all stakeholders have a shared responsibility to carefully evaluate the ethical, legal, and societal implications raised by novel science and technology developments. However, there is no apparent need at this time to reinvent fundamental ethical principles or fields, or to develop novel approaches to assessing societal impacts with respect to nanotechnology.


More recently, codes of conduct have emerged at the forefront of discussions to restrict the use of genetic engineering to create new biological weapons. Although there are concerns that unenforceable codes of conduct will not provide strong enough assurances against the creation of new genetically engineered biological weapons, they may play an important bridging role in providing some initial protection and governance until more formal legal instruments can be negotiated and implemented. In the same way, codes of conduct may play a similar transitional role in establishing agreed-upon principles for the military use of robots.

notechnology funding over the same period, ending at about 5 percent in 2010.257

In addition to the United States, countries like China and Russia are also "openly investing significant amounts of money in nanotechnology."258

The potential benefits of nanotechnology for military purposes have quickly become apparent. As early as 2006, Forbes reported:

The Department of Defense has spent over $1.2 billion on nanotechnology research through the National Nanotech Initiative since 2001. The DOD believed in nano long before the term was mainstream. According to Lux Research, the DOD has given grants totaling $195 million to 809 nanotech-based companies starting as early as 1988. Over the past ten years, the number of nanotech grants has increased tenfold.259

Blake and Imburgia believe that nanotechnology will have a profound effect on both means and methods of warfare:

Scientists believe nanotechnology can be used to develop controlled and discriminate biological and nerve agents; invisible, intelligence gathering devices that can be used for covert activities almost anywhere in the world; and artificial viruses that can enter into the human body without the individual's knowledge. So called "nanoweapons" have the potential to create more intense laser technologies as well as self-guiding bullets that can direct themselves to a target based on artificial intelligence. Some experts also believe nanotechnology possesses the potential to attack buildings as a "swarm of nanoscale robots programmed only to disrupt the electrical and chemical systems in a building," thus avoiding the collateral damage a kinetic strike on that same building would cause.260

Nanotechnology also has the:

potential to drastically enhance military operations and safety as well as homeland security. Advances in lightweight, nanoscale-engineered materials will protect soldiers on the battlefield from bullets and shrapnel while giving them extreme mobility. In case of injury, engineered bandages with embedded antimicrobial na-


258. Blake & Imburgia, supra note 33, at 180.


260. Blake & Imburgia, supra note 33, at 180 (citations omitted).
nparticles will stop deep bleeding in a matter of minutes and keep the wound free from infection.261

Recently, French scientists “report[ed] the first attempt to control the combustion and the detonation properties of a high explosive through its structure.”262

Nanotechnology is likely to improve the strength and longevity of machinery,263 advance stealth technology,264 allow the creation of more powerful and efficient bombs,265 and result in miniature nuclear weapons.266 It will eventually allow for the creation of microscopic nanobots that can be controlled and used as sensors to gather information or as weapons to carry lethal toxins or genomic alterers into the bodies of humans.267

Nanotechnology is a development with almost unlimited applications to future armed conflict. It will make weapons smaller, more mobile, and more potent. It will provide easier, quicker, and more accurate means of collecting information. It will allow greater range, effect, and lethality. For actors with the technology, it has the potential to completely change armed conflict as we know it.

v. Directed Energy

Directed energy weapons include lasers of various magnitude, microwave and millimeter-wave weapons. These weapon systems are based on relatively new technology and almost all are still in the early stages of development. Despite this, in a report by the U.S. Defense Science Board dealing with directed energy,268 the co-chairs lament the lack of focus on what they term a “transformational ‘game changer’.”269 Though the DoD

261. Wolfe & van den Bergh, supra note 259.
269. Id. at vii.
is working on a number of potential systems, “years of investment have not resulted in any currently high-operational laser capability.”270 There are a number of functioning systems such as the Airborne Laser and the Advanced Tactical Laser,271 but these systems have not proven to be effective battlefield weapons to this point,272 though the Navy recently shot down a drone with ship-mounted laser.273

Despite these recent setbacks, directed energy weapons of various types are likely to be deployed in future armed conflicts. They will be used as maritime, airborne, land-based, and space-based systems. They will be used both as lethal and non-lethal variants.274

vi. Biological Agents

Biological agents have rarely appeared in armed conflict since the early twentieth century.275 However, “[s]ince 2001, senior members of both the Obama and Bush administrations, who have reviewed classified intelligence, have consistently placed biodefense at or near the top of the national-security agenda.”276 A 2008 report on the use of weapons of mass destruction, including biological agents, believes that “a weapon of mass destruction will be used in a terrorist attack somewhere in the world by the end of 2013” and that “terrorists are more likely to be able to obtain and use a biological weapon than a nuclear weapon.”277 Though such an attack has not materialized, the concern about such capability is still valid as evidenced by the fact that the FBI has recently established a Biological Countermeasures Unit that monitors the growing Do-It-Yourself Biology

270. Id.
271. Blake & Imburgia, supra note 33, at 177.
272. DEP. SCH. BD. TASK FORCE, supra note 268, at 21–29.
(DIYbio) movement. The general consensus is that although the United States has made progress in its biodefenses, we are far from being adequately prepared.

Recent advances in laboratory technology have allowed access to these horrific weapons to a much more general audience. Brett Giroir, former Director at the Defense Advanced Research Projects Agency (DARPA) argues that

[what took me three weeks in a sophisticated laboratory in a top-tier medical school 20 years ago, with millions of dollars in equipment, can essentially be done by a relatively unsophisticated technician. . . . A person at a graduate-school level has all the tools and technologies to implement a sophisticated program to create a bioweapon.]

Michael Daly writes that “there is already information in public databases that could be used to generate highly pathogenic biological warfare agents,” and “biohacker communities have popped up around the globe, with hundreds of do-it-yourself biologists testing their experimental prowess.”

In addition to increased access, the methods of contamination make biological agents catastrophically dangerous. As Wil Hylton argues,

The specter of a biological attack is difficult for almost anyone to imagine. It makes of the most mundane object, death: a doorknob, a handshake, a breath can become poison. Like a nuclear bomb, the biological weapon threatens such a spectacle of horror—skin boiling with smallpox pustules, eyes blackened with anthrax lesions, the rotting bodies of bubonic plagues—that it can seen the province of fantasy or nightmare or, worse, political manipulation.

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280. Id.


283. Hylton, supra note 276.
In combination with advances in nanotechnology, biological agents become even more deadly. As Immanuel has written, "the application of nanobiotechnology for engineering biological weapons opens pathways for an entirely new class of biology based nanowarfare. They could be self-replicating or non-replicating, remotely operable and extremely destructive."284

Biological agents also pose some unique problems for deterrence and interdiction. Graham Allison, the founding Dean of Harvard’s John F. Kennedy School of Government and a leading expert on nuclear proliferation, argues that biological terrorism presents some problems even more difficult than nuclear terrorism:

Nuclear terrorism is a preventable catastrophe, and the reason it’s preventable is because the material to make a nuclear bomb can’t be made by terrorists. But in the bio case—oh, my God! Can I prevent terrorists from getting into their hands anthrax or other pathogens? No! Even our best efforts can’t do that. I think the amazing thing is that one hasn’t seen more bioterrorism, given the relative ease of making a bioweapon and the relative difficulty of defending.285

The combination of increasing accessibility, the difficulty of detection and interdiction, and the potentially catastrophic nature of biological weapons makes them a very appealing weapon for not only terrorists, but also for nation-states. Despite current legal prohibitions, biological weapons will remain a possible (and likely) weapon in armed conflict.

vii. Genomics

Genomics is the “study of genes and their function.”286 The rapid advances in genomics have had a multitude of benefits for modern medicine and science in general. The costs are rapidly decreasing and accessibility rapidly increasing.

A couple of decades ago, it took three years to learn how to clone and sequence a gene, and you earned a PhD in the process. Now, thanks to ready-made kits you can do the same in less than three days . . . [T]he cost of sequencing DNA has plummeted, from

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287. Hoffman, supra note 144, at 78 (“One thing is certain: The technology for probing and manipulating life at the genetic level is accelerating. . . . But the inquiry itself highlighted the rapid pace of change in manipulating biology. Will rogue scientists eventually learn how to use the same techniques for evil?”).
about $100,000 for reading a million letters, or base pairs, of DNA code in 2001, to around 10 cents today.\textsuperscript{288}

However, calls for controls on genetic research and development are increasing.\textsuperscript{289}

Some scientists and concerned advocates argue for caution and restraint because “vulnerability arises from the relative ease with which this digital genetic code can be accessed, translated, and incorporated into conventional genetic technologies.”\textsuperscript{290} Machi and McNeill state that:

In today’s market it costs just a few thousand dollars to design a custom DNA sequence, order it from a manufacturer, and within a few weeks receive the DNA in the mail. Since select agents are currently not defined by their DNA sequences, terrorists can actually order subsets of select agent DNA and assemble them to create entire pathogens.\textsuperscript{291}

They similarly estimate that “by 2020 malefactors will have the ability to manipulate genomes in order to engineer new bioterrorism weapons.”\textsuperscript{292}

The range of nefarious possibilities through the use of genes is very broad. As proposed at the beginning of this article, stealth viruses could be introduced covertly through agricultural infestation or nanobots into the genomes of a given population, and then triggered later by a signal.\textsuperscript{293}

“Bionanobots might be designed that, when ingested from the air by humans, would assay DNA codes and self-destruct in an appropriate place (probably the brain) in those persons whose codes had been program-

\textsuperscript{288} Chariotis et al., supra note 282.


\textsuperscript{292} Id.; according to Paul Hansen’s review, Jeffery Lockwood’s book, Six-Legged Soldiers, describes how insects have been used in war over the last 100,000 years and suggests some possibilities for genomics and insects in the future. Paul Hansen, Six-Legged Soldiers: Using Insects as Weapons of War by Jeffery A. Lockwood, 13 J. MILITARY & STRATEGIC STUD. 140 (2009), available at http://jmsj.org/jmsj/index.php/jmsj/article/viewFile/375/395. Lockwood also details “the possibility of future human-made genomic infused mosquito weapons in North America,” specifically “the potential of insects to be used in future conflicts; terrorist attacks with crop destroying beetles, fireflies as natural guardians against biological attack, or cyborgs used for bomb detection based on the body of a cockroach as the ultimate indestructible and mobile platform.” Id.

med." The genomic material could be designed to cause a wide array of results “including death, incapacitation, [and] neurological impairment.”

Some domestic legal restrictions are beginning to appear. But the field of genomics and its potential weaponization is still new and difficult to accurately project or regulate. Even with this limited amount of information, it raises some important impacts on the LOAC that will be discussed below.

b. Methods

The method of targeting is most often a matter of tactics where the commander decides how and when to employ a weapon system. Commanders and individuals must not only concern themselves with the weapon they are using, but also with the way in which they are using it. Advancing technology allows weapons to be employed in creative ways that raise interesting legal issues.

i. Latent Attacks

Perhaps one of the most feared methods of attack is the latent attack. This type of attack is characterized by the placing or embedding of some weapon in a place or position where it will not be triggered until signaled sometime in the future or activated by some future action. Some latent attacks may even be triggered by the victim himself. As mentioned above in relation to genomics and biological weapons, latent attacks are a fertile area for development of stealth viruses and similar weapons. “The concept of a stealth virus is a cryptic viral infection that covertly enters human cells (genomes) and then remains dormant for an extended time. However, a signal by an external stimulus could later trigger the virus to activate and cause disease.” The unique aspect of this is that the viral genetic material might be implanted into the victim far in advance by a nanobot and potentially never activated or only activated upon some signal by the attacker or some other event, either triggered by an unknowing third party or the victim himself.


296. Charisiadis et al., supra note 282.

The method of implanting the attack far in advance of its likely use is not unique to biological agents and genomics. Latent computer attacks have already caused concern and continue to grow in appeal. Consider the manufacture of computer components. It is certainly possible that manufacturers of computer materials could embed source code in the hardware of computer components that would trigger certain functions or operations by that computer at a future time. Similarly, consider weapons or military equipment sales. As countries sell military hardware to other countries, it is entirely possible that latent code has been implanted that might affect its future function. For example, the United States sells F-16 aircraft to numerous countries around the world. It seems not only plausible, but perhaps irresponsible to not implant in the computer functions of that aircraft some computer code that will not allow the F-16 to engage aircraft that it identifies as belonging to the United States.

The ability to perform latent attacks and keep them hidden until the appropriate time is a technological question, but it seems unlikely that if the potential for such actions exists, it would not be used extensively, even against current allies, as a hedge against changing political landscapes and alliances.

ii. Camouflage

It is clear that camouflaging soldiers or military equipment is a legitimate ruse of war and raises no LOAC issues generally. However, future developments will allow camouflage in a different way than used before. Prior uses of camouflage included both blending in with the natural environment and mimicking other environments. For example, dressing in a camouflaged uniform allowed soldiers to blend into their environment, but the nature of the uniform was known to opposing forces. Painting vehicles to match the anticipated terrain did not change the form of the vehicle.

New technologies will use electronic sensors to “project images of the surrounding environment back onto the outside of the vehicle enabling it to merge into the landscape and evade attack.” Use of this type of camouflage in cities or urban environments might actually project a tank to be a civilian object such as a car. Similar technology is being developed for individuals as well.

299. War of Naked Force, Israel Eyes Cyberwar on Iran, REUTERS, (Jul. 7, 2009), http://www.ynetnews.com/articles/0,7340,L-3742960,00.html.
300. Sean Watts, Law-of-War Perfidy, on file with author.
301. Id.
303. See, e.g., Charley Cameron, Quantum Stealth Camouflage is a Hi-Tech Invisibility Cloak, INHABITAT (Dec. 22, 2012), http://inhabitat.com/quantum-stealth-camouflage-is-a-hi-
Other forms of “camouflage” for modern weapons might include hiding specific computers or information through making it appear to be something else, or piggybacking harmful malware or biological or genetic agents on useful or benign agents. These types of methods of attack, though not new in theory, will be much more prevalent because of the nature of new technologies and weapons in future armed conflict.

2. Emerging Law

Technologically advanced means and methods of warfare will change the way armed conflict occurs. As David Ignatius comments,

The ‘laws of war’ may sound like an antiquated concept in this age of robo-weapons. But, in truth, a clear international legal regime has never been more needed: It is a fact of modern life that people in conflict zones live in the perpetual cross hairs of deadly weapons. Rules are needed for targets and targeters alike.

The LOAC must respond by evolving in several specific but fundamental areas. The section below will outline some of the areas where adaptation is most needed.

a. Attack

As discussed above, the LOAC provisions apply most completely and forcefully only to actions that are deemed an “attack.” The meaning of attack is defined in GPI as “acts of violence against the adversary, whether in offence or in defence.” Many operations conducted with new technologies will not reach the threshold of an attack, meaning they are not proscribed. This has already been discussed with reference to cyber operations, but it equally applies to the other means and methods discussed above.

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306. See supra, Part II.B.2.a.
307. Protocol I, supra note 9, art. 49.1.
cussed above. For example, the use of a nanobot to infiltrate an individual’s body and collect data and then transmit that data to an adversary may seem more like espionage than an attack, despite its invasive nature. Similarly, the spreading of a gene\textsuperscript{308} that creates an allergic sensitivity to pollen may have significant effect on a fighting force, but might not be termed an act of violence.

Perhaps more vexing with respect to the LOAC definition of attack is its inability to clearly demarcate the temporal limitations on actions. Recalling the example at the beginning of this article, when does the attack occur? Is it when the virus is sent to Samantha? Is it when Samantha ingests the virus? Does Samantha attack all of her friends, associates, and unwitting accomplices by spreading the virus through proximity? Does the attack occur when the first infected person, whether Samantha or someone who has caught the virus from her, enters an area where she is proximate to the President? What about when the President actually ingests the virus? Or is it not an attack until the virus actually begins to do its genetic work on the President? If an analogy to a mine or explosive is appropriate, the attack would not occur until the virus actually began to take effect in the President. That would mean that no proportionality analysis was necessary for such an attack, since there would be no collateral damage from that specific attack. Such a conclusion does not seem to support the purposes of the LOAC in protecting non-participants from the effects of armed conflict.

Similar scenarios can be created with most future weapons that have latent effects. Computer viruses may sit resident in computer systems until activated by the attacker or victim (or third party—see below). Swarms of microrobots may cross a nation’s borders and take up residence at various critical points, awaiting the activation signal to commence their operations.\textsuperscript{309} As advancing technologies are developed that might affect future

\textsuperscript{308}. With respect specifically to genetic weapons, some commentators believe that all genetic weapons are already prohibited by the provisions of the 1925 Gas Protocol, Gas Protocol, supra note 275, and the 1972 Biological Weapons Convention which proscribes “microbial or other biological agents, or toxins[,]” Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, supra note 277. For example, Louise Doswald-Beck, in a presentation on the application of the LOAC to future wars, stated:

Mention must be made of a potential new method of warfare that is already prohibited in law but that could have horrific effects if developed, namely genetic weapons. The specter of this as well as of new and obviously preliminary developments in bio-technology has already motivated States to begin negotiations for the development of verification methods for the Biological Weapons Convention.

Louise Doswald-Beck, supra note 2, at 44. However, this position is not universally accepted. Additionally, even if states accepted that they were limited in the use of genetic weapons and honored their obligations, those arms control conventions do not bind non-state actors and certainly wouldn’t be a deterrent to terrorist organizations.

\textsuperscript{309}. This scenario could also cause some reflection on the adequacy of the \textit{jus ad bellum} under the U.N. Charter.
conflict, the LOAC will need to be ready to not only proscribe illegal behavior, but also signal in advance what kinds of behavior are prohibited.

b. Distinction and Discrimination

Article 48 of GPI embodies the foundational LOAC principle of distinction and states that “belligerents may direct their operations only against military objectives.”\(^{310}\) This rule is complemented by Article 51, paragraph 2 which states that “the civilian population as such, as well as individual civilians, shall not be the object of attack.”\(^{311}\) This rule is considered to be customary international law and binding on all nations, whether parties to the Additional Protocols or not.\(^{312}\)

Discrimination in the attack, or the prohibition on indiscriminate attacks, is “an implementation of the principle of distinction”\(^{313}\) and is codified in GPI, Article 51.4.\(^{314}\) As discussed above, these restrictions only apply to “attacks,” but even if one takes a very broad view of what constitutes an attack, the LOAC still struggles to signal effectively in the case of future weapons. For example, in the virus scenario from the beginning of the article, it appears that the lethal aspect of the virus can be and is directed at a specific military objective, and therefore not indiscriminate. Article 51.4(c) might allow one to argue that the virus was not indiscriminate in the attack because it was “of a nature to strike military objectives [the President in this case] and civilians or civilian objects without distinction.”\(^{315}\) However, the argument might be made equally convincingly that the virus did not “strike” civilians; it merely used or inconvenienced civilians.

A similar analysis can be made with cyber operations. Some have already made the argument that as a result of the use of Stuxnet by the United States, “contemporary warfare will change fundamentally” if cyber warfare is not regulated by international agreement.\(^{310}\) Speaking specifically about distinction and discrimination, Patrick Lin, Fritz Allhoff, and Neil Rowe write:

\(^{310}\) Protocol I, supra note 9, art. 48.

\(^{311}\) Id. art. 51.2.


\(^{313}\) 1 HUNKAERIS & DOWSWALD-BECK, supra note 312, at 43.

\(^{314}\) Protocol I, supra note 9, art. 51.4 (“Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.”).

\(^{315}\) Id. art. 51.4.

\(^{316}\) Misha Glenny, A Weapon We Can’t Control, N.Y. TIMES (June 14, 2012), http://www.nytimes.com/2012/06/25/opinion/stuxnet-will-come-back-to-haunt-us.html?_r=0.
It is unclear how discriminatory cyberwarfare can be. If victims use fixed Internet addresses for their key infrastructure systems, and these could be found by an adversary, then they could be targeted precisely. However, victims are unlikely to be so cooperative. Therefore, effective cyberattacks need to search for targets and spread the attack, but as with biological viruses, this creates the risk of spreading to noncombatants: while noncombatants might not be targeted, there are also no safeguards to help avoid them. The Stuxnet worm in 2010 was intended to target Iranian nuclear processing facilities, but it spread far beyond intended targets. Although its damage was highly constrained, its quick, broad infection through vulnerabilities in the Microsoft Windows operating system was noticed and required upgrades to antivirus software worldwide, incurring a cost to nearly everyone. The worm also inspired clever ideas for new exploits currently being used, another cost to everyone.\footnote{Lin et al., \textit{supra} note 238.}

The apparent difficulties in applying the principles of distinction and discrimination\footnote{See \textit{Tallinn Manual}, supra note 42, at 157; Jensen, \textit{supra} note 193, at 213–14.} to potential uses of future weapons implies that an evolved LOAC would provide better protections to victims of armed conflicts.

c. Precautions and Re-engineering

Article 57 of the GPI is titled “Precautions in Attack”\footnote{Protocol 1, \textit{supra} note 9, arts. 57.2(a)(i)–(ii), 58.} and requires the commander or fighter to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects”\footnote{\textit{Id.} art. 57.2(a)(i).} and “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”\footnote{\textit{Id.} art. 57.2(a)(ii).}

During the ratification process for the Protocol, there was great debate about what the term “feasible” meant.\footnote{14 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977), at 199 (1978); Jensen, \textit{supra} note 193, at 209.} Ultimately, “feasible” was generally understood “to mean that which is practicable or practicably
possible, taking into account the circumstances ruling at the time." This is the accepted standard when considering an attack.224

One of the interesting aspects of many future weapons systems that is different than historical weapon systems is the ability to re-engineer these weapons. Historically, when an attacker dropped a bomb on his adversary, he did not have to think of potential uses his adversary might make of that bomb. It was destroyed amidst the heat, blast, and fragmentation of the explosion. The same is not true of many future weapons. For example, when an attacker uses a virus or computer malware, the enemy can see those weapons, recover them, analyze their composition, and then re-create or re-engineer them and reuse that weapon. This would be equivalent to the United States, after using its new stealth aircraft in the fight against Saddam Hussein in Iraq, simply landing one of the aircraft at an Iraqi airport and inviting Saddam to give the aircraft to his scientists for analysis. Viruses, computer malware, genetic material, and many other future weapon systems do not self-destroy on impact. Re-engineering has already occurred in the case of computer malware225 and will undoubtedly continue to do so with other modern and future weapon systems.

This raises the question of whether these new technologies lead to a requirement for commanders to consider the potential effects from re-engineering as part of their attack analysis. In other words, assume a commander has the following plan. He will release a swarm of microrobots, perhaps in the form of flies, that injects the general population with a deadly but limited toxin that will only become lethal when combined with a known vaccination usually given only to military. He knows that his toxin is very discriminate in the attack, but he also knows that some enterprising geneticist might come along and reengineer his virus to affect the population more generally, having lethal effect on millions instead of one. If his discretely targeted toxin has the ability to be re-engineered and used to kill thousands or millions, must he consider that as part of his analysis when deploying the toxin?

d. Marking

The LOAC requirement of marking and its relation to future armed conflict has been addressed earlier in relation to actors on the battle-

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223. Letter from Christopher Hulse, Ambassador from the U.K. to Switz., to the Swiss Gov't (Jan. 28, 1998), available at http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1 256A0203FB6D277OpenDocument (listing the United Kingdom's reservations and declarations to Additional Protocol I, and explaining in paragraph (b) that "[t]he United Kingdom understands the term 'feasible' as used in the Protocol to mean that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations"); see also JOINT DOCTRINE & CONCEPTS CENTER, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 81 n. 191 (2004) (suggesting the same interpretation for the word "feasible").


field. The fundamental principle is that an attacker is required to distinguish himself in the attack. Similar concerns exist with relation to means and methods. Even if the actors are distinguishing themselves, to what extent is there or should there be a requirement that the weapon be distinguishable? For example, in the virus scenario, the victim state could have taken precautions had it been able to distinguish Samantha’s flu-like symptoms from a potentially deadly virus. As future weapons transform from “over the horizon” to “from everywhere,” the LOAC will need to provide some way for the victim to identify the attacker.

One of the more obvious examples of this is brought about by advances in camouflage, discussed above. As both vehicles and individuals use advanced technology to look like the surrounding environs, it is likely that both vehicles and fighters will take on civilian aspects. A tank that is parked amongst civilian vehicles and takes on their visual attributes may cross the line between ruse and perfidy. Is a genetically linked virus, masquerading as the common flu, significantly different? Similar concerns may exist in cyber warfare.

CONCLUSION

The rule of law is the civilian’s best bulwark not only against his own government but against those who would hold him hostage to their political objectives by threatening him with violence.

When Samantha and the others to whom she has already spread the virus enter the auditorium where the President will soon be speaking and carry with them the genetically targeted virus, they will be launching the LOAC on a course it is not currently prepared to travel. It is likely that many nations are on the brink of developing similar capabilities and they will undoubtedly be used in the future.

As Professor Bobbitt states above, the rule of law is vital to protecting the victims of armed conflict from the effects of armed conflict. The LOAC’s role as a signaling mechanism to states and other developers of future technologies that will appear on the battlefield is vital to continuing to limit hostilities with legal proscriptions. Future changes in the places, actors and means and methods of armed conflict will stress the LOAC’s ability, as currently understood and applied, to sufficiently regulate that conflict.

Now is the time to act. In anticipation of these developments, the international community needs to recognize the gaps in the current LOAC and seek solutions in advance of the situation. As the LOAC evolves to

326. See supra, section II.B.1.c.i.
327. Protocol I, supra note 9, art. 44.3.
328. Lin et al., supra note 238.
330. See id.
face anticipated future threats, its signaling function will help ensure that advancing technologies comply with the foundational principles of the LOAC and that future armed conflicts remain constrained by law.
Drones versus their Critics: A Victory for President Obama’s War Powers Legacy?

By Charles J. Dunlap, Jr.
Journal Article | Oct 14 2013 | 11:09pm

Drones versus their Critics: A Victory for President Obama’s War Powers Legacy?

Charles J. Dunlap, Jr.

Introduction

Few things have been more emblematic of the military and, indeed, political aspects of the Obama War Powers legacy than drones.[1][2] As many have noted, the use of this novel weapon’s system has vastly increased during the Obama Administration, particularly in areas outside of active combat zones directly involving U.S. forces.

Moreover, although there has been robust criticism by significant parts of the legal, academic, and political communities, neither the courts nor Congress has evinced much inclination to curtail or even publicly scrutinize the Administration’s use of drones. Most importantly for any democracy, the support of the American electorate for drones remains very strong, even after the tragic deaths of two hostages (including an American) in a strike in early 2015. In effect, the President has “de facto” institutionalized (if not expanded) War Powers with respect to drone operations.

How and why did this happen? This brief essay will attempt to outline the answer, and to suggest why the critics have been largely unsuccessful in efforts to limit or ban drone strikes. It will also offer some thoughts as to the meaning of (and limitations to) the President’s War Powers legacy as it relates to drone operations.

Context and Underpinnings

Drones operation must be understood in the context of the fact that today—as has been the case during most of the post-9/11 era—Americans consider terrorism to be the top foreign policy issue, and of even more importance, “in 10 Americans say the U.S. should use military force to protect itself from terrorist attacks.”[3] Given that the use of drones has been principally in the counterterrorism mode, it can be credibly asserted that the President’s program is consonant with the broader security expectations of the citizenry. This cannot help to enhance his “de facto” War Powers authority, especially since drones seem to be effective.

Regarding effectiveness, an illustrative (albeit not only) analysis is Jennifer Williams’ March article in Foreign Affairs. In it she reports that a newly-released trove of documents from Osama bin Laden’s lair “paint a picture of [al Qaeda’s] an organization crippled by the U.S. drone campaign.” Moreover, Williams concludes that the evidence supports “the argument that U.S. President Barack Obama and other proponents of the drone program have made” that the strikes are effective and that the U.S. drone program is heavily constrained.” Significantly, she notes the critically important psychological impact of drones on terrorists:

Because drone strikes have been effective and because the United States targets them carefully, al Qaeda operatives have taken to restricting their own movement, staying inside, and avoiding gathering in large groups—all activities that are fairly integral to running a successful terrorist organization. It’s not easy to train legions of recruits on how to fire RPGs, build bombs, and shoot guns with any accuracy when you have to stay inside the house and can’t have more than five people gathered together at one time. (Emphasis added.)

Does Global Disapproval Matter?

To be sure, controversy about drone effectiveness remains, but there is a growing consensus among experts that they are a useful tool, even if unpopular in some quarters, and notwithstanding that few believe they are the complete solution to terrorism and other security issues. Furthermore, the absence of another “9/11” event doesn’t seem to be lost on the public and US governmental officials. This may be why, as the New York Times reported in April, that even after the deaths of the hostages in January, support remains “deep” for drone operations not only within the Administration itself but on Capitol Hill as well. Even progressives like Senator Bernie Sanders has said he would continue the drone program.

Of course, U.S. public opinion and Congressional support are not the only relevant factors in assessing Obama’s War Powers’ drone legacy. For example, Professor Ashley Deeks recently analyzed the influence of foreign state and nonstate actors on U.S. security policy. While as will be explained below, it does look as if that the Administration modified its approach to drone operations at least in part to accommodate the views of foreign allies (among others), that effort appears to have had limited success.

However, global disapproval seems to have little strategic consequence. Consider the Pew Research Center’s 2014 survey that found that while the US’s drone’s intelligence program was popular in the vast majority of nations, there is nevertheless “little evidence this opposition has severely harmed America’s overall image”–in fact, 65% still had a “favorable” view of the U.S. Thus, at least with respect to drone operations as they are currently conducted, it is unlikely that overseas opposition will necessarily limit the President’s exercise of War Powers.

Ineffectiveness of Drone Critics?

There are many reasons that drone critics have not gained the traction in the U.S. that they seemed to have enjoyed overseas. In part, this may be the result of a larger problem that many lawyers, academics and others suffer: an insufficient understanding of the technologies of war as well as the methodologies and strategies for their use.

For example, with respect to drones, Amnesty International’s highly critical 2013 report was seriously discredited by David Axe in an article (“Dear Amnesty International, Do You Even Know How Drones Work?”) that emphasized the technical inaccuracies and even impossibilities about drone operations that Amnesty’s allegations reflected. Axe’s article is important not, per se, because of whatever circulation it received, but because it much reduces what knowledgeable decision-makers think when they read Amnesty ill-informed attack on drone use.
Joshua Feust did a similarly critical review of Human Rights Watch's (HRW) 2013 report about Yemen that it entitled - misleadingly - "Between a Drone and Al-Qaeda." What is misleading? Consider this: the report addresses six incidents where a total of 57 civilians were allegedly killed, but 41 of those civilian deaths were the result of a 2009 cruise missile attack, not a drone.

Evidently, HRW could not grasp the essential differences between the two weapons' systems, and why drones are typically a vastly better option than cruise missiles or even Special Forces in counterterrorism situations. Feust also points out something else that often undermines critics of knowledgeable decision-makers: HRW, he says, "asserts [that] individual targets, while part of AQAP, are not militarily important enough to warrant a strike" adding the profoundly important insight "[y]et they hardly have access to the same intelligence that guides U.S. targeters."

In short, well-versed leaders within the Administration, the armed forces, the intelligence community, and Congress are likely aware of the factual errors of many of the critics' complaints, and that has made them less susceptible to anti-drone arguments that might have otherwise operated to limit the President's political ability to use the systems.

Transparency: A Disingenuous Complaint?

An oft-repeated criticism of drone operations is that it is somehow lacking in the supposed lack of transparency. In a real way, this argument suggests an element of cognitive dissonance. For example, HRW, Amnesty International (as well as a more recent report by the Open Justice Society) all admit to concealing the identity of the people who the organizations claim witness drone strikes (or their aftermath), making it virtually impossible to verify the allegations or even determine if the witnesses actually exist. The irony is, of course, that "security" is precisely the same reason government puts forth for limiting transparency about drone strikes.

Insofar as Americans are concerned, the body politic does not appear to be too concerned about "transparency" complaints. The US public seems to instinctively appreciate the need to secrecy in national security matters. This may explain why a majority of Americans thought that the December 2014 release of the previously-classified Senate report on torture would hurt U.S. national security.

Still, the Obama administration has made a number of efforts at transparency. The President's May 2013 speech at the National Defense University (along with the accompanying fact sheet), outlined in general terms drone targeting policies, as well as his personal conviction that "these [drone] strikes have saved lives." – a conclusion echoed by former Deputy Director of the CIA Michael Morell in his new (2015) book.

The Administration's effort at transparency has, however, come with a cost. For example, the announced policy requirement of "near certainty" of no civilian casualties before an attack is authorized has no doubt encouraged adversaries to embed themselves among civilians, and may be one reason the hostages killed in January were found in the company of senior terrorist leaders.

Shifting Critics' Strategy?

All of this may suggest from a War Powers perspective that Americans (especially given poll results) are satisfied with the effectiveness and the transparency of the Obama administration drone program. This would seem to call for a change of strategy by drone critics. In a study released in May, two political scientists pointed out that "critics focusing on the effectiveness of strikes [have] had little impact, only those highlighting normative principles embodied in international legal principles significantly altered public attitudes toward drone warfare." [Emphasis added].

It is not surprising, therefore, that some critics have been reduced to obfuscating the realities with respect to drone strikes, apparently in the hopes of audiences drawing counterfactual conclusions as to adherence to "international legal principles." For example, in a July 2015 opinion piece published by the New York Times, Pratik Chatterjee -- an Amnesty International board member -- made this statement:

In 664 probable drone strikes in Pakistan, Somalia and Yemen recorded by the Bureau of Investigative Journalism (BIJ), as many as 1,128 civilians, including 225 children, were killed — 22 percent of deaths. The New America Foundation's estimates are lower, but suggest a civilian death rate of about 10 percent.

What he fails to point out is that even assuming the figures are true, the vast majority of the casualties that the drone-hostile BIJ claims actually occurred more than four years ago. As William Safire wrote in Slate in April shortly after reports surfaced about the deaths of two hostages in a January drone strike:

If you look at long-term data from Pakistan, you'll see a clear trend. Since 2012, drone strikes have declined. But civilian fatalities, at a far more acute rate, have virtually disappeared. A year ago, BIJ reported, "In the past 18 months, reports of civilian casualties in attacks on any targets have almost completely vanished... despite a rise in the proportion of strikes that hit houses."

To be sure, civilian casualties are hardly definitive or even criteria that might evidence a lack of adherence to "international legal principles," but they are often used to suggest the same because of their potential emotional impact, even if they are, in fact, legally justifiable. There are, however, some additional problems with a strategy intended to erode support for drone operations based on inaccuracies of illegality if not outright claims of the same.

Counters: Why Better Educated Americans Support Drone Strikes

It is quite noteworthy that support of drone strikes among Americans soars as educational levels rise. Specifically, the May 2015 Pew survey shows that among those with a high school degree or less, only 49% approved of drone strikes (with 42% disapproving). However, among those with a college degree or more, a whopping 67% approved, with just 27% disapproving. This plausibly suggests that education about the actualities of drone operations is an effective counter to many critics' contentions.

There is another, perhaps even more important problem with an anti-drone strategy that depends upon showing a lack of adherence to "international legal principles." The Pew survey also found that despite ongoing concerns that drone attacks endanger lives of innocent civilians only 29% of Americans were "very concerned" about whether the strikes were conducted legally. It is hard, frankly, to fully interpret this statistic as it is not clear whether people are indifferent to legality, or are simply satisfied that those conducting the strikes are doing so legally.

To the extent that the drone strikes are conducted by the U.S. armed forces (or are perceived to be) the poll results as to legality may be a reflection of the public's confidence in the military itself. In Gallup's annual poll of confidence in institutions (June 2015), the military was -- as has been the case for several years -- the institution in American society in which the public had the most confidence, far exceeding
even such entities as organized religion and the Supreme Court, not to mention Congress and the Presidency itself.

It appears that for its part the Administration is satisfied that it has successfully made its legal case. Steven Preston, the former CIA General Counsel and recently retired as the DoD General Counsel, contended in an April 2015 presentation that one result of a "series of speeches" by various governmental officials was that:

You no longer find, in the popular press or in professional discourse, the same routine references to the U.S. Government's counterterrorism operations as being "illegal." Not that the Administration has persuaded everyone or will ever satisfy all of its critics. But the lawfulness of our government's efforts to counter foreign terrorist threats is now better understood, and more widely accepted, at home and abroad.

Of course, the domestic legal authority for drone strikes would be central to any analysis of the President's War Powers legacy vis-à-vis drones. It is beyond the scope of this brief essay to fully explicate this issue, but it might be observed that the drone program's origination in the Bush Administration's "Article II"-centric rationale, coupled with the Obama Administration's increasingly tenuous AUMF-legalistic-constitutional rationale (and occasional overt reference to Article II authority) has over time produced something of a historical "gloss" favoring an innate presidential authority basis.

Consider this: In discussing the possible domestic legal bases for U.S. air and drone strikes supporting the African Union Mission to Somalia (AMISOM) last July, Professor Bobby Chesney noted the difficulty of finding a legal rationale within the existing 2001 AUMF. He further acknowledged the shift by the Obama Administration towards an Article II rationale by pointing out "how broadly the Obama administration construed its independent Article II authority to direct airstrikes (even if not boots-on-the-ground in Iraq during the first few months of airstrikes against ISIS)." But most importantly, Chesney concluded his analysis by asking with reference to the precise legal basis: "Does anyone care?" In answering his own question, he says:

It's not clear anyone really does. I may have missed it, to be sure, but I've not seen this issue raised anywhere else so far. And I doubt this post is going to set off any real debate. This is, I think, an unhealthy state of affairs.

It might well be said that Professor Chesney's assessment might also be applied with equal or greater emphasis to the drone program writ large.

Concluding Observations

The American experience with drones has clear implications for Obama's War Powers legacy. To reiterate, given widespread US public support for a program that began during a Republican administration and markedly expanded during a Democratic administration — with almost no interference from either Congress or the courts — it appears that the "historical gloss" plainly supports a nonpartisan argument that it is reflective of the President's War Powers authority.

Remarkably, the citizenry seems to accept any reasonably conceivable legal basis, be it either an aggressive construct of Article II power, or from tenuous statutory authority. There is, however, a major caveat: Public support might evaporate if there was documented — and credible — evidence of ineffectiveness and/or significant evidence of excessive and unwarranted civilian casualties.

The real lesson as to War Powers that could be drawn from the drone program might be that Americans are very pragmatic as to how a President exercises his War Powers, that is, they are less concerned about the technical legal basis as they are about success against authentic threats. Moreover, Americans are largely unmoved by foreign disapproval — even from allies — where they perceive the Nation's security to be threatened.

Finally, critics would do well to avoid the sometimes neo-Luddite flavor of their objections to military force employing drone technology. The fundamental idea of using technology to substitute for sending young soldiers in harm's way fits squarely with America's nation-of-tinkerers' culture, and has much basis in U.S. military history. Furthermore, on a very basic level — and contrary to the assumption of many — the notion of attempting to strike an adversary at a range beyond his ability to bring his weapons to bear is hardly new in the history of warfare. David killed Goliath with a missile weapon launched from afar; English long-bowmen destroyed the flower of French knighthood at Agincourt with ground-launched air weapons; and the US savaged Saddam Hussein's armored formations much because the main guns of American tanks outranged those of the Iraqis by 1,000 meters.

More provocatively, it is also worth observing historian Ian Morris' recent analysis of 10,000 years of conflict that he believes shows — quite counterintuitively to this writer — that "Fire has not only made us safer, but richer, too." While Morris focuses on the societal organization that armed conflict induces (and the many societal benefits that such human organization generates) it also might be reasonably suggested that the advance of warfighting technology has paralleled the 10,000 years during which he says the rates of violent death have declined very significantly.

In any event, it appears to this writer that criticism of the drone program is still extant but fading in the face of growing international acceptance. Recently, for example, the United Kingdom killed several of its own citizens in its first drone strike, it is claimed, "outside a formal conflict." An even harsher verity is found in a 2014 Defense One report which asserts that:

Virtually every country on Earth will be able to build or acquire drones capable of firing missiles within the next ten years. Armed aerial drones will be used for targeted killings, terrorism and the government suppression of civil unrest. What's worse, say experts, it's too late for the United States to do anything about it.

Those concerned with the appropriate use of the exercise of Presidential War Powers may find it prudent not to focus upon a particular technical expression of that power — vulnerable as doing so is to factual and technical analysis for which they may not be especially well-equipped to convincingly perform — but rather on the wisdom of larger purpose for which force is being used in the first place. Critics prepared to offer palatable options would also likely find an interested audience. In the absence of reasonable alternatives, drones can quickly become the best choice when the facts indicate a need for force.

Accordingly, the War Powers legacy emerging from Obama's drone operations may be that a President will nearly always enjoy broad support — almost regardless of the particular legal basis offered — when force is used to confront what Americans perceive as an authentic and serious threat, particularly when the force seems to be effective and is used in such a way as to minimize the risk to young Americans serving in uniform for whom the U.S. citizenry evinces such great affection and respect.
About the Author

Charles J. Dunlap, Jr.

Maj Gen Charles J. Dunlap Jr., USAF (ret.), the former deputy judge advocate general of the United States Air Force, joined the Duke Law faculty in July 2010 where he is a professor of the practice of law and Executive Director of the Center on Law, Ethics and National Security. His teaching and scholarly writing focus on national security, international law, civil-military relations, cyberwar, sipriwar, counter-insurgency, military justice, and ethical issues related to the practice of national security law.

In the course of his more than 34 year career, Dunlap has been involved in various high-profile interagency and policy matters, highlighted by his testimony before the U.S. House of Representatives concerning the Military Commissions Act of 2006.

Dunlap previously served as staff judge advocate at Headquarters Air Combat Command, Headquarters Air Education and Training Command, Headquarters U.S. Central Command Air Forces, and at U.S. Strategic Command among other leadership posts. His other assignments include the faculty of the Air Force Judge Advocate General School where he taught various civil and criminal law topics. An experienced trial lawyer, he also spent two years as a military trial judge for a 22-state circuit. He served overseas tours in the United Kingdom and Korea, and he deployed for operations in the Middle East and Africa, including data stints in support of the wars in Afghanistan and Iraq. He also led military-to-military delegations to Colombia, Uruguay, Iraq, and the Czech Republic.

A prolific author and accomplished public speaker, Dunlap’s commentary on a wide variety of national security topics has been published in leading newspapers, civilian publications and military journals. Many of his writings are available here, and his online contributions may be found here.

Available online at: http://smallwarsjournal.com/jrnl/art/drones-versus-their-critics-a-victory-for-president-obama%E2%80%99s-war-powers-legacy

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(15) http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6061&context=faculty_scholarship
(16) http://www.amnestyusa.org/research/reports/will-i-be-next-us-drone-strikes-in-pakistan
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(32) http://www.medium.com/pakistan-drone-strikes
(33) http://www.thebureauinvestigates.com/2014/05/23/most-us-drone-strikes-in-pakistan-attack-houses/
NATIONAL SECURITY LAW: A JUDICIAL ROUNDUP

MODERATOR: WILLIAM BANKS
MEMORANDUM

From: Ann Daniels, Legal Intern, ABA Standing Committee on Law & National Security
Date: October 20, 2015

BRIEF SUMMARY

This memorandum contains several cases recently decided and/or pending in lower federal courts and the Supreme Court of the United States that are within the realm of national security law. In the October 2015 term of the Supreme Court of the United States, there are three cases being argued before the Court that can be related to national security law. There are several Material Support of Terrorism (specifically, ISIL) prosecutions pending in the Federal District Courts, as well as unique civil cases still in litigation in the District Court of Oregon and Southern District of New York. The most unique case is the lawsuit against the Saudi Arabia government for its alleged involvement in the 9/11 terrorist attacks which has been revived by a recent remand from the 2nd Circuit Court of Appeals and a decision pending on the motions of the Saudi government and victims representatives. Further, in the United States Courts of Appeal, there have been several rulings on national security related issues in 2015.

1. SUPREME COURT OF THE UNITED STATES

The three cases that are set for oral arguments in the October 2015 term are OBB Personenverkehr v. Sachs, Bank Markazi v. Peterson, and RJR Nabisco, Inc. v. The European Community.

OBB Personenverkehr v. Sachs

The Supreme Court heard oral arguments in OBB Personenverkehr v. Sachs on October 5, 2015. Carol Sachs filed the original lawsuit against OBB, OBB Holding Group, and the Republic of Austria on the grounds that she suffered personal injuries when she tried to board a train in Innsbruck, Austria due to OBB’s negligence in moving the train while she attempted to board.¹ OBB Personenverkehr is a legal entity owned by OBB Holding Group, a joint-stock company, created by the Republic of Austria to operate a passenger rail service in Austria.² Further, OBB is a member of the Eurail Group—an association organized under Luxemburg law who markets and sells rail passes to non-European residents.³ Sachs purchased a four-day Eurail pass from the Rail Pass Experts (RPE), a travel agent, for travel in Austria and the Czech Republic.⁴ RPE is

² Id. at 587.
³ Id.
⁴ Id.
located in Massachusetts, but Sachs bought the Eurail pass through its website.\textsuperscript{5} OBB filed a motion to dismiss for lack of subject matter jurisdiction on the grounds that it was entitled to sovereign immunity under the FSIA.\textsuperscript{6} The District Court granted OBB's motion to dismiss on FSIA because there was no principal-agent relationship between OBB and RPE.\textsuperscript{7} Thus, the District Court found that RPE's commercial activity in the United States could not be imputed to OBB for the FSIA commercial activity exception. Sachs appealed to the 9\textsuperscript{th} Circuit Court of Appeals and that Court affirmed the District Court.\textsuperscript{8} However, the 9\textsuperscript{th} Circuit Court of Appeals ordered a reenacting en banc to determine the issue of "whether the first clause of FSIA commercial activity exception applies to a foreign sovereign when a person purchases a ticket in the United States from a travel agency for passage on a commercial common carrier owned by that foreign state."\textsuperscript{9} The en banc Court held that Sachs met her burden of proving that the commercial activity exception of FSIA applied to a common carrier owned by a foreign state that acted through a domestic agent to sell tickets to U.S. citizens or residents for use on that common carrier's transportation system.\textsuperscript{10}

OBB filed for writ of certiorari and presented two issues revolving around the Foreign Sovereign Immunities Act (FSIA). OBB presented two issues: (1) whether for purposes for determining when an entity is an "agent" of a "foreign state" under the first clause of the commercial activity exception to FSIA, 28 U.S.C. 1605(a)(2), the express definition of agency in FSIA, the factors in National City Bank v. Banco Para el Comercio Exterior de Cuba or common law agency; and (2) whether, under the first clause of the commercial activity exceptions of the FSIA, 28 U.S.C. 1605(a)(2), a tort claim for personal injuries suffered in connection with travel outside of the United States is "based upon" the allegedly tortious conduct occurring outside of the United States or the preceding sale of the ticket in the United States for the travel entirely outside the United States.\textsuperscript{11}

\textit{Bank Markazi v. Peterson}

The \textit{Bank Markazi} case addresses the issue of whether Congress exceeded its authority under separation of powers doctrine in the enactment of Section 8772 of the Iran Threat Reduction and Syria Human Rights Act of 2012 while the litigation of this case was pending. The case originated out of the 2001 case where representatives of Americans killed in the

\textsuperscript{5} Id.
\textsuperscript{7} Id.
\textsuperscript{8} Id.
\textsuperscript{9} Id. at 589.
\textsuperscript{10} Id. at 603.
1983 bombing of Maine barracks in Beirut, Lebanon filed wrongful death lawsuit to against Iran for its role in the bombing. The plaintiffs claimed that Iran provided financial and other support to Hezbollah in the bombing. Iran failed to file responses to two served complaints. As a result, the District Court, under FSIA requirements, made a finding that the plaintiffs have the right to obtain judicial relief and the plaintiffs received a default judgment. However, the plaintiffs were unable to receive the judgment from Iran.

In 2008, the plaintiffs discovered that Iran held $1.75 billion in cash proceeds of government bonds in New York at Citibank. The bonds belonged to an Italian bank whose customers included the Central Bank of Iran (Bank Markazi). The plaintiffs filed suit under Section 201(a) of the Terrorism Risk Insurance Act (TRIA) to collect these assets. Section 201(a) of TRIA allows individuals to collect the blocked assets of a terrorist party when that individual has received a judgment against a terrorist party. While this case was pending, Congress passed 22 U.S.C. § 8772. Section 8772 states, “the financial assets that are identified in and the subject of proceedings in the United States District for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., shall be subject to execution...in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of [terrorism].” Peterson and the other plaintiffs sought summary judgment; whereas, Bank Markazi argued that the statute violated the separation of powers doctrine because Congress ordered a federal court to direct a certain result in a particular case before it. The District Court granted summary judgement for plaintiffs and ordered that Bank Markazi turn over the assets on 22 U.S.C. § 8772 and Section 201(a) of TRIA. The 2nd Circuit Court of Appeals affirmed the ruling of the District Court. Bank Markazi filed a petition of certiorari on December 29, 2014 and the Supreme Court granted certiorari on October 1, 2015. The United States was invited to file a brief expressing the views of the United States.

13. Id. at 51-52.
14. Id. at 48.
15. Id. at 48.
16. Peterson v. Islamic Republic of Iran, 758 F.3d 185, 188 (2d Cir. 2014).
17. Id.
18. Id.
19. Id.
20. Id. at 189.
21. Peterson v. Islamic Republic of Iran, 758 F.3d 185, 189 (2d Cir. 2014).
22. Id.
23. Id. at 188.
RJR Nabisco, Inc. v. The European Community

The issue pending in RJR Nabisco, Inc. v. The European Community, is whether, or to what extent, the Racketeer Influenced and Corrupt Organizations Act ("RICO") applies extraterritorially. The case revolves around the Respondents, the European Union, alleging that the Petitioner, a tobacco company, was involved in an international scheme to launder the proceeds of illegal drug sales in Europe and the result of this scheme caused harm to European governments. The Complaint alleged that the predicate offenses under RICO were money laundering, mail and wire fraud, Travel Act violations, and providing material support to foreign terrorist organizations. The District Court dismissed the civil RICO claims as impermissibly extraterritorial; yet, on appeal, the 2nd Circuit Court of Appeals held that RICO extended to foreign racketeering activity employed by foreign enterprises which cause foreign injuries. Petitioners argue that the RICO statute is silent to its extraterritorial application and thus, only applies domestically, specifically to domestic injuries. Petitioners filed for writ of certiorari on December 29, 2014 and certiorari was granted on October 1, 2015 by the Supreme Court.

This case considered with the In the matter of a Warrant to Search a Certain E-mail Account Controlled and Maintained by Microsoft Corporation (Microsoft warrant case) may have a great impact on national security prosecutions and civil litigation on the issue of extraterritoriality. The Microsoft warrant case originated out of a dispute between the United States Government and Microsoft over a warrant served on Microsoft to compel the production of emails. Microsoft did not comply with the warrant on the grounds that the emails were contained in Ireland and that the warrant could not apply extraterritorially. The Magistrate Judge and District Court judge held that the warrant was valid because the emails could be accessed by Microsoft employees in the United States and thus not extraterritorial. Microsoft appealed and the Second Circuit recently heard oral arguments on September 9, 2015.

II. UNITED STATES CIRCUIT COURTS OF APPEAL

a. Historical Geo Location/Cell Site Data

There is a circuit split on the issue of whether historical cell site data collected by the United States’ Government invokes a reasonable expectation of privacy and requires a warrant.

26. Id. at 4.
27. Id. at 2.
28. Id. at 5.
29. Id. at 6
30. Id. at 8.
32. Id.
33. Id.
The recent opinion in *United States v. Graham* and the rehearing *en banc* of the 11th Circuit *United States v. Davis* case illustrate the difficulties of reconciling cell site metadata with the Fourth Amendment and the *Smith v. Maryland* third party doctrine.

*United States v. Graham*

In *Graham*, defendants appealed their Hobbs Act convictions by challenging the admission of evidence in the form of cell site location data collected from their service provider. The United States’ Government collected the cell site location data for 221 days pursuant a court order obtained under the Stored Communications Act. The *Graham* Court held that “the government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user’s historical cell-site location information for an extended period of time” and that the government must obtain a warrant to seize these records. They distinguished this holding from the *en banc United States v. Davis* opinion and the 5th Circuit Court of Appeals opinion in *In re Application of U.S. for Historical Cell Site Data* because although the *Graham* Court recognizes that cell site data court orders are valid for periods less than an extended period of time, it does not recognize the application of the third party doctrine to the issue. “Extended period of time” was not defined but the *Graham* Court reasoned that a warrant is required for an extended time because “society recognizes an individual’s privacy interest in her movements over an extended time period.” The *Graham* Court refused to apply the *Smith v. Maryland* third party doctrine because they reasoned that individuals do not voluntarily disclose their cell site location to their service provider, it is automatically generated by the service provider.

*United States v. Davis*

The 11th Circuit Court of Appeals issued an opinion upon rehearing *en banc* of *United States v. Davis*. The defendant in *Davis* was charged with several Hobbs Act counts and the United States’ Government used cell site location data obtained through a court order under the Stored Communications Act at trial. The defendant claimed that the United States’ Government violated his Fourth Amendment rights by not obtaining a search warrant before obtaining his cell site...
data from the service provider. In the original United States v. Davis opinion, the Davis Court held that cell-site location data invokes a reasonable expectation of privacy requiring a warrant by the government before collection. However, the en banc Court reversed by holding that cell-site location data falls under the Smith v. Maryland third party doctrine; Users are generally aware that their calls are connected through cell towers and thus, their use of their phones amounts to voluntary conveyance of “their general location within that cell tower’s range.” The Davis Court held that the United States’ Government does not need a warrant to obtain this information because it does not fall within the purview of the Fourth Amendment.

b. Foreign Intelligence Surveillance Act, Section 215

The Courts of Appeal have issued divisive rulings on the issue of the NSA’s Telephony Metadata Program, its statutory authorization, and constitutionality under the Fourth Amendment. Two federal Courts of Appeal have released opposing opinions on the Program. Although the USA Freedom Act requires that the NSA halt its Telephony Metadata Program, the issues of metadata and the Smith v. Maryland third-party doctrine are still left up to varying judicial interpretations and critical to national security.

Obama v. Klayman

Most recently, the D.C. Circuit Court released its opinion on August 28, 2015 on Obama v. Klayman where it reversed the District Court’s ruling that held the NSA Program to be unconstitutional and in violation of the Fourth Amendment. The Klayman Court ruling was released after Congress had let Section 215 language expire under the sunset clause of the USA Patriot Act and later enacted the USA Freedom Act which revived the Section 215 language with some substantial changes that would take place in 180 days. Klayman held that the preliminary injunction entered by the District Court be vacated because the collection of telephony metadata by the NSA was temporary and FISC interpreted the USA Freedom Act as reinstating the NSA Program for 180 days.

43. Id. at 505.
45. Davis, 785 F.3d at 511.
46. Id.
50. Id. at *5-6.
ACLÜ v. Clapper

In the 2nd Circuit Court of Appeals, the Court reversed the District Court in ACLÜ v. Clapper. The ACLÜ Court held that the NSA Program exceeded the scope of Section 215 of FISA and declined to address the constitutional grounds of the NSA Program. This appellate opinion held on opposite grounds of the District Court which held that the NSA Program was constitutional under the Fourth Amendment because the metadata collected constituted voluntarily disclosed information under the Smith v Maryland third party disclosure doctrine.

c. Military Commissions

Ali Hamza Ahmad Suliman Al-Bahlul v. United States

The Al-Bahlul Court addressed the issue of whether military commissions have subject matter jurisdiction over offenses that are not international war crimes, i.e. conspiracy. The defendant was convicted by military commission in Guantanamo Bay, Cuba of material support for terrorism, solicitation of others to commit war crimes, and inchoate conspiracy to commit war crimes. In 2014, the D.C. Circuit Court of Appeals vacated the defendant’s convictions for material support and solicitation and now the defendant claims that his conviction for inchoate conspiracy to commit war crimes should also be vacated on the grounds that Congress exceeded its authority to define offenses triable by military commission that are not war crimes under international law and that Congress violated Article III of the Constitution by vesting jurisdiction of these non-international war offenses in military commissions instead of Article III courts.

The Al-Bahlul Court vacated the defendant’s conviction and held that Congress cannot grant military commissions jurisdiction over offenses that are not international war crimes and that the government’s broad interpretation of the “Define and Punish Clause” was improper. Further, Congress cannot declare that an offense is an international war crime when international law does not recognize this offense. Thus, the Court held that Article III Courts hold primary jurisdiction over criminal cases.

51. 785 F.3d 787 (2d Cir. 2015), available at http://www.ca2.uscourts.gov/decisions/isysquery/3de4fc4d-4c8a-4052-ac6c-9cfd2c1f1204/1/doc/14-42_complete_opn.pdf?xml=http://www.ca2.uscourts.gov/decisions/isysquery/3de4fc4d-4c8a-4052-ac6c-9cfd2c1f1204/1/hilite/.
52. Id. at 822.
55. Id. at 3.
56. Id.
57. Id. at 3, 16-18.
58. Id.
d. CIPA and FISA

The United States v. Daoud\textsuperscript{59} case caused discussion in the national security community when for the first time a District Court judge granted disclosure of the classified FISA application and related materials to the defense counsel of a defendant charged with terrorism-related charges.\textsuperscript{60} Defense counsel argued for disclosure on the grounds that he possessed a valid Top-Secret Sensitive Compartmented Security Clearance and the District Court reasoned that the risk of non-disclosure outweighed the risk of disclosure to the defense counsel.\textsuperscript{61} The 7th Circuit Court of Appeals reversed the District Court and held that the District Court erred in disclosing the classified FISA Application to the defense counsel because there were compelling reasons for the information to be kept from disclosure and that disclosure was not “necessary” to determine the legality of the surveillance.\textsuperscript{62} The 7th Circuit further noted that “it is a mistake to think that simple possession of a security clearance automatically entitles its possessor to access to classified information that he is cleared to see... the Government’s interest in confidentiality is diminished because defense counsel possesses security clearance to review classified material.”\textsuperscript{63}

III. UNITED STATES DISTRICT COURTS

a. The Constitutionality of No-Fly List Redress Systems

The case of Latif, et al. v. Holder, et al.\textsuperscript{64} in the United States District Court of Oregon and its ongoing litigation poses an interesting threat to the constitutionality of No Fly Lists. Latif has been in the court docket since 2010 when it originally was filed and dismissed without prejudice for failure to join the TSA as a party. In Latif, thirteen United States citizens and legally permanent residents challenged the adequacy of the United States’ Government’s redress system for persons who were denied ability to fly in United States airspace under the FBI’s No-Fly List.\textsuperscript{65} All thirteen individuals were denied entry onto a flight to, from, and within the United States and later filed applications with the Department of Homeland Security’s Traveler Redress Inquiry Program.\textsuperscript{66} Plaintiffs argued that they did not receive explanations for their denial to board an aircraft and did not know of their ability to fly in the future.\textsuperscript{67} The Latif Court held that the Plaintiffs had a protected liberty interest in their rights to travel internationally by air and to be free from government stigmatization which was

\textsuperscript{60} Id. at *8.
\textsuperscript{61} Id. at *6-7.
\textsuperscript{63} Id. at 484.
\textsuperscript{65} Id. at 1139.
\textsuperscript{66} Id. at 1140.
\textsuperscript{67} Id.
affected by the No-Fly List. The District Court further held that the DHS Traveler Redress Inquiry System was in violation of the Plaintiff’s procedural due process rights under the Fifth Amendment because the Plaintiffs were not given any post-deprivation notice or opportunity to contest their inclusion on the No-Fly List. The Court concluded that the United States’ Government must revise their redress system and procedures to provide the Plaintiffs with adequate due process without jeopardizing national security.

By January 2015, the United States’ Government notified the individuals of their status on the No-Fly List or gave them an unclassified summary of why they were on the No-Fly List. In April 2015, the Court entered a non-final judgment order in favor of six of the individuals who were indicated to be not on the No-Fly List. However, the litigation for this case is on-going because the remaining Plaintiffs are continuing to challenge the adequacy of the revised redress measures put into place by DHS and renewing their motions for summary judgment.

b. Material Support of Terrorism Cases

United States v. Dandach

On August 10, 2015, Adam Dandach, a California college student, plead guilty to two counts of providing material support to terrorism, specifically to the Islamic State of Iraq and the Levant (ISIL) and making false statements on a passport application. Dandach was influenced by ISIL online propaganda and purchased a plane ticket to fly ultimately to Syria to plead his allegiance to ISIL and its leader. He will be sentenced on January 11, 2016. Some of the conduct giving rise to the offense occurred in 2013 which was before ISIL was designated a foreign terrorist organization by the State Department. In 18 U.S.C. § 2339B prosecutions, the Government must prove that the entity that the defendant is providing support to is a foreign terrorist organization. Al-Qa’ida in Iraq was designated a foreign terrorist organization on October 15,
2004; however, the State Department added the alias of ISIL to al-Qa’ida in Iraq on May 15, 2014.\(^{77}\) The United States Government correlated ISIL to the previously designated al-Qa’ida in Iraq in the plea agreement in order to support the charges in the indictment.\(^{78}\)

**United States v. Ahmed Mohammed El Gammal**

On August 27, 2015, Ahmed Mohammed El Gammal was indicted on charges of providing material support to terrorism, specifically ISIL, aiding and abetting the receipt of military-type training from ISIL, and conspiring to receive training from ISIL.\(^{79}\) Gammal is alleged to have assisted a college student in New York to support ISIL by receiving terrorist training in Syria through his ISIL contact.\(^{80}\) Gammal communicated with this individual through the Internet and social media websites.\(^{81}\) The individual traveled to Turkey and Gammal still continued communication with the individual and providing advice on traveling to Syria to meet with his ISIL contact.\(^{82}\) The case is pending prosecution in the Southern District of New York.\(^{83}\)

**United States v. Ali Saleh**

On September 17, 2015, Ali Saleh, a 22 year old man, was arrested and charged with attempting to provide material support to terrorism, specifically ISIL.\(^{84}\) Saleh is alleged to have made several attempts to travel out of the United States to join ISIL and specifically, before a flight reservation in 2014, he used his Twitter social media account to post “I’m ready to die for the Caliphate, prison is nothing.”\(^{85}\) Since mid-2013, Saleh used a Twitter account to demonstrate his support of and intent to join ISIL.\(^{86}\) The case is pending prosecution in the Eastern District of New York.\(^{87}\)


\(^{78}\) Id.; Plea Agreement, supra note 73, 7-8.


\(^{80}\) Id.; *Arizona Man Charged*, supra note 79.

\(^{81}\) Id. *Arizona Man Charged*, supra note 79.

\(^{82}\) Id.; *Arizona Man Charged*, supra note 79.

\(^{83}\) Id.; *Arizona Man Charged*, supra note 79.


\(^{85}\) Id.; *New York Man Arrested*, supra note 84.

\(^{86}\) Complaint, supra note 84, 3.

\(^{87}\) *New York Man Arrested*, supra note 84.
c. 9/11 Victim’s families’ lawsuit against Saudi Arabia

In 2002, Ron Motely sued the Kingdom of Saudi Arabia and Saudi banks, charities, and members of the Saudi royal family on behalf of 9/11 victims’ families in the Southern District of New York.\(^8\) The lawsuit claimed that Saudi Arabia and these entities financed al-Qa’ida which helped al-Qa’ida carry out the 9/11 terrorist attacks\(^9\) and sought “full, just timely compensation and punitive damages appropriate and necessary to deter future acts.”\(^9\) The original Complaint specifically alleged that the Defendants individually and jointly aided and abetted, sponsored, materially supported, and conspired to proximately cause death and injury to the Plaintiffs through acts of international terrorism.\(^9\) The Complaint included a statutory claim under the Foreign Sovereign Immunity Act and common law claims of wrongful death, negligence, and negligent and/or intentional infliction of emotional distress.\(^9\) The lawsuit has remained on the docket since 2002 because of several procedural delays and the deaths of Ron Motely and the originally assigned judge.\(^9\)

In 2005, some of the original defendants, including Saudi Arabia were dismissed on the claim of foreign sovereign immunity, but in 2013, the 2nd Circuit Court of Appeals reversed this decision and remanded the case back to the District Court partially on the grounds of the tort exception to foreign sovereign immunity.\(^9\) The government of Saudi Arabia returned as a Defendant, but not the individual members of the Saudi royal family.\(^9\) In February 2015, the case re-emerged in the news when the Plaintiffs’ lawyers disclosed that their deposition of Zacarias Moussaoui revealed that members of the Saudi royal family had been major donors to Al Qa’ida.\(^9\) On April 10, 2015, Saudi Arabia and the Plaintiffs filed briefs to make their arguments to Judge George Daniels.\(^9\) The Plaintiffs filed a reply to their motion to amend their pleading of facts and evidence;\(^9\) whereas, the Saudi Government filed a reply to support their renewed motion to dismiss of the lawsuit.\(^9\)


\(^9\) Id.

\(^9\) Id. at 178-185.

\(^9\) Id.

\(^9\) Id.


\(^9\) Risen, supra note 88.

\(^9\) Id.


\(^9\) *See Plaintiff’s Reply in Further Support of Their Motion To File a Consolidated Amended Pleading of Facts and Evidence as to the Kingdom of Saudi Arabia and the Saudi High Commission for Relief of Bosnia & Herzegovina, In re*
In their brief, the Defendants supported their motion to dismiss by arguing that the Plaintiffs cannot rebut the presumptive immunity of the government of Saudi Arabia because they only presented mere allegations and not solid evidence that linked the Saudi government and other Defendants with the al-Qa’ida hijackers.100 Specifically, they claimed that the Plaintiff’s evidence is inadmissible because it relies solely on individual affirmations which lack authenticity and personal knowledge.101 Further, they claim that the Plaintiffs failed to state a claim that an agent of the Saudi government committed a tortious act upon the United States.102 Conversely, the Plaintiffs sought to amend their pleading and claimed that the Defendant’s motion to dismiss forces the Court to draw unwarranted conclusions on the merits of the case from selective facts and non-developed discovery.103 Plaintiffs argued that their motion to amend pleadings presented a colorable claim predicated on the tortious acts of agents of the Saudi government and their direct assistance to the 9/11 terrorist attacks; thus, they argued that the inquiry into the merits of the claim should be deferred to subsequent motions to dismiss and summary judgment.104 Further, the Plaintiffs obtained affidavits from former members of the 9/11 Commission indicating that the Commission never acquitted the Saudi government from responsibility and there is room for further investigation.105 On July 30th, 2015, the District Court held a hearing for oral arguments on the Defendant’s motion to dismiss.106 The ultimate ruling by Judge Daniels on these motions will determine whether the Plaintiffs can in fact proceed with this lawsuit against the government of Saudi Arabia for their alleged involvement in the 9/11 terrorist attacks.

100. Id. at 2.
101. Id. at 18.
102. Id. at 5.
103. Plaintiff’s Reply, supra note 98, 5.
104. Id. at 5-8.
105. Frankel, supra note 97.
SUMMARY

Foreign Sovereign Immunities Act

Reversing the district court’s dismissal of an action for lack of subject matter jurisdiction, the en banc court held that a foreign-state owned common carrier engages in commercial activity in the United States, and thus is not immune from suit under the Foreign Sovereign Immunities Act, when it sells tickets in the United States through a travel agent, regardless of whether the travel agent is a direct agent or subagent of the common carrier.

Agreeing with the Second and D.C. Circuits, the en banc court held that the sale of a Eurail pass to the plaintiff could be imputed to the defendant for purposes of establishing that it carried on commercial activity in the United States. In addition, the sale created “substantial contact” with the United States. The en banc court also held that the plaintiff’s claims, which arose from a fall when she attempted to board a train in Austria, were “based upon” the defendant’s commercial activity in the United States because the plaintiff showed a nexus between her claims and the sale of the Eurail pass. The en banc court held, therefore, that the FSIA’s commercial-activity exception applied.

Dissenting, Judge O’Scannlain, joined by Chief Judge Kozinski and Judge Rawlinson, wrote that the commercial-activity exception did not apply because the sale of the Eurail
pass was not attributable to the defendant, and so the plaintiff failed to allege commercial activity “by the foreign state.”

Dissenting, Chief Judge Kozinski agreed with Judge O’Scannlain that a foreign sovereign does not engage in commercial activity in the United States when a subagent over which it exercises no direct control sells tickets for passage on a common carrier wholly owned by that sovereign. Chief Judge Kozinski wrote that he would affirm the district court on the ground that the plaintiff’s claim arose from events that transpired entirely in Austria, and thus was not “based upon” commercial activity carried on in the United States.

COUNSEL

Geoffrey Becker, Becker & Becker, Lafayette, California, for Plaintiff-Appellant.

Juan C. Basombrio, Dorsey & Whitney LLP, Irvine, California, for Defendant-Appellee.

4 SACHS V. REPUBLIC OF AUSTRIA

OPINION

GOULD, Circuit Judge:

We must decide whether a resident of the United States has a domestic forum in which to bring a claim against a foreign common carrier, operated by a foreign sovereign entity, that sells tickets through a third-party agent or subagent in the United States. Carol P. Sachs filed a complaint against OBB Personenverkehr AG (OBB) in the United States District Court for the Northern District of California. Sachs sought damages for traumatic injuries that she sustained while trying to board an OBB train in Innsbruck, Austria.

The district court granted OBB’s motion to dismiss for lack of subject-matter jurisdiction, concluding that OBB, as an instrumentality of the Republic of Austria, was immune from suit under the Foreign Sovereign Immunities Act of 1976 (FSIA). On appeal, Sachs argues that under the first clause of the FSIA’s commercial-activity exception, the district court has subject-matter jurisdiction over her claims. We agree. A foreign-state owned common carrier, such as a railway or airline, engages in commercial activity in the United States when it sells tickets in the United States through a travel agent regardless of whether the travel agent is a direct agent or subagent of the common carrier. Under the FSIA, federal courts of the United States will have subject-matter jurisdiction over actions against a foreign sovereign common carrier that engages in commercial activity of this kind as long as the plaintiff’s claims are based upon that activity.
I

OBB Personenverkehr AG is a separate legal entity wholly owned by OBB Holding Group, a joint-stock company created by the Republic of Austria. OBB Holding Group is wholly owned by the Austrian Federal Ministry of Transport, Innovation, and Technology. OBB's main function is to operate passenger rail service within Austria. Like many of its counterparts in other European countries, OBB is a member of the Eurail Group, which is an association organized under Luxemburg law. According to OBB, Eurail Group is responsible for marketing and selling rail passes. Eurail passes are marketed to non-European residents, as they cannot be used by residents of Europe and nearby countries.

In early March 2007, Sachs purchased a four-day Eurail pass from the Rail Pass Experts (RPE) for travel in Austria and the Czech Republic. RPE is located in Massachusetts, but Sachs bought the Eurail pass online through the RPE website. Sachs’s Eurail pass listed various disclaimers, including that “the issuing office is merely the intermediary of the carriers in Europe and assumes no liability resulting from the transport.” The Eurail pass also stated that it is “non-transferable and only valid upon presentation of a passport or a valid travel document replacing the passport.”

In late April 2007, Sachs arrived in Innsbruck, Austria, and presented her Eurail pass to OBB to purchase a couchette reservation for her trip from Innsbruck to Prague. Although Sachs would have been able to board the train to sit in an unassigned seat with the Eurail pass that she bought from RPE, she paid the €30.90 fee to upgrade her pass and reserve

a couchette bed. The Eurail pass required customers to pay separately for upgrades of this kind.

When Sachs tried to board the train, she fell between the tracks. Her legs were crushed by the moving train. As a result of these injuries, both of Sachs’s legs were amputated above the knee. Sachs alleges that OBB caused her injuries by negligently moving the train while she attempted to board. OBB disputes this allegation, claiming that the train was already moving when Sachs tried to board.

Sachs filed suit against OBB in the United States District Court for the Northern District of California.¹ Her complaint asserts claims for negligence; strict liability for a design defect; strict liability for failure to warn about a design defect; breach of implied warranty of merchantability; and breach of implied warranty of fitness. To support these claims, Sachs alleges (a) that she purchased the Eurail pass through OBB’s agent Eurail and the American-based company RPE; (b) that through the Eurail pass OBB agreed to provide railway transportation to Sachs during her April 2007 visit to Austria; and (c) that OBB, as a common carrier, owed her a duty of “utmost care.”

OBB filed a motion to dismiss on June 21, 2010, arguing that it was entitled to sovereign immunity under the FSIA. In the alternative, OBB also argued that Sachs’s complaint should be dismissed for forum non conveniens, lack of

¹ Sachs’s complaint also named the Republic of Austria and the OBB Holding Group as defendants. The Republic of Austria was dismissed from the lawsuit when Sachs did not oppose the Republic of Austria’s motion to dismiss. OBB Holding Group was not properly served and is not a party to this litigation.
personal jurisdiction, and international comity. After a
hearing and supplemental briefing on the motion, the district
court granted OBB’s motion to dismiss for lack of subject-
matter jurisdiction on foreign-sovereign-immunity grounds. 
district court concluded that Sachs had not shown a
connection between OBB and RPE sufficient to create a
principal-agent relationship. As a result, the district court
found that RPE’s commercial activity in the United States
could not be imputed to OBB. Sachs timely appealed.

A divided three-judge panel of this court affirmed. Sachs
v. Republic of Austria, 695 F.3d 1021, 1029 (9th Cir. 2012).
The majority of judges agreed on result but not reasoning. Relying on our previous decision in Doe v. Holy See,
557 F.3d 1066 (9th Cir. 2009) (per curiam), the majority
opinion concluded that RPE’s sale of the Euralp pass could
not be imputed to OBB for purposes of establishing
jurisdiction under the FSIA’s commercial-activity exception. 
Sachs, 695 F.3d at 1025–26. The concurrence agreed that the
district court properly dismissed the case for lack of subject-
matter jurisdiction, but it argued that Holy See was inapposite
because that case addressed a different exception under the
FSIA. Instead, the concurrence argued that Sachs’s claim
failed under Sun v. Taiwan, 201 F.3d 1105 (9th Cir. 2000),
because Sachs did not allege facts sufficient to show that her
claims were “based upon” the sale of the Euralp pass in the
United States. Sachs, 695 F.3d at 1029–30 (quoting
28 U.S.C. § 1605(a)(2)). The dissent explained that both
Holy See and Sun were distinguishable from Sachs’s case and
that the plain language of the FSIA permits jurisdiction over
OBB. Id. at 1032–33.

We ordered rehearing en banc to clarify whether the first
clause of the FSIA commercial-activity exception applies to
a foreign sovereign when a person purchases a ticket in the
United States from a travel agency for passage on a
commercial common carrier owned by that foreign state.

II

We review de novo the district court’s determination of
immunity under the FSIA. Embassy of the Arab Republic of
Egypt v. Lasheen, 603 F.3d 1166, 1170 (9th Cir. 2010). A
defendant asserting foreign sovereign immunity “may make
either a facial or factual challenge to the district court’s
subject matter jurisdiction.” Terenkian v. Republic of Iraq,
694 F.3d 1122, 1131 (9th Cir. 2012), cert. denied, 2013 WL
challenge argues only that the facts as alleged in the
complaint are insufficient to state a claim. Id. A factual
challenge disputes the truth of the allegations that would
otherwise be sufficient to invoke federal jurisdiction. Id.

OBB’s challenge is factual. OBB submitted documentary
evidence and a declaration to prove OBB’s status as an
agency or instrumentality of the Austrian government and to
dispute the truth of Sachs’s allegations that RPE sold the
ticket as an authorized agent of OBB. Sachs submitted her
own declaration and evidence to support her claim of
jurisdiction under the FSIA’s commercial-activity exception.
When the district court relies on such evidence for its
decision, we generally treat the jurisdictional attack as
factual. See Holy See, 557 F.3d at 1073. For such a factual
challenge, we must determine (1) whether Sachs has carried
her burden to prove, by offering evidence, that the
commercial-activity exception to foreign sovereign
immunities applies and (2) whether OBB has carried its burden to prove, by showing a preponderance of evidence, that the exception is not applicable. See Terenktian, 694 F.3d at 1131–32.

III

The doctrine of foreign sovereign immunity has its roots in the common law, tracing back to the Supreme Court’s decision in Schooner Exchange v. McFadden, 11 U.S. 116 (1812), which extended “virtually absolute immunity to foreign sovereigns as ‘a matter of grace and comity.’” Samantar v. Yousuf, 560 U.S. 305, 311 (2010) (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983)). After Schooner Exchange, federal courts routinely deferred to the State Department on whether to assume jurisdiction over an action against a foreign sovereign or its instrumentalities. Republic of Austria v. Altman, 541 U.S. 677, 689 (2004). In 1952, the State Department adopted a “restrictive” theory of sovereign immunity. Samantar, 560 U.S. at 312. The restrictive theory of sovereign immunity recognizes that sovereigns are immune “with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis).” Altman, 541 U.S. at 690 (internal quotation marks omitted). This shift was based on the philosophy that where foreign sovereigns engage in commercial dealings there is “a much smaller risk


In 1976, Congress codified the State Department’s restrictive theory of sovereign immunity in the FSIA, which established a comprehensive “set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities” and shifted the primary responsibility for determining immunity to the federal courts. Altman, 541 U.S. at 691 (quoting Verlinden B.V., 461 U.S. at 488). The FSIA establishes a presumption of immunity for foreign states but carves out specified exceptions to that grant of immunity. Id. The FSIA exceptions are “the sole basis for obtaining jurisdiction over a foreign state in [U.S.] courts.” Peterson, 627 F.3d at 1122 (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989)).

The exception relevant to this appeal is the first clause of the commercial-activity provision, which provides that a foreign state is amenable to suit where the plaintiff’s action is “based upon a commercial activity carried on in the United States by the foreign state.” 28 U.S.C. § 1605(a)(2). This clause has two parts: (1) the foreign sovereign must have carried on commercial activity within the United States; and (2) the claim must be based upon that activity.

2 Under this practice, the State Department would usually file a suggestion of immunity in the court at the request of the foreign state and the district court would grant immunity on that basis. Peterson v. Islamic Republic of Iran, 627 F.3d 1117, 1126 (9th Cir. 2010). In the absence of suggestion from the State Department, the district court would determine jurisdiction based on the established policy of the State Department. Id.

3“Courts have construed this commercial activity provision to have three independent clauses, and have used different criteria for each of the three separate clauses to assess a claimed exception.” Terenktian, 694 F.3d at 1127. We review only the first of these clauses here, and we use the term “commercial-activity exception” to refer only to that clause.
As for the first part, commercial activity occurs when a foreign state acts as a private player within the market or exercises powers that can also be exercised by private citizens. Terenjian, 694 F.3d at 1132. Commercial activity can be "either a regular course of commercial conduct or a particular commercial transaction or act." Id. (quoting 28 U.S.C. § 1603(d)). "In determining whether an act or activity is commercial, we must look to its nature, not its purpose." Siderman de Blake v. Republic of Arg., 965 F.2d 699, 708 (9th Cir. 1992). To be "carried on in the United States" there must be "substantial contact" between the commercial act and this country. Terenjian, 694 F.3d at 1132 (quoting 28 U.S.C. § 1603(e)).

As for the second part, "based upon" means "those elements of a claim that, if proven, would entitle a plaintiff to relief." Id. (quoting Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993)). That is, the commercial activity that occurs within the United States must be connected with the conduct that gives rise to the plaintiff's cause of action. Id. at 1132–33; see also Am. W. Airlines, Inc., v. GPA Grp. Ltd., 877 F.2d 793, 796 (9th Cir. 1989).

IV

Two main issues are raised on appeal: (1) whether the sale of the Eurail pass, as the underlying commercial activity, can

The district court concluded, based on the agreement of the parties, that "the only relevant commercial activity within the United States was plaintiff's March 2007 purchase of a Eurail pass from the Rail Pass Experts." We consider only the relevant conduct as defined by the district court. See Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777, 781 (9th Cir. 1991) (accepting the district court's definition of relevant conduct when not clearly erroneous).

be imputed to OBB for purposes of establishing that OBB carried on commercial activity in the United States; and, if so, (2) whether Sachs's claims are "based upon" that commercial activity as required by the commercial-activity exception. The parties agree that OBB is an agency or instrumentality of the Republic of Austria and that it qualifies as a foreign state for purposes of the FSIA. They also agree that the sale of a Eurail pass constitutes a commercial activity under the FSIA. We must first determine if there is a relationship between OBB and RPE sufficient to impute RPE's commercial act within the United States to OBB. If we conclude such a relationship exists, then we must determine if there is a nexus between Sachs's claims and the underlying commercial activity sufficient to show that the claims of Sachs are "based upon" the commercial activity.

A

The first clause of the commercial-activity exception gives United States courts subject-matter jurisdiction over any case against a foreign state or its instrumentality "in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). To apply this exception to Sachs's claims against OBB, there must be a sufficient connection between OBB and RPE's sale of a Eurail pass within the United States to support the conclusion that OBB "carried on" commercial activity within the United States. Id. We conclude that there is.

The plain text of the FSIA indicates that the first clause of the commercial-activity exception encompasses situations in which a foreign state carries on commerce through the acts of an independent agent in the United States. The FSIA defines
“commercial activity carried on in the United States by a foreign state” as “commercial activity carried on by such state and having substantial contact with the United States.” Id. § 1603(e). This definition requires two elements to establish that a foreign state carried on commercial activity in the United States: (1) that the foreign state carries on commercial activity and (2) that commercial activity has substantial contact with the United States. See Nelson, 507 U.S. at 356 (establishing that jurisdiction requires a plaintiff’s action to be “based upon” some ‘commercial activity’ by [a foreign state] that had ‘substantial contact’ with the United States”).

The FSIA’s legislative history shows that Congress intended the commercial-activity exception to be read broadly to “include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a ‘substantial contact’ with the United States.” H.R. Rep. No. 94-1487, at 17 (1976). Notably, neither the statute nor the legislative history defines how the commercial activity within the United States must be “carried on” but both suggest that “the ‘carried on by’ requirement can be interpreted in light of broad agency principles.” Mar. Int’l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1105 (D.C. Cir. 1983). Under traditional agency principles, the foreign state may engage in commerce in the United States indirectly by acting through its agents or subagents. See Phaneuf v. Republic of Indon., 106 F.3d 302, 307–08 (9th Cir. 1997) (establishing that a foreign state can conduct commercial activity through its agents). As long as the agent or subagent acts with actual authority, those acts can be imputed to the foreign state. Id.

The Second Circuit and the D.C. Circuit have both applied this principle of imputing the acts of a subagent to a foreign state under the first clause of the commercial-activity exception.\(^5\) Both have applied the commercial-

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\(^5\) The dissent of Judge O’Scanlan virtually ignores (and the dissent of Chief Judge Kozinski entirely ignores) the two cases that are most like this one, Kirkham v. Société Air France, 429 F.3d 288, 290, 293 (D.C. Cir. 2005), and Barkanic v. General Administration of Civil Aviation of the Peoples Republic of China, 822 F.2d 11 (2d Cir. 1987), by arguing that those considered decisions of the D.C. Circuit in Kirkham and the Second Circuit in Barkanic “do not analyze when the acts of agents can be attributed to a foreign state.” Judge O’Scanlan Dissent at 49. We agree that the issue was not explicitly raised in those opinions, as noted in the dissent on the three-judge panel, but we do not agree with the argument by the dissent of Judge O’Scanlan on this en banc panel aimed at discrediting the force of these cases for us. Further, the dissent of Judge O’Scanlan does not acknowledge that its view, if adopted, would create a circuit split with those decisions of the D.C. Circuit and Second Circuit. At the time our prior three-judge panel had decided this case, the jurisdictional argument on which the dissent of Judge O’Scanlan relies had not even been raised by the Republic of Austria in its briefing or in its oral argument. Because the issue is jurisdictional, we have considered the Republic of Austria’s new contentions about agency even though they were not previously presented.Infra note 7. Whether or not in Barkanic the government of the People’s Republic of China conceded agency from the sale of its ticket by a travel agent in the United States, and whether or not in Kirkham the government of France conceded agency from the sale of its ticket by a travel agent in the United States, is beside the point. Because the issue is jurisdictional, these other circuits, like us, had an independent duty to assess jurisdiction. If the sale by the travel agent was not sufficient for jurisdictional purposes, then the district courts would have been without jurisdiction and the circuit courts should not have proceeded to render decision accepting that the district courts had jurisdiction over the foreign common carriers by virtue of the commercial-activity exception, and the sale in the United States by the travel agency. Thus the position of the dissent of Judge O’Scanlan creates a conflict with the two other United States Courts of Appeals that have considered parallel cases where a travel agent in the United States sold a ticket for
activity exception where the commercial act in the United States was that of a travel agent acting for the foreign sovereign. In Barkanic v. General Administration of Civil Aviation of the Peoples Republic of China (CAAC), the Second Circuit concluded that the first clause of the commercial-activity exception applied to the Chinese airline CAAC based on the sale of a plane ticket in the United States by a third-party agent. 822 F.2d 11, 13 (2d Cir. 1987). CAAC had entered into an agreement with Pan American World Airways whereby Pan American would act as a general sales agent for CAAC in the United States. Id. at 12. The tickets in question were not purchased directly through Pan American but through Pan American’s agent, Vanslycke & Reeside Travel, Inc. Id. Similarly, in Kirkham v. Société Air France, the D.C. Circuit applied the commercial-activity exception to a suit against Air France which was based on the sale of airline tickets through a D.C. travel agency for travel in France. 429 F.3d 288, 290, 293 (D.C. Cir. 2005). Because Congress passed the FSIA to promote uniformity in the treatment of foreign sovereign immunity, and because we think that Congress intended to permit suit in the United States against foreign sovereign common carriers that sell

tickets in the United States through agents, we see no compelling reason to create a split with our sister circuits. See Kelton Arms Condo. Owners Ass’n. v. Homestead Ins. Co., 346 F.3d 1190, 1192 (9th Cir. 2003) (When a law is “best applied uniformly, . . . we decline to create a circuit split unless there is a compelling reason to do so.”).

Sachs’s claim is no different in substance, for purposes of assessing sovereign immunity, from those analyzed by our sister circuits. Like the travel agents in Kirkham and Barkanic, RPE is a subagent of OBB through Eurail Group. Under traditional theories of agency, RPE’s act of selling the Eurail pass to Sachs within the United States can be imputed to OBB as the principal. Where a common carrier authorizes a travel intermediary to “issue tickets on its behalf and to collect and hold customer payment, the intermediary acts as the [carrier’s] agent.” Restatement (Third) of Agency § 3.14 cmt. e (2006). Here, Eurail Group markets and sells rail passes for transportation on OBB’s rail lines, making Eurail Group an agent of OBB. Eurail Group enlists subagents, like RPE, to sell and market its passes worldwide. Eurail Group’s use of these subagents establishes a legal relationship between OBB (the principal) and RPE (the subagent): “As to third parties, an action taken by a subagent carries the legal consequences for the principal that would follow were the action instead taken by the appointing agent.” Restatement (Third) of Agency § 3.15 cmt. d (2006). OBB admits as much in describing the relationship between OBB and RPE: “you have the operator, you have a separate legal entity, then you have a marketing arm, then you have a general agent.”

OBB argues that even if an agency relationship exists between it and RPE, RPE still lacked actual authority to sell the Eurail pass. We disagree. RPE’s authority to sell the
Eurail pass derives from the original authority that OBB granted to Eurail Group to market and sell passes for transportation on its rail lines. Indeed, Andreas Fuchs, a member of the Board of Management of OBB, conceded in his declaration that this Eurail pass entitled Sachs to board the train in Innsbruck. Moreover, RPE’s actual authority to sell the Eurail pass can be inferred from OBB’s sale of the couchette bed upgrade to Sachs. Sachs could purchase the couchette upgrade only if she had a valid Eurail pass. Otherwise, she would have been required to purchase an entirely new ticket, not just an upgrade. If RPE had impermissibly sold the Eurail pass to Sachs, OBB would have had no duty to honor the pass. But it did. It cannot now sensibly argue that the sale of that pass by RPE in the United States was unauthorized.⁴ Because we conclude RPE acted as an authorized agent of OBB, we impute RPE’s sale of the Eurail pass in the United States to OBB. See Phaneuf, 106 F.3d at 307–08 (“[A]n agent’s deed which is based on the actual authority of the foreign state constitutes activity ‘of the foreign state.’”) (quoting 28 U.S.C. § 1605(a)(2)).

Our case law is not to the contrary. In *Holy See*, we considered what acts performed by the Holy See’s domestic corporations could be attributed to the Holy See for purposes of the non-commercial torts exception under 28 U.S.C. § 1605(a)(5). *Holy See*, 557 F.3d at 1076–78. In that context, we found it appropriate to adopt the standard articulated by the Supreme Court in *First National City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*,

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⁴ We also agree with Sachs that even if we were to conclude that the sale was originally unauthorized, this ratification of the pass by OBB gives it the “effect as if originally authorized.” *Rayonier, Inc. v. Polson*, 400 F.2d 909, 915 (9th Cir. 1968).

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462 U.S. 611 (1983). *Id.* Drawing on common-law corporate principles, the Supreme Court in *Bancec* adopted and applied a presumption of separate juridical status that can be overcome only when (1) “[a] corporate entity is so extensiely controlled by its owner that a relationship of principal and agent is created,” or (2) “when recognizing the separate status of a corporation ‘would work fraud or injustice.’” *Holy See*, 557 F.3d at 1077–78 (quoting *Bancec*, 462 U.S. at 629).

Both *Bancec* and *Holy See* are distinguishable because they determined agency in the context of assessing responsibility of corporate affiliates. In contrast, Sachs’s allegations are not based on a corporate relationship between OBB and RPE, but rather on principles of agency. Unlike Cuba and its official bank, Bancec, or the Holy See and its domestic corporations, OBB and RPE are “entirely distinct” entities. See *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 535 (5th Cir. 1992). “There is neither common ownership nor any similar legal relationship between these entities.” *Id.* Thus *Bancec’s* definition of agency for purposes of piercing the corporate veil is inapposite—“[o]ne cannot pierce a non-existent corporate veil.” *Id.* The day-to-day control inquiry under *Bancec* makes no sense here where the question is “whether a particular type of agency relationship is sufficient under the commercial activity exception.” *Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006) (distinguishing *Bancec* from the inquiry of whether an individual agent had authority to bind the foreign state); see also *Phaneuf*, 106 F.3d at 307 n.3 (distinguishing the “alter ego” analysis).

OBB contends that common-law principles of agency are inapplicable under the plain language of the FSIA unless the purported agent first meets the statutory definition of “agency
or instrumentality of a foreign state” under § 1603(b). Section 1603(b) defines an “agency or instrumentality of a foreign state” as any entity:

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State or of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). OBB argues that this definition of agency applies throughout the FSIA to limit who could be considered an agent of a foreign state. Under this theory, the court can consider common-law definitions of agency only after the statutory definition of agency is met. OBB contends that because RPE cannot meet the definition of agency under § 1603(b), RPE’s sale of the Eurail pass cannot be imputed to OBB and no jurisdiction exists under the FSIA. We reject this contention.

The plain text of the FSIA does not support OBB’s proposed framework for determining whether RPE is an agent of OBB. Section 1603(b) defines what type of entity can be considered a foreign state for purposes of claiming sovereign immunity. If an entity cannot show that it meets that definition then it is not entitled to sovereign immunity. Whether an entity meets the definition of an “agency or instrumentality of a foreign state” to claim immunity is a “completely different question” from whether the acts of an agent can be imputed to a foreign state for the purpose of applying the commercial-activity exception. Gates v. Victor Fine Foods, 54 F.3d 1457, 1460 n.1 (9th Cir. 1995) (quoting Hester Int’l Corp. v. Fed. Republic of Nigeria, 879 F.2d 170, 176 n.5 (5th Cir. 1989)).

Common sense also tells us that an agent that carries on commercial activity for a foreign sovereign in the United States does not need to be an agency or instrumentality of a foreign state under § 1603(b). Foreign sovereigns invariably must act through agents, and if they engage in commercial activity in the United States it will necessarily be through an agent, whether that agent is its own employee or a separate company in an agency or subagency relationship.

Further, it is a well-established canon of statutory interpretation that “when a statute covers an issue previously governed by the common law, we interpret the statute with the presumption that Congress intended to retain the substance of the common law.” Samantar, 560 U.S. at 320 n.13. To abrogate common-law principles of agency, the FSIA “must speak directly to the question addressed by the common law.” United States v. Best Foods, 524 U.S. 51, 63 (1998) (quoting United States v. Texas, 507 U.S. 529, 534 (1993)). Because the FSIA codified our common law of

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7 OBB did not initially brief this argument before our court. We do not consider it waived, however, because it goes to our independent duty to determine subject-matter jurisdiction. See Lasheen, 603 F.3d at 1171 n.3 (“[C]hallenges to subject-matter jurisdiction cannot be waived . . .”). Also, after oral argument we ordered supplemental briefing on this issue.
sovereign immunity, *Samantar*, 560 U.S. at 311, we begin with the presumption that the statute maintains common-law principles. That Congress defined the term “agency or instrumentality of a foreign state” does not convince us that Congress intended to displace common-law agency principles under the statute for purposes of assessing commercial activity within the United States.

OBB asks us to read this definition to apply not only to the phrasal term “agency or instrumentality of a foreign state” but also to the individual terms “agency” and “agent.” OBB’s advocated reading strains the plain language of the FSIA, renders the bulk of the phrase superfluous, and ignores that § 1603(b) defines a singular phrasal term wherein all words are important. Each word within the defined term does not hold the same meaning individually that it has when placed alongside the other terms in the defined phrase. The three elements listed in § 1603(b) define only what constitutes an “agency or instrumentality of a foreign state.” See *Samantar*, 560 U.S. at 314 (describing this as a single term). They do not give meaning to the word “agency” or “agent” if used alone. If we were to adopt OBB’s preferred reading, then § 1605A’s references to an “agent” of a foreign state “acting within the scope of his or her . . . agency” becomes illogical. We will not “construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous.” *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476–77 (2003).

The position that OBB advances would negate the possibility of commercial activity by a state-owned railway or airline within the United States through a travel agent. We cannot believe that this is what Congress intended. Throughout the world many foreign states own and operate legally independent passenger railways and airlines, which may qualify for sovereign immunity as an “agency or instrumentality of a foreign state” under 28 U.S.C. § 1603(b). Foreign states are also heavily involved in the airline industry.* Given the prevalence of these rail lines and

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airlines worldwide, we believe that Congress contemplated that the sale of tickets by travel agents within the United States for passage on foreign-sovereign owned common carriers would constitute "commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2).

Adopting the OBB position would mean that scores of state-owned railroads and airlines worldwide could sell their tickets for foreign travel through travel agents in the United States and then claim sovereign immunity thereafter because the travel agents selling their tickets do not meet the definition of a state instrumentality under § 1603(b). Such immunity would extend not only to torts but to contract liability stemming from the actions of their common law agents in the United States. That result would mean that American citizens who buy tickets through authorized domestic agents on airlines or railroads owned by foreign governmental entities could find their reservations not honored and their payments retained. The only recourse against the contract-breaching carrier would be to sue abroad, even though the contract was entered into in the United States. There is no reason to think Congress intended such a chaotic result.

We likewise find no support for OBB's suggested interpretation in the FSIA's legislative history. OBB contends that the legislative history confirms its interpretation because it says that the term "foreign state" applies consistently throughout the FSIA. According to OBB, the term "foreign state" has a consistent definition throughout the statute, "the definition of an 'agency' in Subsection 1603(b) limits who is an agent for purposes of Section 1605(a)(2)." We do not see the connection. That Congress intended the terms defined in § 1603 to apply consistently throughout the FSIA does not mean that Congress intended for those defined terms to displace principles of common law. Indeed, the Supreme Court has looked to common-law corporate principles to determine the proper interpretation of § 1603(b). See Dole Food Co., 538 U.S. at 474 (relying on a "basic tenet of American corporate law" to hold that "only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement" under § 1603(b)); see also Samantar, 560 U.S.

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10 We observe the existence of these foreign-state owned railways and airlines as legislative, rather than adjudicative, facts because of their relevance to our "legal reasoning" and interpretation of the "lawmaking process." Fed. R. Evid. 201(a), advisory note to 1972 amendments; see also Kenneth Culp Davis, Judicial Notice, 55 Colum. L. Rev. 945, 952 (1955) (explaining that a court may "resort to legislative facts, whether or not those facts have been developed on the record"). Even if we were to view the existence of state-owned railroads and airlines as adjudicative facts, it would still be correct to recognize their existence as a matter of judicial notice. We may take judicial notice of an adjudicative fact "that is not subject to reasonable dispute" because it is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). There might be dispute about whether any particular airline or railroad is state owned. Ownership may have changed; government carriers may have been privatized. There might also be a problem of where to draw the line on percentage of ownership required for the presumption of immunity. But whatever the detail as to particular carriers, it cannot reasonably be disputed that there are many national airlines and railroads worldwide that may market and sell tickets through agents or subagents in the United States. The existence of a state-owned carrier can be shown by reference to government websites and papers of the governments and reviewing agencies.

at 320 (examining “relevant common law and international practice” to interpret the FSIA).\footnote{In addition to asking us first to adopt what we think is a strained reading of the statute, OBB asks us next to preserve the Bancroft presumption of separate juridical status to be applied after we determine agency under § 1603(b). That is, OBB argues that the definition of “agency” under § 1603(b) did not fully abrogate common-law principles of agency but preserved the common law as a second requirement for establishing agency. Under that analysis, we would first determine whether an entity met the elements enumerated in § 1603(b) and, if so, we would determine whether that entity met Bancroft’s standard for overcoming the presumption of separate juridical status.}

Moreover, none of the cases relied on by OBB applied this strained reading of the FSIA. The main case on which OBB relies is the Supreme Court’s decision in Samantar, which held that individual officials are not included within the meaning of “agency or instrumentality of a foreign state.” 560 U.S. at 316. OBB points to a passage in the opinion that states that § 1603(b) “specifically delimits what counts as an ‘agency or instrumentality.’” Id. at 314 (quoting 28 U.S.C. § 1603(b)). That is true, but Samantar makes this statement while interpreting what or who constitutes a foreign state under the meaning of § 1603(b). Id. at 314–16. That is the opposite question from the one we are presented with here. The other cases cited by OBB are equally unavailing and either do not address the issue or support a statutory construction contrary to that proposed by OBB. See, e.g., Gates, 54 F.3d at 1460 n.1 (distinguishing the analysis for determining whether a defendant is an agent or instrumentality of a foreign state from the analysis for determining whether to impute the acts of an agency to the government). OBB has not convinced us that its reading of the FSIA is proper.\footnote{The dissent of Judge O’Scannlain cites the “Presumption of Consistent Usage” canon, which stands for the proposition that a “word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.” ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012). In the statute, there are different phrasings of “agency or instrumentality of a foreign state”, 28 U.S.C. § 1603(b), and “agent of that foreign state . . . acting within the scope of his or her . . . agency,” id. § 1605A(c), and the commercial-activity exception, id. § 1605(a)(2), which does not include the word “agency.” We do not have text from one part of the statute interpreted differently from the same text in another part of the statute. While not applying correctly the maxim of consistent usage, the dissent of Judge O’Scannlain also ignores other statutory construction principles pointing in the direction that an “agent” for purposes of satisfying the commercial-activity exception is not the same as an “agency or instrumentality of a foreign state” for purposes of invoking sovereign immunity. Some of these other principles are: the surplusage canon (“every word and every provision is to be given effect”), the harmonious reading canon (“the provisions of a text should be interpreted in a way that renders them compatible, not contradictory”), the associated words canon (“associated words bear on one another’s meaning [noscitur a sociis]”), and the prior construction canon (“If a statute uses words or phrases that have already received authoritative construction by the jurisdiction’s court of last resort . . . they are to be understood according to that construction”). See SCALIA & GARNER, 174, 181, 195, 322. All of these canons suggest that “agency or instrumentality of a foreign state” must be interpreted as an entire phrase, and that the definitions within § 1603(b) do not supplant or implicate the common law definition of agency which can be taken into account in assessing § 1605(a)(2).} We conclude that RPE’ s sale of the Eurail pass in the United States can be imputed to OBB.
Although imputing the sale of the pass by RPE to OBB is essential to showing that the “commercial activity was carried on in the United States,” we must still determine if that sale creates “substantial contact” with the United States. 28 U.S.C. § 1603(e). We conclude that it does.

“Substantial contact” is not clearly defined in the FSIA or by our circuit or our sister circuits. See Shapiro v. Republic of Bol., 930 F.2d 1013, 1019 (2d Cir. 1991). It is generally agreed that it sets a higher standard for contact than the minimum contacts standard for due process. See id.; Mar. Int'l Nominees Establishment, 693 F.2d at 1109 (explaining that the substantial contact requirement makes “clear that the immunity determination under the first clause diverges from the ‘minimum contacts’ due process inquiry”). Under this standard, we have concluded that merely executing contracts for the sale of crude oil in the United States, by itself, is not a substantial contact. Terenkian, 694 F.3d at 1137. In Terenkian, we found relevant that no activity related to the formation of the contracts other than that their execution occurred within the United States. Id. at 1126, 1137. In a different context, we have concluded that there was substantial contact where a foreign state, through its agent in the United States, advertised to and solicited customers in the United States, causing numerous Americans to stay in the foreign state’s hotel. Siderman de Blake, 965 F.2d at 709. Although in some situations the formation of a contract within the United States may not be sufficient to establish substantial contact, in other situations the advertisement to and solicitation of customers in the United States is enough. The context of the commercial activity helps to determine whether the substantial-contact requirement is met.

In the common-carrier context, we also look to factors such as the marketing, selling, and arranging of foreign travel in the United States to determine whether substantial contact exists. See Schoenberg, 930 F.2d at 781–82 (concluding that substantial contact exists where the trip was arranged and started in California); see also Santos v. Compagnie Nationale Air Fr., 934 F.2d 890, 894 (7th Cir. 1991) (cataloguing cases); Sugarman v. Aeromexico, Inc., 626 F.2d 270, 272–73 (3d Cir. 1980). Where a ticket for travel on a foreign common carrier is bought and paid for in the United States, we conclude that the substantial contact requirement is satisfied. See Barkanic, 822 F.2d at 14. The sale and marketing of Eurail passes within the United States is sufficient to meet the substantial-contact element and to show that OBB carried on commercial activity in the United States. It remains for us to determine whether the claims of Sachs are “based upon” this commercial activity.

B

“[T]he phrase ‘based upon’ in § 1605(a)(2) ‘is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under [his or her] theory of the case.’” Lasheen, 603 F.3d at 1170–71 (quoting Nelson, 507 U.S. at 357); see also Santos, 934 F.2d at 893 (“An action is based upon the elements that prove the claim, no more and no less.”). The “based upon” language demands “more than a mere connection with, or relation to, commercial activity.” Nelson, 507 U.S. at 358. But it is not necessary that the entire claim be based upon the commercial activity of OBB. Sachs’s claims will be “based upon” the commercial activity if “an element of [her] claim consists in conduct that occurred in commercial activity carried on in the United States.” Sun, 201 F.3d at 1109 (quoting Sugimoto v.
Exportadora De Sal, 19 F.3d 1309, 1311 (9th Cir. 1994)); see also Terenkian, 694 F.3d at 1132.

To establish that her action is “based upon” OBB’s commercial activity, Sachs must show a nexus between her claims and the sale of the Eurail pass. See Sun, 201 F.3d at 1109. We look to Sachs’s theory of the case to determine if she meets this burden. See id. at 1110; see also Nelson, 507 U.S. at 357 (considering Nelson’s theory of the case to determine jurisdiction). Sachs’s complaint asserts five claims for relief: negligence; strict liability for a design defect; strict liability for failure to warn for a design defect; breach of implied warranty of merchantability; and breach of implied warranty of fitness. “A court must analyze each claim and determine if it is ‘based upon’ commercial activity . . . .” Lasheen, 603 F.3d at 1172. We begin with Sachs’s negligence claim.

To show negligence, Sachs must establish that OBB owed her a duty of care. Under Sachs’s theory of the case, OBB owed her a duty of care because her purchase of the Eurail pass established a common-carrier/passenger relationship. It is well established that common carriers owe a duty of utmost care to their passengers. See Andrews v. United Airlines, Inc., 24 F.3d 39, 40 (9th Cir. 1994) (applying California law); see also Restatement (Third) of Torts § 40(b) (2012) (“Special relationships giving rise to the duty [of reasonable care] . . . include a common carrier with its passengers.”). And the basis for that duty of care is established when a foreign state or its agent sells a ticket or otherwise makes travel arrangements for passage abroad. See Santos, 934 F.2d at 893–94.

Here, buying the Eurail pass from RPE was the start of Sachs’s tragic misadventure, and buying the pass in the United States helped to define the scope of duty owed by common carrier OBB to the pass purchaser and traveler, the FSIA requires the application of that rule to foreign states in like circumstances.” Baneev, 462 U.S. at 622 n.11 (quoting 28 U.S.C. § 1606). So we think it is a permissible view of Supreme Court precedent to look to California law to determine the elements of Sachs’s claims.

However, it may also be permissible to view the above cases as suggesting there be a choice-of-law decision, either based on the forum’s choice of law principles, or some other rule. We have held that, with no choice-of-law provision expressed in the FSIA, we should use the choice-of-law principles of the federal common law, which leads us to the Second Restatement of Conflicts. See Schoenberg, 930 F.2d at 782. The Second Restatement factors for the “more significant relationship” test include: the needs of the interstate and international systems; the relevant policies of the forum; the relevant policies of other interested states; the protection of justified expectations; the policies underlying a field of law; ideas on certainty, predictability, and uniformity of result; and ease in determination and application of applicable law. Id. at 783; see Restatement (Second) of Conflicts § 6(2) (1971). Even if we should make a separate conflicts analysis under the Restatement, that conflicts analysis supports the same conclusion that California law applies to Sachs’s claims. Although Sachs was injured in Austria, the purchase of the common carrier ticket occurred in California. California has a strong interest in providing compensation to its residents under its law when those residents buy a common carrier ticket in California and then travel abroad on state-owned transportation.
Sachs. Because the sale of the Eurail pass is an essential fact that Sachs must prove to establish her passenger-carrier relationship with OBB, a nexus exists between an element of Sachs’s negligence claim and the commercial activity in the United States. See Kirkham, 429 F.3d at 292 (“[S]o long as the alleged commercial activity establishes a fact without which the plaintiff will lose, the commercial activity exception applies . . . .”). Without the pass, Sachs could not have boarded, or tried to board, the OBB train in Innsbruck. Moreover, the Eurail pass created an exclusive relationship between OBB and Sachs. No one could use this pass but Sachs. The Eurail pass bore her name, said that it was non-transferrable, and required that she present a valid passport to use it. Thus, the sale of the Eurail pass in the United States is “necessary to the ‘duty of care’ element of [Sachs’s] negligence claim.” Id. To demand more at the jurisdictional phase is to require a plaintiff to prove the merits of her claim, “expanding the category of jurisdictional facts to include actions and events other than the actual commercial activity which triggers the exception.” Id. at 293.

Sachs’s purchase of the couchette reservation upgrade in Innsbruck does not change our conclusion. The passenger-carrier relationship had already been established, and the couchette purchase did not change this relationship or OBB’s duty in any way; it rather upgraded the means of her transit in Austria. OBB acknowledges that Sachs could have boarded the train from Innsbruck to Prague with just her Eurail pass, so the couchette reservation merely constitutes an upgrade to her existing pass, not a new transaction. The situation is similar to a person who buys a coach-class airline ticket but pays an additional fee for a first-class upgrade before boarding the plane. The latter is not a new transaction that changes the duty of care owed by the airline to the passenger.

Similarly, Sachs’s purchase of the upgrade changed nothing about the duty of care OBB owed her. Because the sale of the Eurail pass in the United States forms the basis of an element of Sachs’s negligence claim, she satisfies the “based upon” requirement for that claim.

OBB contends that this conclusion is inconsistent with our decision in Sun v. Taiwan. We disagree. In Sun, we considered whether the appellants could bring a wrongful death action against Taiwan under the commercial-activity exception after their son drowned during a cultural tour of Taiwan. 201 F.3d at 1106. The Suns alleged that Taiwan was negligent by failing to warn their son of the swimming hazards and failing to exercise reasonable supervision. Id. at 1109. We concluded that Taiwan had engaged in commercial activity in the United States by promoting and managing applications for the program, but that this activity did not form the basis of Sun’s negligence claims. Id. at 1110. We explained that “[t]he promotion and application process in the United States was not conduct involved in proving any of the elements of the Suns’ action.” Id.15 Sachs’s negligence claim is different from that considered in Sun because OBB’s conduct in the United States—the sale of the Eurail pass—is essential to proving the duty-of-care element of Sachs’s negligence claim.

Similarly, our conclusion is consistent with the Supreme Court’s decision in Saudi Arabia v. Nelson, which analyzed the “based upon” requirement of the commercial-activity exception. The Supreme Court concluded that Nelson’s

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15 The Suns later claimed that the organization of the trip in the United States established a duty of care, but because that was a new issue on appeal, we did not decide it. Sun, 201 F.3d at 1110 & n.2.
action “alleging personal injury resulting from unlawful detention and torture by the Saudi Government [was] not ‘based upon a commercial activity’ within the meaning of [the FSIA].” Nelson, 507 U.S. at 351. To reach this conclusion, the Court rejected Nelson’s argument that the defendant’s act of recruiting and signing a contract with Nelson in the United States was the relevant commercial activity that formed the basis of Nelson’s tort claims. Id. at 358. Although those acts within the United States preceded the torts alleged by Nelson, they were not relevant to proving Nelson’s claims. Id. In contrast, Sachs’s negligence claim requires her to show that OBB owed her a duty of care as a passenger on its train—a duty based upon the sale of the Eurail pass within the United States.

For similar reasons, we conclude that Sachs’s breach-of-implied-warranty claims and strict-liability claims are “based upon” the sale of the Eurail pass.16 Products-liability claims and breach-of-implied-warranty claims are variations on a theme: attributing liability based on the sale of a product into the market. See Greenman v. Yuba Power Prods. Inc., 377 P.2d 897, 900–901 (Cal. 1963) (discussing implied warranties and strict liability for design defects); see also Dan B. Dobbs et al., The Law of Torts § 448 (2d ed. 2011) (“To a large extent, the law of implied warranty gradually merged with strict tort liability.”). A transaction between a seller and a consumer is a necessary prerequisite to proving either type of claim. See Restatement (Second) of Torts § 402A (1965)

16 We review Sachs’s claims only to the extent necessary to determine whether jurisdiction exists under the FSIA. Whether Sachs has properly pleaded these claims is not before us. See Kirkham, 429 F.3d at 293 (explaining that the jurisdictional inquiry under the FSIA is distinct from the Rule 12(b)(6) analysis).

(establishing liability for those who sell products to consumers); West’s Ann. Cal. Com. Code § 2314(1) (“[A] warranty that the goods shall be merchantable is implied in a contract for their sale . . .”); West’s Ann. Cal. Com. Code § 2315 (establishing an implied warranty that the goods shall be fit for a particular purpose at the time of contracting). Here, the sale relevant to proving these claims is the sale of the Eurail pass to Sachs in the United States.17 As we explained above, Sachs’s purchase of the couchette upgrade does not change our conclusion because her existing Eurail pass was a necessary precedent to the upgrade. Because the sale of the Eurail pass in the United States forms an essential element of each of Sachs’s claims, we conclude that Sachs’s claims are “based upon a commercial activity carried on in the United States” by OBB.18 28 U.S.C § 1605(a)(2).

17 The dissent of Judge O’Scannlain does not contest that if the ticket sale of the Eurail pass to Sachs in the United States was commercial activity of OBB, then the negligence claim is based on that conduct in the sense that one of the elements of negligence is the creation of the duty of the common carrier. But the dissent of Judge O’Scannlain argues that strict liability stands on a different footing because that claim does not require privity of contract. This misses the point. Under the standard formulation for strict liability for harm to a consumer, there must be a sale of the product. See Restatement (Second) of Torts § 402A (1965). Here, the sale by RPE was in the United States, and there is jurisdiction on the strict liability claim.

18 Chief Judge Kozinski, though he joins Judge O’Scannlain’s dissenting analysis, launches his own independent theory to take agency out of the case. Thus, Chief Judge Kozinski’s dissent argues that even if the Eurail pass tickets here sold by OBB’s agent had been sold directly by Austria “from a kiosk in Times Square,” Chief Judge Kozinski Dissent at 53, nonetheless, Sachs’s claims would not be based upon commercial activity in the United States. To reach this conclusion, Chief Judge Kozinski would simply overrule all prior case law in the Ninth Circuit which had held that it was sufficient if an element of the claim was supported by the
activity exception applies to a common carrier owned by a foreign state that acts through a domestic agent to sell tickets to United States citizens or residents for passage on the foreign common carrier’s transportation system. Sachs has met her burden of proving that the first clause of the commercial-activity exception applies. The district court erred in concluding that it lacked subject-matter jurisdiction over Sachs’s claims. We reverse and remand for further proceedings consistent with this opinion, including consideration of the other claims raised by OBB in its motion to dismiss.19

REVERSED and REMANDED.

O’SCANNLAIN, Circuit Judge, dissenting, with whom KOZINSKI, Chief Judge, and RAWLINSON, Circuit Judge, join:

Because I am not persuaded that an instrumentality of the Republic of Austria may be subjected to the jurisdiction of the United States Courts on the basis of the facts alleged in this case, I must respectfully dissent from the decision of the en banc court to the contrary.

I

The Foreign Sovereign Immunities Act of 1976 (FSIA) is “the sole basis for obtaining jurisdiction over a foreign state

19 Whether Sachs can successfully pursue her claims depends on a great many issues that are not presently before us. We express no view on those issues.
in our courts.” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Under the FSIA, a foreign state is presumptively “immune from the jurisdiction of the courts of the United States” unless the plaintiff can show that his action falls within a specified statutory exception. 28 U.S.C. § 1604; see also *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1127 (9th Cir. 2012).

Exceptions to sovereign immunity must be interpreted narrowly. Courts should guard against overly broad readings because expanding federal jurisdiction in this area can have serious foreign policy consequences. *See Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1155–56 (7th Cir. 2001) (“In interpreting the FSIA, we are mindful that judicial resolution of cases bearing significantly on sensitive foreign policy matters, like the case before us, might have serious foreign policy implications which courts are ill-equipped to anticipate or handle.”) (internal quotation marks omitted); *see also J.H. Trotter, Narrow Construction of the FSIA Commercial Activity Exception: Saudi Arabia v. Nelson*, 33 Va. J. Int’l L. 717, 733–34 (1993) (“As [the FSIA] exceptions undergo judicial expansion . . . the strains on foreign policy intensify.”). Indeed, we have expressly recognized the restricted nature of these exceptions. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010) (describing the FSIA’s exceptions as “narrow”); *see also McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012) (describing the FSIA’s exceptions as “narrowly drawn”).

By expanding the commercial-activity exception to encompass the facts in this case, the court, regrettably, claims jurisdiction that is denied to us by statute.

II

Carol P. Sachs, who lives in California, purchased a Eurail pass online from Rail Pass Experts (RPE), an entity located in Massachusetts. A Eurail pass enabled her to ride railways in Austria and the Czech Republic. RPE gained authority to sell Eurail passes from the Eurail Group. OBB Personenverkehr AG (OBB), a railway wholly owned by the Austrian government, is one of many Eurail Group members. OBB and Eurail are separate entities with distinct managements, employees, and purposes. While in Austria, Sachs attempted to board a moving train operated by OBB. She fell between the platform and the train such that she landed on the tracks, suffering severe bodily injuries. Sachs has sued OBB for negligence, strict liability, and breach of implied warranties.

Our analytical task in this case is made easier by the limited nature of the parties’ arguments. Sachs does not contest that OBB is an instrumentality of the Republic of Austria and therefore entitled to foreign sovereign immunity under the FSIA. The majority correctly notes that “[t]he [only] exception relevant to this appeal is the first clause of the commercial-activity provision.” Slip Op. at 10. The commercial-activity exception can helpfully be divided into three requirements: (1) the activity must be commercial rather than sovereign, (2) the activity must be “carried on in the

1 “A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state.” 28 U.S.C. § 1605(a)(2). Like the majority, I use the phrase “commercial-activity exception” to refer to the first clause of § 1605(a)(2). See Slip Op. at 10 n.3.
United States by the foreign state,” and (3) the plaintiff’s suit must be “based upon” that activity. 28 U.S.C. § 1605(a)(2).

The parties do not dispute that the only relevant commercial activity in the United States was Sachs’ purchase of a Eurail pass from RPE. See Slip Op. at 11 n.4. OBB does not contest that the sale of the Eurail pass was commercial, rather than sovereign, activity. The first requirement is therefore satisfied. It is the two other requirements that are disputed.

III

To repeat, the commercial-activity exception applies only if the activity in question was “carried on in the United States by the foreign state.” 28 U.S.C. § 1605(a)(2). Although the sale of the ticket by RPE clearly occurred in the United States, OBB disputes that it “carried on” that activity. Rather, OBB argues that the sale is attributable exclusively to RPE. See Phaneuf v. Republic of Indonesia, 106 F.3d 302, 306 (9th Cir 1997) (“Defendants should be permitted to argue . . . that they did not act: that there was no commercial activity of the foreign state.”) (internal quotation marks omitted).

To determine whether the activity is attributable to OBB, it is necessary to consider the meaning of “foreign state.” Because foreign states are not natural persons, they necessarily act through agents. See Slip Op. at 20. The question is what principle limits the extent to which another entity’s activity can be attributed to a foreign state for purposes of the FSIA.

Relying on Phaneuf, the majority rules that the activity of any authorized agent can be imputed to a foreign sovereign. See Slip Op. at 17 (“Because we conclude RPE acted as an authorized agent of OBB, we impute RPE’s sale of the Eurail pass in the United States to OBB.”) (citing Phaneuf, 106 F.3d at 307–08). Thus, it effectively reads “activity carried on . . . by a foreign state” and “activity carried on by such state” to mean activity carried on by the authorized agents of a foreign state. This necessarily equates a foreign state and its authorized agents.

With respect, I suggest that such a reading is inconsistent with other provisions of the FSIA. Rather, “foreign state” must be interpreted more narrowly. The approach we adopted in Doe v. Holy See, 557 F.3d 1066 (9th Cir. 2009), correctly interpreted “foreign state” and provides a framework with which to analyze this case. Under this narrower reading, “activity carried on . . . by a foreign state” cannot include activity carried on by RPE.

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2 Congress defined “commercial activity carried on in the United States by a foreign state” to mean “commercial activity carried on by such state and having substantial contact with the United States.” 28 U.S.C. § 1603(e).

3 While Phaneuf held that an agent must have acted with actual authority in order for its actions to be attributed to a foreign state, Phaneuf, 106 F.3d at 308, it did not hold that actual authority was sufficient to allow for such attribution in all circumstances. The actions at issue in Phaneuf were taken by members of Indonesia’s National Defense Security Council, rather than a corporate entity with whom Indonesia had only a loose relationship, so the closeness of the connection between the foreign state and the alleged agent was not at issue. See id. at 304, 307.
The term "foreign state," of course, is used repeatedly in the FSIA, not just in the commercial-activity exception. The meaning of "foreign state" remains constant throughout the statute, and textual evidence from other provisions demonstrates that "foreign state" cannot be so broad as to include all authorized agents of a foreign state.

Courts generally presume that a term is used consistently throughout a statute. See Powerex Corp. v. Reliant Energy Services, Inc., 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."); Antonin Scalia & Bryan A. Garner, Reading Law 170 (2012) (discussing the presumption of consistent usage). Here, far from indicating that different uses of "foreign state" have different meanings, the FSIA suggests that the definition remains constant throughout the statute (with the express exception of § 1608, which is not relevant here). See 28 U.S.C. § 1603(a) ("For purposes of this chapter—(a) A foreign state, except as used in section

1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).”) (emphasis added).

Confirming this analysis, the Supreme Court has interpreted the term "foreign state" consistently. In Samantar v. Yousuf, 560 U.S. 305 (2010), the Court interpreted "foreign state" as it was used in § 1604, which grants immunity to "foreign state[s].” 28 U.S.C. § 1604. In doing so, the Court expressly relied on the meaning of "foreign state" in an exception to immunity found in § 1605(a)(5). See Samantar, 560 U.S. at 317–18. Such approach is sensible only if "foreign state" has the same meaning in both provisions. Clearly, Supreme Court precedent indicates that "foreign state" has the same meaning when providing an exception to immunity as it does when granting immunity.

The majority, by contrast, treats the meaning of "foreign state" for the purposes of § 1604 and the meaning of "foreign state" for the purposes of § 1605 as separate inquiries. See Slip Op. at 20 (contrasting the status required to claim sovereign immunity and the status required for activity to be attributable under the commercial-activity exception). In light of the presumption of consistent usage and Supreme Court precedent applying it to the FSIA, I cannot accept the majority's assumption that the interpretation of this term differs so greatly between provisions.

Given that the meaning of "foreign state" is consistent, we can turn to analyzing the meaning of that term in other provisions of the FSIA. Textual evidence from § 1605A,
which also uses "foreign state," indicates that the term does not embrace all authorized agents.

Section 1605A(c) creates a cause of action against "[a] foreign state that is or was a state sponsor of terrorism . . . and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. § 1605A(c) (emphasis added). In Samantar, the Supreme Court tells us that "the creation of a cause of action against both the 'foreign state' and 'any official, employee, or agent' thereof reinforces the idea that 'foreign state' does not by definition include foreign officials." Samantar, 560 U.S. at 318 n.11 (citation omitted). Relying on § 1605A(c) and a similar provision in § 1605(a)(5), the Court invoked the rule against superfluity: "If the term 'foreign state' by definition includes an individual acting within the scope of his office, the phrase 'or of any official or employee . . . ' in 28 U.S.C. § 1605(a)(5) would be unnecessary." Id. at 318 (citing Dole Food Co. v. Patrickson, 538 U.S. 468, 476–77 (2003) ("[W]e should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous.").

Just as the inclusion of "official" in § 1605(a)(5) and § 1605A(c) would be superfluous were "foreign state" to include officials, the inclusion of "agent" in § 1605A(a)⁵ and

§ 1605A(c) would be superfluous if "foreign state" included all agents acting in the scope of their agencies (that is, authorized agents). And just as the avoidance of superfluity in another provision informed Samantar's interpretation of "foreign state" in § 1604, it similarly affects the meaning of "foreign state" in § 1605(a)(2). Therefore, by the same logic that the Supreme Court used in Samantar, the commercial-activity exception's use of "foreign state" does not include all authorized agents.

B

Because the majority's approach is inconsistent with the text of the statute, another approach is required. Our opinion in Holy See provides the proper standard for attributing the actions of third parties to foreign states. In determining whether acts taken by the Archdiocese of Portland, the Catholic Bishop of Chicago, and the Order of the Friar Servants could be imputed to the Holy See for determining jurisdiction under the FSIA, the Holy See court relied on First National City Bank v. Banco Para el Comercio Exterior de Cuba ("Bancec"), 462 U.S. 611 (1983). Bancec created a presumption of separate status for liability purposes. Id. at 626–27. This presumption could be overcome "in two instances: when 'a corporate entity is so extensively controlled by its owner that a relationship of principal and

within the scope of his or her office, employment, or agency.

agent is created.\textsuperscript{6} or when recognizing the separate status of a corporation "would work fraud or injustice." \textit{Holy See}, 557 F.3d at 1077–78 (quoting \textit{Bancec}, 462 U.S. at 629).

While \textit{Bancec} dealt with questions of substantive liability rather than jurisdiction, \textit{Holy See} decided that the standard announced in \textit{Bancec} applied to jurisdictional questions as well. \textit{See Holy See}, 557 F.3d at 1079. Thus, a determination of whether to attribute the actions of another entity to a foreign state for jurisdictional purposes begins with a presumption against such attribution. That presumption can be rebutted if the other entity is the alter ego of the foreign state or if failure to attribute the entity's actions to the foreign state "would work fraud or injustice." \textit{Id.} at 1077–78. Other circuits have applied \textit{Bancec} to jurisdictional issues as well. \textit{See Transamerica Leasing, Inc. v. La Republica de Venezuela}, 200 F.3d 843, 848 (D.C. Cir. 2000); \textit{Arriba Ltd. v. Petroleos Mexicanos}, 962 F.2d 528, 533 (5th Cir. 1992).

The standard from \textit{Holy See} fits the statutory text well. \textit{Holy See} counsels in favor of reading "activity . . . by a foreign state"\textsuperscript{6} to mean activity by a foreign state, its alter ego, or an entity the recognition of whose separateness would

\textsuperscript{6} As will be discussed below, the Court used the term "agent" in a different sense than the majority does. Courts have interpreted this prong of the \textit{Bancec} standard to refer to an "alter ego" analysis. \textit{See, e.g., Holy See}, 557 F.3d at 1080 (comparing the \textit{Bancec} standard to an "alter ego" or "piercing the corporate veil" standard); \textit{Transamerica Leasing, Inc. v. La Republica de Venezuela}, 200 F.3d 843, 848 (D.C. Cir. 2000) (noting that "in the case cited by the Supreme Court to illustrate the agency exception, various corporations were allegedly operated as a 'single enterprise.'").

\textsuperscript{7} How (or whether) this standard would apply to the actions of an individual agent, rather than entity agent, need not be addressed in this case. RPE is an entity, not an individual.
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But the majority’s distinction between the corporate affiliate context and the agency context is problematic for another reason as well: courts applying the Bancec standard have spoken expressly in terms of agency. In Bancec itself, the Court described the alter ego analysis as relevant because such extensive control creates “a relationship of principal and agent.” Bancec, 462 U.S. at 629; see also Holy See, 557 F.3d at 1079 (“[I]n applying the jurisdictional provisions of the FSIA, courts will routinely have to decide whether a particular individual or corporation is an agent of a foreign state.”). Thus, at least in certain circumstances, we have held that the Bancec standard is the method for determining whether another entity is an agent of a foreign state. The majority, therefore, cannot distinguish Holy See on the ground that it applies to the actions of corporate affiliates rather than agents.

Of particular importance here is that the meaning of “agent” or “agency” varies in different legal contexts. See Holy See, 557 F.3d at 1080 (“Agent’ can have more than one legal meaning.”). In Holy See, the court contrasted the typical common law agency analysis with the first prong of the Bancec standard. See id. (“The Bancec standard is in fact most similar to the ‘alter ego’ or ‘piercing the corporate veil’ standards . . .”).

The plaintiff in Holy See alleged a traditional agency relationship as the basis for attributing the actions of others to the Holy See. See id. (“Doe does directly allege in his complaint that the corporations are ‘agents’ of the Holy See.”); Pl.-Appellee/Cross-Appellant John V. Doe’s Principal and Resp. Br., 2007 WL 923313, II.C.1 (“Appellants Catholic Bishop, Archdiocese and Order, were the agents of Appellant Holy See, acting in furtherance of the purposes of the the [sic]

Holy See, doing the kind of acts they were engaged to perform, and were motivated, at least in part, to further the purposes of the Holy See.”). Nonetheless, the Holy See court ruled that it could not “infer from the use of the word ‘agent’ that Doe [wa]s alleging the type of day-to-day control that Bancec . . . require[s] to overcome the presumption of separate juridical status.” Holy See, 557 F.3d at 1080. If a common law agency relationship were all that is required for the imputation of an agent’s actions to the foreign state, surely the court would have treated Doe’s allegation differently in Holy See. Thus, it is clear that the sort of agency relationship that Bancec and Holy See required for the imputation of actions to the foreign state (an alter ego relationship, for example) differs significantly from the all-authorized-agents standard adopted by the majority.

C

Sachs simply cannot show that RPE’s actions are attributable to OBB under the Bancec standard. The first method of rebutting the presumption of separateness, the alter ego analysis, certainly cannot apply on these facts. Far from being the alter ego of OBB, RPE and Eurail are independent companies with different managements from OBB. RPE may be a subagent of Eurail, but Eurail is controlled by a group of railways, not OBB alone. The second method of rebutting the presumption of separateness—whether recognizing separate existences would work fraud or injustice—certainly does not suggest that the actions of RPE should be attributed to OBB. In Bancec, the Court found such equitable prong applicable because Bancec was attempting to recover money that would directly benefit the Cuban government while simultaneously arguing that its claim should not be subject to a set-off that would have applied if the Cuban government sued directly.
Bancerc, 462 U.S. at 631–32. Here, OBB has not behaved in a comparable way. OBB has not, for example, inconsistently characterized RPE’s actions to its advantage; it has consistently asserted that RPE’s actions cannot be attributed to it.

If there is any “injustice” at all from failing to impute RPE’s actions to OBB, it stems from Sachs’ inability to sue OBB in American courts. This, however, is not the sort of injustice that validates treating RPE as if it were OBB. The inability to sue in American courts is a natural result of recognizing foreign sovereign immunity, the general rule and policy of the FSIA. See Sachs v. Republic of Austria, 695 F.3d 1021, 1026 (9th Cir. 2012) (“Any injustice that results is no greater than the mine-run of cases—jurisdiction over a foreign state is, after all, ordinarily not available.”).

D

The majority relies on Barkanic v. General Administration of Civil Aviation of the People’s Republic of China, 822 F.2d 11 (2d Cir. 1987), and Kirkham v. Societe Air France, 429 F.3d 288 (D.C. Cir. 2005). These cases do not analyze when the acts of agents can be attributed to a foreign state. As acknowledged by the majority, see Slip Op. at 14 n.5a, the parties in Barkanic and Kirkham did not dispute that the relevant actions constituted activity of the foreign state. See Barkanic, 822 F.2d at 13 (assuming without discussion that a ticket sale by Pan American was attributable to the defendant); Kirkham, 429 F.3d at 291–92 (noting that the “sole question” before the court related to the “based upon” prong of the commercial-activity exception). Although those courts “had an independent duty to assess jurisdiction,” see Slip Op. at 14 n.5b, their decisions “do[ ]

not stand for the proposition that no defect existed.” Arizona Christian School Tuition Organization v. Winn, 131 S. Ct. 1436, 1448 (2011) (“When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.”).

The majority makes much of the possibility that, if its reading were rejected, federal courts would not be able to exercise jurisdiction over foreign states based on the actions of travel agents. Slip Op. at 21–24. The majority’s concern seems to stem from the idea that the lack of federal jurisdiction would leave plaintiffs to sue abroad, a result the majority describes as too “chaotic” for Congress to have intended. Slip Op. at 24. But, the general rule for the FSIA is that foreign states are immune from suit; there will be many instances in which Americans who wish to sue foreign sovereigns can only do so overseas. This is a result Congress clearly intended in many instances, so it is hard to see why the same result in this situation should strike the majority as so “chaotic.”

Because Sachs has not shown that RPE and OBB have a relationship that rebuts the Bancerc presumption of separate status, I would affirm the district court’s dismissal for lack of jurisdiction.

IV

Even if the sale of the Eurail pass by RPE were “commercial activity carried on . . . by the foreign state,” sovereign immunity would still, at a minimum, bar Sachs’ strict liability claims because they are not “based upon” the sale of the pass, as would be required for the commercial-activity exception to apply. 28 U.S.C. § 1605(a)(2).
Assuming the majority’s interpretation of this requirement is correct, I agree that Sachs’ negligence and implied warranty claims would be “based upon” the sale of the Eurail pass had the sale been attributable to OBB. The Supreme Court has clarified that the commercial activity in question, here the sale of the Eurail pass, must be an “element [ ] of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.” *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). The majority understands this to mean that a claim is based upon commercial activity if that activity will establish one element of the claim. But still, a mere connection between the claim and the commercial activity is insufficient. *Sun v. Taiwan*, 201 F.3d 1105, 1110 (9th Cir. 2000) (citing *Nelson*, 507 U.S. at 362).

The majority believes that Sachs’ negligence claim is “based upon” the sale of the Eurail pass because the sale evidences that OBB, as a common carrier, owed a duty of care to Sachs, a passenger. Slip Op. at 29–31. This strikes me as a proper application of the majority’s rule; however, the majority also concludes that Sachs’ other claims are “based upon” the sale of the Eurail pass because the sale was the transaction necessary for an implied warranty claim or strict liability claim. Slip Op. at 33.

This theory inappropriately lumps together Sachs’ strict liability claims and implied warranty claims. While the majority is correct that both types of claims center on “attributing liability based on the sale of a product into the market,” Slip Op. at 33, there is a crucial difference between them. Strict liability claims do not require proof that the plaintiff entered a transaction with the defendant. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), which the majority relies on to explain California law on strict liability, discusses “the abandonment of the requirement of a contract between” the manufacturer and the plaintiff. *Id.* at 901; *see also* Restatement (Third) of Torts: Products Liability § 1 cmt a (1998) (“Strict liability in tort for defectively manufactured products merges the concept of implied warranty, in which negligence is not required, with the tort concept of negligence, in which contractual privity is not required.”).

While the majority claims that Sachs’ strict liability claim requires her to prove that OBB was a “seller,” Slip Op. at 33, California cases suggest that a strict liability plaintiff need not prove that the defendant is a seller. *See Price v. Shell Oil Co.*, 466 P.2d 722, 726 (Cal. 1970) (“[W]e can perceive no substantial difference between sellers of personal property and non-sellers, such as bailors and lessors. In each instance, the seller or non-seller places [an article] on the market, knowing that it is to be used without inspection for defects.”) (second alteration in original) (internal quotation marks omitted); *Greenman*, 377 P.2d at 901 (“To establish the manufacturer’s liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.”) Under California law, it appears that OBB’s provision of train service and Sachs’ use of it are sufficient to subject OBB to strict liability. Therefore, Sachs has not established that she must prove that OBB was a “seller” in order to prevail on her strict liability claim.

Because contractual privity is not an element of Sachs’ strict liability claims, they are not “based upon” the sale by RPE, the only relevant commercial activity. Sachs, therefore,
may not invoke the commercial-activity exception to overcome OBB's sovereign immunity. Even if RPE's sale of the Eurail pass to Sachs were attributable to OBB, the majority should affirm the district court insofar as it dismissed the strict liability claims for lack of jurisdiction.

V

For the foregoing reasons, I would affirm the district court's dismissal for lack of jurisdiction. Because RPE's sale of the Eurail pass is not attributable to OBB, Sachs has not alleged commercial activity "by the foreign state." Indeed, even if the majority's theory of attribution were valid, the strict liability claims would still need to be dismissed because they are not "based upon" the sale to Sachs in the United States.

Chief Judge KOZINSKI, dissenting:

I agree with Judge O'Scannlain that a foreign sovereign doesn't engage in commercial activity in the United States when a subagent over which it exercises no direct control sells tickets for passage on a common carrier wholly owned by that sovereign. But there is another, simpler way to affirm the district court. Because plaintiff's claim arises from events that transpired entirely in Austria, it isn't "based upon" commercial activity carried on in the United States. 28 U.S.C. § 1605(a)(2). This would be true even if Austria were itself selling train tickets from a kiosk in Times Square.

The majority holds that all of plaintiff's claims are based on domestic commercial activity, relying on our cases requiring that only "an element" of the claim consist of such activity. Maj. op. at 28 (quoting Sun v. Taiwan, 201 F.3d 1105, 1109 (9th Cir. 2000)). But an en banc court can overrule circuit law; in fact, that's the principal reason for taking a case en banc. See Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1479 (9th Cir. 1987) (en banc). Because these earlier cases conflict with Supreme Court precedent, we should take the opportunity to sweep them aside.

The Supreme Court has addressed what it means for a claim to be "based upon" commercial activity only once. In Saudi Arabia v. Nelson, 507 U.S. 349 (1993), the Court observed that "the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." Id. at 357. Nelson emphasized the limited scope of its holding: "We do not mean to suggest that the first clause of § 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state, and we do not address the case where a claim consists of both commercial and sovereign elements." Id. at 358 n.4. Some of our cases have misread this holding—that a claim can be based upon commercial activity even if proving that activity won't establish every element of the claim—for an endorsement of the converse proposition—that a claim is based upon commercial activity so long as proving that activity will establish at least one element of the claim. See, e.g., Sun, 201 F.3d at 1109; Sugimoto v. Exportadora de Sal, S.A. de C.V., 19 F.3d 1309, 1311 (9th Cir. 1994).

This broad interpretation of the "based upon" requirement runs contrary to our "background rule that foreign states are immune from suit," subject only to "narrow exceptions." Peterson v. Islamic Republic of Iran, 627 F.3d 1117, 1125
(9th Cir. 2010). It also invites plaintiffs’ lawyers to manufacture jurisdiction through artful pleading.

An action can frequently be brought under multiple theories, as plaintiff’s negligence, breach-of-contract and product-liability claims amply demonstrate. Each of these theories accords plaintiffs plenty of opportunity to find at least one element involving domestic commercial conduct. For example, the Supreme Court observed in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), that “[i]t will virtually always be possible to assert that the negligent activity that injured the plaintiff [abroad] was the consequence of faulty training, selection or supervision . . . in the United States.” Id. at 702 (second alteration in original) (quoting Beattie v. United States, 756 F.2d 91, 119 (D.C. Cir. 1984) (Scalia, J., dissenting)). Sosa considered a claim under the Federal Tort Claims Act (FTCA) arising out of plaintiff’s abduction in Mexico. Although the Court recognized that negligent acts or omissions during the planning stages in the United States may have contributed to the injury, this was not sufficient to overcome the FTCA’s exclusion of “any claim arising in a foreign country.” 28 U.S.C. § 2680(k).

This mode of analysis applies with even greater force when we are dealing with suits against foreign sovereigns. Earlier this year, the Supreme Court cited the “danger of unwarranted judicial interference in the conduct of foreign policy” in holding that the Alien Tort Statute did not automatically apply to violations of the law of nations that occur within the territory of a foreign sovereign. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013). Similarly, in Morrison v. Nat’l Australia Bank Ltd., 130 S. Ct. 2869 (2010), the Court interpreted Section 10(b) of the Securities Exchange Act of 1934 as inapplicable to transactions that neither occurred in the United States nor involved securities listed on U.S. exchanges. Id. at 2886. Although the government argued that the term “in connection with the purchase or sale of any security registered on a national securities exchange” should be read more broadly, the Court reasoned that “it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.” Id. at 2884 (emphasis in original).

The Nelson Court recognized the perils of an overly permissive reading of the FSIA’s “based upon” requirement when it rejected plaintiff’s failure-to-warn claim as a “semantic ploy” designed to dress up what was, at its heart, an intentional tort claim based on conduct that occurred exclusively in Saudi Arabia. Nelson, 507 U.S. at 363. It didn’t dispute that the commercial activity would prove one element of a failure-to-warn claim, but recognized that “[t]o give jurisdictional significance to this feint of language would effectively thwart the Act’s manifest purpose to codify the restrictive theory of foreign sovereign immunity.” Id.

Our case illustrates the expansive sweep of the majority’s approach. Plaintiff had a train ticket to travel from Austria to the Czech Republic. She was injured due to defendant’s alleged negligence when she tried to board. The injury and any negligence occurred in Austria. But, because plaintiff happened to buy her ticket online from a vendor in Massachusetts, a federal court in California now asserts power to hale the Austrian government before it and make it defend against a claim based on facts that occurred in Austria.
This makes as much sense as forcing Mrs. Palsgraf to litigate her case in Vienna.

As the Sosa Court recognized with respect to the FTCA, a critical element in this analysis is proximate causation, with jurisdiction hinging on whether "the act or omission [in the United States] was sufficiently close to the ultimate injury, and sufficiently important in producing it, to make it reasonable to follow liability back to the [domestic] behavior." Sosa, 542 U.S. at 703. "[U]nderstanding that California planning was a legal cause of the harm in no way eliminates the conclusion that the claim here arose from harm proximately caused by acts" abroad. Id. at 704. Because plaintiff hasn't shown a sufficient nexus between her purchase and the injury, we have no jurisdiction over Austria. I would affirm the district court on that basis. See Weiser v. United States, 959 F.2d 146, 147 (9th Cir. 1992) ("Our review is not limited to a consideration of the grounds upon which the district court decided the issues; we can affirm the district court on any grounds supported by the record.").
United States Court of Appeals, Second Circuit.


Docket No. 11–2475–cv.

Decided: April 23, 2014


This is the latest installment in litigation brought by the European Community and twenty-six of its member states1 (collectively “Plaintiffs”) against RJR Nabisco, Inc., and related entities (collectively “RJR”).2 Plaintiffs appeal from the dismissal of their Second Amended Complaint (the “Complaint”) by the United States District Court for the Eastern District of New York (Garaufis, J.). The principal issues they raise are (1) whether their claims under the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1961 et seq., are impermissibly extraterritorial, and (2) whether the European Community qualifies as an organ of a foreign state for purposes of diversity jurisdiction under 28 U.S.C. §§ 1332, 1603. The Complaint alleges that RJR directed, managed, and controlled a global money-laundering scheme with organized crime groups in violation of the RICO statute, laundered money through
New York-based financial institutions and repatriated the profits of the scheme to the United States, and committed various common law torts in violation of New York state law. The district court dismissed the RICO claims because it concluded that RICO has no extraterritorial application. The court dismissed the state law claims because it determined that the European Community did not qualify as an organ of a foreign state under 28 U.S.C. §§ 1332, 1603 so that its participation in the suit destroyed complete diversity, and thus deprived the court of jurisdiction over the state law claims.

We conclude that the district court erred in dismissing the federal and state law claims. We disagree with the district court's conclusion that RICO cannot apply to a foreign enterprise or to extraterritorial conduct. Recognizing that there is a presumption against extraterritorial application of a U.S. statute unless Congress has clearly indicated that the statute applies extraterritorially, see Morrison v. Nat'l Austl. Bank Ltd., 130 S.Ct. 2869 (2010), we conclude that, with respect to a number of offenses that constitute predicates for RICO liability and are alleged in this case, Congress has clearly manifested an intent that they apply extraterritorially. As to the other alleged offenses, the Complaint alleges sufficiently important domestic activity to come within RICO's coverage.

We believe that the district court also erred in ruling that the European Community's participation as a plaintiff in this lawsuit destroyed complete diversity. The European Community is an "agency or instrumentality of a foreign state" as that term is 19 defined in 28 U.S.C. § 1603(b). It therefore qualifies as a "foreign state" for purposes of 28 U.S.C. § 1332(a)(4), and its suit against "citizens of a State or of different States" comes within the diversity jurisdiction.

BACKGROUND

According to the Complaint, the scheme alleged to violate RICO involves a multi-step process beginning with the smuggling of illegal narcotics into Europe by Colombian and Russian criminal organizations. The drugs are sold, producing revenue in euros, which the criminal organizations "launder" by using money brokers in Europe to exchange the euros for the domestic currency of the criminal organizations' home countries. The money brokers then sell the euros to cigarette importers at a discounted rate. The cigarette importers use these euros to purchase RJR's cigarettes from wholesalers or "cut-outs." The wholesalers then purchase the cigarettes from RJR and ship the cigarettes to the importers who purchased them. And the money brokers use the funds derived from the cigarette importers to continue the laundering cycle.

The Complaint alleges that RJR directed and controlled this money-laundering scheme, utilizing other companies to handle and sell their products. It alleges that RJR gave special handling instructions "intended to conceal the true purchaser of the cigarettes." Complaint ¶ 58. The Complaint also alleges that RJR's executives and employees would travel from the United States to Europe, the Caribbean, and Central America in order to further these money-laundering arrangements; that they shipped cigarettes through Panama in order to use Panama's secrecy laws to shield the transactions from government scrutiny; that RJR's employees would take monthly trips from the United States to Colombia through Venezuela, bribe border guards in order to enter Colombia illegally, receive payments for cigarettes, travel back to Venezuela, and wire the
funds to RJR's accounts in the United States; that RJR employees traveled extensively from the United States to Europe and South America to supervise the money-laundering scheme and to entertain the criminal customers; that RJR communicated internally and with its coconspirators by means of U.S. interstate and international mail and wires; that RJR's employees filed large volumes of fraudulent documents with the U.S. Customs Service and the Bureau of Alcohol, Tobacco and Firearms to further their scheme; that RJR received the profits of its money-laundering schemes in the United States; and that RJR acquired Brown & Williamson Tobacco "for the purpose of expanding upon their illegal cigarette sales and money-laundering activities," id. ¶¶ 100–103.

The Complaint asserts that in the course of executing this scheme RJR committed various predicate racketeering acts in violation of RICO, including mail fraud, wire fraud, money laundering, violations of the Travel Act, 18 U.S.C. § 1952, and providing material support to foreign terrorist organizations. In addition the Complaint asserts that RJR committed New York common law torts of fraud, public nuisance, unjust enrichment, negligence, negligent misrepresentation, conversion, and money had and received.

Defendants moved to dismiss both the RICO and state law claims. In its first decision, the district court dismissed the RICO claims on the ground that RICO has no application to activity outside the territory of the United States and cannot apply to a foreign enterprise. European Cmty. v. RJR Nabisco, Inc. (European Cmty. I), No. 02–CV–5771, 2011 WL 843957, at *4–5, *7 (E.D.N.Y. Mar. 8, 2011). The court concluded, citing Morrison, that the “focus” of the RICO statute is the enterprise, see 18 U.S.C. §§ 1961(4), 1962(a)-(c), and that the enterprise alleged in the Complaint, which consisted largely of a loose association of Colombian and Russian drug-dealing organizations and European money brokers whose activity was directed outside the United States, could not be considered domestic. Because the enterprise was foreign, the district court concluded, under Morrison's presumption that United States statutes do not apply extraterritorially absent a clear indication of congressional intent, that the Complaint failed to state an actionable violation of RICO. The court thus dismissed the RICO claims under Federal Rule of Civil Procedure 12(b)(6).

As for the state law claims alleged to come within the federal courts' diversity jurisdiction, the district court observed that the necessary complete diversity might be destroyed if the European Community remained a plaintiff. European Cmty. I, 2011 WL 843957, at *8. The court allowed Plaintiffs' counsel time to determine whether the European Community intended to remain a party to the suit. Id.

Once advised that the European Community would remain a party, the court ruled that the state law claims did not come within the diversity jurisdiction of the federal courts. It held that the European Community was not a “foreign state,” as used in 28 U.S.C. § 1332, with the consequence that the European Community's continued participation in the suit together with various foreign nation plaintiffs destroyed complete diversity and deprived the court of jurisdiction. European Cmty. v. RJR Nabisco, Inc. (European Cmty. II), 814 F.Supp.2d 189, 208 (E.D.N.Y.2011). The court declined to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(c) because it had dismissed all the federal law claims. Id.
DISCUSSION

Plaintiffs contend on appeal that the district court erred in concluding that the Complaint failed to allege federal law claims, and that the district court erred in finding absence of diversity jurisdiction for the state law claims. We agree with both contentions.

I. RICO Claims

We turn first to the dismissal of the RICO claims. We review a district court's dismissal under Rule 12(b)(6) de novo. Connecticut v. Duncan, 612 F.3d 107, 112 (2d Cir.2010).

A. The Extraterritoriality of RICO

The district court concluded that the Complaint failed to state actionable RICO claims because the alleged enterprise was located and directed outside the United States. The court's analysis was based on the Supreme Court's ruling in Morrison that the presumption against extraterritorial application of U.S. statutes bars such application absent a clear manifestation of congressional intent. European Cmty. I, 2011 WL 843957, at *4. The district court concluded that RICO is silent as to whether Congress intended it to apply to conduct outside the United States, and that "this silence prohibits any extraterritorial application of RICO." Id. The district court believed this conclusion was compelled by our holding in Norex Petroleum Ltd. v. Access Industries, Inc., 631 F.3d 29, 32 (2d Cir.2010). We disagree in several respects with the district court's analysis, including its understanding of the Norex precedent.

The RICO statute incorporates by reference numerous specifically identified federal criminal statutes, as well as a number of generically described state criminal offenses (known in RICO jurisprudence as "predicates"). 18 U.S.C. § 1961(1). It adds new criminal and civil consequences to the predicate offenses in certain circumstances—generally speaking, when those offenses are committed in a pattern (consisting of two or more instances) in the context of "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962; see also id. § 1964.

Litigants, including Plaintiffs in this case, have argued that this just-quoted provision of the statute, which makes RICO applicable to enterprises whose activities affect foreign commerce, sufficiently indicates congressional intent that RICO should apply extraterritorially. In Norex we rejected that argument, noting the Supreme Court's admonishment in Morrison that the mere fact of a statute's generic reference to "interstate or foreign commerce," identifying the source of Congress's authority to regulate, would not qualify as a manifestation of congressional intent that the statute apply extraterritorially. Norex, 631 F.3d at 33 (internal quotation mark omitted). The argument we rejected in Norex was to the effect that all claims under RICO may apply to foreign conduct because all RICO claims require proof of an enterprise whose activities affect interstate or foreign commerce. Id. We viewed this argument as plainly foreclosed by Morrison.

We rejected also a similarly ambitious argument to the effect that Congress's adoption of some RICO predicate statutes with extraterritorial reach indicated a congressional intent that RICO have extraterritorial reach for all its predicates. See id. In so holding, we refused to equate the
extraterritoriality of certain RICO predicates with the extraterritoriality of RICO as a whole. See id. ("Morrison similarly forecloses Norex's argument that because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach.").

The district court here construed our rejection in Norex of arguments that RICO applies extraterritorially in all of its applications as a ruling that RICO can never have extraterritorial reach in any of its applications. See European Cmty. I, 2011 WL 843957, at *4. This was a misreading of Norex. We now confront an argument about the extraterritorial reach of RICO that was not considered in Norex, or in other rulings called to our attention. Congress manifested an unmistakable intent that certain of the federal 19 statutes adopted as predicates for RICO liability apply to extraterritorial conduct. This appeal requires us to consider whether and how RICO may apply extraterritorially in the context of claims predicated on such statutes.

We conclude that RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate. Thus, when a RICO claim depends on violations of a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially, RICO will apply to extraterritorial conduct, too, but only to the extent that the predicate would. Conversely, when a RICO claim depends on violations of a predicate statute that does not overcome Morrison's presumption against extraterritoriality, RICO will not apply extraterritorially either. In all cases, what constitutes sufficient domestic conduct to trigger liability is the same as between RICO and the predicate that forms the basis for RICO liability.

Our conclusion is compelled primarily by the text of RICO. Section 1961(1), which defines "racketeering activity" for purposes of RICO, incorporates by reference various federal criminal statutes, which serve as predicates for RICO liability. Some of these statutes unambiguously and necessarily involve extraterritorial conduct. They can apply only to conduct outside the United States. As examples, § 2332 of Title 18 criminalizes killing, and attempting to kill, "a national of the United States, while such national is outside the United States." 18 U.S.C. § 2332(a) (emphasis added). Section 2423(c) criminalizes "[e]ngaging in illicit sexual conduct in foreign places." Id. § 2423(c) (emphasis added). As the conduct which violates these two statutes can occur only outside the United States, Congress unmistakably intended that they apply extraterritorially. By explicitly incorporating these statutes by reference as RICO predicate offenses, Congress also unmistakably intended RICO to apply extraterritorially when § 2332 or § 2423(c) form the basis for RICO liability. Indeed, it is hard to imagine why Congress would incorporate these statutes as RICO predicates if RICO could never have extraterritorial application.

Other statutes that serve as RICO predicates clearly state that they apply to both domestic and extraterritorial conduct. For example, § 1203(b), which criminalizes hostage taking, explicitly applies to conduct that "occurred outside the United States" if the offender or the hostage is a U.S. national, the offender is found in the United States, or the conduct sought to coerce the government of the United States; sections 351(i) and 1751(k) expressly provide "extraterritorial jurisdiction" for their criminalization of assassination, kidnapping, or assault of various U.S. government officials; a provision of § 1512 criminalizes extraterritorial tampering with witnesses, victims, or informants; and § 2332b(e) expressly asserts "extraterritorial Federal jurisdiction" as to its criminalization of various "conduct transcending national boundaries".”

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including attempts, threats, or conspiracies to kill persons within the United States or damage property within the United States. Here too, Congress has not only incorporated into RICO statutes that overcome the presumption against extraterritoriality, it has also provided detailed instructions for when certain extraterritorial conduct should be actionable.

By incorporating these statutes into RICO as predicate racketeering acts, Congress has clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of those statutes serve as the basis for RICO liability. Thus, a RICO complaint predicating the defendants' liability on their having engaged in a pattern of attempting, while "outside the United States," to kill the plaintiff, "a national of the United States," as prohibited by 18 U.S.C. § 2332(b), would state an actionable violation of RICO notwithstanding the extraterritorial conduct because RICO incorporates Congress's express statement that § 2332(b) applies to whomever "outside the United States attempts to kill . a national of the United States." Id. (emphasis added). When, and to the extent that, a RICO charge is based on an incorporated predicate that manifests Congress's clear intention to apply extraterritorially, the presumption against extraterritorial application of U.S. statutes is overcome. The district court was mistaken in interpreting our Norex decision as holding that RICO can never apply extraterritorially.

Applying its perception of our holding in Norex, the district court approached the question whether a RICO claim can apply to extraterritorial conduct by determining that the "focus" of RICO is the criminal enterprise and that any application of RICO is therefore impermissibly extraterritorial when the alleged enterprise is foreign. Because the district court viewed the enterprise alleged in the Complaint as consisting primarily of a loose association of foreign criminal organizations whose policies and activities were directed from outside the United States, it concluded that the enterprise was foreign. It accordingly held that the presumption against extraterritorial application of U.S. statutes barred application of RICO to the facts alleged in the Complaint. In our view, the court erred in that analysis for two principal reasons.

First, the district court's approach necessarily disregards the textual distinctions in the statutes incorporated by reference as RICO predicates. For example, the money laundering statute explicitly applies to extraterritorial conduct "if (1) the conduct is by a United States citizen . and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000." 18 U.S.C. § 1956(f). The district court's reading of RICO would preclude extraterritorial applications of RICO where they are explicitly permitted under the money laundering statute. By contrast, some RICO predicates do not mention any extraterritorial application, see, e.g., 18 U.S.C. § 1511 (criminalizing the obstruction of state or local law enforcement), while others clearly apply to extraterritorial conduct, but under different circumstances than the money laundering statute, see, e.g., id. § 1203(b) (criminalizing a subset of extraterritorial hostage-taking). The district court would presumably have RICO apply extraterritorially in the same manner when claims are brought under these different predicates, effectively erasing carefully crafted congressional distinctions.

Nothing in RICO requires or even suggests such an erasure of statutory distinctions. Rather, RICO prohibits, roughly speaking, investing in, acquiring control of, working for, or associating with an "enterprise" if the defendant's conduct involves (in a variety of potential fashions) a
“pattern of racketeering activity.” 18 U.S.C. §§ 1962(c), 1964(c). RICO does not qualify the geographic scope of the enterprise. Nor does RICO contain any other language that would suggest its extraterritorial application differs from that specified in its various predicates. Without any congressional instruction to the contrary, we see no reason to adopt a construction of RICO that would permit a defendant associated with a foreign enterprise to escape liability for conduct that indisputably violates a RICO predicate, but that could impose liability on a defendant associated with a domestic enterprise for extraterritorial conduct that does not fall within the geographic scope of the relevant predicate.

Second, the district court’s requirement that the defendant be, loosely speaking, associated with a domestic enterprise in order to sustain RICO liability seems to us illogical. Under that standard, if an enterprise formed in another nation sent emissaries to the United States to engage in domestic murders, kidnappings, and violations of the various RICO predicate statutes, its participants would be immune from RICO liability merely because the crimes committed in the United States were done in conjunction with a foreign enterprise. Surely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States. Cf. United States v. Parness, 503 F.2d 430, 438–39 (2d Cir.1974) (noting that a conclusion that RICO requires both a domestic enterprise and a domestic pattern of racketeering activity would “permit those whose actions ravage the American economy to escape prosecution simply by investing the proceeds of their ill-gotten gains in a foreign enterprise”).

The district court’s standard has the additional, undesirable effect of complicating the question of what conduct exposes a party to liability in the United States. Under the substantive criminal law, conduct may be sufficiently extraterritorial to provide a party with peace of mind that it is not subject to U.S. law. Under the district court’s reasoning, however, if the party acts in concert with a “domestic enterprise,” it may nevertheless face stiff penalties under RICO. An important value of the presumption against extraterritoriality is predictability. An interpretation of RICO that depends on the location of the enterprise would undermine, rather than promote, that value.

We think it far more reasonable to make the extraterritorial application of RICO coextensive with the extraterritorial application of the relevant predicate statutes. This interpretation at once recognizes that “RICO is silent as to any extraterritorial application” and thus has no extraterritorial application independent of its predicate statutes. See Norex, 631 F.3d at 33 (quoting N.S. Fin. Corp. v. Al–Turki, 100 F.3d 1046, 1051 (2d Cir.1996)). At the same time, it gives full effect to the unmistakable instructions Congress provided in the various statutes incorporated by reference into RICO. This approach has the benefit of simplifying the question of what conduct is actionable in the United States and permitting courts to consistently analyze that question regardless of whether they are presented with a RICO claim or a claim under the relevant predicate. It also avoids incongruous results, such as insulating purely domestic conduct from liability simply because the defendant has acted in concert with a foreign enterprise.

B. The Conduct Alleged in the Complaint

The Complaint in our case alleges a pattern of racketeering activity based on predicates that include (1) money laundering, 18 U.S.C. §§ 1956–57, (2) providing material support to foreign
terrorist organizations, 18 U.S.C. § 2339B, (3) mail fraud, 18 U.S.C. § 1341, (4) wire fraud, 18 U.S.C. § 1343, and (5) violations of the Travel Act, 18 U.S.C. § 1952. Applying Morrison's presumption against extraterritoriality to these predicate statutes, we conclude first that the money laundering and material support of terrorism statutes both apply extraterritorially under specified circumstances, including those circumstances alleged in the Complaint. Second, we conclude that the wire fraud and money fraud statutes, as well as the Travel Act, do not overcome Morrison's presumption against extraterritoriality. Nevertheless, because Plaintiffs have alleged that all elements of the wire fraud, money fraud, and Travel Act violations were completed in the United States or while crossing U.S. borders, we conclude that the Complaint states domestic RICO claims based on violations of those predicates.

1. Allegations of Money Laundering and Material Support of Terrorism

The money laundering predicates apply extraterritorially "if (1) the conduct is by a United States citizen, and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000." 18 U.S.C. § 1956(f), Section 1956(f) expressly states that "[t]here is extraterritorial jurisdiction over the conduct prohibited by this section." Section 1957 similarly criminalizes knowingly engaging "in a monetary transaction in criminally derived property of a value greater than $10,000 . derived from specified unlawful activity," id. § 1957(a), if the offense "takes place outside the United States ., but the defendant is a United States person," id. § 1957(d) (emphasis added). The predicate act criminalizing material support for terrorism similarly states that it applies extraterritorially. It covers "knowingly provid[ing] material support or resources to a foreign terrorist organization," id. § 233913(a)(1), and adds that "[t]here is extraterritorial Federal jurisdiction over an offense under this section," id. § 233913(d)(2).

The claims of the Complaint asserting RICO liability for a pattern of violations of these predicates meet the statutory requirements for extraterritorial application of RICO. The district court erred in dismissing, as impermissibly extraterritorial, the RICO claims based on these predicates. 7

2. Allegations of Mail Fraud, Wire Fraud, and Travel Act Violations

Whether Congress manifested an intent that the wire fraud statute, 18 U.S.C. § 1343, 8 or the Travel Act, 18 U.S.C. § 1952, 9 applies extraterritorially presents a more complicated question. The argument in favor of extraterritoriality depends on their references to foreign commerce. The wire fraud statute applies to the transmission of communications by "wire, radio, or television . in interstate or foreign commerce" in the execution of a scheme to defraud. Id. § 1343. The Travel Act applies to "travel[ ] in interstate or foreign commerce or use[ ]of the mail or any facility in interstate or foreign commerce" with intent to further unlawful activity. Id. § 1952(a). In Morrison, the Supreme Court observed that a "general reference to foreign commerce . does not defeat the presumption against extraterritoriality." Morrison, 130 S.Ct. at 2882. This admonition appears to bar reading these statutes literally to cover wholly foreign travel or communication. We conclude that the references to foreign commerce in these statutes, deriving from the Commerce Clause's specification of Congress's authority to regulate, do not indicate a congressional intent that the statutes apply extraterritorially. 10
The mail fraud statute presents an easier case.\textsuperscript{11} There, unlike in the Travel Act and wire fraud statute, Congress included no reference to transnational application whatsoever. See generally 18 U.S.C. \textsection{} 1341. Accordingly, we see no basis for finding a manifestation of congressional intent that the mail fraud statute apply extraterritorially.

Applying these principles to the Complaint, we conclude that it alleges sufficient domestic conduct for the claims involving mail fraud, wire fraud, and Travel Act violations to sustain the application of RICO, notwithstanding that these predicates do not apply extraterritorially.\textsuperscript{12}

The Complaint alleges that RJR essentially orchestrated a global money laundering scheme from the United States by sending employees and communications abroad. It claims that RJR “communicated . with [its] coconspirators on virtually a daily basis by means of U.S. interstate and international wires as a means of obtaining orders for cigarettes, arranging for the sale and shipment of cigarettes, and arranging for and receiving payment for the cigarettes in question.” Complaint ¶ 94. The Complaint also states that RJR and its coconspirators “utilized the interstate and international mail and wires, and other means of communication, to prepare and transmit documents that intentionally misstated the purchases of the cigarettes in question so as to mislead the authorities within the United States, the European Community, and the Member States.” Id. ¶ 95. The Complaint alleges that “the U.S. mails and wires are used by [RJR] to bill and pay for the cigarettes, to confirm billing and payment for the cigarettes, to account for the payment of the cigarettes to [RJR] and [its] subsidiaries, and to maintain an accounting of the proceeds received by [RJR] from the sale of the cigarettes, with said proceeds ultimately being returned to [RJR] in the United States.” Id. ¶ 96. The Complaint furthermore alleges:

[T]he employees, executives, and managers of [RJR] often traveled extensively, both to supervise the schemes and also to entertain [RJR's] criminal customers. RJR executives traveled from the United States to Europe and South America to meet with, entertain, and maintain relations with RJR's criminal customers. RJR executives and managers who engaged in such travel and entertainment often received large travel and entertainment budgets from [RJR].

Id. ¶ 84.

Beyond these allegations that the Defendants managed their global money laundering schemes from the United States through foreign travel and communications, the Complaint also claims that the schemes themselves were directed at the United States and had substantial domestic effects. The Complaint alleges that RJR repatriated the profits of its unlawful activity into the United States through money laundering and other acts of concealment. The money laundering involved in one portion of the scheme—that comprising Russian organized crime and the Bank of New York—was largely centered in and operated from Queens, New York, where tens of millions of dollars were allegedly laundered. Defendants allegedly filed large volumes of false documents with the United States Customs Service and the Bureau of Alcohol, Tobacco and Firearms in order to deceive these agencies and permit the unlawful activity to continue. Finally, the Complaint alleges that the money laundering scheme it describes is intertwined with organized crime and narcotics trafficking in New York City, that much of the money laundering through cigarette sales occurs in New York City, and that millions of dollars' worth of real estate have been purchased within New York in conjunction with the scheme.
We need not now decide precisely how to draw the line between domestic and extraterritorial applications of the wire fraud statute, mail fraud statute, and Travel Act, because wherever that line should be drawn, the conduct alleged here clearly states a domestic cause of action. The complaint alleges that defendants hatched schemes to defraud in the United States, and that they used the U.S. mails and wires in furtherance of those schemes and with the intent to do so. Defendants are also alleged to have traveled from and to the United States in furtherance of their schemes. In other words, plaintiffs have alleged conduct in the United States that satisfies every essential element of the mail fraud, wire fraud, and Travel Act claims. If domestic conduct satisfies every essential element to prove a violation of a United States statute that does not apply extraterritorially, that statute is violated even if some further conduct contributing to the violation occurred outside the United States.¹³

We note that, as we are reviewing a dismissal based solely on the contents of the Complaint, our conclusion is based entirely on the Complaint, which we find sufficient to state an actionable claim. Plaintiffs' ability to prevail will depend, in part, on their ability to present evidence showing that the alleged statutory violation was domestic. Should the pattern of conduct of certain Defendants or certain schemes prove to be extraterritorial, the district court may need to narrow the scope of this action accordingly, through either motions for (partial) summary judgment or through carefully tailored jury instructions.

II. Diversity Jurisdiction and State Law Claims

Next, we turn to the district court's dismissal of Plaintiffs' state law claims. We review a district court's legal conclusions dismissing state law claims for lack of subject matter jurisdiction de novo. Capital Ventures Int'l v. Republic of Argentina, 552 F.3d 289, 293 (2d Cir.2009).

Federal courts are powerless to adjudicate a suit unless they have subject matter jurisdiction over the action. The district court determined that it lacked subject matter jurisdiction over Plaintiffs' state law claims under the diversity jurisdiction statute, 28 U.S.C. § 1332. Section 1332 requires complete diversity between opposing parties. See, e.g., Hallingby v. Hallingby, 574 F.3d 51, 56 (2d Cir.2009); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806). If the European Community is not diverse from RJR, its continued participation in this lawsuit would destroy complete diversity and deprive the federal court of jurisdiction.¹⁴

Section 1332(a)(4) grants the federal courts jurisdiction over suits where the amount in controversy exceeds $75,000 and the suit is between “a foreign state . as plaintiff and citizens of a State.” 28 U.S.C. § 1332(a)(4). A “foreign state” is defined for purposes of § 1332(a)(4) by § 1603, which is part of the Foreign Sovereign Immunities Act (“FSIA”). This latter section provides:

(a) A “foreign state” includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An “agency or instrumentality of a foreign state” means any entity—

(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof.

and

(3) which is neither a citizen of a State of the United States nor created under the laws of any third country.

Id. § 1603.

The European Community is therefore a “foreign state” for purposes of § 1332(a)(4) if it is an “agency or instrumentality of a foreign state.” Whether it is an agency or instrumentality of a foreign state, in turn, depends on whether it conforms to the definition in subsection (b). There is no doubt that the European Community satisfies the first and 19 third elements of the definition of “agency or instrumentality” provided in § 1603(b). It is clear also that the European Community is not a political subdivision of a foreign state. The question is whether the European Community is “an organ of a foreign state.” Id.

For the reasons discussed below, we conclude that the European Community is an organ of a foreign state, and thus an agency or instrumentality of a foreign state. As a result, the continued participation of the European Community in this suit does not destroy complete diversity.

A. Definitions

The FSIA does not include a definition of the term “organ.” A number of dictionaries we have consulted include definitions of “organ” that are altogether compatible with the European Community in its relationship to the states that formed it. See Organ Definition, Oxford English Dictionary, http://www.oed.com/view/Entry/132421 (last visited July 10, 2013) (“A means of action or operation, an instrument; (now) esp. a person, body of people, or thing by which some purpose is carried out or some function is performed.”); American Heritage Dictionary 875 (2d College ed. 1982) (“An organization that performs certain specified functions: The FBI is an organ of the Justice Department.”); Merriam–Webster’s Third New International Dictionary of the English Language 1589 (1976) (“an instrumentality exercising some function or accomplishing some end”). RJR in rebuttal points to definitions that characterize an organ as subordinate to a larger entity, arguing that this is not the case with the European Community’s relationship to its member nations. But the fact that the word is sometimes used to refer to a smaller part of a larger whole does not mean that the word can serve only in that fashion. The European Community was formed by its member nations to serve on their collective behalf as a body exercising governmental functions over their collective territories. We see no reason why it is not properly described as an organ of each nation.

In Filler v. Hanvitt Bank, 378 F.3d 213, 217 (2d Cir.2004), this court set forth five factors to guide a court in determining whether a party is an “organ” under the FSIA. The factors are:

(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public
employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

Id. (quoting Kelly v. Syria Shell Petroleum Dev. B. V., 213 F.3d 841, 846–47 (5th Cir.2000)) (alteration in original). We have stated that these factors invite a balancing process, and that an entity can be an organ even if not all of the factors are satisfied. See In re Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 85 (2d Cir.2008), abrogated on other grounds by Samantar v. Yousuf, 560 U.S. 305 (2010). The European Community satisfies four of these factors and, very likely, also the fifth: it was created by the European nations for national purposes; it is supervised by the foreign countries; it has public employees whose salaries are paid, at least indirectly, by the member nations, which continue to bear collectively the expenses of operation; it holds exclusive rights in the foreign countries; and the foreign countries treat it as a government entity under their laws. We discuss each of these factors briefly below.

1. National Purpose

It seems beyond doubt that the member states that founded the European Community did so for a “national purpose.” Filler, 378 F.3d at 217. Their purpose was to establish governmental control on a collective basis over various national functions previously performed by each of the member states on an individual basis, such as by establishing a common market and a monetary union, and by coordinating economic activities throughout the community. EC Treaty, arts. 1–4. The management of a common currency and the maintenance of economic stability are quintessential national purposes.

2. Supervision

We have said that a foreign state actively supervises an organ when it appoints the organ's key officials and regulates some of the activities the organ can undertake. See, e.g., Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co., 476 F.3d 140, 143 (2d Cir.2007). Member states exercise supervisory responsibility over the European Community by appointing representatives to serve on the Council of Ministers, which is the European Community's “primary policy-making and legislative body.” See Stephen Breyer, Changing Relationships Among European Constitutional Courts, 21 Cardozo L.Rev. 1045, 1046 (2000). Each member of the Council is the appointed representative of one member state (although the individual representative will change depending on the subject matter to be discussed by the Council). Id. Additionally, each member state selects commissioners to serve on the European Commission, which administers the Community's various departments. Id. at 1046–47.

It is true that these entities are just two of the five basic institutions of the European Community. However, this factor does not require the foreign state to micro-manage every aspect of the organ's activities. The Council of Ministers is the European Community's primary policy-making and legislative body. Therefore, the member states' supervision of this entity enables the member states to supervise the most significant policy decisions made by the European Community.

3. Public Employees
The third factor asks “whether the foreign state requires the hiring of public employees and pays their salaries.” Filler, 378 F.3d at 217. The EC Treaty, enacted by the member states, requires the creation of particular positions, which are to be filled by public officials. See European Cmty. II, 814 F.Supp.2d at 205. Service as a European Community official satisfies the European Court of Justice’s definition of “public service” because such officials exercise “powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities.” Id. (quoting Case 149/79, Comm’n of the European Cmtns. v. Kingdom of Belgium, 1980 E.C.R. 3881, ¶ 10). The member states indirectly pay the salaries of the public employees. In 2000, for example, they contributed 78.4% of the European Community’s budget, 5.5% of which goes to administrative expenses, which include salaries and pensions. See European Commission, EU Budget 2008 Financial Report, 82, 88 (2009).

RJR argues that the European Community does not satisfy this factor because its employees are not public employees of the member states. See, e.g., Patrickson v. Dole Food Co., 251 F.3d 795, 808 (9th Cir.2001), aff’d by 538 U.S. 468 (2003). This fact seems to us of small importance at best. Given that the European Community exercises governmental functions delegated to it by the member states, and does so through public employees whose pay is financed largely by the member states, it seems to make little or no difference for the question whether the European Community serves as an organ of its member states that its employees are not employees directly of the member states. Nevertheless, as noted above, our precedent makes clear that the five Filler factors are merely issues to be considered in the decision, and there is no requirement that all five be satisfied to support the conclusion that an entity is an organ of a foreign state. We would reach the same conclusion even if precedent compelled us to decide that the European Community fails to satisfy this factor. See Peninsula Asset Mgmt., 476 F.3d at 143 (concluding the entity was an “organ” despite the fact that it failed to satisfy the public employee factor).

4. Exclusive Rights

Fourth, we consider “whether the entity holds exclusive rights to some right in the foreign country.” Filler, 378 F.3d at 217 (alteration omitted). This factor has been given a broad meaning. See, e.g., Terrorist Attacks, 538 F.3d at 86 (an entity satisfied this factor when it held “the ‘sole authority’ to collect and distribute charity to Bosnia”); Peninsula Asset Mgmt., 476 F.3d at 143 (entity “has the exclusive right to receive monthly business reports from the solvent financial institutions it oversees”). The European Community holds the exclusive right to exercise a number of significant governmental powers, which include the right to “authoriz[e] the issue of banknotes within the Community” and “to conclude the Multilateral Agreements on Trade in Goods.” European Cmty., 814 F.Supp.2d at 206–07.

5. Foreign State Law

Finally, the fifth factor asks “how the entity is treated under foreign state law.” Filler, 378 F.3d at 217. In Peninsula Asset Management, this factor was satisfied when the “Korean government informed the State Department and the district court that it treats [the entity] as a government entity.” Peninsula Asset Mgmt., 476 F.3d at 143. Neither party cites to European law that clearly addresses this question. The member states that are parties to this suit have identified the European Community as an organ. Plaintiffs informed the district court in their briefing that they
consider the European Community to be a governmental entity, and the United States Department of State has advised that it accepts this representation. See Brief for the United States as Amicus Curiae at 29. Therefore, in a manner similar to the one employed in Peninsula Asset Management, the European Community appears to satisfy this factor. Furthermore, the fact that the member states have ceded portions of their governmental authority to the European Community to be exercised by it in their stead and on their collective behalf seems to confirm its status as an organ and agency of the member states.

RJR argues that none of the member states has treated the European Community as its “organ,” rather than as a supranational body of the member states. This argument, however, depends on the proposition that a governmental entity created by a collectivity of governments to exercise certain powers in their stead and on their behalf cannot be at once a supranational entity and an organ or agency of the actors that created it. It appears to us that both descriptions are accurate, and the fact that the European Community functions as a supranational governmental entity does not negate its also being an organ and agency of its member states, which continue to exist as sovereign nations, notwithstanding having delegated some of their governmental powers to the supranational agency they created.

B. Multi-National Entities

RJR argues that the text and legislative history of the FSIA, along with the common law at the time of the FSIA's enactment, demonstrate that an “organ” of a foreign state cannot include an international organization created by multiple states. We disagree.

First, we turn to the text of § 1603. The fact that § 1603(b)(2) uses the term “organ of a foreign state” in the singular does not necessarily negate application to the European Community, which serves numerous foreign states. 28 U.S.C. § 1603(b)(2) (emphasis added). There is no logic to the proposition that an entity that serves as an organ of one foreign state cannot also serve as the organ of another. The Dictionary Act furthermore states that “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things.” 1 U.S.C. § 1. Context “means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts.” Rowland v. Cal. Men's Colony, 506 U.S. 194, 199 (1993). The context here gives no indication that the phrase “a foreign state” must be interpreted to exclude an organ that serves as an agency of several states. Our interpretation finds support in the law of other circuits dealing with the pooling of shares to determine the status of commercial entities. See In re Air Crash Disaster Near Roselawn, Ind., 96 F.3d 932, 938–39 (7th Cir.1996) (holding that an entity created by multiple governments is an “agency or instrumentality” under the FSIA); Mangattu v. M/V IBN Hayyan, 35 F.3d 205, 208 (5th Cir.1994) (same); Linton v. Airbus Indus., 30 F.3d 592, 598 n. 29 (5th Cir.1994) (collecting cases). In these “share pooling” cases, courts have repeatedly held that corporations owned by several foreign states are covered by the FSIA, even though the statute uses the singular.

RJR argues that because some dictionaries define “organ” as a smaller unit of a larger entity, an “organ” cannot be a larger international organization created by multiple foreign states. See Merriam–Webster's Collegiate Dictionary 819 (10th ed.1997) (giving as a definition of “organ”:
"a subordinate group or organization that performs specialized functions"). This argument is not persuasive for at least two reasons: First, while some dictionary definitions treat an organ as smaller than, or subordinate to, the entity for which it functions as an organ, other dictionary definitions do not include any specification that the entity serving as an organ must be smaller or subordinate, but focus rather on the organ's performance of a service. See definitions provided supra. Second, even if we accept an implicit connotation of subordinate status, that is not necessarily inconsistent with treating the European Community as an organ of the nations that created it. While the member states ceded to the European Community primacy as to certain specified governmental functions, they retained the vast majority of governmental control. Each member state continued to exist as a sovereign state, notwithstanding having voluntarily ceded portions of its authority to the European Community, and, through the Treaty of Lisbon, the member states dissolved the European Community and incorporated it into the European Union. Thus, in certain senses, the European Community exercised its powers by the sufferance of the member states, and was both subordinate to and smaller than the aggregate of the nation states that created it.

RJR advances a number of additional strained arguments to the effect that an international organization should not be considered an agency or instrumentality, none of 17 which are convincing.16

* * *

We are satisfied that the European Community meets at least four, and possibly all five of the Filler factors, and therefore qualifies as an organ and agency of a foreign state under § 1332(a)(4). The suit accordingly comes within the diversity jurisdiction, as specified in 28 U.S.C. § 1332.17

CONCLUSION

The judgment of the district court dismissing the action is VACATED, and the case REMANDED for further proceedings.

FOOTNOTES

1. The member state plaintiffs are: the Kingdom of Belgium, the Republic of Finland, the French Republic, the Hellenic Republic, the Federal Republic of Germany, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain, the Kingdom of Denmark, the Czech Republic, the Republic of Lithuania, the Republic of Slovenia, the Republic of Malta, the Republic of Hungary, the Republic of Ireland, the Republic of Estonia, the Republic of Bulgaria, the Republic of Latvia, the Republic of Poland, the Republic of Austria, the Kingdom of Sweden, the Republic of Cyprus, the Slovak Republic, and Romania.

2. The procedural history of this litigation was summarized by the district court. See European Cmty. v. RJR Nabisco, Inc., No. 02–CV–5771, 2011 WL 843957, at *1–2 (E.D.N.Y. Mar. 8, 2011).
3. “[C]onduct transcending national boundaries” is defined as “conduct occurring outside of the United States in addition to the conduct occurring in the United States.” 18 U.S.C. § 2332b(g)(1).

4. RICO does, however, limit its application to conduct associated with enterprises “engaged in, or the activities of which affect interstate or foreign commerce.” 18 U.S.C. § 1962.

5. Our rejection of the district court’s conclusion—that RICO has an exclusive focus on the location of the enterprise, which alone determines whether a particular application is impermissibly extraterritorial—accords with the Ninth Circuit’s ruling in United States v. Chao Fan Xu, 706 F.3d 965, 977 (9th Cir.2013), although on different reasoning.

6. In defining the offense of money laundering, § 1956 also states that money laundering includes transporting “a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States.” 18 U.S.C. § 1956(a)(2). This however is irrelevant to our inquiry. The quoted passage necessarily involves crossing the United States border. Regulation of conduct in crossing the United States borders is not regulation of extraterritorial conduct. The presumption against extraterritorial application of United States statutes does not apply to statutes that regulate entering and exiting the United States.

7. It might be argued that Congress’s clear statement in the predicate statute that it applies extraterritorially does not constitute a congressional statement that a RICO charge predicated on that statute applies extraterritorially. This overlooks the fact that the predicate statutes are incorporated by reference into the RICO statute and are a part of it.

8. The wire fraud statute, 18 U.S.C. § 1343, provides that: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned.

9. The Travel Act, 18 U.S.C. § 1952, provides, in pertinent part, as follows: (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—(1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—(A) an act described in paragraph (1) or (3). or (B) an act described in paragraph (2). shall be fined ., imprisoned ., or both. (b) As used in this section “unlawful activity” means . any act . indictable under . section 1956 or 1957 [the money-laundering statute].

10. In Pasquantino v. United States, 544 U.S. 349, 371–72 (2005), the Supreme Court suggested, in dictum, that, because “the wire fraud statute punishes frauds executed in interstate or foreign commerce” it “is surely not a statute in which Congress had only domestic concerns in mind.” Id. (internal citations and quotation marks omitted). Because that statement is dictum, and
because Morrison explicitly rejects the reasoning on which it relies, we do not read Pasquintino to require us to construe the “foreign commerce” language of the wire fraud statute as rebutting the presumption against extraterritoriality.

11. The mail fraud statute, 18 U.S.C. § 1341, provides that: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier. shall be fined under this title or imprisoned .

12. As noted above, the allegations based on the money-laundering predicate and the predicate covering material support for terrorist activities state an actionable claim notwithstanding their non-domestic elements, because Congress manifested its intention that those predicates apply extraterritorially as RICO violations.

13. We need not decide whether domestic conduct satisfying fewer than all of the statute’s essential elements could constitute a violation of such a statute.

14. Since this lawsuit was filed, the European Community has been incorporated into the European Union. Despite this change, the European Community remains the relevant entity, as the court's subject matter jurisdiction and a party's instrumentality status for purposes of § 1603 are both determined at the time when the complaint is filed. See Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989) (subject matter jurisdiction); Dole Food Co. v. Patrickson, 558 U.S. 468, 478 (2003) (instrumentality status).

15. The European Community has independent legal status. Consolidated Version of the Treaty Establishing the European Community, art. 281, Oct. 11, 1997, O.J. (C340) 293 (1997) [hereinafter EC Treaty] (“The Community shall have legal personality.”). The European Community was not created under the laws of a non-member state. See EC Treaty, art. 313; see also In re Air Crash Disaster Near Roselawn, Ind., 96 F.3d 932, 938 (7th Cir.1996) (“The FSIA requires that the [entity] not be created under the laws of a third country, that is, a nation not a member of the multinational joint venture.”).

16. RJR also cites, in support of its position, the enactment of separate statutes, 22 U.S.C. §§ 288–288-l, which provide certain immunities to certain international organizations, but which do not grant co-extensive immunities to all international organizations as the FSIA provides to foreign states. RJR argues that this separate statutory framework for analyzing the immunities of international organizations suggests that Congress did not contemplate that such organizations would fall within the definition of “foreign state” under the FSIA. It suffices to say that Congress's belief that certain international organizations were not organs of foreign states under the FSIA cannot be read to imply that Congress believed none could be organs of foreign states. Nothing in the statutes cited by RJR suggests that international organizations that do qualify as
organs of a foreign state cannot, by virtue of their status as international organizations, be treated as foreign states under the FSIA.

17. Plaintiffs also contend that the district court erred by dismissing their federal common law nuisance claim without discussion. Although the Complaint does not specify whether Plaintiffs' public nuisance claim was brought under federal or state law, it appears that Plaintiffs stipulated that all of their common law claims were to be decided under New York law. Therefore, we have considered the dismissal of Plaintiffs' public nuisance claim along with Plaintiffs' other state law claims.

LEVAl, Circuit Judge:

- See more at: http://caselaw.findlaw.com/us-2nd-circuit/1664121.html#sthash.ynMmtD1n.dpuf
PETE PRSON v. ISLAMIC REPUBLIC OF IRAN

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UNITED STATES COURT OF APPEALS, SECOND CIRCUIT.


No. 13-952-CV.
Decided: July 9, 2014


To satisfy terrorism-related judgments against Iran, the district court (Forrest, J.) awarded turnover of $1.75 billion in assets under both the Terrorism Risk Insurance Act of 2002 ("TRIA") and a statute enacted specifically to address the assets at issue in this case, 22 U.S.C. § 8772. Although Iran argues that the TRIA ownership requirements have not been satisfied, we need not reach this issue in light of Congress's enactment of § 8772. Iran concedes that the statutory elements for turnover of the assets under § 8772 have been satisfied, and we reject Iran's arguments that § 8772 conflicts with the Treaty of Amity between the United States and Iran, violates separation of powers, and effects an unconstitutional taking. We also conclude that the district court did not abuse its discretion in issuing an anti-suit injunction to protect its judgment. We AFFIRM.

BACKGROUND

Plaintiffs-appellees are the representatives of hundreds of Americans killed in multiple Iran-sponsored terrorist attacks, and they have billions of dollars in unpaid compensatory damages judgments against Iran stemming from these attacks. Defendant-appellant Bank Markazi is the Central Bank of Iran, which is wholly owned by the Iranian government. The assets at issue in this appeal are $1.75 billion in cash proceeds of government bonds, currently held in New York by defendant Citibank, N.A., in an omnibus account for defendant Clearstream Banking, S.A., a financial intermediary. One of the customers for whom Clearstream maintains this account is defendant Banca UBAE S.p.A., an Italian bank whose customer, in turn, is Bank Markazi. Bank Markazi concedes that through this chain of parties it has at least a "beneficial interest" in the assets at issue. Plaintiffs seek turnover of these assets to satisfy their judgments.

When plaintiffs first learned of Bank Markazi's interest in the assets in 2008, they obtained restraints against transfer of the assets. In 2010, plaintiffs initiated this action against Bank Markazi, UBAE, Clearstream, and Citibank to obtain turnover of the assets under section 201(a) of the TRIA, which provides that "in every case in which a person has obtained a judgment against a terrorist party the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment." Terrorism Risk Insurance Act of 2002, Pub L. No. 107-297, § 201(a), 116 Stat. 2342, 2337 (codified at 28 U.S.C. § 1605 Note "Satisfaction of Judgments from Blocked Assets of Terrorists, Terrorist Organizations, and State Sponsors of Terrorism").

In February 2012, while this action was pending, President Obama issued Executive Order 13,599, which stated:

[In light of the deceptive practices of [Bank Markazi] to conceal transactions of sanctioned parties. [all] property and interests in property of the Government of Iran, including [Bank Markazi], that are in the United States or that are hereafter come within the possession or control of any United States person.}
are blocked.

Exec. Order No. 13,599, 77 Fed.Reg. 6659, 6659 (Feb. 5, 2012). The assets at issue (which were still under restraint) were blocked based on this Executive Order. Plaintiffs then filed a motion for partial summary judgment on their TRIA claim.

In August 2012, while that motion was pending, Congress passed the Iran Threat Reduction and Syria Human Rights Act of 2012. That Act included a section, codified at 22 U.S.C. § 8772, which stated that "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 "shall be subject to execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of [terrorism]." Pub.L. 112–158, § 502, 126 Stat. 1214, 1258. Plaintiffs then filed a supplemental motion for summary judgment under § 8772.

In March 2013, the district court granted summary judgment to plaintiffs, ordering turnover of the assets on the two independent bases of TRIA section 201(a) and 22 U.S.C. § 8772. Peterson v. Islamic Republic of Iran, No. 10 Civ. 4518, 2013 WL 1155576 (S.D.N.Y. Mar.13, 2013). In July 2013, the district court issued an order directing turnover of the blocked assets and enjoining the parties from initiating a claim to the assets in another jurisdiction. Peterson v. Islamic Republic of Iran, No. 10 Civ. 4518 (S.D.N.Y. July 9, 2013), ECF No. 463. Post-judgment, plaintiffs settled with Clearstream and UBAE, and Citibank is a neutral stakeholder, leaving Bank Markazi as the sole appellant.

DISCUSSION

"We review de novo a district court’s grant of summary judgment, construing the evidence in the light most favorable to the non-moving, asking whether there is a genuine dispute as to any material fact and whether the movant is entitled to judgment as a matter of law." Padilla v. Maersk Line, Ltd., 721 F.3d 77, 81 (2d Cir.2013) (citing Fed.R.Civ.P. 56(a)). "We [also] review de novo the district court’s legal conclusions, including those interpreting and determining the constitutionality of a statute," United States v. Stewart, 590 F.3d 93, 109 (2d Cir.2009), or involving the "interpretation of a treaty," Swarna v. Al-Awadi, 622 F.3d 123, 132 (2d Cir.2010).

Bank Markazi argues that the assets at issue are not "assets of" Bank Markazi as required for turnover under TRIA section 201(a), and that even if the assets were held to be "assets of" Bank Markazi, then they would be "the property of a foreign central bank held for its own account" and thus "immune from attachment and from execution" under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1611(b)(1). We need not resolve this dispute under the TRIA, however, as Congress has changed the law governing this case by enacting 22 U.S.C. § 8772. Bank Markazi concedes that plaintiffs have satisfied the statutory elements of their § 8772 claim but argues that turnover under this provision (1) conflicts with the Treaty of Amity between the United States and Iran; (2) violates separation of powers under Article III; and (3) violates the Takings Clause. As we explain below, none of these arguments has merit. We also reject Bank Markazi’s challenge to the district court’s anti-suit injunction.

I. Treaty of Amity

Bank Markazi argues that turnover of the assets under § 8772 would conflict with obligations of the United States under the Treaty of Amity, which is a self-executing treaty between the United States and Iran that was signed in 1955. Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, Aug. 15, 1955, 8 U.S.T. 899; see also McKesson Corp. v. Islamic Republic of Iran, 539 F.3d 485, 488 (D.C.Cir.2008) ("The Treaty of Amity, like other treaties of its kind, is self-executing."). But even if there were a conflict, the later-enacted § 8772 would still apply: "The Supreme Court has held explicitly that legislative acts trump treaty-made international law, stating that 'when a statute which is subsequent in time [to a treaty] is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.' " United States v. Yousuf, 337 F.3d 110 (2d Cir.2003) (alteration in original) (quoting Breed v. Greene, 523 U.S. 371, 376, 118 S.Ct. 1352, 130 L.Ed.2d 529 (1998)); see also Whitney v. Robertson, 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. [and] if the two are inconsistent, the one last in date will control the other."). Indeed, when Iran raised a similar argument against turnover under TRIA section 201(a) in a different case, we concluded that even if this provision conflicted with the Treaty of Amity, "the TRIA would have to be read to abrogate that portion of the Treaty." Weinstein v. Islamic Republic of Iran, 609 F.3d 43, 53 (2d Cir.2010).

In any event, we see no conflict between § 8772 and the Treaty of Amity. Bank Markazi first contends that Congress’s inclusion of Bank Markazi in its definition of “Iran” in § 8772(d)(1) violates Article II.1 of the Treaty, which states that “Iranian companies ‘shall have their juridical status recognized within’ the United States. But as Bank Markazi acknowledges, this argument has been rejected by our Court in the context of a similar provision in the TRIA. See Weinstein, 609 F.3d at 53 (concluding that Iran’s argument was foreclosed by the Supreme Court’s analysis of similar provisions in Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 216, 112 S.Ct. 2374, 72 L.Ed.2d 765 (1982)).
Bank Markazi also argues that § 8772 violates Articles IV.1 and V.1, which require that treatment of Iranian companies and their property interests be "fair and equitable" and no "less favorable than that accorded nationals and companies of any third country." But the provision of § 8772 that Bank Markazi points to contains no country-based discrimination; rather, it simply states that "[n]othing in this section shall be construed to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than [those] proceedings." 22 U.S.C. § 8772(c). Contrary to Bank Markazi's argument, this provision is expressly non-discriminatory.

Finally, Bank Markazi argues that turnover under § 8772 violates Article III.2, which accords Iranian companies "freedom of access to [U.S.] courts," and Article IV.2, which states that Iranian "property shall not be taken except for a public purpose" and upon "prompt payment of just compensation." As discussed below, however, § 8772 neither usurps the adjudicative role of the courts nor effects an unconstitutional taking of Bank Markazi's assets.

In sum, turnover of the blocked assets under § 8772 is entirely consistent with the United States' obligations under the Treaty of Amity. And, assuming arguendo that it is not, § 8772 would have to be read to abrogate any inconsistent provisions in the Treaty.

II. Separation of Powers

Bank Markazi next challenges § 8772 as violating the separation of powers between the legislative branch and the judiciary under Article III by compelling the courts to reach a predetermined result in this case.

We conclude, however, that § 8772 does not usurp the judicial function; rather, it retroactively changes the law applicable in this case, a permissible exercise of legislative authority.

In the leading case to find a separation-of-powers violation, United States v. Klein, 80 U.S. (14 Wall.) 128, 20 L.Ed. 519 (1872), Congress had passed a statute requiring courts to treat pardons of Confederate sympathizers as conclusive evidence of disloyalty, and the Supreme Court found the statute invalid for prescribing a rule of decision to the courts. But while Klein illustrates that Congress may not " usurp[ ] the adjudicative function assigned to the federal courts," later cases have explained that Congress may " chang[e] the law applicable to pending cases," even when the result under the revised law is clear. Axel Johnson Inc. v. Arthur Andersen & Co., 6 F.3d 76, 81 (2d Cir.1993).

In Robertson v. Seattle Audubon Society, 503 U.S. 429, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992), Congress had passed legislation to resolve two environmental suits challenging logging in the Pacific Northwest. The result of the cases under the new law was clear: the statute stated that "Congress hereby determines and directs" that if the forests at issue were managed under the terms of the new statute, it would "meet[ ] the statutory requirements that are the basis for" the plaintiffs' environmental law challenges in those particular cases. 503 U.S. at 434-35 (quoting Department of the Interior and Related Agencies Appropriations Act, Pub.L. No. 101-121, § 318(b)(6)(A), 103 Stat. 701, 747 (1989)). The Ninth Circuit held this statute to be unconstitutional under Klein as directing a particular decision in the two cases. Id. at 436. But the Supreme Court rejected this position, concluding instead that "[t]o the extent that [the statute] affected the adjudication of the cases, it did so by effectively modifying the provisions at issue in those cases," not by compelling findings or results under those provisions. Id. at 440.

Our court rejected a similar separation-of-powers challenge to section 27A(a) of the Securities Exchange Act of 1934, which was enacted to preserve pending securities law claims that would otherwise have been dismissed as untimely. Axel Johnson, 6 F.3d at 80-82. We noted that, like the statute in Robertson, section 27A(a) does not compel findings or results under old law, but rather "constitutes a change in law applicable to a limited class of cases" that "leaves to the courts the task of determining whether a claim falls within the ambit of the statute." Id. at 82.

Similarly, § 8772 does not compel judicial findings under old law; rather, it changes the law applicable to this case. And like the statutes in Robertson and Axel Johnson, § 8772 explicitly leaves the determination of certain facts to the courts:

[T]he court shall determine whether Iran holds equitable title to, or the beneficial interest in, the assets [at issue] and that no other person possesses a constitutionally protected interest in the assets . . . under the Fifth Amendment to the Constitution of the United States. To the extent the court determines that a person other than Iran holds—

(A) equitable title to, or a beneficial interest in, the assets . . . (excluding a custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran); or

(B) a constitutionally protected interest in the assets . . .

such assets shall be available only for execution or attachment in aid of execution to the extent of Iran's equitable title or beneficial interest therein and to the extent such execution or attachment does not infringe upon such constitutionally protected interest.

Bank Markazi argues that while § 8772(a)(2) may formally give discretion to the courts, it effectively compels only one possible outcome, as Iran's beneficial interest in the assets had been established by the time Congress enacted § 8772. But this argument is foreclosed by the Supreme Court's decision in Robertson, as the statute there was specifically enacted to resolve two pending cases, and the Supreme Court found no constitutional violation. Indeed, it would be unusual for there to be more than one likely outcome when Congress changes the law for a pending case with a developed factual record.

As we have noted, "[t]he conceptual line between a valid legislative change in law and an invalid legislative act of adjudication is often difficult to draw," Axel Johnson, 6 F.3d at 81, and there may be little functional difference between § 8772 and a hypothetical statute directing the courts to find that the assets at issue in this case are subject to attachment under existing law, which might raise more concerns. But we think it is clear that under the Supreme Court's guidance in Robertson, § 8772 does not cross the constitutional line.

III. Takings Clause

Bank Markazi's final challenge to § 8772 is that it effects an unconstitutional taking. See U.S. Const., amend. V ("[N]or shall private property be taken for public use, without just compensation."). As we have already stated in a similar case against another Iranian bank, however, "where the underlying judgment against Iran has not been challenged, seizure of [the bank's] property, as an instrumentality of Iran, in satisfaction of that liability does not constitute a 'taking' under the Takings Clause." Weinstein, 609 F.3d at 54.

Bank Markazi argues that this case raises retroactivity concerns that were not present in Weinstein because § 8772 was enacted after the assets were first restrained. But this is not a case in which legislation "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability." E. Enters. v. Apfel, 534 U.S. 498, 528–29, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (plurality opinion). Iran—the 100% owner of Bank Markazi—had already been found liable to plaintiffs for billions of dollars in uncontested judgments, and § 8772 simply helps plaintiffs reach Iranian assets in partial satisfaction of those judgments. "Here, where Bank [Markazi's] assets are subject to attachment to satisfy a judgment against its foreign sovereign, the underlying purpose of the Takings Clause is in no way violated by attachment of Bank [Markazi's] assets." Weinstein, 609 F.3d at 54.

IV. Anti-Suit Injunction

Bank Markazi's final argument on appeal challenges the district court's order that it "shall be permanently restrained and enjoined from instituting or prosecuting any claim or pursuing any actions against Clearstream in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the Blocked Assets." Peterson v. Islamic Republic of Iran, No. 10 Civ. 4518, slip op. at 12 (S.D.N.Y. July 9, 2013), ECF No. 406. Bank Markazi argues that the district court lacked jurisdiction to issue this impermissible restraint on its property outside the United States.

As this court has explained, however, "federal courts have inherent power to protect their own judgments from being undermined or vitiated by vexatious litigation in other jurisdictions." Kanaha Bades Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111, 124 (2d Cir.2007) (emphasis omitted). "The standard of review for the grant of a permanent injunction, including an anti-suit injunction, is abuse of discretion." Id. at 118–19. We see no abuse of discretion here, especially as Bank Markazi expressly consented to this language in the district court. At the hearing on this order, Bank Markazi's counsel objected to the anti-suit injunction as overly broad, the district court modified the language in response to this objection, and Bank Markazi's counsel then expressly stated, "That's fine with us as well, your Honor." Transcript of Conference at 24, Peterson v. Islamic Republic of Iran, No. 10 Civ. 4518 (S.D.N.Y. July 9, 2013), ECF No. 466. Because this issue does not involve jurisdictional concerns, Bank Markazi has no basis to now object to this injunction on appeal. See Knaebel v. N.Y. City Dept of Hous. Pres. & Dev., 959 F.2d 395, 401 (2d Cir.1992) ("We have repeatedly held that if an argument has not been raised before the district court, we will not consider it.").

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

JOHN M. WALKER, JR., Circuit Judge:
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF A WARRANT TO : 13 Mag. 2814
SEARCH A CERTAIN E-MAIL ACCOUNT :
CONTROLLED AND MAINTAINED BY : MEMORANDUM
MICROSOFT CORPORATION : AND ORDER

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

"The rise of an electronic medium that disregards geographical boundaries throws the law into disarray by creating entirely new phenomena that need to become the subject of clear legal rules but that cannot be governed, satisfactorily, by any current territorially based sovereign." David R. Johnson & David Post, Law andBorders -- The Rise of Law in Cyberspace, 48 Stan. L. Rev. 1367, 1375 (1996). In this case I must consider the circumstances under which law enforcement agents in the United States may obtain digital information from abroad. Microsoft Corporation ("Microsoft") moves to quash a search warrant to the extent that it directs Microsoft to produce the contents of one of its customer's e-mails where that information is stored on a server located in Dublin, Ireland. Microsoft contends that courts in the United States are not authorized to issue warrants for extraterritorial search and seizure, and that this is such a warrant. For the reasons that follow, Microsoft's motion is denied.
Background

Microsoft has long owned and operated a web-based e-mail service that has existed at various times under different internet domain names, including Hotmail.com, MSN.com, and Outlook.com. (Declaration of A.B. dated Dec. 17, 2013 ("A.B. Decl."), ¶ 3).¹ Users of a Microsoft e-mail account can, with a user name and a password, send and receive email messages as well as store messages in personalized folders. (A.B. Decl., ¶ 3). E-mail message data include both content information (the message and subject line) and non-content information (such as the sender address, the recipient address, and the date and time of transmission). (A.B. Decl., ¶ 4).

Microsoft stores e-mail messages sent and received by its users in its datacenters. Those datacenters exist at various locations both in the United States and abroad, and where a particular user's information is stored depends in part on a phenomenon known as "network latency"; because the quality of service decreases the farther a user is from the datacenter where his account is hosted, efforts are made to assign each account to the closest datacenter. (A.B. Decl., ¶ 6). Accordingly, based on

¹ Pursuant to an application by Microsoft, certain information that is commercially sensitive, including the identity of persons who submitted declarations, has been redacted from public filings.
the "country code" that the customer enters at registration, Microsoft may migrate the account to the datacenter in Dublin. (A.B. Decl., ¶ 7). When this is done, all content and most non-content information associated with the account is deleted from servers in the United States. (A.B. Decl., ¶ 7).

The non-content information that remains in the United States when an account is migrated abroad falls into three categories. First, certain non-content information is retained in a data warehouse in the United States for testing and quality control purposes. (A.B. Decl., ¶ 10). Second, Microsoft retains "address book" information relating to certain web-based e-mail accounts in an "address book clearing house." (A.B. Decl., ¶ 10). Finally, certain basic non-content information about all accounts, such as the user's name and country, is maintained in a database in the United States. (A.B. Decl., ¶ 10).

On December 4, 2013, in response to an application by the United States, I issued the search warrant that is the subject of the instant motion. That warrant authorizes the search and seizure of information associated with a specified web-based e-mail account that is "stored at premises owned, maintained, controlled, or operated by Microsoft Corporation, a company headquartered at One Microsoft Way, Redmond, WA." (Search and Seizure Warrant ("Warrant"), attached as Exh. 1 to Declaration of C.D. dated Dec.
17, 2013 ("C.D. Decl."), Attachment A). The information to be disclosed by Microsoft pursuant to the warrant consists of:

a. The contents of all e-mails stored in the account, including copies of e-mails sent from the account;

b. All records or other information regarding the identification of the account, to include full name, physical address, telephone numbers and other identifiers, records of session times and durations, the date on which the account was created, the length of service, the types of service utilized, the IP address used to register the account, log-in IP addresses associated with session times and dates, account status, alternative e-mail addresses provided during registration, methods of connecting, log files, and means and sources of payment (including any credit or bank account number);

c. All records or other information stored by an individual using the account, including address books, contact and buddy lists, pictures, and files;

d. All records pertaining to communications between MSN . . . and any person regarding the account, including contacts with support services and records of actions taken.

(Warrant, Attachment C, ¶ I(a)-(d)).

It is the responsibility of Microsoft's Global Criminal Compliance ("GCC") team to respond to a search warrant seeking stored electronic information. (C.D. Decl., ¶ 3). Working from offices in California and Washington, the GCC team uses a database program or "tool" to collect the data. (C.D. Decl., ¶¶ 3, 4). Initially, a GCC team member uses the tool to determine where the data for the target account is stored and then collects the
information remotely from the server where the data is located, whether in the United States or elsewhere. (C.D. Decl., ¶¶ 5, 6).

In this case, Microsoft complied with the search warrant to the extent of producing the non-content information stored on servers in the United States. However, after it determined that the target account was hosted in Dublin and the content information stored there, it filed the instant motion seeking to quash the warrant to the extent that it directs the production of information stored abroad.

Statutory Framework

The obligation of an Internet Service Provider ("ISP") like Microsoft to disclose to the Government customer information or records is governed by the Stored Communications Act (the "SCA"), passed as part of the Electronic Communications Privacy Act of 1986 (the "ECPA") and codified at 18 U.S.C. §§ 2701-2712. That statute authorizes the Government to seek information by way of subpoena, court order, or warrant. The instrument law enforcement agents utilize dictates both the showing that must be made to obtain it and the type of records that must be disclosed in response.

First, the Government may proceed upon an "administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena." 18 U.S.C. § 2703(b)(1)(B)(i). In response, the service provider must produce (1) basic customer
information, such as the customer's name, address, Internet Protocol connection records, and means of payment for the account, 18 U.S.C. § 2703(c)(2); unopened e-mails that are more than 180 days old, 18 U.S.C. § 2703(a); and any opened e-mails, regardless of age, 18 U.S.C. §§ 2703(b)(1)(B)(i). The usual standards for

2 The distinction between opened and unopened e-mail does not appear in the statute. Rather, it is the result of interpretation of the term "electronic storage," which affects whether the content of an electronic communication is subject to rules for a provider of electronic communications service ("ECS"), 18 U.S.C. § 2703(a), or those for a provider of remote computing service ("RCS"), 18 U.S.C. § 2703(b). The SCA regulates the circumstances under which "[a] governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication [] that is in electronic storage in an electronic communications system . . . ." 18 U.S.C. § 2703(a). "Electronic storage" is in turn defined as "(A) any temporary intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for the purposes of backup protection of such communication." 18 U.S.C. § 2510(17). While most courts have held that an e-mail is no longer in electronic storage once it has been opened by the recipient, see, e.g., Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 987 (C.D. Cal. 2010); United States v. Weaver, 636 F. Supp. 2d 769, 771-73 (C.D. Ill. 2009); see also Owen S. Kerr, A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It, 72 Geo. Wash. L. Rev. 1208, 1216 (2004) (hereinafter A User's Guide) ("The traditional understanding has been that a copy of an opened e-mail sitting on a server is protected by the RCS rules, not the ECS rules"), the Ninth Circuit has instead focused on whether "the underlying message has expired in the normal course," Theofel v. Farley-Jones, 359 F.3d 1066, 1076 (9th Cir. 2004); see also id. at 1077 ("[W]e think that prior access is irrelevant to whether the messages at issue were in electronic storage."). Resolution of this debate is unnecessary for purposes of the issue before me.

Likewise, it is not necessary to determine whether Microsoft
issuance of compulsory process apply, and the SCA does not impose any additional requirements of probable cause or reasonable suspicion. However, the Government may obtain by subpoena the content of e-mail only if prior notice is given to the customer. 18 U.S.C. § 2703(b)(1)(B)(i).

If the Government secures a court order pursuant to 18 U.S.C. § 2703(d), it is entitled to all of the information subject to production under a subpoena and also "record[s] or other information pertaining to a subscriber [.] or customer," such as

was providing ECS or RCS in relation to the communications in question. The statute defines ECS as "any service which provides users thereof the ability to send or receive wire or electronic communications," 18 U.S.C. § 2510(15), while RCS provides "to the public [] computer storage or processing services by means of an electronic communications system, 18 U.S.C. § 2711(2). Since service providers now generally perform both functions, the distinction, which originated in the context of earlier technology, is difficult to apply. See Crispin, 717 F. Supp. 2d at 986 n.42; In re Application of the United States of America for a Search Warrant for Contents of Electronic Mail and for an Order Directing a Provider of Electronic Communication Services to not Disclose the Existence of the Search Warrant, 665 F. Supp. 2d 1210, 1214 (D. Or. 2009) (hereinafter In re United States) ("Today, most ISPs provide both ECS and RCS; thus, the distinction serves to define the service that is being provided at a particular time (or as to a particular piece of electronic communication at a particular time), rather than to define the service provider itself."); Kerr, A User’s Guide at 1215 ("The distinction of providers of ECS and RCS is made somewhat confusing by the fact that most network service providers are multifunctional. They can act as providers of ECS in some contexts, providers of RCS in some contexts, and as neither in some contexts as well.").
historical logs showing the e-mail addresses with which the customer had communicated. 18 U.S.C. § 2703(c)(1). In order to obtain such an order, the Government must provide the court with "specific and articulable facts showing that there are reasonable grounds to believe that the content of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. 2703(d).

Finally, if the Government obtains a warrant under section 2703(a) (an "SCA Warrant"), it can compel a service provider to disclose everything that would be produced in response to a section 2703(d) order or a subpoena as well as unopened e-mails stored by the provider for less than 180 days. In order to obtain an SCA Warrant, the Government must "us[e] the procedures described in the Federal Rules of Criminal Procedure" and demonstrate probable cause. 18 U.S.C. § 2703(a); see Fed. R. Crim. P. 41(d)(1) (requiring probable cause for warrants).

Discussion

Microsoft's argument is simple, perhaps deceptively so. It notes that, consistent with the SCA and Rule 41 of the Federal Rules of Criminal Procedure, the Government sought information here by means of a warrant. Federal courts are without authority to issue warrants for the search and seizure of property outside the
territorial limits of the United States. Therefore, Microsoft concludes, to the extent that the warrant here requires acquisition of information from Dublin, it is unauthorized and must be quashed.

That analysis, while not inconsistent with the statutory language, is undermined by the structure of the SCA, by its legislative history, and by the practical consequences that would flow from adopting it.

A. Statutory Language

In construing federal law, the "starting point in discerning congressional intent is the existing statutory language." Lamie v. United States Trustee, 540 U.S. 526, 534 (2004) (citing Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). "And where the statutory language provides a clear answer, [the analysis] ends there as well." Hughes Aircraft Co., 525 U.S. at 438. However, a court must search beneath the surface of text that is ambiguous, that is, language that is "capable of being understood in two or more possible senses or ways." Chickasaw Nation v. United States, 534 U.S. 84, 90 (1985) (internal quotation marks omitted).

Here, the relevant section of the SCA provides in pertinent part:

A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only
pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure . . . by a court of competent jurisdiction.

18 U.S.C. § 2703(a). This language is ambiguous in at least one critical respect. The words "using the procedures described in the Federal Rules of Criminal Procedure" could be construed to mean, as Microsoft argues, that all aspects of Rule 41 are incorporated by reference in section 2703(a), including limitations on the territorial reach of a warrant issued under that rule. But, equally plausibly, the statutory language could be read to mean that while procedural aspects of the application process are to be drawn from Rule 41 (for example, the presentation of the application based on sworn testimony to a magistrate judge), more substantive rules are derived from other sources. See In re United States, 665 F. Supp. 2d at 1219 (finding ambiguity in that "'[i]ssued' may be read to limit the procedures that are applicable under § 2703(a), or it might merely have been used as a shorthand for the process of obtaining, issuing, executing, and returning a warrant, as described in Rule 41"); In re Search of Yahoo, Inc., No. 07-3194, 2007 WL 1539971, at *5 (D. Ariz. May 21, 2007) (finding that "the phrase 'using the procedures described in' the Federal Rules remains ambiguous"). In light of this ambiguity, it is appropriate to look for guidance in the "statutory structure, relevant legislative history, [and] congressional purposes."

B. Structure of the SCA

The SCA was enacted at least in part in response to a recognition that the Fourth Amendment protections that apply in the physical world, and especially to one’s home, might not apply to information communicated through the internet.

Absent special circumstances, the government must first obtain a search warrant based on probable cause before searching a home for evidence of crime. When we use a computer network such as the Internet, however, a user does not have a physical “home,” nor really any private space at all. Instead, a user typically has a network account consisting of a block of computer storage that is owned by a network service provider, such as America Online or Comcast. Although a user may think of that storage space as a “virtual home,” in fact that “home” is really just a block of ones and zeroes stored somewhere on somebody else’s computer. This means that when we use the Internet, we communicate with and through that remote computer to contact other computers. Our most private information ends up being sent to private third parties and held far away on remote network servers.

This feature of the Internet’s network architecture has profound consequences for how the Fourth Amendment protects Internet communications -- or perhaps more accurately, how the Fourth Amendment may not protect such communications much at all.

See Kerr, A User’s Guide at 1209-10 (footnotes omitted).

Accordingly, the SCA created “a set of Fourth Amendment-like privacy protections by statute, regulating the relationship between
government investigators and service providers in possession of users' private information." Id. at 1212. Because there were no constitutional limits on an ISP's disclosure of its customer's data, and because the Government could likely obtain such data with a subpoena that did not require a showing of probable cause, Congress placed limitations on the service providers' ability to disclose information and, at the same time, defined the means that the Government could use to obtain it. See id. at 1209-13.

In particular, the SCA authorizes the Government to procure a warrant requiring a provider of electronic communication service to disclose e-mail content in the provider's electronic storage. Although section 2703(a) uses the term "warrant" and refers to the use of warrant procedures, the resulting order is not a conventional warrant; rather, the order is a hybrid: part search warrant and part subpoena. It is obtained like a search warrant when an application is made to a neutral magistrate who issues the order only upon a showing of probable cause. On the other hand, it is executed like a subpoena in that it is served on the ISP in possession of the information and does not involve government agents entering the premises of the ISP to search its servers and seize the e-mail account in question.

This unique structure supports the Government's view that the SCA does not implicate principles of extraterritoriality. It has
long been the law that a subpoena requires the recipient to produce information in its possession, custody, or control regardless of the location of that information. See Marc Rich & Co., A.G. v. United States, 707 F.2d 663, 667 (2d Cir. 1983) ("Neither may the witness resist the production of documents on the ground that the documents are located abroad. The test for production of documents is control, not location."); Tiffany (NJ) LLC v. Oi Andrew, 276 F.R.D. 143, 147-48 (S.D.N.Y. 2011) ("If the party subpoenaed has the practical ability to obtain the documents, the actual physical location of the documents -- even if overseas -- is immaterial."); In re NTL, Inc. Securities Litigation, 244 F.R.D. 179, 195 (S.D.N.Y. 2007); United States v. Chase Manhattan Bank, N.A., 584 F. Supp. 1080, 1085 (S.D.N.Y. 1984). To be sure, the "warrant" requirement of section 2703(a) cabins the power of the government by requiring a showing of probable cause not required for a subpoena, but it does not alter the basic principle that an entity lawfully obligated to produce information must do so regardless of the location of that information.

This approach is also consistent with the view that, in the context of digital information, "a search occurs when information from or about the data is exposed to possible human observation, such as when it appears on a screen, rather than when it is copied by the hard drive or processed by the computer." Orin S. Kerr,
Searches and Seizures in a Digital World, 119 Harv. L. Rev. 531, 551 (2005). In this case, no such exposure takes place until the information is reviewed in the United States, and consequently no extraterritorial search has occurred.

This analysis is not undermined by the Eighth Circuit’s decision in United States v. Bach, 310 F.3d 1063 (8th Cir. 2002). There, in a footnote the court noted that “[w]e analyze this case under the search warrant standard, not under the subpoena standard. While warrants for electronic data are often served like subpoenas (via fax), Congress called them warrants and we find that Congress intended them to be treated as warrants.” Id. at 1066 n.1. Given the context in which it was issued, this sweeping statement is of little assistance to Microsoft. The issue in Bach was whether the fact that a warrant for electronic information was executed by employees of the ISP outside the supervision of law enforcement personnel rendered the search unreasonable in violation of the Fourth Amendment. Id. at 1065. The court utilized the stricter warrant standard for evaluating the reasonableness of the execution of a search, as opposed to the standard for executing a subpoena; this says nothing about the territorial reach of an SCA Warrant.

C. Legislative History

Although scant, the legislative history also provides support for the Government’s position. When the SCA was enacted as part of
the ECPA, the Senate report, although it did not address the specific issue of extraterritoriality, reflected an understanding that information was being maintained remotely by third-party entities:

The Committee also recognizes that computers are used extensively today for the processing and storage of information. With the advent of computerized recordkeeping systems, Americans have lost the ability to lock away a great deal of personal and business information. For example, physicians and hospitals maintain medical files in offsite data banks, businesses of all sizes transmit their records to remote computers to obtain sophisticated data processing services. . . . Because it is subject to control by a third party computer operator, the information may be subject to no constitutional privacy protection.


While the House report did address the territorial reach of the law, it did so ambiguously. Because the ECPA amended the law with respect to wiretaps, the report notes:

By the inclusion of the element "affecting (affects) interstate or foreign commerce" in these provisions the Committee does not intend that the Act regulate activities conducted outside the territorial United States. Thus, insofar as the Act regulates the "interception" of communications, for example it . . . regulates only those "interceptions" conducted within the territorial United States. Similarly, the controls in Section 201 of the Act [which became the SCA] regarding access to stored wire and electronic communications are intended to apply only to access within the territorial United States.

H.R. Rep. 99-647, at 32-33 (1986) (citations omitted). While this language would seem to suggest that information stored abroad would
be beyond the purview of the SCA, it remains ambiguous for two reasons. First, in support of its observation that the ECPA does not regulate activities outside the United States, the Committee cited *Stowe v. DeVoy*, 588 F.2d 336 (2d Cir. 1978). In that case, the Second Circuit held that telephone calls intercepted in Canada by Canadian authorities were admissible in a criminal proceeding even if the interception would have violated Title III of the Omnibus Crime Control Act of 1968 if it had occurred in the United States or been performed by United States officials. *Id.* at 340-41. This suggests that Congress was addressing not the reach of government authority, but rather the scope of the individual rights created by the ECPA. Second, in referring to "access" to stored electronic communications, the Committee did not make clear whether it meant access to the location where the electronic data was stored or access to the location of the ISP in possession of the data.

Additional evidence of congressional intent with respect to this latter issue can be gleaned from the legislative history of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the "Patriot Act"). Section 108 of the Patriot Act provided for nationwide service of search warrants for electronic evidence. The House Committee described the rationale for this as follows:

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Title 18 U.S.C. § 2703(a) requires a search warrant to compel service providers to disclose unopened e-mails. This section does not affect the requirement for a search warrant, but rather attempts to address the investigative delays caused by the cross-jurisdictional nature of the Internet. Currently, Federal Rules of Criminal Procedure 41 requires that the “warrant” be obtained “within the district” where the property is located. An investigator, for example, located in Boston who is investigating a suspected terrorist in that city, might have to seek a suspect’s electronic e-mail from an Internet service provider (ISP) account located in California. The investigator would then need to coordinate with agents, prosecutors and judges in the district in California where the ISP is located to obtain the warrant to search. These time delays could be devastating to an investigation, especially where additional criminal or terrorist acts are planned.

Section 108 amends § 2703 to authorize the court with jurisdiction over the investigation to issue the warrant directly, without requiring the intervention of its counterpart in the district where the ISP is located.

H.R. Rep. 107-236(I), at 58 (2001). This language is significant, because it equates “where the property is located” with the location of the ISP, not the location of any server. See In re Search of Yahoo, Inc., 2007 WL 1539971, at *4 (“Commentators have suggested that one reason for the amendments effected by Section 220 of the Patriot Act was to alleviate the burden placed on federal district courts in the Eastern District of Virginia and the Northern District of California where major internet service providers [] AOL and Yahoo, respectively, are located.”) (citing, inter alia, Patricia L. Bellia, Surveillance Law Through Cyberlaw’s Lens, 72 Geo. Wash. L. Rev. 1375, 1454 (2004)).
Congress thus appears to have anticipated that an ISP located in the United States would be obligated to respond to a warrant issued pursuant to section 2703(a) by producing information within its control, regardless of where that information was stored.3

D. Practical Considerations

If the territorial restrictions on conventional warrants applied to warrants issued under section 2703(a), the burden on the Government would be substantial, and law enforcement efforts would be seriously impeded. If this were merely a policy argument, it would be appropriately addressed to Congress. But it also provides context for understanding congressional intent at the outset, for it is difficult to believe that, in light of the practical consequences that would follow, Congress intended to limit the reach of SCA Warrants to data stored in the United States.

First, a service provider is under no obligation to verify the information provided by a customer at the time an e-mail account is opened. Thus, a party intending to engage in criminal activity could evade an SCA Warrant by the simple expedient of giving false

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3 Suppose, on the contrary, that Microsoft were correct that the territorial limitations on a conventional warrant apply to an SCA warrant. Prior to the amendment effected by the Patriot Act, a service provider could have objected to a warrant issued by a judge in the district where the provider was headquartered on the basis that the information sought was stored on a server in a different district, and the court would have upheld the objection and quashed the subpoena. Yet, I have located no such decision.
residence information, thereby causing the ISP to assign his account to a server outside the United States.

Second, if an SCA Warrant were treated like a conventional search warrant, it could only be executed abroad pursuant to a Mutual Legal Assistance Treaty ("MLAT"). As one commentator has observed, "This process generally remains slow and laborious, as it requires the cooperation of two governments and one of those governments may not prioritize the case as highly as the other." Orin S. Kerr, The Next Generation Communications Privacy Act, 162 U. Penn. L. Rev. 373, 409 (2014). Moreover, nations that enter into MLATs nevertheless generally retain the discretion to decline a request for assistance. For example, the MLAT between the United States and Canada provides that "[t]he Requested State may deny assistance to the extent that . . . execution of the request is contrary to its public interest as determined by its Central Authority." Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Can., March 18, 1985, 24 I.L.M. 1092 ("U.S.-Can. MLAT"), Art. V(1). Similarly, the MLAT between the United States and the United Kingdom allows the Requested State to deny assistance if it deems that the request would be "contrary to important public policy" or involves "an offense of a political character." Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-U.K., Jan. 6, 1994, S. Treaty Doc. No. 104-2 ("U.S.-U.K. MLAT"), Art. 3(1)(a) &
(c)(i). Indeed, an exchange of diplomatic notes construes the term “important public policy” to include “a Requested Party’s policy of opposing the exercise of jurisdiction which is in its view extraterritorial and objectionable.” Letters dated January 6, 1994 between Warren M. Christopher, Secretary of State of the United States, and Robin W. Renwick, Ambassador of the United Kingdom of Great Britain and Northern Ireland (attached to U.S.-U.K. MLAT). Finally, in the case of a search and seizure, the MLAT in both of these examples provides that any search must be executed in accordance with the laws of the Requested Party. U.S.-Can. MLAT, Art. XVI(1); U.S.-U.K. MLAT, Art. 14(1), (2). This raises the possibility that foreign law enforcement authorities would be required to oversee or even to conduct the acquisition of information from a server abroad.

Finally, as burdensome and uncertain as the MLAT process is, it is entirely unavailable where no treaty is in place. Although there are more than 60 MLATs currently in force, Amy E. Pope, Lawlessness Breeds Lawlessness: A Case for Applying the Fourth Amendment to Extraterritorial Searches, 65 Fla. L. Rev. 1917, 1931 (2013), not all countries have entered into such agreements with the United States. Moreover, Google has reportedly explored the possibility of establishing true “offshore” servers: server farms located at sea beyond the territorial jurisdiction of any nation.
Steven R. Swanson, Google Sets Sail: Ocean-Based Server Farms and International Law, 43 U. Conn. L. Rev. 709, 716-18 (2011). Thus, under Microsoft's understanding, certain information within the control of an American service provider would be completely unavailable to American law enforcement under the SCA.  

The practical implications thus make it unlikely that Congress intended to treat a Section 2703(a) order as a warrant for the search of premises located where the data is stored.

E. Principles of Extraterritoriality

The presumption against territorial application provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," Morrison v. National Australia Bank Ltd., 561 U.S. 247, __, 130 S. Ct. 2869, 2878 (2010), and reflect the "presumption that United States law governs domestically but does not rule the world," Microsoft Corp. v. AT & T Corp., 550 U.S. 437, 454 (2007).

Kioibel v. Royal Dutch Petroleum Co., __ U.S. __, __, 133 S. Ct. 1659, 1664 (2013). But the concerns that animate the presumption against extraterritoriality are simply not present here: an SCA Warrant does not criminalize conduct taking place in a foreign country; it does not involve the deployment of American law enforcement personnel abroad; it does not require even the physical

4 Non-content information, opened e-mails, and unopened e-mails stored more than 180 days could be obtained, but only by means of a subpoena with notice to the target; unopened e-mails stored less than 180 days could not be obtained at all.
presence of service provider employees at the location where data are stored. At least in this instance, it places obligations only on the service provider to act within the United States. Many years ago, in the context of sanctioning a witness who refused to return from abroad to testify in a criminal proceeding, the Supreme Court observed:

With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government. While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States are concerned, is one of construction, not of legislative power.

Blackmer v. United States, 284 U.S. 421, 437 (1932) (footnotes omitted). Thus, the nationality principle, one of the well-recognized grounds for extension of American criminal law outside the nation's borders, see Marc Rich, 707 F.2d at 666 (citing Introductory Comment to Research on International Law, Part II, Draft Convention on Jurisdiction With Respect to Crime, 29 Am. J. Int'l Law 435, 445 (Supp. 1935)), supports the legal requirement that an entity subject to jurisdiction in the United States, like Microsoft, may be required to obtain evidence from abroad in connection with a criminal investigation.

The cases that Microsoft cites for the proposition that there
is no authority to issue extraterritorial warrants are inapposite, since these decisions refer to conventional warrants. For example, in United States v. Odeh, 552 F.3d 157 (2d Cir. 2008), the Second Circuit noted that "seven justices of the Supreme Court [in United States v. Verduq-Urquidez, 494 U.S. 259 (1990)] endorsed the view that U.S. courts are not empowered to issue warrants for foreign searches," id. at 169, and found that "it is by no means clear that U.S. judicial officers could be authorized to issue warrants for overseas searches," id. at 171. But Odeh involved American law enforcement agents engaging in wiretapping and searching a residence in Kenya. Id. at 159-60. The court held that while the Fourth Amendment's proscription against unreasonable search and seizure would apply in such circumstances, the requirement of a warrant would not. Id. at 169-71. Similarly, in Verduq-Urquidez, the Supreme Court held that a Mexican national could not challenge, on Fourth Amendment grounds, the search of his residence in Mexico by American agents acting without a warrant. 494 U.S. at 262-63, 274-75; id. at 278 (Kennedy, J., concurring); id. at 279 (Stevens, J., concurring). Those cases are not applicable here, where the requirement to obtain a section 2703(a) order is grounded in the SCA, not in the Warrant Clause.

Nor do cases relating to the lack of power to authorize intrusion into a foreign computer support Microsoft's position. In
In re Warrant to Search a Target Computer at Premises Unknown, 958 F. Supp. 2d 753 (S.D. Tex. 2013), the court rejected the Government’s argument that data surreptitiously seized from a computer at an unknown location would be “located” within the district where the agents would first view it for purposes of conforming to the territorial limitations of Rule 41. Id. at 756-57. But there the Government was not seeking an SCA Warrant.

The Government [did] not seek a garden-variety search warrant. Its application request[ed] authorization to surreptitiously install data extraction software on the Target Computer. Once installed, the software [would have] the capacity to search the computer’s hard drive, random access memory, and other storage media; to activate the computer’s built-in camera; to generate latitude and longitude coordinates for the computer’s location; and to transmit the extracted data to FBI agents within this district.

Id. at 755. “In other words, the Government [sought] a warrant to hack a computer suspected of criminal use.” Id. Though not “garden-variety,” the warrant requested there was conventional: it called for agents to intrude upon the target’s property in order to obtain information; it did not call for disclosure of information in the possession of a third party. Likewise, in United States v. Gorshkov, No. CR 00-550, 2001 WL 1024026 (W.D. Wash. May 23, 2001), government agents seized a computer in this country, extracted a password, and used it to access the target computer in Russia. Id. at *1. The court characterized this as “extraterritorial access"
to the Russian computer, and held that "[u]ntil the copied data was transmitted to the United States, it was outside the territory of this country and not subject to the protections of the Fourth Amendment." *Id.* at *3. But this case is of even less assistance to Microsoft since the court did not suggest that it would have been beyond a court's authority to issue a warrant to accomplish the same result.⁵

Perhaps the case that comes closest to supporting Microsoft is *Cunzhu Zheng v. Yahoo! Inc.*, No. C-08-1068, 2009 WL 4430297 (N.D. Cal. Dec. 2, 2008), because at least it deals with the ECPA. There, the plaintiffs sought damages against an ISP on the ground that it had provided user information about them to the People's Republic of China (the "PRC") in violation of privacy provisions of the ECPA and particularly of the SCA. *Id.* at *1. The court found that "the alleged interceptions and disclosures occurred in the

⁵ Microsoft argues that the Government itself recognized the extraterritorial nature of remote computer searches when it sought an amendment to Rule 41 in 2013. See Letter from Mythili Raman, Acting Assistant Attorney General, Criminal Division to Hon. Reena Raggi, Chair, Advisory Committee on Criminal Rules (Sept. 18, 2013) ("Raman Letter") at 4-5, available at [http://uscourts.gov/uscourts/RulesAndPolicies/](http://uscourts.gov/uscourts/RulesAndPolicies/). But the proposed amendment had nothing to do with SCA Warrants directed to service providers and, rather, was intended to facilitate the kind of "warrant to hack a computer" that was quashed in *In re Warrant to Search a Target Computer at Premises Unknown*; indeed, the Government explicitly referred to that case in its proposal. Raman Letter at 2.
PRC," id. at *4, and as a result, dismissed the action on the ground that "[p]laintiffs point to no language in the ECPA itself, nor to any statement in the legislative history of the ECPA, indicating Congress intended that the ECPA . . . apply to activities occurring outside the United States," id. at *3. But this language, too, does not advance Microsoft's cause. The fact that protections against "interceptions and disclosures" may not apply where those activities take place abroad hardly indicates that Congress intended to limit the ability of law enforcement agents to obtain account information from domestic service providers who happen to store that information overseas.

Conclusion

Even when applied to information that is stored in servers abroad, an SCA Warrant does not violate the presumption against extraterritorial application of American law. Accordingly, Microsoft's motion to quash in part the warrant at issue is denied.

SO ORDERED.

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
April 25, 2014
Copies mailed this date:

Guy Petrillo, Esq.
Nelson A. Boxer, Esq.
Petrillo Klein & Boxer LLP
655 Third Ave.
New York, NY 10017

Nancy Kestenbaum, Esq.
Claire Catalano, Esq.
Covington & Burling LLP
The New York Times Building
620 Eighth Ave.
New York, NY 10018-1405

James M. Garland, Esq.
Alexander A. Berengaut, Esq.
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

Lorin L. Reisner, Esq.
Justin Anderson, Esq.
Serrin Turner, Esq.
Assistant U.S. Attorneys
One St. Andrew’s Plaza
New York, NY 10007
PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM LEONARDO GRAHAM, a/k/a Leo,

Defendant-Appellant.

No. 09-5067

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William D. Quarles, Jr., District Judge.
(1:08-cr-00411-WDQ-4)

Argued: January 31, 2013
Decided: March 29, 2013

Before TRAXLER, Chief Judge, and AGEE and DAVIS,
Circuit Judges.

Affirmed by published opinion. Judge Davis wrote the opinion, in which Chief Judge Traxler and Judge Agee joined.

COUNSEL

ARGUED: Michael Alan Wein, Greenbelt, Maryland, for Appellant. Michael Clayton Hanlon, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for
Appellee. ON BRIEF: Rod J. Rosenstein, United States Attorney, Baltimore, Maryland, for Appellee.

OPINION

DAVIS, Circuit Judge:

A jury convicted Appellant William Leonardo Graham of one count of conspiracy to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 846. Pursuant to 21 U.S.C. § 851, the district court imposed a mandatory life sentence. On appeal, Graham asserts reversible error in three respects: (1) an alleged violation of the Court Reporter Act, 28 U.S.C. § 753(b); (2) the admission of statements by coconspirators recorded during wiretapped conversations; and (3) his life sentence contravenes the Constitution. For the reasons set forth below, we reject each of Graham’s contentions and we therefore affirm the judgment.

I.

Although several of Graham’s codefendants testified against him and thereby provided direct evidence of his participation in the narcotics conspiracy, their trial testimony was significantly bolstered by recordings of their wiretapped conversations which occurred during the existence of the conspiracy. Graham’s focus on appeal before us is that (1) the full vindication of his right to appellate review has been denied by the lack of a reliable trial record of the wiretapped conversations; and, in any event, (2) the district court abused its discretion when it admitted the wiretapped conversations. For the reasons explained within, we reject each of these contentions.

A.

On September 11, 2008, Graham was named with seven others in count one of a superseding indictment charging con-
spiration to distribute and possess with intent to distribute five kilograms or more of cocaine from March 2006 through August 2008. Graham alone proceeded to trial; his co-defendants entered into plea agreements or (as to one) the indictment was dismissed on motion of the government. Prior to trial, Graham’s counsel discussed with the prosecuting Assistant United States Attorney ("AUSA") the admissibility of five recordings of wiretap conversations among Graham’s co-defendants in which Graham was not a participant. The government indicated that it planned to seek admission of the recordings as non-hearsay co-conspirator statements and/or pursuant to the present sense impression exception to the hearsay rule.

Trial took place from August 17 through August 24, 2009. During opening statements, the AUSA explained to the jury that the government would present testimony of the case agent regarding the investigation, specifically as to how the government was able to install a wiretap on the cellphone of co-defendant Lawrence Reeves, and thereby intercept conversations between Reeves and co-defendants Devon Marshall and Justin Gallardo. The government further explained that the jury would hear in the recordings that Reeves, Marshall, and Gallardo were attempting to collect a drug debt from Graham. (Reeves, Marshall, and Gallardo all testified against Graham pursuant to plea agreements with the government.)

The government’s first witness, Drug Enforcement Agency ("DEA") Special Agent Thomas Cindric, testified that investigators recorded approximately 35,000 conversations in the course of the investigation of the conspiracy. Cindric also confirmed that there were no recordings of Graham himself talking on the wire.

Next, Reeves testified. He explained how he and Gallardo were in a partnership: Gallardo received drugs from Arizona, Reeves distributed them to various buyers and sellers, and Gallardo returned the proceeds to the Arizona suppliers.
Reeves also described working with Graham to sell drugs, including going to Graham's house to "pick up the money that he owed [him] for [a] [ ] shipment of drugs that [he] gave him." J.A. 178. Reeves testified that he received a total of six shipments of cocaine from Arizona. At some point, Reeves met Marshall, one of Graham's customers. Reeves testified that Marshall was unhappy with Graham's prices and began to buy directly from Reeves.

Reeves testified that while working with Graham to sell the fourth shipment of narcotics, which was delivered to Graham's home and contained approximately 26 kilograms of cocaine and about 200 pounds of marijuana, they "gave the drugs to [Graham] up front and expected to get payment afterwards, after he was done selling." Id. at 191. Graham complained about the quality of the marijuana, however, and told them "he tried to sell" it but could not. Id. at 192. As a result, he owed Reeves and Gallardo money for the marijuana, which resulted in the Arizona suppliers going unpaid. According to Reeves, Graham's debt after that transaction was "about $30,000." Id.

Reeves further testified that Graham had received a portion of four of the six shipments from Arizona, but future supplies had ended "[b]ecause Leo [Graham] owed [them] on the money on the marijuana and he refused to pay. And therefore, [they] cut him off." J.A. 199. Specifically, Reeves explained that the sixth shipment was the last shipment from Arizona:

There was a huge, basically, beef between myself, Mr. Gallardo, and the people in Arizona because of this marijuana, and because of the shortage, how those [kilos] came short, and the money not come in. So they basically shut us down.

J.A. 199.
Thereafter, Reeves asked Marshall to assist in persuading Graham to pay the debt. Reeves and Marshall planned to tell Graham that "Mexicans" were looking for him in hopes that he would be intimidated into paying the debt. \textit{Id.} at 203. During Reeves's testimony, the government played three recordings\footnote{Call number 1452 was played first, and it corresponded to "tab 8" in the binder. During call 1452, Reeves and "Big Moe" spoke about Moe's attempts to locate Graham. "Big Moe" was another associate, and he was offered a portion of the pay-out if he was successful in persuading Graham to pay the debt.} of wiretapped phone conversations on Reeves’s phone. The jurors were given binders containing transcripts of each recording played during the trial. When a recording was played, the prosecutor referenced the corresponding tab number in the transcript binder for the jury to follow along.

Justin Gallardo was the second cooperating codefendant to testify. He testified that he transported cocaine from Arizona to Maryland, helped Reeves distribute it in Baltimore, and took the money earned from the sales to Arizona. Gallardo confirmed that Graham received multiple kilograms of each cocaine shipment the group received. He testified that he kept tally sheets, which were seized in August 2008 during the execution of a search warrant issued for his home. Gallardo used the sheets to keep track of the amount and type of drug each customer received and the money paid, and the portion of the money to be returned to Arizona. Gallardo’s tally sheets showed that Graham acquired cocaine and marijuana from the group and that he owed or paid money for those drugs.

The second call played was call 23, which corresponded to "tab 13" in the binder. It consisted of Reeves talking with Gallardo about Marshall’s attempts to get Graham to pay the debt. Reeves told Gallardo that Graham had refused to pay.

The third call played was call 1454, which corresponded to "tab 9" in the binder. The call was between Reeves and "Big Moe." Reeves explained Marshall’s attempt to intimidate Graham by telling him "Esses" were looking for him, and that Graham continued to refuse to pay the debt.
Marshall was the third cooperating codefendant to testify. He explained that in early 2007 he began selling cocaine that he received from a supplier named "Leonardo." Marshall identified Graham as his supplier, "Leonardo." According to Marshall, he would pick up kilogram quantities of cocaine from Graham at Graham's home. Marshall stated that in October 2007 he began to obtain his supply directly from Reeves.

Marshall testified that Reeves informed him that Graham owed Reeves money, and at Reeves's request, Marshall agreed to talk to Graham. When he did so, Marshall told Graham that Mexican cocaine suppliers were looking for him. In response, Marshall testified, Graham said he refused to give any money to Reeves until he "gets some more product" — "coke." J.A. 385.

After meeting with Graham, Marshall relayed the information to Reeves via telephone. Call 22, which was "tab 12" of the transcript binder, was played to the jury. In that call, Marshall told Reeves that Graham had refused to pay the debt. In this conversation, however, Marshall did not tell Reeves that Graham wanted more drugs, and Marshall explained during his testimony that this was because he (Marshall) did not like to talk about drugs over the phone. Marshall did indicate during the call, however, that Graham had said more, and that he (Marshall) would discuss it with Reeves the next day.

In its rebuttal closing argument, the government replayed the first twenty-three seconds of one of the conversations between Reeves and "Big Moe." See supra n.1.

The district court instructed the jury that the actual recorded conversations constituted the evidence, and no: the

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2Call 20, which corresponded to "tab 11" of the transcript binder, was played for the jury. In that call, Reeves asked Marshall to "pull it off" (i.e., get Graham to pay the debt), and told Marshall that he could "keep the rest" if he could manage to get the debt paid. J.A. 664.
transcripts, which were simply aids to follow the conversations.

The jury convicted Graham of conspiracy to distribute five kilograms or more of cocaine. The parties entered a stipulation that stated that the exhibits from the trial would be "retained by counsel who offered them, pending appeal." J.A. 503.

Graham was sentenced on November 6, 2009. During the sentencing proceeding, the government reminded the district court that it had filed an information under 21 U.S.C. § 851, "noting that the Defendant had three prior felony drug offenses." J.A. 515. The court asked whether there was a mandatory minimum sentence in the case, and the government confirmed that Graham faced a mandatory life sentence as a result of the § 851 information. In response, the court stated "[f]rankly, if I were applying 3553(a) factors, there is no way that I would impose that sentence in this case . . . . [I]t would be a severe sentence, but it would certainly not be a life sentence that I am required to impose in this case." J.A. 516. The court imposed a sentence of life imprisonment. Graham filed a timely notice of appeal.

B.

We appointed appellate counsel for Graham. During his research of appealable issues, counsel discovered that none of the recordings played during trial had themselves been recorded or transcribed by the court reporter during their presentation to the jury. Concerned that, as he had not been present for trial, his incomplete knowledge of the trial record might impede his representation of Graham before us, counsel filed and we granted a consent motion to rescind the briefing order to permit counsel to pursue relief before the district
court pursuant to Federal Rule of Appellate Procedure ("FRAP") 10.3

Thereafter, in summer 2011, the government provided to counsel a copy of a CD containing the recordings and a copy of the transcript binder. The district court held an evidentiary hearing to determine which recordings were played for the jury during trial. Prior to the hearing, the government submitted two affidavits to the district court. One was of the lead trial prosecutor, a former AUSA. The former AUSA stated that he, his co-counsel, and the case agent, had reviewed the DEA wiretaps in Graham’s case, and selected which calls would be played at trial. He stated that he organized the preparation of the transcripts for the calls they planned to play for the jury, and checked the transcripts for errors prior to trial. He stated that, based on his recollection, as refreshed by his review of the trial transcript, the wiretap CD, and examination of the transcript binder, he could "attest that the compact disk provided to [him] by [the current AUSA] contains true and accurate copies of the wiretap recordings played during the trial in [Graham’s] case." J.A. 710. He specifically identified which recorded calls from the duplicate CD had been played

3Federal Rule of Appellate Procedure 10(e) provides as follows in pertinent part:

(e) Correction or Modification of the Record.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(B) by the district court before or after the record has been forwarded . . .

FRAP 10(e).
at each reference in the trial transcript to a tape being played to the jury.

During the hearing, the former AUSA testified consistently with the averments in his affidavit. He stated that he was in the courtroom when all of the recordings were played to the jury. He further testified that in preparation for the hearing, he reviewed each page of the trial transcript which indicated a recorded call had been played and "compar[ed] them to the transcripts and ma[de] sure that the transcripts were the transcripts that related to those calls." J.A. 729.

The second affidavit submitted prior to the hearing was of DEA Task Force Officer Detective William Nickoles. Nickoles stated that he was the case agent on Graham’s case and, in that capacity, he reviewed wiretap recordings and the transcripts of the recordings selected to be used at trial. He asserted that he was present at trial when the calls were played on August 18, 2009, and when the prosecutor played a portion of a call during his rebuttal closing argument. Nickoles averred that he reviewed the contents of the CD that contained copies of the recordings prepared for trial, and the copy of the transcript binder prepared for the trial, and based on that review and his best recollection of relevant events, he could "attest that the compact disk provided to [him] by [the current AUSA] contains the true and accurate copies of the wiretap recordings played during the trial in [Graham’s] case." J.A. 714.

Nickoles also testified at the hearing. He explained that, while working as the case agent on Graham’s case, he had reviewed every wiretap call in the case. He also stated that he executed his affidavit after listening to the audio CD and reviewing the transcript binder provided to him, which together led him to conclude that they were accurate copies of the originals used in Graham’s trial. Finally, he testified that the transcribed portions of the five phone calls in the five tabs
in the transcript binder were played in their entirety, and only the transcribed portions were played to the jury.

On July 25, 2012, the district court issued a Memorandum Opinion and Order Confirming Record on Appeal, which made findings as to which calls, and which portions of the calls, were heard by the jury. Six tapes were played at trial, covering five calls; one recording was replayed during the government’s rebuttal argument. The district court "[found] beyond a reasonable doubt that the wiretap recordings played at trial were those indicated by the testimony and affidavits" presented by the government. J.A. 804. Thereafter, the parties resumed their briefing in this appeal.4

C.

Graham argues that the court reporter’s failure to transcribe the contents of the wiretap conversations played to the jury during trial constituted a violation of the Court Reporter Act ("CRA"), 28 U.S.C. § 753(b), and that the district court lacked sufficient proof at the FRAP 10 hearing to conclude definitively what wiretap recordings were played to the jury. In response, the government argues that the district court’s findings and conclusions are sound and that, even if the district court erred in failing to ensure at trial that the wiretap conversations played were recorded or transcribed contemporaneously by the court reporter, the error was resolved by the district court’s FRAP 10 conclusions.

We review a district court’s compliance with the CRA de novo. United States v. Brown, 202 F.3d 691, 696 (4th Cir. 2000).

The CRA states, in pertinent part:

4In our summary of the evidence set forth above in section I.A. of this opinion, we have interpreted the record fully in accordance with the district court’s findings and conclusions.
Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim . . . . Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court . . . .


We have not previously addressed the issue whether a district court’s failure to ensure the transcription of audio recordings played during a trial constitutes a violation of the CRA. We need not resolve the issue in this case, however, because Graham is not entitled to relief on his claim in any event. In United States v. Brown, we held that, although a defendant has a right to a meaningful appeal, with the assistance of a complete transcript, "omissions from a trial transcript only warrant a new trial if ‘the missing portion of the transcript specifically prejudices [a defendant’s] appeal.’" 202 F.3d 691, 696 (4th Cir. 2000) (quoting United States v. Gillis, 773 F.2d 549, 554 (4th Cir. 1985)). Thus, "‘to obtain a new trial, whether or not appellate counsel is new, the defendant must show that the transcript errors specifically prejudiced his ability to perfect an appeal.’" Brown, 202 F.3d at 696 (quoting United States v. Huggins, 191 F.3d 532, 537 (4th Cir. 1999)). Because we find the district court’s FRAP 10 findings were amply supported by the evidence presented at the hearing and enabled Graham to "perfect [his] appeal," we need not and do not address whether the CRA was violated. Id.

D.

In reviewing the district court’s decision on a FRAP 10 motion, we consider the district court’s findings conclusive "unless intentionally false or plainly unreasonable." United States v. Hernandez, 227 F.3d 686, 695 (6th Cir. 2000) (citing United States v. Zichettello, 208 F.3d 72, 93 (2nd Cir. 2000); United States v. Garcia, 997 F.2d 1273, 1278 (9th Cir. 1993);
Graham argues that the evidence presented at the FRAP 10 proceeding was insufficient to correct the lack of transcription of the recordings played to the jury. This is so, he contends conclusorily, because the trial court did not hear enough evidence at the FRAP 10 hearing to find definitively which recordings were played during the trial.

We disagree. The district court’s findings were adequately supported by the evidence. First, the district court pointed to the fact that both of the witnesses were closely involved in the actual preparation of the original disc containing the recordings and transcript binder used at the trial. Both were present throughout the trial. The district court also noted that the lead trial prosecutor testified that he "very clearly" recalled which recording was played in his rebuttal closing, and after reviewing the trial transcript, the disc, and the transcript binder, remembered which of the other recordings had been played. J.A. 804-05. Lastly, the district court emphasized the fact that "Graham [who attended the hearing with counsel] presented no contradictory affidavits or testimony," and concluded that the calls that were played were calls 20, 22, 23, 1452 and 1454. Id. at 805-06.

Based on the wealth of highly persuasive evidence before the district court, we conclude the court had a sufficient basis to find beyond a reasonable doubt that the copies of the disc and transcript binder were genuine and accurate duplicates of the calls that were played at trial. We have no hesitation in concluding that Graham’s counsel has available in this case an appellate record that fully and accurately reflects the pre-trial and trial proceedings before the district court leading to the jury’s verdict. Cf. Hernandez, 227 F.3d at 695.
Graham next argues that the district court erred in admitting the wiretap conversations of his coconspirators under Federal Rule of Evidence ("FRE" or "Rule") 801(d)(2)(E) because the tapes merely captured "idle chatter" between them about Graham's past debt for marijuana, and because the conversations were not in the course, or in furtherance, of a conspiracy.


The standard for admission of a coconspirator statement is clear in this Circuit:

A statement is not hearsay if it is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" and is offered against the party. Fed. R. Evid. 801(d)(2)(E). In order to admit a statement under 801(d)(2)(E), the moving

5Rule 801(d)(2)(E) provides:

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish . . . the existence of the conspiracy or participation in it under (E). Fed. R. Evid. 801(d)(2)(E).
party must show that (i) a conspiracy did, in fact, exist, (ii) the declarant and the defendant were members of the conspiracy, and (iii) the statement was made in the course of, and in furtherance of, the conspiracy. See, e.g., United States v. Heater, 63 F.3d 311, 324 (4th Cir. 1995). Idle conversation that touches on, but does not further, the purposes of the conspiracy does not constitute a statement in furtherance of a conspiracy under Rule 801(d)(2)(E). See United States v. Urbanik, 801 F.2d 692, 698 (4th Cir. 1986).

United States v. Pratt, 239 F.3d 640, 643 (4th Cir. 2001). "A statement by a co-conspirator is made 'in furtherance' of a conspiracy if it was intended to promote the conspiracy's objectives, whether or not it actually has that effect." United States v. Shores, 33 F.3d 438, 443 (4th Cir. 1994), cert. denied, 514 U.S. 1019 (1995).

The existence of the three prongs of admissibility for coconspirator statements (existence of a conspiracy, membership therein of defendant and declarants, and the statements being made in the course of and in furtherance of that conspiracy) must be supported by a preponderance of the evidence. See Blevins, 960 F.2d at 1255. The incorrect admission of a statement under the coconspirator statement exclusion from the definition of hearsay is subject to harmless error review. United States v. Urbanik, 801 F.2d 692, 698 (4th Cir. 1986).

Graham first contends that the district court erred by not making explicit findings on the existence of a conspiracy prior to admitting the statements. This argument fails, however, because a trial court is not required to hold a hearing to determine whether a conspiracy exists before admitting statements under the rule, and the court need not explain the reasoning behind the evidentiary ruling. Blevins, 960 F.2d at 1256. We "may affirm a judgment where the record reveals that the co-conspirator's statements were plainly admissible,
whether or not a detailed rationale for admitting the statements had been stated by the trial court." *Id.*

Next, Graham argues that each of the five recordings played for the jury was nothing more than "profanity laden conversation" about collecting a debt from Graham, but that "[t]here’s no way that [conversations about] a ‘debt collecting’ job" constituted coconspirator statements. Appellant’s Br. at 65-66 (brackets added). In other words, Graham contends that the conversations played for the jury were not "in furtherance of a conspiracy" to distribute cocaine.

The government responds that the only issue surrounding the admissibility of the statements is whether the conspiracy continued to exist on June 27, 2008, when the recordings were made. The government points to the efforts of Reeves and Marshall to collect the unpaid sums from Graham so that the money could be used to salvage the relationship with their Arizona-based supplier as indicative that the conspiracy was ongoing at the time of the calls. To the extent Graham is arguing that he withdrew from the conspiracy, the government adds, that claim must fail because it is the defendant who has the burden of establishing withdrawal, and "'[a] mere cessation of activity in furtherance of the conspiracy is insufficient.'" Gov’t’s Br. at 46-47 (quoting *United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986)). The government contends that although Graham may have refused to pay the debt, he did not take affirmative action to withdraw from the conspiracy.

Additionally, the government argues the conversations were "in furtherance of the conspiracy," because "it was necessary for members of the conspiracy, Reeves and Marshall, to discuss the status of the conspiracy, the status of its members, and monies owed by one member to another." Gov’t’s Br. at 57.

The government’s position is persuasive. The evidence demonstrates that one of the primary reasons Reeves and
Marshall sought to collect the debt from Graham was to gain funds to continue or re-establish their drug supply, which according to their testimony at trial, had been plentiful before Graham’s refusal to ante up dislocated their profitable enterprise. Additionally, the evidence shows that Graham himself continued to want to engage in further drug activities with the group by receiving more cocaine. There is, in contrast, no evidence that Graham attempted to disavow the conspiracy and communicate his departure to his coconspirators. See Smith v. United States, 133 S. Ct. 714, 719 (2013) (holding that the burden rests with the defendant to establish withdrawal from a conspiracy). What we have said in the context of substantive liability for a conspiracy offense applies with equal force in the context of the admissibility of coconspirator statements: "evidence of an internal conflict between [a defendant] and other members of the conspiracy" is not alone sufficient to undermine proof that coconspirator statements were made in furtherance of and in the course of the conspiracy. See United States v. Green, 599 F.3d 360, 369 (4th Cir.), cert. denied, 131 S.Ct. 271 (2010).

Even though Graham himself was not captured in a conversation with a coconspirator in any of the 35,000 calls recorded during the investigation of this case, and even though there was adversity between Graham and his coconspirators, each call played at trial contained discussions that rendered them "in furtherance" of the overall conspiracy. The calls all consisted of the speakers exchanging information about the status of their efforts to collect the intra-conspiracy debt owed by Graham. Some included discussions of the plan to give Graham the impression (to intimidate him into paying) that "Esses" or "Mexicans" were looking for him to collect on the debt, and most ended with the speakers planning the next time they would discuss their efforts to persuade Graham to pay up. It is apparent that debt collection was a primary aim of the conspiracy at the time the calls were made, most likely because recoupment of the unpaid funds had some bearing on
the group’s ability to receive additional narcotics from their Arizona source.

In short, the district court’s admission of the challenged statements was neither erroneous nor, it necessarily follows, an abuse of discretion. *Blevins*, 960 F.2d at 1256.

II.

Finally, invoking the strongly-worded sentiments expressed by the district court at sentencing to the effect that it would not choose to impose a life sentence if it had a choice in the matter, Graham challenges his mandatory life sentence. Although the argument is not made with great clarity, we understand his principal purpose to be that he wishes to preserve the issue in the event the Supreme Court should elect to reexamine its holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In any event, we are bound by

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6The district court stated:

In this case, if I did have my discretion, I would impose a harsh sentence. It would be a sentence at the bottom of the guidelines. It would be a 30-year sentence, which I find would be appropriate and would meet the goals of 3553(a), because you certainly deserve, I believe, every day of the sentence within the guidelines, but, as I said, at the bottom of the guidelines. I impose, because I am required to, a sentence of life.

J.A. 528.


8See, e.g., United States v. Mason, 628 F.3d 123, 133-34 (4th Cir. 2010):

Finally, Mason contends that the fact of his prior convictions needed to be proved to a jury beyond a reasonable doubt. Because that fact was not found by a jury beyond a reasonable
Almendarez-Torres unless and until the Supreme Court says otherwise. Accordingly, we reject the challenge to Graham’s sentence.

III.

For the reasons set forth, the judgment is

AFFIRMED.

doubt, he asserts, the use of the prior convictions to enhance his sentence violated his Sixth Amendment rights. Mason candidly acknowledges that this argument is presented for purposes of preserving the issue for the Supreme Court and that, under the present jurisprudence of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), such an argument cannot be sustained. We agree. Moreover, we note that since *Almendarez-Torres*, the Supreme Court has repeatedly affirmed the exception, as have we. See *Shepard v. United States*, 544 U.S. 13, 25–26 & n. 5 (2005); *Apprendi v. New Jersey*, 530 U.S. 466, 488–90 (2000); *United States v. Cheek*, 415 F.3d 349, 354 (4th Cir. 2005).
I. BACKGROUND

Appellant Quartavious Davis\(^1\) was convicted by a jury on several counts of Hobbs Act robbery, 18 U.S.C. § 1951(b)(1), (3), conspiracy, id. § 1951(a), and knowing possession of a firearm in furtherance of a crime of violence, id. §§ 924(c)(1)(A)(ii), 2. The district court entered judgment on the verdict, sentencing Davis to consecutive terms of imprisonment totaling 1,941 months. In this appeal, we are called on to decide whether the court order authorized by the Stored Communications Act, id. § 2703(d), compelling the production of a third-party telephone company’s business records containing historical cell tower location information, violated Davis’s Fourth Amendment rights and was thus unconstitutional. We hold it did not and was not.

Therefore, the district court did not err in denying Davis’s motion to suppress and we affirm Davis’s convictions. We reinstate the panel opinion, United States v. Davis, 754 F.3d 1205 (11th Cir.), rev’d en banc granted, opinion vacated, 573 F. App’x 925 (11th Cir. 2014), with respect to all issues except those addressed in Parts I and II, 754 F.3d at 1210-18, which are now decided by the en banc court.\(^2\)

\(^1\)The Presentence Investigation Report notes that “Quartavious” is the correct spelling of appellant’s first name, despite the spelling in the caption.

\(^2\)Davis’s advisory guidelines range was 57 to 71 months’ imprisonment for his Hobbs Act robberies. However, each of his seven § 924(c) convictions required consecutive sentences. 18 U.S.C. § 924(c)(1)(D)(ii). The district court sentenced Davis to concurrent terms of 57 months.\(^3\)
A. Seven Armed Robberies in a Two-Month Period

Quartavious Davis committed seven separate armed robberies in a two-month period. From the beginning of August 2010 to the beginning of October 2010, Davis and accomplices, bearing an array of firearms, terrorized a wide range of South Florida businesses, including a pizzeria, a gas station, a drugstore, an auto parts store, a beauty salon, a fast food restaurant, and a jewelry store.

On February 18, 2011, a federal grand jury returned a seventeen-count indictment against Davis and five codefendants. Davis was named in sixteen of the seventeen counts. The indictment charged violations of the Anti-Racketeering Act, 18 U.S.C. § 1951 (Hobbs Act), and conspiracy to violate the Hobbs Act. The indictment specifically charged Davis with conspiracy to engage in Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Counts 1, 15); seven Hobbs Act armed robberies, in violation of 18 U.S.C. §§ 1951(a), 2 (Counts 2, 4, 6, 8, 10, 13, 16); and knowingly using, carrying, and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii), 2 (Counts 3, 5, 7, 9, 11, 14, 17).

All of Davis’s codefendants pled guilty to various counts. Davis alone went to trial. The jury convicted Davis on all charged counts.

imprisonment on counts 1, 2, 4, 6, 8, 10, 13, 15, and 16, plus a consecutive term of 84 months on count 3, plus consecutive terms of 365 months’ imprisonment on counts 5, 7, 9, 11, 14, and 17.
The panel opinion affirmed Davis’s convictions but vacated the application of the guidelines sentencing increase for “brandishing” of a firearm. Davis, 754 F.3d at 1220-21, 1223. To be clear, that disposition stands.

At trial, the prosecution offered evidence of two conspiracies to commit Hobbs Act robbery and evidence that Davis took part in each conspiracy and each robbery. The prosecution further presented evidence that the conspirators committed such robberies. One member of each conspiracy testified for the government. Codefendant Willie Smith (“Smith”) testified as to the first conspiracy, encompassing six robberies at commercial establishments, including a Little Caesar’s restaurant, an Amerika Gas Station, a Walgreens drug store, an Advance Auto Parts store, a Universal Beauty Salon, and a Wendy’s restaurant. Codefendant Michael Martin (“Martin”) testified as to the second conspiracy, encompassing the robbery of a Mayors Jewelry store. Smith and Martin testified that Davis was involved in each robbery, where they wore masks, carried guns, and stole items such as cash, cigarettes, and watches.

Separately, an eyewitness, Edwin Negron, testified regarding Davis’s conduct at the Universal Beauty Salon and the adjacent martial arts studio. He testified that Davis pointed a gun at his head, pushed both a 77-year-old woman and Negron’s wife to the ground, and took several items from Negron and others. Another eyewitness, Antonio Brooks, testified that Brooks confronted Davis and his accomplices outside the Wendy’s after that robbery. Brooks testified that Davis fired a gun at Brooks, and that Brooks returned fire towards the getaway car.
Beyond the accomplice and eyewitness testimony, the government produced additional evidence. Surveillance videos showed a man matching Davis’s description participating in the robberies at Walgreens, Advance Auto Parts, Wendy’s, and Mayors Jewelry. Smith and Martin identified Davis on the videos. DNA shown to be Davis’s was recovered from the getaway car used to flee the scene of the Universal Beauty Salon robbery and the Mayors Jewelry store robbery.

In addition, the prosecution introduced telephone records obtained from MetroPCS for the 67-day period from August 1, 2010, through October 6, 2010, the time period spanning the first and last of the seven armed robberies. The toll records show the telephone numbers for each of Davis’s calls and the number of the cell tower that connected each call. A MetroPCS witness identified his company’s cell tower glossary, which lists the physical addresses, including longitude and latitude, of MetroPCS’s cell towers. A police witness then located on a map the precise addresses (1) of the robberies and (2) of the cell towers connecting Davis’s calls around the time of six of the seven robberies. While there was some distance between them, the cell tower sites were in the general vicinity of the robbery sites.

The location of the cell user, though, is not precise. The testimony tells us (1) the cell tower used will typically be the cell tower closest to the user, (2) the cell tower has a circular coverage radius of varying sizes, and (3) although the tower sector number indicates a general direction (North, South, etc.) of the user from the tower, the user can be anywhere in that sector. Despite this lack of precision as to where Davis’s cell phone was located, the cell tower evidence did give the government a basis for arguing calls to and from Davis’s cell phone were connected through cell tower locations that were near the robbery locations, and thus Davis necessarily was near the robberies too.

This appeal concerns the introduction of MetroPCS’s toll records and glossary as evidence against Davis at trial. We thus review in more detail how the government acquired MetroPCS’s records, the types of data in the records, and the witnesses’ testimony about the records.

B. Court Order Regarding MetroPCS Business Records

After Davis’s arrest, the government acquired MetroPCS’s business records by court order. In February 2011, the government applied to a federal magistrate judge for a court order directing various phone companies to disclose stored telephone communications records for four subject telephone numbers that included a number ending in 5642 (the “5642 number”). The application requested production of stored “telephone subscriber records” and “phone toll records.”

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3The first robbery took place on August 7, 2010, and the final robbery took place on October 1, 2010.
including the “corresponding geographic location data (cell site),” for the 5642 number. The government requested only records “for the period from August 1, 2010 through October 6, 2010.” The government sought clearly-delineated records that were both historical and tailored to the crimes under investigation.

The government did so following the explicit design of the governing statute, the Stored Communications Act (“SCA”), 18 U.S.C. § 2701 et seq. Section 2703 of the SCA provides that a federal or state governmental entity may require a telephone service provider to disclose “a record . . . pertaining to a subscriber to or a customer of such service (not including the contents of communications)” if “a court of competent jurisdiction” finds “specific and articulable facts showing that there are reasonable grounds to believe” that the records sought “are relevant and material to an ongoing criminal investigation.” Id. § 2703(c)(1)(A), (B), (d). The court order under subsection (d) does not require the government to show probable cause.

No one disputes that the government’s § 2703 application to the magistrate judge contained “specific and articulable facts” showing “reasonable grounds” to believe MetroPCS’s business records—pertaining to Davis’s 5642 cell phone number—were “relevant and material” to the government’s investigation. The government’s § 2703 application provided a detailed summary of the evidence implicating Davis in the seven robberies, including post-Miranda statements from two accomplices and the DNA evidence found in two getaway cars. Undisputedly, a sufficient showing was made to satisfy the SCA’s statutory requirements.

The magistrate judge’s order granted the § 2703 application. The court order required MetroPCS, the third-party cellular telephone service provider, to produce “all telephone toll records and geographic location data (cell site)” for the 5642 number during the period August 1, 2010 through October 6, 2010.

MetroPCS complied. For this two-month time period, MetroPCS produced its stored telephone records for number 5642 showing these five types of data: (1) telephone numbers of calls made by and to Davis’s cell phone; (2) whether the call was outgoing or incoming; (3) the date, time, and duration of the call; (4) the number assigned to the cell tower that wirelessly connected the calls from and to Davis; and (5) the sector number associated with that tower. For ease of reference, the fourth and fifth items are collectively called “historical cell tower location information.”

Importantly though, MetroPCS’s business records did not show (1) the contents of any call; (2) the contents of any cell phone; (3) any data at all for text messages sent or received; or (4) any cell tower location information for when the cell phone was turned on but not being used to make or receive a call. The government did not seek, nor did it obtain, any GPS or real-time (also known as “prospective”) location information.
Before trial, Davis moved to suppress MetroPCS’s business records for number 5642. Although the government obtained them through a statutorily-prescribed judicial order, Davis argued the evidence should be suppressed because the § 2703(d) production of MetroPCS’s records constituted a search under the Fourth Amendment and thus required probable cause and a search warrant. The district court denied the motion.⁴

C. Evidence at Trial

During the jury trial, the government introduced the MetroPCS records for the 5642 number, which was registered to “Lil Wayne.”⁵ The government also introduced evidence tying Davis to the 5642 phone number. One of Davis’s codefendants testified that Davis used the 5642 number from August 2010 to October 2010. And a codefendant’s cell phone, which was entered into evidence, listed the 5642 number under Davis’s nickname, “Quat,” in the phone’s contact list.⁶

⁴Davis did not present any evidence in support of his Fourth Amendment claim, either at the suppression hearing or at trial.

⁵MetroPCS had not required the subscriber Davis to give his true name. Instead, MetroPCS sells phones with monthly plans—averaging $40 a month—paid up front. When that plan expires, the subscriber pays another monthly payment up front or the plan is cancelled.

⁶The government also obtained MetroPCS records for three other cell phone numbers used by Davis’s co-conspirators, which were registered under the alias names of “Nicole Baker,” “Shawn Jay,” and “Dope Boi Dime.” The issue before us involves only Davis’s cell phone number, the 5642 number registered to “Lil Wayne.” In this en banc appeal, Davis did not raise arguments about the other cell phone numbers.

Michael Bosillo, a custodian of records from MetroPCS, identified and testified about the business records regarding number 5642. He testified that MetroPCS’s toll records, described above, are created and maintained in the regular course of its business.

As to cell tower location, Bosillo explained that, when a cellular phone user makes a call, the user’s cell phone sends a signal to a nearby cell tower, which is typically but not always the closest tower to the phone. Two people driving together in the same car might be using different cell towers at the same time.

Each cell phone tower has a circular coverage radius, and the “coverage pie” for each tower is further divided into either three or six parts, called sectors.

Bosillo testified that a cell tower would generally have a coverage radius of about one to one-and-a-half miles and that an individual cell phone user could “be anywhere” in the specified sector of a given cell tower’s range. Bosillo also testified that the density of cell towers in an urban area like Miami would make the coverage of any given tower smaller, but he never said how much smaller.⁷

Bosillo also testified that the toll records for Davis’s cell number 5642 show only (1) the number of the cell tower used to route Davis’s call, and (2) the sector

⁷Davis and various amici argue that some cellular telephone companies have now increased their network coverage by augmenting their cell tower network with low-power small cells, or “femtocells,” which can cover areas as small as ten meters. There is no evidence, or even any allegation, that the MetroPCS network reflected in the records in this case included anything other than traditional cell towers and the facts of this case do not require, or warrant, speculation as to the newer technology.
number associated with that tower. Thus, to determine the location of any cell tower used, Bosillo identified and explained the cell tower glossary created and kept by MetroPCS. The MetroPCS glossary listed (1) each of its cell tower numbers, (2) the physical address, including latitude and longitude, of that cell tower, and (3) how many sectors are within each cell tower’s range.

This MetroPCS glossary, along with its toll records, allowed the government to determine the precise physical location of the cell towers that connected calls made by and to Davis’s cell phone around the time of the robberies, but not the precise location of that cell phone or of Davis.

Davis objected to the introduction of the toll records for the account corresponding to the 5642 number, the subscriber records, and MetroPCS’s cell-tower glossary. The district court overruled those objections.

The government also introduced into evidence maps that showed the locations of six of the armed robberies in relation to certain cell towers. Detective Mitch Jacobs examined the records, analyzing the records only for the days the armed robberies occurred. Detective Jacobs had, at that time, been employed by the Miami-Dade Police Department for 27 years and for the last ten years had worked with cases involving cell tower location information. He had utilized cell tower location information for his investigations of homicides, parental kidnappings, robberies, fugitives, and various other types of crime.

Detective Jacobs created the maps introduced at trial based on MetroPCS’s records. These maps showed that, at or near the time of the armed robberies, cell phones linked to Davis and his codefendants made and received numerous calls routed through cell towers located in the general vicinity of the robbery locations. Detective Jacobs testified, and the maps showed, that this was true for six of the seven armed robberies. On the maps, Jacobs placed: (1) the location of the robberies and (2) the location of the cell towers that routed calls from Davis and his codefendants’ phones.\(^8\)

The distance between the robbery and cell tower locations was never quantified. The distance between the cell user and the cell tower was never quantified, but the evidence—records and testimony—as a whole suggests Davis’s calls occurred within an area that covers at least several city blocks. The government argued the cell tower evidence showed Davis was near the robberies when they occurred.

D. The Appeal

Following his convictions by the jury, Davis appealed. A panel of this Court affirmed his convictions, but held that the government violated Davis’s rights under the Fourth Amendment by obtaining stored telephone communications records from MetroPCS, a third-party telephone service provider, pursuant to the

\(^8\)The maps did not show any cell tower's coverage radius or display any cell tower's sectors.
order of the magistrate judge issued under the SCA, 18 U.S.C. § 2703(c)(1)(B),
(d). United States v. Davis, 754 F.3d 1205, 1217 (11th Cir. 2014). Nevertheless,
the panel affirmed Davis’s convictions based on the good-faith exception to the
exclusionary rule. Id. at 1217-18. This Court vacated the panel’s decision and
granted the government’s petition for rehearing en banc. United States v. Davis,
573 F. App’x 925 (11th Cir. 2014).

II. STANDARD OF REVIEW

This Court reviews de novo constitutional challenges to a federal statute.
United States v. Campbell, 743 F.3d 802, 805 (11th Cir.), cert. denied, 135 S. Ct.
704 (2014). We review the district court’s legal conclusions de novo and its
findings of fact for clear error. United States v. Jordan, 635 F.3d 1181, 1185 (11th
Cir. 2011). In the context of an appeal from the denial of a suppression motion, all
facts are construed in the light most favorable to the party prevailing below—here,
the government. United States v. Gibson, 708 F.3d 1256, 1274 (11th Cir. 2013).

III. DISCUSSION

On appeal, Davis argues the government violated his Fourth Amendment
rights by obtaining historical cell tower location information from MetroPCS’s
business records without a search warrant and a showing of probable cause. Davis
contends that the SCA, as applied here, is unconstitutional because the Act allows
the government to obtain a court order compelling MetroPCS to disclose its
historical cell tower location records without a showing of probable cause. Davis
claims the Fourth Amendment precludes the government from obtaining a third-
party company’s business records showing historical cell tower location
information, even for a single day, without a search warrant issued to that third
party.

In the controversy before us, there is no GPS device, no physical trespass,
and no real-time or prospective cell tower location information. This case
narrowly involves only (1) government access to the existing and legitimate
business records already created and maintained by a third-party telephone
company and (2) historical information about which cell tower locations connected
Davis’s cell calls during the 67-day time frame spanning the seven armed
robberies. We start by reviewing the SCA, which authorized the production of
MetroPCS’s business records.

A. The Statute

Under the SCA, Congress authorized the U.S. Attorney to obtain court
orders requiring “a provider of electronic communication service . . . to disclose a
record or other information pertaining to a subscriber to . . . such service (not
including the contents of communications).” 18 U.S.C. § 2703(c). Section 2703
directs that a judge “shall issue” the order if the government “offers specific and
articulable facts showing that there are reasonable grounds to believe that the . . .
records or other information sought] are relevant and material to an ongoing criminal investigation.” Id. § 2703(d) (emphasis added). While this statutory standard is less than the probable cause standard for a search warrant, the government is still required to obtain a court order and present to a judge specific and articulable facts showing reasonable grounds to believe the records are relevant and material to an ongoing criminal investigation. See id.

The SCA does not lower the bar from a warrant to a § 2703(d) order. Rather, requiring a court order under § 2703(d) raises the bar from an ordinary subpoena to one with additional privacy protections built in. The government routinely issues subpoenas to third parties to produce a wide variety of business records, such as credit card statements, bank statements, hotel bills, purchase orders, and billing invoices. In enacting the SCA, Congress has required more before the government can obtain telephone records from a third-party business. The SCA goes above and beyond the constitutional requirements regarding compulsory subpoena process.

A number of the SCA’s privacy-protection provisions warrant mention. First, the SCA affords citizens protection by “interposing a ‘neutral and detached magistrate’ between the citizen and the officer engaged in the often competitive enterprise of ferreting out crime.” See United States v. Karo, 468 U.S. 705, 717, 104 S. Ct. 3296, 3304 (1984) (internal quotation marks omitted). Congress made review by a judicial officer a pre-condition for the issuance of a § 2703(d) order. Moreover, the telephone records are made available only if a judicial officer finds (or the government shows) a factual basis for why the records are material to an ongoing criminal investigation.

In addition, the SCA generally prohibits telephone companies from voluntarily disclosing such records to “a governmental entity.” Id. § 2702(a)(3), (c)(4), (c)(6). As that prohibition underscores, a telephone company (like MetroPCS) would, absent privacy-protecting laws (like the SCA), be free to disclose its historical cell tower location records to governmental and non-governmental entities alike—without any judicial supervision and without having to satisfy the statutory standard in § 2703(d).

Further, the SCA bars “[i]mproper disclosure” of records obtained under § 2703(d). See id. § 2707(g). The SCA also provides remedies and penalties for violations of the Act’s privacy-protecting provisions, including money damages and the mandatory commencement of disciplinary proceedings against offending federal officers. See id. §§ 2707(a), (c), (d), 2712(a), (c).

Despite the SCA’s protections, Davis claims the court’s § 2703(d) order compelling the production of MetroPCS records violated his Fourth Amendment
rights. To prevail on his Fourth Amendment claim, Davis must show both (1) that
the application of the SCA to the facts of his case involved a “search” within the
meaning of the Fourth Amendment, and (2) that such search was unreasonable.
This Davis cannot do.

B. What Constitutes a “Search”

The Fourth Amendment guarantees “[t]he right of the people to be secure in
their persons, houses, papers, and effects, against unreasonable searches and
seizures.” U.S. Const. amend. IV. A party may establish a Fourth Amendment
search by showing that the government engaged in conduct that “would have
constituted a ‘search’ within the original meaning of the Fourth Amendment,”
originally was tied to common-law trespass and involved some trespassory
intrusion on property. See, e.g., Kyllo v. United States, 533 U.S. 27, 31-32, 121 S.

Davis makes no trespass claim, nor could he.

In 1967, the Supreme Court added a separate test—the reasonable-
expectation-of-privacy test—to analyze whether a search occurred for purposes of
the Fourth Amendment. See Smith v. Maryland, 442 U.S. 735, 739-40, 99 S. Ct.
(1967)). The reach of the Fourth Amendment now does not turn on the presence or

Thus, to determine whether the government’s obtaining access to
MetroPCS’s records constitutes a search within the meaning of the Fourth
Amendment, our lodestar is Katz’s reasonable-expectation-of-privacy test. Smith,

“Katz posits a two-part inquiry: first, has the individual manifested a
subjective expectation of privacy in the object of the challenged search?”
is society willing to recognize that expectation as reasonable?” Id. Thus, “a party
alleging an unconstitutional search under the Fourth Amendment must establish
both a subjective and an objective expectation of privacy to succeed.” United
States v. Robinson, 62 F.3d 1325, 1328 (11th Cir. 1995).

Notably, it was the interception and recording of conversations reasonably
intended to be private that drove the new test and result in Katz. See 389 U.S. at
351-53, 88 S. Ct. at 511-12. The government recorded Katz’s conversations by
attaching an electronic listening and recording device to the outside of a public
phone booth in which Katz made calls. Id. at 348, 88 S. Ct. at 509. The
government had no warrant or court order of any sort. See id. at 354-56, 88 S. Ct.
at 512-514. The Supreme Court held that the government’s conduct in


"electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth," and thus constituted a “search and seizure” under the Fourth Amendment.  

Id. at 353, 88 S. Ct. at 512. The critical fact was that one who enters a telephone booth, “shuts the door behind him, and pays the toll that permits him to place a call” is entitled to assume that his conversation is not being intercepted and recorded. Id. at 352, 88 S. Ct. at 511-12; id. at 361, 88 S. Ct. at 516-17 (Harlan, J., concurring).

C. Third Party’s Business Records

In subsequently applying Katz’s test, the Supreme Court held—in both United States v. Miller and Smith v. Maryland—that individuals have no reasonable expectation of privacy in certain business records owned and maintained by a third-party business.

In United States v. Miller, during an investigation into tax fraud, federal agents presented subpoenas to the presidents of two banks, seeking to obtain from those banks all of Miller’s bank account records. 425 U.S. 435, 437-38, 96 S. Ct. 1619, 1621 (1976). The issue was whether the defendant Miller had a "legitimate expectation of privacy" in the documents' contents. See id. at 440-43, 96 S. Ct. at 1622-24. The Supreme Court held that Miller had no protectable Fourth Amendment interest in the account records because the documents were: (1) business records of transactions to which the banks were parties and (2) Miller voluntarily conveyed the information to the banks.  

Id. Miller had "neither ownership nor possession" over the papers and the records. Id. at 437, 440, 96 S. Ct. at 1621, 1623. Rather, the papers were "the business records of the banks." Id. at 440-41, 96 S. Ct. at 1623. All of the bank records contained information "voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." Id. at 442, 96 S. Ct. at 1624. The Supreme Court noted "that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." Id. at 443, 96 S. Ct. at 1624; see also In re Grand Jury Proceeding, 842 F.2d 1229, 1234 (11th Cir. 1988) ("[A]n individual has no claim under the fourth amendment to resist the production of business records held by a third party.").

Then, in Smith v. Maryland, the Supreme Court held that telephone users have no reasonable expectations of privacy in dialed telephone numbers recorded through pen registers and contained in the third-party telephone company’s records. 442 U.S. at 742-46, 99 S. Ct. at 2581-83. The Supreme Court determined that Smith had no subjective or objective expectation of privacy in the numbers he dialed on the telephone and thus the installation of the pen register, by the
telephone company at the government's request, did not constitute a search under
the Fourth Amendment. Id.

As to the subjective expectation of privacy, the Supreme Court in Smith
doubted that "people in general entertain any actual expectation of privacy in the
numbers they dial" because "[a]ll telephone users realize that they must 'convey'
phone numbers to the telephone company, since it is through telephone company
switching equipment that their calls are completed." Id. at 742, 99 S. Ct. at 2581.
The Supreme Court stated that "[t]elephone users, in sum, typically know that they
must convey numerical information to the phone company; that the phone
company has facilities for recording this information; and that the phone company
does in fact record this information for a variety of legitimate business purposes."
Id. at 743, 99 S. Ct. at 2581. "Although subjective expectations cannot be
scientifically gauged, it is too much to believe that telephone subscribers, under
these circumstances, harbor any general expectation that the numbers they dial will
remain secret." Id. The Supreme Court stressed that "a pen register differs
significantly from the listening device employed in Katz, for pen registers do not
acquire the contents of communications." Id. at 741, 99 S. Ct. at 2581.

More telling in Smith though for this case is the location information
revealed through the telephone records. Smith argued that, "whatever the
expectations of telephone users in general, he demonstrated an expectation of

privacy by his own conduct here, since he us[ed] the telephone in his house to the
exclusion of all others." Id. at 743, 99 S. Ct. at 2582 (internal quotation marks
omitted). The Supreme Court expressly rejected Smith's argument that he
demonstrated an expectation of privacy in his own conduct here by using the
telephone only in his house. The Supreme Court found that "[a]lthough [Smith's]
conduct may have been calculated to keep the contents of his conversation private,
his conduct was not and could not have been calculated to preserve the privacy of
the number he dialed." Id. The Supreme Court reasoned: "[R]egardless of his
location, [Smith] had to convey that number to the telephone company in precisely
the same way if he wished to complete his call. The fact that he dialed the number
on his home phone rather than on some other phone could make no conceivable
difference, nor could any subscriber rationally think that it would." Id.

As to the objective expectation of privacy, the Supreme Court determined
that, "even if [Smith] did harbor some subjective expectation that the phone
numbers he dialed would remain private, this expectation is not 'one that society is
prepared to recognize as reasonable.'" Id. (quoting Katz, 389 U.S. at 361, 88 S. Ct.
at 516) (internal quotation marks omitted). The Supreme Court "consistently has
held that a person has no legitimate expectation of privacy in information he
voluntarily turns over to third parties." Id. at 743-44, 99 S. Ct. at 2582. The
Supreme Court found that, "[w]hen he used his phone, [Smith] voluntarily
conveyed numerical information to the telephone company.” Id. at 744, 99 S. Ct. at 2582. The Supreme Court explained: “[t]he switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber.” Id.

In Smith, the Supreme Court decided that “a different constitutional result is [not] required because the telephone company has decided to automate.” Id. at 744-45, 99 S. Ct. at 2582. “The fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not in our view, make any constitutional difference.” Id. at 745, 99 S. Ct. at 2583.

The Supreme Court concluded: “[Smith] in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and . . . even if he did, his expectation was not ‘legitimate.’” Id.

D. Fifth Circuit Decision

Before turning to Davis’s case, we review the Fifth Circuit’s recent decision holding that a court order under § 2703(d) compelling production of business records—showing this same cell tower location information—does not violate the Fourth Amendment and no search warrant is required. In re Application of the United States for Historical Cell Site Data (“In re Application (Fifth Circuit”), 724

F.3d 600, 611-15 (5th Cir. 2013). At the outset, the Fifth Circuit stressed who had collected the cell tower information. See id. at 609-10. The telephone company, not the government, collected the cell tower location information in the first instance and for a variety of legitimate business purposes. Id. at 611-12. The Fifth Circuit emphasized:

The Government does not require service providers to record this information or store it. The providers control what they record and how long these records are retained . . . . In the case of such historical cell site information, the Government merely comes in after the fact and asks a provider to turn over records the provider has already created.

Id. at 612.

The Fifth Circuit reasoned these are the telephone company’s “own records of transactions to which it is a party.” Id. The telephone company created the record to memorialize its business transactions with the customer. Id. at 611-12. The Fifth Circuit was careful to define business records as records of transactions

10The dissent mistakenly argues that we are faced with “persuasive . . . authority on both sides of the debate . . . .” Dissenting Op. at 79 n.2. To purportedly illustrate this, the dissent cites a Third Circuit decision, but that decision did not hold, as the dissent would, that a search warrant is required to obtain historical cell tower location data. In re Application of U.S. for an Order Directing a Provider of Elec. Commc’n Serv. to Disclose Records to Gov’t (“In re Application (Third Circuit”), 620 F.3d 304 (3d Cir. 2010). Rather, after the lower courts denied the government’s § 2703(d) application for historical cell tower data, the government appealed and the Third Circuit actually vacated that denial. Id. at 319. The Third Circuit concluded that the SCA itself gave the magistrate judge the discretionary option to require a warrant showing probable cause and that the discretionary warrant option should “be used sparingly because Congress also included the option of a § 2703(d) order.” Id.

The dissent also cites a Florida Supreme Court decision, but that case involved real-time data and did not involve a § 2703(d) order. Tracey v. State, 152 So. 3d 504, 507-08 (Fla. 2014).
to which the record-keeper business is a party. See id. It also pointed out that these business records contained no content of communications, such as the content of phone calls, letters, or emails. Id.

After discussing the nature of the business records, the Fifth Circuit, relying on Smith, explained why the cell user had no subjective expectation of privacy in such business records showing cell tower locations. The court reasoned: (1) the cell user has knowledge that his cell phone must send a signal to a nearby cell tower in order to wirelessly connect his call; (2) the signal only happens when a user makes or receives a call; (3) the cell user has knowledge that when he places or receives calls, he is transmitting signals through his cell phone to the nearest cell tower and thus to his service provider; (4) the cell user thus is aware that he is conveying cell tower location information to the service provider and voluntarily does so when he uses his cell phone for calls. Id. at 613-14.

The Fifth Circuit concluded that “[a]ll phone users, therefore, understand that their service providers record their location information when they use their phones at least to the same extent that the landline users in Smith understood that the phone company recorded the numbers they dialed.” Id. at 613. Just as the

11In the Fifth Circuit case, the court stated that the “contractual terms of service and providers’ privacy policies expressly stat[d] that a provider uses a subscriber’s location information to route his cell phone calls” and, moreover, “that the providers not only use the information, but collect it.” In re Application (Fifth Circuit), 724 F.3d at 613. The government stresses that MetroPCS’s privacy policy, accessible from the company website, plainly states that cell tower location data may be recorded, stored, and even shared with law enforcement.

petitioner in Smith knew that when he dialed telephones, he was conveying and exposing those numbers to electronic equipment, cell phone users have knowledge they are conveying signals and exposing their locations to the nearest cell tower. Id. at 612-14.

The Fifth Circuit agreed “that technological changes can alter societal expectations of privacy,” but reasoned, “[a]t the same time, ‘[l]aw enforcement tactics must be allowed to advance with technological changes, in order to prevent criminals from circumventing the justice system.’” Id. at 614 (quoting United States v. Skinner, 690 F.3d 772, 778 (6th Cir. 2012)). The Fifth Circuit concluded that “[a] legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.” Id. (quoting Jones, 565 U.S. at __, 132 S. Ct. at 964 (Alito, J., concurring)).

In the end, the Fifth Circuit determined: (1) “Congress has crafted such a legislative solution in the SCA,” and (2) the SCA “conforms to existing Supreme Court Fourth Amendment precedent.” Id. The Fifth Circuit “decline[d] to create a new rule to hold that Congress’s balancing of privacy and safety is unconstitutional.” Id. at 615.

E. Davis’s Case

Although Davis would have signed a contract when beginning service with MetroPCS, that contract does not appear on this record to have been entered into evidence here. Thus we cannot consider it, or MetroPCS’s privacy policy, in this particular case.
Based on the SCA and governing Supreme Court precedent, we too conclude the government’s obtaining a § 2703(d) court order for the production of MetroPCS’s business records did not violate the Fourth Amendment.

For starters, like the bank customer in Miller and the phone customer in Smith, Davis can assert neither ownership nor possession of the third-party’s business records he sought to suppress. Instead, those cell tower records were created by MetroPCS, stored on its own premises, and subject to its control. Cell tower location records do not contain private communications of the subscriber. This type of non-content evidence, lawfully created by a third-party telephone company for legitimate business purposes, does not belong to Davis, even if it concerns him. Like the security camera surveillance images introduced into evidence at his trial, MetroPCS’s cell tower records were not Davis’s to withhold. Those surveillance camera images show Davis’s location at the precise location of the robbery, which is far more than MetroPCS’s cell tower location records show.

More importantly, like the bank customer in Miller and the phone customer in Smith, Davis has no subjective or objective reasonable expectation of privacy in MetroPCS’s business records showing the cell tower locations that wirelessly connected his calls at or near the time of six of the seven robberies.

As to the subjective expectation of privacy, we agree with the Fifth Circuit that cell users know that they must transmit signals to cell towers within range, that the cell tower functions as the equipment that connects the calls, that users when making or receiving calls are necessarily conveying or exposing to their service provider their general location within that cell tower’s range, and that cell phone companies make records of cell-tower usage. See In re Application (Fifth Circuit), 724 F.3d at 613-14. Users are aware that cell phones do not work when they are outside the range of the provider company’s cell tower network. Id, at 613. Indeed, the fact that Davis registered his cell phone under a fictitious alias tends to demonstrate his understanding that such cell tower location information is collected by MetroPCS and may be used to incriminate him.

Even if Davis had a subjective expectation of privacy, his expectation of privacy, viewed objectively, is not justifiable or reasonable under the particular circumstances of this case. The unreasonableness in society’s eyes dooms Davis’s position under Katz. In Smith, the Supreme Court presumed that phone users knew of uncontroverted and publicly available facts about technologies and practices that the phone company used to connect calls, document charges, and assist in legitimate law-enforcement investigations. See 442 U.S. at 742-43, 99 S. Ct. at 2581. Cell towers and related records are used for all three of those purposes. We find no reason to conclude that cell phone users lack facts about the functions of cell towers or about telephone providers’ recording cell tower usage.
Smith’s methodology should not be set aside just because cell tower records may also be used to decipher the approximate location of the user at the time of the call. Indeed, the toll records for the stationary telephones at issue in Smith included location data far more precise than the historical cell site location records here, because the phone lines at issue in Smith corresponded to stationary landlines at known physical addresses. At the time of Smith, telephone records necessarily showed exactly where the user was—his home—at the time of the call, as the user’s telephone number was tied to a precise address. And the number dialed was also tied to a precise address, revealing if the user called a friend, a business, a hotel, a doctor, or a gambling parlor.

In certain respects, Davis has an even less viable claim than the defendant in Miller. For example, the Supreme Court in Miller held that a customer did not have a reasonable expectation of privacy in records made and kept by his bank even where the bank was required by law to maintain those records. See Miller, 425 U.S. at 436, 440-41, 96 S. Ct. at 1621, 1623. Here, federal law did not require that MetroPCS either create or retain these business records.

Admittedly, the landscape of technology has changed in the years since these binding decisions in Miller and Smith were issued. But their holdings did not turn on assumptions about the absence of technological change. To the contrary, the dispute in Smith, for example, arose in large degree due to the technological

advance from call connections by telephone operators to electronic switching, which enabled the electronic data collection of telephone numbers dialed from within a home. See 442 U.S. at 744-45, 99 S. Ct. at 2582-83. The advent of mobile phones introduced calls wirelessly connected through identified cell towers. This cell tower method of call connecting does not require “a different constitutional result” just “because the telephone company has decided to automate” wirelessly and to collect the location of the company’s own cell tower that connected the calls. See id. at 744-45, 99 S. Ct. at 2582. Further, MetroPCS’s cell tower location information was not continuous; it was generated only when Davis was making or receiving calls on his phone. The longstanding third-party doctrine plainly controls the disposition of this case.12

The use of cell phones is ubiquitous now and some citizens may want to stop telephone companies from compiling cell tower location data or from producing it to the government. Davis and amici advance thoughtful arguments for changing the underlying and prevailing law, but these proposals should be directed to Congress and the state legislatures rather than to the federal courts. As aptly stated

12To avoid the third-party doctrine, the dissent claims that “[t]he extent of voluntariness of disclosure by a user is simply lower for cell site location data.” Dissenting Op. at 80. Not so. Cell phone users voluntarily convey cell tower location information to telephone companies in the course of making and receiving calls on their cell phones. Just as in Smith, users could not complete their calls without necessarily exposing this information to the equipment of third-party service providers. The government, therefore, did not search Davis when it acquired historical cell tower location information from MetroPCS. In order to reach its result, the dissent effectively would cast aside longstanding and binding Supreme Court precedents in favor of its own view of the Fourth Amendment.
attached a GPS device to a private vehicle and used its own device to track the
vehicle’s movements over a four-week period. Id. at __, 132 S. Ct. at 948. In
Jones, the Supreme Court held that the government’s physical intrusion on the
defendant’s private property was a “search” and violated the Fourth Amendment.
Id. at __, 132 S. Ct. at 949. Significantly, the government-initiated physical
trespass in Jones led to constant and real-time GPS tracking of the precise location
of the defendant’s vehicle. Id. at __, 132 S. Ct. at 948. “The Government
physically occupied private property for the purpose of obtaining information.” Id.
at __, 132 S. Ct. at 949. The Supreme Court had “no doubt that such a physical
intrusion would have been considered a ‘search’ within the meaning of the Fourth
Amendment when it was adopted.” Id.

The majority opinion in Jones acknowledged that “later cases, of course,
have deviated from [an] exclusively property-based approach” and have adopted
an alternative “reasonable expectation of privacy” standard. Id. at __, 132 S. Ct. at
950 (citing Katz, 389 U.S. at 351, 360, 88 S. Ct. at 511, 516 (majority opinion and
opinion of Harlan, J., concurring)). But the result in Jones required nothing other
than legal analysis, the dissent consists mainly of myriad hypothetical fact
patterns and a tabloid-type parade of horribles. As the dissenting author well knows, our
decision can hold nothing beyond the facts of this case.” Edwards v. Prime, Inc., 602 F.3d
1279, 1289 (11th Cir. 2010) (citing Watts v. BellSouth Telecommunications, Inc., 316 F.3d
1203, 1207 (11th Cir. 2003)) (“Whatever their opinions say, judicial decisions cannot make law beyond the
facts of the cases in which those decisions are announced.”); United States v. Aquiñard, 217 F.3d
1319, 1321 (11th Cir. 2000) (“The holdings of a prior decision can reach only as far as the facts
and circumstances presented to the Court in the case which produced that decision.” (quotation
marks omitted))
than the property-based approach. Though the government argued Jones had no
"reasonable expectation of privacy," the Supreme Court majority determined it
"need not address the Government’s contentions, because Jones’s Fourth
Amendment rights d[id] not rise or fall with the Katz formulation.” Id.

Explaining the distinction, the majority opinion stressed that “the Katz
reasonable-expectation-of-privacy test has been added to, not substituted for, the
common-law trespassory test.” Id. at __, 132 S. Ct. at 952. But the majority
holding in Jones turned on the physical intrusion of the government placing a GPS
device on a private vehicle. Id. at __, 132 S. Ct. at 949.

That is not this case. The government’s obtaining MetroPCS records,
showing historical cell tower locations, did not involve a physical intrusion on
private property or a search at all. The records belonged to a private company, not
Davis. The records were obtained through a court order authorized by a federal
statute, not by means of governmental trespass. MetroPCS, not the government,
built and controlled the electronic mechanism (the cell towers) and collected its
cell tower data for legitimate business purposes. Jones is wholly inapplicable to
this case.

Davis and the dissent attempt to deploy the concurrences in Jones to argue
that historical cell tower location data is the equivalent of GPS and constitutes the
sort of precise, long-term monitoring requiring the government to show probable
cause. This attempt misreads the concurrences. We review the concurrences in
detail because they leave the third-party doctrine untouched and do not help
Davis’s case. If anything, the concurrences underscore why this Court remains
bound by Smith and Miller.

Justice Sotomayor concurring in the majority opinion, but was concerned
because the government’s GPS monitoring had "generate[d] a precise,
comprehensive record of a person’s public movements” and gave the government
“unrestrained power to assemble data.” Id. at __, 132 S. Ct. at 955-56. She found the
“[r]esolution of [that] difficult question[]” was “unnecessary . . . because the
Government’s physical intrusion on Jones’ Jeep supply[ed] a narrower basis for
decision.” Id. at __, 132 S. Ct. at 957 (emphasis added). In joining the majority’s
opinion, she provided the fifth vote for the physical trespass holding. Id.

Justice Sotomayor did state: “it may be necessary to reconsider the premise
that an individual has no reasonable expectation of privacy in information
voluntarily disclosed to third parties.” Id. (citing Smith, 442 U.S. at 742, 99 S. Ct.
at 2581; Miller, 425 U.S. at 443, 96 S. Ct. at 1624). But she quickly added and
counterced her own suggestion, stating: “[p]erhaps, as Justice ALITO notes, some
people may find the ‘tradeoff’ of privacy for convenience ‘worthwhile,’ or come to
accept this ‘diminution of privacy’ as ‘inevitable,’ post, at 962, and perhaps not.”
Id. Justice Sotomayor, writing alone, raised a question, but did not even purport to answer it.

Justice Alito’s concurrence further underscores why this Court is bound by Supreme Court precedent in Smith and Miller. Justice Alito concurred in the judgment and explained why the government-initiated, and government-controlled, real-time constant GPS monitoring violated the Fourth Amendment. Id. at __, 132 S. Ct. at 957-64. Only the government did the tracking and its tracking was not authorized or regulated by a federal statute. See id. at __, 132 S. Ct. at 956 (Sotomayor, J., concurring); id. at __, 132 S. Ct. at 964 (Alito, J., concurring in the judgment). Justice Alito’s focus is on unrestrained government power.

The context of his concurrence is critical. Nothing Justice Alito says contravenes the third-party doctrine. His concurring opinion does not question, or even cite, Smith, Miller, or the third-party doctrine in any way. The opinion never uses the words “third party” or “third-party doctrine.” It would be a profound change in jurisprudence to say Justice Alito was questioning, much less casting aside, the third-party doctrine without even mentioning the doctrine.

Further, Justice Alito’s concurrence speaks only at a high level of abstraction about the government’s placement and control of an electronic GPS mechanism on a private vehicle that did the precise, real-time, and long-term monitoring. See id. at __, 132 S. Ct. at 962-64. In stark contrast, the mechanism in Davis’s case is MetroPCS’s own electronic mechanism—the cell tower. MetroPCS created and assembled the electronic data. The government obtained access only through judicial supervision and a court order. Nothing in Justice Alito’s concurrence in any way undermines the third-party doctrine. If anything, Justice Alito’s concurrence, joined by three others, suggests that a legislative solution is needed. Id. at __, 132 S. Ct. at 964 (“In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.” (citation omitted)). At present, the SCA is that solution.

Not only are Davis and the dissent ignoring controlling law, but even the internal logic of their arguments fails.16

First, historical cell tower location data is materially distinguishable from the precise, real-time GPS tracking in Jones, even setting aside the controlling third-party doctrine discussed above. Historical cell tower location data does not identify the cell phone user’s location with pinpoint precision—it identifies the cell tower that routed the user’s call. The range of a given cell tower will vary given

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16The dissent remarks that we “ignore[] the opinion of five Justices of the Supreme Court at [our] own risk.” Dissenting Op. at 91, n. 7. Quite the contrary, the majority opinion has faithfully recounted the two concurring opinions in Jones in the factual context of the case actually decided by the Supreme Court. Furthermore, because Jones involved a government trespass and not the third-party doctrine, eight of the nine Justices did not write or join one word about the “third-party doctrine,” much less criticize it. It is the dissent that ignores, and fails to follow, binding Supreme Court precedent.
the strength of its signal and the number of other towers in the area used by the same provider. While the location of a user may be further defined by the sector of a given cell tower which relays the cell user’s signal, the user may be anywhere in that sector. This evidence still does not pinpoint the user’s location. Historical cell site location data does not paint the “intimate portrait of personal, social, religious, medical, and other activities and interactions” that Davis claims.

Second, reasonable expectations of privacy under the Fourth Amendment do not turn on the quantity of non-content information MetroPCS collected in its historical cell tower location records. The § 2703(d) order covered 67 days of MetroPCS records. In his brief before this en banc Court, Davis argued that the length of the records covered by the order made the production an unconstitutional “search.” But at oral argument Davis’s counsel firmly contended that even one day of historical cell tower location information would require a search warrant supported by probable cause. Counsel’s response at oral argument is faithful to Davis’s broader claim, but misapprehends the governing law. Because Davis has no reasonable expectation of privacy in the type of non-content data collected in MetroPCS’s historical cell tower records, neither one day nor 67 days of such records, produced by court order, violate the Fourth Amendment.¹⁷

¹⁷The SCA necessarily limits the time span of telephone records for which the government may secure a court order, as the government must show that such records are “relevant and material to an ongoing criminal investigation.” 18 U.S.C. § 2703(d).

As an extension of the argument above, Davis and various amici argue that cell tower data potentially implicating the home is due particular Fourth Amendment protection. In addition to noting the Supreme Court’s clear rejection of this argument as it concerned toll records in Smith, we find it useful to recount the manner in which the evidence about Davis’s home tower arose in this case.

On cross-examination by Davis’s trial counsel, Detective Jacobs was asked whether a person’s calls made from his or her home may be connected through a single cell tower—the “home tower.” Detective Jacobs responded that they may be. Defense counsel followed up, asking whether, “[o]n the other hand . . . you might see more than one tower” even though the person remains in his or her house? Again, Detective Jacobs responded yes. At that time, defense counsel was arguing the imprecision of the data collected. Like two riders in the same car, a user’s calls from his home may be connected by different towers if more than one tower is located in range of the home. The government only discussed Davis’s home tower after it was introduced by the defense, and only did so to illustrate that none of the robberies were committed in the vicinity of the home tower.

MetroPCS produced 67 days of historical cell site location information for Davis’s cellular phone. Davis, a prolific cell phone user, made approximately 86 calls a day.¹⁸ Without question, the number of calls made by Davis over the course

¹⁸This number comes from an analysis of Davis’s cell phone usage by the American Civil
of 67 days could, when closely analyzed, reveal certain patterns with regard to his physical location in the general vicinity of his home, work, and indeed the robbery locations. But no record evidence here indicates that the cell tower data contained within these business records produces precise locations or anything close to the “intimate portrait” of Davis’s life that he now argues.19 The judicial system does not engage in monitoring or a search when it compels the production of preexisting documents from a witness.

G. Reasonableness

Even if this Court were to hold that obtaining MetroPCS’s historical cell tower locations for a user’s calls was a search and the Fourth Amendment applies, that would begin, rather than end, our analysis. Maryland v. King, 569 U.S. __, __, 133 S. Ct. 1958, 1969 (2013). The Fourth Amendment prohibits unreasonable searches, not warrantless searches. As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is

Liberties Union in its capacity as amicus curiae in this case. While all 67 days of toll records were placed in evidence against Davis, the government witnesses analyzed Davis’s cell phone usage only for the seven days on which the armed robberies occurred.

19Davis now also argues that the Supreme Court’s recent decision in Riley v. California, 573 U.S. __, 134 S. Ct. 2473 (2014), where law enforcement officers seized the cell phones of arrestees and then searched the contents of the phones without obtaining warrants, supports his claim of an unconstitutional search. Riley held that this warrantless search of the contents of a cell phone obtained incident to an arrest violated the Fourth Amendment. Id. at __, 134 S. Ct. at 2485. But the Supreme Court in Riley made a special point of stressing that the facts before it “do not implicate the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances.” Id. at __, 134 S. Ct. at 2489 n.1. It is not helpful to lump together doctrinally unrelated cases that happen to involve similar modern technology.


Simply put, the reasonableness of a search or seizure is evaluated “under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” Wyoming v. Houghton, 526 U.S. 295, 300, 119 S. Ct. 1297, 1300 (1999). In addition, “there is a strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is ‘reasonable’” within the meaning of the Fourth Amendment. United States v. Watson, 423 U.S. 411, 416, 96 S. Ct. 820, 824 (1976) (internal quotation marks omitted).

This traditional Fourth Amendment analysis supports the reasonableness of the § 203(d) order in this particular case. As outlined above, Davis had no reasonable expectation of privacy in business records made, kept, and owned by MetroPCS. At most, Davis would be able to assert only a diminished expectation of privacy in MetroPCS’s records. See King, 569 U.S. at __, 133 S. Ct. at 1969
(identifying “diminished expectations of privacy” as one of the factors that “may render a warrantless search or seizure reasonable” (quotation marks omitted)).

Further, any intrusion on Davis’s alleged privacy expectation, arising out of MetroPCS’s production of its own records pursuant to a § 2703(d) order, was minimal for several reasons. First, there was no overhearing or recording of any conversations. Second, there is no GPS real-time tracking of precise movements of a person or vehicle. Even in an urban area, MetroPCS’s records do not show, and the examiner cannot pinpoint, the location of the cell user. Ironically, Davis was using old technology and not the new technology of a smartphone equipped with a GPS real-time, precise tracking device itself.

Third, a § 2703(d) court order functions as a judicial subpoena, but one which incorporates additional privacy protections that keep any intrusion minimal. The SCA guards against the improper acquisition or use of any personal information theoretically discoverable from such records. See King, 569 U.S. at __, 133 S. Ct. at 1799-80. Under § 2703(d), investigative authorities may not request such customer-related records merely to satisfy prurient or otherwise insubstantial governmental interests. Instead, a neutral and detached magistrate must find, based on “specific and articulable facts,” that there are “reasonable grounds to believe” that the requested records are “relevant and material to an ongoing criminal investigation.” Such protections are sufficient to satisfy “the primary purpose of the Fourth Amendment,” which is “to prevent arbitrary invasions of privacy.” Brock v. Emerson Elec. Co., Elec. & Space Div., 834 F.2d 994, 996 (11th Cir. 1987); see e.g., Terry v. Ohio, 392 U.S. 1, 21 n.18, 88 S. Ct. 1868, 1880 n.18 (1968) (explaining that the “demand for specificity in the information upon which police action is predicated is the central teaching of this Court’s Fourth Amendment jurisprudence”).

The stored telephone records produced in this case, and in many other criminal cases, serve compelling governmental interests. Historical cell tower location records are routinely used to investigate the full gamut of state and federal crimes, including child abductions, bombings, kidnappings, murders, robberies, sex offenses, and terrorism-related offenses. See, e.g., United States v. Troya, 733 F.3d 1125, 1136 (11th Cir. 2013) (“quadruple homicide” involving the “gangland-style murder of two children”); United States v. Mondestin, 535 F. App’x 819, 821 (11th Cir. 2013) (unpublished) (per curiam) (armed robbery); United States v. Sanders, 708 F.3d 976, 982-83 (7th Cir. 2013) (kidnapping). Such evidence is particularly valuable during the early stages of an investigation, when the police lack probable cause and are confronted with multiple suspects. In such cases, § 2703(d) orders—like other forms of compulsory process not subject to the search warrant procedure—help to build probable cause against the guilty, deflect
suspicion from the innocent, aid in the search for truth, and judiciously allocate scarce investigative resources.

The societal interest in promptly apprehending criminals and preventing them from committing future offenses is "compelling." See United States v. Salerno, 481 U.S. 739, 750-51, 107 S. Ct. 2095, 2103 (1987). But so too is the societal interest in vindicating the rights of innocent suspects. See King, 569 U.S. at __, 133 S. Ct. at 1974. Both interests are heavily implicated when the government seeks to compel the production of evidence "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Cell tower location records have the capacity to tell the police investigators that an individual suspect was in the general vicinity of the crime scene or far away in another city or state.

In sum, a traditional balancing of interests amply supports the reasonableness of the § 2703(d) order at issue here. Davis had at most a diminished expectation of privacy in business records made, kept, and owned by MetroPCS; the production of those records did not entail a serious invasion of any such privacy interest, particularly in light of the privacy-protecting provisions of the SCA; the disclosure of such records pursuant to a court order authorized by Congress served substantial governmental interests; and, given the strong presumption of constitutionality applicable here, any residual doubts concerning the reasonableness of any arguable "search" should be resolved in favor of the government. Hence, the § 2703(d) order permitting government access to MetroPCS's records comports with applicable Fourth Amendment principles and is not constitutionally unreasonable.20

IV. CONCLUSION

For the reasons set forth above, we affirm the judgment of conviction and vacate only that portion of the sentence attributable to the enhancement for brandishing.21

20 In the alternative, we hold that the prosecutors and officers here acted in good faith and therefore, under the well-established Leon exception, the district court's denial of the motion to suppress did not constitute reversible error. See United States v. Leon, 468 U.S. 897, 919-21, 104 S. Ct. 3405, 3418-19 (1984).

21Because there are multiple opinions, it may be helpful to summarize the final count. Nine members of the en banc court agree there was no Fourth Amendment violation in this case. Seven members of the court join the majority opinion. Two members of the court, Judges Wilson and Jordan, join the majority opinion as to its reasonableness holding.
WILLIAM PRYOR, Circuit Judge, concurring:

I join the majority opinion in full, but I write separately to explain that a court order compelling a telephone company to disclose cell tower location information would not violate a cell phone user’s rights under the Fourth Amendment even in the absence of the protections afforded by the Stored Communications Act, 18 U.S.C. §§ 2701–2712, and as judges of an inferior court, we must leave to the Supreme Court the task of developing exceptions to the rules it has required us to apply.

It is well-established that “the application of the Fourth Amendment depends on whether the person invoking its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government action.” Smith v. Maryland, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580 (1979) (citations omitted). And the Supreme Court has made clear that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” Id. at 743–44, 99 S. Ct. at 2582. There is no doubt that Davis voluntarily disclosed his location to a third party by using a cell phone to place or receive calls. For that reason, this appeal is easy.

Smith controls this appeal. In Smith, the Supreme Court held that, because telephone users voluntarily convey the phone numbers they dial to their telephone companies, the installation of a pen register at police request to record those numbers did not constitute a “search” under the Fourth Amendment. Id. at 742–46, 99 S. Ct. at 2581–83. But just as telephone users voluntarily convey the phone numbers they dial to a telephone company’s switching equipment, cell phone users too voluntarily convey their approximate location to a carrier’s cell towers.

To the extent that Smith is distinguishable from this appeal, Smith presents a closer question, because in this appeal the government did not request that MetroPCS maintain records of its customers’ cell phone calls. MetroPCS decided what business records to maintain, and the government sought the records of Davis’s calls after the fact. And those records contained location information that Davis voluntarily conveyed to MetroPCS by placing calls that were routed through nearby cell towers, which are a familiar part of our landscape.

That Davis had no legitimate expectation of privacy in the information he conveyed to MetroPCS follows from a straightforward application of the third-party doctrine, completely aside from the additional protections of the Stored Communications Act. The Act provides that a court order for disclosure “shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the . . . records or other information sought[] are relevant and material to an ongoing criminal investigation.” 18 U.S.C. § 2703(d). Davis does not dispute that the government complied with the Act. But the greater protections afforded telephone customers
under the Act do not disturb the constitutional principle that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith, 442 U.S. at 743–44, 99 S. Ct. at 2582. So Davis would have no legitimate expectation of privacy in the information he conveyed to MetroPCS even if Congress repealed the Act tomorrow. A court order compelling a carrier to disclose cell tower location information does not violate a cell phone user’s rights under the Fourth Amendment any more than a court order compelling a bank to disclose customer account information, see United States v. Miller, 425 U.S. 435, 96 S. Ct. 1619 (1976).

The dissent’s argument that Smith is distinguishable from this appeal because the disclosure of location information to cell carriers is less “voluntary” and less “knowing,” Dissenting Op. at 78-80, than the disclosure of dialed telephone numbers makes no sense. The dissent argues that the disclosure of location information is less “voluntary” than the disclosure of dialed telephone numbers because “cell phone users do not affirmatively enter their location in order to make a call.” Id. at 78, but in neither case is a phone user coerced to reveal anything. If a telephone caller does not want to reveal dialed numbers to the telephone company, he has another option: don’t place a call. If a cell phone user does not want to reveal his location to a cellular carrier, he also has another option: turn off the cell phone. That Davis had to disclose his location in order to place or receive a call does not distinguish this appeal from Smith, because, as the dissent admits, telephone callers “have to” convey dialed numbers to the telephone company in order to place calls, Dissenting Op. at 78. That a caller “affirmatively enter[s]” phone numbers but a cell phone user does not “affirmatively enter” his location when he places or receives a call may implicate the user’s knowledge that he is conveying information to a third party, but it does not make the latter disclosure less voluntary than the former. Davis’s disclosure of his location was also no less “knowing” than the disclosure at issue in Smith. In Smith, the Supreme Court explained that “[a]ll telephone users realize that they must convey phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed.” 442 U.S. at 742, 99 S. Ct. at 2581. Similarly, cell phone users realize that their calls are routed through nearby cell towers. It is no state secret that cell phones work less effectively in remote areas without cell towers nearby. As the Court made clear in Smith, that “most people may be oblivious to” the “esoteric functions” of a technology is consistent with most people having “some awareness” of its purpose. Id. at 742, 99 S. Ct. at 2581. In the light of common experience, it is “too much to believe,” id. at 743, 99 S. Ct. at 2581, that cell phone users lack “some awareness,” id. at 742, 99 S. Ct. at 2581, that they communicate information about their location to cell towers.
If the rapid development of technology has any implications for our interpretation of the Fourth Amendment, it militates in favor of judicial caution, because Congress, not the judiciary, has the institutional competence to evaluate complex and evolving technologies. "Judges cannot readily understand how... technologies may develop, cannot easily appreciate context, and often cannot even recognize whether the facts of the case before them raise privacy implications that happen to be typical or atypical." Orin S. Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801, 858–59 (2004). Our decisions resolve adversarial proceedings between parties. Legislatures, by contrast, must consider "a wide range" of factors and balance the opinions and demands of competing interest groups. Id. at 875. "The task of generating balanced and nuanced rules requires a comprehensive understanding of technological facts. Legislatures are well-equipped to develop such understandings; courts generally are not." Id. Simply put, we must apply the law and leave the task of developing new rules for rapidly changing technologies to the branch most capable of weighing the costs and benefits of doing so.

As judges of an inferior court, we have no business in anticipating future decisions of the Supreme Court. If the third-party doctrine results in an unacceptable "slippery slope," Dissenting Op. at 85, the Supreme Court can tell us as much. See, e.g., Hohn v. United States, 524 U.S. 236, 252–53, 118 S. Ct. 1969, 1978 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 1921–22 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); Evans v. Sec’y, Fla. Dep’t of Corr., 699 F.3d 1249, 1263 (11th Cir. 2012) ("We must not, to borrow Judge Hand’s felicitous words, ‘embrace the exhilarating opportunity of anticipating’ the overruling of a Supreme Court decision.") (internal citation omitted). That is, if "the Supreme Court has given reasons to doubt the rule’s breadth," Dissenting Op. at 80, it alone must decide the exceptions to its rule.
JORDAN, Circuit Judge, concurring, in which WILSON, Circuit Judge, joins:

This case is certainly about the present, but it is also potentially about the future. Although the Court limits its decision to the world (and technology) as we knew it in 2010, see Maj. Op. at 10 n.7 & 31 n.13, its holding that Mr. Davis lacked an expectation of privacy in service provider records used to establish his cell site location may have implications going forward, particularly given the Court’s reliance on the third-party doctrine. See, e.g., Smith v. Maryland, 442 U.S. 735, 743-44 (1979); United States v. Miller, 425 U.S. 435, 442-43 (1976). As technology advances, location information from cellphones (and, of course, smartphones) will undoubtedly become more precise and easier to obtain, see generally Planet of the Phones, THE ECONOMIST (Feb. 28, 2015), and if there is no expectation of privacy here, I have some concerns about the government being able to conduct 24/7 electronic tracking (live or historical) in the years to come without an appropriate judicial order. And I do not think I am alone in this respect. See United States v. Jones, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring, joined by Ginsburg, Breyer, and Kagan, JJ.) (“[T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”); id. at 955 (Sotomayor, J., concurring) (“I agree with Justice Alito that, at the very least, longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”).\(^1\)

As a result, I would decide the Fourth Amendment question on reasonableness grounds and leave the broader expectation of privacy issues for another day, much like the Supreme Court did in City of Ontario v. Quon, 560 U.S. 746, 759-60 (2010) (assuming that police officer had an expectation of privacy in text messages he sent from his city-provided pager, even though those messages were routed through and kept by a third-party service provider, and resolving the case on reasonableness grounds). I would assume that Mr. Davis had a reasonable expectation of privacy—albeit a diminished one—and hold that the government satisfied the Fourth Amendment’s reasonableness requirement by using the procedures set forth in 18 U.S.C. § 2703(d) to obtain a court order for Mr. Davis’ cell site records.

I

The Fourth Amendment’s “basic purpose . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”

\(^{1}\)Three decades ago, a defendant in a case before the Supreme Court argued that allowing the police to place a digital beeper in a container filled with chloroform, in order to monitor the container’s location, would lead to “twenty-four hour surveillance of any citizen in this country . . . without judicial knowledge or supervision.” United States v. Knoos, 460 U.S. 276, 283-84 (1983). The Supreme Court’s response to that assertion was that “if such dragnet type law enforcement practices as [the defendant] envisaged should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.” Id.

"The reasonableness of a search," the Supreme Court recently explained, "depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." Grady v. North Carolina, 135 S. Ct. 1368, 1371 (2015). These circumstances include, among others, "the means adopted" by the government to effectuate the search. See Carroll v. United States, 267 U.S. 132, 168 (1925).

II

At times, circumstances may render a warrantless search or seizure reasonable. One such scenario is when there are “diminished expectations of privacy.” King, 133 S. Ct. at 1969 (citation and internal punctuation omitted). Although I am prepared to assume that Mr. Davis enjoyed some expectation of privacy, cf. STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 8 (2012) (defining privacy, in today’s digital world, in terms of control rather than secrecy, because practical necessities now require individuals to share information about themselves “with trusted individuals and institutions for limited purposes”), I think it is fair to say that such an expectation was somewhat diminished, and not full-throated, due to the third-party doctrine. After all, Smith indicates that a person gives up control of certain information when he makes and receives calls from a phone. Although Smith does not fit this case like a glove—cellphones and smartphones (and the vast amounts of information they contain and can generate) are qualitatively different from land-line phones—it is nevertheless relevant that the cell site information the government obtained existed due to calls Mr. Davis made and received on his cellphone.\(^2\)

On the other side of the ledger, Mr. Davis’ cell site information was not obtained or seized “outside the judicial process, without prior approval by a judge or magistrate.” Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971). Cf. Johnson v. United States, 333 U.S. 10, 13-14 (1948) (noting that the Fourth Amendment’s “protection consists in requiring that . . . inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime”). The government secured the cell site records under a provision of the Stored Communications Act. And that provision requires a magistrate judge—a neutral judicial officer to review an

\(^2\) I recognize that some of the cell site information resulted from calls Mr. Davis received but never answered. For obvious reasons, however, Mr. Davis did not make (and has not made) a nuanced Fourth Amendment argument differentiating between data generated from calls he made and answered and data generated from calls he merely received without answering. Such an argument would not have been of much help to Mr. Davis, who sought to suppress all of the cell site data the government obtained.
application and determine whether the government has offered “specific and articulable facts showing that there are reasonable grounds to believe that the [cell cite location information] sought [is] relevant and material to an ongoing criminal investigation.” 18 U.S.C. § 2703(d). Significantly, “there is a strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is ‘reasonable[,]’” United States v. Watson, 423 U.S. 411, 416 (1976) (citation and some internal punctuation omitted), and this strong presumption attaches to § 2703(d).

As explained briefly below, the government articulated the necessary "specific and articulable facts." I therefore agree with the Court that the magistrate judge's order, which authorized the government to obtain the cell site information, satisfied the reasonableness requirement of the Fourth Amendment. See Camara, 387 U.S. at 528.3

The government's application for Mr. Davis' cell site information stated the following: Willie Smith confessed that he and Mr. Davis were involved in the robberies of a Little Caesar's restaurant, the Universal Beauty Salon, and a Wendy's restaurant in Miami, Florida; Jamarquis Terrell Reid admitted that he had participated with Mr. Davis in the robberies of an Amerika gas station, a Walgreens store, and an Advance Auto Parts store in Miami, Florida; Michael Martin told the authorities that he and Mr. Davis had robbed a Mayor's jewelry store in Weston, Florida; Mr. Davis' DNA was recovered from a stolen BMW that was used as the getaway car in the Mayor's jewelry store robbery; the robberies in question took place between August 7, 2010, and October 1, 2010, and Mr. Smith and Mr. Reid each said that, at the time of certain of the robberies (those of the Little Caesar's restaurant, the Amerika gas station, the Advance Auto Parts store, and the Universal Beauty Salon), Mr. Davis' cellphone number was the 5642 number. Not surprisingly, Mr. Davis conceded at oral argument that the government could have secured a warrant (had it elected to do so) for the cell site information because it had the necessary probable cause.

The temporal scope of the request, moreover, was reasonable. The government sought cell site information spanning from August 1, 2010, to October 6, 2010—a 67-day period which began six days before the first known robbery and ended six days after the last known robbery. The government explained in its application that those records would “assist law enforcement in determining the locations of [Mr. Davis] on days when robberies in which [he was] suspected to

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3 For whatever it is worth, the Supreme Court has on occasion held that the phrase “reasonable grounds,” as used in certain federal narcotics laws, is essentially the same as “probable cause” for purposes of the Fourth Amendment. See Draper v. United States, 358 U.S. 307, 310 n.3 (1959); Wong-Sum v. United States, 371 U.S. 471, 478 n.6 (1963). And it has said that “[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.” Maryland v. Pringle, 540 U.S. 366, 371 (2003) (citation and internal punctuation omitted). So maybe the evidentiary showing required by § 2703(d) is not too far removed from the probable cause normally demanded for warrants under the Fourth Amendment. But cf. Griffin v. Wisconsin, 483 U.S. 868, 872-77 (1987) (differentiating between “reasonable grounds” standard and “probable cause” standard).
have participated occurred," and "whether [he] communicated with [the] other [individuals] on the days of the robberies and, if so, how many times."

Finally, it is important to reiterate that the cell site information was generated from calls Mr. Davis made and received on his cellphone, and was not the result of his merely having his cellphone turned on. There was, in other words, no passive tracking based on Mr. Davis’ mere possession of a cellphone, and I do not read the Court’s opinion as addressing such a situation. See Maj. Op. at 8, 30.

III

For me, this is one of those cases where it makes sense to say less and decide less. See Cass R. Sunstein, One Case at a Time 4-10 (1999); Alexander M. Bickel, The Least Dangerous Branch 111-13 (1st ed. 1962). "Prudence counsels caution before the facts in the instant case are used to establish . . . premises that define the existence, and extent, of privacy expectations." Quon, 560 U.S. at 759.

With these thoughts, I join Parts I, II, III.G, and IV of the Court’s opinion and concur in the judgment.

ROSENBAUM, Circuit Judge, concurring.

I concur in the Majority’s opinion. I write separately, though, because, like the Dissent, I think that the third-party doctrine, as it relates to modern technology, warrants additional consideration and discussion. I view the third-party doctrine as applying in this case because Smith v. Maryland, 442 U.S. 735, 99 S. Ct. 2577 (1979), implicitly found no historical expectation of privacy implicated by the information that we give to a service provider for the purpose of making a telephone call other than the expectation of privacy that we generally do not have in information that we voluntarily convey to a third party. Since, like Smith, this case involves information that we knowingly expose to a service provider for the purpose of making a telephone call and no more specific historically recognized privacy interest is implicated by cell-site location information, this case is necessarily controlled by Smith.

But when, historically, we have a more specific expectation of privacy in a particular type of information, the more specific privacy interest must govern the Fourth Amendment analysis, even though we have exposed the information at issue to a third party by using technology to give, receive, obtain, or otherwise use the protected information. In other words, our historical expectations of privacy do

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1 The third-party doctrine applies when a person voluntarily entrusts information to a third party, and it generally renders the Fourth Amendment’s warrant requirement inapplicable as it pertains to the procurement of the exposed information from the third party. See United States v. Miller, 425 U.S. 435, 442-43, 96 S. Ct. 1619, 1624 (1976).
not change or somehow weaken simply because we now happen to use modern technology to engage in activities in which we have historically maintained protected privacy interests. Neither can the protections of the Fourth Amendment. See Kyllo v. United States, 533 U.S. 27, 34, 121 S. Ct. 2038, 2043 (2001) ("To withdraw protection of this minimum expectation of privacy would be to permit . . . technology to erode the privacy guaranteed by the Fourth Amendment."). So reliance on the third-party doctrine must be limited to those cases involving alleged privacy interests that do not implicate a more specific historically recognized reasonable privacy interest.

I.

Before exploring why this is so, I pause to express my view that the Dissent is right to raise its concerns. In our time, unless a person is willing to live "off the grid," it is nearly impossible to avoid disclosing the most personal of information to third-party service providers on a constant basis, just to navigate daily life. And the thought that the government should be able to access such information without the basic protection that a warrant offers is nothing less than chilling. Today's world, with its total integration of third-party-provided technological services into everyday life, presents a steroidal version of the problems that Justices Marshall and Brennan envisioned when they dissented in United States v. Miller, 425 U.S. 435, 447, 454, 96 S. Ct. 1619, 1626, 1629 (1976) (Brennan, J., and Marshall, J., dissenting, respectively), and its progeny, including Smith v. Maryland, 442 U.S. 735, 748, 99 S. Ct. 2577, 2584 (1979) (Marshall, J., dissenting). As Justice Marshall aptly explained the problem, under the third-party doctrine, "unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance." Smith, 442 U.S. at 750, 99 S. Ct. 2577, 2585 (Marshall, J., dissenting). Perhaps it was this type of realization that caused Justice Sotomayor to write, "[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." United States v. Jones, ___ U.S. ___, 132 S. Ct. 945, 957 (Sotomayor, J., concurring). Since we are not the Supreme Court and the third-party doctrine continues to exist and to be good law at this time, though, we must apply the third-party doctrine where appropriate.

But, as the Dissent points out, the mere fact that the third-party doctrine could have been applied to an alleged privacy interest does not mean that it always has been. To ensure that this is a case where the third-party doctrine should be applied, I think it important to consider what sets apart those cases where the Supreme Court has chosen not to apply the third-party doctrine, despite the fact that a party has exposed its effects or information to a third party.
The Supreme Court has explained that, in analyzing a Fourth Amendment claim, we begin by determining "whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." Wyoming v. Houghton, 526 U.S. 295, 299, 119 S. Ct. 1297, 1300 (1999). We do this because, "[a]t bottom, we must assure[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."2

2 Some might suggest that we must first determine whether a search within the meaning of the Fourth Amendment has occurred, and only if one has such we then assess whether that search has violated a constitutionally protected expectation of privacy, in the context of engaging in a reasonableness analysis. But generally, when the alleged search is of information and it is not accompanied by a concurrent physical trespass, we must evaluate whether a reasonable expectation of privacy existed in the information in the first place in order to determine whether a "search" has occurred. See Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967); Smith, 442 U.S. 735, 99 S. Ct. 2577. That inquiry requires us to resolve the conflict between the historical expectation of privacy allegedly violated by the search and the third-party doctrine's rule that no expectation of privacy exists when a person voluntarily exposes information to a third party. And under the reasonableness analysis, we balance the degree to which a search or seizure "intrudes upon an individual's privacy" against "the degree to which it is needed for the promotion of legitimate governmental interests." Wyoming v. Houghton, 526 U.S. 295, 300, 119 S. Ct. 1297, 1300 (1999). So we would again need to figure out the relationship between the competing historical expectation of privacy and the third-party doctrine to determine the ultimate expectation of privacy to weigh against the government's interest. As a result, this two-step analysis becomes redundant in the context of an alleged search of information without a concurrent physical trespass.

Moreover, if, in conducting the reasonableness analysis, we ignore the historical privacy interest and always defer to the third-party doctrine, that does not account for the way in which the Supreme Court has resolved the conflict between the historical privacy interest and the third-party doctrine in cases like Katz, 389 U.S. 347, 88 S. Ct. 507, because ignoring the historical privacy interest in favor of the third-party doctrine would always result in a determination that no warrant is required under a reasonableness evaluation. This is necessarily so because when the third-party doctrine applies, by definition, there is no reasonable privacy interest to weigh on the individual's side of the scale against the government's interest in crime fighting. But "the normal need for law enforcement" generally cannot exempt a search from the warrant requirement where the searched party enjoys a reasonable expectation of privacy. Farnonia Sch. Dist. v. Accon, 315 U.S. 646, 653, 115 S. Ct. 2386, 2391 (1995), such as when the privacy interest at stake has historically been recognized—unless, of course, it is impracticable to obtain a warrant under the circumstances. See, e.g., Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968).

And if we resolved the conflict between the historically existing privacy interest and the third-party doctrine by assuming a diminished expectation of privacy in the historical interest being weighed against the government's general interest in crime fighting, that still would not seem to account for cases like Katz, 389 U.S. 347, 88 S. Ct. 507, even if the Court found that satisfying a lesser requirement than probable cause, such as that set forth by § 2703(d), was necessary to obtain the information. Indeed, I am aware of no case where the Court has expressly found an expectation of privacy diminished because of the third-party doctrine and yet has concluded that a warrant was required. See e.g., Riley v. California, 134 U.S. 2483 (2001) (holding that a warrant is generally required to search an arrestee's cell phone, even though arrestees have a diminished expectation of privacy because of their status as arrestees). Whether we ignored the more specific historical privacy interest in favor of the third-party doctrine or found that the historical privacy interest was diminished, though, privacy interests long recognized as reasonable by society, which therefore historically necessitated a showing of probable cause and a warrant under the Fourth Amendment in order to breach, would be violated without a warrant and on a showing of less than probable cause, simply because we happen to use technology to do more efficiently what we used to do without technology. I do not believe that Supreme Court precedent supports the conclusion that the long-established privacy interests protected by the Fourth Amendment should be subject to the whims of technology. See Kyllo, 533 U.S. 34, 121 S. Ct. 2033 (2001) ("To withdraw protection of this minimum expectation of privacy would be to permit . . . technology to erode the privacy guaranteed by the Fourth Amendment."). And even if the Court were prepared to conclude that a privacy interest diminished by the third-party doctrine nonetheless required a warrant to breach, it would still need to articulate why one particular expectation of privacy diminished by the third-party doctrine was sufficient to outweigh the government's general interest in crime fighting, while a different expectation of privacy diminished by the third-party doctrine was not, unless the more specific historical expectation of privacy negates the effects of the third-party doctrine in evaluating the privacy interest for purposes of conducting the reasonableness analysis.
recognized Fourth Amendment rights at the door of the modern world or finding ourselves locked out from it. That the Constitution will not abide.

A.

As the Dissent points out, the Supreme Court has held that “[a] hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office.” Hoffa v. United States, 385 U.S. 293, 301, 87 S. Ct. 408, 413 (1966); see also Minnesota v. Carter, 525 U.S. 83, 95-96, 119 S. Ct. 469, 476 (1998) (Scalia, J., concurring) (citing Oyestad v. Shed, 13 Mass. 520 (1816), for the proposition that a trespass occurs when the sheriff breaks into a dwelling to capture a boarder living there); Minnesota v. Olson, 495 U.S. 91, 96-97, 110 S. Ct. 1684, 1688 (1990) (holding that overnight guests in the homes of a third person can have a reasonable expectation of privacy in those premises). This is so, even though housekeepers and maintenance people commonly have access to hotel rooms during a guest’s stay and can view and even move around a guest’s belongings in order to conduct their duties. But the fact that a hotel guest has exposed his or her belongings to hotel workers does not, in and of itself, entitle the government to enter a rented hotel room and conduct a warrantless search.

Similarly, historically, human operators were known to eavesdrop on the contents of telephone calls in the early days of telephone usage. See Jeff Nilsson,

What the Operators Overheard in 1907, The Saturday Evening Post, June 30, 2012, http://www.saturdayeveningpost.com/2012/06/30/history/post-perspective/operators-heard-1907.html (last visited Apr. 16, 2015). And, as Justice Stewart observed, even after human operators were taken out of the equation, telephone conversations may have been “recorded or overheard by the use of other [telephone] company equipment.” Smith v. Maryland, 442 U.S. 735, 746, 99 S. Ct. 2577, 2583 (1979) (Stewart, J., dissenting). But the fact that, historically, we exposed our private conversations to third parties did not stop the Supreme Court from holding in Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967), that we have a reasonable expectation of privacy in telephone communications and that the government generally must obtain a warrant before intercepting them.

Why should that be so when the third-party doctrine also speaks to what a reasonable expectation of privacy is (none where it applies), and the doctrine seemingly applies to these situations? I believe that Supreme Court precedent fairly may be read to suggest that the third-party doctrine must be subordinate to expectations of privacy that society has historically recognized as reasonable. Indeed, our privacy expectations in modern-day hotels and the content of our telephone conversations hearken back to historically recognized reasonable expectations of privacy.
As Justice Scalia has explained, "The people’s protection against unreasonable search and seizure in their ‘houses’ was drawn from the English common-law maxim, ‘A man’s home is his castle.’" Carter, 525 U.S. at 95, 119 S. Ct. at 475 (Scalia, J., concurring) (emphasis omitted). And a person enjoys a recognized expectation of privacy in that home, provided he or she actually is living there. Id. at 95-96, 119 S. Ct. at 476. So, when a person rents and dwells in a hotel room,\(^3\) that hotel room becomes that person’s “home” and “castle,” for purposes of the Fourth Amendment, regardless of who else may enter the premises.

As for the telephone, it, of course, was not invented until the late 1800’s and was not widely used until well after the Framers’ time.\(^4\) Until then, people who were not closely located to each other typically communicated by letter. See, e.g., https://jeffersonpapers.princeton.edu/ (last visited Apr. 16, 2015) (noting that Thomas Jefferson wrote and received letters). As the Supreme Court has noted, “Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy . . . .” United States v. Jacobson, 466 U.S. 109, 114, 104 S. Ct. 1652, 1657-58 (1984); see also Ex parte Jackson, 96 U.S. 727, 733, 24 L. Ed. 877 (1877).

While the Supreme Court did not mention society’s reasonable expectation of privacy in the content of communications sent by letter through third parties when it found a reasonable expectation of privacy in the content of communications transmitted by telephone through third parties in Katz, it is clear that the historical expectation of privacy in communications by letter is the same expectation of privacy that we continue to have in communications that we conduct by telephone. And the fact that we have always had to rely on third parties to engage in telephone calls—even when the third parties were known to eavesdrop from time to time—does not somehow change our reasonable expectation of privacy in personal telephone calls. Put simply, the fact that we have changed the way that we conduct personal communications does not mean that we have altered our expectation of privacy in our personal communications.

B.

To help explain how the conflict between historically recognized privacy interests and the third-party doctrine plays out in light of modern technology—and why the cell-site location information at issue in this case is subject to the third-party doctrine—consider a few examples of historical privacy interests implicated by modern technology.

\(^3\) I recognize that inns existed in the Framers’ day.

\(^4\) Alexander Graham Bell obtained a patent for the telephone on March 7, 1876. See http://www.pbsonlineaudio.com/transcript/alum/ad/d/hibbel/phone.html (last visited Apr. 16, 2015). He successfully transmitted speech over the line five days later. Id. But the United States House of Representatives has since recognized Antonio Meucci as the inventor of the telephone. H.R. Res. 269, 107th Cong. (June 11, 2002). Meucci reportedly developed the first version of a working telephone in 1860. See id.
If our expectation of privacy in our personal communications has not changed from what it was when we only wrote letters to what it is now that we use telephones to conduct our personal interactions, it has not changed just because we now happen to use email to personally communicate. See United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010). Just as the need to entrust third parties with our personal conversations when we communicate by written letter or by telephone does not affect the analysis, the need to rely on third parties to provide Internet service when we communicate by email cannot do so, either.

The same is true for our other historically recognized reasonable expectations of privacy. So, for instance, while the Internet and its search engines obviously did not exist in the 18th century, libraries did. See, e.g.,

3 The Supreme Court has held that addressing and other routing information on paper letters, like pen-register and trap-and-trace information (including the date and time of listed calls) regarding telephone calls, is accessible to the government without a warrant. See Ex parte Jackson, 96 U.S. 727, 736, 24 L. Ed. 877; Smith, 442 U.S. 735, 99 S. Ct. 2577. Email routing information, such as the sender, the receiver, the date, the time, and other routing information (such as Internet Protocol addresses) implicates the same expectations of privacy as older versions of routing information found on paper letters and in pen-register and trap-and-trace information. See United States v. Forester, 512 U.S. 500, 511 (9th Cir. 2007). The lack of a reasonable expectation of privacy in routing information as it pertains to paper letters and telephone conversations does not change just because the medium for engaging in personal conversations does. Subject lines in emails, however, are not in any way related to the routing or transaction information of an email; no one writes the subject matter of the letters they send on the outside of the envelope, and people do not give the telephone service provider a general overview of the telephone conversations they are about to have. So subject-matter lines on emails cannot be governed by the lack of an expectation of privacy attending paper-letter or telephone-call routing information. Instead, subject-matter lines usually disclose a summary or general statement about the content of the email communication itself, and the privacy interest implicated by subject-matter lines is therefore the same as the privacy interest in personal communications conducted by paper letters and telephone calls. As a result, as with the content of paper letters and telephone conversations, a reasonable expectation of privacy exists in the subject-matter lines of emails.

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researching what we want, free from government surveillance without a warrant, has not changed just because the mechanism we use for engaging in this conduct has evolved.

As for documents that we store in the Cloud, our privacy interest there is the same as that recognized in documents and other items maintained in a rented office or residence, or a hotel room during a paid visit. As discussed previously, the Supreme Court has plainly recognized as reasonable under the Fourth Amendment the privacy interest in effects held in such places, even though a straight-forward application of the third-party doctrine would suggest the opposite conclusion, particularly in the case of a hotel room, where housekeeping and maintenance workers can be expected to enter the premises. The privacy expectation has not abraded simply because the effect to be searched is virtual and the “place” of storage is now the intangible Cloud. Cf. Riley v. California, ___ U.S. ___, 134 S. Ct. 2473, 2494-95 (2014) (recognizing that searches of cell phones implicate the same type of privacy interest invaded by the “reviled ‘general warrants’ and ‘writs of assistance’ of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity,” and holding that a warrant is generally required to search a cell phone in an arrestee’s possession at the time of arrest, despite the historical rule allowing for a search of effects on an arrestee at the time of arrest). “For the Fourth Amendment protects people, not places.” Katz, 389 U.S. at 351, 88 S. Ct. at 511.

C.

And Justice Alito’s concurrence in Jones, 132 S. Ct. at 964 (Alito, J., concurring in the judgment), suggests a viable and apt historical privacy interest that pertains to global-positioning system information: the expectation of privacy as it regards incessant surveillance. Justice Alito has described this expectation of privacy as follows:

[ R elatively short-term monitoring of a person’s movements on public streets accords with expectations of privacy that our society has recognized as reasonable . . . . But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society’s expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual’s car for a very long period.]

Id.

Three other Justices joined in Justice Alito’s Jones concurrence, and another, Justice Sotomayor, expressed her agreement with the idea that, “at the very least, ‘longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.’” Id. at 955 (Sotomayor, J., concurring) (quoting id. at 964 (Alito, J., concurring)). While this view may not constitute binding Supreme Court precedent, it certainly suggests that society has long
viewed as reasonable the expectation of privacy in not being subjected to constant, longer-term surveillance. And if that’s the case, the only question that remains about whether the government must obtain a warrant to engage in longer-term GPS monitoring is where we draw the line establishing what constitutes “longer-term” GPS monitoring. But that is not a question that we must answer today.

Nevertheless, in my opinion, the longer-term GPS issue necessarily means that the Dissent is correct in its concerns that the expectation of privacy that is infringed by longer-term GPS monitoring may, at some point, become the same expectation of privacy implicated by more and more precise cell-site location technology. When that happens, the historical reasonable expectation of privacy in not being subjected to longer-term surveillance may well supersede the third-party doctrine’s applicability to information entrusted to third parties as it pertains to cell-site location information. But that is not this case.

According to the MetroPCS records custodian who testified in this case, the radii of the cell towers at issue were approximately a mile to a mile and a half. Since a sector is generally a one-third to a one-sixth pie slice of the roughly circular tower range, that means that, at best, the government was able to determine where Davis was within approximately 14,589,696 square feet. In an urban environment, this is not precise enough to rival the invasion of privacy that pinpoint-longer-term surveillance represents.

Since no specific historical privacy interest is implicated by cell-site location information, and further, because the privacy interest in the cell-site location information at issue here is materially indistinguishable from the privacy interest in the pen-register information at stake in Smith, we must apply the third-party doctrine, as the Supreme Court did in Smith. I read Smith, in turn, as implicitly finding no historical privacy interest implicated by information provided to the telephone company to allow a call to be made, other than the general third-party

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7 A one-mile radius (5,280 feet), squared (27,878,400), times Pi, equals 87,538,176 square feet, divided by six (one sector), equals 14,589,696 square feet.

8 I respect the Dissent’s thought process in attempting to distinguish the concept of whether cell-phone users know that they are disclosing to their service providers the fact that they are usually located in the range of the nearest cell towers that their cell phones are using when they make and receive calls, from the Supreme Court’s conclusion in Smith that standard telephone users know that they are disclosing the telephone numbers that they are calling when they dial. But it seems to me that the average cell-phone user knows that cell phones work only when they are within service range of a cell tower. Advertising campaigns are built on this concept. See, e.g., https://www.youtube.com/watch?v=O%2Po-I-AQ-E (last visited Apr. 13, 2015) (“Can you hear me now?”), https://www.youtube.com/watch?v=VZPJ00K7Bi (last visited Apr. 13, 2015) (“There’s a map for that”). In Smith, similar to the Dissent here, Justice Marshall argued that the third-party doctrine did not apply, in part, because people do not “typically know” that a phone company monitors call[] information for internal reasons. 442 U.S. at 748-49, 99 S. Ct. at 2584-85. Right or wrong, he lost that battle. And, while cell-site location information is certainly not pen-register information and I can understand where the Dissent is coming from, I do not feel comfortable taking the position that the average cell-phone user does not know that he or she is disclosing location information to the cell-service provider.
doctrine. Because no specific historical privacy interest is implicated by pen-register-type information, the more general historical privacy expectation associated with the third-party doctrine governed in Smith. The same is true with respect to the cell-site location information at issue in this case.

III.

Nevertheless, where, as here, no historical privacy interest exists in the information sought, Congress always has the option of legislating higher standards for the government to obtain information. Justice Alito has opined, “In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. Jones, 132 U.S. at 964 (Alito, J., concurring in the judgment). This is certainly one potential limitation on the third-party doctrine. And we have seen Congress enact legislation in response to the application of the third-party doctrine to our modern world. See, e.g., the Right to Financial Privacy Act, 12 U.S.C. § 2701, et seq. Indeed, the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510, et seq., of which the Stored Communications Act, 18 U.S.C. §§ 2701-2712, is a part—the statute under which the government obtained the order authorizing it to receive Davis’s historical cell-site location information in this case—was enacted (and later amended), in part, to protect what Congress recognized as “privacy interests in personal and proprietary information” that travels and is maintained in electronic form by third-party service providers. See H.R. Rep. No. 99-541 at § I (1986).

But legislation should fill only the gaps that occur when no historically recognized privacy interest is implicated by the technology under review. The legislature, after all, does not have the power to entirely redefine the protections of the Fourth Amendment each time that it enacts a new law. While providing more protection than the Fourth Amendment requires represents a choice that Congress may, within its power, make, providing less is not a constitutional option. If it were, the Fourth Amendment would be meaningless because it would simply be whatever Congress said it was at any given time.

That cannot be right under our Constitution. So Congress’s ability to legislate reasonable expectations of privacy (other than when Congress elects to increase expectations above the Fourth Amendment baseline) must be limited to, at most, only those circumstances where no historical privacy interest implicated by the technology under review exists.
IV.

For all of these reasons, I believe that *Smith* (and therefore, the third-party doctrine) inescapably governs the outcome of this case. But when we must necessarily expose information to third-party technological service providers in order to make use of everyday technology, and the technological service merely allows us to engage in an activity that historically enjoyed a constitutionally protected privacy interest, Supreme Court precedent can be viewed as supporting the notion that the historically protected privacy interest must trump the third-party doctrine for purposes of Fourth Amendment analysis. If the historically protected privacy interest does not, then with every new technology, we surrender more and more of our historically protected Fourth Amendment interests to unreasonable searches and seizures.

MARTIN, Circuit Judge, dissenting.1 in which JILL PRYOR, Circuit Judge, joins:

In this case, the government got 67 days of cell site location data disclosing Quartavious Davis's location every time he made or received a call on his cell phone. It got all this without obtaining a warrant. During that time, Mr. Davis made or received 5,803 phone calls, so the prosecution had 11,606 data points about Mr. Davis's location. We are asked to decide whether the government's actions violated Mr. Davis's Fourth Amendment rights. The majority says our analysis is dictated by the third-party doctrine, a rule the Supreme Court developed almost forty years ago in the context of bank records and telephone numbers. But such an expansive application of the third-party doctrine would allow the government warrantless access not only to where we are at any given time, but also to whom we send e-mails, our search-engine histories, our online dating and shopping records, and by logical extension, our entire online personas.

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1 The en banc court voted to vacate the panel opinion which held that the warrantless search of Mr. Davis's cell site location data was unconstitutional, but upheld Mr. Davis's conviction based on the good-faith exception. The good-faith exception says that where officers' conduct is based on their good-faith understanding of an existing statute, the exclusionary rule will not apply. See, e.g., United States v. Williams, 672 F.3d 480, 841 (5th Cir. 1980); see also Ronney v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981). The majority here refers to the good-faith exception as an alternative basis for affirming Mr. Davis's conviction. Maj. Op. 44 n.20. I agree with them about that. My disagreement is with the majority's Fourth Amendment analysis, which permits government access to Mr. Davis's cell site location data without a warrant. I understand the Fourth Amendment to require the government to get a warrant for that information, while the majority does not. I refer to this opinion as a dissent, not a concurrence in the judgment, for that reason.
Decades ago, the Supreme Court observed that “[i]f times have changed, reducing everyman’s scope to do as he pleases in an urban and industrial world, . . . the values served by the Fourth Amendment [are] more, not less, important.” *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S. Ct. 2022, 2032 (1971). This is even truer today. The judiciary must not allow the ubiquity of technology—which threatens to cause greater and greater intrusions into our private lives—to erode our constitutional protections. With that in mind, and given the striking scope of the search in this case, I would hold that the Fourth Amendment requires the government to get a warrant before accessing 67 days of the near-constant cell site location data transmitted from Mr. Davis’s phone. I respectfully dissent.

I.

I turn first to the third-party doctrine, which the majority believes decides this case for us. They say: “Davis can assert neither ownership nor possession of the third-party’s business records he sought to suppress.” Maj. Op. 27; see also William Pryor Concurrence 45 (“Smith controls this appeal.”). My reading of Supreme Court precedent suggests that things are not so simple.

The Supreme Court announced the third-party doctrine nearly forty years ago in *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619 (1976). The Court said that “the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if

the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.” *Id.* at 443, 96 S. Ct. at 1624. Three years later, in *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577 (1979), the Court applied that doctrine to hold that a defendant did not have a reasonable expectation of privacy in the numbers he dialed on his home telephone, recorded by means of a pen register at a telephone company’s central office. *Id.* at 742, 99 S. Ct. at 2581. The Court reasoned that “[w]hen he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and ‘exposed’ that information to its equipment in the ordinary course of business.” *Id.* at 744, 99 S. Ct. at 2582. The Court reminisced that “[t]he switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber.” *Id.* The government believes that *Smith* controls the outcome of this case, and the majority apparently agrees. I do not.

First, the phone numbers a person dials are readily distinguishable from cell site location data. *Smith* involved “voluntarily conveyed numerical information”—voluntary because phone dialers have to affirmatively enter the telephone number they are dialing in order to place a call. By contrast, cell phone users do not affirmatively enter their location in order to make a call. Beyond that, the ACLU informs us that “[p]hones communicate with the wireless network when
a subscriber makes or receives calls." ACLU Amicus Br. 5 (emphasis added). As our sister Circuit observed, "when a cell phone user receives a call, he hasn't voluntarily exposed anything at all." In re Application of U.S. for an Order Directing a Provider of Elec. Commc'ns Serv. to Disclose Records to the Gov't., 620 F.3d 304, 317–18 (3d Cir. 2010) (Third Circuit Case) (emphasis added) (quotation marks omitted). 

The Smith Court also emphasized that the numbers a person dials appear on the person’s telephone bill and referenced the pre-automation process that required the caller to recite phone numbers out loud to a phone operator in order to make a call. Thus, the Court concluded that "[t]elephone users . . . typically know that they must convey numerical information to the phone company." Smith, 442 U.S. at 743, 99 S. Ct. at 2581 (emphasis added). There is not the same sort of "knowing" disclosure of cell site location data to phone companies because there is no history of cell phone users having to affirmatively disclose their location to an operator in order to make a call. The extent of voluntariness of disclosure by a user is simply lower for cell site location data than for the telephone numbers a person dials. For that reason, I don't think Smith controls this case.

Second, although the Miller/Smith rule appears on its own to allow government access to all information that any third-party obtains, in rulings both before and since those cases, the Supreme Court has given reasons to doubt the rule's breadth. For instance, in Ferguson v. City of Charleston, 532 U.S. 67, 121 S. Ct. 1281 (2001), the Court stated that "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." Id. at 78, 121 S. Ct. at 1288. Though the majority did not mention the third-party doctrine, Justice Scalia noted the incongruity between that doctrine and the Ferguson holding in his dissent. As he stated:

Until today, we have never held—or even suggested—that material which a person voluntarily entrusts to someone else cannot be given by that person to the police, and used for whatever evidence it may contain. Without so much as discussing the point, the Court today opens a hole in our Fourth Amendment jurisprudence, the size and shape of which is entirely indeterminate.

Id. at 95–96, 121 S. Ct. at 1297–98 (Scalia, J., dissenting). Further, and again without mentioning the third-party doctrine, the Court has routinely recognized that people retain a reasonable expectation of privacy in things that they have
arguably exposed to third parties. See, e.g., United States v. Jacobsen, 466 U.S. 109, 114, 104 S. Ct. 1652, 1657 (1984) (holding that “[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy” even though they touch the hands of third-party mail carriers); Stoner v. California, 376 U.S. 483, 487–88, 490, 84 S. Ct. 889, 892, 893 (1964) (finding unpersuasive the argument that “the search of a hotel room, although conducted without the petitioner’s consent, was lawful because it was conducted with the consent of the hotel clerk,” because a hotel guest’s constitutional protections should not be “left to depend on the unfeathered discretion of an employee of the hotel”); see also Smith, 442 U.S. at 746–47, 99 S. Ct. at 2583 (Stewart, J., dissenting) (noting that in Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967), the Court held that a person has a reasonable expectation of privacy in the contents of phone conversations made in telephone booths even though calls “may be recorded or overheard by the use of other company equipment”). I am well aware that each of these cases can be distinguished from Mr. Davis’s case. I mean only to say that a comprehensive review of Supreme Court precedent reveals that the third-party doctrine may not be as all-encompassing as the majority seems to believe.

Third and most importantly, the majority’s blunt application of the third-party doctrine threatens to allow the government access to a staggering amount of information that surely must be protected under the Fourth Amendment. Consider the information that Google gets from users of its e-mail and online search functions. According to its website, Google collects information about you (name, e-mail address, telephone number, and credit card data); the things you do online (what videos you watch, what websites you access, and how you view and interact with advertisements); the devices you use (which particular phone or computer you are searching on); and your actual location. See Privacy Policy, http://www.google.com/intl/en/policies/privacy/ (last accessed March 30, 2015). Beyond that, in its “Terms of Service,” Google specifies that “[w]hen you upload, submit, store, send or receive content to or through our Services, you give Google (and those we work with) a worldwide license to use, host, store, reproduce, modify, create derivative works, . . . communicate, publish, publicly perform, publicly display and distribute such content.” See Google Terms of Service, http://www.google.com/intl/en/policies/terms/ (last accessed March 30, 2015). Like in Miller and Smith, Google even offers a legitimate business purpose for such data storage and mining: “Our automated systems analyze your content (including emails) to provide you personally relevant product features, such as customized search results, tailored advertising, and spam and malware detection.” Id. Under a plain reading of the majority’s rule, by allowing a third-party company

3 I refer to Google only as an example. The same analysis applies to most other online search engine or e-mail service providers.
access to our e-mail accounts, the websites we visit, and our search-engine
history—all for legitimate business purposes—we give up any privacy interest in
that information.

And why stop there? Nearly every website collects information about what
we do when we visit. So now, under the majority’s rule, the Fourth Amendment
allows the government to know from YouTube.com what we watch, or
Facebook.com what we post or whom we “friend,” or Amazon.com what we buy,
or Wikipedia.com what we research, or Match.com whom we date—all without a
warrant. In fact, the government could ask “cloud”-based file-sharing services like
Dropbox or Apple’s iCloud for all the files we relinquish to their servers. I am
convinced that most internet users would be shocked by this. But as far as I can
tell, every argument the government makes in its brief regarding cell site location
data applies equally well to e-mail accounts, search-engine histories, shopping-site
purchases, cloud-storage files, and the like. See, e.g., Appellee’s Br. 21–22
(“Davis can assert neither ownership nor possession of the third-party records he
sought to suppress.”); id. at 22 (“Evidence lawfully in the possession of a third
party is not his, even if it has to do with him.”); id. at 23 (“Davis is not in a good
position to complain that the government improperly obtained ‘his location data,’
since he himself exposed and revealed to MetroPCS the very information he now
seeks to keep private.”); id. at 24 (“It is not persuasive to argue that phone users do
not knowingly or intentionally disclose any location-related information to their
service providers.”); id. at 25 (“For purposes of the Fourth Amendment, it makes
no difference whether Davis knew that MetroPCS was collecting location-related
information.”); id. at 27–28 (“[S]ervice contracts and privacy policies typically
warn cell-phone customers that phone companies collect location-related
information and may disclose such data to law-enforcement authorities.”).

The enormous impact of this outcome is probably why at least one Circuit
has held that a person’s Fourth Amendment rights are violated when the
government compels an internet service provider to turn over the contents of e-
mails without a warrant. See United States v. Warshak 631 F.3d 266, 286–88 (6th
Cir. 2010). Surely the majority would agree and would also shield e-mails from
government snooping absent a warrant. But if e-mails are protected despite the
fact that we have surrendered control of them to a third party, then the rule from
Smith and Miller has its limits.

The majority suggests that e-mails can be distinguished because cell site
location data is “non-content evidence.” Maj. Op. 27 (emphasis omitted). The
majority offers no coherent definition of the terms “content” and “non-content,”
and I am hard-pressed to come up with one. For instance, would a person’s
Google search history be content or non-content information? Though a person’s
search terms may seem like “content,” a search term exists in the web address
generated by a search engine. And web addresses, like phone numbers, seem like quintessentially non-content information that merely direct a communication. But regardless, although this content—non-content distinction could—maybe—shield the body of e-mail messages, the government may presumably still access the time and date that we send e-mails, the names of the people who receive them, and the names of the people who email us, without a warrant. Likewise, although our actual activities on a dating or shopping website might be protected, the fact that we visited those websites or any other would still be freely discoverable. The government agreed at oral argument that under its theory, it could at the very least obtain records like the sender and receiver of e-mails, the time of day e-mails are sent, the number of e-mails a person sends, the websites that a person visits, and maybe even the connections a person communicates with on a dating website and whom she meets in person—all without a warrant.

This slippery slope that would result from a wooden application of the third-party doctrine is a perfect example of why the Supreme Court has insisted that technological change sometimes requires us to consider the scope of decades-old Fourth Amendment rules. See Kyllo v. United States, 533 U.S. 27, 35, 121 S. Ct. 2038, 2044 (2001) (rejecting a “mechanical interpretation of the Fourth Amendment” in the face of “advancing technology”); cf. Katz, 389 U.S. at 353, 88 S. Ct. at 512 (“To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.”). For instance, in Riley v. California, 573 U.S. ___, 134 S. Ct. 2473 (2014), the Court was asked to decide whether the decades-old search-incident-to-arrest exception to the warrant requirement applied to cell phones on an arrestee’s person. Id. at 2480. California argued that the Court’s 41-year-old decision in United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467 (1973), controlled the outcome in Riley because the Court held that a search of objects on an arrestee’s person was categorically reasonable. See Riley, 134 S. Ct. at 2491. The Riley Court agreed that “a mechanical application of Robinson might well support the warrantless searches at issue.” Id. at 2484. But it nonetheless unanimously rejected that argument, saying that cell “phones are based on technology nearly inconceivable just a few decades ago, when . . . Robinson w[as] decided.” Id. Thus, to say that a search of cell phone data is “materially indistinguishable” from a search of physical items is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.

Id. at 2488–89.

Likewise here, the extent of information that we expose to third parties has
increased by orders of magnitude since the Supreme Court decided Miller and Smith. Those forty years have seen not just the proliferation of cell phones that can be tracked, but also the advent of the internet. Given these extraordinary technological advances, I believe the Supreme Court requires us to critically evaluate how far to extend the third-party doctrine. As Justice Sotomayor observed:

"It may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.... I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, entitled to Fourth Amendment protection."

United States v. Jones, 565 U.S. ___, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (citations omitted). Neither would I assume as much. Though the doctrine may allow the government access to some information that we disclose to third parties, I would draw the line short of the search at issue here. Sixty-seven days of near-constant location tracking of a cell phone—a technological feat impossible to imagine when Miller and Smith were decided—is an application of the doctrine that goes too far.

II.

Because I believe that the third-party doctrine does not dictate the outcome of this case, I turn to fundamental Fourth Amendment principles. The Fourth Amendment says:

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

U.S. Const. amend. IV. "As the text makes clear, the ultimate touchstone of the Fourth Amendment is reasonableness." Riley, 134 S. Ct. at 2482 (quotation marks omitted). Our analysis is two-fold: "First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that he sought to preserve something as private." Bond v. United States, 529 U.S. 334, 338, 120 S. Ct. 1462, 1465 (2000) (quotation omitted) (alteration adopted). "Second, we inquire whether the individual’s expectation of privacy is one that society is prepared to recognize as reasonable.” Id. (quotation omitted). If we conclude that a particular search violates a defendant’s reasonable expectation of privacy, the government must get a search warrant.

For me, the answer to the subjective inquiry is easy. It seems obvious that Mr. Davis never intended to disclose his location to the government every time he made or received calls. Recent polling data tells us that 82% of adults “feel as though the details of their physical location gathered over a period of time” is “very sensitive” or “somewhat sensitive.” Mary Madden, Public Perceptions of Privacy and Security in the Post-Snowden Era 34, Pew Research Center (Nov. 12,
http://www.pewinternet.org/files/2014/11/PI_PublicPerceptionsofPrivacy_1112 14.pdf. This supports the common-sense notion that people do not expect the government to track them simply as a consequence of owning and using what amounts to a basic necessity of twenty-first century life—the cell phone. Beyond that, the prosecutor in this case specifically admitted at closing argument that “what this defendant could not have known was that . . . his cell phone was tracking his every moment.” Trial Tr. 4–5, Feb. 8, 2012, ECF No. 287 (emphasis added); see also id. at 14 (arguing that Mr. Davis and his co-conspirators “had no idea that by bringing their cell phones with them to these robberies they were allowing MetroPCS and now [the jury] to follow their movements”). In short, I believe that Mr. Davis—like any other person interacting in today’s digital world—quite reasonably had a subjective expectation that his movements about town would be kept private.6

5 The government argues that regardless of what people think, “MetroPCS’s current privacy policy . . . advises its wireless customers that the company ‘may disclose, without your consent, the approximate location of a wireless device to a governmental entity or law enforcement authority when we are served with lawful process.’” Appellee Br. 28 (citation omitted). But as another court recently noted, “[t]he fiction that the vast majority of the American population consents to warrantless government access to the records of a significant share of their movements by ‘choosing’ to carry a cell phone must be rejected.” In re Application of the U.S. for an Order Authorizing the Release of Historical Cell-Site Info., 809 F. Supp. 2d 113, 127 (E.D.N.Y. 2011). Regardless, and as the majority acknowledges, the “contract does not appear on this record to have been entered into evidence here,” so “we cannot consider it.” Maj. Op. 25 n.11.

6 The majority does not explain why it believes that “the fact that Davis registered his cell phone under a fictitious alias tends to demonstrate his understanding that such cell tower location information is collected by MetroPCS and may be used to incriminate him.” Maj. Op. 28. Mr. Davis’s use of an alias more naturally evidences his desire not to tie his identity to his phone’s account with MetroPCS. For me, Mr. Davis’s use of an alias says nothing about his subjective expectation of privacy in his location.

The more important and more difficult question we must consider is whether Mr. Davis’s expectation of privacy is one society is objectively prepared to recognize as reasonable. I believe the answer is yes. The Supreme Court recently reminded us that “there is an element of pervasiveness that characterizes cell phones.” Riley, 134 S. Ct. at 2490. Today, “it is the person who is not carrying a cell phone . . . who is the exception.” Id. The Court noted that “nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower.” Id. (quoting Harris Interactive, 2013 Mobile Consumer Habits Study (June 2013)). In other words, “modern cell phones . . . are now 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.” Id. at 2484; see also City of Ontario, Cal. v. Quon, 560 U.S. 746, 760, 130 S. Ct. 2619, 2630 (2010) (“Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.”).

Since we constantly carry our cell phones, and since they can be used to track our movements, the recent opinions of five Justices in United States v. Jones that long-term location-monitoring generally violates expectations of privacy are
Instructive. In Jones, the Supreme Court considered whether warrantless monitoring of the location of a person's car for twenty-eight days by means of a GPS tracker violated the defendant's rights under the Fourth Amendment. 132 S. Ct. at 948–49. All nine Justices said yes. Five Justices held that such tracking violated the Fourth Amendment under a trespass theory that considered the government's physical intrusion of the car. Id. at 949. Important for Mr. Davis's case, however, a different set of five Justices were in agreement that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." Id. at 955 (Sotomayor, J., concurring) (quoting id. at 964 (Alito, J., joined by Ginsburg, Breyer, and Kagan, J.), concurring in the judgment)). Said one Justice, "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." Id. at 955 (Sotomayor, J., concurring). Said four other Justices, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." Id. at 964 (Alito, J., concurring in the judgment).\footnote{The majority chides Mr. Davis for "deploy[ing] the concurrences in Jones," Maj. Op. 33, but a lower federal court ignores the opinion of five Justices of the Supreme Court at its own risk.}

The amount of data the government collected, though not quite as precise as the GPS data in Jones, still revealed Mr. Davis's comings and goings around Miami with an unnerving level of specificity. Each time he made or received a call, MetroPCS catalogued the cell tower to which his cell phone connected, typically the "[n]earest and strongest" tower. Trial Tr. 221, Feb. 6, 2012, ECF No. 283. In a "cosmopolitan area [like] Miami," there are "many, many towers" whose coverage radii are "much smaller" than a "mile-and-a-half." Id. at 222–23. Each coverage circle is further subdivided into "three or six portions." Id. at 222. The data the government obtained in this case specified the sector within a tower's coverage radius in which Mr. Davis made or received a call.

The amount of data the government got is also alarming. The government demanded from MetroPCS sixty-seven days of cell site location data—more than double the time at issue in Jones. In total, this data included 5,803 separate call records. Since MetroPCS cataloged the cell tower sector where each phone call started and ended, the government had 11,606 cell site location data points. This averages around one location data point every five and one half minutes for those sixty-seven days, assuming Mr. Davis slept eight hours a night.

The amount and type of data at issue revealed so much information about Mr. Davis's day-to-day life that most of us would consider quintessentially private. For instance, on August 13, 2010, Mr. Davis made or received 108 calls in 22
unique cell site sectors, showing his movements throughout Miami during that day. And the record reflects that many phone calls began within one cell site sector and ended in another, exposing his movements even during the course of a single phone call.

Also, by focusing on the first and last calls in a day, law enforcement could determine from the location data where Mr. Davis lived, where he slept, and whether those two locations were the same. As a government witness testified at trial, “if you look at the majority of . . . calls over a period of time when somebody wakes up and when somebody goes to sleep, normally it is fairly simple to decipher where their home tower would be.” Trial Tr. 42, Feb. 7, 2012, ECF No. 285. For example, from August 2, 2010, to August 31, 2010, Mr. Davis’s first and last call of the day were either or both placed from a single sector—purportedly his home sector. But on the night of September 2, 2010, Mr. Davis made calls at 11:41 pm, 6:52 am, and 10:56 am—all from a location that was not his home sector. Just as Justice Sotomayor warned, Mr. Davis’s “movements [were] recorded and aggregated in a manner that enable[d] the Government to ascertain, more or less at will, . . . [his] sexual habits, and so on.” Jones, 132 S. Ct. at 956 (Sotomayor, J., concurring); see also United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010) (“A person who knows all of another’s travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.”).

Importantly, the specificity of the information that the government obtained was highlighted by the way the government used it at trial. The government relied upon the information it got from MetroPCS to specifically pin Mr. Davis’s location at a particular site in Miami. See, e.g., Trial Tr. 58, Feb. 7, 2012, ECF No. 285 (noting that “Mr. Davis’s phone [was] literally right up against the America Gas Station immediately preceding and after [the] robbery occurred”); id. at 61 (noting “the presence of his cell phone literally . . . right next door to the Walgreen’s just before and just after that store was robbed”). On this record, Mr. Davis had a reasonable expectation of privacy in the cell site location data the government obtained, and his expectation was one that society should consider reasonable. I would therefore hold that absent a warrant, a Fourth Amendment violation occurred.

III.

The majority, of course, believes that Mr. Davis had no reasonable expectation of privacy in the cell site location data obtained in his case. It emphasizes the large size of the sectors that each location data point revealed as evidence that the privacy intrusion was not so great. See Maj. Op. 5–6, 10–12. It also says we need not consider more invasive technologies that have developed
since the search that took place here. Id. at 11 n.7 ("There is no evidence, or even any allegation, that the MetroPCS network reflected in the records included anything other than traditional cell towers and the facts of this case do not require, or warrant, speculation as to the newer technology."). Yet the Supreme Court has cautioned us that "[w]hile the technology used in the present case [may be] relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development." 

Kyllo, 533 U.S. at 36, 121 S. Ct at 2044. Just as the majority appropriates decades-old precedent from Miller and Smith and applies it to new technologies, the rule we make today necessarily will apply to everyone else’s case going forward.

That future impact is troubling. As technology advances, the specificity of cell site location information has increased. Cell phone companies are constantly upgrading their networks with more and more towers. As the ACLU explains:

Cell site density is increasing rapidly, largely as a result of the growth of internet usage by smartphones. . . . As new cell sites are erected, the coverage areas around existing nearby cell sites will be reduced, so that the signals sent by those sites do not interfere with each other. In addition to erecting new conventional cell sites, providers are also increasing their network coverage using low-power small cells, called "microcells," "picocells," and "femtocells" (collectively, "femtocells"), which provide service to areas as small as ten meters. . . . Because the coverage area of femtocells is so small, callers connecting to a carrier’s network via femtocells can be located to a high degree of precision, sometimes effectively identifying individual floors and rooms within buildings.

ACLU Amicus Br. 7–8 (quotations, citations omitted); see also id. at 7 (noting that “the number of cell sites in the United States has approximately doubled in the last decade”); id. at 8 (noting that “[f]emtocells with ranges extending outside of the building in which they are located can also provide cell connections to passersby, providing highly precise information about location and movement on public streets and sidewalks”). The location features on smartphones are even more precise. See Riley, 134 S. Ct. at 2490 ("Historic location information is a standard feature on many smart phones and can reconstruct someone’s specific movements down to the minute, not only around town but also within a particular building.").

Beyond that, today, the vast majority of communications from cell phones are in the form of text messages and data transfers, not phone calls. The frequency of text messaging is much greater than the frequency of phone calling—particularly among young cell phone users. See Amanda Lenhart, Teens, Smartphones & Texting (available at http://www.pewinternet.org/2012/03/19/teens-smartphones-texting/) (finding that the median number of texts sent per day by teens ages 12 to 17 rose from 50 in 2009 to 60 in 2011). Also, “smartphones, which are now used by more than six in ten Americans, communicate even more frequently with the carrier’s network, because they typically check for new email messages or other data every few minutes.” ACLU Amicus Br. 5 (citations omitted). Each of these new types of communications can generate cell site location data. See, e.g., United States v. Cooper, No. 13-cr-00693-SI-1, 2015 WL
881578, at *8 n.6 (N.D. Cal. Mar. 2, 2015) (noting the government’s admission that “cell site data is recorded for both calls and text messages”).

Finally, not only are cell sites fast growing in number, but the typical user has no idea how precise cell site location data is at any given location. As a person walks around town, particularly a dense, urban environment, her cell phone continuously and without notice to her connects with towers, antennas, microcells, and femtocells that reveal her location information with differing levels of precision—to the nearest mile, or the nearest block, or the nearest foot. And since a text or phone call could come in at any second—without any affirmative act by a cell phone user—a user has no control over the extent of location information she reveals.

The government tells us these technological advances do not change our analysis. At oral argument, it admitted that its theory requires us to hold that it could obtain location data without a warrant even when technology someday allows it to know a person’s location to within six inches, and when tracking is continuous and does not require making or receiving a phone call. I reject a theory that allows the government such expansive access to information about where we are located, no matter how detailed a picture of our movements the government may receive.

But we need not fear the threat of increasing precision of location information, says the majority. At the same time it suggests that today’s ruling might not apply to future technology, however, the majority’s opinion offers absolutely no guidance to the judges who authorize searches of cell site location data and the officers who conduct them. As the ACLU pointed out, “[a]gents will not have prior knowledge of whether the surveillance target was in a rural area with sparse cell sites, an urban area with dense cell sites or six-sector antennas, or a home, doctor’s office, or church with femtocells.” ACLU Amicus Br. 9. Thus, a judge will authorize a search of a person’s cell site location data for a certain period of time without knowing how precise the location information will be.

While I admire the majority’s attempt to cabin its holding to the technology of five years ago, its assurances in this regard seem naïve in practice. As a result of today’s decision, I have little doubt that all government requests for cell site location data will be approved, no matter how specific or invasive the technology.

IV.

The majority offers dire warnings of the consequences of restricting the government’s access to cell site location data, suggesting that without it, all manner of horrific crimes—from child abductions to terrorism—would go uninvestigated. See Maj. Op. 42. But if my view of the Fourth Amendment were to prevail, all the officers in this case had to do was get a warrant for this search. That is no great burden. “Under the Fourth Amendment, an officer may not
properly issue a warrant . . . unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation.” Nathanson v. United States, 290 U.S. 41, 47, 54 S. Ct. 11, 13 (1933). The probable-cause standard is not onerous. See Illinois v. Gates, 462 U.S. 213, 291, 103 S. Ct. 2317, 2360 (1983) (Brennan, J., dissenting) (criticizing a probable-cause standard that “imposes no structure on magistrates’ probable cause inquiries . . . and invites the possibility that intrusions may be justified on less than reliable information from an honest or credible person”); Ricardo J. Bascuas, Property and Probable Cause: The Fourth Amendment’s Principled Protection of Privacy, 60 Rutgers L. Rev. 575, 592–93 (2008) (“The Supreme Court has set the standard for the quality of information that can support a warrant so low that judges can hardly be expected to uncover a baseless request.”); cf. Riley, 134 S. Ct. at 2493 (noting that “[r]ecent technological advances . . . have . . . made the process of obtaining a warrant itself more efficient”). Nor is cell site data the type of information which would spoil or parish during the short time it takes to get a warrant. Finally, requiring a warrant would not do away with the other well-established exceptions to the warrant requirement, like exigent circumstances. Cf. Riley, 134 S. Ct. at 2494 (noting that “the availability of the exigent circumstances exception . . . address[es] some of the more extreme hypotheticals that have been suggested”). Imposing the requirement for a warrant under these circumstances would hardly shackle law enforcement from conducting effective investigations.

But regardless of how easy it might be to get warrants, the Supreme Court has reminded us time and again of how important they are.

The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow “weighed” against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the “well-intentioned but mistakenly over-zealous, executive officers” who are a part of any system of law enforcement.

Coolidge, 403 U.S. at 481, 91 S. Ct. at 2046 (citation omitted). The majority emphasizes that the Stored Communications Act (SCA) requires the government to “offer[] specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.” 18 U.S.C. § 2703(d). But it does not contest—nor could it—that this standard falls below the probable-cause standard that courts usually demand.

See Maj. Op. 15.8

Once again, the Supreme Court’s analysis in Riley is instructive.9 There, the

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8 Certainly the Stored Communications Act is better than nothing. See Maj. Op. 15 (noting that the SCA “raises the bar from an ordinary subpoena to one with additional privacy protections built in”). But the mere fact that the Act provides some judicial oversight before the government can get cell site location data does not answer the question whether the government is constitutionally required to have a warrant.

9 “[T]here is dicta and then there is dicta, and then there is Supreme Court dicta.” Schwab v. Crosby, 451 F.3d 1308, 1325 (11th Cir. 2006).
Court recognized:

We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.

Riley, 134 S. Ct. at 2493. But still, the Court insisted that law enforcement officers get a warrant before searching a cell phone incident to arrest. So too here. I would simply require the government do what it has done for decades when it seeks to intrude upon a reasonable expectation of privacy. That is, "get a warrant." Id. at 2495.

V.

The majority proclaims that its holding today is "narrow[]." Maj. Op. 14, limited only to cell site location data, and only to the kind of data the government could obtain in 2010. But "[s]teps innocently taken may one by one lead to the irretrievable impairment of substantial liberties." Glasser v. United States, 315 U.S. 60, 86, 62 S. Ct. 457, 472 (1942). Under the reasoning employed by the majority, the third-party doctrine may well permit the government access to our precise location at any moment, and in the end, our entire digital lives. And although Mr. Davis—as the majority reminds us in great detail, see Maj. Op. 3–5—has been convicted of very serious crimes and is not therefore the most sympathetic bearer of this message,10 "the rule[s] we fashion [are] for the innocent and guilty alike." Draper v. United States, 358 U.S. 307, 314, 79 S. Ct. 329, 333 (1959) (Douglas, J., dissenting). I would not subject the citizenry to constant location tracking of their cell phones without requiring the government to get a warrant. The Fourth Amendment compels this result. I respectfully dissent.

10 Though regardless of the outcome of this en banc appeal, Mr. Davis's convictions will stand and he will remain incarcerated due to the good-faith exception. See supra note 1.
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2014

(Argued: September 2, 2014           Decided: May 7, 2015)
Docket No. 14-42-cv

AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, NEW YORK CIVIL LIBERTIES UNION FOUNDATION,

v.

JAMES R. CLAPPER, in his official capacity as Director of National Intelligence, MICHAEL S. BUCKLEY, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service, ARTHUR S. CARTER, in his official capacity as Secretary of Defense, LORETTA E. LYNN, in her official capacity as Attorney General of the United States, and JAMES B. COMEY, in his official capacity as Director of the Federal Bureau of Investigation,

Defendants-Appellees.

Before:

SACK and LYNCH, Circuit Judges, and BRODERICK, District Judge.**

Plaintiffs-appellants American Civil Liberties Union and American Civil Liberties Union Foundation, and New York Civil Liberties Union Foundation, appeal from a decision of the United States District Court for the Southern District of New York (William H. Pauley, III, Judge) granting defendants-appellees' motion to dismiss and denying plaintiffs-appellants' request for a preliminary injunction. The district court held that § 215 of the PATRIOT Act implicitly precludes judicial review; that plaintiffs-appellants' statutory claims regarding the scope of § 215 would in any event fail on the merits; and that § 215 does not violate the Fourth or First Amendments to the United States Constitution. We disagree in part, and hold that § 215 and the statutory scheme to which it relates do not preclude judicial review, and that the bulk telephone metadata program is not authorized by § 215. We therefore

**The Honorable Vernor S. Broderick, of the United States District Court for the Southern District of New York, sitting by designation.

VACATE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Robert D. Sack, Circuit Judge, concurs in the opinion of the Court and files a separate concurring opinion.

ALEXANDER ABDO, American Civil Liberties Union Foundation [James] [Valerie, Patrick Toomey, Brett Max-Kaufman, Catherine Crump, American Civil Liberties Union Foundation, New York, NY; Christopher T. Dunn, Arthur N. Eisenberg, New York Civil Liberties Union Foundation, New York, NY, for the brief], New York, NY, for Plaintiffs-Appellants.

STUART F. DELERY, Assistant Attorney General, Civil Division, United States Department of Justice [Douglas N. Letter, H. Thomas Byron III, Henry C. Whitaker, Appellate Staff, Civil Division, United States Department of Justice, Washington, District of Columbia; Preet Bharara, United States Attorney for the Southern District of New York, New York, NY; David S. Jones, John D. O'Quinn, Emily E. Daughtry, Assistant United States Attorneys, New York, NY, for the brief], Washington, D.C., for Defendants-Appellees.

Laura K. Dunneau, Georgetown University Law Center, Washington DC; Erin Chemerinsky, University of California, Irvine School of Law, Irvine, CA, for Amici Curiae Former Members of the Church Committee and Law Professors in Support of Plaintiffs-Appellants.


Cindy Cohn, Mark Rumold, Andrew Crocker, Electronic Frontier Foundation, San Francisco, CA, for Amici Curiae Experts in Computer and Data Science in Support of Appellants and Reversal.


John Frazer, Law Office of John Frazer, PLLC, Fairfax, VA, for Amicus Curiae National Rifle Association of America, Inc., in Support of Plaintiffs-Appellants and Supporting Reversal.


GERALD E. LYNCH, Circuit Judge:

This appeal concerns the legality of the bulk telephone metadata collection program (the "telephone metadata program"), under which the National Security Agency ("NSA") collects in bulk "on an ongoing daily basis" the metadata associated with telephone calls made by and to Americans, and aggregates those metadata into a repository or data bank that can later be queried. Appellants
challenge the program on statutory and constitutional grounds. Because we find that the program exceeds the scope of what Congress has authorized, we vacate the decision below dismissing the complaint without reaching appellants’ constitutional arguments. We affirm the district court’s denial of appellants’ request for a preliminary injunction.

BACKGROUND

In the early 1970s, in a climate not altogether unlike today’s, the intelligence-gathering and surveillance activities of the NSA, the FBI, and the CIA came under public scrutiny. The Supreme Court struck down certain warrantless surveillance procedures that the government had argued were lawful as an exercise of the President’s power to protect national security, remarking on “the inherent vagueness of the domestic security concept and the necessarily broad and continuing nature of intelligence gathering.” United States v. U.S. Dist. Court for the E. Dist. of Mich. (Koehler), 407 U.S. 297, 320 (1972). In response to that decision and to allegations that those agencies were abusing their power in order to spy on Americans, the Senate established the Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the “Church Committee”) to investigate whether the intelligence agencies had engaged in unlawful behavior and whether legislation was necessary to govern their activities. The Church Committee expressed concerns that the privacy rights of U.S. citizens had been violated by activities that had been conducted under the rubric of foreign intelligence collection.

The findings of the Church Committee, along with the Supreme Court’s decision in

Keith and the allegations of abuse by the intelligence agencies, prompted Congress in 1978 to enact comprehensive legislation aimed at curtailing abuses and delineating the procedures to be employed in conducting surveillance in foreign intelligence investigations. That legislation, the Foreign Intelligence Surveillance Act of 1978 (“FISA”), Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801 et seq.), established a special court, the Foreign Intelligence Surveillance Court (“FISC”), to review the government’s applications for orders permitting electronic surveillance. See 50 U.S.C. § 1803. Unlike ordinary Article III courts, the FISC conducts its usually ex parte proceedings in secret; its decisions are not, in the ordinary course, disseminated publicly. Id. § 1807(c).

We are faced today with a controversy similar to that which led to the Keith decision and the enactment of FISA. We must confront the question whether a surveillance program that the government has put in place to protect national security is lawful. That program involves the bulk collection by the government of telephone metadata created by telephone companies in the normal course of their business but now explicitly required by the government to be turned over in bulk on an ongoing basis. As in the 1970s, the revelation of this program has generated considerable public attention and concern about the intrusion of government into private matters. As in that era, as well, the nation faces serious threats to national security, including the threat of foreign-generated acts of terrorism against the United States. Now, as then, Congress is tasked in the first instance with achieving the right balance between these often-competing concerns. To do so, Congress has amended FISA, most significantly, after the terrorist attacks of September 11, 2001, in the PATRIOT Act. See USA PATRIOT ACT of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). The government argues that § 215 of that Act authorizes the telephone metadata program. See id. § 215, 115 Stat. at 287 (codified as amended at 50 U.S.C. § 1861).

1. Telephone Metadata

Before proceeding to explore the details of § 215 of the PATRIOT Act, we pause to define “telephone metadata,” in order to clarify the type of information that the government argues § 215 authorizes it to collect in bulk. Unlike what is gleaned from the more traditional investigative practice of wiretapping, telephone metadata do not include the voice content of telephone conversations. Rather, they include details about telephone calls, including, for example, the length of a call, the phone number from which the call was made, and the phone number called. Metadata can also reveal the user or device making or receiving a call through unique “identity numbers” associated with the equipment (although the government maintains that the information collected does not include information about the identities or names of individuals), and provide information about the routing of a call through the telephone network, which can sometimes (although not always) convey information about a caller’s general location. According to the government, the metadata it collects do not include cell site location information, which provides a more precise indication of a caller’s location than call-routing information does.

That telephone metadata do not directly reveal the content of telephone calls, however, does not vitiate the privacy concerns arising out of the government’s bulk collection of such data. Appellants and amici take pains to emphasize the startling amount of detailed information metadata can reveal—
“information that could traditionally only be obtained by examining the contents of communications” and that is therefore “often a proxy for content.” Joint App’s 50 (Declaration of Professor Edward W. Felten). For example, a call to a single-purpose telephone number such as a “hotline” might reveal that an individual is a victim of domestic violence or rape; a veteran suffering from an addiction of one type or another; contemplating suicide; or reporting a crime. Metadata can reveal civil, political, or religious affiliations; they can also reveal an individual’s social status, or whether and when he or she is involved in intimate relationships.1

1 A report of a recent study in Science magazine revealed how much information can be gleaned from credit card metadata. In the study, which used three months of anonymous credit card records for 3.1 million people, scientists were able to reidentify 90% of the individuals where they had only four additional “spatiotemporal points” of information— for example, information that an individual went to one particular store on four specific days. Such information could be gathered from sources as accessible as a “tweet” from that individual. Yves-Alexandre de Montjoye, Laura Radaelli, Vivek Kumar Singh, Alex “Sandy” Pentland, Unique in the Shopping Mall: On the Redundancy of Credit Card Metadata, Science, Jan. 30, 2015, at 536. The study’s authors concluded that, in the context of most large-scale metadata sets, it would not be difficult to reidentify individuals even if the data were anonymized. Id. at 539. While credit card data differ in important ways from telephone data, the study illustrates the ways in which metadata can be used by sophisticated investigators to deduce significant private information about individuals.

II. Section 215

The original version of § 215, which pre-dated the PATRIOT Act, allowed

20 U.S.C. § 1861(q)(1). In its current form, the provision requires such an application to include

a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (c)(D) of this section to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

Id. § 1861(b)(2)(A). Such an order “may only require the production of a tangible thing if such thing can be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation or with any other order issued by a court of the United States directing the production of records or tangible things.” Id. § 1861(c)(D). Finally, the statute requires the Attorney General to “adopt specific minimization procedures governing the retention and dissemination by the [FBI] of any tangible things, or information therein, received by the [FBI] in response to an order under this subsection.” Id. § 1861(g)(1). Because § 215 contained a “sunset” provision from its inception, originally terminating its authority on December 31, 2005, it has required subsequent renewal. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 224, 115 Stat. at 295.
Congress has renewed § 215 seven times, most recently in 2011, at which time it was amended to expire on June 1, 2015. See PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216 (2011).

III. The Telephone Metadata Program

Americans first learned about the telephone metadata program that appellants now challenge on June 5, 2013, when the British newspaper The Guardian published a FISC order leaked by former government contractor Edward Snowden. The order directed Verizon Business Network Services, Inc. ("Verizon"), a telephone company, to produce to the NSA "on an ongoing daily basis . . . all call detail records or 'telephony metadata' created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls." In re Application of the FBI for an Order Requiring the Prod. of Tangible Things From Verizon Bus. Network Servs, Inc. ex rel. NCT Commc'n Servs. Inc. d/b/a Verizon Bus. Servs.," ("Verizon Secondary Order"), No. BR 13-40 slip. op. at 2 (F.I.S.C. Apr. 25, 2013). The order thus requires Verizon to produce call detail records, every day, on all telephone calls made through its systems or using its services where one or both ends of the call are located in the United States.

terrorism"; and that the items sought "could be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation or with any other order issued by a court of the United States directing the production of records or tangible things." Id. at 3. The order required its recipient, upon receiving the "appropriate secondary order," to "continue production on an ongoing daily basis . . . for the duration of the[e] order" and contemplated creation of a "data archive" that would only be accessed "when NSA has identified a known telephone number for which . . . there are facts giving rise to a reasonable, articulable suspicion that the telephone number is associated with [Redacted]"—presumably, with terrorist activity or a specific terrorist organization. Id. at 4-5. The order also states that the NSA "exclusively will operate" the network on which the metadata are stored and processed. Id. at 5.

The government has disclosed additional FISC orders reauthorizing the program. FISC orders must be renewed every 90 days, and the program has therefore been renewed 41 times since May 2006. Most recently, the program

was reauthorized by the FISC on February 26, 2015; that authorization expires on June 1, 2015. See In re Application of the FBI for an Order Requiring the Prod. of Tangible Things From [Redacted], No. BR 15-24 (F.I.S.C. Feb. 26, 2015).


The government disputes appellants' characterization of the program as collecting "virtually all telephony metadata" associated with calls made or received in the United States, but declines to elaborate on the scope of the program or specify how the program falls short of that description. It is unclear, however, in what way appellants' characterization of the program can be faulted. On its face, the Verizon order requires the production of "all call detail records or 'telephony metadata'" relating to Verizon communications within the United States or between the United States and abroad. Verizon Secondary Order 2 (emphasis added). The Verizon order and the Primary Order described above reveal that the metadata collected include "comprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, International Mobile Subscriber Identity (IMSI) number, International Mobile Station Equipment

1 The order published in The Guardian and served on Verizon was one such "Secondary Order."
Identity (IMEI) number, etc.), truck identifier,7 telephone calling card numbers, and time and duration of call. 7 Verizon Secondary Order 2; see also 2006 Primary Order 2. The government does not suggest that Verizon is the only telephone service provider subject to such an order; indeed, it does not seriously dispute appellants' contentions that all significant service providers in the United States are subject to similar orders.

The government explains that it uses the bulk metadata collected pursuant to these orders by making "queries" using metadata "identifiers" (also referred to as "selectors"), or particular phone numbers that it believes, based on "reasonable articulable suspicion," to be associated with a foreign terrorist organization. Joint App's 264 (Declaration of Teresa H. Shea). The identifier is used as a "seed" to search across the government's database; the search results yield phone numbers, and the metadata associated with them, that have been in contact with the seed. Id. That step is referred to as the first "hop." The NSA can then also search for the numbers, and associated metadata, that have been in contact with the numbers resulting from the first search — conducting a second

7 A "truck identifier" provides information regarding how a call is routed through the telephone network, revealing general information about the parties' locations.
retain the bulk metadata. That recommendation, however, has so far not been adopted.

In addition to that group, the Privacy and Civil Liberties Oversight Board (“PCLOB”) published a detailed report on the program. The PCLOB is a bipartisan agency within the executive branch that was established in 2007, pursuant to a recommendation from the National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission," established after the September 11, 2001 terrorist attacks to prepare an account of the circumstances surrounding the attacks), in order to monitor the actions taken by the government to protect the nation from terrorism and to ensure that they are appropriately balanced against the need to protect privacy and civil liberties. See Implementing Recommendations of the 9/11 Comm'n Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (2007). The PCLOB concluded that the program was inconsistent with § 215, violated the Electronic Communications Privacy Act, and implicated privacy and First Amendment concerns. See Privacy and Civil Liberties Oversight Board, Rep. on the Tel. Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court (Jan. 23, 2014) (“PCLOB Report”).


Finally, the program has come under scrutiny by Article III courts other than the FISC. In addition to this case, similar cases have been filed around the country challenging the government’s bulk collection of telephone metadata. See, e.g., Smith v. Obama, 24 F. Supp. 3d 1005 (D. Idaho 2014); No. 14-3555 (9th Cir. argued Dec. 8, 2014); Klayman v. Obama, 957 F. Supp. 2d 1 (D.D.C. 2013); No. 14-5004 (D.C. Cir. argued Nov. 4, 2014).

IV. Procedural History.

On June 11, 2013, the American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, "ACLU") and the New York Civil Liberties Union and New York Civil Liberties Union Foundation (collectively, "NYCLU") – current and former Verizon customers, respectively – sued the government officials responsible for administering the telephone metadata program, challenging the program on both statutory and constitutional grounds and seeking declaratory and injunctive relief. The complaint asks the court to declare that the telephone metadata program exceeds the authority granted by § 215, and also violates the First and Fourth Amendments to the U.S. Constitution. It asks the court to permanently enjoin defendants from continuing the program, and to order defendants to "purge from their possession all of the call records of plaintiffs' communications" collected in accordance with the program. Joint App'x 27.

On August 26, 2013, plaintiffs moved for a preliminary injunction barring defendants from collecting their call records under the program, requiring defendants to quarantine all of the call records they had already collected, and prohibiting defendants from using their records to perform queries on any phone number or other identifier associated with plaintiffs. On the same date, the government moved to dismiss the complaint.

On December 27, 2013, the district court granted the government’s motion to dismiss and denied plaintiffs’ motion for a preliminary injunction. See ACLU v. Clapper, 959 F. Supp. 2d 724 (S.D.N.Y. 2013). Plaintiffs now appeal that decision.
DISCUSSION

We review de novo a district court’s grant of a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Klein v. Co. Futures, Inc. v. Bd. of Trade of City of New York, 464 F.3d 355, 259 (2d Cir. 2006); see also Lotus Co., Ltd. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 403 (2d Cir. 2014).

We review a district court’s denial of a preliminary injunction for abuse of discretion, see Cent. Rehobithical Corp. of U.S. & Canada v. N.Y.C. Dept. of Health & Mental Hygiene, 763 F.3d 183, 192 (2d Cir. 2014), which occurs when the court’s decision either “rests on an error of law . . . or a clearly erroneous factual finding, or . . . its decision – though not necessarily the product of a legal error or a clearly erroneous factual finding – cannot be located within the range of permissible decisions,” Vincenty v. Bloomberg, 476 F.3d 74, 83 (2d Cir. 2007).

I. Standing

The district court ruled that appellants had standing to bring this case. Clapper, 969 F. Supp. 2d at 738. The government argues that the district court’s ruling was erroneous, contending that appellants lack standing because they have not demonstrated that any of the metadata associated with them have been or will be actually reviewed by the government, and have not otherwise

identified an injury that is sufficiently concrete or imminent to confer standing. We recognize that “[n]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” Clapper v. Amnesty Int’l USA, 133 S. Ct. 1136, 1146 (2013), quoting DaimlerChrysler Corp. v. Cnooc, 547 U.S. 332, 341 (2006) (alteration in original). In order to meet that requirement, plaintiffs must, among other things, establish that they have standing to sue. Raines v. Byrd, 521 U.S. 811, 818 (1997). “Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” Monanto Co. v. Gerstenson Seed Farms, 561 U.S. 139, 149 (2010); see also Amnesty Int’l USA, 133 S. Ct. at 1147 (collecting cases). The Supreme Court has “repeatedly reiterated that ‘threatened injury must be certainly impending to constitute injury in fact,’ and that ‘[i]njuries of possible future injury are not sufficient.’” Amnesty Int’l USA, 133 S. Ct. at 1147, quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (emphasis in original). We remain mindful that the “standing inquiry has been especially rigorous when reaching the merits of [a] dispute would force us to decide whether an action taken by one of the

other two branches of the Federal Government was unconstitutional” and “in cases in which the judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs.” Id., quoting Raines, 521 U.S. at 819-20.

Appellants in this case have, despite those substantial hurdles, established standing to sue, as the district court correctly held. Appellants here need not speculate that the government has collected, or may in the future collect, their call records. To the contrary, the government’s own orders demonstrate that appellants’ call records are indeed among those collected as part of the telephone metadata program. Nor has the government disputed that claim. It argues instead that any alleged injuries here depend on the government’s reusing the information collected, and that appellants have not shown anything more than a “speculative prospect that their telephone numbers would ever be used as a selector to query, or be included in the results of queries of, the telephony metadata.” Appellants’ Br. 22.

But the government’s argument misapprehends what is required to establish standing in a case such as this one. Appellants challenge the telephone metadata program as a whole, alleging injury from the very collection of their

telephone metadata. And, as the district court observed, it is not disputed that the government collected telephone metadata associated with the appellants’ telephone calls. The Fourth Amendment protects against unreasonable searches and seizures. Appellants contend that the collection of their metadata exceeds the scope of what is authorized by § 215 and constitutes a Fourth Amendment search. We think such collection is more appropriately challenged, at least from a standing perspective, as a seizure rather than as a search. Whether or not such claims prevail on the merits, appellants surely have standing to allege injury from the collection, and maintenance in a government database, of records relating to them. "[A] violation of the Fourth Amendment is fully accomplished at the time of an unreasonable governmental intrusion." United States v. Verdugo-Urquides, 494 U.S. 259, 264 (1990) (internal quotation marks omitted). If the telephone metadata program is unlawful, appellants have suffered a concrete and particularized injury fairly traceable to the challenged program and redressable by a favorable ruling.

Amnesty International does not hold otherwise. There, the Supreme Court, reversing our decision, held that respondents had not established standing because they could not show that the government was surveilling them, or that
such surveillance was "certainly impending." 131 S. Ct. at 1148-1150. Instead, the Supreme Court stated that respondents' standing arguments were based on a "speculative chain of possibilities" that required that: respondents' foreign contacts be targeted for surveillance; the surveillance be conducted pursuant to the statute challenged, rather than under some other authority; the FISC approve the surveillance; the government actually intercept the communications of the foreign contacts; and among those intercepted communications be those involving respondents. Id. Because respondents' injury relied on that chain of events actually transpiring, the Court held that the alleged injury was not "fairly traceable" to the statute being challenged. Id. at 1150. As to costs incurred by respondents to avoid surveillance, the Court characterized those costs as "a product of their fear of surveillance" insufficient to confer standing. Id. at 1152.

Here, appellants' alleged injury requires no speculation whatsoever as to how events will unfold under § 215 – appellants' records (among those of numerous others) have been targeted for seizure by the government; the government has used the challenged statute to effect that seizure; the orders have been approved by the FISC; and the records have been collected. Amnesty International's "speculative chain of possibilities" is, in this context, a reality.

fact occurred, as an injury sufficient to confer standing, without considering whether such data were likely to be reviewed.

Finally, the government admits that, when it queries its database, its computers search all of the material stored in the database in order to identify records that match the search term. In doing so, it unnecessary searches appellants' records electronically, even if such a search does not return appellants' records for close review by a human agent. There is no question that an equivalent manual review of the records, in search of connections to a suspect person or telephone, would confer standing even on the government's analysis. That the search is conducted by a machine might lessen the intrusion, but does not deprive appellants of standing to object to the collection and review of their data.

Appellants likewise have standing to assert a First Amendment violation. Appellants contend that their First Amendment associational rights are being violated, both directly and through a "chilling effect" on clients and donors. The Supreme Court has long recognized that an organization can assert associational privacy rights on behalf of its members, stating that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute ... a restraint on freedom of association." NAACP v. Alabama, 357 U.S. 449, 462 (1958). In NAACP, furthermore, the Supreme Court held that the organization "argued ... appropriately the rights of its members, and that its nexus with them was sufficient to permit that it act as their representative before this Court." Id. at 458-59. We have similarly stated that a union's "standing to assert the First and Fourteenth Amendment rights of association and privacy of its individual members is beyond dispute." Local 1814, Int'l Longshoremen's Ass'n v. waterfront Comm'n of N.Y. Harbor, 667 F.2d 267, 270 (2d Cir. 1981). When the government collects appellants' metadata, appellants' members' interests in keeping their associations and contacts private are implicated, and any potential "chilling effect" is created at that point. Appellants have therefore alleged a concrete, fairly traceable, and redressable injury sufficient to confer standing to assert their First Amendment claims as well.

II. Preclusion and the Administrative Procedure Act

The government next contends that appellants are impliedly precluded from bringing suit to challenge the telephone metadata program on statutory grounds. According to the government, the statutory scheme set out by § 215
limits judicial review of § 215 orders "to the FISC and its specialized mechanism for appellate review," Appellants' Br. 26, and provides for challenges to those orders only by recipients of § 215 orders (that is, the communications companies), rather than the targets of such orders, thereby implicitly precluding appellants here from bringing suit in federal court. The government also argues that 18 U.S.C. § 2712 implicitly precludes the relief appellants seek, either independently or in conjunction with the larger statutory framework established by the two provisions.

A. Section 215 and Implied Preclusion

The Administrative Procedure Act ("APA") waives sovereign immunity for suits against the United States for relief other than money damages. Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof," and can bring suit in an "action in a court of the United States seeking relief other than money damages." 5 U.S.C. § 702. The APA thus establishes a broad right of judicial review of administrative action. The APA does not, however, apply where "statutes preclude judicial review." id. § 701.

In determining whether judicial review is precluded under a particular statute, we must "begin with the strong presumption that Congress intended judicial review of administrative action. From the beginning, our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986), quoting Abbott Labs. v. Gardner, 387 U.S 136, 140 (1967) (alterations in original). "[O]nly . . . a showing of clear and convincing evidence of a contrary legislative intent" can rebut the presumption that Congress intended that an action be subject to judicial review. Bowen, 476 U.S. at 672, quoting Abbott Labs., 387 U.S at 141. The Supreme Court has emphasized that there is a "heavy burden" on a party that attempts to overcome this presumption. id. (internal quotation marks omitted).

That burden is, of course, not insurmountable, and "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." Block v. Cmty. Nutrition Inst., 467 U.S 340, 349 (1984).

Such an intent must be "fairly discernible in the statutory scheme." id. at 351 (internal quotation marks omitted), looking to the scheme's "structure . . ., its

objectives, its legislative history, and the nature of the administrative action involved," id. at 345. Importantly, "where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." NRDC v. Johnson, 461 F.3d 164, 172 (2d Cir. 2006), quoting Block, 467 U.S. at 351. Implied preclusion of review is thus disfavored.

The government points to no language in § 215, or in FISA or the PATRIOT Act more generally, that excludes actions taken by executive or administrative officials pursuant to its terms from the presumption of judicial review established by the APA. Rather, it argues that the provision of one mechanism for judicial review, at the behest of parties other than those whose privacy may be compromised by the seizure, implicitly precludes review pursuant to the APA by parties thus aggrieved. To understand that argument, we begin by describing the provision for judicial review on which the government relies.

A recipient of a § 215 order may challenge its legality "by filing a petition with the pool of FISC judges established by the statute." 50 U.S.C. § 1861(f)(2)(A)(i). That decision can then be appealed to the FISA Court of Review. id. § 1861(f)(3). The statute also provides that "[a]ny production or

nondisclosure order not explicitly modified or set aside consistent with this subsection shall remain in full effect." id. § 1861(f)(2)(D).

According to the government, those provisions establish a limited and detailed framework that eviscerates Congressional intent to limit judicial review to the method specified. Both the government and the district court point to the Supreme Court's language in Block that "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." Block, 467 U.S. at 349.

But that is not always the case. The Supreme Court has also noted that "if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reevaluability for all final agency action, it would not be much of a presumption at all." Sackett v. EPA, 132 S. Ct. 1367, 1373 (2012). The question remains whether the government has demonstrated by clear and convincing or "discernible" evidence that Congress intended to preclude review in these particular circumstances.
(1) Secrecy

The government’s primary argument in support of preclusion is based on the various secrecy provisions that attach to § 215 orders. For example, § 215 states that "[n]o person shall disclose to any other person that the Federal Bureau of Investigation has sought or obtained tangible things pursuant to an order under this section" unless disclosure is necessary to comply with the order; the disclosure is made to an attorney for advice or assistance in connection with the order; or the disclosure is made to others as permitted by the FBI Director or his designee. 50 U.S.C. § 1861(d)(3). And the statute explicitly lays out various supplemental secrecy procedures accompanying the review process, including the requirements that the records of any such proceedings be "maintained under security measures established by the Chief Justice of the United States, in consultation with the Attorney General and the Director of National Intelligence." id. § 1861(f)(4); that "[a]ll petitions . . . be filed under seal," id. § 1861(f)(5); and that, in the case of any government submission that may contain classified information, the court review it ex parte and in camera, id. These secrecy measures, the government argues, are evidence that Congress did not intend that § 215 orders be reviewable in federal court upon suit by an individual whose metadata are collected.

Upon closer analysis, however, that argument fails. The government has pointed to no affirmative evidence, whether “clear and convincing” or “fairly discernible,” that suggests that Congress intended to preclude judicial review. Indeed, the government’s argument from secrecy suggests that Congress did not contemplate a situation in which targets of § 215 orders would become aware of those orders on anything resembling the scale that they now have. That revelation, of course, came to pass only because of an unprecedented leak of classified information. That Congress may not have anticipated that individuals like appellants, whose communications were targeted by § 215 orders, would become aware of the orders, and thus be in a position to seek judicial review, is not evidence that Congress affirmatively decided to revoke the right to judicial review otherwise provided by the APA in the event the orders were publicly revealed.

The government’s argument also ignores the fact that, in certain (albeit limited) instances, the statute does indeed contemplate disclosure. If a judge finds that “there is no reason to believe that disclosure may endanger the

national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person,” he may grant a petition to modify or set aside a nondisclosure order. 50 U.S.C. § 1861(f)(2)(C)(i). Such a petition could presumably only be brought by a § 215 order recipient, because only the recipient, not the target, would know of the order before such disclosure. But this provision indicates that Congress did not expect that all § 215 orders would remain secret indefinitely and that, by providing for such secrecy, Congress did not intend to preclude targets of § 215 orders, should they happen to learn of them, from bringing suit.

(2) Statutory Scheme

The government also relies heavily on Block in arguing that the statutory scheme as a whole implicitly precludes judicial review. In Block, the Supreme Court considered whether consumers of milk could obtain judicial review of milk market orders, which are issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937 ("AMAA"), codified as amended at 7 U.S.C. § 601 et seq. Those orders set the minimum prices that milk processors (also known as “handlers”) must pay to milk producers. The Court held that, in the context of that statute, the statute’s silence as to the ability of milk consumers to challenge milk market orders was sufficient to imply that Congress intended that they be precluded from doing so. 467 U.S. at 347. The government would have us view § 215 as a similarly complex administrative scheme that would clearly be disrupted should targets of the orders be permitted judicial review of them.

But the AMAA and the Court’s decision in Block are distinguishable from this case. First, the Court in Block, and in its decisions since Block, has made much of whether a statute has administrative review requirements that would be end-run if the APA provided for ordinary judicial review. In Block, for example, the Court noted that, for a milk market order to become effective, the AMAA requires that: (1) the Secretary of Agriculture conduct a rulemaking proceeding before issuing a milk market order; (2) the public be notified of the proceeding and given an opportunity for comment; (3) a public hearing be held, in which (4) the evidence offered shows that the order will further the statute’s policy; and (5) certain percentages of milk handlers and producers vote in favor of the orders. See id. at 342.
Such a scheme is a far cry from what is contemplated by § 215. Section 215 contains no administrative review requirements that would be "end run" if targets of the orders were allowed to obtain judicial review thereof. Indeed, the only express mechanism for any review at all of § 215 orders is via judicial review—albeit by the FISC, rather than a federal district court.

Unlike the ACAA, § 215 in no way contemplates a "cooperative venture" that precedes the issuance of orders. Id. at 346. In Block, the Court pointed out that the statute provided for milk handlers and producers—and not consumers—to participate in the adoption of the market orders. See id. Those parties, according to the Court, were the ones who could obtain review of the orders, not the consumers, whom Congress had excluded from the entire process. Section 215, in contrast, does not contemplate ex ante cooperation between, for example, telephone companies and the government in deciding how production orders should be crafted and whether they should be approved. To the contrary, under § 215, the government unilaterally crafts orders that may then be approved or not by the FISC. Unlike in the case of the ACAA, there is no indication that Congress, in drafting § 215, intended that the phone companies be the only party entitled to obtain judicial review of the orders by providing for them to otherwise participate in the order-issuing process.

Block is further distinguishable because the Court there emphasized the fact that “[h]andlers have[d] interests similar to those of consumers” and could “therefore be expected to challenge unlawful agency action.” Id. at 352. Here, in contrast, the interests and incentives of the recipients of § 215 orders are quite different from those of the orders’ targets. As appellants point out, telecommunications companies have little incentive to challenge § 215 orders—first, because they are unlikely to want to antagonize the government, and second, because the statute shields them from any liability arising from their compliance with a § 215 order. See 50 U.S.C. § 1861(c). Any interests that they do have are distinct from those of their customers. The telephone service providers’ primary interest would be the expense or burden of complying with the orders; only the customers have a direct interest in the privacy of information revealed in their telephone records.

Indeed, courts since Block have interpreted this factor—whether Congress has extended a cause of action to a party whose interests are aligned with those of a party seeking to sue—as critical to the heavily fact-bound Block decision.

The D.C. Circuit has noted that "some discussion in Block... sweep[s] broadly" but has concluded that, for example, the ACAA does not preclude milk producers (as opposed to consumers) from obtaining judicial review of market orders, in part because “[u]nlike the consumers whose interests were coextensive with those of handlers in Block, the producers are the only party with an interest in ensuring that the price paid them is not reduced by too large an amount paid to handlers.” Ark. Dairy Coo-op Ass’n v. U.S. Dept. of Agric., 573 F.3d 815, 823 (D.C. Cir. 2009) (internal citation omitted). In other words, whether a party with aligned interests can obtain judicial review is an important consideration in interpreting and applying Block.

(3) Legislative History

Finally, the legislative history of the provision for challenging § 215 orders further supports appellants’ argument that Congress did not intend to preclude targets of the orders from bringing suit. Appellants point out that the amendment to § 215 that provided for judicial review of § 215 orders in the FISC was passed in response to Doe v. Ashcroft, 334 F. Supp. 2d 471 (D.D.C. 2004), vacated in part sub nom. Doe v. Gonzales, 449 F.3d 415 (D.C. Cir. 2006). At the same time it added the judicial review provision in § 215, Congress passed a provision for judicial review in the context of National Security Letters ("NSLs")—a form of administrative subpoenas used to gather communications and records in national security matters. That subsection was added to address the court’s concerns in Doe that 18 U.S.C. § 2709, pursuant to which NSLs are issued, "effectively bar[red] or substantially deter[red] any judicial challenge to the propriety of an NSL request." Doe, 334 F. Supp. 2d at 475. Congress’s primary purpose in adopting both of these provisions was apparently to clarify that judicial review is available to recipients of NSLs and § 215 orders—not to preclude review at the behest of the targets of orders. In fact, in Doe, the government argued that the NSL statute already implicitly provided for judicial review. See id. at 492–93. The amendment, therefore, only "clarified[] that a FISA 215 order may be challenged and that a recipient of a 215 order may consult with the lawyer and the appropriate people necessary to respond to the order." H.R. Rep. No. 109-174, pt. 1, at 106 (statement of Chairman Sensenbrenner)—both concerns raised by the district court in Doe with respect to NSLs. The amendment was a clarification of the judicial review provision that already implicitly existed; in thus clarifying, it did not affirmatively take away a right to judicial review from another category of individuals not mentioned in the statute.
The government argues that Congress “specifically considered, and rejected, an amendment that would have allowed Section 215 orders to be challenged not only in the FISC, but also in district court.” Appellees’ Br. 29. But that is an oversimplification of the sequence of events relating to an amendment proposed by Representative Nadler. First, the proposed amendment encompassed more than the issue of judicial review. The amendment primarily proposed a more rigorous standard for obtaining orders under § 215 than existed at the time, and the bulk of the debate on the amendment concerned what degree of suspicion should be required for issuance of a § 215 order. See H.R. Rep. No. 109-174, pt. 1, at 128-32, 135 (2005). Second, the amendment proposed judicial review in a district court by the recipients of § 215 orders—a category of persons already granted an avenue of review under § 215, through the FISC process. Id. at 128, 134. It did not address—again, presumably because Congress did not have reason to consider the question at that point—whether a person whose records were seized as a result of such an order would be able, upon learning of the order, to challenge it in district court. Indeed, Representative Nadler specifically noted that his amendment did not grant judicial review at the behest of the “target” of a § 215 order because such a target “doesn’t know about” the order. See id. at 128 (statement of Rep. Nadler) (“It doesn’t give the target of the order the ability to go to court. He doesn’t know about it.”); id. at 134 (statement of Rep. Nadler) (“The fact is that . . . the target of the investigation never hears about this.”).

As Justice Scalia has reminded us, moreover, we should exercise caution in relying on this type of legislative history in attempting to discern Congress’s intent, because it is so often “impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the only remnant of ‘history’ that bears the unambiguous endorsement of the majority in each House: the text of the enrolled bill that became law.” Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 599 U.S. 280, 302 (2010) (Scalia, J., concurring) (emphasis in original). Congress’s rejection of the Nadler amendment cannot reliably be interpreted as a specific rejection of the opportunity for a § 215 target to obtain judicial review, under the APA or otherwise.

Finally, the government argues that Congress must have intended to preclude judicial review of § 215 orders, because if any customer of a company that receives a § 215 order may challenge such an order, lawsuits could be filed by a vast number of potential plaintiffs, thus “severely disrupting[ ] the sensitive field of intelligence gathering for counter-terrorism efforts.” Appellees’ Br. 30 (internal quotation marks omitted).

That argument, however, depends on the government’s argument on the merits that bulk metadata collection was contemplated by Congress and authorized by § 215. The risk of massive numbers of lawsuits challenging the same orders, and thus risking inconsistent outcomes and confusion about the legality of the program, occurs only in connection with the existence of orders authorizing the collection of data from millions of people. Orders targeting limited numbers of persons under investigation could be challenged only by the individuals targeted—who, it was expected, would never learn of the orders in the first place. It is only in connection with the government’s expansive use of § 215 (which, as will be seen below, was not contemplated by Congress) that these risks would create concern.

In any event, restricting judicial review of the legality of § 215 orders under the statute itself would do little to eliminate the specter of duplicative lawsuits challenging orders like the one at issue here. The government does not contend that those whose records are collected pursuant to § 215, assuming they have established standing, are somehow precluded from bringing constitutional challenges to those orders. The government would thus attribute to Congress a proclination of statutory challenges that would not eliminate the supposed dangers of duplicative lawsuits, while channeling those lawsuits toward constitutional issues.

Such an outcome would be anomalous. It would fly in the face of the doctrine of constitutional avoidance, which “allows courts to avoid the decision of constitutional questions” by providing “a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.” Clark v. Martinez, 543 U.S. 371, 381 (2005) (emphasis in original). In contrast, the approach professed by the government would preclude lawsuits challenging the legality of § 215 on statutory grounds, while leaving open the path to review of § 215 under the Constitution. While constitutional avoidance is a judicial doctrine, the principle should have considerable appeal to Congress: it would seem odd that Congress would preclude challenges to executive actions that allegedly violate Congress’s own commands, and thereby channel the complaints of those aggrieved by such actions into constitutional
challenges that threaten Congress’ own authority. There may be arguments in favor of such an unlikely schema, but it cannot be said that any such reasons are so potent and indisputable that Congress can be assumed, in the face of the strong presumption in favor of APA review, to have adopted them without having said a word about them.

B. Section 2712 and Implied Preclusion

The other potentially relevant exception to the APA’s waiver of sovereign immunity looks to whether “any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.” 5 U.S.C. § 702 (emphasis added).

The government urges that 18 U.S.C. § 2712, passed in the same statute that contained § 215, is just such a statute. granting as it does a private right of action for money damages against the United States for violations of the Wiretap Act, the Stored Communications Act, and three particular FISA provisions that concern electronic surveillance, physical searches, and pen registers or trap and trace devices (but not § 215). See 18 U.S.C. § 2712(a); see also 30 U.S.C. §§ 1806(a), 1825(a), 1845(a). Section 2712 withdrew the general right to sue the United States under the Wiretap Act and the Stored Communications Act at the same time it added a right of action for money damages. Importantly, it also stated that

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hold here, that some general similarity of subject matter can alone trigger a remedial statute’s preclusive effect.” Id. The “exclusive remedy” provision applies only to claims within the purview of the remedial section, which does not cover all of FISA but rather specifies those FISA provisions to which it applies. Had Congress intended § 2712’s exclusive right of action (and its preclusion of other remedies) to extend to § 215, it is fair to assume that it would have also enumerated that section—particularly considering the fact that both provisions were passed in the same statute.

Section 2712, moreover, explicitly withdraws the right to challenge the specific government actions taken under specific authorization, in connection with extending an explicit cause of action for monetary damages in connection with such actions. First, § 2712 shows that the Congress that enacted the PATRIOT Act understood very well how to withdraw the right to sue under the APA, and to create an exclusive remedy, when it wished to do so. Second, § 2712 manifestly does not create a cause of action for damages for violations of § 215, as it does with respect to those statutes of which it does preclude review under the APA.

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“Any action against the United States under this subsection shall be the exclusive remedy against the United States for any claims within the purview of this section.” 18 U.S.C. § 2712(d). According to the government, such provisions demonstrate that, where Congress did intend to allow a private right of action for violations of FISA, it did so expressly.

That the provision extending a right of action makes no mention of § 215, however, supports appellants’ argument, not the government’s. To be sure, “[w]hen Congress has dealt in particularity with a claim and [has] intended a specified remedy . . . to be exclusive, that is the end of the matter; the APA does not undo the judgment.” Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak, 132 S. Ct. 2199, 2205 (2012) (second alteration in original) (internal quotation marks omitted). But § 2712 does not deal “in particularity” with § 215. Instead, the government would have us conclude “that in authorizing one person to bring one kind of suit seeking one form of relief, Congress barred another person from bringing another kind of suit seeking another form of relief.” Id. at 2209. Section 2712 makes no mention whatsoever of claims under § 215, either to permit them or to preclude them, and, as the Supreme Court stated in Patchak, “[w]e have never held, and see no cause to
withdraw rights granted in a generally applicable, explicit statute such as the APA.

Accordingly, we disagree with the district court insofar as it held that appellants here are precluded from bringing suit against the government, and hold that appellants have a right of action under the APA. We therefore proceed to the merits of the case.

III. Statutory Authorization

Although appellants vigorously argue that the telephone metadata program violates their rights under the Fourth Amendment to the Constitution, and therefore cannot be authorized by either the Executive or the Legislative Branch of government, or by both acting together, their initial argument is that the program simply has not been authorized by the legislation on which the government relies for the issuance of the orders to service providers to collect and turn over the metadata at issue. We naturally turn first to that argument.

Section 215 clearly sweeps broadly in an effort to provide the government with essential tools to investigate and forestall acts of terrorism. The statute permits the government to apply for “an order requiring the production of any tangible things . . . for an investigation . . . to protect against international terrorism or clandestine intelligence activities.” 50 U.S.C. § 1861(a)(1) (emphasis added). A § 215 order may require the production of anything that “can be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation” or any other court order. Id. § 1861(c)(2)(D).

While the types of “tangible things” subject to such an order would appear essentially unlimited, such “things” may only be produced upon a specified factual showing by the government. To obtain a § 215 order, the government must provide the FISC with “a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) conducted [under guidelines approved by the Attorney General].” Id. § 1861(b)(2)(A); see id. § 1861(a)(2) (requiring that investigations making use of such orders be conducted under guidelines approved by the Attorney General). The basic requirements for metadata collection under § 215, then, are simply that the records be relevant to an authorized investigation (other than a threat assessment).

For all the complexity of the statutory framework, the parties’ respective positions are relatively simple and straightforward. The government emphasizes that “relevance” is an extremely generous standard, particularly in the context of realized that “it was time to apply to terrorism many of the same kinds of techniques in law enforcement authorities that we already deemed very useful in investigating other kinds of crimes. Our idea was, if it is good enough to investigate money laundering or drug dealing, for example, we sure ought to use those same kinds of techniques to fight terrorists.” 152 Cong. Rec. S1607 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl). He also remarked that “[r]elevance is a simple and well established standard of law. Indeed, it is the standard for obtaining every other kind of subpoena, including administrative subpoenas, grand jury subpoenas, and civil discovery orders.” Id. at S1606. And it is well established that “where Congress borrows terms of art . . . it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.” Morissette v. United States, 342 U.S. 246, 250 (1952).

So much, indeed, seems to us unexceptionable. In adopting § 215, Congress intended to give the government, on the approval of the FISC, broad-ranging investigative powers analogous to those traditionally used in connection with grand jury investigations into possible criminal behavior.
The government then points out that, under the accepted standard of relevance in the context of grand jury subpoenas, "courts have authorized discovery of large volumes of information where the requester seeks to identify within that volume smaller amounts of information that could directly bear on the matter." Appellants' Br. 31. The government asks us to conclude that it is "eminently reasonable to believe that Section 215 bulk telephony metadata is relevant to counterterrorism investigations." Id. at 32. Appellants, however, dispute that metadata from every phone call with a party in the United States, over a period of years and years, can be considered "relevant to an authorized investigation," by any definition of the term.

The very terms in which this litigation has been conducted by both sides suggest that the matter is not as routine as the government's argument suggests. Normally, the question of whether records demanded by a subpoena or other court order are "relevant" to a proceeding is raised in the context of a motion to quash a subpoena. The grand jury undertakes to investigate a particular subject matter to determine whether there is probable cause to believe crimes have been committed, and seeks by subpoena records that might contain evidence that will help in making that determination.4 Given the wide investigative scope of a grand jury, the standard is easy to meet, but the determination of relevance is constrained by the subject of the investigation. In resolving a motion to quash, a court compares the records demanded by the particular subpoena with the subject matter of the investigation, however broadly defined.

Here, however, the parties have not undertaken to debate whether the records required by the orders or question are relevant to any particular inquiry. The records demanded are all-encompassing; the government does not even suggest that all of the records sought, or even necessarily any of them, are relevant to any specific defined inquiry. Rather, the parties ask the Court to decide whether § 215 authorizes the "creation of a historical repository of information that bulk aggregation of the metadata allows," Appellants' Br. 32, because bulk collection to create such a repository is "necessary to the application

5 Although subpoenas may be used in aid of other court proceedings, we take the grand jury to our example because the powers of the grand jury are particularly wide-ranging, and the standard of relevance or materiality of information sought is much more relaxed than, for example, in a trial, where to be relevant evidence must tend to make a fact "of consequence in determining the action," Fed. R. Evid. 401(b). "More or less probable than it would be without the evidence," id. 401(e).

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of certain analytic techniques," Appellants' Br. 23. That is not the language in which grand jury subpoenas are traditionally discussed.

Thus, the government takes the position that the metadata collected—a vast amount of which does not contain directly "relevant" information, as the government concedes—are nevertheless "relevant" because they may allow the NSA, at some unknown time in the future, utilizing its ability to sift through the trove of irrelevant data it has collected up to that point, to identify information that is relevant.5 We agree with appellants that such an expansive concept of "relevance" is unprecedented and unwarranted.

The statutes to which the government points have never been interpreted to authorize anything approaching the breadth of the sweeping surveillance at issue here.6 The government admitted below that the case law in analogous

Section 215 lists three factors that would render a tangible thing sought "presumptively relevant" to an authorized investigation, see 50 U.S.C. § 1861(b)(2)(A), but the records of ordinary telephone company customers' phone calls do not fall within any of those descriptions.

4 A recently disclosed, now discontinued program under which the Drug Enforcement Administration utilized administrative subpoenas obtained pursuant to 21 U.S.C. § 806 to collect and maintain a telephone metadata database may have demanded an interpretation approaching the breadth of the government's interpretation of similar language here. See ECF No. 159 (Appellants' Fed. R. App. P. 28(i) letter); ECF No. 161 (Appellees' Fed. R. App. P.

\[ 28(i) \text{ letter}. \) That program, which, according to both parties, has been discontinued, is not being challenged here, and we therefore need not opine as to whether the language of the statute pursuant to which the metadata were collected authorized that program.
under investigation, and cover particular time periods when the events under investigation occurred. The orders at issue here contain no such limits. The metadata concerning every telephone call made or received in the United States using the services of the recipient service provider are demanded, for an indefinite period extending into the future. The records demanded are not those of suspects under investigation, or of people or businesses that have contact with such subjects, or of people or businesses that have contact with others who are in contact with the subjects – they extend to every record that exists, and indeed to records that do not yet exist, as they impose a continuing obligation on the recipient of the subpoena to provide such records on an ongoing basis as they are created. The government can point to no grand jury subpoena that is remotely comparable to the real-time data collection undertaken under this program.

Nevertheless, the government emphasizes the permissive standards applied to subpoenas, noting that, at least in the context of grand jury subpoenas, motions to quash on relevancy grounds are “denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury’s investigation.” United States v. P. Enters., Inc., 498 U.S. 292, 301 (1991). That is because such subpoenas “are customarily employed to gather information and make it available to the investigative team of agents and prosecutors so that it can be digested and sifted for pertinent matters” and are therefore “often drawn broadly, sweeping up both documents that may prove decisive and documents that turn out not to be.” United States v. Triumph Capital Grp., 544 F.3d 149, 168 (2d Cir. 2008).

In that vein, the government points to cases in which courts have upheld subpoenas for broad categories of information and for “large-scale collection[s] of information.” Appellants’ Br. 33 (internal quotation marks omitted). For example, in In re Grand Jury Proceedings: Subpoenas Duces Tecum, 827 F.2d 301 (8th Cir. 1987), the Eighth Circuit denied Western Union’s motion to quash a subpoena that requested production by Western Union’s primary wire service agent in Kansas City of all money order applications for amounts over $1,000 over a more than two-year period, and of a report summarizing all wire transactions it conducted over an approximate one-year period. Despite Western Union’s argument that the subpoena would sweep in “records involving hundreds of innocent people,” the court stated that grand juries are not necessarily prohibited from engaging in “dragnet operations.” Id. at 305 (internal quotation marks omitted).

turn over records on an “ongoing daily basis” – with no foreseeable end point, no requirement of relevance to any particular set of facts, and no limitations as to subject matter or individuals covered. Even in the Eighth Circuit case that the government cites, moreover, although it upheld the subpoena at issue, the Eighth Circuit suggested that the district court “consider the extent to which the government would be able to identify in advance . . . patterns or characteristics that would raise suspicion . . . designed to focus on illegal activity without taking in an unnecessary amount of irrelevant material.” In re Grand Jury Proceedings: Subpoenas Duces Tecum, 827 F.2d at 305-06. Courts have typically looked to constrain even grand jury subpoenas to a standard of reasonableness related to a defined investigative scope; we have found excessively broad a subpoena requiring production of all of an accountant’s files within a mere three filing
cabinets, "without any attempt to define classes of potentially relevant documents or any limitations as to subject matter or time period," because it swept in papers that there was no reason to believe were relevant. In re Horowitz, 482 F.2d 72, 79 (2d Cir. 1973). We therefore limited the subpoena's time period absent the government's making a minimal showing of relevance. Id. at 79-80.

To the extent that §215 was intended to give the government, as Senator Kyl proposed, the "same kinds of techniques to fight terrorists" that it has available to fight ordinary crimes such as "money laundering or drug dealing," 152 Cong. Rec. S1607 (daily ed. Mar. 3, 2006) (statement of Sen. Kyl), the analogy is not helpful to the government's position here. The techniques traditionally used to combat such ordinary crimes have not included the collection, via grand jury subpoena, of a vast trove of records of metadata concerning the financial transactions or telephone calls of ordinary Americans to be held in reserve in a database, to be searched if and when at some hypothetical future time the records might become relevant to a criminal investigation.

The government's emphasis on the potential breadth of the term "relevant," moreover, ignores other portions of the text of §215. "Relevance"

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conducted by the FBI . . . to protect against international terrorism," see e.g., 2006 Primary Order at 2; joint App'x 127, 317, merely echoing the language of the statute. The PCLOB report explains that the government's practice is to list in §215 applications multiple terrorist organizations, and to declare that the records being sought are relevant to the investigations of all of those groups. PCLOB Report 59. As the report puts it, that practice is "little different, in practical terms, from simply declaring that they are relevant to counterterrorism in general. . . . At its core, the approach boils down to the proposition that essentially all telephone records are relevant to essentially all international terrorism investigations." Id. at 59-60. Put another way, the government effectively argues that there is only one enormous "anti-terrorism" investigation, and that any records that might ever be of use in developing any aspect of that investigation are relevant to the overall counterterrorism effort.

The government's approach essentially reads the "authorized investigation" language out of the statute. Indeed, the government's information-gathering under the telephone metadata program is inconsistent with the very concept of an "investigation." To "investigate" something, according to the Oxford English Dictionary, is "[t]o search or inquire into; to examine (a matter) systematically or in detail; to make an inquiry or examination into." 8 Oxford English Dictionary 47 (2d ed. 2001). Section 215's language thus contemplates the specificity of a particular investigation — not the general counterterrorism intelligence efforts of the United States government. But the records in question here are not sought, at least in the first instance, because the government plans to examine them in connection with a "systematic examination" of anything at all; the records are simply stored and kept in reserve until such time as some particular investigation, in the sense in which that word is traditionally used in connection with legislative, administrative, or criminal inquiries, is undertaken. Only at that point are any of the stored records examined. The records sought are not even asserted to be relevant to any ongoing "systematic examination" of any particular suspect, incident, or group; they are relevant, in the government's view, because there might at some future point be a need or desire to search them in connection with a hypothetical future inquiry.

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The term "investigation" is similarly defined as "[t]he action of investigating; the making of a search or inquiry; systematic examination; careful and minute research." 8 Oxford English Dictionary 47 (2d ed. 2001).
The government’s approach also needs to be consistent with the statute’s language. The government cannot simply produce records when the government shows that the records are “relevant to an authorized investigation (other than a threat assessment).” 50 U.S.C. § 1861(b)(2)(A) (emphasis added). The legislative history tells us little or nothing about the meaning of “threat assessment.” The Attorney General’s Guidelines for Domestic FBI Operations, however, tell us somewhat more. The Guidelines divide the category of “investigations and intelligence gathering” into three subclasses: assessments, predicated investigations (both preliminary and full), and enterprise investigations. See Attorney General’s Guidelines for Domestic FBI Operations 16-18 (2008).

Assessments are distinguished from investigations in that they may be initiated without any factual predicate. Id. at 17. The Guidelines cite the objective of preventing the commission of terrorist acts against the nation as an example of a proper assessment objective, stating that the FBI “must proactively draw on available sources of information to identify terrorist threats and activities.” Id. at 18. The methods used in assessments “generally those of relatively low

intrusiveness, such as obtaining publicly available information, checking government records, and requesting information from members of the public.” Id. at 17-18. Because of that low level of intrusiveness, the Guidelines do not require supervisory approval for assessments, although FBI policy may require it in particular cases, depending on the assessment’s purpose and the methods being used. Id. at 18.

The FBI Domestic Investigations and Operations Guide elaborates on this scheme. It too provides that threat assessments “do not require a particular factual predicate but do require an authorized purpose and clearly defined objective(s).” Assessments may be carried out to detect, obtain information about, or prevent or protect against Federal crimes or threats to the national security or to collect foreign intelligence.” FBI Domestic Investigations and Operations Guide § 5.1 (2011).

In limiting the use of § 215 to “investigations” rather than “threat assessments,” then, Congress clearly meant to prevent § 215 orders from being issued where the FBI, without any particular, defined information that would permit the initiation of even a preliminary investigation, sought to conduct an inquiry in order to identify a potential threat in advance. The telephone metadata program, however, and the orders sought in furtherance of it, are even more remote from a concrete investigation than the threat assessments that – however important they undoubtedly are in maintaining an alertness to possible threats to national security – Congress found not to warrant the use of § 215 orders. After all, when conducting a threat assessment, FBI agents must have both a reason to conduct the inquiry and an articulable connection between the particular inquiry being made and the information being sought. The telephone metadata program, by contrast, seeks to compile data in advance of the need to conduct any inquiry (or even to examine the data), and is based on no evidence of any current connection between the data being sought and any existing inquiry.

We agree with the PCLCB, which concluded that the government’s rationale for the “relevance” of the bulk collection of telephone metadata “undermines” the prohibition on using § 215 orders for threat assessments.
governing the program limit the use of telephone records to searches that are prompted by a specific investigation, the relevance requirement in Section 215 restricts the acquisition of records by the government. 

PCLCB Report 60 (emphasis in original) (footnote omitted).16

The interpretation urged by the government would require a drastic expansion of the term “relevance,” not only with respect to § 215, but also as that term is construed for purposes of subpoenas, and of a number of national security-related statutes, to sweep further than those statutes have ever been thought to reach. For example, the same language is used in 18 U.S.C. § 2709(b)(1) and 20 U.S.C. § 1232g(j)(1)(A), which authorize, respectively, the compelled production of telephone toll-billing and educational records relevant to authorized investigations related to terrorism. There is no

16 The government also argues that, aside from their relevance to the subject matter of counterterrorism, the telephone metadata records are relevant to authorized investigations in that they are necessary for the government to apply certain investigative techniques here, searching based on “selectors” through the government’s metadata repository. That argument proves too much. If information can be deemed relevant solely because of its necessity to a particular process that the government has chosen to employ, regardless of its subject matter, then so long as “the government develops an effective means of searching through everything in order to find something . . . everything becomes relevant to its investigations”—and the government’s “technological capacity to ingest information and sift through it efficiently” would be the only limit to what is relevant. PCLCB Report 62 (emphasis in original).

language of the statute, on its face, is not naturally read as permitting investigative agencies, on the approval of the FISC, to do any more than obtain the sorts of information routinely acquired in the course of criminal investigations of “money laundering and/or drug dealing.”

We conclude that to allow the government to collect phone records only because they may become relevant to a possible authorized investigation in the future fails even the permissive “relevance” test. Just as “the grand jury’s subpoena power is not unlimited,” United States v. Calandra, 414 U.S. 338, 346 (1974), § 215’s power cannot be interpreted in a way that defies any meaningful limit. Put another way, we agree with appellants that the government’s argument is “irreconcilable with the statute’s plain text.” Appellants’ Br. 26.

Such a monumental shift in our approach to combating terrorism requires a clearer signal from Congress than a recycling of oft-used language long held in similar contexts to mean something far narrower. “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not . . . hide elephants in mouseholes.” Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 468 (2001). The language of § 215 is decidedly too ordinary for what the government would have us believe is such an extraordinary departure from any accepted understanding of the term “relevant to an authorized investigation.”

Finally, as it did with respect to the question of judicial review, the government again resorts to the claim that if Congress did not explicitly adopt the rule for which it argues, it did so implicitly. Here, the government argues that Congress has ratified the FISC’s interpretation of § 215, and thus the telephone metadata program, by reauthorizing § 215 in 2010 and 2011. We reject that argument.

First, the theory of congressional ratification of judicial interpretations of a statute by reenactment cannot overcome the plain meaning of a statute. “Where the law is plain, subsequent ratification does not constitute an adoption of a previous administrative construction.” Demaret v. Manipalak, 498 U.S. 184, 603 (1991).

Second, although “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change,” Lorillard v. Pons, 434 U.S. 575, 580 (1978), there are limits to that presumption — particularly where, as here, knowledge of the program was intentionally kept to a minimum, both within Congress and among
the public. We have said that, at least in the case of an administrative
interpretation of a statute, for the doctrine of legislative ratification to apply, we
must first "ascertain whether Congress has spoken clearly enough to constitute
acceptance and approval of an administrative interpretation. Mere reenactment
is insufficient." In Reis v. Bowen, 865 F.2d 468, 473 (D.C. Cir. 1989). In Atkins v.
Parker, the Supreme Court applied the doctrine of legislative ratification where
"Congress was . . . well aware of, and legislated on the basis
of, . . . contemporaneous administrative practice," concluding that it therefore
"must be presumed to have intended to maintain that practice absent some clear
indication to the contrary." 472 U.S. 115, 140 (1985). In contrast, in a situation in
which "there [was] nothing to indicate that [the interpretation of a regulation]
was ever called to the attention of Congress," and the statute's reenactment "was
not accompanied by any congressional discussion which throws light on its
intended scope," the Court has "consider[ed] the . . . re-enactment to be without
significance." United States v. Calamari, 345 U.S. 351, 359 (1954); see also
Comm'r v. Chloraseptic Glass Co., 348 U.S. 426, 431 (1955) ("Re-enactment of a
statute—particularly without the slightest affirmative indication that Congress
ever had a particular decision before it—is an unreliable indicium at best.").

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Third, as the above precedents suggest, the public nature of an
interpretation plays an important role in applying the doctrine of legislative
ratification. The Supreme Court has stated that "[w]here an agency's statutory
construction has been fully brought to the attention of the public and the
Congress, and the latter has not sought to alter that interpretation although it has
amended the statute in other respects, then presumably the legislative intent has
been correctly discerned." North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535
(1982) (internal quotation marks omitted); see also United States v. Chapman, 947
F.2d 551, 560 (2d Cir. 1991). Congressional inaction is already a tenuous basis
upon which to infer much at all even where a court's or agency's interpretation
is fully accessible to the public and to all members of Congress, who can discuss
and debate the matter among themselves and with their constituents. But here,
far from the ordinary publicity accessible judicial or administrative opinions that
the presumption contemplates, no FISC opinions authorizing the program were
made public prior to 2013—well after the two occasions of reauthorization upon
which the government relies, and despite the fact that the FISC first authorized
the program in 2006.

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Congress cannot reasonably be said to have ratified a program of which
many members of Congress—and all members of the public—were not aware. In
2010, the Senate and House Intelligence Committees requested that the Executive
Branch provide all members of Congress access to information about the
program before the reauthorization vote. In response, the Executive Branch
provided the Intelligence Committee chairs with a classified paper on the
program, which was then made available to members of Congress. That
availability, however, was limited in a number of ways. First, the briefing papers
could only be viewed in secure locations, for a limited time period and under a
number of restrictions. See Joint App'x 146-165. The government does not
dispute appellants' assertion that members of Congress could not bring staff with
them when they went to read the briefing papers, nor discuss the program with
their staff. And, of course, no public debate on the program took place. In 2011,
briefing papers were also provided to the Intelligence Committees, but only the
Senate Committee shared the papers with other members of that body who were
not committee members. The House Intelligence Committee did not share the
papers at all with non-members, leaving the non-committee Representatives in

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the dark as to the program. See generally id. at 170-73; see also Clapper, 959 F.
Supp. 2d at 745.

To be sure, the government is correct that whether a particular
interpretation was legislatively ratified ordinarily should not depend on the
"number of legislators with actual knowledge of the government's
interpretation." Appellees' Br. 36. We do not insist, in the ordinary case, on
evidence that members of Congress actually read and understood administrative
or judicial decisions interpreting a statute to apply the doctrine of ratification.
But this is far from the ordinary case. In the ordinary case in which we apply the
Lorillard presumption, the administrative or judicial interpretation argued to
have been ratified by Congress was available to the public in published sources.
Concerned citizens and interest groups had every opportunity to bring
interpretations that they believed were incorrect or undesirable to the attention of
their representatives in the House and Senate, and to lobby for legislation
rejecting those interpretations. To the extent that some members of Congress
were unaware of the details of those interpretations, their ignorance itself very
likely reflected the absence of any particular controversy surrounding them.

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In sharp contrast, the telephone metadata program was (for understandable reasons) shrouded in the secrecy applicable to classified information, and only a limited subset of members of Congress had a comprehensive understanding of the program or its purported legal bases.

There was certainly no opportunity for broad discussion in the Congress or among the public of whether the FISC’s interpretation of § 215 was correct.10 Finding the government’s interpretation of the statute to have been “legislatively ratified” under these circumstances would ignore reality. Practically speaking, it is a far stretch to say that Congress was aware of the FISC’s legal interpretation of § 215 when it reauthorized the statute in 2010 and 2011. We therefore cannot accept the argument that Congress, by reauthorizing § 215 without change in 2010 and 2011, thereby legislatively ratified the interpretation of § 215 urged by the government. The widespread controversy that developed, in and out of Congress, upon the public disclosure of the program makes clear that this is not a situation in which Congress quietly but knowingly adopted the FISC’s interpretation of § 215 because there was no real opposition to that interpretation.

For all of the above reasons, we hold that the text of § 215 cannot bear the weight the government asks us to assign to it, and that it does not authorize the telephone metadata program. We do so comfortably in the full understanding that if Congress chooses to authorize such a far-reaching and unprecedented program, it has every opportunity to do so, and to do so unambiguously. Until such time as it does so, however, we decline to deviate from widely accepted interpretations of well-established legal standards. We therefore disagree with the district court insofar as it held that appellants’ statutory claims failed on the merits, and vacate its judgment dismissing the complaint.

IV. Constitutional Claims

In addition to arguing that the telephone metadata program is not authorized by § 215, appellants argue that, even if the program is authorized by statute, it violates their rights under the Fourth and First Amendments to the Constitution. The Fourth Amendment claim, in particular, presents potentially vexing issues.11

Appellants contend that the seizure from their telephone service providers, and eventual search, of records of the metadata relating to their telephone communications violates their expectations of privacy under the Fourth Amendment in the absence of a search warrant based on probable cause to believe that evidence of criminal conduct will be found in the records. The government responds that the warrant and probable cause requirements of the Fourth Amendment are not implicated because appellants have no privacy rights in the records. This dispute touches an issue on which the Supreme Court’s jurisprudence is in some turmoil.

10 For that reason, we discuss infra some of the Fourth Amendment concerns that the program implicates. As to the First Amendment issues, appellants argue that the program infringes their First Amendment associational privacy and free speech rights, "substantially impair[ing]" those rights by "exposing[ing]" their telephonic associations to government monitoring and scrutiny.” Appellants’ Br. 53. They contend that the program must therefore survive “exacting scrutiny.” Id. at 58. The government responds, as to the merits of appellants’ First Amendment claim, that any such burdens are merely "incidental." Appellants’ Br. 54. As noted infra, because we find that the telephone metadata program exceeds the bounds of what is authorized by § 215, we need not reach either constitutional issue, and we see no reason to discuss the First Amendment claims in greater depth.
search for Fourth Amendment purposes because by placing calls, individuals expose the telephone numbers they dial to the telephone company and therefore "assume[ ] the risk that the company [may] reveal to police the numbers . . . dialled." Id. at 744. Similarly, it has long been commonplace for grand juries to subpoena an individual's telephone records from the individual's telephone service provider, in the absence of probable cause or a warrant issued by a judge. The acquisition of such records, it has been held, implicates no legitimate privacy interest of the subscriber, because the records are not his or hers alone. See, e.g., id. at 742-44; Crouch v. United States, 409 U.S. 322, 334-36 (1973). The subscriber cannot reasonably believe that the records are private, because he or she has voluntarily exposed the information contained in them to the telephone company, which uses them for its own business purpose of billing the subscriber.

The government argues, and the district court held, that this doctrine accords rejection of appellants' claim that the acquisition of telephone metadata (as opposed to the contents of communications) violates the Fourth Amendment, or even implicates its protections at all. Appellants respond that modern technology requires revisitation of the underpinnings of the third-party doctrine as applied to telephone metadata.

Appellants' argument invokes one of the most difficult issues in Fourth Amendment jurisprudence: the extent to which modern technology alters our traditional expectations of privacy. On the one hand, the very notion of an individual's expectation of privacy, considered in Katz, a key component of the rights protected by the Fourth Amendment, may seem quaint in a world in which technology makes it possible for individuals and businesses to say nothing of the government to observe acts of individuals once regarded as protected from public view. On the other hand, rules that permit the government to obtain records and other information that consumers have shared with businesses without a warrant seem much more threatening as the extent of such information grows.

Appellants point to the Supreme Court's decision in United States v. Jones, 132 S. Ct. 945 (2012), exemplifying the kind of challenge to apparently established law that they seek to bring. Jones does not address telephone or other business records, but arose in the somewhat analogous context of physical surveillance. Prior to Jones, in United States v. Knotts, 460 U.S. 276 (1983), in a

ruling based in substantial part on the core notion that an individual has no expectation of privacy in what he exposes to the eyes of third parties, the Court held that a person has no expectation of privacy in his public movements, because he "voluntarily convey[s] to anyone who want[s] to look the fact that he is traveling on particular roads, in a particular direction, the fact of whatever stops he makes[es], and the fact of his final destination." Id. at 281-82. The Court therefore ruled that, just as police agents may follow a suspect in public without a warrant or probable cause, the government's use of a beeper to follow a suspect without a warrant was constitutional; the beeper merely "augmented" the officers' normal sensory faculties, but did nothing that an individual otherwise monitoring the suspect could not do without it. Id. at 282. The Court noted, however, in response to concern about the potential for twenty-four-hour surveillance without judicial supervision, that "if . . . dragnet type law enforcement practices . . . should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." Id. at 284.

That opportunity came decades later, in Jones. In that case, the government had tracked an individual's location over the course of 28 days using a GPS tracking device it had attached to his vehicle without first obtaining a warrant. 132 S. Ct. at 948. The D.C. Circuit held that, because an individual does not expose his location to the public over the course of an entire month, either actually or constructively, the proper framework from which to analyze the operation was not a variation on the third-party doctrine but instead Katz's reasonable expectation of privacy standard. United States v. Maynard, 615 F.3d 544, 555-56 (D.C. Cir. 2010), abrogated on other grounds sub nom. Jones, 132 S. Ct. 945. It held that the defendant's expectation of privacy had been violated, because the long-term surveillance revealed a "menace" of information in which individuals had privacy interests, even in the absence of a privacy interest in discrete pieces of such information. Id. at 562-63.

The Supreme Court affirmed the D.C. Circuit's opinion, but on different grounds. It held that the operation was a search entitled to Fourth Amendment protection because the attachment of the GPS device constituted a technical trespass on the defendant's vehicle. Jones, 132 S. Ct. at 949-53. The Court's majority opinion declined to reach the issue of whether the operation would have passed Katz's "reasonableness" test, id. at 954, or whether the third-party doctrine instead applied, id. at 952.
As appellees note, however, five of the Justices appeared to suggest that there might be a Fourth Amendment violation even without the technical trespass upon which the majority opinion relied. Four of the Justices argued that the Court should have applied the Katz "reasonableness" test, and that the surveillance would not survive that test. Id. at 957-58, 964 (Alito, J., concurring). Justice Sotomayor noted in another concurring opinion that "the majority opinion's trespassory test may provide little guidance" for certain modern-day surveillance techniques, for which physical trespass is often not necessary. Id. at 955 (Sotomayor, J., concurring). Consequently, she observed that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties," noting that such an approach is "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." Id. at 957.

Appellants argue that the telephone metadata program provides an archetypal example of the kind of technologically advanced surveillance techniques that, they contend, require a revision of the third-party records doctrine. Metadata today, as applied to individual telephone subscribers, particularly with relation to mobile phone services and when collected on an ongoing basis with respect to all of an individual's calls (and not merely, as in traditional criminal investigations, for a limited period connected to the investigation of a particular crime), permit something akin to the 24-hour surveillance that worried some of the Court in *Jones*. Moreover, the bulk collection of data as to essentially the entire population of the United States, something inconceivable before the advent of high-speed computers, permits the development of a government database with a potential for invasions of privacy unimaginable in the past. Thus, appellants argue, the program cannot simply be sustained on the reasoning that permits the government to obtain, for a limited period of time as applied to persons suspected of wrongdoing, a simple record of the phone numbers contained in their service providers' billing records.

Because we conclude that the challenged program was not authorized by the statute on which the government bases its claim of legal authority, we need not and do not reach these weighty constitutional issues. The seriousness of the constitutional concerns, however, has some bearing on what we hold today, and on the consequences of that holding.

We note first that whether Congress has considered and authorized a program such as this one is not irrelevant to its constitutionality. The endorsement of the Legislative Branch of government provides some degree of comfort in the face of concerns about the reasonableness of the government's assertions of the necessity of the data collection. Congress is better positioned than the courts to understand and balance the intricacies and competing concerns involved in protecting our national security, and to pass judgment on the value of the telephone metadata program as a counterterrorism tool. Moreover, the legislative process has considerable advantages in developing knowledge about the far-reaching technological advances that render today's surveillance methods drastically different from what has existed in the past, and in understanding the consequences of a world in which individuals can barely function without involuntarily creating metadata that can reveal a great deal of information about them. A congressional judgment as to what is "reasonable" under current circumstances would carry weight—at least with us, and, we assume, with the Supreme Court as well—in assessing whether the availability of information to telephone companies, banks, internet service providers, and the like, and the ability of the government to collect and process volumes of such data that would previously have overwhelmed its capacity to make use of the information, render obsolete the third-party records doctrine or, conversely, reduce our expectations of privacy and make more intrusive techniques both expected and necessary to deal with new kinds of threats.

Finally, we are not unmindful that a full debate by Congress of the appropriateness of a program such as that now operated by the government may result in the approval of a program with greater safeguards for privacy, or with other limitations, that are not now in place and that could alter or even moot the issues presented by appellants. In the last Congress, for example, a bill to authorize a modified version of the telephone metadata program, supported by the Administration, passed the House of Representatives; a similar bill failed in the Senate after a majority of senators—"but not the required 60 to cut off debate—sought to bring the bill to a vote. See USA FREEDOM Act, H.R. 3361, 113th Cong. (2014); USA FREEDOM Act, S. 2685, 113th Cong. (2014). As noted above, more recently, on April 30, 2015, a modified version of the USA FREEDOM Act, which would limit the bulk metadata program in various ways, was passed by

We note that, at oral argument, appellants' counsel indicated that the adoption of certain measures would lead at least these appellants to withdraw their constitutional challenges.
the House Judiciary Committee, see USA FREEDOM Act of 2015, H.R. 2048, 114th Cong. (2015), and a vote in that Chamber is expected later this month. An identical bill has been introduced in the Senate and referred to the Senate Judiciary Committee. See USA FREEDOM Act of 2015, S. 1123, 114th Cong. (2015).

We reiterate that just as we do not here address the constitutionality of the program as it currently exists, we do not purport to express any view on the constitutionality of any alternative version of the program. The constitutional issues, however, are sufficiently daunting to remind us of the primary role that should be played by our elected representatives in deciding, explicitly and after full debate, whether such programs are appropriate and necessary. Ideally, such issues should be resolved by the courts only after such debate, with due respect for any conclusions reached by the coordinate branches of government.

V. Preliminary Injunction

Finally, we consider the district court's denial of appellants' motion for a preliminary injunction. A party seeking a preliminary injunction must either show that he is likely to succeed on the merits; that he is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his favor; and that an injunction is in the public interest. Winter v. NRDC, 555 U.S. 7, 20 (2008); or he may show irreparable harm and either a likelihood of success on the merits or "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the parties requesting the preliminary relief," Christian


Here, as is clear from our analysis above, the district court erred in certain respects on several issues of law critical to deciding the legality of the government's program. On a correct view of those issues, appellants have shown a likelihood - indeed, a certainty - of success on the merits of at least their statutory claims. Appellants argue that, because they have alleged a deprivation of constitutional rights, we should presume irreparable harm, and that the balance of equities tips in their favor, because the government does not have any legitimate interest in conducting unlawful surveillance.

At least at this point, however, we decline to conclude that a preliminary injunction is required, and leave it to the district court to reconsider, in the first instance, the propriety of preliminary relief in light of a correct understanding of

decide what if any relief appellants are entitled to based on our finding that the program as it has operated to date is unlawful. If Congress decides to institute a substantially modified program, the constitutional issues will certainly differ considerably from those currently raised. If Congress fails to reauthorize § 215 itself, or reenacts § 215 without expanding it to authorize the telephone metadata program, there will be no need for prospective relief, since the program will end, and once again there will be time to address what if any relief is required in terms of the data already acquired by the government. We believe that such issues will be best addressed in the first instance by the district court in due course.

CONCLUSION

This case serves as an example of the increasing complexity of balancing the paramount interest in protecting the security of our nation - a job in which, as the President has stated, "actions are second-guessed, success is unreported, and failure can be catastrophic," Remarks by the President on Review of Signals Intelligence - with the privacy interests of its citizens in a world where surveillance capabilities are vast and where it is difficult if not impossible to avoid exposing a wealth of information about oneself to those surveillance
mechanisms. Reconciling the clash of these values requires productive contribution from all three branches of government, each of which is uniquely suited to the task in its own way.

For the foregoing reasons, we conclude that the district court erred in ruling that § 215 authorizes the telephone metadata collection program, and instead hold that the telephone metadata program exceeds the scope of what Congress has authorized and therefore violates § 215. Accordingly, we VACATE the district court’s judgment dismissing the complaint and REMAND the case to the district court for further proceedings consistent with this opinion.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
Chief Judge

CATHARINE H. WOLFE
Clerk of Court

Date: May 07, 2015
Docket #: 14-42cv
Shirt Title: American Civil Liberties Union v.
Clapper

BILLS OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court’s website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the like, unless
  * identify the number of copies which comprise the printer’s unit;
  * include the printer’s bill, which must state the minimum charge per printer’s unit for a page, a cover, title page, the like, and an index and table of cases by the page;
  * state the number of necessary copies inserted in enclosed form;
  * state actual costs at rates not higher than those generally charged for printing services in New York City;
  * show itemized costs subject to reflection;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee

Costs of printing appendix (necessary copies __________)

Costs of printing brief (necessary copies __________)

Costs of printing reply brief (necessary copies __________)

(VERIFICATION HERE)

Signature
United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 4, 2014 Decided August 28, 2015

No. 14-5004

BARACK HUSSEIN OBAMA, ET AL., APPELLANTS

v.

LARRY ELLIOTT KLAYMAN, ET AL., APPELLEES

Consolidated with 14-5005, 14-5016, 14-5017

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-851)
(No. 1:13-cv-881)

H. Thomas Byron, III, Attorney, U.S. Department of Justice, argued the cause for appellants/cross-appellees. With him on the briefs were Stuart F. Delery, Assistant Attorney General, Ronald C. Machen, Jr., U.S. Attorney, and Douglas N. Letter and Henry C. Whitaker, Attorneys.

Larry E. Klayman argued the cause and filed the briefs for appellees/cross-appellants.

Cindy A. Cohn argued the cause for amici curiae Electronic Frontier Foundation, et al. On the brief were Alex Abdo, Jameel Jaffer, Arthur B. Spitzer, and Mark Rumold.
Paul M. Smith argued the cause for amicus curiae Center for National Security Studies. With him on the brief were Kate A. Martin, Joseph Onek, and Michael Davidson.

Before: BROWN, Circuit Judge, and WILLIAMS and SENTELLE, Senior Circuit Judges.

Opinion for the Court filed PER CURIAM.

Separate opinions filed by Circuit Judge BROWN and Senior Circuit Judge WILLIAMS.

Opinion dissenting in part filed by Senior Circuit Judge SENTELLE.

PER CURIAM: In the wake of the terrorist attacks of September 11, 2001, Congress enacted the USA PATRIOT Act. Pub. L. No. 107-56, 115 Stat. 272 (2001). Section 215 of that Act empowered the FBI to request, and the Foreign Intelligence Surveillance Court ("FISC") to enter, orders "requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation . . . to protect against international terrorism." Id. at § 215, 115 Stat. at 291, codified as amended at 50 U.S.C. § 1861(a)(1). Since May 2006, the government has relied on this provision to operate a program that has come to be called "bulk data collection," namely, the collection, in bulk, of call records produced by telephone companies containing "telephony metadata"—the telephone numbers dialed (incoming and outgoing), times, and durations of calls. The FBI has periodically applied for, and the FISC has entered, orders instructing one or more telecommunications service providers to produce, on a daily basis over a period of ninety days, electronic copies of such data. Decl. of Robert J. Holley, Acting Assistant FBI Director, at ¶¶ 10-13, Joint Appendix 224-25.
Under the program, the collected metadata are consolidated into a government database, where (except in exigent circumstances) the NSA may access it only after demonstrating to the FISC a “reasonable articulable suspicion” that a particular phone number is associated with a foreign terrorist organization. Gov’t’s Br. at 11-12. Even then, the NSA may retrieve call detail records only for phone numbers in contact with the original number—within two steps, or “hops” of it. Id. at 11. If telephone number A was used to call telephone number B, which in turn was used to call telephone number C, and if the FISC affirms the government’s “reasonable articulable suspicion” that A is associated with a foreign terrorist organization, the FISC may authorize the government to retrieve from the database the metadata associated with A, B, and C. (Before 2014, the FISC orders allowed the government to conduct queries for any number within three steps of the approved identifier, and the FISC did not play any role in assessing the government’s “reasonable articulable suspicion” for each query. Id. at 12 n.3). Once the government has retrieved the metadata, which does not include the content of the calls or the identities of the callers, it uses the data “in conjunction with a range of analytical tools to ascertain contact information that may be of use in identifying individuals who may be associated with certain foreign terrorist organizations because they have been in communication with certain suspected-terrorist telephone numbers or other selectors.” Id. at 9, 15.

Plaintiffs contend that this bulk collection constitutes an unlawful search under the Fourth Amendment; they seek injunctive and declaratory relief as well as damages. Third Amended Complaint ¶ 53, Klayman v. Obama, 13-cv-851 (D.D.C. Feb. 10, 2014), ECF No. 77. The district court issued a preliminary injunction barring the government from

The court reverses the judgment of the district court, and for the reasons stated in the opinions of Judge Brown and Judge Williams orders the case remanded to the district court. (Judge Sentelle dissents from the order of remand and would order the case dismissed.) The opinions of the judges appear below after a brief explanation of why the case is not moot.

* * *

Under a “sunset” clause, the section of the U.S. Code amended by Section 215 was scheduled to revert to its pre-2001 form on June 1, 2015 unless Congress acted. See Pub. L. No. 109-177, § 102(b)(1), 120 Stat. 192, 194-95 (2006); Pub. L. No. 112-14, § 2(a), 125 Stat. 216, 216 (2011). That date came and went without any legislative action. One day after the deadline, however, Congress enacted the USA Freedom Act, which revived the language added by Section 215 with some substantial changes. See Pub. L. No. 114-23, Tit. I, 129 Stat. 268, 269-77 (2015), codified at 50 U.S.C. § 1861. The Act’s changes do not take effect until 180 days after the date of enactment (June 2, 2015). *Id.* § 109(a), 129 Stat. at 276. And the legislation provides for continuation of pre-existing authority until the effective date of the new legislation: “Nothing in this Act shall be construed to alter or eliminate the authority of the Government to obtain an order under title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861 et seq.) as in effect prior to the effective date . . . during the period ending on such effective date.” *Id.* § 109(b), 129 Stat. at 276.

Cessation of a challenged practice moots a case only if “there is no reasonable expectation . . . that the alleged violation will recur.” *Larsen v. U.S. Navy*, 525 F.3d 1, 4
(D.C. Cir. 2008) (quotations and citations omitted). Here, any lapse in bulk collection was temporary. Immediately after Congress acted on June 2 the FBI moved the FISC to recommence bulk collection, United States’ Mem. of Law, In re Application of the FBI, No. BR 15-75 (FISC, filed Jun. 2, 2015), and the FISC confirmed that it views the new legislation as effectively reinstating Section 215 for 180 days, and as authorizing it to resume issuing bulk collection orders during that period. See Opinion and Order, In re Application of the FBI, Nos. BR 15-75, Misc. 15-01 (FISC June 29, 2015) (Mosman, J.); Mem. Op., In re Applications of the FBI, Nos. BR 15-77, BR 15-78 (FISC Jun. 17, 2015) (Saylor, J.). Accordingly, plaintiffs and the government stand in the same positions that they did before June 1, 2015.

* * *

The preliminary injunction entered by the district court is hereby vacated and the case remanded for such further proceedings as may be appropriate.

So ordered.
BROWN, Circuit Judge: I disagree with the district court’s conclusion that plaintiffs have established a “substantial likelihood of success on the merits.” See, e.g., Sottera, Inc. v. Food & Drug Admin., 627 F.3d 891, 893 (D.C. Cir. 2010). I write separately to emphasize that, while plaintiffs have demonstrated it is only possible—not substantially likely—that their own call records were collected as part of the bulk-telephony metadata program, plaintiffs have nonetheless met the bare requirements of standing. Accordingly, I join the court in vacating the preliminary injunction entered by the district court.

In order to establish his standing to sue, a plaintiff must show he has suffered a “concrete and particularized” injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). In other words, plaintiffs here must show their own metadata was collected by the government. See, e.g., Clapper v. Amnesty International, 133 S. Ct. 1138, 1148 (2013) (“[R]espondents fail to offer any evidence that their communications have been monitored under § 1881a, a failure that substantially undermines their standing theory.”); ACLU v. NSA, 493 F.3d 644, 655 (6th Cir. 2007) (“If, for instance, a plaintiff could demonstrate that her privacy had actually been breached (i.e., that her communications had actually been wiretapped), then she would have standing to assert a Fourth Amendment cause of action for breach of privacy.”); Harkin v. Helms, 690 F.2d 977, 999–1000 (D.C. Cir. 1982) (“[T]he absence of proof of actual acquisition of appellants’ communications is fatal to their watching claims.”).

The record, as it stands in the very early stages of this litigation, leaves some doubt about whether plaintiffs’ own metadata was ever collected. Plaintiffs’ central allegation is that defendants “violated the Fourth Amendment to the U.S. Constitution when they unreasonably searched and seized and
continue to search Plaintiffs' phone records . . . without reasonable suspicion or probable cause.” Third Amended Complaint at ¶ 53, Klayman I, 957 F. Supp. 2d 1. Plaintiffs have supported this claim with specific facts, notably: (1) The NSA operates a bulk telephony-metadata collection program; and (2) on April 25, 2013, the FISC issued an order requiring Verizon Business Network Services to produce its subscribers’ call detail records to the NSA on a daily basis from April 25, 2013 to July 19, 2013. However, plaintiffs are Verizon Wireless subscribers and not Verizon Business Network Services subscribers. Thus, the facts marshaled by plaintiffs do not fully establish that their own metadata was ever collected.

In his opinion below, Judge Leon eloquently explains how these facts are nonetheless sufficient to draw the inference that “the NSA has collected and analyzed [plaintiffs’] telephony metadata and will continue to operate the program consistent with FISC opinions and orders.” Klayman v. Obama, 957 F. Supp. 2d 1, 29 (D.D.C. 2013). In particular, Judge Leon infers from the government’s efforts to “create a comprehensive metadata database” that “the NSA must have collected metadata from Verizon Wireless, the single largest wireless carrier in the United States, as well as AT&T and Sprint, the second[-] and third-largest carriers.” Id. at 27.

As Judge Leon’s opinion makes plain, plaintiffs have set forth significant evidence about the NSA’s bulk-telephony metadata program. As a result, this case is readily distinguishable from cases like Tooley v. Napolitano, 586 F.3d 1006 (D.C. Cir. 2009), in which allegations of unlawful surveillance were dismissed as “patently insubstantial.” Id. at 1009–10 (concluding that the governmental surveillance scheme described in plaintiff’s allegations was “not
realistically distinguishable from allegations of little green men.”).

This evidence also sets this case apart from *Clapper*. There, plaintiffs’ claim of standing relied “on a highly attenuated chain of possibilities.” 133 S. Ct. at 1148. One link of that chain was that plaintiffs’ “theory necessarily rests on their assertion that the Government will target other individuals—namely, their foreign contacts.”1 *Id.* The *Clapper* plaintiffs, however, had “no actual knowledge of the Government’s § 1881a targeting practices” nor could they even show that the surveillance program they were challenging even existed. *Id.* at 1148–49 (“Moreover, because § 1881a at most authorizes—but does not mandate or direct—the surveillance that respondents fear, respondents’ allegations are necessarily conjectural.”); cf. *United Presbyterian Church in the USA v. Reagan*, 738 F.2d 1375, 1380–81 (D.C. Cir. 1984) (dismissing a complaint as a “generalized grievance” against the “entire national intelligence-gathering system” where plaintiffs were unable to show the injury they suffered was the result of a specific government surveillance program.) By contrast, here, plaintiffs have set forth specific evidence showing that the government operates a bulk-telephony metadata program that collects subscriber information from domestic telecommunications providers, including Verizon Business Network Services. Contrary to the assertions of my colleagues, these facts bolster plaintiffs’ position: where the *Clapper* plaintiffs relied on speculation and conjecture to press their claim, here, plaintiffs offer an inference derived

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1 The statute authorizing the surveillance program at issue in *Clapper*, 50 U.S.C. § 1881a, explicitly provided that, as U.S. persons, plaintiffs could not be targeted for surveillance. 133 S. Ct. at 1148.
from known facts. *See In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from Verizon Business Network Services, Inc. on behalf of MCI Communication Services, Inc. d/b/a Verizon Business Services, No. BR-13-80 (Foreign Intelligence Surveillance Court, April 25, 2013), J.A. 250–53.*

However, the burden on plaintiffs seeking a preliminary injunction is high. Plaintiffs must establish a “substantial likelihood of success on the merits.” *Sottera, Inc.*, 627 F.3d at 893. Although one could reasonably infer from the evidence presented the government collected plaintiffs’ own metadata, one could also conclude the opposite. Having barely fulfilled the requirements for standing at this threshold stage, Plaintiffs fall short of meeting the higher burden of proof required for a preliminary injunction.

Judge Williams is right to remind us that any number of unexpected constraints may frustrate the effectiveness of a given program. Appropriations may fall short. Technicians may err. Legal challenges may stymie the most dedicated bureaucrats. But while *post hoc* obstacles may undermine a program’s efficacy, they do not alter its intended objective, which, here, remains (commonsensically) the comprehensive collection of telephonic metadata.

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2 Although originally classified “top secret,” this order was declassified on July 11, 2013. The order expired on July 19, 2013.

3 FISA provides that a “person receiving a production order may challenge the legality of [that order]...by filing a petition with the [FISC].” 50 U.S.C. § 1861 (f)(2)(A)(i). However, such petitions are filed under seal and may not be disclosed. *Id.* § 1861 (c)(1), (f)(2)(D)(4), (f)(2)(D)(5).
On remand it is for the district court to determine whether limited discovery to explore jurisdictional facts is appropriate. See, e.g., Natural Resources Defense Council v. Pena, 147 F.3d 1012, 1024 (D.C. Cir. 1998). Of course, I recognize that, in order for additional discovery to be meaningful, one of the obstacles plaintiffs must surmount is the government’s unwillingness to make public a secret program. See United Presbyterian Church in the U.S.A., 738 F.2d at 1382; cf. ACLU, 493 F.3d at 655 (“In the present case, the plaintiffs concede that there is no single plaintiff who can show that he or she has actually been wiretapped. Moreover, due to the State Secrets Doctrine, the proof needed either to make or negate such a showing is privileged, and therefore withheld from discovery or disclosure.”). It is entirely possible that, even if plaintiffs are granted discovery, the government may refuse to provide information (if any exists) that would further plaintiffs’ case. Plaintiffs’ claims may well founder in that event. But such is the nature of the government’s privileged control over certain classes of information. Plaintiffs must realize that secrecy is yet another form of regulation, prescribing not “what the citizen may do” but instead “what the citizen may know.” Daniel P. Moynihan, Secrecy: The American Experience 59 (1999). Regulations of this sort may frustrate the inquisitive citizen but that does not make them illegal or illegitimate. Excessive secrecy limits needed criticism and debate. Effective secrecy ensures the perpetuation of our institutions. In any event, our opinions do not comment on the propriety of whatever privileges the government may have occasion to assert.
WILLIAMS, Senior Circuit Judge: "[A] party seeking a preliminary injunction must demonstrate, among other things, a likelihood of success on the merits." Munaf v. Geren, 553 U.S. 674, 690 (2008) (internal quotations and citations omitted); see also Mills v. District of Columbia, 571 F.3d 1304, 1308 (D.C. Cir. 2009) (requiring a "substantial likelihood of success on the merits") (emphasis added) (quotations and citations omitted). In this context, the "merits" on which plaintiff must show a likelihood of success encompass not only substantive theories but also establishment of jurisdiction. The "affirmative burden of showing a likelihood of success on the merits . . . necessarily includes a likelihood of the court's reaching the merits, which in turn depends on a likelihood that plaintiff has standing." Nat'l Wildlife Fed'n v. Burford, 835 F.2d 305, 328 (D.C. Cir. 1987) (Williams, J., concurring and dissenting). And to show standing, a plaintiff must demonstrate an "injury in fact" that is "actual or imminent, not conjectural or hypothetical." Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167, 180 (2000).

Plaintiffs claim to suffer injury from government collection of records from their telecommunications provider relating to their calls. But plaintiffs are subscribers of Verizon Wireless, not of Verizon Business Network Services, Inc.—the sole provider that the government has acknowledged targeting for bulk collection. Gov't's Br. at 38; Appellees' Br. at 26-28; see also Secondary Order, in re Application of FBI, No. BR 13-80 (FISC, Apr. 25, 2013) (Vinson, J.). Thus, unlike some others who have brought legal challenges to the bulk collection program, plaintiffs lack direct evidence that records involving their calls have actually been collected. Cf. ACLU v. Clapper, 785 F.3d 787, 801 (2d Cir. 2015) (finding that Verizon Business subscribers had standing to challenge the bulk collection program because "the government's own orders demonstrate that appellants'
call records are indeed among those collected as part of the telephone metadata program").

Plaintiff’s contention that the government is collecting data from Verizon Wireless (a contention that the government neither confirms nor denies, Gov’t’s Br. at 38-39), depends entirely on an inference from the existence of the bulk collection program itself. Such a program would be ineffective, they say, unless the government were collecting metadata from every large carrier such as Verizon Wireless; ergo it must be collecting such data. Appellee’s Br. 27-28. This inference was also the district judge’s sole basis for finding standing. Klayman v. Obama, 957 F. Supp. 2d 1, 27 & n.36 (2013).

Yet the government has consistently maintained that its collection “never encompassed all, or even virtually all, call records and does not do so today.” Gov’t’s Br. at 39; Decl. of Teresa Shea, NSA Signals Intelligence Director at ¶ 8, Addendum to Gov’t’s Br. at 101 (similar). While one district judge has claimed that “the Government acknowledged that since May 2006, it has collected this information for substantially every telephone call in the United States,” neither of his sources—an Administration “White Paper” and a declaration by an NSA official—actually supports the claim. ACLU v. Clapper, 959 F. Supp. 2d 724, 735 (S.D.N.Y. 2013), vacated and remanded, 785 F.3d 787 (2d Cir. 2015); see Administration White Paper, Bulk Collection of Telephony Metadata Under Section 215 of the USA Patriot Act at 3 (Aug. 9, 2013) (“FBI obtains orders from the FISC directing certain telecommunications service providers to produce business records that contain information about communications between telephone numbers . . .” (emphasis added)); Decl. Teresa Shea ¶ 14, ACLU v. Clapper, 13-cv-3994 (S.D.N.Y. Oct. 1, 2013), ECF No. 63 (“FBI obtains orders from the FISC directing certain telecommunications
service providers to produce all business records created by them (known as call detail records) that contain information about communications between telephone numbers” (emphasis added)).

I note the Second Circuit’s observation that the government had not “seriously” disputed the contention that “all significant service providers” were subject to the bulk collection program. ACLU, 785 F.3d at 797. But in that case the government said, “Various details of the program remain classified, precluding further explanation here of its scope,” and went on to insist that “the record does not support the conclusion that the program collects ‘virtually all telephony metadata’ about telephone calls made or received in the United States. Nor is that conclusion correct.” See Appellees’ Br. at 7, ACLU v. Clapper, No. 14-42 (2d Cir. filed Apr. 10, 2014) (citations omitted). Thus the government’s assertions in the two cases are parallel. Of course the Second Circuit’s comment was irrelevant to its conclusion, as the plaintiffs in that case were not subscribers of Verizon Wireless but of Verizon Business, whose data the government acknowledged collecting. See ACLU, 785 F.3d at 801.

It appears true, as plaintiffs and the district court suggest, that the effectiveness of the program expands with its coverage; every number that goes uncollected reduces the utility of the government’s “two-hop” querying. Indeed, it may well be that a reduction in coverage of, say, 50% would diminish the effectiveness of the program by far more than that proportion. Yet, in the face of the government’s representations that it has never collected “all, or even virtually all” call records, I find plaintiffs’ claimed inference inadequate to demonstrate a “substantial likelihood” of injury.

Clapper v. Amnesty International, 133 S. Ct. 1138 (2013), represents the Supreme Court’s most recent
evaluation of comparable inferences and cuts strongly against plaintiffs’ claim that they have a substantial likelihood of prevailing as to standing. There, a group of US-based “attorneys and human rights, labor, legal, and media organizations” challenged the surveillance authorized by the FISA Amendments Act of 2008. Id. at 1145. The statute empowered the Attorney General and the Director of National Intelligence to jointly seek an order from the FISC authorizing “the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information” for a period of up to one year. 50 U.S.C. § 1881a. Plaintiffs claimed they were injured by the surveillance because their work required them “to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, sources, and other individuals located abroad” and that “some of the people with whom they exchange foreign intelligence information [are] likely targets of surveillance under § 1881a” because they communicate with “people the Government ‘believes or believed to be associated with terrorist organizations,’ ‘people located in geographic areas that are a special focus’ of the Government’s counterterrorism or diplomatic efforts, and activists who oppose governments that are supported by the United States Government.” 133 S. Ct. at 1145.

But as the Court observed, the Clapper plaintiffs had “no actual knowledge of the Government’s § 1881a targeting practices” and accordingly “merely speculate[d] and make[d] assumptions about whether their communications with their foreign contacts will be acquired under § 1881a.” Id. at 1148. The premises for their speculation were hardly trivial. They claimed (and it was not disputed) (1) that they engaged in communications eligible for surveillance under the disputed section, (2) that the government had a strong motive to intercept these particular communications because of the subject matter and identities involved, (3) that the government
had (under separate legal authority) already intercepted 10,000 phone calls and 20,000 emails involving one individual who is now in regular communication with one of the plaintiffs, and (4) that the government had the capacity to intercept these communications. *Id.* at 1157-59. The Court held that these allegations left it merely “speculative whether the Government w[ould] imminently target communications to which respondents [we]re parties,” and so provided an inadequate basis for standing. *Id.* at 1148-49 (citations and some quotations omitted).

Here, the plaintiffs’ case for standing is similar to that rejected in *Clapper*. They offer nothing parallel to the *Clapper* plaintiffs’ evidence that the government had previously targeted them or someone they were communicating with (No. 3 above). And their assertion that NSA’s collection must be comprehensive in order for the program to be most effective is no stronger than the *Clapper* plaintiffs’ assertions regarding the government’s motive and capacity to target their communications (Nos. 2 & 4 above).

The strength of plaintiffs’ inference from the government’s interest in having an effective program rests on an assumption that the NSA prioritizes effectiveness over all other values. In fact, there are various competing interests that may constrain the government’s pursuit of effective surveillance. Plaintiffs’ inference fails to account for the possibility that legal constraints, technical challenges, budget limitations, or other interests prevented NSA from collecting metadata from Verizon Wireless. Many government programs (even ones associated with national defense) seem to be calibrated or constrained by collateral concerns not directly related to the program’s stated objectives, such as funding deficiencies, bureaucratic inertia, poor leadership, and diversion to non-defense interests of resources nominally dedicated to defense. It is possible that such factors have
operated to hamper the breadth of the NSA’s collection. In fact, both the district court and the plaintiffs contradict their own assertions about the effectiveness of the program by emphatically asserting its ineffectiveness in support of their conclusions that it violates the Fourth Amendment. See Klayman, 957 F. Supp. 2d at 40-41 ("I have serious doubts about the efficacy of the metadata collection program. . . "); Appellees’ Br. at 47-49; Appellees’ Reply at 30-33.

Judge Brown distinguishes Clapper on the grounds that the plaintiffs here have offered “specific evidence” about the government’s bulk collection program. Op. of Brown, J., at 3. But, assuming their evidence to be in some sense more specific, the relevant inquiry is whether that evidence indicates that the program targets plaintiffs. As to that, the plaintiffs here do no better than those in Clapper.

Plaintiffs complain that the government should not be allowed to avoid liability simply by keeping the material classified. But the government’s silence regarding the scope of bulk collection is a feature of the program, not a bug. The Clapper Court rejected a request for “in camera” review of classified government materials precisely on the ground that any such approach would tend to undermine the program’s effectiveness:

As an initial matter, it is respondents’ burden to prove their standing by pointing to specific facts, not the Government’s burden to disprove standing by revealing details of its surveillance priorities. Moreover, this type of hypothetical disclosure proceeding would allow a terrorist (or his attorney) to determine whether he is currently under U.S. surveillance simply by filing a lawsuit challenging the Government’s surveillance program. Even if the terrorist’s attorney were to comply with a
protective order prohibiting him from sharing the Government’s disclosures with his client, the court’s postdisclosure decision about whether to dismiss the suit for lack of standing would surely signal to the terrorist whether his name was on the list of surveillance targets.

133 S. Ct. at 1149 n.4 (citations omitted). These considerations apply with equal force here, where the government has sought to maintain a similarly strategic silence regarding the scope of its bulk collection.

It is true that Clapper came to the Court on review of cross-motions for summary judgment, not a preliminary injunction, but the Court’s rejection of the Clapper plaintiffs’ claims is nonetheless telling. Those plaintiffs actually faced a lighter burden than do ours: in granting the government’s motion for summary judgment, the Court necessarily found that plaintiffs’ inferences were inadequate even to preserve the question of standing as a “genuine issue.” See Amnesty Int’l USA v. McConnell, 646 F. Supp. 2d 633, 641 (S.D.N.Y. 2009) (quoting Fed. R. Civ. P. 56(c)), vacated and remanded sub nom. Amnesty Int’l USA v. Clapper, 638 F.3d 118 (2d Cir. 2011), rev’d, 133 S. Ct. 1138 (2013). Here, by contrast, plaintiffs must show a “substantial likelihood” of standing.

Accordingly, I find that plaintiffs have failed to demonstrate a “substantial likelihood” that the government is collecting from Verizon Wireless or that they are otherwise suffering any cognizable injury. They thus cannot meet their burden to show a “likelihood of success on the merits” and are not entitled to a preliminary injunction.

It remains possible that on remand plaintiffs will be able to collect evidence that would establish standing. Indeed, noting that the government was “uniquely in control of the facts, information, documents, and evidence regarding the
extent and nature of their mass surveillance,” they moved in the district court to depose “an employee of the NSA.” Pls.’ Mot. For Leave, Klayman v. Obama, 13-cv-851 (D.D.C. Oct. 30, 2013), ECF No. 15. But the district judge denied the motion as moot after granting the preliminary injunction. Minute Order, Klayman v. Obama, 13-cv-851 (D.D.C. Jan. 21, 2014). Given the possibility that plaintiffs’ efforts along these lines may be fruitful, I join Judge Brown in remanding to the district court for it to decide whether limited discovery to explore jurisdictional facts is appropriate.

I am uncertain about the meaning of Judge Brown’s view that although plaintiffs have failed to show a substantial likelihood of success on standing, they have nonetheless “fulfilled the requirements for standing,” if only “barely.” Op. of Brown, J., at 4. If the latter “fulfill[ment]” means simply that standing cannot be ruled out and thus poses no jurisdictional obstacle to discovery on standing, I agree. To the extent that Judge Brown regards the “burden of proof required for a preliminary injunction” as “higher,” id., I don’t understand in what sense the burden would be higher than in other contexts (motions for judgment on the pleadings, for summary judgment, or after hearing), or the basis for regarding it as higher than in those contexts.
SENTELLE, Senior Circuit Judge, dissenting in part: I will not restate either the facts or the background law, as I fully agree with my colleagues' statements on those subjects. Indeed, I agree with virtually everything in Judge Williams' opinion, save for its conclusion, and I even agree with part of that. My colleagues believe that the preliminary injunction entered by the district court must be vacated, as plaintiffs have failed to establish a "substantial likelihood of success on the merits." Brown Op. 1; Williams Op. 3. I agree. However, my colleagues also believe that the case should be remanded for further proceedings. I do not agree. Like Judge Williams, I believe that the failure to establish the likelihood of success depends at least in the first instance on plaintiffs' inability to establish the jurisdiction of the court. I also agree with Judge Williams that plaintiffs have not established the jurisdiction of the court. That being the case, I would not remand the case for further proceedings, but would direct its dismissal.

As my colleagues recognize, in order to bring a cause within the jurisdiction of the court, the plaintiffs must demonstrate, inter alia, that they have standing. "[T]o show standing, a plaintiff must demonstrate an 'injury in fact' that is 'actual or imminent, not conjectural or hypothetical.'" Williams Op. at 1 (quoting Friends of the Earth, Inc. v. Laidlaw Env'tl Servs. (TOC), Inc., 528 U.S. 167, 180 (2000). As Judge Williams goes on to note, "[p]laintiffs claim to suffer injury from government collection of records from their telecommunications provider relating to their calls." Id. at 1; see also Brown Op. 2. However, plaintiffs never in any fashion demonstrate that the government is or has been collecting such records from their telecommunications provider, nor that it will do so. Briefly put, and discussed in more detail by Judge Williams, plaintiffs' theory is that because it is a big collection and they use a big carrier, the government must be getting at their records. While this may be a better-than-usual conjecture, it is nonetheless no more
than conjecture.

As Judge Williams further notes, “Clapper v. Amnesty International, 133 S. Ct. 1138 (2013), represents the Supreme Court’s most recent evaluation of comparable inferences and cuts strongly against plaintiffs’ claim that they have a substantial likelihood of prevailing as to standing.” Williams Op. at 3–4. While Clapper involved collection under a different statutory authorization, the standing claims of the plaintiffs before us and the plaintiffs in that case are markedly similar. In fact, the plaintiffs’ claim before us is weaker than that of the Clapper plaintiffs. The Clapper plaintiffs at least claimed that the government had previously targeted them or someone with whom they were communicating. The plaintiffs before us make no such claim. I would go farther than Judge Williams. Clapper does not just “cut[ ] strongly against plaintiffs’ claims that they have a substantial likelihood of prevailing as to standing,” Clapper cuts their claims out altogether.

Plaintiffs have not demonstrated that they suffer injury from the government’s collection of records. They have certainly not shown an “injury in fact” that is “actual or imminent, not conjectural or hypothetical.” Friends of the Earth, Inc., 528 U.S. at 180. I agree with the conclusion of my colleagues that plaintiffs have not shown themselves entitled to the preliminary injunction granted by the district court. However, we should not make that our judicial pronouncement, since we do not have jurisdiction to make any determination in the cause. I therefore would vacate the preliminary injunction as having been granted without jurisdiction by the district court, and I would remand the case, not for further proceedings, but for dismissal.

In Clapper, the Court stated, “Yet respondents have no
actual knowledge of the Government’s... targeting practices. Instead, respondents merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired....” 133 S. Ct. at 1148. After discussing the speculative nature of plaintiffs’ claims, the Supreme Court summed up its decision as “respondents’ speculative chain of possibilities does not establish that injury based on potential future surveillance is certainly impending or is fairly traceable to [the government’s acts].” Id. at 1150. Therefore, in a conclusion fully applicable to the case before us, the Supreme Court held “that respondents lack Article III standing because they cannot demonstrate that the future injury they purportedly fear is certainly impending and because they cannot manufacture standing by incurring costs in anticipation of non-imminent harm.” Id. at 1155.

Without standing there is no jurisdiction. Without jurisdiction we cannot act. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94–95 (1998). Therefore, I agree with my colleagues that the issuance of the preliminary injunction was an ultra vires act by the district court and must be vacated. However, I believe we can do no more. I would remand the case for dismissal, not further proceedings.
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AYMAN LATIF, MOHAMED SHEIKH ABDIRAHM
KARIYE, RAYMOND EARL ISABELE IV,
 STEVEN WILLIAM WASHBURN, NAGIB ALI
GHALEB, ABDULLATIF MUTHANNA, FAISAL
NABIN KASHM, ELIAS MUSTAPA MOHAMED,
 IBRAHEEM Y. MASHAL, SALAH ALI AHMED,
 AMIR MISHAL, STEPHEN DURGA PERSAUD,
 and NASHAAL RANA,

Plaintiffs,

v.

ERIC H. HOLDER, JR., in his official
capacity as Attorney General of the
United States; JAMES B. COMOT, in his
official capacity as Director of the
Federal Bureau of Investigation; and
CHRISTOPHER M. PIETROTA, in his
official capacity as Director of the
FBI Terrorist Screening Center,

Defendants.

1 - OPINION AND ORDER

STEVEN M. WILKER
Tonkon Torp LLP
888 S.W. 5th Avenue, Ste. 1600
Portland, OR 97204
(503) 802-2040

HINA SHAHGI
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

KEVIN DIAZ
American Civil Liberties Union
P.O. Box 40585
Portland, OR 97240
(503) 227-6928

ALEXANDRA F. SMITH
LAURA SCHAUER IVES
ACLU Foundation of New Mexico
P.O. Box 506
Albuquerque, NM 87103
(505) 266-5915

ANILAM ARULANANTHAM
JENNIFER PASQUARELLA
ACLU Foundation of Southern California
1331 West 8th Street
Los Angeles, CA 90017
(213) 977-5211

ALAN L. SCHLOSSER
JULIA HARZI MASS
ACLU of Northern California
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493

CHRISTOPHER M. EGLESON
JUSTIN M. BELL
MITCHELL P. HURLEY
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
(212) 872-1039

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REEM SALahi
Salahi Law
429 Santa Monica Boulevard, Ste. 550
Santa Monica, CA 90401
(310) 225-8880
Attorneys for Plaintiffs

DEVIN N. ROBINSON
Stewart Shaddock & Robinson LLC
6110 N. Lombard Street, Ste. D
Portland, OR 97203
(503) 228-7020

RITA M. SIMION
637 Kenyon Street NW
Washington, DC 20010
(703) 655-1467
Attorneys for Amicus Curiae The Constitution Project

ERIC N. HOLDER, JR.
United States Attorney General

AMY ELIZABETH POWERL
United States Department of Justice
Civil Division
20 Massachusetts Avenue N.W., Suite 5377
Washington, DC 20001
(202) 514-9836

S. AMANDA MARSHALL
United States Attorney
JAMES E. COX, JR.
Assistant United States Attorney
District of Oregon
1000 S.W. Third Avenue, Ste. 600
Portland, OR 97204
(503) 727-1026
Attorneys for Defendants

BROWN, Judge.

This matter comes before the Court on Defendants’ Motion
(#85) for Partial Summary Judgment and Plaintiffs’ Cross-Motion
(#91) for Partial Summary Judgment. The parties each seek
summary judgment on Plaintiffs’ Claim One of the Third Amended
Complaint (#83) (that Defendants violated Plaintiffs’ right to
procedural due process under the Fifth Amendment to the United
States Constitution) and Claim Three (that Defendants violated
Plaintiffs’ rights under the Administrative Procedure Act (APA),
5 U.S.C. § 706). In their claims Plaintiffs specifically
challenge the adequacy of Defendants’ redress procedures for
persons on the No-Fly List (sometimes referred to as “the List”).
In addition to the parties’ briefs, the record includes an Amicus
Curiae Brief (#99) in Support of Plaintiffs’ Cross-Motion filed
by The Constitution Project.

On June 21, 2013, after the Court first heard oral argument
on the parties’ Motions, the Court took these issues under
adviseement. On August 28, 2013, the Court issued an Opinion and
Order (#110) granting in part Plaintiffs’ Cross-Motion, denying
in part Defendants’ Motion, and deferring ruling on the remaining
portions of the pending Motions to permit additional development
of the factual record and supplemental briefing. In that Opinion
and Order the Court concluded Plaintiffs established the first
factor under Mathews v. Eldridge, 424 U.S. 319, 335 (1976),
because Plaintiffs had protected liberty interests in their
rights to travel internationally by air and rights to be free
from false governmental stigmatization that were affected by
their inclusion on the No-Fly List. The Court, however, found the record was not sufficiently developed to balance properly Plaintiffs' protected liberty interests on the one hand against the procedural protections on which Defendants rely, the utility of additional safeguards, and the government interests at stake in the remainder of the Mathews analysis. See id.

After the parties filed a Third Joint Statement of Stipulated Facts (#114) and completed their respective supplemental briefing, the Court heard oral argument on March 17, 2014, and again took the Motions under advisement.

For the reasons that follow,1 the Court GRANTS Plaintiffs' Cross-Motion (#91)2 and DENIES Defendants' Motion (#85).

1 In order to complete the procedural due-process analysis in this Opinion and Order that the Court began in its August 28, 2013, Opinion and Order (#110), the Court repeats and summarizes herein many of the facts and analyses from the prior Opinion and Order to ensure a clear and comprehensive record.

2 Plaintiffs also seek a declaratory judgment that Defendants' policies, practices, and customs violate the Fifth Amendment of the United States Constitution and the APA and also seek an injunction requiring Defendants (1) to remedy such violations, including removal of Plaintiffs' names from any watch list or database that prevents them from flying; (2) to provide Plaintiffs with notice of the reasons and bases for their inclusion on the No-Fly List; and (3) to provide Plaintiffs with the opportunity to contest inclusion on the List. Although the Court concludes Plaintiffs are entitled to summary judgment on the bases described herein, the issues concerning the substance of any declaratory judgment and/or injunction remain for further development.

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PLAINTIFFS' CLAIMS

Plaintiffs are citizens and lawful permanent residents of the United States (including four veterans of the United States Armed Forces) who were not allowed to board flights to or from the United States or over United States airspace. Plaintiffs believe they were denied boarding because they are on the No-Fly List, a government terrorist watch list of individuals who are prohibited from boarding commercial flights that will pass through or over United States airspace. Federal and/or local government officials told some Plaintiffs that they are on the No-Fly List.

Each Plaintiff submitted applications for redress through the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP). Despite Plaintiffs' requests to officials and agencies for explanations as to why they were not permitted to board flights, explanations have not been provided and Plaintiffs do not know whether they will be permitted to fly in the future.

Plaintiffs allege in their Third Amended Complaint (#83), Claim One, that Defendants have violated Plaintiffs' Fifth Amendment right to procedural due process because Defendants have not given Plaintiffs any post-deprivation notice nor any meaningful opportunity to contest their continued inclusion on the No-Fly List. In Claim Three Plaintiffs assert Defendants'
actions have been arbitrary and capricious and constitute "unlawful agency action" in violation of the APA.

PROCEDURAL BACKGROUND

Plaintiffs filed this action on June 30, 2010. On May 3, 2011, this Court issued an Order (#69) granting Defendants' Motion (#43) to Dismiss for failure to join the Transportation Security Administration (TSA) as an indispensable party and for lack of subject-matter jurisdiction on the ground that the relief Plaintiffs sought could only come from the appellate court in accordance with 49 U.S.C. § 46110(a). Plaintiffs appealed the Court's Order to the Ninth Circuit. See Latif v. Holder, 686 F.3d 1122 (9th Cir. 2012).

On July 26, 2012, the Ninth Circuit issued an opinion in which it reversed this Court's decision and held "the district court ... has original jurisdiction over Plaintiffs' claim that the government failed to afford them an adequate opportunity to contest their apparent inclusion on the List." Id. at 1130. The Court also held "(49 U.S.C.) § 46110 presents no barrier to adding TSA as an indispensable party." Id. The Ninth Circuit issued its mandate on November 19, 2012, remanding the matter to this Court.

As noted, the parties subsequently filed Motions for Partial Summary Judgment.

FACTUAL BACKGROUND

The following facts are undisputed unless otherwise noted:

1. The No-Fly List

The Federal Bureau of Investigation (FBI), which administers the Terrorist Screening Center (TSC), develops and maintains the federal government's consolidated Terrorist Screening Database (TSDB or sometimes referred to as "the watch list"). The No-Fly List is a subset of the TSDB.

TSC provides the No-Fly List to TSA, a component of the Department of Homeland Security (DHS), for use in pre-screening airline passengers. TSC receives nominations for inclusion in the TSDB and generally accepts those nominations on a showing of "reasonable suspicion" that the individuals are known or suspected terrorists based on the totality of the information. TSC defines its reasonable-suspicion standard as requiring "articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual 'is known or suspected to be, or has been engaged in conduct constituting, in preparation for, in aid of or related to, terrorism or terrorist activities.'" Joint Statement of Stipulated Facts (#84) at 4.

The government also has its own "Watchlisting Guidance" for internal law-enforcement and intelligence use, and the No-Fly
List has its own minimum substantive derogatory criteria. The government does not release these documents.  

II. DHS TRIP Redress Process

DHS TRIP is the mechanism available for individuals to seek redress for any travel-related screening issues experienced at airports or while crossing United States borders; i.e., denial of or delayed airline boarding, denial of or delayed entry into or exit from the United States, or continuous referral for additional (secondary) screening.

A. Administrative Review

Travelers who have faced such difficulties may submit a Traveler Inquiry Form to DHS TRIP online, by email, or by regular mail. The form prompts travelers to describe their complaint, to produce documentation relating to the issue, and to provide identification and their contact information. If the traveler is an exact or near match to an identity within the TSDB, DHS TRIP deems the complaint to be TSDB-related and forwards the traveler’s complaint to TSC Redress for further review.

On receipt of the complaint, TSC Redress reviews the available information, including the information and documentation provided by the traveler, and determines (1) whether the traveler is an exact match to an identity in the TSDB and (2) whether the traveler should continue to be in the TSDB if the traveler is an exact match. When making this determination, TSC coordinates with the agency that originally nominated the individual to be included in the TSDB. If the traveler has been misidentified as someone who is an exact match to an identity in the TSDB, TSC Redress informs DHS of the misidentification. DHS, in conjunction with any other relevant agency, then addresses the misidentification by correcting information in the traveler’s records or taking other appropriate action.

When DHS and/or TSC finish their review, DHS TRIP sends a determination letter advising the traveler that DHS TRIP has completed its review. A DHS TRIP determination letter neither confirms nor denies that the complainant is in the TSDB or on the No-Fly List and does not provide any further details about why the complainant may or may not be in the TSDB or on the No-Fly List. In some cases a DHS TRIP determination letter advises the recipient that he or she can pursue an administrative appeal of the determination letter with TSA or can seek judicial review in

1 The Court has reviewed the minimum substantive derogatory criteria for the No-Fly List and a summary of the guidelines contained within the Watchlisting Guidance submitted to the Court by Defendants ex parte and in camera. Because this information constitutes Sensitive Security Information, the Court does not refer to its substance in this Opinion and Order.

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a United States court of appeals pursuant to 49 U.S.C. § 46110.'

Determination letters, however, do not provide assurances about the complainant's ability to undertake future travel. In fact, DHS does not tell a complainant whether he or she is in the TSDB or a subset of the TSDB or give any explanation for inclusion on such a list at any point in the available administrative process. Thus, the complainant does not have an opportunity to contest or knowingly to offer corrections to the record on which any such determination may be based.

B. Judicial Review

When a final determination letter indicates the complainant may seek judicial review of the decisions represented in the letter, it does not advise whether the complainant is on the No-Fly List or provide the legal or factual basis for such inclusion. If the complainant submits a petition for review to the appropriate court, the government furnishes the court (but not the petitioner) with the administrative record.

49 U.S.C. § 46110(a) provides in part: "[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . in whole or in part under this part . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." When the relief sought from judicial review of a DHS TRIP inquiry requires review and modification of a TSC order, original jurisdiction lies in the district court. Arjmand v. United States Dep't of Homeland Sec., 745 F.3d 1300, 1302-03 (9th Cir. 2014).

If the administrative DHS TRIP review of a petitioner’s redress file resulted in a final determination that the petitioner is not on the No-Fly List, the administrative record will inform the court of that fact. If, on the other hand, the administrative DHS TRIP review of a petitioner’s redress file resulted in a final determination that the petitioner is and should remain on the No-Fly List, the administrative record will include the information that the government relied on to maintain that listing. The government may have obtained this information from human sources, foreign governments, and/or "signals intelligence." The government may provide to the court ex parte and in camera information that is part of the administrative record and that the government has determined is classified, Sensitive Security Information, law-enforcement investigative information, and/or information otherwise privileged or protected from disclosure by statute or regulation.

The administrative record also includes any information that the petitioner submitted to the government as part of his or her DHS TRIP request, and the petitioner has access to that portion of the record. As noted, at no point during the judicial-review process does the government provide the petitioner with confirmation as to whether the petitioner is on the No-Fly List, set out the reasons for including petitioner’s name on the list,

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or identify any information or evidence relied on to maintain the petitioner’s name on the List.

For a petitioner who is on the No-Fly List, the court will review the administrative record submitted by the government in order to determine whether the government reasonably determined the petitioner satisfied the minimum substantive derogatory criteria for inclusion on the List. If after review the court determines the administrative record supports the petitioner’s inclusion on the No-Fly List, it will deny the petition for review. If the court determines the administrative record contains insufficient evidence to satisfy the substantive derogatory criteria, however, the government takes the position that the court may remand the matter to the government for appropriate action.

III. Plaintiffs’ Pertinent History

 Solely for purposes of the parties’ Motions ($85, $91) presently before the Court, Defendants do not contest the following facts as asserted by Plaintiffs:3

3 As a matter of policy, the United States government does not confirm or deny whether an individual is on the No-Fly List nor does it provide any other details as to that issue. Accordingly, Defendants have chosen not to refute Plaintiffs’ allegations that they are on the No-Fly List for purposes of these Motions only. The Court, therefore, assumes for purposes of these Motions only that Plaintiffs’ assertions regarding their inclusion on the No-Fly List are true.

Plaintiffs are thirteen United States citizens who were denied boarding on flights over United States airspace after January 1, 2009, and who believe they are on the United States government’s No-Fly List. Airline representatives, FBI agents, or other government officials told some Plaintiffs that they are on the No-Fly List.

Each Plaintiff filed DHS TRIP complaints after being denied boarding and each received a determination letter that does not confirm or deny any Plaintiff’s name is on any terrorist watch list nor provide a reason for any Plaintiff to be included in the TSDB or on the No-Fly List.

Many of these Plaintiffs cannot travel overseas by any mode other than air because such journeys by boat or by land would be cost-prohibitive, would be time-consuming to a degree that Plaintiffs could not take the necessary time off from work, or would put Plaintiffs at risk of interrogation and detention by foreign authorities. In addition, some Plaintiffs are not physically well enough to endure such infeasible modes of travel.

While Plaintiffs’ circumstances are similar in many ways, each of their experiences and difficulties relating to and arising from their alleged inclusion on the No-Fly List is unique as set forth in their Declarations filed in support of their Motion and summarized briefly below.
Ayman Latif: Latif is a United States Marine Corps veteran and lives in Stone Mountain, Georgia, with his wife and children. Between November 2008 and April 2010 Latif and his family were living in Egypt. When Latif and his family attempted to return to the United States in April 2010, Latif was not allowed to board the first leg of their flight from Cairo to Madrid. One month later Latif was questioned by FBI agents and told he was on the No-Fly List. Because he was unable to board a flight to the United States, Latif’s United States veteran disability benefits were reduced from $899.00 per month to zero as the result of being unable to attend the scheduled evaluations required to keep his benefits. In August 2010 Latif returned home after the United States government granted him a “one-time waiver” to fly to the United States. Because the waiver was for “one time,” Latif cannot fly again, and therefore, he is unable to travel from the United States to Egypt to resume studies or to Saudi Arabia to perform a hajj, a religious pilgrimage and Islamic obligation.

Mohamed Sheik Abdurahman Kariye: Kariye lives in Portland, Oregon, with his wife and children. In March 2010 Kariye was not allowed to board a flight from Portland to Amsterdam, was surrounded in public by government officials at the airport, and was told by an airline employee that he was on a government watch list. Because Kariye is prohibited from boarding flights out of the United States, he could not fly to visit his daughter who was studying in Dubai and cannot travel to Saudi Arabia to accompany his mother on the hajj pilgrimage.

Raymond Earl Knaeble IV: Knaeble is a United States Army veteran and lives in Chicago, Illinois. In 2006 Knaeble was working in Kuwait. In March 2010 Knaeble flew from Kuwait to Bogota, Colombia, to marry his wife, a Colombian citizen, and to spend time with her family. On March 14, 2010, Knaeble was not allowed to board his flight from Bogota to Miami. Knaeble was subsequently questioned numerous times by FBI agents in Colombia. Because Knaeble was unable to fly home for a required medical examination, his employer rescinded its job offer for a position in Qatar. Knaeble attempted to return to the United States through Mexico where he was detained for over 15 hours, questioned, and forced to return to Bogota. Knaeble eventually returned to the United States in August 2010 by traveling for 12 days from Santa Marta, Colombia, to Panama City and then to Mexicali, California. United States and foreign authorities detained, interrogated, and searched Knaeble on numerous occasions during that journey.

Faisal Habib Kashem: In January 2010 Kashem traveled from the United States to Saudi Arabia to attend a two-year Arabic language-certification program and eventually to enroll in a four-year Islamic studies program. In June 2010 Kashem attempted
to fly from Jeddah, Saudi Arabia, to New York for summer vacation; was denied boarding; and was told by an airline employee that he was on the No-Fly List. FBI agents later questioned Kashem and told him that he was on the No-Fly List. After Kashem joined this lawsuit, the United States government offered him a "one-time waiver" to return to the United States, which he has so far declined because United States officials have refused to confirm that he will be able to return to Saudi Arabia to complete his studies.

Elias Mustafa Mohamed: In January 2010 Mohamed traveled from the United States to Saudi Arabia to attend a two-year Arabic language-certification program. In June 2010 Mohamed attempted to fly from Jeddah, Saudi Arabia, to his home in Seattle, Washington, via Washington, D.C., but he was not allowed to board his flight and was told by an airline employee that he was on the No-Fly List. FBI agents later questioned Mohamed and told him that he was on the No-Fly List. After joining this lawsuit, the United States government offered Mohamed a "one-time waiver" to return to the United States, which he has so far declined because United States officials have refused to confirm that he will be able to return to Saudi Arabia to complete his studies.

Steven William Washburn: Washburn is a United States Air Force veteran and lives in New Mexico. In February 2010 Washburn was not allowed to board a flight from Ireland to Boston. He later attempted to fly from Dublin to London to Mexico City. Although he was allowed to board the flight from Dublin to London, on the London to Mexico City flight the aircraft turned around 34 hours after takeoff and returned to London where Washburn was detained. On numerous later occasions FBI agents interrogated Washburn. In May 2010 Washburn returned to New Mexico by taking a series of five flights that eventually landed in Juarez, Mexico, where he crossed the United States border on foot. During this trip Mexican officials detained and interrogated Washburn. In June 2012 an FBI agent told Washburn that the agent would help remove Washburn's name from the No-Fly List if he agreed to speak to the FBI. Since May 2010 Washburn has been separated from his wife who is in Ireland because she has been unable to obtain a visa to come to the United States and Washburn is unable to fly to Ireland.

Nagib Ali Ghaleb: Ghaleb lives in Oakland, California. In February 2010 Ghaleb attempted to travel from Yemen where his wife and children were living to San Francisco via Frankfurt. Ghaleb was not allowed to board his flight from Frankfurt to San Francisco. FBI agents later interrogated Ghaleb and offered to arrange to fly him back to the United States if he agreed to tell them who the "bad guys" were in Yemen and San Francisco and to provide names of people from his mosque and community. The
agents threatened to have Ghaleb imprisoned. In May 2010 Ghaleb again attempted to return to the United States. He was able to fly from Sana‘a, Yemen, to Dubai, but he was not allowed to board his flight from Dubai to San Francisco. In July 2010 Ghaleb accepted a “one-time waiver” offered by the United States government to return to the United States. Because Ghaleb cannot fly, he cannot go to Yemen to be with his ill mother or to see his brothers or sisters.

Abdulatif Muthanna: Muthanna lives in Rochester, New York. In June 2009 Muthanna left Rochester to visit his wife and children who live in Yemen. In May 2010 Muthanna was to return to the United States on a flight from Aden, Yemen, to New York via Jeddah, Saudi Arabia, but he was not allowed to board his flight from Jeddah to New York. In September 2010 Muthanna accepted a “one-time waiver” offered by the United States government to return home. In June 2012 Muthanna wanted to be with his family and attempted to fly to Yemen, but he was not allowed to board a flight departing from New York. In August 2012 Muthanna attempted a journey of thirty-six days over land and by ship from Rochester to Yemen, but a ship captain refused to let Muthanna sail on a cargo freighter departing from Philadelphia on the recommendation of United States Customs and Border Protection. Muthanna was not allowed to board flights on four separate occasions before he finally boarded a flight from New York to Dubai in February 2013.

Mashal Rana: Rana moved to Pakistan to pursue a master’s degree in Islamic studies in 2009. In February 2010 Rana was not allowed to board a flight from Lahore, Pakistan, to New York. An FBI agent later interrogated Rana’s brother, who lives in the United States. In October 2012 Rana was six-months pregnant and again attempted to return to New York to receive needed medical care and to deliver her child. Rana’s brother worked with United States officials to clear Rana to fly. Rana received such clearance, but five hours before her flight was to depart she received notice that she would not be allowed to board. Rana was not able to find a safe alternative to travel to the United States before the birth of her child. In November 2010 the United States government offered Rana a “one-time waiver,” which she has not used because she fears she would not be able to return to Pakistan to be with her husband.

Ibraheem Y. Mashal: Mashal is a United States Marine Corps veteran. Mashal was not allowed to board a flight from Chicago, Illinois, to Spokane, Washington, and was told by an airline representative that he was on the No-Fly List. FBI agents later questioned Mashal and told him that his name would be removed from the No-Fly List and he would receive compensation if he helped the FBI by serving as an informant. When Mashal asked to
have his attorney present before answering the FBI's questions, the agents ended the meeting. Mashal owns a dog-training business. Because he is unable to fly, he has lost clients; had to turn down business; and has been prevented from attending his sister-in-law's graduation in Hawaii, the wedding of a close friend, the funeral of a close friend, and fundraising events for the nonprofit organization that he founded.

Salah Ali Ahmed: Ahmed lives in Norcross, Georgia. In July 2010 Ahmed attempted to travel from Atlanta to Yemen via Frankfurt and was not allowed to board the flight in Atlanta. FBI agents later questioned Ahmed. Because he is unable to fly, Ahmed was unable to travel to Yemen in 2012 when his brother died and is unable to travel to Yemen to visit his extended family and to manage property that he owns in Yemen.

Amir Meshal: Meshal lives in Minnesota. In June 2009 Meshal was not allowed to board a flight from Irvine, California, to Newark, New Jersey. FBI agents told Meshal that he was on a government list that prohibits him from flying. In October 2010 FBI agents offered Meshal the opportunity to serve as a government informant in exchange for assistance in removing his name from the No-Fly List. Because Meshal is unable to fly, he cannot visit his mother and extended family in Egypt.

Stephen Durga Persaud: Persaud lives in Irvine, California. In May 2010 Persaud was not allowed to board a flight from St. Thomas to Miami. An FBI agent told Persaud that he was on the No-Fly List, interrogated him, and told him the only way to get off the No-Fly List was to "talk to us." In June 2010 Persaud took a five-day boat trip from St. Thomas to Miami and a four-day train ride from Miami to Los Angeles so he could be home for the birth of his second child. Because he cannot fly, Persaud cannot travel to Saudi Arabia to perform the hajj pilgrimage.

STANDARDS

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Washington Mut. Ins. v. United States, 636 F.3d 1207, 1216 (9th Cir. 2011). See also Fed. R. Civ. P. 56(a). The moving party must show the absence of a dispute as to a material fact. Rivera v. Philip Morris, Inc., 395 F.3d 1142, 1146 (9th Cir. 2005). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine dispute as to a material fact for trial. Id. "This burden is not a light one. . . . The non-moving party must do more than show there is some 'metaphysical doubt' as to the material facts at issue." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010) (citation omitted).
A dispute as to a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in favor of the nonmoving party. Sluimer v. Verity, Inc., 606 F.3d 584, 587 (9th Cir. 2010). "Summary judgment cannot be granted where contrary inferences may be drawn from the evidence as to material issues." Easter v. Am. W. Fin., 381 F.3d 948, 957 (9th Cir. 2004) (citation omitted). A "mere disagreement or bald assertion" that a genuine dispute as to a material fact exists "will not preclude the grant of summary judgment." Deering v. Lassen Cnty. Coll. Dist., No. 2:07-CV-1521-JAM-DAD, 2011 WL 202797, at *2 (E.D. Cal., Jan. 20, 2011) (citing Harper v. Wallingford, 877 F.2d 728, 731 (9th Cir. 1989)). When the nonmoving party's claims are factually implausible, that party must "come forward with more persuasive evidence than otherwise would be necessary." LVRG Holdings LLC v. Brekke, 581 F.3d 1127, 1137 (9th Cir. 2009) (citation omitted).

The substantive law governing a claim or a defense determines whether a fact is material. Miller v. Glenn Miller Prod., Inc., 454 F.3d 975, 987 (9th Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. Id.

DISCUSSION

As noted, Plaintiffs allege Defendants have violated Plaintiffs' Fifth Amendment rights to procedural due process because Defendants have not provided Plaintiffs with any post-deprivation notice nor any meaningful opportunity to contest their continued inclusion on the No-Fly List. Plaintiffs also allege Defendants violated Plaintiffs' rights under the APA.

I. Claim One: Procedural Due-Process

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Mathews, 424 U.S. at 332. See also Maclean v. Dep't of Homeland Sec., 543 F.3d 1145, 1151 (9th Cir. 2008). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). See also Villa-Anguiano v. Holder, 727 F.3d 973, 981 (9th Cir. 2013). Due process, however, "is flexible and calls for such procedural protections as the particular situation demands." Mathews, 424 U.S. at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). See also Wynn v. Douglas Cnty. School Dist., 728 F.3d 1062, 1073 (9th Cir. 2013).
The court must weigh three factors when evaluating the sufficiency of procedural protections: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews, 424 U.S. at 336. See also Vasquez v. Rackauckas, 734 F.3d 1025, 1044 (9th Cir. 2013).

A. First Factor: Private Interest

Plaintiffs contend the first factor under Mathews weighs in their favor because Defendants' inclusion of Plaintiffs on the No-Fly List has deprived Plaintiffs of their constitutionally-protected liberty interests in travel and reputation.

1. Right to Travel

"The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." Kont v. Dulles, 357 U.S. 116, 125 (1958). See also Eunique v. Powell, 302 F.3d 971, 976-77 (9th Cir. 2002). "[T]he [Supreme] Court has consistently treated the right to international travel as a liberty interest that is protected by the Due Process Clause of the Fifth Amendment."
While the Constitution does not ordinarily guarantee the right to travel by any particular form of transportation, given that other forms of travel usually remain possible, the fact remains that for international travel, air transport in these modern times is practically the only form of transportation, travel by ship being prohibitively expensive. . . . Decisions involving domestic air travel, such as the Gilmore case, are not on point.

No. C 06-00545 WHA, 2012 WL 6652362, at *7 (N.D. Cal. Dec. 20, 2012). Other cases Defendants cite are similarly distinguishable. See, e.g., Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999) (restrictions on interstate travel as it relates to the right to drive); Town of Southold v. Town of E. Hampton, 477 F.3d 38 (2d Cir. 2007) (restrictions on interstate travel as it relates to riding ferries); Cramer v. Skinner, 931 F.2d 1020 (5th Cir. 1991) (restrictions on interstate air service to one airport).

Second, the burdens imposed by the restrictions on the plaintiffs in Green and Gilmore are far less than the alleged burdens in this matter. Gilmore involved the requirement that passengers present photo identification before boarding a commercial flight and Green involved passengers being subjected to enhanced security screening because they had been mistakenly identified as being on a terrorist watch list. Unlike the security-screening restrictions in Green and Gilmore, Plaintiffs' placement on the No-Fly List operates as a complete and indefinite ban on boarding commercial flights.

The Court also disagrees with Defendants' assertion that all modes of transportation must be foreclosed before any infringement of an individual's due-process right to international travel is triggered. In DeNieves, the Ninth Circuit found the plaintiff's protected liberty interest in her right to international travel had been infringed in that "retention of [her] passport infringed upon her ability to travel internationally" because "[w]ithout her passport, she could travel internationally only with great difficulty, if at all." DeNieves, 966 F.2d at 485 (emphasis added). In other words, her protected liberty interest in international travel had been infringed even though she may not have been completely banned from traveling.

As Plaintiffs' difficulties with international travel demonstrate, placement on the No-Fly List is a significant impediment to international travel. It is undisputed that inclusion on the No-Fly List completely bans listed persons from boarding commercial flights to or from the United States or over United States airspace. In addition, the realistic implications of being on the No-Fly List are far-reaching. For example, TSC shares watch-list information with 22 foreign governments, and United States Customs and Border Protection makes recommendations to ship captains as to whether a passenger poses a risk to transportation security. Thus, having one's name on the watch...
list can also result in interference with an individual's ability
to travel by means other than commercial airlines as evidenced by
some Plaintiffs' experiences as they attempted to travel
internationally or return to the United States by sea and by
land. In addition, the ban on air travel has exposed some
Plaintiffs to extensive detention and interrogation at the hands
of foreign authorities. With perhaps the exception of travel to
a small number of countries in North and Central America, a
prohibition on flying turns routine international travel into an
odyssey that imposes significant logistical, economic, and
physical demands on travelers. Thus, while the nature of the
depression in this case may be different from the retention of
the plaintiff's passport in DeNieves, placement on the No-Fly
List, as noted, results in an individual being able to "travel
internationally only with great difficulty, if at all." Id.

Accordingly, the Court concludes on this record that
Plaintiffs have constitutionally-protected liberty interests in
traveling internationally by air, which are significantly
affected by being placed on the No-Fly List.

The first step of the Mathews inquiry, however, does
not end with mere recognition of a liberty interest. The Court
must also weigh the liberty interest deprived against the other

As noted, placement on the No-Fly List renders most
international travel very difficult or impossible. One need not
look beyond the hardships suffered by Plaintiffs to understand
the significance of the deprivation of the right to travel
internationally. Due to the major burden imposed by inclusion on
the No-Fly List, Plaintiffs have suffered significantly including
long-term separation from spouses and children; the inability to
access desired medical and prenatal care; the inability to pursue
an education of their choosing; the inability to participate in
important religious rites; loss of employment opportunities; loss
of government entitlements; the inability to visit family; and
the inability to attend important personal and family events such
as graduations, weddings, and funerals. The Court concludes
international travel is not a mere convenience or luxury in this
modern world. Indeed, for many international travel is a
necessary aspect of liberties sacred to members of a free
society.

Accordingly, on this record the Court concludes
Plaintiffs' inclusion on the No-Fly List constitutes a
significant deprivation of their liberty interests in
international travel.

2. Stigma-Plus – Reputation

Plaintiffs also assert the first factor under Mathews
has been satisfied because Plaintiffs have been stigmatized "in
conjunction with their right to travel on the same terms as other travelers." First Am. Compl. ¶ 141.

Under the "stigma-plus" doctrine, the Supreme Court has recognized a constitutionally-protected interest in "a person's good name, reputation, honor, or integrity." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). See also Miller v. Cal., 355 F.3d 1172, 1178-79 (9th Cir. 2004). "To prevail on a claim under the stigma-plus doctrine, Plaintiffs must show (1) public disclosure of a stigmatizing statement by the government, the accuracy of which is contested; plus (2) the denial of some more tangible interest such as employment, or the alteration of a right or status recognized by state law." Green, 351 F. Supp. 2d at 1129 (emphasis added) (citing Ulrich v. City of San Francisco, 308 F.3d 968, 982 (9th Cir. 2002), and Paul v. Davis, 424 U.S. 693, 701, 711 (1976)). ""The plus must be a deprivation of a liberty or property interest by the state that directly affects the [Plaintiffs'] rights."" Green, 351 F. Supp. 2d at 1129 (quoting Miller, 355 F.3d at 1178). Under the "plus" prong, a plaintiff can show he has suffered a change of legal status if he "legally [cannot] do something that [he] could otherwise do." Miller, 355 F.3d at 1179 (discussing Constantineau, 400 U.S. 433 (1971)).

Plaintiffs contend, and Defendants do not dispute, that placement on the No-Fly List satisfies the "stigma" prong because it carries with it the stigma of being a suspected terrorist that is publicly disclosed to airline employees and other travelers near the ticket counter. According to Defendants, however, Plaintiffs cannot meet the "plus" prong of the test because (1) Plaintiffs do not have a right to travel by commercial airline and (2) there is not a "connection" between the stigma and the "plus" in light of the fact that Plaintiffs have alternative means of travel.

As noted, the Court has concluded Plaintiffs have constitutionally-protected liberty interests in the right to travel internationally by air. In addition, the Court concludes Plaintiffs have satisfied the "plus" prong because being on the No-Fly List means Plaintiffs are legally barred from traveling by air at least to and from the United States and over United States airspace, which they would be able to do but for their inclusion on the No-Fly List. Thus, Plaintiffs have suffered a change in legal status because they "legally [cannot] do something that [they] otherwise could do." Miller, 355 F.3d at 1179. The Court, therefore, concludes on this record that Plaintiffs have constitutionally-protected liberty interests in their reputations.

On the other hand, Plaintiffs' private interests at the heart of their stigma-plus claim are not as strong. Although placement on the No-Fly List carries with it the significant
stigma of being a suspected terrorist and Defendants do not contest the fact that the public disclosure involved may be sufficient to satisfy the stigma-plus test, the Court notes the limited nature of the public disclosure in this case mitigates Plaintiffs' claims of injury to their reputations. Because the No-Fly List is not released publicly, the "public" disclosure is limited to a relatively small group of individuals in the same area of the airport as the traveler when the traveler is denied boarding. Notwithstanding the fact that being denied boarding an airplane and, in some instances, being arrested or surrounded by security officials in an airport is doubtlessly stigmatizing, the Court notes the breadth and specificity of the public disclosure in this case is more limited than in the ordinary "stigma-plus" case. See, e.g., Paul v. Davis, 424 U.S. 693, 694-96 (1976) (distribution of a list and mug shots of "active shoplifters" to approximately 800 merchants); Constantineau, 400 U.S. at 433-36 (posting a list of the identities of those who have caused harm "by excessive drinking" in all retail liquor outlets); Ulrich v. City & Cnty. of San Francisco, 308 F.3d 968, 971 (9th Cir. 2002) (filing of an adverse action report with the California Medical Board and the National Practitioner Data Bank detailing the reasons why a psychologist relinquished his privileges at a hospital). Nevertheless, the Court concludes the injury to Plaintiffs' reputations is sufficient to implicate

Plaintiffs' constitutionally-protected interests in their reputations.

On this record the Court concludes Plaintiffs' claims raise constitutionally-protected liberty interests both in international air travel and in reputation, and, therefore, the first factor under the Mathews test weighs heavily in Plaintiffs' favor.

B. Second Factor: Risk of Erroneous Deprivation

As noted, in the second Mathews factor the Court weighs "the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards." Mathews, 424 U.S. at 335. See also Vasquez, 734 F.3d at 1044.

1. Risk of Erroneous Deprivation

When considering the risk of erroneous deprivation, the Court considers both the substantive standard that the government uses to make its decision as well as the procedural processes in place. See Santosky v. Kramer, 455 U.S. 745, 761-64 (1982).

As noted, nominations to the TSDB are generally accepted based on a "reasonable suspicion" that requires "articulable facts which, taken together with rational inferences, reasonably warrant the determination that an
**individual** meets the substantive derogatory criteria. Joint Statement of Stipulated Facts (#84) ¶ 16. This "reasonable suspicion" standard is the same as the traditional reasonable suspicion standard commonly applied by the courts. See Terry v. Ohio, 392 U.S. 1, 21 (1968) (permitting investigatory stops based on a reasonable suspicion supported by "articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."). See also Ramirez v. City of Buena Park, 560 F.3d 1012, 1020–21 (9th Cir. 2009). "The reasonable-suspicion standard is not a particularly high threshold to reach." United States v. Valdez-Vega, 738 F.3d 1074, 1078 (9th Cir. 2013). Although reasonable suspicion requires more than "a mere 'bunch,'" the evidence available "need not rise to the level required for probable cause, and . . . falls considerably short of satisfying a preponderance of the evidence standard." United States v. Arizu, 534 U.S. 266, 274 (2002) (quoting Terry, 392 U.S. at 27).

It is against the backdrop of this substantive standard that the Court considers the risk of erroneous deprivation of the protected interests; i.e., the risk that travelers will be placed on the No-Fly List under Defendants’ procedures despite not having a connection to terrorism or terrorist activities.

Defendants argue there is little risk of erroneous deprivation because the TSC has implemented extensive quality controls to ensure that the TSDS includes only individuals who are properly placed there. Defendants point out that the TSDS is updated daily and audited for accuracy and currentness on a regular basis and that each entry into the TSDS receives individualized review if the individual files a DHS TRIP inquiry. Finally, Defendants argue judicial review of the UMS TRIP determination further diminishes the risk of erroneous deprivation.

Plaintiffs, in turn, cite a 2007 report by the United States Government Accountability Office and a 2009 report by the Department of Justice Office of the Inspector General that concludes the TSDS contains many errors and that the TSC has failed to take adequate steps to remove or to modify records in a timely manner even when necessary. In addition, Plaintiffs maintain the lack of notice of inclusion on the No-Fly List or the reasons therefor forces aggrieved travelers to guess about the evidence that they should submit in their defense and, by definition, creates a one-sided and insufficient record at both the administrative and judicial level that does not provide a
genuine opportunity to present exculpatory evidence for the correction of errors.

Defendants point out that the information on which Plaintiffs rely to support their contention that the TSC has failed to modify adequately or to remove records when necessary is outdated and that the 2009 report indicated significant progress in maintenance of the TSDB. Although Defendants are correct that the TSC appears to have made improvements in ensuring the TSDB is current and accurate, Plaintiffs’ contention that the TSDB carries with it a risk of error, nevertheless, carries significant weight. This point was recently reinforced in *Ibrahim* where the plaintiff was nominated to the No-Fly List in 2004 as a consequence of human error despite the fact that she did not pose a threat to national security. *Ibrahim v. Dep’t of Homeland Sec.*, No. C 06-00545 WHA (#682) (N.D. Cal. Jan. 14, 2014) at 9. Although Ibrahim was taken off the No-Fly List shortly after the 2004 listing, the mistake itself was not discovered until 2013 and Ibrahim continued to experience substantial difficulties through the date of the order in which Judge William Alsup ultimately ordered the government to purge references to the erroneous 2004 nomination in all of its databases. *Id.* at 16-25, 38. The fact that the TSDB could still contain erroneous information more than nine years after commission of the error belies Defendants’ argument that the TSDB front-end safeguards substantially mitigate the risk of erroneous deprivation.

In any event, the DHS TRIP process suffers from an even more fundamental deficiency. As noted, the reasonable suspicion standard used to accept nominations to the TSDB is a low evidentiary threshold. This low standard is particularly significant in light of Defendants’ refusal to reveal whether travelers who have been denied boarding and who submit DHS TRIP inquiries are on the No-Fly List and, if they are on the List, to provide the travelers with reasons for their inclusion on the List. “Without knowledge of a charge, even simple factual errors may go uncorrected despite potentially easy, ready, and persuasive explanations.” *Al Haramain Islamic Found., Inc. v. United States Dep’t of Treasury*, 686 F.3d 965, 982 (9th Cir. 2012).

The availability of judicial review does little to cure this risk of error. While judicial review provides an independent examination of the existing administrative record, that review is of the same one-sided and potentially insufficient administrative record that TSC relied on in its listing decision without any additional meaningful opportunity for the aggrieved traveler to submit evidence intelligently in order to correct anticipated

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Moreover, judicial review only extends to whether the government reasonably determined the traveler meets the minimum substantive derogatory criteria; i.e., the reasonable suspicion standard. Thus, the fundamental flaw at the administrative-review stage (the combination of a one-sided record and a low evidentiary standard) carries over to the judicial-review stage.

Accordingly, on this record the Court concludes the DHS TRIP redress process, including the judicial review of DHS TRIP determinations, contains a high risk of erroneous deprivation of Plaintiffs' constitutionally-protected interests.

2. Utility of Substitute Procedural Safeguards

In its analysis of the second Mathews factor, the Court also considers the probative value of additional procedural safeguards. Mathews, 424 U.S. at 335. Plaintiffs contend due process requires Defendants to provide post-deprivation notice of their placement on the No-Fly List; notice of the reasons they have been placed on the List; and a post-deprivation, in-person hearing to permit Plaintiffs to present exculpatory evidence. Notably, Plaintiffs argue these additional safeguards are only necessary after a traveler has been denied boarding. Defendants,

Because the risk of erroneous deprivation arises from the insufficiency of the administrative record rather than the reviewing court's analysis, the Ninth Circuit's holding in Arjmand is inapplicable. 745 F.3d at 1302-03.

...
List. Moreover, the Court finds additional procedural safeguards would have significant probative value in ensuring that individuals are not erroneously deprived of their constitutionally-protected liberty interests. Accordingly, the Court concludes the second Matthews factor weighs heavily in favor of Plaintiffs.

C. The Government's Interest

When considering the third Matthews factor, the Court weighs "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Matthews, 424 U.S. at 335. See also Vasquez, 734 F.3d at 1044.

"[T]he Government's interest in combating terrorism is an urgent objective of the highest order." Holder v. Humatitarian Law Project, 561 U.S. 1, 28 (2010). "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964)). See also Al Haramain, 686 F.3d at 980 ("[T]he government's interest in national security cannot be understated.").

"[T]he Constitution certainly does not require that the government take actions that would endanger national security." Al Haramain, 686 F.3d at 980. Moreover, the government has a compelling interest in withholding national security information from unauthorized persons. Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988) (quoting Snepp v. United States, 444 U.S. 507, 509 n.3 (1980)). "Certainly the United States enjoys a privilege in classified information affecting national security so strong that even a criminal defendant to whose defense such information is relevant cannot pierce that privilege absent a specific showing of materiality." Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 207 (D.C. Cir. 2001) (Waters J.)(NCORF). Obviously, the Court cannot and will not order Defendants to disclose classified information to Plaintiffs.

On this record the Court concludes the governmental interests in combating terrorism and protecting classified information are particularly compelling, and, viewed in isolation, the third Matthews factor weighs heavily in Defendants' favor.

D. Balancing the Matthews Factors

"[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Gilbert v. Homar, 520 U.S. 924, 930 (1997) (quoting Cafeteria & Rest. Workers v. McElroy, 367 U.S. 886, 895 (1961)). See also Ching v. Mayorkas, 725 F.3d 1149, 1157 (9th Cir. 2013). "[D]ue process is flexible and calls for
such procedural protections as the particular situation demands."" Gilbert v. Romer, 520 U.S. at 930 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). See also Ching, 725 F.3d at 1157.

"...The fundamental requisite of due process of law is the opportunity to be heard." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (quoting Grannis v. Ordean, 234 U.S. 365, 394 (1914)). See also In re Raina, 428 F.3d 893, 903 (9th Cir. 2005). "...This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane, 339 U.S. at 314. See also Circu v. Gonzalez, 450 F.3d 990, 993 (9th Cir. 2006). "...An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections." Id. See also Al Haramain, 686 F.3d at 980 ("[T]he Constitution requires] that the government take reasonable measures to ensure basic fairness to the private party and that the government follow procedures reasonably designed to protect against erroneous deprivation of the private party's interests.").

1. Applicable Case Law

Although balancing the Mathews factors is especially difficult in this case involving compelling interests on both sides, the Court, fortunately, does not have to paint on an empty canvas when balancing such interests. Indeed, several other courts have done so in circumstances that also required balancing a plaintiff's due-process right to contest the deprivation of important private interests with the government's interest in protecting national security and classified information. See, e.g., Al Haramain, 686 F.3d 965; Jifry v. Fed. Aviation Admin., 370 F.3d 1174 (D.C. Cir. 2004); NCORI, 251 F.3d 192 (D.C. Cir. 2001); Ibrahim, No. C 06-00545 WHA (#682); KindHearts for Charitable and Humanitarian Dev., Inc. v. Geithner, 647 F. Supp. 2d 857 (N.D. Ohio 2009).

a. Ibrahim v. Department of Homeland Security

As noted, the plaintiff in Ibrahim was placed on the No-Fly List in November 2004 as a result of human error. Ibrahim, No. C 06-00545 WHA (#682), at 16. Nonetheless, Ibrahim's student visa was revoked in January 2005 because of "law enforcement interest in her as a potential terrorist." Id. at 17-18 (emphasis added). Even though Ibrahim was taken off of the No-Fly List shortly after her initial listing and the government had determined by February 10, 2006, that she had "no nexus to terrorism," she remained in the TSDB until September 18,
2006. Id. at 16–18. Shortly after her removal from the TSDB, Ibrahim was placed back in the TSDB before once again being removed at the end of May 2007. Id. at 18–19. On October 20, 2009, however, Ibrahim was again nominated to the TSDB pursuant to a secret exception to the reasonable-suspicion standard. She was not, however, placed on the No-Fly List. Id. at 19.

When Ibrahim applied for a visa in 2005, her application was denied pursuant to 8 U.S.C. § 1182(a)(3)(B), which is a section of the Immigration and Nationality Act that relates to terrorist activities. The word “Terrorist” was handwritten on the letter informing her of the denial. Id. at 20–22. Although Ibrahim again applied for a visa in 2013, it was denied even though the government conceded during litigation that Ibrahim did not pose a threat to national security. Id. at 18, 19–24.

In 2013 Ibrahim’s daughter, a United States citizen, was not permitted to board a flight to the United States because her name was in a section of the TSDB in which travelers’ admissibility to enter the United States is evaluated. Within six minutes, however, United States Customs and Border Patrol discovered the error and corrected it the next day, and Ibrahim’s daughter was removed from the TSDB. Id. at 24–25.

The Ibrahim court applied the Mathews factors to Ibrahim’s procedural due-process challenge and found: (1) Ibrahim’s presence on the No-Fly List and subsequent events infringed on her right to travel, right to be free from incarceration, and right to be free from the stigma associated with her public denial of boarding an airplane and subsequent incarceration; (2) there was not merely the risk of erroneous deprivation, but an actual erroneous deprivation; and (3) the government interest was low because the government conceded Ibrahim did not pose a threat to national security. Id. at 27.

The court ordered the defendants to purge from government databases all references to the erroneous 2004 listing and ordered the government to give Ibrahim the opportunity to apply for a discretionary waiver of visa ineligibility. After reviewing classified information, however, the court refused to overturn Ibrahim’s visa denial. Id. at 27–28, 31–34.

b. National Council of Resistance of Iran (NCRI) v. Department of State

In NCRI two organizations sought review of the Secretary of State’s actions designating them as “foreign terrorist organizations” under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 8 U.S.C. § 1189. 251 F.3d at 195–96. Such a designation under AEDPA results in the blocking of all funds that the organization has on deposit in United States banks, bans certain members and representatives of the organization from entry into the United States, and forbids all persons within the United States “from knowingly providing material support or resources” to the organization.” Id. at 196.
(quoting 10 U.S.C. § 2339b(a)(1)). During the administrative review of the State Department's determination, the Secretary of State "compiles an 'administrative record,'" but the Secretary does not provide the target organizations with notice of the materials used against them in that record, the opportunity to comment on such materials, or the opportunity to develop the administrative record further. Id. The administrative record may contain classified materials. Id. Judicial review is available, but it is based solely on the administrative record and the classified portion of the record that the government submits to the court ex parte and in camera. Id. at 196-97.

When analyzing the procedural due-process claim, the District of Columbia Circuit found the plaintiffs were deprived of their property interests and a stigma-plus liberty interest by their designation as foreign terrorist organizations. Id. at 203-05. After considering the risk of erroneous deprivation and the government's interests, the court held the Secretary must provide the organizations with "notice of the action sought," along with the opportunity to effectively be heard." Id. at 208 (quoting Mathews, 424 U.S. at 334).

Accordingly, the court held the Secretary must (1) afford the target organizations pre-deprivation notice that they are under consideration for designation; (2) provide the organizations with notice of the unclassified portions of the administrative record on which the Secretary will rely in making the designation determination; and (3) provide the organizations with some "opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations." Id. at 206-09.

Notably, however, the court left open "the possibility of the Secretary, in an appropriate case, demonstrating the necessity of withholding all notice and all opportunity to present evidence until the designation is already made." Id. at 208.

c. KindHearts for Charitable Humanitarian Development v. Geithner

In KindHearts the plaintiff challenged the Office of Foreign Assets Control's provisional designation of KindHearts as a Specially Designated Global Terrorist (SDGT). 647 F. Supp. 2d at 864. On February 19, 2006, the Office of Foreign Assets Control (OFAC) sent notice to KindHearts that OFAC had frozen all of KindHearts's assets and property pending investigation into whether KindHearts was subject to designation as an SDGT. Id. at 866-67. The "blocking notice" reflected KindHearts was being investigated "for being controlled by, acting for or on behalf of, assisting in or providing financial or material support to, and/or otherwise being associated with Hamas." Id. at 867.
After ignoring a responsive letter from KindHearts and its request for a copy of the administrative record relied on in the investigation, OFAC provisionally designated KindHearts as an SDGT on May 25, 2007, more than a year after the initial asset freeze. Id. With that letter OFAC included 35 unclassified and nonprivileged documents; "acknowledged it also relied on other 'classified and privileged documents'" and provided a three-page summary of the classified evidence; and informed KindHearts that it could present any evidence or other information for OFAC's consideration in making the final determination. Id. at 868.

After unsuccessfully requesting access to the full classified and unclassified record, KindHearts sent OFAC a 28-page preliminary submission on June 25, 2007, together with 1,369 pages of evidence to address OFAC's concerns to the best of KindHearts' ability. Id. OFAC later misplaced Kindhearts' submission. Id. at 868 n.4.

KindHearts filed a lawsuit in which it argued, among other things, that "OFAC provided inadequate post-deprivation process" by failing "to specify any objective criteria for blocking KindHearts' assets" and by failing to provide either pre- or post-deprivation process. Id. at 899. While finding other issues unripe for review on the merits, the court addressed the sufficiency of the procedural protections associated with the initial freeze of Kindhearts' assets.

In a summary of the notice provided to KindHearts, the court noted "KindHearts remains largely uniformed about the basis for the government's actions." Id. at 904. The government's failure to provide notice was particularly important in that "[n]otice is to come from the government because it alone knows what it believes, and why what it believes justifies its action." Id. at 904 n.25 (emphasis in original). Accordingly, after weighing the Mathews factors, the court found OFAC failed to provide KindHearts with proper notice, and, therefore, "violated KindHearts' fundamental right to be told on what basis and for what reasons the government deprived it of all access to all its assets and shut down its operations." Id. at 906. In addition to the notice deficiencies, the court found OFAC "failed to provide a meaningful hearing, and to do so with sufficient promptness to moderate or avoid the consequences of delay." Id. at 907-08.

d. Jifry v. Federal Aviation Administration

In Jifry the Federal Aviation Administration (FAA) revoked the airman certificates of Jifry and Zarie on the ground that the two pilots "presented a security risk to civil aviation or national security." Jifry, 370 F.3d at 1176-77. Jifry and Zarie were both nonresident alien pilots who used their FAA certificates to pilot aircraft abroad, but they had not piloted
commercial aircraft in the United States for four and nine years respectively. Id. at 1177.

The airman certificate-revocation process involved both the TSA and FAA. Id. When the TSA finds a pilot poses a security threat, TSA issues an Initial Notification of Threat Assessment (Initial Notice) to the individual and serves that determination on the FAA. Id. The pilot may request "releasable materials upon which the Initial Notice was based." Id. On receipt of the releasable materials, the pilot has 15 days to submit a substantive response to the Initial Notice. Id. The TSA Deputy Administrator then reviews the record de novo and issues a Final Notification of Threat Assessment (Final Notice) if he finds the pilot poses a security threat, and the FAA revokes the pilot's certificate. Id. The pilot may appeal to the National Transportation Safety Board and then to the court of appeals. Id. at 1177-78.

Jifry and Zarie received the Initial Notice and requested the releasable materials. The materials that TSA provided, however, did not include the factual basis for TSA's determination because it was based on classified information. Id. at 1178. Jifry and Zarie stated in their written response that "the 'lack of evidence and information about the basis for the determination contained in the TSA's response' made it impossible for them to specifically rebut the TSA's allegations,

and [they denied] that they were security threats." Id. The TSA Deputy Administrator issued a Final Notice, and the FAA subsequently revoked the pilots' certificates. Id.

Jifry and Zarie argued the procedures for revoking their certificates violated their rights to due process. After assuming Jifry and Zarie were entitled to constitutional protections as nonresident alien pilots with FAA certificates, the court found the balance of the Mathews factors favored the FAA. The court noted the pilots' interest in possessing FAA airman certificates to fly foreign aircraft outside of the United States "pales in significance to the government's security interests in preventing pilots from using civil aircraft as instruments of terror." Id. at 1183. The court also noted "whatever the risk of erroneous deprivation, the pilots had the opportunity to file a written reply to the TSA's initial determination and [the] independent de novo review of the entire administrative record by the Deputy Administrator of the TSA . . . and ex parte, in camera judicial review of the record" and that "substitute procedural safeguards may be impracticable in light of the government's interest in protecting classified information. The court relied on NORG for the proposition that the government needed to "afford to the entities under consideration notice that the designation is impending," . . . and 'the opportunity to present, at least in written form, such
e. Al Haramain Islamic Foundation v. United States Department of the Treasury

The issues in Al Haramain are similar to those in this case. In Al Haramain, the Ninth Circuit addressed the sufficiency of the procedural safeguards in OFAC’s investigation and designation of AHIF-Oregon as an SDGT. On February 19, 2004, OFAC issued a press release stating it had blocked the assets of AHIF-Oregon pending an investigation concerning the potential designation of AHIF-Oregon as an SDGT. Al Haramain, 688 F.3d at 973. OFAC did not provide notice before blocking AHIF-Oregon’s assets nor did the press-release reveal the reasons for the investigation. OFAC and AHIF-Oregon exchanged “voluminous documents on a range of topics,” the bulk of which concerned AHIF-Oregon’s possible connections to and financial support of Chechen terrorism. Id. On September 9, 2004, OFAC issued a press-release declaring that it had designated AHIF-Oregon as an SDGT because of direct links between AHIF-Oregon and Osama bin Laden, violations of tax and money-laundering laws, attempts to conceal the movement of funds intended for Chechnya by falsely representing that those funds were for the purpose of purchasing a prayer house in Missouri, and re-appropriation of funds donated for the purpose of humanitarian relief to support mujahideen in Chechnya. Id. at 973-74.

On September 16, 2004, OFAC sent a letter advising AHIF-Oregon that it had been designated as an SDGT and that it could request administrative reconsideration. Id. at 974. In early 2005 AHIF-Oregon submitted additional documents for the administrative record and requested reconsideration of the designation. AHIF-Oregon asserted it did not have a connection to terrorism and provided a detailed explanation of its Chechen donation. Id. Thereafter it repeatedly sought an explanation for its designation and a determination of its request for reconsideration, but OFAC did not respond. Id. AHIF-Oregon then filed a lawsuit in which it asserted the procedural protections provided by OFAC violated AHIF-Oregon’s procedural due-process rights under the United States Constitution.

In November 2007 after the commencement of AHIF-Oregon’s lawsuit and more than three years after the letter informing AHIF-Oregon of its designation, OFAC sent AHIF-Oregon a letter advising that OFAC provisionally intended to ‘redesignate’ AHIF-Oregon and offering AHIF-Oregon a final opportunity to submit documentation for OFAC’s consideration. Id. AHIF-Oregon again submitted nearly 1,000 pages of documents.
Id. On February 6, 2008, OFAC sent AHIF-Oregon a letter stating OFAC had determined AHIF-Oregon continued to meet the criteria for designation as an SDGT and specified three reasons for the designation: (1) two designated persons owned or controlled AHIF-Oregon; (2) AHIF-Oregon acted for or on behalf of those designated persons; and (3) AHIF-Oregon operated as a branch office of the Al Haramain Islamic Foundation, an international charity that provided support for al-Qaeda and other SDGTs. Id.

The court found the procedural protections afforded to AHIF-Oregon did not satisfy due process. Applying the Mathews factors, the court found AHIF-Oregon's "property interest is significant" because the designation "completely shuts all [of AHIF-Oregon's] domestic operations" indefinitely. Id. at 979-80. On the other hand, the court found "the government's interest in national security cannot be understated." Id. at 980.

"With respect to the use of classified information without disclosure," the court observed "[o]ne would be hard pressed to design a procedure more likely to result in erroneous deprivations." Id. (quoting American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1069 (9th Cir. 1995)). As to the probative value of additional procedural safeguards, the court found "[t]o the extent that an unclassified summary could provide helpful information, such as the subject

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matter of the agency's concerns, and to the extent that it is feasible to permit a lawyer with security clearance to view the classified information, the value of those methods seems undeniable." Id. at 982-83.

The Al Haramain court noted the Ninth Circuit held in Gete v. Immigration and Naturalization Services, 121 F.3d 1285, 1287-91 (9th Cir. 1997), that in the context of the government's seizure of vehicles from aliens who allegedly transported unauthorized aliens into the country, "[d]ue process required the INS to disclose the 'factual bases for seizure[]' and 'the specific statutory provision allegedly violated.'" Al Haramain, 686 F.3d at 981 (quoting Gete, 121 F.3d at 1290). The court specifically rejected the defendants' argument that NCORI and a subsequent District of Columbia Circuit case, Holy Land Foundation for Relief and Development v. Ashcroft, 333 F.3d 156, 163-64 (D.C. Cir. 2003), stood for the proposition that the agency need not provide a statement of reasons for its investigation. The Ninth Circuit observed the District of Columbia Circuit did not address whether the agency was required to provide notice of the reasons for the deprivation in either NCORI or Holy Land Foundation. Al Haramain, 686 F.3d at 987-88. To the extent that NCORI and Holy Land Foundation could be interpreted as permitting the agency to avoid providing a statement of reasons for the deprivation, the Al Haramain court

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explicitly stated those cases were inconsistent with the Ninth Circuit’s precedent in Gete. Id. at 988. Accordingly, the court held: “In the absence of national security concerns, due process requires OFAC to present the entity with, at a minimum, a timely statement of reasons for the investigation.” Id. at 987. As to national security concerns about providing a statement of reasons for the deprivation or permitting counsel with security clearance to view the classified information, the court “recognize[d] that disclosure may not always be possible” and that the agency may in some cases withhold such mitigating measures after considering “at a minimum, the nature and extent of the classified information, the nature and extent of the threat to national security, and the possible avenues available to allow the designated person to respond more effectively to the charges.” Id. at 983-84.

2. Application to the DHS TRIP Process

As noted, the Court finds Plaintiffs here have significant protected liberty interests at stake. Plaintiffs' interests in traveling internationally by air are substantially greater than the interest “in possessing FAA airman certificates to fly foreign aircraft outside the United States” as in Jifry. Although the private interests involved in Al Haramain, KindHearts, and NCORI are somewhat different from Plaintiffs' individual interests, the analysis in those three cases

(particularly in Al Haramain) is more closely applicable to this case.

As in Al Haramain, “the government’s interest in national security cannot be understated” in this case. Id. at 980. Nevertheless, the Ninth Circuit in Al Haramain found additional probative procedural protections were possible without jeopardizing the government’s interest in national security. The adequacy of current procedures and potential additional procedures, however, affect the weight given to the governmental interest. See Al Haramain, 686 F.3d at 983 (“In many cases, though, some information could be summarized or presented to a lawyer with a security clearance without implicating national security.”). Thus, while the government’s interest in national security in this case weighs heavily, the sufficiency of the DHS TRIP redress process ultimately turns on the procedural protections provided to Plaintiffs.

A comparison of the procedural protections provided in this case with those provided in Al Haramain, Jifry, KindHearts, and NCORI reveals the DHS TRIP process falls short of satisfying the requirements of due process. In Al Haramain, Jifry, and KindHearts the defendants provided the plaintiffs with some materials relevant to the respective agencies’ reasons for the deprivation at some point in the proceedings. In KindHearts the initial notice of the asset freeze advised the plaintiff that
the investigation concerned connections between KindHearts and Hamas and a later, provisional designation notice included the unclassified administrative record and a three-page summary of the classified evidence. 847 F. Supp. 2d at 866-68. In Jalify TSA provided the pilots with the Initial Notice and, upon request, the "releaseable materials" before issuing the Final Notice. 370 F.3d at 1177. Finally, in Al Haramain during the months after AHIF-Oregon's assets were initially frozen, OFAC and AHIF-Oregon "exchanged voluminous documents," the "bulk" of which "concerned AHIF-Oregon's possible connections to Chechen terrorism in Russia." Al Haramain, 686 F.3d at 973.

Unlike the plaintiffs in Al Haramain, KindHearts, and Jalify, however, Plaintiffs in this case were not given any notice of the reasons for their placement on the No-Fly List nor any evidence to support their inclusion on the No-Fly List. Indeed, the procedural protections provided to Plaintiffs through the DHS TRIP process fall substantially short of even the notice that the courts found insufficient in KindHearts and Al Haramain. In this respect, this case is similar to NCIORI in which the plaintiffs were not afforded "notice of the materials used against [them], or a right to comment on such materials or [to develop the] administrative record." NCIORI, 251 F.3d at 196.

Defendants' failure to provide any notice of the reasons for Plaintiffs' placement on the No-Fly List is especially important in light of the low evidentiary standard required to place an individual in the TSDB in the first place. When only an ex parte showing of reasonable suspicion supported by "articulable facts . . . taken together with rational inferences" is necessary to place an individual in the TSDB, it is certainly possible, and probably likely, that "simple factual errors" with "potentially easy, ready, and persuasive explanations" could go uncorrected. See Al Haramain, 686 F.3d at 982. Thus, without proper notice and an opportunity to be heard, an individual could be doomed to indefinite placement on the No-Fly List. Moreover, there is nothing in the DHS TRIP administrative or judicial-review procedures that remedies this fundamental deficiency. The procedures afforded to Plaintiffs through the DHS TRIP process are wholly ineffective and, therefore, fall short of the "elementary and fundamental requirement of due process" to be afforded "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections." See Mullane, 339 U.S. at 314.

Accordingly, on this record the Court concludes the absence of any meaningful procedures to afford Plaintiffs the opportunity to contest their placement on the No-Fly List violates Plaintiffs' rights to procedural due process.
3. Due-Process Requirements

Although the Court holds Defendants must provide a new process that satisfies the constitutional requirements for due process, the Court concludes Defendants (and not the Court) must fashion new procedures that provide Plaintiffs with the requisite due process described herein without jeopardizing national security.

Because due process requires Defendants to provide Plaintiffs (who have all been denied boarding flights and who have submitted DHS TRIP inquiries without success) with notice regarding their status on the No-Fly List and the reasons for placement on that List, it follows that such notice must be reasonably calculated to permit each Plaintiff to submit evidence relevant to the reasons for their respective inclusions on the No-Fly List. In addition, Defendants must include any responsive evidence that Plaintiffs submit in the record to be considered at both the administrative and judicial stages of review. As noted, such procedures could include, but are not limited to, the procedures identified by the Ninth Circuit in Al Haramain; that is, Defendants may choose to provide Plaintiffs with unclassified summaries of the reasons for their respective placement on the No-Fly List or disclose the classified reasons to properly-cleared counsel.

Although this Court cannot foreclose the possibility that in some cases such disclosures may be limited or withheld altogether because any such disclosure would create an undue risk to national security, Defendants must make such a determination on a case-by-case basis including consideration of, at a minimum, the factors outlined in Al Haramain; i.e., (1) the nature and extent of the classified information, (2) the nature and extent of the threat to national security, and (3) the possible avenues available to allow the Plaintiff to respond more effectively to the charges. See Al Haramain, 686 F.3d at 984. Such a determination must be reviewable by the relevant court.

II. Claim Three: Administrative Procedure Act

Plaintiffs also raise claims under 5 U.S.C. §§ 706(2)(A) and 706(2)(B) of the APA.

A. Section 706(2)(A)

Under Section 706(2)(A) the court will only set aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." An agency rule is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

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When prescreening passengers, Congress instructed the Executive to "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct information contained in the system." 49 U.S.C. § 44903(b)(2)(C)(iii)(I)(emphasis added). See also 49 U.S.C. § 44903(b)(2)(G)(i) (the Executive "shall establish a timely and fair process for individuals identified as a threat . . . to appeal to the [TSA] the determination and correct any erroneous information.").

As discussed herein at length, the DHS TRIP process does not provide a meaningful mechanism for travelers who have been denied boarding to correct erroneous information in the government’s terrorism databases. A traveler who has not been given any indication of the information that may be in the record does not have any way to correct that information. As a result, the DHS TRIP process “entirely fail[s] to consider an important aspect” of Congress’s instructions with respect to travelers denied boarding because they are on the No-Fly List. See Motor Veh. Mfrs. Ass’n, 463 U.S. at 43.

Accordingly, on this record the Court concludes the DHS TRIP process violates § 706(2)(A) of the APA.

B. Section 706(2)(B)

Under 5 U.S.C. § 706(2)(B) the court must set aside any agency action that is "contrary to constitutional right, power, privilege, or immunity." As noted, the Court has concluded the DHS TRIP process violates Plaintiffs’ rights to procedural due process under the United States Constitution. Accordingly, Plaintiffs’ claim under § 706(2)(B) merely mirrors Plaintiffs’ procedural due-process claim.

Because the Court has already concluded the DHS TRIP process violates Plaintiffs’ procedural due-process rights, the Court also concludes the DHS TRIP process violates § 706(2)(B) of the APA.

C. Remedy

As noted, Plaintiffs’ APA claims are closely related to Plaintiffs’ procedural due-process claims, and the substantive deficiencies in the DHS TRIP redress process are the same under the APA as they are under procedural due process. Accordingly, the substitute procedures that Defendants select to remedy the violations of Plaintiffs’ due-process rights, if sufficient, will also remedy the violations of Plaintiffs’ rights under the APA.
CONCLUSION

For these reasons, the Court DENIES Defendants' Motion (#85) for Partial Summary Judgment and GRANTS Plaintiffs' Cross-Motion (#91) for Partial Summary Judgment as to Claims One and Three in Plaintiffs' Third Amended Complaint (#83).

The Court directs the parties to confer as to the next steps in this litigation and to file no later than July 14, 2014, a Joint Status Report with their respective proposals and schedules. The Court will schedule a Status Conference thereafter at which primary counsel for the parties should plan to attend in person.

IT IS SO ORDERED.

DATED this 24th day of June, 2014.

[Signature]

United States District Judge
IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AYMAN LATIF; MOHAMED SHEIKH
ABDIRAHIM KARIYE; RAYMOND
EARL KNAEBLE, IV; STEVEN
WILLIAM WASHBURN; NAGIB ALI
GHaleb; ABDULLATIF MUTHANNA;
FAISAL NABIN KASHEM; ELIAS
MUSTAFA MOHAMED; IBRAHEIM Y.
MASHAL; SALAH ALI AHMED;
AMIR MESHAL; STEPHEN DURGA
PERSAUD; and MASHAAL RANA,

Plaintiffs,

v.

ERIC H. HOLDER, JR., in his
official capacity as Attorney
General of the United States;
JAMES B. COMEY, in his official
capacity as Director of the
Federal Bureau of Investigation;
and CHRISTOPHER M. PIEHOTA, in
his official capacity as Director
of the FBI Terrorist Screening
Center,

Defendants.

1 - ORDER
BROWN, Judge.

This matter comes before the Court on the parties' Joint Filings (#181, #194) regarding the disposition of claims brought by Plaintiffs that are not presently on the No-Fly List. Having fully considered the parties' respective positions, the Court enters a non-final Judgment in favor of Plaintiffs not on the No-Fly List.

In their Third Amended Complaint (#83) Plaintiffs (all of whom had been denied boarding a commercial aircraft) brought three claims against Defendants concerning Plaintiffs' alleged placement on the No-Fly List and the procedures that Defendants did or did not provide to Plaintiffs to challenge their placement on the List. In Claim One Plaintiffs alleged the procedures Defendants provided to Plaintiffs for challenging their placement on the No-Fly List were constitutionally deficient and, therefore, violated Plaintiffs' procedural due-process rights under the Fifth Amendment to the United States Constitution. In Claim Two Plaintiffs alleged Defendants' placement of Plaintiffs on the No-Fly List violated their Fifth Amendment rights to substantive due-process because Plaintiffs did not present any threat to commercial aviation. In Claim Three Plaintiffs alleged Defendants' placement of Plaintiffs on the No-Fly List and the procedures provided for challenging their placement on the No-Fly List violated the Administrative Procedure Act, 5 U.S.C. §§ 702,

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In its Opinion and Order (#136) issued June 24, 2014, the Court granted Plaintiffs' Cross-Motion for Partial Summary Judgment (#91) as to Plaintiffs' Claims One and Three. The Court held, among other things, that Defendants must provide Plaintiffs with notice regarding their status on the No-Fly List (i.e., advise whether they were, in fact, on the No-Fly List) and, without creating an undue risk to national security, a statement of the reasons for including each Plaintiff on the No-Fly List that is reasonably calculated to permit each Plaintiff to submit evidence challenging their placement on the List.

After conducting a Rule 16 case-management conference with the parties, the Court issued a Case-Management Order (#152) on October 3, 2014, in which, inter alia, the Court ordered Defendants to disclose to the Court and to Plaintiffs by October 10, 2014, which Plaintiffs, if any, would not be precluded as of that date from boarding a commercial aircraft flying over United States airspace. The Court also informed the parties that it would not consider any additional substantive motions on the merits of Plaintiffs' claims until Defendants had an opportunity to reconsider the remaining Plaintiffs' DHS TRIP inquiries regarding their status on the No-Fly List under procedures consistent with the Court's June 24, 2014, Opinion and Order. The Court set a January 31, 2015, deadline for Defendants

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to complete that reconsideration.


On February 13, 2015, after the parties submitted a Joint Status Report (#167) updating the Court as to the status of the case, the Court issued a Case-Management Order (#168) that, among other things, directed the parties to submit their proposals for a dispositive order confirming the conclusion of all claims by Plaintiffs who are not presently on the No-Fly List. On March 13, 2015, the parties filed a Joint Filing (#181) Regarding Disposition of Claims for Individuals Not on the No Fly List. After the Court sent to the parties a draft form of judgment and invited the parties to provide additional comment, the parties filed a Supplemental Joint Filing (#194).

Plaintiffs contend the Court should enter a judgment on Claims One and Three in favor of Plaintiffs who are not presently on the No-Fly List as a result of the Court’s grant of partial summary judgment in favor of Plaintiffs and Defendants’ subsequent disclosure that those Plaintiffs are not presently on the List.

Defendants, on the other hand, contend the Court should dismiss all of the claims of Plaintiffs who are not presently on
the No-Fly List because Defendants’ disclosure rendered their claims moot and, as a result, Defendants also assert this Court presently lacks jurisdiction to enter judgment in favor of Plaintiffs who are not on the No-Fly List.

It appears, however, that Defendants misunderstand the nature of the Court’s action in entering a non-final judgment in favor of Plaintiffs who are not on the No-Fly List. By entering such a non-final judgment, the Court is merely acknowledging the fact that the Court’s June 24, 2014, Opinion and Order has afforded those Plaintiffs a sufficient measure of relief that disposes of certain claims. Accordingly, the entry of this non-final judgment does not represent any new adjudication of the rights of any party before the Court and is done for the sole purpose of clarifying there are not any remaining unadjudicated claims for these Plaintiffs.

The Court emphasizes it does not enter this non-final judgment pursuant to Federal Rule of Civil Procedure 54(b) and will only enter a final judgment as to all claims and all parties at the conclusion of this action. Similarly, the entry of this non-final Judgment does not adjudge prevailing-party status or any other issue related to an eventual award of attorneys’ fees or court costs. The Court will address any petition for attorneys’ fees or costs filed by any party at the conclusion of this action.

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CONCLUSION

For these reasons, the Court ENTERS a non-final Judgment on
Claims One and Three in Plaintiffs’ Third Amended Complaint in
favor of Plaintiffs Ayman Latif, Elias Mustafa Mohamed, Nagib Ali
Ghaleb, Abdullatif Muthanna, Ibraheim Y. Mashal, Salah Ali Ahmed,
and Mashaal Rana, who are not on the No-Fly List. The Court also
DISMISSES without prejudice Claim Two as to these Plaintiffs, who
are not presently on the No-Fly List.

IT IS SO ORDERED.

DATED this 24th day of April, 2015.

/s/ Anna J. Brown
ANNA J. BROWN
United States District Judge

6 - ORDER
United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  

Argued October 22, 2014  Decided June 12, 2015  

No. 11-1324  

ALI HAMZA AHMAD SULIMAN AL BAHUL,  
Petitioner  

v.  

UNITED STATES OF AMERICA,  
Respondent  

On Petition for Review from the  
United States Court of Military Commission Review  

Michel Paradis, Counsel, Office of the Chief Defense Counsel, argued the cause for petitioner. With him on the briefs were Mary R. McCormick, Counsel, and Major Todd R. Pierce, JA, U.S. Army (ret.).  

Jeffrey T. Renee was on the brief for amici curiae First Amendment Scholars and Historians and The Montana Pardon Project in support of petitioner.  

Agnieszka M. Fryczman was on the brief for National Institute of Military Justice as amicus curiae in support of petitioner.  

McKenzie A. Livingston was on the brief for amici curiae Robert D. Steele and other former members of the Intelligence Community in support of petitioner.  

Robert Barton and Thomas J. McIntosh were on the brief for amici curiae Professor David W. Glazier in support of petitioner.  

Jonathan Hafetz was on the brief for amici curiae Asian American Legal Defense and Education Fund, et al., in support of petitioner.  

John E. De Pue, Attorney, U.S. Department of Justice, argued the cause for respondent. With him on the brief were Steven M. Dunne, Chief, Appellate Unit, and Joseph Palmer, Attorney. Francis A. Gilligan, Office of Military Commission, Lisa G. Moreno and Jeffrey M. Smith, Attorney, U.S. Department of Justice, entered appearances.  

James A. Schoettler Jr. was on the brief for amici curiae Former Government Officials, et al., in support of respondent.  

Before: HENDERSON, ROGERS, and TATEL, Circuit Judges  

Opinion for the Court by Circuit Judge ROGERS  

Concurring opinion by Circuit Judge TATEL  

Dissenting opinion by Circuit Judge HENDERSON  

ROGERS, Circuit Judge: Pursuant to the Military Commissions Act of 2006, 10 U.S.C. §§ 948a et seq. ("2006 MCA"), a law of war military commission convened at Guantanamo Bay, Cuba, found Ali Hamza Ahmad Suliman al Bahul guilty of material support for terrorism, solicitation of others to commit war crimes, and inchoate conspiracy to commit war crimes. The court, sitting en banc, vacated al Bahul's
convictions for material support and solicitation as violative of the Ex Post Favo Clause of the U.S. Constitution, see Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014), and remanded Bahlul's remaining challenges to his conspiracy conviction to the original panel, see id. at 31. Bahlul contends that his inchoate conspiracy conviction must be vacated because: (1) Congress exceeded its authority under Article I, § 8 of the Constitution by defining crimes triable by military commission that are not offenses under the international law of war; (2) Congress violated Article III of the Constitution by vesting military commissions with jurisdiction to try crimes that are not offenses under the international law of war; (3) the government put his thoughts, beliefs, and ideas on trial in violation of the First Amendment of the Constitution; and (4) the 2006 MCA discriminates against aliens in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment.

Because Bahlul's challenges include a structural objection under Article III that cannot be forfeited, see Commodity Futures Trading Comm'n v. Schor, 478 U.S. 333, 850–51 (1986), we review that challenge de novo, and we conclude, for the following reasons, that his conviction for inchoate conspiracy must be vacated.

I.

Bahlul contends that the jurisdiction of law of war military commissions is, under the Constitution, limited to offenses under the international law of war, and thus that Congress has encroached upon the Article III judicial power by authorizing Executive Branch tribunals to try the purely domestic crime of inchoate conspiracy. As a threshold matter, the government maintains that Bahlul has forfeited the Article III challenge, having failed to raise the argument at his trial before the military commission. Bahlul's challenge, however, presents a structural violation of Article III and is not waivable or forfeitable.

The Supreme Court held in Schor that an Article III structural claim of encroachment on the judicial power was not subject to waiver. Id. at 850–51. The Court explained that "Article III, § 1, not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as an inseparable element of the constitutional system of checks and balances." Id. at 850 (internal quotation marks omitted). Further, the Court explained, it "safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts, and thereby prevent[s] "the encroachment or aggrandizement of one branch at the expense of the other."" Id. (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)) (alterations and some internal quotation marks omitted). The Court held:

To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.

Id. at 850–51 (internal citation omitted). As a result, even though Schor had consented to adjudication of his state-law claim by an Article I tribunal, see id. at 849–50, the Supreme Court analyzed his structural challenge de novo, see id. at 851–57.
The Court reaffirmed Schor’s analysis in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), explaining that it was consistent with a rule that although res judicata claims were waivable, courts had discretion to excuse the waiver. *See id.* at 231–32. Accordingly, this court, as well as every other circuit court to address the issue, has held that under Schor a party “could not ... waive his ‘structural claim’ under Article III.” *Koretsky v. Comm’r of Internal Revenue Serv.*, 755 F.3d 929, 937 (D.C. Cir. 2014) (emphasis added); *see In re BP, L.P.*, 735 F.3d 279, 287–90 (5th Cir. 2013); *Wellness Int’l Network, Ltd. v. Sharp*, 727 F.3d 751, 769 (7th Cir. 2013) (rev’d on other grounds); *Waldman v. Stone*, 698 F.3d 910, 917–18 (6th Cir. 2012). Most recently, *In re Wellness International Network, Ltd. v. Sharp*, No. 13-935 (U.S. May 26, 2015), the Supreme Court again confirmed that “‘Schor forbids [] using consent to excuse an actual violation of Article III.’” *Id.*, slip op. at 14 n.10; *see id.* at 9, 11–12; *accord id.* at 12 (Roberts, C.J., dissenting).

Of course, the issue before us is not waiver but forfeiture. *See generally United States v. Olano*, 507 U.S. 725, 733–34 (1993). The Supreme Court’s analysis of waiver in Schor applies to forfeiture as well. There, the Court rejected waiver of Article III § 1 claims “for the same reason” that parties cannot waive Article III § 2 jurisdictional limitations, 478 U.S. at 851, which are not subject to forfeiture, *see United States v. Cotton*, 535 U.S. 625, 630 (2002). The Court cited *United States v. Griffin*, 303 U.S. 226, 229 (1938), where it had addressed *de novo* a subject-matter jurisdiction challenge that the defendants had failed to raise in the district court. In Schor, the Court explained that the analogy stems from the fact that both “Article III limitations ... serve institutional interests that the parties cannot be expected to protect.” 478 U.S. at 851. As four Justices observed in *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868 (1991), “[t]he precedent in Schor is right, but it has allowed the analogy to Article III subject-matter jurisdiction in mind.” *Id.* at 897 (Scalia, J., joined by O’Connor, Kennedy, and Souter, J.J., concurring in part and concurring in the judgment). Likewise in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the Court analyzed *de novo* a structural Article III challenge to a bankruptcy court’s jurisdiction even though that challenge had not been raised in the bankruptcy court. *Id.* at 2598–601. Again in *Sharf*, the Court reviewed the structural Article III issue *de novo*, even though the claim had not been raised in the bankruptcy court or the district court. *See Sharf*, No. 13-935, slip op. at 6, 12–15. We therefore hold that under Schor’s analysis, Bahil’s structural challenge under Article III is not subject to forfeiture.

Such searching, *de novo* review is appropriate because Bahil’s Article III challenge implicates the power of the political branches to sideline the federal courts. “Trial by military commission raises separation-of-powers concerns of the highest order.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 658 (2006) (Kennedy, J., concurring in part). “Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts ...” *Reid v. Covert*, 354 U.S. 1, 21 (1957) (plurality op.). The government has conceded, in light of Schor, that to the extent Bahil raises a structural challenge, it is subject to *de novo* review. *See Appellee’s Br.* 50; *Oral Arg. Tr.* 29, 30. It mistakenly suggests, however, that Bahil’s Article III challenge asserts only his personal right to a jury trial, which is subject to forfeiture and thus plain error review. *See Appellee’s Br.* 49–50. This ignores Part II of Bahil’s brief where he discusses the “judicial power” and relies on Article III structural precedent of the Supreme Court in maintaining that “[t]his [c]ourt must be sure that the political branches are not seeking to ‘chip away at the authority of the Judicial Branch ... Slight encroachments create new boundaries from which legislatures can seek new territory to capture.’” *Appellant’s Br.* 27 (quoting *Stern*, 131 S. Ct. at 2620 (quoting *Reid*, 354 U.S. at 39 (plurality op.))).
Our dissenting colleague misreads Schor in maintaining that its holding, quoted above, does not speak to waivability or forfeitability at all. See Dis. Op. 11–18. To the contrary, the Supreme Court, at that point in its opinion, was addressing the distinction between the waivability of the right component and the structural component of Article III § 1, and concluded that only the former was waivable. See Schor, 478 U.S. at 848–51. The Court reiterated that distinction in Schor, No. 13-935, slip op. at 9, 11–12, and emphasized that Schor “forbids” waiver of the latter, id. at 14 n.10. The dissent suggests that Schor’s non-waiver holding applies only to substantive rights, not arguments. See Dis. Op. 17–19. But the analysis in Schor applied to both “consent and waiver,” 478 U.S. at 851 (emphasis added), and later Supreme Court precedent confirms that Schor’s non-waiver holding applies to “defense[s],” “doctrine[s],” “challenge[s],” and “claim[s],” not just rights. Pleist, 514 U.S. at 231–32. Indeed, the discussion in Pleist about excusing waiver in the res judicata context would make little sense if waiver meant there was no violation in the first place. See id. at 231. Under Schor and Schor, parties can waive neither a separation-of-powers violation nor a separation-of-powers challenge. Our colleague also confuses Schor’s analysis by conflating the individual right and the structural interest protected by Article III § 1. See Dis. Op. 14–17. Each acknowledgment of waivability in the Court’s opinion refers to the individual right. See Schor, No. 13-935, slip op. at 2, 9, 11, 12–13, 17, 19 & n.13. By contrast, each time the Court discussed the distinction, it made clear that the structural interest, unlike the individual right, is not subject to waiver. Id. at 9, 11–12, 14 n.10. The Court explained that it could “not rely on Schor’s consent to ‘cure’ an ‘actual’ separation-of-powers violation, but simply treated his consent as relevant to the merits question of whether ‘such violation has occurred’” in the first place. Id. at 14 n.10 (alteration omitted).

Our dissenting colleague also misinterprets Schor to suggest that structural Article III claims can be forfeited. See Dis. Op. 15–16. Having decided the structural question de novo, the Court remanded two questions: Whether Sharif had in fact consented to adjudication by the bankruptcy court, and if so, whether he had forfeited his right to adjudication by an Article III judge by failing to raise an Article III objection in the district court. Schor, No. 13-935, slip op. at 6, 20. The reference to forfeiture is unremarkable. If the Seventh Circuit on remand finds that Sharif consented, then all that is left for the Seventh Circuit to decide is Sharif’s personal right claim, and it has always been clear that individual rights — even individual Article III rights — are subject to forfeiture. The Court resolved the structural issue de novo without regard to any possible forfeiture. Even the Justice who was certain that Sharif had forfeited his constitutional claim thought it proper to resolve the structural Article III issue de novo. See id. at 1–2 (Alito, J., concurring in part and concurring in the judgment). Indeed, the Court tied its remand instruction to the contentions in the petitioners’ brief; see id. at 20, which acknowledged there are some Article III claims that “raise structural concerns that litigants may not waive or forfeit.” Br. for Pet’n Wellness Int’l, et al. 52.

Our analysis would not change even if, as the dissent maintains, the Court in Schor had instructed that courts should excuse waivers of Article III structural claims, instead of holding that such claims were unwaivable. See Dis. Op. 12–13, 19. The Article III challenge in Bahlul’s case goes to the heart of the judiciary’s status as a coordinate branch of government. Our colleague’s focus on the fact that Bahlul is “concededly — and unapologetically — guilty of the charged offenses,” id. at 25, is a red herring. To excuse forfeiture would not be for the purpose of protecting an individual defendant, but to “safeguard [the] role of the Judicial Branch in our tripartite system.” Schor, 478 U.S.
at 850. The court would vindicate "the federal Judiciary's strong interest[s]." Kurevitz, 755 F.3d at 957 (emphasis added), not merely Bahlul's. Any disruption to normal appellate process, see Dis. Op. 20–22, 22 n.8, is "plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers" under Article III. Gilhudd Co. v. Zidanek, 370 U.S. 530, 536 (1962). To the extent the dissent insists that this court lacks the power to excuse forfeiture, see Dis. Op. 19–20; contra Nguyen v. United States, 539 U.S. 69, 80 (2003), it relies on precedent applying Federal Rule of Criminal Procedure 52(b), which "governs on appeal from criminal proceedings . . . in district court," Olanon, 507 U.S. at 731; see Fed. R. Crim. P. 1 Advisory Comm. Note ("[T]hese rules are intended to govern proceedings in criminal cases triable in the United States District Court."); whereas Bahlul is appealing the decision of the Court of Military Commission Review, and the statute governing such appeals, see 10 U.S.C. § 950g, contains none of the limitations the dissent labors to establish. The United States Court of Appeals for the Armed Forces has rejected the same argument in the court-martial context, affirming the decision of a lower tribunal to excuse forfeiture and conducting its own review de novo. See United States v. Quire, 55 M.J. 334, 338 (C.A.A.F. 2001); 10 U.S.C. § 950g(d).

We turn to the merits of Bahlul's structural Article III challenge to his conspiracy conviction.

II.

"Article III, § 1, of the Constitution mandates that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Stern, 131 S. Ct. at 2608. Section 2, clause 1, provides that "[t]he judicial Power shall extend" to, among others, "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority" and "to Controversies to which the United States shall be a Party." These cases and controversies include criminal prosecutions. See United States ex rel. Toth v. Quarles, 350 U.S. 11, 15 (1955); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 121 (1866). Article III § 2 requires that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. CONST. art III, § 2, cl. 3. The Supreme Court, based on the text of Article III and its own precedent, has continued to reaffirm that Article III is an inseparable element of the constitutional system of checks and balances that both defines the power and protects the independence of the Judicial Branch. Under the basic concept of separation of powers that flows from the scheme of a tripartite government adopted in the Constitution, the "judicial Power of the United States" can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.

Stern, 131 S. Ct. at 2608 (alterations and some internal quotation marks omitted) (quoting U.S. CONST. art III, § 1).

If a suit falls within the judicial power, then "the responsibility for deciding that suit rests with Article III judges in Article III courts." Id. at 2609. There are limited exceptions: Congress may create non-Article III courts to try cases in the District of Columbia and U.S. territories not within a state. See Palmore v. United States, 411 U.S. 389, 390–91 (1973); American Ins. Co. v. 555 Batts of Cotton, 36 U.S. (1 Pet.) 511, 546 (1838). It may assign certain criminal prosecutions to courts
martial, see Dymes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857), and military commissions, see Ex parte Quarin, 317 U.S. 1, 46 (1942). And it may assign to administrative agencies the adjudication of disputes involving "public rights" stemming from federal regulatory programs. See Stern, 131 S. Ct. at 2610; Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855). There are three types of military commissions. See, e.g., Hamdan, 548 U.S. at 595-98 (plurality op.). 683 (Thomas, J., dissenting). Bahlul was tried by a law of war military commission, Bahlul, 767 F. 3d at 7, so the question is whether conspiracy falls within the Article III exception for that type of commission.

A. The Supreme Court addressed the contours of the exception to Article III for law of war military commissions in the seminal case of Ex parte Quarin, 317 U.S. 1 (1942). There, Nazi soldiers found out of uniform in the United States during World War II were convicted of sabotage and other offenses by a law of war military commission. They challenged their convictions on the ground that Article III guaranteed them a right to trial by jury in civil court. The Supreme Court held that the law of war military commission had jurisdiction to try "offense[s] against the law of war," of which sabotage was one. Id. at 46. The Court explained that Article III § 2 was intended to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

Id. at 39 (citation omitted). Given this "long-continued and consistent interpretation," the Court stated "that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts." Id. at 40. "[S]ince the founding of our government" and continued in the Articles of War, Article III has been construed "as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces." Id. at 41.

In Quarin, the Supreme Court described the law of war as a "branch of international law," 317 U.S. at 29, and defined "the law of war as including ... the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals." Id. at 28. In addition to international precedents, see id. at 30 n.7, 31 n.9, 35 n.12, the Court also considered domestic precedents (during the American Revolution, the War of 1812, and the Mexican and Civil Wars, see id. at 31 n.9 & 10, 42 n.14), but only as potential limits on the law of war. The Court explained.

We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be
triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury.

Id. at 29 (citing, as an example of the latter, Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866)). Thus, "our courts" may recognize fewer laws of war offenses than other countries' courts, whether because they disagree about the content of international law or because of independent constitutional limitations. In the same vein, the Supreme Court recognized that Congress had "adopt[ed] the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts." Id. at 30. The Court in Hamdan likewise treated "the American common law of war" as a source of constraint, not expansion. 548 U.S. at 613.

The Supreme Court has adhered to Quin's understanding of the meaning of the "law of war" for over seventy years. In Application of Yamashita, 327 U.S. 1 (1946), the Court reaffirmed Quin's "governing principles," id. at 9, and its statement that Congress had exercised its power to "define and punish offenses against the Law of Nations, of which the law of war is a part," id. at 7 (alterations omitted) (citing U.S. Const. art. I, § 8, cl. 10). The Court held that the offenses there, stemming from the commanding general's breach of duty to protect civilian populations and prisoners of war against atrocities committed by troops under his command, were "recognized in international law as violations of the law of war." Id. at 14. To determine the content of the law of war, the Court looked to international sources, id. at 14–16, and it concluded that those sources alone "plaintly imposed on petitioner ... an affirmative duty" that he had violated. Id. at 16. Having established that the charged offenses were violations of the international law of war, the Court mentioned two domestic field orders, but only to confirm domestic recognition of the duty imposed by the Hague and Geneva Conventions. See id. at 16 & n.3. Again, in Johnson v. Eisentrager, 339 U.S. 763 (1950), the Supreme Court looked only to international law sources to determine whether the charged offense, "[b]reach of the terms of an act of surrender," was a "war crime." Id. at 787–88 & n.13. More recently, in Hamdan, the Supreme Court reaffirmed Quin's principle that the "law of war" means "the body of international law governing armed conflict." 548 U.S. at 641 (Kennedy, J., concurring in part); id. at 603 (plurality op.) (quoting Quin, 317 U.S. at 30, 35–36).

The Supreme Court's reason in Quin for recognizing an exception to Article III — that international law of war offenses did not entail a right to trial by jury at common law, 317 U.S. at 40–41 — does not apply to conspiracy as a standalone offense. The Court in Quin held that the international law of war offense of unlawful belligerency was triable by law of war military commissions, 317 U.S. at 36, 46. Although the Court had no occasion to speak more broadly about whether other offenses came within the Article III exception, its reasoning precludes an Article III exception for conspiracy, which did entail a right to trial by jury at common law. In Callen v. Wilson, 127 U.S. 540 (1888), cited in Quin, 317 U.S. at 39, the Court pointed to authorities "sufficient to show" that "the nature of the crime of conspiracy at common law ... [w]as an offense of a grave character, affecting the public at large," such that a person so charged could not be tried without a jury, see Callen, 127 U.S. at 556. The reasoning in Quin also counsels against expanding the exception beyond international law of war offenses. Stating that "[f]rom the very beginning of its history the Court has recognized and applied the law of war as [being] part of the law of nations," Quin, 317 U.S. at 27, the Court explained that some offenses may not be triable by military commission because "they are not recognized by our courts as
violations of the law of war,” id. at 29. No subsequent Supreme Court holding suggests that law of war military commissions may exercise jurisdiction over offenses not recognized by the “law of war” as defined in Quirin.

B. The parties agree that Balhlul was tried by a law of war military commission that had jurisdiction to try charges for offenses against the law of war as defined in Quirin. The government concedes that conspiracy is not a violation of the international law of war. See U.S. Appellee’s Br. to the en Banc Court at 34 (July 10, 2013). The question, therefore, is whether a law of war military commission may try domestic offenses — specifically conspiracy — without intruding on the judicial power in Article III.

The government insists that the Article III exception identified in Quirin is not limited to international law of war offenses because “the sabotage offense at issue in Quirin — which the Court viewed as akin to spying — is not and has never been an offense under the international law of war.” Appellee’s Br. 54. Yet the Supreme Court in Quirin concluded otherwise. It looked to “authorities on International Law” who “regarded as war criminals” saboteurs who passed behind enemy lines without uniform. 317 U.S. at 35 & n.12. It relied on international sources to establish that the offense was recognized “[b]y universal agreement and practice.” Id. at 30 & n.7, 31 n.8, 35 n.12. And it quoted language from early statutes and military tribunal proceedings where spying was identified as punishable by military tribunal under the “law and usage of nations.” Id. at 31 n.9, 41. The government points to scholarly criticism of the Court’s conclusion, see Appellee’s Br. 32, but this court is bound by the Supreme Court’s analysis in Quirin, which was premised on sabotage being an international offense. See Quirin, 317 U.S. at 35–36.

Alternatively, the government maintains that even if Quirin did not extend the Article III exception to domestic offenses, historical practice demonstrates that it has been so extended. See Appellee’s Br. 20, 31–39. The Supreme Court, however, when relying on historical practice to analyze the separation of powers, has required much more evidence of a settled tradition than the government has identified. For instance, in Myers v. United States, 272 U.S. 52, 175 (1926), the Court held, upon reviewing more than seven decades in which Presidents had continuously removed Executive Branch officers without congressional involvement, that Congress lacked authority to restrict the President’s removal power. In United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the Court rejected, in view of an “unbroken legislative practice which has prevailed almost from the inception of the national government to the present day,” the argument that a joint resolution of Congress authorizing the President to determine whether to embargo the sale of arms and munitions to belligerents in a foreign war was an unlawful delegation of legislative power. Id. at 322. Recently, in National Labor Relations Board v. Noel Canning, 134 S. Ct. 2550 (2014), the Court defined the scope of the President’s authority under the Recess Appointments Clause, U.S. CONST. art. II, § 2, cl. 3, based on a lengthy and dense historical practice. Upon identifying “thousands of intra-session recess appointments” and noting that “Presidents since Madison have made many recess appointments filling vacancies that initially occurred prior to a recess,” id. at 2562, 2571, the Court concluded that the Clause authorized those types of appointments. By contrast, where the Court found only a handful of instances in which a President had made a recess appointment during an inter-session recess lasting less than ten days, the Court held that those recesses were “presumptively too short to fall within the Clause.” Id. at 2567.

The history on which the government relies fails to
establish a settled practice of trying non-international offenses in law of war military commissions. The longstanding statutes conferring military jurisdiction over charges of spying and aiding the enemy do not, as the government maintains, demonstrate that domestic offenses come within the Article III exception. The Congresses that enacted those statutes viewed those offenses as punishable under the international law of war. The 1806 statute "imposed the death penalty on alien spies according to the law and usage of nations, by sentence of a general court martial." Quirin, 317 U.S. at 41 (quoting Act of Congress of Apr. 10, 1806, 2 Stat. 371). A 1776 Resolution adopted by the Continental Congress contained a nearly identical provision. Id. at 41 & n.13 (citing Edmund M. Morgan, Court-Martial Jurisdiction over Civilian Offenders Under the Articles of War, 4 Minn. L. Rev. 79, 107-09 (1920) (quoting Resolution of Aug. 21, 1776, 1 JOURNALS OF CONGRESS 450)). In 1865, the Attorney General of the United States, James Speed, concluded in a formal opinion that "to act as spy is an offense against the laws of war," and that "every lawyer knows that a spy was a well-known offender under the laws of war." Military Commissions, 11 Op. Att’y Gen. 297, 312, 313 (1865). The acceded William Winthrop, the "Blackstone of Military Law," Hamdan, 548 U.S. at 597 (plurality op.) (quoting Reed, 354 U.S. at 19 n.38 (plurality op.)), reached the same conclusion. See W. Winthrop, MILITARY LAW AND PRECEDENTS 769-70 (2d ed. 1920). Even authority relied upon by the government indicates that during the early Republic spies were considered "war criminals." See Appellee’s Br. 31-32 (quoting 2 L. Oppenheim, INTERNATIONAL LAW 287 (4th ed. 1926)).

But even if spying and aiding the enemy were not international offenses, their historical pedigrees stand in marked contrast to that of conspiracy. Both of those offenses have been subject to military jurisdiction since the ratification of the Constitution. See Quirin, 317 U.S. at 41; Act of Apr. 10, 1806, 2 Stat. 359, 371. Congress has reenacted the spying and aiding the enemy statutes on multiple occasions, see, e.g., Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 759, 804; Act of Aug. 29, 1916, Pub. L. No. 64-242, 39 Stat. 619, 663; Act of Mar. 3, 1863, 12 Stat. 731, 737, and scores of law of war military tribunals have tried the offenses, see Quirin, 317 U.S. at 42 n.14. When analyzing separation-of-powers challenges, the Supreme Court has explained, "the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land." Marshall Field & Co. v. Clark, 143 U.S. 649, 691 (1892); see Mistretta v. United States, 488 U.S. 334, 401 (1989); Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803).

The history of inchoate conspiracy being tried by law of war military tribunals is thin by comparison and equivocal at best. The government has identified only a handful of ambiguous examples, and none in which an inchoate conspiracy conviction was affirmed by the Judicial Branch. The examples are unpersuasive in themselves and insufficient to establish a longstanding historical practice.

First, although the charges against the Lincoln assassins referred to conspiracy, the specifications listed the elements of the completed offense. See J. Holt & T. Ewing, CHARGE AND SPECIFICATION AGAINST DAVID E. HEROLD, ET AL. 3 (1865) (Pet.’s Supp. App.’s 77-78); see also Hamdan, 548 U.S. at 604 n.35 (plurality op.), id. at 609. The Attorney General’s formal opinion in 1865 described the charge as "the offence of having assassinated the President." 11 Op. Att’y Gen. at 297, see id. at 316-17. At the time, it was unclear that conspiracy could even be charged separately from the object offense, once completed. See Jernell v. United States, 450 U.S. 770, 781 & n.13 (1975).
Because of conspiracy’s uncertain legal status at the time, the dissent’s theory that “[t]he circumstances surrounding the Lincoln assassination” indicate that “the criminal defendants could only have been charged with conspiracy,” Dis. Op. 62–63 (emphasis in original), is mere speculation, especially in view of the contrary contemporary analysis by the Attorney General. See 11 Op. Att’y Gen. at 297, 316–17. Moreover, Winthrop noted that the Lincoln assassins’ tribunal was a mixed martial law and law of war military commission. See W. Winthrop, MILITARY LAW AND PRECEDENTS, at 839 & n.5. of id. at 842. The dissent appears to disagree with Winthrop (on whom it otherwise relies, see Dis. Op. 54, 59–61, 67) regarding the jurisdictional basis for the assassins’ tribunal Compare id. at 834–85, with W. Winthrop, MILITARY LAW AND PRECEDENTS, at 839 & n.5. The dissent further ignores Winthrop’s explanation that conspiracy was a “civil crime” or “crime against society” and not a law of war offense. W. Winthrop, MILITARY LAW AND PRECEDENTS, at 842. Where Winthrop listed the law of war violations that had “principally” been charged in U.S. military commissions, conspiracy was not among them. See id. at 839–40. In response, the dissent cites Milligan, 71 U.S. at 127, for the proposition that military tribunals cannot exercise martial law jurisdiction unless the civil courts are closed, see Dis. Op. 64, even though Milligan was decided after the Lincoln assassins’ prosecution. The unreported district court opinion in Ex parte Millini, 17 F. Cas. 954 (1868), hardly strengthens the dissent’s position, see Dis. Op. 64 n.21; the district court described the offense as “assassination” and only used “conspiracy” in the same terms as the charging document, while distinguishing Milligan based on the state of war in the Capital, not based on the nature of the offense. Mudd, 17 F. Cas. at 954.

Second, although the charges against the Nazi saboteurs in Quirin included conspiracy to commit the charged offenses, the Court upheld the jurisdiction of the law of war military commission only as to the charge of sabotage and did not mention the conspiracy charge in its analysis. See Quirin, 317 U.S. at 46. Similarly, although William Colepaugh was convicted of sabotage and spying, in addition to conspiracy to commit those offenses, the U.S. Court of Appeals for the Tenth Circuit affirmed the jurisdiction of the military tribunal in view of the law of war acts of belligerency without addressing the conspiracy charge. See Colepaugh v. Looney, 235 F.2d 429, 431–32 (10th Cir. 1956). Moreover, in both Quirin and Colepaugh, the charged conspiracies involved completed offenses. By contrast, none of the underlying overt acts for Bahall’s conspiracy conviction was a law of war offense itself, and the government declined to charge him with vicarious liability under Pinkerton v. United States, 328 U.S. 640 (1946), or with joint criminal enterprise, see Bahall, 767 F.3d at 38–39 (Rogers, J., concurring in the judgment in part and dissenting) (citing U.S. Appellee’s Br. to the En Banc Court at 47 (Jul. 10, 2013)).

Third, the government asserts that “during the Civil War, defendants were regularly convicted of conspiracies that were charged as unsummarized offenses,” Appellee’s Br. 37, but it cites only a single instance. Col. George St. Leger Grenfel was convicted by a military tribunal of conspiracy to free prisoners of war in Chicago and to destroy that city. See GENERAL COURT-MARTIAL ORDERS No. 452 (Aug. 22, 1865). As Bahall points out, however, Grenfell’s commission, like that of the Lincoln assassins, was a “hybrid” commission exercising

The historical examples identified by the government thus fall far short of what the Supreme Court has required when using historical practice to interpret the constitutional separation of powers. Our dissenting colleague adds only the orders of General MacArthur and General Wedemeyer from the end of World War II and the Korean Conflict. See Dis. Op. 66 & nn.22–23. But the en banc court dismissed the persuasiveness of such military orders for lack of high-level Executive Branch consultation. See Behlul, 767 F.3d at 25 n.16. And during the Korean Conflict there apparently were no trials conducted by United Nations Military Commissions. See Jordan J. Paust et al., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 724 (1996).

Finally, the government asserts that any "enemy belligerent" can be tried by a military commission regardless of the offense. Appellee's Br. 36. But the Supreme Court has focused on "the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged." Quirin, 317 U.S. at 29 (emphasis added). Thus, in Quirin, the Court "assume[d] that there are acts" that could not be tried by military commission "because they are of that class of offenses constitutionally triable only by a jury." Id. (emphasis added). Likewise, in Yamashita, the Court "consider[ed] only the lawful power of the commission to try the petitioner for the offense charged." 327 U.S. at 8 (emphasis added). In Hamdan, the Court explained that the status of the offender (being a member of a foreign armed force) and the nature of the offense were both necessary conditions for the exercise of jurisdiction by a law of war military commission. See Hamdan, 548 U.S. at 597–98 (plurality op.) (citing W. Winthrop, MILITARY LAW AND PRECEDENTS, at 836–39); accord id. at 2826 (Thomas, J., dissenting).

C.

This court need not decide the precise relationship between Bahlul's Article I and Article III challenges. In Quirin, the Supreme Court's Article III analysis did not look to Article I at all. See Quirin, 317 U.S. at 38–46. In some contexts, however, Article III exceptions have turned on the extent of congressional power. See Palmore v. United States, 411 U.S. 389, 402–04 (1973); Kinsella v. United States ex rel. Singleton, 361 U.S. 254, 236–38 (1960). Upon examining the government's Article I contentions, we conclude that they do not call into question the conclusion that the Article III exception for law of war military commissions does not extend to the trial of domestic crimes in general, or inchoate conspiracy in particular.

I. The government maintains that the war powers in Article I vest Congress with broad authority to subject war-related offenses to the jurisdiction of military commissions. See Appellee's Br. 27–30. The war powers include the power to "define and punish . . . Offences against the Law of Nations," U.S. CONST. art. I, § 8, cl. 10; "declare War," id. § 8, cl. 11,
"raise and support Armies," id. § 8, cl. 12, "provide and maintain a Navy," id. § 8, cl. 13, "make Rules for the Government and Regulation of the land and naval Forces," id. § 8, cl. 14, "provide for calling forth the Militia," id. § 8, cl. 15, and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," id. § 8, cl. 18. Because the war powers contain no textual limitation based on international law, the government concludes there is no such restriction on military commission jurisdiction. See Appellee's Br. 29–30. In the government's view, the war powers support military jurisdiction over any offense "committed by an enemy belligerent during and in relation to an armed conflict with the United States [that]... has a palpable effect on the nature of that conflict." Oral Arg. Tr. 49.

The Supreme Court has looked to the Define and Punish Clause in determining whether Congress may designate particular offenses within the jurisdiction of a law of war military commission. The Court in Quirin, Yamashita, and Hamdan did look to the war powers in discussing congressional authority to establish military commissions. See Hamdan, 548 U.S. at 591 (plurality op.), Yamashita, 327 U.S. at 12; Quirin, 317 U.S. at 26, see also W. Winthrop, MILITARY LAW AND PRECEDENTS, at 831 (stating that Congress's power "to declare war" and "raise armies" provided the "original sanction" for military commissions). But in addressing Congress's authority to confer jurisdiction over particular offenses, the Court has consistently looked to the Define and Punish Clause alone. See Hamdan, 548 U.S. at 601–02 (plurality op.); Yamashita, 327 U.S. at 7; id. at 26 (Murphy, J., dissenting); Quirin, 317 U.S. at 28. In Yamashita, the Court emphasized the distinction, explaining that the [military] commission derives its existence" from the war powers, 327 U.S. at 12 (emphasis added), but that its jurisdiction over specific offenses comes from Congress's "exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to 'define and punish * * * Offenses against the Law of Nations * * *, of which the law of war is a part.'" Id. at 7. Winthrop endorsed this distinction in stating that Civil War-era legislation subjecting "spies and guerrillas" to military jurisdiction "may be regarded as deriving its authority from" the Define and Punish Clause. W. Winthrop, MILITARY LAW AND PRECEDENTS, at 831.

In applying the Define and Punish Clause, the Supreme Court long ago cautioned that "[t]he offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by [Congress]." United States v. Arima, 120 U.S. 479, 488 (1887). As noted, the government has conceded that conspiracy is not an international war crime. Notwithstanding the atrocities at issue, the International Military Tribunal at Nuremberg considered and rejected conspiracy to commit war crimes as an international law of war offense. See 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 469 (1948). Conspiracy to commit war crimes is included neither in the major treaties on the law of war, nor in the jurisdiction of

modern war crimes tribunals. Congress cannot, pursuant to the Define and Punish Clause, declare an offense to be an international war crime when the international law of war concededly does not. See United States v. Furlong, 18 U.S. (5 Wheat.) 184, 198 (1820). The exceptions — conspiracy to commit genocide and common plan to wage aggressive war, see Homan, 548 U.S. at 610 (plurality op.) — are not at issue here, for Bahul was charged with neither. In light of the international community’s explicit and repeated rejection of conspiracy as a law of war offense, we are puzzled by our dissenting colleague’s statement that “[t]he international community does recognize that Bahul violated the principles of the law of nations.” Dis. at 4.


Op. 31 (internal quotation marks and italics omitted), by its reference to “the international community’s agreement that those who conspire to commit war crimes can be punished as war criminals,” id. at 53. There is no such “agreement.” The dissent offers nothing to support this claim.

Our dissenting colleague also maintains that this court must accord Congress “extraordinary deference when it acts under its Define and Punish Clause powers.” Dis. Op. 34 (quoting Bahul, 767 F.3d at 59 (Brown, J., concurring in the judgment in part and dissenting in part)). This court has no occasion to decide the extent of that deference because the government has never maintained that Congress defined conspiracy in the 2006 MCA as a violation of the law of nations. The legislative history of the 2006 MCA is not to the contrary. See id. at 46 n.17. In maintaining otherwise, the dissent confuses acting pursuant to the Define and Punish Clause with identifying the content of the law of nations, see id. at 45–47. Congress purported to do the former, not the latter. In Bahul’s case, the “law of nations” is not “too vague and deficient to be a rule,” id. at 32 (quotation marks omitted); to the contrary, it quite clearly does not view conspiracy to be an independent war crime, as the government has conceded.

To the extent our colleague would interpret the Define and Punish Clause to confer open-ended congressional authority to create new war crimes, see Dis. Op. 38–43, the Supreme Court has rejected such an approach. In Furlong, 18 U.S. (5 Wheat.) 184, the Court explained with regard to piracy, the other object of the Define and Punish Clause: “If by calling murder piracy, [Congress] might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device?” Id. at 198 (emphasis in original). The same reasoning applies to “Offenses against the Law of Nations,” the other object of the
Define and Punish Clause. U.S. CONST. art. I, § 8, cl. 10. Congress cannot define as piracy a crime that is clearly not piracy, nor define as a law of nations offense a crime that is avowedly a law of nations offense. In other contexts as well, the Supreme Court has rejected the limitless form of congressional power the dissent proposes. Cf. City of Boerne v. Flores, 521 U.S. 507, 539 (1997). Contrary to our dissenting colleague, international law itself affords no limit because it does not purport to identify which non-international offenses can and cannot be treated as domestic war crimes; the dissent points to no offenses whose trial by military commission are "inconsistent with" or not "permitted" by international law. DIS. OP. 53, 38 (italics omitted). In urging such a limitation, however, the dissent does reveal another premise: that the content of international law constrains congressional authority under the Define and Punish Clause. According to the dissent, congressional action under the Clause must be "consistent with international law," id. at 47, such that Congress may only "track somewhat ahead of the international community," id. at 43 (emphasis added). Thus, despite some rhetorical protestations to the contrary, see DIS. OP. 1, 42, 73, the dissent's disagreement is not about whether international law constrains congressional authority, only to what extent.

The dissent's reliance on Yamashita as support for its understanding of the Define and Punish Clause, see DIS. OP. 35-37, is misplaced. In Yamashita, the Supreme Court did not address the nature of Define and Punish Clause authority at all, because Congress had not defined any specific offenses. See Yamashita, 267 U.S. at 7. The Court therefore had to undertake its own analysis of international law, and it concluded that the Hague and Geneva Conventions "plainly imposed on petitioner" a duty that he had violated. Id. at 16. It is therefore difficult to understand how Yamashita affects the type of deference owed to Congress one way or the other.

2. Nor does the Necessary and Proper Clause allow Congress to do what it expressly does not. See Toth, 350 U.S. at 21-22. The government maintains that even if Congress's authority arose only under the Define and Punish Clause, "Congress is not restricted under that Clause to criminal offenses that are violations of international law." Appellant's Br. 43. "Rather, Congress may, under the Necessary and Proper Clause, prescribe conspiracy to commit war crimes, such as terrorist attacks against civilians, that are themselves violations of the law of nations as a necessary and proper implication of its power and responsibility to prevent and punish such violations." Id. The Supreme Court has adopted a different view.

In Toth, 350 U.S. at 22, the Supreme Court explained that it was "not willing to hold that power to circumvent [jury] safeguards should be inferred through the Necessary and Proper Clause." It described the "great difference between trial by jury and trial by selected members of the military forces," id. at 17, and explained that "it would be dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution," id. at 22. In Singleton, the Court rejected the expansion of military jurisdiction through the Necessary and Proper Clause because "[i]f this Court cannot thoroughly safeguard the rights of those on trial as would be done were the power in question exercised in a court of competent jurisdiction," id. at 247. "We are therefore constrained to say that since this Court has said that the Necessary and Proper Clause cannot expand Clause 14 so as to include prosecution of civilian dependents for capital crimes, it cannot expand Clause 14 to include prosecution of them for noncapital offenses." Id. at 248.
As the plurality in *Read* emphasized, "the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law." 354 U.S. at 21; see *Hamilton*, 548 U.S. at 590 (plurality op.). Consequently, "the Necessary and Proper Clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in" an enumerated Article I power. *Read*, 354 U.S. at 20–21 (plurality op.). "Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States." *Id.* at 21.

The government’s response is that Congress may enact legislation "necessary to comply with our nation’s international responsibilities." Appellee’s Br. 45. In *Arizona*, 120 U.S. at 484, the Supreme Court upheld a counterfeiting prohibition because "[t]he law of nations requires every national government . . . to punish those who, within its own jurisdiction, counterfeit the money of another nation." The Court observed that without the criminal statute, the United States would "be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations." *Id.* at 487. Here, the government points to the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 ("Geneva IV"), which prohibits "[c]ollective penalties and likewise all measures of intimidation or of terrorism." *Id.* art. 33. The Convention requires signatories to "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention," *id.* art. 146, which include the "willful killing . . . of a protected person," *id.* art. 147, defined as "those who . . . find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." *Id.* art. 4. Each signatory "shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention." *Id.* art. 146.

Even if Congress has authority to criminalize non-international offenses pursuant to the Define and Punish Clause, as supplemented by the Necessary and Proper Clause, the government fails to explain why such congressional power to prohibit conduct implies the power to establish military jurisdiction over that conduct. Military jurisdiction over the offenses that the Supreme Court has previously upheld under the Define and Punish Clause — such as spying and sabotage — have a textual basis in the Constitution. The "Law of Nations," U.S. CONST. art. I, § 8, cl. 10, *itself* makes those offenses "cognizable by [military] tribunals." *Quirin*, 317 U.S. at 28, see *id.* at 41 & n.13; *Act of Apr. 10, 1806, 2 Stat. 359, 371; 11 Op. Att’y Gen. at 316; W. Winthrop, MILITARY LAW AND PRECEDENTS, at 769. Court-martial jurisdiction similarly has a textual basis in the Constitution, which authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces," U.S. CONST. art. I, § 8, cl. 14, and exempts those offenses from trial by jury, see *id.* amend. V. The sabotage offense in *Quirin* was subject to military jurisdiction based on "a construction of the Constitution which has been followed since the founding of our government." 317 U.S. at 41. Military jurisdiction over conspiracy, by contrast, has neither an express textual basis nor an established historical tradition.

The government maintains that under the Necessary and Proper Clause, "[i]f commission of the substantive crime that is the conspiracy’s object would be within the scope of permissible congressional regulation, then so is the conspiracy." Appellee’s Br. 45. But again, Bahlul’s Article III challenge is not that Congress lacks authority to prohibit his conduct; rather, be
challenges Congress's authority to confer jurisdiction in a military tribunal. Absent a textual or historical basis for prosecuting conspiracy as a standalone offense in a law of war military commission, the government's position is confounded by the Supreme Court's repeated reluctance to extend military jurisdiction based on the Necessary and Proper Clause. See, e.g., Singleton, 361 U.S. at 246–48; Reid, 354 U.S. at 20–21 (plurality op.), Toth, 350 U.S. at 21–22. The cases on which the government relies, such as Callanan v. United States, 364 U.S. 587, 593–94 (1961), and United States v. Feola, 420 U.S. 671, 694 (1975), involve criminal conspiracy prosecutions in civil courts. See Appellee's Br. 45–46 (also citing United States v. Price, 265 F.3d 1097, 1107 n.2 (10th Cir. 2001); United States v. Zannotti, 673 F.2d 578, 591–94 (3d Cir. 1982)).

D.

Before concluding we address some further flaws in our dissenting colleague's opinion.

First, the dissent relies on inapposite authorities regarding the source of congressional authority for law of war military commissions. Its citations refer to military commissions exercising jurisdiction far beyond the law of war. Thus, in Ex parte Milligan, 71 U.S. 2 (1866), the four Justices cited by the dissent, see Dis. Op. 55, were discussing courts martial and military commissions whose jurisdiction was based on military government and martial law. See Milligan, 71 U.S. at 141–42 (Chase, C.J., concurring in the result), see generally Hamdan, 548 U.S. at 595–96 (plurality op.), Bahlul, 767 F.3d at 7. The constitutional authority for those commissions, whose jurisdiction may include domestic crimes, see Hamdan, 548 U.S. at 595–96 (plurality op.), Bahlul, 767 F.3d at 7, does not extend to law of war commissions. The dissent's reliance on Mabry v. Kinsella, 343 U.S. 341 (1952); see Dis. Op. 55, 58, 61, is likewise misplaced; that case involved a military-government commission, not a law of war military commission. Maddox, 343 U.S. at 343–44, 345–48. And the dissent's reliance on Winthrop's statement that "in general, it is" the war powers "from which the military tribunal derives its original sanction," Dis. Op. 60 (alterations omitted) (quoting W. Winthrop, MILITARY LAW AND PRECEDENTS, at 831), ignores both that Winthrop was discussing all three kinds of military commission, stating the commission's "authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law," and that Winthrop looked exclusively to the Define and Punish Clause as the source of authority for law of war commissions to try spying and aiding the enemy, see W. Winthrop, MILITARY LAW AND PRECEDENTS, at 831.

Second, the dissent maintains that if conspiracy does not fall within the Article III exception for law of war military commissions, then Bahlul's conviction must be affirmed under Schor's multi-factor balancing approach. See Dis. Op. 73–80. The Supreme Court has never suggested that an entire criminal adjudication outside an established Article III exception could ever satisfy the Schor analysis. The dissent cites Palko more to suggest otherwise, see id. at 72, but the Court conducted no balancing analysis in Palko more because the case involved a criminal adjudication within the established Article III exception for territorial courts. Palko, 411 U.S. at 463, see Northern Pipeline, 458 U.S. at 55 & n.16 (plurality op.). But even accepting the dissent's premise, its analysis falls on its own terms. Bahlul's military commission is on the wrong side of nearly every balancing factor that the Supreme Court has applied.

With respect to what the dissent characterizes as the "most important[j] factor, Dis. Op. 74, the 2006 MCA provides for appellate review "only with respect to matters of law, including
the sufficiency of the evidence to support the verdict,” 10 U.S.C. § 950(g)(d). Sufficiency review is “sharply limited.” Wright v. West, 503 U.S. 277, 296 (1992), and “very deferential.” United States v. Harrison, 931 F.2d 65, 71 (D.C. Cir. 1991). This is exactly the type of limited judicial review the Supreme Court has repeatedly held offends Article III. See Stern, 131 S. Ct. at 2611; Schor, 478 U.S. at 853; Northern Pipeline, 458 U.S. at 85, 86 n.39 (plurality op.); id. at 91 (Rehnquist, J., concurring in the judgment); Crowell v. Benson, 285 U.S. 22, 57 (1922). The dissent pretends otherwise, glossing over the details of Schor and ignoring Stern and Northern Pipeline. See Dis. Op. 74–76. In Stern, the Supreme Court faulted the bankruptcy statute for providing judicial review “only under the usual limited appellate standards,” which “require[d] marked deference to, among other things, the [tribunal’s] findings of fact.” 131 S. Ct. at 2611. The Court reached the same conclusion in Northern Pipeline, 458 U.S. at 85, 86 n.39 (plurality op.); id. at 91 (Rehnquist, J., concurring in the judgment). In Schor, the Court noted that “CFTC orders are [ ] reviewed under the same ‘weight of the evidence’ standard sustained in Crowell, rather than the more deferential [clearly erroneous] standard found lacking in Northern Pipeline.” 478 U.S. at 853. The “sufficiency of the evidence” standard in the 2006 MCA is more deferential than the “usual limited appellate standards” rejected in Stern and the “clearly erroneous” standard rejected in Northern Pipeline and Schor. Rather than addressing these holdings directly, the dissent relies on inapposite precedent involving (1) “adjunct” fact-finders within Article III courts, see Dis. Op. 75 (citing Crowell, 285 U.S. at 51); see also Stern, 131 S. Ct. at 2619; Northern Pipeline, 458 U.S. at 78 (plurality op.), (2) factual review in appeals from state courts and Article III district courts, see Dis. Op. 75–76 (citing Jackson v. Virginia, 443 U.S. 307, 318–19 (1979); The Francis Wright, 105 U.S. 381, 386 (1881)), and (3) cases within the “public rights” exception to Article III, where there is no reason to apply a balancing analysis, see Dis.

Op. 76 (citing Estep v. United States, 327 U.S. 114 (1946)). No Article III issue was raised or addressed in Estep or Jackson. Thus, the dissent’s “most important[ ]” factor — appellate review for legal error only, id. at 74 — is one the Supreme Court has expressly foreclosed.

In Sharp, where the Court upheld adjudication by bankruptcy courts outside the established Article III exception, the two necessary factors were the parties’ consent to the adjudication, and the fact that “Article III courts retain[ed] supervisory authority over the process.” Sharp, No. 13-935, slip op. at 12. Neither is true in Bahill’s case. First, the Court in Sharp emphasized that litigant consent has been a crucial factor in its prior decisions on non-Article III adjudication: In Schor, the Court “[l]ent[ed] heavily on the importance of Schor’s consent.” Sharp, No. 13-935, slip op. at 5; see id. at 14 n.10. Subsequent decisions by the Supreme Court involving the Federal Magistrates Act “reiterated the importance of consent to the constitutional analysis.” Id. at 10. And in both Stern and Northern Pipeline, compliance with Article III “turned on” whether the litigant “truly consent[ed]” to the adjudication. Id. at 15 (internal quotation marks omitted). Bahill plainly did not “consent” to his trial by military commission. As the en banc court observed, he “objected to the commission’s authority to try him” and “flatly refused to participate in the military commission proceedings,” even assuming his objections were “too general” to raise specific legal claims. Bahill, 767 F.3d at 10 (internal quotation marks omitted); see TNI Tr. 96–97 (“Bahill has made it very clear that he is boycotting and that he does not recognize this commission.”); contra Dis. Op. 74. Second, the Court in Sharp relied on the fact that bankruptcy judges are appointed, referred cases, allowed to keep cases, supervised, and removable by Article III judges, who thus retain “total control and jurisdiction” over bankruptcy adjudication. Sharp, No. 13-935, slip op. at 13 (internal quotation marks omitted); see id. at 3–4.
The Court expressly conditioned its holding on this level of “control by the Article III courts.” Id. at 12, 15. Nothing of the sort is true in Bahlul’s case. Military commissions under the 2006 MCA are independent of the Article III courts except for very limited appellate review.

Another factor the Supreme Court has considered is the “concern[] that drove Congress to depart from the requirements of Article III.” Schor, 478 U.S. at 851. In non-Article III adjudications upheld by the Supreme Court, Congress’s “concern” was the fact that an ostensibly “private” claim was so “closely intertwined with a federal regulatory program,” Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 54 (1989), that the program would be “confounded” without the ability to adjudicate that claim. Schor, 478 U.S. at 856; see Sharif, No. 13-935, slip op. at 13; Stern, 131 S. Ct. at 2613–14; Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 593–94 (1985). Neither the government nor the dissent offer any reason to conclude that otherwise-valid military commission prosecutions will be “confounded” by the inability to prosecute non-law of war offenses.

Bahlul’s military commission fails a number of other Schor factors the dissent neglects to mention. The military commission resolves “all matters of fact and law in whatever domains of the law to which a charge may lead.” Stern, 131 S. Ct. at 2610 (internal quotation marks and alterations omitted). It “issues[] final judgments, which are binding and enforceable.” Id. at 2610–11 (quoting Northern Pipeline, 458 U.S. at 85–86 (plurality op.)); see Schor, 478 U.S. at 853, and “subject to review only if a party chooses to appeal.” Stern, 131 S. Ct. at 2619. As for the “origins and importance of the right to be adjudicated,” Schor, 478 U.S. at 851, the right to “[f]reedom from imprisonment” is one of the oldest and most basic in our legal system. Zacharyas v. Davis, 533 U.S. 678, 690 (2001). The circumstances of Bahlul’s prosecution thus could not be further from Schor’s. There, Congress added to an Article I tribunal otherwise within an established Article III exception the authority to adjudicate a closely intertwined common-law cause of action, only with the consent of the parties, without authority to issue final enforceable judgments, and with meaningful factual review on appeal. Here, in Bahlul’s case, Congress has created a standalone Article I tribunal to adjudicate his entire criminal case without his consent, with the ability to issue final enforceable judgments, and with almost no factual review on appeal.

If Bahlul’s military commission falls outside the historical Article III exception for law of war military commissions, then there is no question that it usurps “the essential attributes of judicial power.” Schor, 478 U.S. at 851 (internal quotation marks omitted). The Supreme Court unanimously agreed in Stern that “Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in an adjudication of private rights, without consent of the litigants, and subject only to ordinary appellate review.” 131 S. Ct. at 2624 (Breyer, J., dissenting); id. at 2615 (majority op.); see Thomas, 473 U.S. at 584. The dissent struggles, unpersuasively, to avoid this conclusion. It suggests that military commissions somehow do not raise the same separation-of-powers concerns as bankruptcy courts, see Diss. Op. 79; contra Hamdan, 456 U.S. at 638 (Kennedy, J., concurring in part), even though bankruptcy judges are appointed, supervised, and removable by Article III courts, see Sharif, No. 13-935, slip op. at 13; Perez v. United States, 501 U.S. 923, 938–39 (1991). It points to the established Article III exception for military commissions, see Diss. Op. 79–80, even though the analysis in Schor is premised on the adjudication being outside of such an exception, as the dissent elsewhere acknowledges, see id. at 71,
The government, unsurprisingly, has barely presented any balancing analysis, see Appellee’s Br. 51.

For more than seventy years the Supreme Court has adhered to the definition of the law of war articulated in Quirin, which the government concedes does not prohibit conspiracy. The government has failed to identify a sufficiently settled historical practice for this court to conclude that the inchoate conspiracy offense of which Bahful was convicted falls within the Article III exception for law of war military commissions. Absent further guidance from the Supreme Court, this court must apply the settled limitations that Article III places on the other branches with respect to the “judicial Power of the United States.” U.S. CONST. art. III, § 1.

Contrary to the government’s suggestion, vacating Bahful’s inchoate conspiracy conviction does not “cast doubt on the constitutional validity of the most prominent military commission precedents in our nation’s history.” Appellee’s Br. 52. The Lincoln assassins and Colonel Grenfell were tried by mixed commissions, whose jurisdiction was based on martial law. The lawfulness of military commission jurisdiction over the charges against the Nazi saboteurs and Colepaugh was judicially upheld without having to reach the conspiracy charges. Neither does our holding “inappropriately restrict Congress’s ability, in the absence of broad concurrence by the international community, to adapt the range of offenses triable by military commission in light of future changes in the practice of modern warfare and the norms that govern it.” Id. at 38. Military commissions retain the ability to prosecute joint criminal enterprise, aiding and abetting, or any other offenses against the law of war, however it may evolve. Congress retains the authority it has always had to proscribe domestic offenses through the criminal law in the civil courts. The international law of war limits Congress’s authority because the Constitution expressly ties that authority to “the Law of Nations,” U.S. CONST. art. I, § 8, cl. 10.

Accordingly, we hold that Bahful’s conviction for inchoate conspiracy by a law of war military commission violated the separation of powers enshrined in Article III § 1 and must be vacated. We need not and do not address Bahful’s other contentions.
TATEL, Circuit Judge, concurring: Although I agree that al-Bahlul’s conviction runs afoul of Article III of the Constitution, I write separately to explain why, having joined the en banc Court in upholding that conviction, I now join an opinion that invalidates it. I also wish to draw out a few points that are especially relevant to the separation-of-powers questions this case presents.

Sitting en banc, this Court decided last year that the Ex Post Facto Clause does not prevent Congress from granting military commissions jurisdiction over the crime of conspiracy. We began by noting that in the months leading up to the September 11th attacks, when al-Bahlul committed his crimes, federal law gave military commissions jurisdiction over “offenders or offenses that by statute or by the law of war may be tried by military commissions.” 10 U.S.C. § 821 (emphasis added). Because no statute on the books in 2001 allowed military commissions to try conspiracy, the en banc Court needed to determine whether that crime qualified as a “law of war” offense at that time and was thus triable by military commission. If so, the Court observed, al-Bahlul’s ex post facto argument would necessarily fail. Reviewing much of the same history and case law before us now, the en banc Court was unable to conclude that “conspiracy was not already triable by law-of-war military commissions” in 2001.

Al Bahlul v. United States, 767 F.3d 1, 18 (D.C. Cir. 2014).

So why the different result here? The answer is the standard of review. The en banc Court came down the way it did, and I voted the way I did, because al-Bahlul had forfeited his ex post facto challenge by failing to raise it before the Commission, so our review was for plain error. Applying that highly deferential standard, the Court concluded that it was “not ‘obvious’” that conspiracy was “not . . . triable by law-of-war military commissions” at the time al-Bahlul committed his crimes. Id. at 27.

The government insists that al-Bahlul also failed to raise his Article III argument below. But even if that were true, the Article III claim is structural, see Reid v. Covert, 354 U.S. 1, 21 (1957) (“Every extension of military jurisdiction, is an encroachment on the jurisdiction of civil courts . . .”), and the Supreme Court held in Commodity Futures Trading Commission v. Schor that structural claims cannot be waived or forfeited, see 478 U.S. 833, 850–51 (1986) (“To the extent that [a] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty.”). This Court followed suit in Kuczyński v. Commissioner of Internal Revenue Service, holding that “the Supreme Court has recognized an exception” to the “general rule” that a party may forfeit an argument it fails to raise below: we may nonetheless “hear a constitutional challenge . . . if the ‘alleged defect . . . goes to the validity of the . . . proceeding.’” 755 F.3d 929, 936 (D.C. Cir. 2014) (quoting Freytag v. Commissioner of Internal Revenue Service, 506 U.S. 868, 879 (1991)). The Supreme Court, moreover, recently reaffirmed Schor’s holding in Wellness International Network, Ltd. v. Sharif (a litigant’s waiver of his “personal right” to an Article III court is not always dispositive;[1] . . . [t]o the extent that [a] structural principle is implicated in a given case . . . the parties cannot by consent cure the constitutional difficulty.” 575 U.S. __ (2015), slip op. at 9 (quoting Schor, 478 U.S. at 850–51); see id., dissenting op. at 12 (Roberts, C.J.) (“nobody disputes that Schor forbids a litigant from consenting to a constitutional violation when the structural component of Article III is implicated”) (internal quotation marks omitted); Op. at 6–7. If, as the dissent argues, the Court instead intended to hold that structural claims are now forfeitable, see Dissenting Op. 14–15, thus overruling
decades of precedent and requiring us to depart from our own case law, then I suspect it would have made that point clear.

Under these circumstances, the en banc Court's conclusion that it was neither "clear" nor "obvious"—that is, not "plain"—that the law of war is purely international cannot determine the outcome of this case. However unclear the law and the evidence, we must decide not whether the error below was plain, but whether there was any error at all. In my view, whether Article III prohibits military commissions from trying conspiracy turns on what Ex Parte Quirin says and what Hamdan does not.

Article III provides that Congress "may vest[] . . . the judicial power of the United States . . . only in courts whose judges enjoy the protections set forth in that Article." Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011) (emphasis added). The Supreme Court has ruled time and again that this mandate is essentially irrevocable, allowing exceptions only where "delineated in [the Court's] precedents, rooted in history and the Constitution." Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 74 (1982). One such exception—the only one relevant here—permits Congress to assign certain criminal cases to military commissions. See Al Bihrid, 767 F.3d at 7. The question in this case is whether conspiracy to commit war crimes falls within the military-commission exception to Article III as articulated by the Supreme Court.

The search for precedent on that question begins and, for the most part, ends with Ex Parte Quirin. Although the en banc Court considered Quirin in some depth, our review here must be more searching, and that heightened standard leads me to a different result.

In Quirin, the Supreme Court described the contours of the military-commission exception: commissions, the Court ruled, may try enemy belligerents for violations of the "law of war." Ex Parte Quirin, 317 U.S. 1 (1942). That holding, of course, goes only so far. Because the conviction the Court sustained was for passing behind enemy lines out of uniform in order to attack military assets, and because the Court assumed that that crime violated the international law of war—whatever the contemporary scholarly view—it had no reason to decide whether the law-of-war exception was limited to international law. See Quirin, 317 U.S. at 36-37, Op. at 10-11.

That question is critical here because in defending the constitutionality of MCA section 950, the government concedes that conspiracy does not violate the international law of war, thus implicitly acknowledging that by enacting that provision, Congress was not exercising its Article I authority to "define" the law of war. Given this, the issue before us is not whether this Court must defer to Congress's "definition" of international law, but whether, as the government insists, the law of war includes some domestic crimes.

In my view, the weight of the Court's language in Quirin strongly indicates that the law-of-war exception is exclusively international. Making this point repeatedly, the Court observed that in sending Quirin and his fellow saboteurs to a military commission, Congress had permissibly "exercised its authority . . . by sanctioning . . . the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals." Id. at 28 (emphasis added); see also id. at 29 (calling the law of war a "branch of international law"). The Court made the
point even clearer in *Yamashita*: military-commission authority derives from “the Law of Nations . . . of which the law of war is a part.” 327 U.S. 1, 7 (1946) (alteration in original) (emphasis added); see also Op. at 15–14.

Still, the Supreme Court never held—because it had no need to—that military commissions are barred from trying crimes recognized only by domestic law. Instead, it left that question for another day. That day looked like it would come in 2006 when the Court took up the case of Salim Hamdan, Osama Bin Laden’s personal driver, who was convicted of, among other things, conspiring to commit acts of terrorism. Like al Bahful, Hamdan argued that the military commission that convicted him lacked jurisdiction because conspiracy was not a violation of the law of war. The Court, however, never reached that issue because it resolved the case on statutory grounds, i.e., it held that the commission’s procedures ran afoul of the Uniform Code of Military Justice. In other words, the Court ruled that domestic law could limit military commission jurisdiction, but it had no reason to decide whether it could extend it.

The government, though agreeing that the *Hamdan* Court never directly held that the law of war includes domestic precedent, nonetheless argues that “seven justices . . . agreed that resolution of the question did not turn solely on whether conspiracy was a violation of international law.” Respondent’s Br. 41. As the government points out, Justice Thomas, writing on behalf of himself and two other Justices, did embrace this proposition. See *Hamdan*, 548 U.S. at 689 (Thomas, J., dissenting) (“The common law of war as it pertains to offenses tried by military commission is derived from the experience of our wars and our wartime tribunals, and the laws and usages of war as understood and practiced by the civilized nations of the world.”) (citation and internal quotation marks omitted). But Justice Kennedy, writing for himself and three other Justices, relied on *Quinr* for the proposition that the law of war “derives from ‘rules and precepts of the law of nations’; it is the body of international law governing armed conflict.” Id. at 641 (Kennedy, J., concurring) (quoting *Quinr*, 317 U.S. at 28) (emphasis added)—a definition that rules out resort to domestic law.

To be sure, Justice Stevens observed that “[t]he crime of ‘conspiracy’ has rarely if ever been tried as such in this country by any law-of-war military commission.” Id. at 603 (Stevens, J., plurality opinion). The government, however, reads far too much into this reference to domestic practice, for in the very same sentence Justice Stevens emphasized that “international sources”—the Geneva Conventions and the Hague Conventions, which he described as “the major treaties on the law of war”—“confirm” that conspiracy “is not a recognized violation of the law of war.” Id. at 610 (emphasis added). Justice Stevens described *Quinr in similar terms: sabotage was triable by military commission in that case because it “was, by universal agreement and practice both in this country and internationally, recognized as an offense against the law of war.” Id. at 603 (quoting *Quinr*, 317 U.S. at 30) (emphasis added) (internal quotation marks omitted). By stating that international law “confirms” that conspiracy is not a violation of the law of war, and by describing the *Quinr* sabotage as a violation of the law of war because it was treated as such “both in this country and internationally,” Justice Stevens was saying that, at a minimum, an act must violate the international law of war before Congress can grant military commissions jurisdiction over that crime. In other words, Justice Stevens did not conclude that domestic law alone could support military-commission jurisdiction over conspiracy. This interpretation of Justice Stevens’s opinion seems especially obvious given that the three Justices who
signed onto his opinion also joined Justice Kennedy’s statement that the law of war “is . . . international law,” id. at 641 (Kennedy, J., concurring), and not Justice Thomas’s opinion to the contrary.

Thus, although the Court held in Hamdan that domestic law—namely, the UCMJ—can limit the scope of military-commission jurisdiction, only three Justices would have extended that jurisdiction beyond the international law of war to the “American common law of war.” Given this, and given that Article III courts are the default, that exceptions must be “delineated in [the Court’s] precedents,” Northern Pipeline, 458 U.S. at 74, and that the Schor balancing factors favor al-Bahlul, see Op. at 33–36, this “inferior” court is without authority to go beyond the Supreme Court’s clear signal, sent first in Quirin and repeated in Yamashita, that military-commission jurisdiction is limited to crimes that violate the international law of war. See United States v. Dorsey, 454 F.3d 366, 375 (D.C. Cir. 2006) (the Supreme Court’s “carefully considered language . . . must be treated as authoritative”). Instead, we must leave it to the Supreme Court to take that step.

Moreover, and again proceeding on de novo review, I see nothing in Article I of the Constitution that requires a different result. Judge Rogers demonstrates this convincingly. See Op. at 19–26. I add only that were the government correct about Article I, Congress would have virtually unlimited authority to bring any crime within the jurisdiction of military commissions—even theft or murder—so long as it related in some way to an ongoing war or the armed forces. Congress could simply declare any crime to be a violation of the law of war and then vest military commissions with jurisdiction to try it, thereby gutting Article III’s critical protections. The Supreme Court rejected that view of Article I in Northern Pipeline. There, the Court concluded that Congress had no authority to establish bankruptcy courts entirely outside of Article III’s reach because any limit on such “broad legislative discretion” would prove “wholly illusory.” Northern Pipeline, 458 U.S. at 73–74. Like the bankruptcy scheme the Court rejected in Northern Pipeline, the government’s view of Article I would “effectively eviscerate [Article III’s] guarantee of an independent Judicial Branch of the Federal Government.” Id. at 74.

Although the foregoing is sufficient to resolve this case, the government makes one more argument that deserves attention. Limiting commission jurisdiction to offenses that violate international law, it asserts, “would . . . inappropriately restrict Congress’s ability, in the absence of broad concurrence by the international community, to adapt . . . to future changes in the practice of modern warfare and the norms that govern it.” Respondent’s Br. 38; see also Dissenting Op. at 20–31. I agree with the government’s premise: that as a result of today’s decision, Congress will be unable to vest military commissions with jurisdiction over crimes that do not violate the international law of war. But as explained above, that is precisely what the Constitution, as interpreted by the Supreme Court, requires.

Despite the government’s protestations, moreover, this court’s holding will not “inappropriately restrict” the nation’s ability to ensure that those who conspire to commit terrorism are appropriately punished. After all, the government can always fall back on the apparatus it has used to try federal crimes for more than two centuries: the federal courts. See 18 U.S.C. § 371 (criminalizing conspiracy). Federal courts hand down thousands of conspiracy convictions each year, on everything from gun-running to financial fraud to, most important here, terrorism. See CENTER ON LAW AND
security. New York University School of Law, Terrorist Trial Report Card: September 11, 2001-September 11, 2011 at 2, 7, table 1, available at http://geo.g/j/Ks3Qk (since September 11, 2001, prosecutors have prevailed in almost 200 "jihadist-related" terrorism and national-security cases in federal courts); id. at 13 ("the most commonly charged crimes" have included violations of 18 U.S.C. § 371, for "general criminal conspiracy"). For instance, Zacarias Moussaoui—the potential 20th 9/11 hijacker—pled guilty in federal court to six counts of conspiracy for his role in planning the 2001 attacks, see United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010); a federal jury convicted Wadhil el Hage, Mohamed Odde, and Mohamed al Owhali for conspiring to bomb the American embassies in Kenya and Tanzania, see In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 93, 107 (2d Cir. 2008); and Ahmed Abu Khatallah, who stands accused of conspiring to attack the American diplomatic mission in Benghazi, Libya, awaits trial in this very courthouse, see Superseding Indictment, United States v. Ahmed Abu Khatallah, No. 14-cr-141 (D.D.C. Oct. 14, 2014), ECF No. 19.

By contrast, although the detention camp at the U.S. naval station at Guantanamo Bay has held at least 780 individuals since opening shortly after September 11th, and although military prosecutors have brought charges against some two hundred, the commissions have convicted only eight: al Bahlul, Hamdan, Noor Uthman Muhammed, David Hicks, Omar Khadr, Majid Khan, Ibrahim al Qosi, and Ahmed al Darbi. See Miami Herald, Guantánamo: By the Numbers, http://geo.g/jsEPIPv6 (last updated May 12, 2015). Furthermore, due to various questions about the military-commission process itself, as of this writing only three of
KAREN LE CRAFT HENDERSON, Circuit Judge, dissenting.

In 1952, the Honorable Robert H. Jackson—Associate Justice of the United States Supreme Court and former chief prosecutor at Nuremberg—set out what has become the “accepted framework” for our constitutional jurisprudence in the areas of national security and military affairs. *Medellín v. Texas*, 552 U.S. 491, 524 (2008). Justice Jackson famously identified three categories of governmental action: *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). When the President and the Congress disagree (Category 3), their powers are subtractive. *Id. at 637–38*. When the President and the Congress act in concert (Category 1), however, their powers are additive: “the United States is invested with all the attributes of sovereignty, and the courts should hesitate long before limiting or embarrassing such powers.” *Id. at 635–37 & n.2* (quoting *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915)) (emphasis omitted).

Yet, according to my colleagues, Justice Jackson didn’t get the math quite right. He apparently failed to factor in an additional constraint on the political branches’ combined war powers: international law. My colleagues contend—as a matter of constitutional law, not simple comity—that the Congress cannot authorize military-commission trials unless the international community agrees, jott and title, that the offense in question violates the law of war. And the content of international law is to be determined by—whom else?—the Judiciary, with little or no deference to the political branches. *Contra Rostker v. Goldberg*, 453 U.S. 57, 65–66 (1981) (“perhaps no other area has the Court accorded Congress greater deference” than “in the context of Congress’ authority over national defense and military affairs”). But the definition and applicability of international law is, in large part, a political determination, see *Fincz v. Barry*, 798 F.2d 1450, 1459–60 (D.C. Cir. 1986), aff’d in part, rev’d in part sub nom. *Boos v. Barry*, 485 U.S. 312 (1988), and the decision to try an alien enemy combatant by military commission is part and parcel of waging war, see *Application of Yamashita*, 327 U.S. 1, 11–12 (1946). The majority opinion thereby draws us into a thicket, one in which our “lack of competence . . . is marked.” *Rostker*, 453 U.S. at 65, our democratic accountability glaring. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), and the ramifications of our actions unpredictable. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (“most federal judges” do not “begin the day with briefings that may describe new and serious threats to our Nation and its people”).

The immediate consequences of today’s decision are serious enough: my colleagues bar the Government from employing military commissions to try individuals who conspire to commit war crimes against the United States. But the consequences moving forward may prove more alarming still. My colleagues’ opinion means that, in future conflicts, the Government cannot use military commissions to try enemy combatants for any law-of-war offense the international community has not element-by-element conditioned. Their timing could not be worse. See Letter from the President to the Congress of the United States—Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant (Feb. 11, 2015). And the beneficiary of today’s decision could not be less deserving. Ali Hamza Ahmed Suliman al Bahlul (*Bahlul*) is an alien unlawful enemy combatant who—like Hitler’s Goebbels—led Osama bin Laden’s propaganda operation. *Bahlul v. United States*, 767 F.3d 1, 33–34 (D.C. Cir. 2014) (en banc) (*Henderson*, J., concurring). He “freely admitted”—indeed, bragged about—his role in the attacks of September 11, 2001. *Id. at 34*. During his military-
commission trial, he never raised any of the arguments we today consider. The en banc court deemed his Ex Post Facto challenge forfeited and reviewed it for plain error only. Id. at 9–11. We should have taken the same approach here, rather than declaring unconstitutional a provision of the Military Commissions Act of 2006 (2006 MCA), Pub. L. No. 109-366, 120 Stat 2006.

Accordingly, I must dissent.

I. STANDARD OF REVIEW

Beyond its troubling ramifications, one of the real tragedies of today’s decision is just how unnecessary it is. Rather than reaching the merits, this case should begin and end with the “measuring stick” of appellate decisionmaking: the standard of review. John C. Godbold, Twenty Pages and Twenty Minutes: Effective Advocacy on Appeal, 30 Sw. L.J. 801, 810 (1976). The measuring stick we should use to review Bahlul’s arguments is plain error.

Bahlul is an “alien unlawful enemy combatant” (enemy combatant) subject to trial by military commission under the 2006 MCA. 10 U.S.C. § 948e (2006). He contends that his conviction of conspiracy to commit war crimes, 10 U.S.C. § 950v(28) (2006) (the challenged provision), violates the Define and Punish Clause of Article I, the Judicial Power and Criminal Jurisdiction Clauses of Article III, the equal protection component of the Fifth Amendment Due Process Clause and the First Amendment. Had Bahlul properly preserved these questions of law, we would review them de novo. See United States v. Pepka, 187 F.3d 672, 674 (D.C. Cir. 1999). But he failed to do so.

During the military-commission proceedings, as the en banc court determined, Bahlul “waived all pretrial motions, asked no questions during voir dir[e], made no objections to prosecution evidence, presented no defense and declined to make opening and closing arguments.” Bahlul, 767 F.3d at 7. He “flatly refused to participate” and “instructed his trial counsel not to present a substantive defense.” Id. at 10. When Bahlul did make objections, they were “couch[ed] entirely in political and religious terms.” Id. He began by accusing the United States of being “an enemy [of] the Nation of Muslims” that supports “the great injustice that is carried out by . . . the Jews on the Muslims in Palestine.” Appendix (App.) 112. He concluded by disclaiming concern with the proceedings because they were based on earthly law, not Allah’s dictates. App. 116. Although he made stray references to “discrimination” and the “illegal” nature of his trial, App. 114–15, his remarks were “unquestionably ‘too general to have alerted the trial court to the substance of his point.’” Bahlul, 767 F.3d at 10 (quoting, inter alia, United States v. Bolla, 346 F.3d 1148, 1152 (D.C. Cir. 2003) (alteration omitted)). Bahlul therefore forfeited every
In other words, Bahalul violated the contemporaneous-objection rule. That rule requires a party to, in a phrase, "speak now or forever hold your peace": if he fails to raise an argument in the trial court, he cannot raise it later on appeal. See id. at 135; Miller v. Aviton, 384 F.2d 319, 321-22 (D.C. Cir. 1967). The contemporaneous-objection rule serves at least two purposes. First, it encourages fairness by penalizing sandbagging—i.e., the intentional withholding of an objection by a party to be raised on appeal only if he loses at trial.” Bahalul, 767 F.3d at 9 (citing, inter alia, Wainwright v. Sykes, 433 U.S. 72, 89 (1977)). Second, the rule promotes judicial efficiency by giving the trial court the first opportunity to correct errors, Puckett, 556 U.S. at 134, and by ensuring that "litigation remains, to the extent possible, an orderly . . . winnowing process,” Exxon Shipping Co. v. Baker, 554 U.S. 471, 487 n.6 (2008) (quotation marks omitted). See also Wainwright, 433 U.S. at 90 (contemporaneous-objection rule makes trial "main event" rather than mere "tryout on the road").

The rule operates differently in civil and criminal cases. See Salazar ex rel. Salazar v. Dist. of Columbia, 602 F.3d 431, 437 (D.C. Cir. 2010). In civil cases, forfeiture is usually the end of the matter: the appellate court does not review the tardy argument at all, unless it excuses the forfeiture due to "exceptional circumstances.” Dist. of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1085 (D.C. Cir. 1984). In criminal cases—including these unique enemy combatant cases—torture triggers plain-error review. Bahalul, 161 F.3d at 9 (citing, inter alia, FED. R. CRIM. P. 52(b); 10 U.S.C. § 950(a)). The appellate court automatically excuses the defendant’s forfeiture but reviews his argument under a more

exacting standard. See United States v. Olano, 507 U.S. 725, 732 (1993) (“The appellate court must consider the error” but it “may correct the error . . . only if it is plain (first emphasis added).”). In this way, the plain-error standard “tempers the blow” of the contemporaneous-objection rule for a criminal defendant. United States v. Young, 470 U.S. 1, 15 (1985). But it also "reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.” United States v. Frady, 456 U.S. 152, 163 (1982).

The plain-error standard applies to "all" forfeited arguments in a criminal case. Puckett, 556 U.S. at 136; accord United States v. Delgado, 672 F.3d 320, 331 (5th Cir. 2012) (“[W]e do not read [the Supreme Court’s cases] as allowing for any exceptions to the application of the plain-error test for forfeited claims.”). There is only one type of argument that is nonforfeitable and therefore exempt from plain-error review: subject-matter jurisdiction. See United States v. Cotton, 535 U.S. 625, 631 (2002); United States v. David, 96 F.3d 1477, 1482 (D.C. Cir. 1996); accord United States v. Washington, 653 F.3d 1251, 1257-58 (10th Cir. 2011) ("If a court ordinarily would consider an argument . . .

1 Most of Bahalul’s arguments involve personal constitutional rights that are indisputably forfeitable. See Peters v. United States, 501 U.S. 923, 929 (1991) (“[t]he most basic rights of criminal defendants” can be forfeited); Yohay v. United States, 521 U.S. 434, 444 (1994) (“No procedural principle is more familiar to this Court than that a constitutional right may be forfeited . . .”); see also, e.g., Johnson v. United States, 520 U.S. 461, 466 (1997) (right to press jury); United States v. Broun, 920 F.2d 1180, 1183 (D.C. Cir. 1991) (equal protection). United States v. Accart, 669 F.3d 340, 343-44 (D.C. Cir. 2012) (First Amendment).
to be forfeited, it should only refrain from doing so . . . when the alleged error is jurisdictional.”2 Subject-matter
jurisdiction “can never be forfeited” because “it involves a court’s power to hear a case.” Cotton, 535 U.S. at 630
(emphasis added); see also United States v. Buncum, 80 F.3d 539, 540 (D.C. Cir. 1996).

Bahlul cannot seriously contest the military commission’s jurisdiction. The 2006 MCA authorizes trial by
military commission of “any offense made punishable by this chapter,” including “conspiracy.” 10 U.S.C. §§ 948d(a),
950w(b)(28) (2006). It “explicitly confers jurisdiction on military commissions to try [Bahlul on] the charged
offenses.” Bahlul, 767 F.3d at 10 n.6. Granted, Bahlul challenges this jurisdictional grant as beyond the Congress’s
authority under the Define and Punish Clause. A challenge to the constitutionality of a jurisdictional statute, however, is not
itself jurisdictional. See United States v. Williams, 341 U.S. 58, 66 (1951) (“Even the unconstitutionality of the statute

2 Nguyen v. United States, 539 U.S. 69 (2003), and Glidden Co. v. Zdanok, 370 U.S. 530 (1962) (plurality), are not to the contrary. In both
cases, the criminal defendants complained that a non-Article III judge sat by designation on the court that reviewed or issued their respective
convictions. Nguyen, 539 U.S. at 74 (chief judge of district court for Northern Mariana Islands); Glidden, 370 U.S. at 531 (retired judge of
Court of Customs and Patent Appeals). Although the defendants failed to timely raise their objections, the Supreme Court nevertheless declined to
apply the plain-error standard. Nguyen, 539 U.S. at 90-91; Glidden, 370 U.S. at 535-36. Both Nguyen and Glidden, however, fit comfortably
within the “jurisdictional” exception to plain-error review. In Glidden, the plurality declared that it was “treading . . . the alleged error as
‘jurisdictional.’” 370 U.S. at 536. And in Nguyen, the Court repeatedly described the alleged error as a challenge to the court’s “authority.” 539
`statutory authority to adjudicate the controversy” (emphasis added)).

under which the proceeding is brought does not oust a court of jurisdiction.”), United States v. Drew, 200 F.3d 871, 876
(D.C. Cir. 2000) (noting “the error in labeling a challenge to the constitutionality of a statute a jurisdictional issue”); Cotton, 535 U.S. at 630 (same); Buncum, 80 F.3d at 540-41
(because every federal statute enjoys “a presumption of validity,” the “assertion of a constitutional defect does not work to divest the court of its original jurisdiction”).

Bahlul’s Article I Define and Punish Clause argument is no more jurisdictional than his Article I Ex Post Facto Clause
argument, which the en banc court reviewed for plain error. See Bahlul, 767 F.3d at 10 n.6 (“The question whether [the
2006 MCA] is unconstitutional does not involve the court[s] statutory or constitutional power to adjudicate the case –
(quotation marks omitted), see also, e.g., United States v. Nuesa-Peña, 711 F.3d 191, 197 (1st Cir. 2013) (reviewing
Define and Punish Clause challenge for plain error), United States v. Urena, 140 F. App’x 879, 881 (11th Cir. 2005)
(same).

Bahlul’s challenge under the Judicial Power Clause of Article III is also forfeitable. Like his Define and Punish
Clause argument, his Judicial Power Clause challenge is to the constitutionality of a jurisdictional statute, a challenge that
is itself, to repeat, plainly nonjurisdictional. See Williams, 341 U.S. at 66; Bahlul, 767 F.3d at 10 n.6; Buncum, 80 F.3d
at 540-41. The “Article III” label changes nothing; by this
Clause, Article III restricts the Congress’s power, not the
power of the courts or military commissions. See CFTC v. Schor, 478 U.S. 833, 850 (1986) (“Article III, § 1 . . . bar[s]
congressional attempts to transfer jurisdiction to non-Article III tribunals” (emphasis added) (quotation marks and
alterations omitted)). If a Judicial Power Clause challenge
were in fact jurisdictional, a court would be required to raise it
sua sponte each time it reviews a decision of a non-Article III

tribunal (e.g., agency adjudicator, magistrate judge, bankruptcy court). See Bucum, 80 F.3d at 541. Courts, of course, do not do this because they “would have to assure themselves of a statute’s validity as a threshold matter,” “run[ning] afoul of established Supreme Court precedent declining to address constitutional questions not put in issue by the parties.” Id.; see also, e.g., Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 64 n.19 (1989) (declining to reach Article III issue because “however helpful it might be for us to adjudge every . . . constitutional issue presented by [a statute], we cannot properly reach out and decide matters not before us”), United States v. Spector, 343 U.S. 169, 172 (1952) (declining to consider sua sponte Article III Judicial Power Clause issue), Benjamin v. Jacobson, 172 F.3d 144, 163 n.** (2d Cir. 1999) (en banc) (same); In re Constr. Equip. Co., 665 F.3d 1254, 1256 n.3 (Fed. Cir. 2011) (same).

Why, then, do my colleagues review Bahbāl’s Article III challenge de novo? As best I can tell, their answer is “because Schor says so.” See Maj Op 3–9; Concur Op 2. I respectfully disagree. Here is the relevant passage from Schor:

[O]ur precedents establish that Article III, § 1, not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as an inseparable element of the constitutional system of checks and balances. Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts, and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other. To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. When these Article III limitations are at issue, motions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.

478 U.S. at 850–51 (emphasis added) (quotation marks, citations and alterations omitted). But the High Court did not, by this language, instruct courts to treat Judicial Power Clause challenges as nonforfeitable or to automatically review them de novo.5

5 My colleagues note that the Government “conceded” their reading of Schor is correct. Maj Op 6. I do not take them to be saying, however, that the Government waived its plain-error argument. On the contrary, the Government “argued for plain-error review before the [United States Court of Military Commission Review (CMCR)], in its original brief to a panel of this Court and in its brief to the en banc court.” Bahbāl, 767 F.3d at 10 n.5. The Government again asked us to review Bahbāl’s Article III challenge for plain error. See Resp’y’s Br. 49–52, 60. And, even at oral argument, the Government objected to the notion that Bahbāl was raising a nonforfeitable structural challenge—hardly a concession of the point. See Oral Arg. Recording 30:47 (“I do not acknowledge that he [Bahbāl] was raising it [the structural Article III argument].”)

In any event, to the extent the Government misinterprets Schor, I would decline to accept its interpretation. See Young v. United States, 315 U.S. 257, 259 (1942) (“The proper administration of the criminal law cannot be left merely to the stipulation of parties.”). The Government cannot alter our standard of review—by concession, inadmissence, poor oral advocacy or otherwise. See United States v. Delgado-Carlos, 574
Put simply, Schor is not a case about forfeitability at all. As already discussed, the only nonforfeitable argument is subject-matter jurisdiction. See Cotton, 535 U.S. at 631; David, 96 F.3d at 1482; accord Freytag v. Comm'r, 501 U.S. 868, 893–94 (1991) (Scalia, J., concurring) (“A party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial.”) (emphasis added). Schor did not hold that a Judicial Power Clause challenge is “jurisdictional.” Granting, the Court said that “parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction,” Schor, 478 U.S. at 851 (emphasis added). In a later case, four Justices speculated that Schor drew an “analogy” between the Judicial Power Clause and subject-matter jurisdiction. Freytag, 501 U.S. at 897 (Scalia, J., concurring). But an issue’s analogy to subject-matter jurisdiction does not make it jurisdictional; in fact, the very need for analogy suggests that the concepts are different. See William Fleming, Vocabulary of Philosophy, in A VOCABULARY OF THE PHILOSOPHICAL SCIENCES 21 (1878) (“Analogy implies a difference in sort, and not merely in degree . . . .”). See also NFIB v. Sebelius, 132 S. Ct. 2566, 2666 n.6 (2012) (Scalia, Kennedy, Thomas, Alito, J.J. dissenting) (“That the penalty is to be “assessed and collected in the same manner as taxes” refutes the proposition that it is a tax . . . .”) (emphasis in original). And the analogy is a poor one at that. Because there is nothing jurisdictional about a challenge to the Congress’s constitutional authority to enact a statute, see Williams, 341 U.S. at 66; Bahlul, 767 F.3d at 10 n.6; Bausum, 80 F.3d at 540–41, a one-sentence analogy is far too slim a reed to conclude that Schor carved out a “judicial power” exception to the Court’s earlier—and consistent—precedent on the forfeitability of constitutional arguments. See, e.g., Williams, 341 U.S. at 66; Yukaz, 321 U.S. at 444. See generally Shulala v. III. Council on Long Term Care, Inc., 529 U.S. 1, 18 (2000) (“This Court does not normally overrule, or so dramatically limit, earlier authority sub silentio.”).

But don’t take my word for it. The Supreme Court has since clarified that Schor did not declare Judicial Power Clause challenges to be nonforfeitable; instead, the Court in Schor at most exercised its discretion to excuse the forfeiture. In Plaut v. Spendthrift Farms, Inc., the Government—like Bahlul—attempted to rely on Schor for the proposition that “parties cannot waive the structural principle of Article III.” Brief for United States at 27, 514 U.S. 211 (1995) (No. 93-1121), 1994 WL 387806. The Supreme Court expressly rejected this view:

[The proposition that legal defenses based upon doctrines central to the courts’ structural independence can never be waived simply does not accord with our cases. Certainly one such doctrine consists of the “judicial Power” to disregard an unconstitutional statute; yet none would suggest that a litigant may never waive the defense that a statute is unconstitutional. We held in Schor that, although a litigant had consented to bring a state-law counterclaim before an Article I tribunal, we would nonetheless choose to consider his Article III challenge, because “when these Article III
limitations are at issue, notions of consent and waiver cannot be dispositive;” id., at 851 (emphasis added). See also Freytag v. Commissioner, 501 U.S. 868, 878–879 (1991) (finding a “rare case” in which we should exercise our discretion” to hear a waived claim based on the Appointments Clause, Art. II, § 2, cl. 2).

Plaut, 514 U.S. at 231–32 (first emphasis added) (some citations omitted). Plaut makes plain that a party can forfeit a Judicial Power Clause argument and there is no “Schor exception” to the rule that a “structural” constitutional challenge is forfeitable. Whether an appellate court entertains such a challenge is a matter of discretion, not an inexorable command from Schor.

Granted, in a series of bankruptcy cases, many of our sister circuits interpreted Schor to create a rule of nonforfeatability, despite the Supreme Court’s clarification in Plaut. See Wellness Int’l Network, Ltd. v. Sharf, 727 F.3d 751, 767–73 (7th Cir. 2013), rev’d, No. 13–935, 2015 WL 2456619 (U.S. May 26, 2015); In re BP Hel., L.P., 735 F.3d 279, 286–87 (5th Cir. 2013); Waldman v. Stone, 698 F.3d

4 My colleagues also cite Stern v. Marshall, 131 S. Ct. 2594 (2011), to support their reading of Schor. Maj. Op. 6. But Stern said nothing about the forfeitability of Judicial Power Clause challenges. In Stern, the Supreme Court reviewed de novo the respondent’s Judicial Power Clause challenge to the bankruptcy court’s adjudication of a state-law counterclaim. See id., at 2601. There is no indication, however, that the respondent ever forfeited this argument. Although he did forfeit his challenge to the bankruptcy court’s adjudication of his defamation claim, id., at 2580, he “did not truly consent to its adjudication of the petitioner’s tortious-interference counterclaim.” id., at 2601. And, in fact, the respondent had earlier objected to the bankruptcy court’s jurisdiction of the counterclaim. See id., at 2601–02.

910, 917–18 (6th Cir. 2012). But see In re Bellingham Ins. Agency, Inc., 702 F.3d 553, 566 (9th Cir. 2012), aff’d on other grounds sub nom. Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014). In Koretski v. Commissioner, this Court—relying in part on the bankruptcy cases from our sister circuits—read Schor to mean that a party “did not (and could not) . . . waive his ‘structural’ claim” under the Judicial Power Clause of Article III. 755 F.3d 929, 937 (D.C. Cir. 2014) (emphasis added); see also id., at 938 (citing Waldman). No matter the correctness vel non of these cases when they were decided, their continued validity has been finally undermined by two very recent Supreme Court decisions.

In B&B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293 (2015), the Supreme Court considered whether the decisions of the Trademark Trial and Appeal Board—a non-Article III tribunal—were entitled to issue-preclusive effect. See id., at 1299, 1303. If issue preclusion applied, the respondent claimed that the Judicial Power Clause would be violated. See id., at 1304. The Court expressly declined to consider the claim because the respondent had not briefed it. See id.; see also id., at 1305 n.2 (“We do not decide whether such preclusion is unconstitutional because the issue is not before us.”); id., at 1304 (“To the extent . . . there could be a meritorious constitutional objection, it is not before us.”). In other words, the respondent forfeited the Article III argument—a holding that plainly contradicts the notion that Judicial Power Clause challenges are nonforfeitable. Significantly, the Court relied on Plaut to support its forfeiture determination. See id., at 1304 (citing Plaut, 514 U.S. at 231–32).

In Wellness International Network, Ltd. v. Sharf, No. 13–935 (U.S. May 26, 2015), the Supreme Court made its view on the forfeitability of a Judicial Power Clause challenge as
plain as day. The main holding of Sharf is that a party’s consent eliminates the Article III problem presented by bankruptcy court adjudication. See No. 13-935, slip op. at 2. But, near the end of the opinion, the Court also indicated that Judicial Power Clause challenges are forfeitable. In the decision under review, the Seventh Circuit had held that the “structural interests” protected by the Judicial Power Clause cannot be forfeited. See id. at 7 & n.5 (quoting Sharf, 727 F.3d at 771). The Supreme Court reversed that decision in toto. See id. at 8, 20. In fact, the Court remanded the case to the Seventh Circuit with instructions to conduct the “factbound analysis” necessary to determine “whether . . . Sharf forfeited his Stern argument below.” Id. at 20. [A “Stern argument”—it should go without saying, contra Maj. Op. 7–8—is a “structural” Judicial Power Clause challenge. See Arislon, 134 S. Ct. at 2170 (“Stern claims” are “claim[s] designated for final adjudication in the bankruptcy court . . . but prohibited from proceeding in that way as a constitutional matter” because “Article III prohibits Congress from vesting a bankruptcy court with in[ ] authority” (emphasis added)).] One Justice in Sharf went further, concluding that remand was unnecessary because the Judicial Power Clause challenge was indisputably forfeited.

Respondent forfeited any Stern objection by failing to present that argument properly in the courts below. Stern vindicates Article III, but that does not mean that Stern arguments are exempt from ordinary principles of appellate procedure.

Id., concurred op. at 2 (Alito, J.) He, unsurprisingly, relied on Babb Hardware for this conclusion. Id. (citing Babb Hardware, 135 S. Ct. at 1304). The other five Justices in the Sharf majority necessarily agreed that “ordinary principles of appellate procedure” govern, id.: they would not have

remanded the forfeiture question if the Seventh Circuit were right all along that a “structural” Judicial Power Clause challenge cannot be forfeited. Accordingly, Sharf not only overruled our sister circuits’ earlier bankruptcy cases, but, in my reading, it also undermined the relevant language from Kuczkowski, Contra Maj. Op. 5.

Notwithstanding the charge that I “misinterpret[ ]” Sharf, Maj. Op. 8, it is my colleagues’ reading that misses the mark. They believe Sharf reinforced Schor’s supposed rule of nonforfeitality. To support this point, they rely on passages in Sharf that discuss the distinction between the “personal” and “structural” aspects of Article III. See Maj. Op. 5, 6, 8

7 My colleagues emphasize that in Sharf the Supreme Court reviewed the Article III question de novo. Maj. Op. 6, 8. This is true but unhelpful to them. The Supreme Court granted certiorari in Sharf to determine whether a party’s consent cancels the structural Article III problem posed by bankruptcy court adjudication—a question that was decided by the Seventh Circuit and briefed in the Supreme Court. The Court answered the question in the affirmative. It then remanded to the Seventh Circuit to determine whether Sharf in fact consented to bankruptcy court adjudication and—if not—whether Sharf nonetheless forfeited his Judicial Power Clause challenge by not timely raising it. See No. 13-935, slip op. at 20, Pet’s Wellness Br., et al. Br. 47–48, 2014 WL 440736 (U.S. 2014) (arguing that “[l]itigants may waive or forfeit constitutional rights that implicate structural concerns,”). Pet’s Wellness Br., et al. Reply Br. 26, 2014 WL 7272883 (U.S. 2014) (again arguing that “Sharf forfeited his Stern argument” (quotation marks and brackets omitted)). In other words, the Supreme Court answered an important question of law de novo but still allowed for the prospect that Sharf would ultimately lose his appeal because he forfeited his structural Article III challenge. My colleagues’ decision to vacate Babb’s conviction in fact contradicts, rather than hints to, this approach. If they wanted to be faithful to Sharf’s disposition in the criminal context, they could have reversed Babb’s Article III claim de novo under the error “prong of the plain-error standard but then affirmed his conviction because the error was not ”plain.” See infra p. 28.
To put it another way, when *Sharf* speaks of “waiver,” it means the waiver of rights, not the forfeiture of arguments. The question the Court addressed in *Sharf* is whether “consent” (sometimes referred to, interchangeably, as “waiver”) can “cure the constitutional difficulty” presented by non-Article III adjudication. No. 13-935, slip op. at 9, 14 n.10 (quoting *Schor*, 478 U.S. at 851 (emphasis added); id., dissenting op. at 12 (Roberts, C.J.) (same)). The idea is that, when a party knowingly and voluntarily waives certain constitutional rights, no constitutional violation occurs in the first place. See id., slip op. at 14 n.10; see also id., dissenting op. at 2 (Thomas, J.) (“Although it may not authorize a constitutional violation, consent may prevent one from occurring in the first place”). This is true for “personal” rights, like the right to a jury, but—as *Schor* and *Sharf* make plain—it is not true for violations of the Article III Judicial Power Clause. See id., slip op. at 9; *Schor*, 478 U.S. at 849–51. A party’s consent cannot, by itself, “excuse an actual violation of Article III” because the Judicial Power Clause protects “structural” interests *ad litem* the narrow concerns of the parties. *Sharf*, No. 13-935, slip op. at 14 n.10; see also *Schor*, 478 U.S. at 851 (“When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.” (emphasis added)). *Sharf*, however, clarified that consent can be one factor that keeps a violation of Article III from occurring, so long as it is not the only factor. See No. 13-935, slip op. at 14 n.10 (“[C]onsent remains highly relevant when determining ... whether a particular adjudication in fact raises constitutional concerns....” (emphasis added)).

The Supreme Court eloquently explained the waiver-of-rights/forfeiture-of-arguments distinction in *Puckett*:

[The defendant’s] argument confuses the concepts of waiver and forfeiture. Nobody contends that [the defendant’s] counsel has waived—that is, intentionally relinquished or abandoned—[the defendant’s] right. The objection is rather that [the defendant] forfeited the claim of error through his counsel’s failure to raise the argument in the District Court. This Court’s precedents requiring that certain waivers be personal, knowing, and voluntary are thus simply irrelevant. Those holdings

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{footnote} Even if my colleagues were correct that *Sharf’s* discussion of “waiver” refers to forfeiture, they could not reconcile the Court’s repeated admonitions that structural Article III challenges can, in fact, be waived. See, e.g., *Sharf*, No. 13-935, slip op. at 16–17 n.11 (“[T]he proposition that legal defenses based upon doctrines central to the courts’ structural independence can never be waived simply does not accord with our cases” (citing *Plains*, 514 U.S. at 231 (emphasis added) (alteration in original)); id. at 12–13 (“[A]nything bankruptcy litigants to waive the right to Article III adjudication of Stern claims does not usurp the constitutional precepts of Article III courts.” (emphasis added)) (emphasis added)); id. at 17 (distinguishing *Stern*—a structural Article III precedent—on basis that “[t]he Court has never ... held that a litigant who has the right to an Article III court may not waive that right through his consent.”).
determine whether error occurred, but say nothing about the proper standard of review when the claim of error is not preserved.

556 U.S. at 138 (citation omitted) (second emphasis added). The Court's analysis makes plain an obvious point when applied here. An enemy combatant must knowingly and voluntarily consent to non-Article III adjudication before his consent can ward off a violation of the Judicial Power Clause. See Sharf, No. 13-935, slip op. at 18–19. But we should not even review a Judicial Power Clause challenge if he forfeits the argument by failing to timely raise it.

To summarize, the Supreme Court has made triply clear in Plant, B&B Hardware and Sharf that Schor did not label an Article III challenge as nonforfeitable; instead, the Schor Court exercised its discretion to excuse a forfeiture of the Judicial Power Clause challenge. This distinction—between nonforfeitality, on the one hand, and discretion to excuse forfeiture, on the other—is crucial for two reasons.

First, in a criminal case like this one, an appellate court lacks the kind of discretion the Court exercised in Schor. As noted, appellate courts in civil cases can excuse a forfeiture in "exceptional circumstances." Air Flu, 750 F.3d at 1085. The Supreme Court has expressly declined to limit this discretion. See Exxon Shipping, 554 U.S. at 487. Accordingly, courts occasionally exercise their discretion in civil cases to review "structural" separation-of-powers challenges de novo, notwithstanding they were not raised below. See, e.g., Freytag, 501 U.S. at 879; Schor, 478 U.S. at 851; Glidden, 370 U.S. at 336–37 (plurality); Kowalski, 753 F.3d at 936–37. But see Freytag, 501 U.S. at 892–901 (Scalia, J., concurring) (explaining why "structural" constitutional challenges should not receive special treatment).

...
C.J., dissenting). Likewise, our sister circuits frequently review judicial power clause challenges in criminal cases for plain error only. See, e.g., United States v. Shultz, 733 F.3d 616, 621 (6th Cir. 2013); United States v. Woodard, 387 F.3d 1329, 1331, 1333 (11th Cir. 2004); United States v. Bishop, 603 F.3d 279, 280 (5th Cir. 2010); United States v. Tejeda, 476 F.3d 471, 474 (7th Cir. 2007); United States v. Torres, 258 F.3d 791, 794 (8th Cir. 2001); United States v. Abbe, 632 F.3d 686, 691–92, 700 (10th Cir. 2011); United States v. Nash, 438 F.3d 1302, 1304 (11th Cir. 2006); United States v. Daniels, 182 F.3d 910 (4th Cir. 1999) (table).

The distinction between criminal and civil cases may seem counterintuitive because, ordinarily, the plain-error standard places a criminal defendant in a better position than a civil litigant. See Bahadur, 767 F.3d at 9 (plain-error review "mitigate[s] the sometimes harsh results of the forfeiture rule in criminal cases"). But this intuition focuses myopically on one side of the plain-error "balance" to the exclusion of the other. Puckett, 556 U.S. at 135. Plain-error review gives the contemporaneous-objection rule its "necessary bite." Daniel J. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1135 (1986); see also id. ("A requirement that a particular issue be raised in a particular fashion or at a particular time would hardly be effective if failures to comply were never punished."). As the Supreme Court has cautioned, "a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal" to the rationale of the contemporaneous-objection rule. Puckett, 556 U.S. at 134 (emphasis added). That rationale is "especially compelling" in criminal cases. Coble v. United States, 309 U.S. 323, 325 (1940); see also Dr. Bella v. United States, 369 U.S. 121, 124 (1962) ("undue litigiousness and leaden-footed administration of justice are particularly damaging to the conduct of criminal cases"). Society has an especially strong interest in the finality of criminal proceedings because "[w]ithout it, the criminal law is deprived of much of its deterrent effect." Teague v. Lane, 489 U.S. 288, 309 (1989); see also id. ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation."); Young, 470 U.S. at 16 ("To turn a criminal trial into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution."). In short, plain-error review reconciles multiple competing concerns in criminal cases and provides a rule to accommodate them ex ante. Absent jurisdictional error, we cannot do otherwise than apply the venerable standard.8

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8 None of this analysis—contrary to my colleagues' contention, Maj. Op. 9—turns on the applicability of FED. R. CRIM. P. 52(b). The en banc court imported the plain-error standard into even minor cases “whether or not Rule 52(b) directly governs.” Bahadur, 767 F.3d at 9 n.4 (citing Salazar, 602 F.3d at 417). The plain-error standard strikes a delicate “balance” that is irreversibly “skewed” whenever courts exempt litigants from its requirements. Salazar, 602 F.3d at 440. The Supreme Court's decisions to this effect tend us no matter the doctrinal source of the plain-error standard. See (e.g., 507 U.S. at 731 (noting that Rule 52(b) is merely “a restatement of existing law” (quoting FED. R. CRIM. P. 52(b), advisory committee’s note (1944))).

To the extent it makes a difference, the plain-error standard does have a statutory basis in enemy combatant cases. The 2009 MCA provides that “[a] finding or sentence of a military commission . . . may not be held incorrect on the ground of an error of law unless the error
materially prejudices the substantial rights of the accused.” 10 U.S.C. § 970(e). The Congress took this language from the review provision in the Uniform Code of Military Justice (UCMJ). See id. § 859(a), see also id. § 948(c) (“In the procedures for military commissions . . . are based upon the procedures for trial by general courts-martial under the UCMJ”). The U.S. Court of Appeals for the Armed Forces (CAAF) has long read the UCMJ’s review provision to incorporate a plain-error standard that is identical, in all material respects, to Rule 52(b). See United States v. Townsend, 72 M.J. 197 (C.A.A.F. 2013); see also id. at 196 (“To establish plain error, an appellant has the burden to demonstrate: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.”). Given the CAAF’s interpretive gloss on the UCMJ and the Congress’s use of identical language in the 2006 MCA, the plain-error standard applies with the same statutory force here. See 10 U.S.C. § 948(e) (“Judicial construction and application” of UCMJ is “‘interpretive’ in interpreting 2006 MCA); Seidman v. United States, 133 S. Ct. 2720, 2724 (2013) (“If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”), Bourgeois v. Abbott, 524 U.S. 634, 645 (1998) (“When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.”) The sources cited by my colleagues, Maj. Op. 9, are inappropriate because they deal with review by the Service Courts of Criminal Appeals (CCA) and CMCR, rather than the “much more limited” review of the CAAF and this Court. United States v. Chatterton, 32 M.J. 159, 162 (CMA 1991), see also United States v. Powell, 49 M.J. 460, 463 (CAAF 1998) (“[C][A][A]s enjoy much broader appellate authority than civilian intermediate courts or our Court.”), United States v. Riley, 47 M.J. 276, 281 (CAAF 1997) (Gieger, J., concurring) (whereas “a [CCA] may take notice of errors of law, whether or not they were preserved by timely objection, the CAAF is constrained by the rules of waiver and the doctrine of plain error”). Indeed, the CAAF applies plain error even when the CCA reviewed a forfeited issue de novo. See, e.g., Riley, 47 M.J. at 279-80 (maj. op.); United States v. Geoghegan, 72 M.J. 202, 203-04 (CAAF 2013); Turner, 72 M.J. at 953-96; United States v. Sweeney, 70 M.J. 296, 300 n.8, 304 (CAAF 2011).

Second, even if we could bypass the plain-error standard and review Bahful’s Article III challenge de novo, I would follow the en banc court and decline to do so here. Preliminarily, my colleagues are wrong to suggest that the Supreme Court has “instructed that courts should excuse waivers of Article III structural claims.” Maj. Op. 8 (emphasis added). Quite the contrary, it is a “rare” case in which we entertain a forfeited Article III argument. Plaut, 514 U.S. at 232 (quoting Freytag, 501 U.S. at 878-79). Enforcing the traditional rules of waiver and forfeiture in the context of a Judicial Power Clause challenge, as in other contexts, serves the important interest of “increasing judicial efficiency and checking gamesmanship.” Sharifi, No. 13-935, slip op. at 19. Moreover, several factors unique to Bahful’s case make it a particularly inappropriate occasion to forgive his forfeiture.

Most notably, my colleagues’ application of de novo review lends them to invalidate a provision of the 2006 MCA—a duly enacted statute produced by a coequal branch. See Rostker, 453 U.S. at 64 (“It must be remembered that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.”). Exercising the constitutional validity of a statute is “legitimate only in the last resort, and as a necessity.” Chicago & G.T. Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892); see also Pearson v. Callahan, 555 U.S. 223, 241 (2009) (courts should not “pass on questions of constitutionality unless such adjudication is unavoidable” (ellipsis omitted)); Lyng v. Nw. Indian Cemetery Protective Ass’n, 485 U.S. 439, 445 (1988) (“A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the
necessity of deciding them.""); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment) ("Particularly in an area of constitutional law such as that of "Art. III Courts," with its frequently arcane distinctions and confusing precedents, rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy."). Restraint is particularly necessary here because our decision affects sensitive matters of national security, the consequences of which we have neither the information nor the perspicacity to predict. See Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) ("Courts traditionally have been reluctant to intrude . . . in military and national security affairs"); Latif v. Obama, 677 F.3d 1175, 1182 (D.C. Cir. 2011) ("[t]he Constitution and common sense support judicial modesty in this area because "the judiciary has the least competence and the smallest constitutional footprint." "); Humanitarian Law Project, 561 U.S. at 34 ("[N]ational security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess.").

Further, excusing Bahul's forfeiture would not serve the interests of justice because he is concededly—and unapologetically—guilty of the charged offenses. Before the military commission, Bahul candidly admitted to being a member of al Qaeda and engaging in all of the conduct attributed to him. See App. 190–94. Although he took one exception to the charge that he wore an explosive belt in order to protect bin Laden, he also noted, "[T]his doesn't mean that if I was given an explosive belt and bin Laden... asked me to explode myself, that I wouldn't do that. Of course, I would." App. 194. He promised to continue "to fight America" if released "until the last drop of blood." App. 161–62; see also App. 161 ("I will not leave the American government anywhere on the face of this earth."). As I explain later, infra pp. 38–42, Bahul's conduct was indisputably illegal under international law, whether or not he was charged with an offense the international community expressly recognizes. See Marcor, 560 U.S. at 255 (declining to exempt from plain-error review "errors that create a risk that a defendant will be convicted based exclusively on noncriminal conduct."). The notion that we should pardon Bahul's forfeiture is "so ludicrous as itself to compromise the public reputation of judicial proceedings." Puckett, 355 U.S. at 143; see also Cotton, 355 U.S. at 634 ("The real threat . . . to the 'fairness, integrity, and public reputation of judicial proceedings' would be if respondents, despite the overwhelming and uncontroverted evidence that they were [guilty], were to [benefit from] an error that was never objected to at trial.").

Finally, nothing prevented Bahul from raising his constitutional challenges before the military commission. See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 571 F.3d 69, 76 (D.C. Cir. 2009) (declining to forgive forfeiture because party "offer[ed] no justification for its delay"). Bahul chose to "boycott" the proceedings in the hope it would "make the Muslims rise for [al Qaeda's] cause." App. 156, 162. By rejecting the assistance of counsel and voluntarily absenting himself from the proceedings, forfeiture was "one of the perils [Bahul] assume[d]." United States v. Vonn, 556 U.S. 55, 73 n.10 (2002). Bahul had every opportunity to raise his challenges and he must accept the consequences of his deliberate failure to do so. See Puckett, 355 U.S. at 136.

Nor is this a case where applying the ordinary rules of forfeiture would forever prevent de novo review of the
constitutionality of the challenged provision. This concern may have been the principal motivation behind Schor. The law at issue in Schor permitted the CFTC to bear state-law counterclaims in reparations proceedings. 478 U.S. at 837. But the CFTC’s jurisdiction was non-exclusive: parties remained free to bring reparations claims in federal court. Id. at 836. Thus, parties who chose to litigate before the CFTC arguably waived their right to complain about the CFTC’s adjudication of state-law counterclaims. The same was true for the parties who raised the counterclaims—which were permissive, not compulsory, under the relevant law. Id. at 837. As a result, the Supreme Court faced a dilemma. If the ordinary rules of waiver applied, no court could ever determine whether the CFTC’s adjudication of state-law counterclaims violated the Judicial Power Clause of Article III. This Catch-22 likely animated the Schor Court’s decision to excuse the waiver and explains why it thought that “the parties cannot be expected to protect” the “institutional interests” behind Article III. Id. at 851. Here, that concern is plainly absent because every enemy combatant has the ability—and incentive—to challenge the military commission’s jurisdiction. See Bond v. United States, 131 S Ct. 2355, 2365 (2011) (“[T]he claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances.”); Daniel J. Meltzer, Legislative Courts, Legislative Power, and the Constitution, 65 IND. L.J. 291, 304 (1990) (“[T]he strategic interests of litigants substantially coincide with institutional interests protected by article III.”).

We can indeed check “the power of the political branches to sideline the federal courts.” Maj. Op. 6, once an enemy combatant properly preserves the argument. See Sharf, No. 13-935, slip op. at 19 (“the Article III right is substantially honored” notwithstanding courts “permitting waiver” in some cases).

In sum, I believe my colleagues err by parting ways with the en banc court and reviewing Bahlul’s Article III challenge de novo. Their decision to sidestep the plain-error standard reads too much into an obscure passage from Schor—a reading the Supreme Court disavowed in Paut and overruled in Sharf—and ignores important distinctions between civil and criminal cases. Cf. Sharf, No. 13-935, dissenting op. at 18 (Thomas, J.) (Article III issues “cannot—and should not—be resolved through a cursory reading of Schor, which itself is hardly a model of careful constitutional interpretation”).

Applying the plain-error standard of review, I would easily reject Bahlul’s challenges to his conspiracy conviction. The plain-error standard is “difficult” to satisfy, “as it should be.” United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004). The forfeited error must be “so obvious” that “the trial judge and prosecutor were delict in countenancing it.” Bolla, 346 F.3d at 1153. Here, the Congress’s decision to authorize the trial of conspiracy by military commission did not plainly transcend Article III, as the en banc court’s decision and my colleagues’ concurrence implicitly recognize. See Bahlul, 767 F.3d at 18–27; Concur. Op. 1–2. At the very least, “the lack of prior precedent . . . and the novelty of the issue presented militates against finding plain error.” United States v. Blackwell, 694 F.2d 1325, 1342 (D.C. Cir. 1982); see also United States v. Terrell, 666 F.3d 1257, 1260 (D.C. Cir. 2012) (error not plain unless “a clear precedent in the Supreme Court or this Circuit establish[s] its erroneous character”). Thus, no matter one’s view of the merits, Bahlul cannot satisfy the “plainness” requirement of the plain-error standard. See Olano, 507 U.S. at 732. Nor do I believe he can satisfy the “error” requirement, a topic I turn to now.
II. THE CONSTITUTIONAL CHALLENGES

Bahlul argues that (i) the Congress—by codifying conspiracy to commit war crimes as an offense triable by military commission—exceeded its Article I powers and independently violated Article III; (ii) he was convicted based on his thoughts, beliefs and ideals in contravention of the First Amendment; and (iii) the 2006 MCA discriminates against him as an alien in violation of the equal protection component of the Fifth Amendment. The latter two arguments are frivolous on their face. See infra Part II.C. Bahlul’s Article I and Article III arguments, however, warrant a more thorough examination.

As detailed below, the Congress acted within its Article I authority and did not contravene any personal or structural Article III principles in codifying conspiracy as an offense triable by military commission. Bahlul’s conspiracy trial and conviction were sanctioned by the President, “pursuant to an express authorization of Congress.” Youngstown, 343 U.S. at 635 (Jackson, J., concurring). Their constitutionality is therefore “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rests[] heavily upon” Bahlul to rebut it. Id. at 637. Additionally:

[The detention and trial of petitioner]—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside

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9 See Bahlul, 767 F.3d at 6 (“In 2003, the President designated Bahlul eligible for trial by military commission and the military prosecutors charged him with conspiracy to commit war crimes.”).

Ex parte Quirin, 317 U.S. 1, 25 (1942) (emphasis added).

A. ARTICLE I

Bahlul begins with an uncontroversial premise: “law-of-war military commissions” can try only those “offenses against the law of war.” Pet’r’s Br. 12 (quoting Bahlul, 767 F.3d at 7). But he then embroiders that premise with needlework that produces naught but knots. First, he insists that the Congress’s power to codify a law-of-war offense derives exclusively from the Define and Punish Clause, U.S. CONST. art I, § 8, cl. 10. Second, he argues that the Define and Punish Clause allows the Congress to codify a law-of-war offense only if the international community has expressly agreed, element-by-element, that the offense is cognizable. And based on the Government’s concession that “conspiracy has not attained recognition at this time as an offense under customary international law,” Gov’t’s En Banc Br. at 34, Bahlul insists that “[t]he answer . . . is both plain and

10 In Hamdan, the plurality flipped Quirin’s “clear conviction” language, stating “[w]hen . . . neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous” because “[t]o demand any less would be to risk degrading the military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution.” Hamdan, 548 U.S. at 602 (plurality) (Justice Thomas, in dissent, correctly pointed out that “[t]his is a pure contrivance, and a bad one at that. It is contrary to the [clear conviction] presumption we acknowledged in Quirin” id. at 890 (Thomas, J., dissenting). In any event, the Quirin presumption, even by the Hamdan plurality’s lights, applies here because Bahlul’s offense is “defined by statute”—namely, the 2006 MCA. See id. at 602 (plurality).
uncontested”: conspiracy falls outside the Congress’s Article I power. Pet’r’s Br. 24.

Both of Bahlul’s embroidered premises are wrong. Even under the Define and Punish Clause alone, the Congress has the constitutional authority to codify conspiracy to commit war crimes by military commission. The international community does recognize that Bahlul violated “the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.” Quirin, 317 U.S. at 35, and the Congress has done nothing more than provide for “the limits or precise meaning” of those principles in authorizing the trial and sentencing by military commission for the violation thereof. 11 U.S. Op. Atty. Gen. 297, 299 (1865) (then-Attorney General James Speed’s review of Lincoln conspirators’ trial).

Bahlul’s other embroidered premise fares no better. The Congress does not derive its power to enumerate war crimes triable by military commission solely from the Define and Punish Clause. As the Supreme Court has recognized, the “capture, detention, and trial of unlawful combatants” are “important incidents of war,” Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality) (quoting Quirin, 317 U.S. at 28 (emphases added) (alteration omitted)), and the Congress’s power to conduct war, in all of its “incidents,” necessarily derives from its several Article I war powers mutatis mutandis. “[U]nlike the Define and Punish Clause, ... the other Article I war powers clauses do not refer to international law and are not defined or constrained by international law.” Bahlul, 767 F.3d at 73 (Kavanaugh, J., concurring/dissenting).

1. Define and Punish Clause

The Define and Punish Clause declares that “[t]he Congress shall have Power...[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10. The power to “define” means that the Congress can “determine,” “decide” or “lay down definitely” offenses against the law of nations. Define, OXFORD ENGLISH DICTIONARY (2d ed. 1989). The word “define”—especially joined by the conjunction “and”—has teeth.

At the Constitutional Convention, the debate over the Define and Punish Clause focused on whether the Congress should be given the power to do more than merely punish violations of the law of nations. An early draft of the Clause recited that the Congress could “define & punish piracies and felonies on the high seas” but could only “punish offenses agst. the law of nations” Charles D. Siegel, Deference and Its Dangers: Congress’ Power to “Define ... Offenses Against the Law of Nations”, 21 VAND. J. TRANSNAT’L L. 865, 876 (1988) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 614 (Farrand ed. 1937) (Madison’s notes) (emphasis added)). Governor Morris, a Pennsylvania delegate to the Constitutional Convention, “moved to strike out ‘punish’ before the words ‘offenses agst. the law of nations’” so that they would be “definable as well as punishable, by virtue of the preceding member of the sentence.” Id. (emphasis in original). James Wilson, another Pennsylvania delegate, objected, arguing that “[t]o pretend to define the law of nations” would give the drafters a “look of arrogance” and “make us ridiculous.” Id. (emphasis in original). In rejoinder, Morris explained that passive reliance on the international community was unworkable because “the law of nations [is] often too vague and deficient to be a rule.”
Id. (alterations omitted); see also THE FEDERALIST NO. 42, at 266 (Madison) (explaining that “define” power was necessary to secure “certainty and uniformity”). Morris’s approach carried the day, establishing that the Congress was not reflexively to follow other nations’ lead in formulating offenses but instead to contribute to their formulation. See Peter Margulies, Defining, Punishing, and Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions, 36 Fordham Int’l L.J. 1, 27 (2013) (“Morris’s concern suggested that Congress would play a valuable role by not merely defining the law of nations in a mechanical fashion, but refining that occasionally turgid and murky stream of disparate sources.”). cf. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Morris) (“define... was said by others to be applicable to the creating of offences”).

The Clause’s history and text suggest two principles helpful to our interpretive task. The first is that international law derives from “a myriad of sources” and is “vast and always changing.” Margulies, supra, at 24; see also Bahlal, 767 F.3d at 54 (Brown, J., concurring/dissenting). Justice Joseph Story, in 1820, recognized the varying nature of international law, observing that “[o]ffences... against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognised by the common consent of nations,” and therefore the Congress was given the “power to define.” United States v. Smith, 18 U.S. 153, 159 (1820). The observation has stood the test of time. As declared at the Nuremberg International Military Tribunal that tried the World War II war criminals:

[International law is not the product of an international legislature, and... international agreements... have to deal with general principles of law.... The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world.”]


The second principle is that “[t]he judiciary must give Congress extraordinary deference when it acts under its Define and Punish Clause powers.” Bahlal, 767 F.3d at 59 (Brown, J., concurring/dissenting). The Framers recognized that “[d]efining and enforcing the United States’ obligations under international law require the making of extremely sensitive policy decisions, decisions which will inevitably color our relationships with other nations.” Finci, 798 F.2d at 1458 (emphasis added). “[S]uch decisions are delicate, complex, and involve large elements of prophecy.... They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.” Id. at 1458–59 (quoting Chi. & S. Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948)). Indeed, “[j]udicial deference to such congressional definition is but a corollary to the grant to Congress of any Article I power.” Eldred v. Ashcroft, 537 U.S. 186, 218 (2003) (emphasis added) (quotation marks omitted).

The Supreme Court has remained faithful to these principles in the few instances in which it has examined the prosecution of war crimes by military commission. The first instance was Quirin. There, the Court had no difficulty
concluding that the offenses charged against the Nazi saboteurs—espionage and sabotage—had “generally been accepted” as punishable by military commission under international law. *Quirin*, 317 U.S. at 31–36. The offenses with which the saboteurs were charged, according to the *Quirin* Court, resulted from conduct “plainly” recognized as violative of the law of war. *Id.* at 46.

But the precedent my colleagues cannot reconcile with their Define and Punish Clause holding is *Application of Yamashita*, 327 U.S. 1 (1946). At the time Japanese Commander Yamashita assumed command, General MacArthur’s troops were waging their assault on, and ultimate liberation of, the Philippines. *Id.* at 31–32 (Murphy, J., dissenting). Although Allied victory was imminent, Yamashita’s army troops and naval forces “exterminate[d] a large part [more than 25,000] of the civilian population of Batangas Province.” *Id.* at 14 (majority op.). While the crimes committed by Yamashita’s soldiers and sailors were “recognized in international law as violations of the law of war,” Yamashita himself was not charged with participating in, or directing, their commission but instead with “failing to discharge his duty as commander to control . . . the members of his command.” *Id.* at 13–14. The difficulty, then, was that international law did not expressly provide that a war-time commander could be prosecuted for failing to stop those under his command from committing war crimes. See Segal, supra, at 883 (noting international law “dealt only tangentially with the issue” and “no provision dealt specifically with a commander’s obligation to control his troops”). Nevertheless, the Court affirmed Yamashita’s conviction and capital sentence.

In so doing, the Court framed the question as follows:

> Whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldier, and whether he may be charged with personal responsibility for his failure to take such measures when violations resulted.

*Yamashita*, 327 U.S. at 14–15. The Court looked to four international-law sources for an answer. Although none directly addressed whether a commanding officer’s failure to affirmatively prevent his troops from committing war crimes was itself a war crime, the Fourth Hague Convention of 1907 established that armed forces could be considered lawful belligerents only if commanded by an individual “responsible for his subordinates.” *Id.* at 15 (quoting 36 Stat. 2295). Article 43 of the Annex to the Fourth Hague Convention required a commander occupying enemy territory to “take all the means in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” *Id.* at 16 (quoting 36 Stat. 2306) (emphasis added).

Notwithstanding the absence of international authority outlawing a commander’s failure to affirmatively prevent

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10. The other two sources included Article 19 of the Tenth Hague Convention, which mandated that commanding officers of bombing naval vessels must adhere to the principles of the Tenth Hague Convention, *Yamashita*, 327 U.S. at 15 (quoting 36 Stat. 2380), and Article 20 of the Geneva Red Cross Convention of 1929, which included rules related to wounded and sick in armies and made it the commander’s duty to provide “details of execution of this Convention” for such actions. *Id.* at 15–16 (quoting 47 Stat. 2074, 2092).
those under his command from committing war crimes, the Court was not deterred, finding it "evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent." 327 U.S. at 15 (emphasis added). That "purpose would largely be defeated if the commander could with impunity neglect to take reasonable measures for their protection." Id. "Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates." Id. (emphasis added).

The holding was attacked—indeo agitato—by the two dissenting justices, see id. at 35 (Murphy, J., dissenting) (noting that "[i]nternational law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault; nor [did] it impose liability under such circumstances"); id. at 43 (Rutledge, J., dissenting), on the same ground Bahlul today urges. Justice Murphy’s criticism was sweeping: "Nothing in all history or in international law" established that "such a charge against a fallen commander of a defeated force constituted a war crime. Id. at 35 (Murphy, J., dissenting); see also Eugene Kontorovich, Discretion, Delegation, and Defining in the Constitution’s Law of Nations Clause, 106 NW. U. L. REV. 1675, 1736 (2012) (charge in Yamashita was upheld "with some general and not quite on-point citations to the Hague Conventions.") 12

12 Contrary to my colleagues’ suggestion, I do not rely on Yamashita as precedent, that speaks directly to "the type of defense owed to Congress." Maj. Op. 27. Rather, in Yamashita, as in Quirin and Hamdan, the Court noted that the Congress did not "itself undertake[] to define the law of war. See infra p. 44. It is wrong, however, to suggest that

Mindful of the two principles discussed above—the inherently fluid nature of international law and the deference owed to the Congress’s power to define offenses against the law of nations—we should examine whether the international community permits Bahlul to be tried by military commission rather than requiring that the charge against him, as defined by the Congress, matches an offense expressly recognized by the law of nations as a war crime.

Bahlul was convicted of "conspiracy to commit war crimes." Bahlul, 767 F.3d at 5.11 The 2006 MCA defines conspiracy as including any enemy combatant “who conspires to commit one or more” law-of-war offenses and “who knowingly does any overt act” in furtherance thereof. 10 U.S.C. § 950v(28) (2006). As is common in the United States, the conspiracy offense set out in the 2006 MCA has two elements: an agreement to commit a war crime and an overt act in furtherance of that agreement. Cf. e.g., 18 U.S.C. § 371.

In civil-law countries, conspiracy is instead viewed as a type of vicarious liability requiring proof of a completed offense. See Margulies, supra, at 84. Inchoate conspiracy has Yamashita does not bear on the proper interpretation of the Define and Punish Clause. Far from it. Yamashita demonstrates that the Supreme Court, implicitly rejecting the rigid international-law veto my colleagues rely upon to vacate Bahlul’s conviction, recognizes that military commissions may constitutionally try offenses that, like inchoate conspiracy, reflect broad international norms. My colleagues make no attempt to meet Yamashita on its terms and, given Yamashita’s significance, the silence is deafening.

11 Bahlul was also convicted of material support and solicitation, which convictions were earlier vacated by the en banc court. See Bahlul, 767 F.3d at 5, 29, 31.
been internationally recognized, however, in connection with certain war crimes. See 1 IMT, supra, at 224–26 (“common plan” to wage aggressive war); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 4 (2009) (making punishable “conspiracy to commit genocide” as well as incitement or attempt to commit genocide and complicity in genocide); Statute of the International Criminal Tribunal for Rwanda, art. 2 (1994) (same); Convention on the Prevention and Punishment of the Crime of Genocide, art. 3 (1948) (same). Additionally, international law recognizes “joint criminal enterprise” (JCE). See Prosecutor v. Tadic, Case No. IT-94-3-A, Appeals Chamber Judgment, ¶ 220 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999). JCE has three essential elements: “a plurality of persons participating in the criminal plan,” “the existence of a common purpose which amounts to or involves the commission of a crime,” and “the accused’s participation in the common design.” Giulia Bigi, Joint Criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of Senior Political and Military Leaders: The Krulj/Link Case, in 14 Max Planck Yearbook of United Nations Law 56 (A. von Bogdandy & R. Wolfrum eds. 2010).

At one point, my colleagues suggest that the conspiracy offense set out in the 2006 MCA is inconsistent (as opposed to not recognized in hoc verbo) with international law. They note that “[i]f the International Military Tribunal at Nuremburg considered and rejected conspiracy to commit war crimes as an international law of war offense,” Maj. Op. 24. The Nuremburg Tribunal, however, did recognize one inchoate conspiracy offense: “common plan” to wage aggressive war. 1 IMT, supra, at 224–26. The Congress is aware of this history and could have legitimately concluded that the international community would agree that the September 11, 2001 attacks are sufficiently abhorrent to impose inchoate-conspiracy liability. Importantly, the “jurisdiction” of the military commission has traditionally been “adapted in each instance to the need that called it forth.” Madsen v. Krenzel, 343 U.S. 341, 347–48 (1952), and international terrorism is “the global security challenge of the 21st Century.” Bahul, 767 F.3d at 61 (Brown, J., concurring/dissenting).

Furthermore, international law has developed since the Nuremberg trials of seventy years ago. International tribunals now prosecute JCE, which “functions in ways virtually identical to inchoate conspiracy.” Allison Marston Dammer & Jenny S. Martinez, Guilt Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 Cal. L. Rev. 75, 119 (2005). Thus, the hesitation of certain Allies at Nuremberg—that “overbroad application of the conspiracy principle may drag innocent people into the prosecution’s net,” Telford Taylor, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 553 (1992)—appears to have been removed by the international community. Indeed, JCE allows the prosecution as war criminals of those who join together and participate in a criminal plan, which plan’s purpose “amounts to” the commission of a crime. Bigi, supra, at 56; see also Tadic, supra, at ¶ 109. Bahul joined with other al Qaeda members and participated in the plan to attack our

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84 My colleagues fault my reliance on Madsen because “that case involved a military government commission, not a law of war military commission.” Maj. Op. 31–32. But Madsen’s reliance on Yamamoto, in which case the Supreme Court expressly decided a law-of-war military commission had jurisdiction over a law-of-war offense, makes plain that Madsen’s discussion of “the history of United States military commissions” encompasses Bahul’s military commission. See Madsen, 343 U.S. at 346.

85 The charges against Bahul, on which he was convicted, alleged that he
a. traveled to Afghanistan with the purpose and intent of joining al Qaeda;
b. met with Saif al 'Adl, the head of the al Qaeda Security Committee, as a step toward joining the al Qaeda organization;
c. underwent military-type training at an al Qaeda sponsored training camp then located in Afghanistan near Mes Aynak;
d. pledged fealty, or "bayat," to the leader of al Qaeda, Usama bin Laden, joined al Qaeda, and provided personal services in support of al Qaeda;
e. prepared and assisted in the preparation of various propaganda products, including the video "The Destruction of the American Destroyer U.S.S. Cole," to solicit material support for al Qaeda, to recruit and indoctrinate personnel to the organization and objectives of al Qaeda, and to solicit, incite and advise persons to commit Terrorism;
f. acted as personal secretary and media secretary of Usama bin Laden in support of al Qaeda;
g. arranged for Mohammed Atta, also known as Abu Abdul Rahman al Masi, and Ziad al Jarrah, also known as Abu al Qa'id al Libi, to pledge fealty, or "bayat," to Usama bin Laden;
h. prepared the propaganda declarations styled as martyr wills of Mohammed Atta and Ziad al Jarrah in preparation for the acts of terrorism perpetrated by the said Mohammed Atta, Ziad al Jarrah and others at various locations in the United States on September 11, 2001;
i. at the direction of Usama bin Laden, researched the economic effects of the September 11, 2001 attacks on the United States, and provided the result of that research to Usama bin Laden;
j. operated and maintained data processing equipment and media communications equipment for the benefit of Usama bin Laden and other members of the al Qaeda organization.


country on September 11, 2001, which plan's purpose—to murder civilians—"amounts to" the commission of a war crime.

Discernable in this brief discussion is a common animating principle that, notwithstanding the differences in descriptive labels or elements, individuals who join together to further the commission of a war crime violate the law of war. Granted, the Congress did not include proof of a completed war crime as an element of the conspiracy offense included in the 2006 MCA. My colleagues characterize this omission as the creation of a new, purely "domestic" offense, as if it were made out of whole cloth. Maj. Op. 15. In my view, the Congress has taken a preexisting international law-of-war offense—conspiracy to commit war crimes—and eliminated one element. This it is constitutionally authorized to do within its "power to define" that Justice Story wrote about almost 200 years ago. Smith, 18 U.S. at 159; see also Bahlul, 767 F.3d at 57 (Brown, J., concurring/dissenting).

Nor does the Define and Punish Clause require the Congress to wait for the international community to catch up. The Yamashita Court did not play "Mother, may I?" with established international law. See 327 U.S. at 15–16. Instead, it used what it viewed as the international law of war's "prepossession" and "purpose" in order to uphold Yamashita's conviction of "failure to prevent" war crimes, which failure "result[ed] in war crimes it was the purpose of the law of war to prevent." Id. at 15–16 & n.3. Moreover, it upheld Yamashita's war crimes convictions for omissions to act, even more cognizable as war crimes, then, are Bahlul's commissions. See supra pp. 40–41 n.15. And today, in our post-Erie world, we recognize that there is no "transcendental body of law outside of any particular State." Erie R. Co. v. Tompkins, 304 U.S. 64, 79 (1938). Law is created, not
discovered, and it changes based on the actions of individual sovereigns. As one commentator puts it:

[International law has grown more fluid and responsive to shifts in international consensus. The United States' influence on international law has changed as well: the twentieth century saw the nation develop into a superpower, one that, when it raises its sails, can cause the winds of international law to blow in a new direction.]

Note, *The Offences Clause After Sosa v. Alvarez-Machain*, 118 Harv. L. Rev. 2378, 2390 (2005); see also Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819 (1989). In my view, the Congress can, consonant with the Define and Punish Clause, track somewhat ahead of the international community. The United States can be the standard bearer and take the reins in resolving difficult questions of international law related to the ongoing threat of international terrorism. See *Behalal*, 767 F.3d at 61 (Brown, J., concurring/dissenting) ("Perhaps the United States should be a leader in this area—a leader in international law commensurate with its status as a military leader in the war on terror—recognizing the offense of conspiracy to commit acts of terrorism.").

... against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined." Smith, 18 U.S. at 159, 161. *Ayres*, moreover, stands only for the proposition that a statute need not include the phrase "offense against the law of nations" to be a valid exercise of the Congress's Define and Punish Clause power. 120 U.S. at 488. It says nothing about the deference we owe the Congress when it exercises that power. *Cf. Russ*, 485 U.S. at 129 (referring to "congressional judgment in this delicate area"); *Ward v. Hoover*, 3 U.S. 105, 231 (1798) (opinion of Chase, J.) ("If the right is conceded to be in Congress, it necessarily follows, that she is the judge of the exercise of the right, as to the extent, mode, and manner.")

My colleagues' narrow view of the Congress's authority under the Define and Punish Clause, requiring that a law-offense be *already* recognized by the international community on an element-by-element basis, fails, they believe, from *Quirin* and *Hamdan*. In my view, these two cases did not set the outer limits of the Congress's authority because neither involved an exercise of the Congress's power to "define" the law of nations. The military commissions in *Hamdan* and *Quirin* operated under section 821 (or its predecessor), giving military commissions jurisdiction of "offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. § 821 (emphasis added).

By enacting this statute, however, the Congress did not "itself undertake[] to... define the law of war but instead left its definition to the courts. *Quirin*, 317 U.S. at 28–30. Accordingly, to determine whether an offense was covered by section 821, the Supreme Court had to survey the "common law" of war, id. at 30; *Hamdan*, 548 U.S. at 593, which is necessarily limited to the offenses already recognized as triable by military commission. See *Hamdan*, 548 U.S. at 595 (plurality) ("The common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists."); see also *Quirin*, 317 U.S. at
In Hamdan, however, five Justices emphasized that their task would have been considerably easier had the Congress affirmatively defined conspiracy as an offense against the law of war. See 548 U.S. at 601-02 (plurality) (noting Congress had not "positively identified "conspiracy" as a war crime"); id. at 612 (noting "the absence of specific congressional authorization"); id. at 595 (majority op.) (same); id. at 636 (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes necessary."). As Justice Kennedy put it:

I . . . see no need to address the validity of the conspiracy charge . . . . Congress may choose to provide further guidance in this area. Congress, not the Court, is the branch in the better position to undertake the "sensitive task of establishing a principle not inconsistent with the national interest or with international justice."

Id. at 655 (Kennedy, J., concurring in part) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)).

Heeding this call, the Congress provided such guidance by enacting the 2006 MCA, which expressly enumerates conspiracy as a law-of-war offense triable by military commission. See 10 U.S.C. § 950e(28) (2006). Inexplicably, my colleagues suggest that the Congress was not exercising its power to "define" the law of nations in enacting the challenged provision. Maj. Op. 26; Concur. Op. 4. The en banc court, however, necessarily recognized that the Congress was exercising its power to "define" in the 2006 enactment. See Bahlul, 767 F.3d at 13 ("The 2006 MCA . . . provides the President the very power he sought to exercise in

Hamdan--the power to try the 9/11 perpetrators for conspiracy . . . by military commission . . . . We must heed this inter-branch dialogue." (citation omitted)); id. at 26 ("[T]he elements of the conspiracy charge were not defined by statute in Hamdan . . . . Here, the Congress has positively identified conspiracy as a war crime." (citation omitted)). Moreover, the legislative history accompanying the 2006 MCA makes plain that the Congress viewed itself as acting pursuant to its authority under the Define and Punish Clause.17 My colleagues rely on the Government's failure to argue this point but we "retain[] the independent power to identify and apply the proper construction of governing law." U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446 (1993). And, to the extent we consider the parties' characterizations of what the Congress did, Bahlul himself concedes that the Congress "codified a conspiracy offense . . . in a self-conscious exercise of its power under the Define & Punish Clause." Pet'r's Br. 22; see also id. at 21-22 ("The Define & Punish Clause is the authority . . . to which Congress looked when enacting the 2006 Act." (citing H.R. REP. No. 109-664, pt. 1, at 243)); id. at 25 ("Congress enacted

17 See, e.g., H.R. REP. No. 109-664, pt. 1, at 24 (2006) ("The offenses defined here . . . reflect the codification of the law of war into the United States Code pursuant to Congress's constitutional authority to "Define and Punish.""); id., pt. 2, at 15 ("[T]he Committee finds the authority for this legislation in article 1, section 8 of the Constitution, including clauses 10 [the Define and Punish Clause], 11, 14 and 18"); S. 3959, 109th Cong. § 102 (2000) ("Congress makes the following finding: (1) The Constitution of the United States grants to Congress the power "To define and punish . . . Offenses against the Law of Nations", as well as the power "To declare War . . . To raise and support Armies . . . and To provide and maintain a Navy" . . . . It is in the national interest for Congress to exercise its authority under the Constitution to enact legislation authorizing and regulating the use of military commissions to try and punish violations of the law of war.").
Bahlul’s conspiracy conviction thus stands on firmer constitutional footing than Hamdan’s, Quirin’s or even Yamashita’s convictions. The Congress has in fact exercised its Article I power to “define” conspiracy as an offense against the law of nations. The difference between this case and Hamdan is the difference between Justice Jackson’s first and third categories, respectively. See Youngstown, 343 U.S. at 635–38 (Jackson, J., concurring). The Congress has used its expertise in national security and military affairs, see Forcer, 798 F.2d at 1458–59, which warrants the Judiciary’s utmost deference. Unlike my colleagues, I would not treat this case as another Quirin or Hamdan. Every Justice in Hamdan who ruled against the Government necessarily recognized that a case like Bahlul’s would present a much easier question. Here, the Congress and the President have acted in concert, cloaking their actions “with all the attributes of sovereignty.” Youngstown, 343 U.S. at 625 n.2 (Jackson, J., concurring). We should “hesitate long before limiting or embarrassing such powers,” id. (emphasis omitted)—much longer and harder than my colleagues have hesitated here.

Accordingly, the Congress’s decision to define conspiracy to commit war crimes as an offense against the law of war triable by military commission is consistent with international law—even if not a perfect match. Add to that the elevated level of deference we give the Congress in exercising its Article I powers and, to me, the inclusion of conspiracy to commit war crimes in the 2006 MCA is plainly within its authority under the Define and Punish Clause.

2. Necessary and Proper Clause

Next, the Necessary and Proper Clause augments the Congress’s already ample Define and Punish Clause authority to codify conspiracy as a law-of-war offense triable by military commission. The Supreme Court has made plain that, “in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute,” courts “look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.” United States v. Comstock, 560 U.S. 126, 134 (2010), see also Gonzales v. Raich, 545 U.S. 1, 22 (2005) (statute falls within Necessary and Proper Clause if “Congress had a rational basis” for concluding statute implements another enumerated Article I power). The constitutionally enumerated power here—the Define and Punish Clause—allows the Congress, at a minimum, to codify Bahlul’s object offenses (e.g., murder in violation of the law of war) as war crimes triable by military commission. See Quirin, 317 U.S. at 29. Trying by military commission those who conspire to commit war crimes is “convenient,” “useful,” and “conducive” to the . . . beneficial exercise . . . of the Congress’s power to authorize the trial of substantive war crimes and doing so is abundantly rational. Comstock, 560 U.S. at 133–34 (quoting McCulloch v. Maryland, 17 U.S. 316, 413, 418 (1819)).

In Comstock, the Supreme Court held that the Necessary and Proper Clause granted the Congress the authority to enact a civil-commitment statute allowing the Department of Justice
to detain certain federal prisoners beyond their release date. Id. at 129–30. It based its holding on “five considerations”: (1) the Necessary and Proper Clause “grants Congress broad authority to enact federal legislation,” id. at 133; (2) the civil-commitment statute was a “modest addition” to preexisting law, id. at 137; (3) the Congress had sound reasons for the statute and the statute was “reasonably adapted” thereto, id. at 142–45; (4) the statute “properly accounts for state interests,” id. at 143; and (5) the connection between the statute and an enumerated Article I power was “not too attenuated” and the statute was not “too sweeping in its scope,” id. at 146. Here, each of these considerations indicates that the Congress acted within its constitutional authority.

First, as Comstock emphasized, the Congress’s power under the Necessary and Proper Clause is broad. See id. at 133; see also Armstrong v. Exceptional Child Center, Inc., 135 S. Ct. 1378, 1383 (2015) (Necessary and Proper Clause “vests Congress with broad discretion over the manner of implementing its enumerated powers”). Indeed, in McCulloch, “Chief Justice Marshall emphasized that the word ‘necessary’ does not mean ‘absolutely necessary.’” Comstock, 560 U.S. at 134 (quoting McCulloch, 17 U.S. at 413–15 (emphases omitted)). Rather, he wrote:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

McCulloch, 17 U.S. at 421. For this reason, courts deciding whether the Necessary and Proper Clause supports a piece of legislation ask only “whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.” Comstock, 560 U.S. at 134; see also Sabri v. United States, 541 U.S. 600, 605 (2004) (using “means-ends rationality” to describe necessary relationship). Moreover, the “choice of means” lies “primarily” with “the judgment of Congress” and “the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone.” Burroughs v. United States, 290 U.S. 534, 547–48 (1934).

Second, the Congress, through the 2006 MCA, legislated in an area that is exclusively federal, not simply one with a “long history of federal involvement.” Comstock, 560 U.S. at 149. The Supreme Court has long held that “the government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries,” Arpina, 120 U.S. at 483, and that states are “expressly prohibited from entering into any ‘treaty, alliance, or confederation.’” Id. (quoting U.S. Const. art. I, § 10, cl. 1). In fact, the Define and Punish Clause itself recognizes that “[i]f the national government is ... responsible to foreign nations for all violations by the United States of their international obligations.” Id.

Third, the Congress has indisputably sound reasons for codifying conspiracy as a war crime triable by military commission. As the Supreme Court has explained, “[c]onscorted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individual involved will depart from their path of criminality.” Collura v. United States, 364 U.S. 587, 593 (1961). Bahlul himself recognized this fact at his military-commission trial. He stated that he had “asked bin Laden for a martyrdom operation, a suicide operation, but
[bin Laden] refused.” App. 194. He was instead put in charge of propaganda because, according to bin Laden, “recruiting people through media gets you more people than suicidal attacks.” Id. Furthermore, there is no principled reason to prevent the United States—or any member of the international community, for that matter—from subjecting to military justice those enemy combatants who plot, but fail, to commit war crimes. Once conspirators enter into an agreement, their “[c]riminal intent has crystallized, and the likelihood of actual, fulfilled commission warrants preventive action.” United States v. Feola, 420 U.S. 671, 694 (1975) (emphasis added).

Fourth, for the reasons discussed in the second point, supra, the challenged provision does not infringe on any state interest.

Fifth, the link between the Congress’s decision to authorize trial of conspiracy to commit war crimes by military commission and its undisputed power to authorize trial of other war crimes by military commission is not attenuated. Indeed, under the challenged provision, an enemy combatant tried by military commission can be convicted of conspiracy only if the Government proves that he agreed to commit, and took acts in furtherance of committing, a war crime. There is no question that the object offenses underlying Bahlul’s conspiracy conviction—which the Government proved or Bahlul conceded—violated the international law of war. See, e.g., Findings Worksheet 2 (Bahlul convicted of conspiring to “murder ... protected persons”); Rome Statute of the International Criminal Court, art 8, July 17, 1998, 2187 U.N.T.S. 90 (murder of civilians constitutes international war crime). Nor is the conspiracy provision of the 2006 MCA sweeping in scope.

Bahlul makes no attempt to distinguish Comstock, arguing instead that United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), forecloses application of the Necessary and Proper Clause. But Toth, a case involving the court-martial trial of an Army veteran who had been honorably discharged, id. at 13, is beyond inapposite. In Toth, the Supreme Court rejected an attempt to use the Necessary and Proper Clause to supplement the Congress’s power “[t]o make Rules for the Government and Regulation of the land and naval Forces.” Id. at 14 (quoting U.S. Const. art. I, § 8, cl. 14). The Court declared that the Make Rules Clause “authorizes Congress to subject persons actually in the armed service to trial by court-martial for military and naval offenses.” Id. (emphasis added). It gave two reasons: that the Congress had exceeded its Article I authority by trying Toth, by then a civilian, via court-martial: (1) the Necessary and Proper Clause did not empower the Congress “to deprive people of trials under Bill of Rights safeguards”; and (2) it was “impossible to think that the discipline of the Army [was] going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving exservicemen the benefit of a civilian court trial when they [were] actually civilians.” Id. at 22.

Neither of these concerns exists here. There is no risk that a countervailing constitutional right supersedes the Necessary and Proper Clause because Bahlul—an alien enemy combatant outside the sovereign United States—is not protected by the Bill of Rights. See infra Part II.B.2. In addition, the Supreme Court’s holding that Toth could not be tried by court-martial was, by necessary implication, a determination that the trial of a citizen by court-martial was not “rationally related” to the Congress’s authority under the
Make Rules Clause. *Comstock*, 560 U.S. at 134.\(^\text{18}\) The Army would gain nothing in discipline or morale by court-martialing an individual who was no longer a service member. *See supra* pp. 50–51, the Congress’s inclusion of conspiracy to commit war crimes as an offense triable by military commission is rationally related to its unquestioned authority to make war crimes themselves triable by military commission. And trying conspiracy by military commission is not inconsistent with international law. *Cf. McCulloch*, 17 U.S. at 421. Conspiracy to commit war crimes is not a purely “domestic” offense, Maj. Op. 15, but instead is in accord with the international community’s agreement that those who conspire to commit war crimes can be punished as war criminals. *See supra* Part II.A.1.

To the extent there is any doubt that the Congress has the power to “define” conspiracy as a war crime and “punish” it by military commission, the Necessary and Proper Clause is more than sufficient to remove it.

3. Broader War Powers

“[O]ut of seventeen specific paragraphs of congressional power, eight of them are devoted in whole or in part to specification of powers connected with warfare.” *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950). Specifically, the Congress has the power:

\[\begin{align*}
& \bullet \quad \text{“[T]o . . . provide for the common Defence and general Welfare of the United States,” U.S. Const. art. I, § 8, cl. 1;} \\
& \bullet \quad \text{“To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,” id. cl. 10;} \\
& \bullet \quad \text{“To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” id. cl. 11;} \\
& \bullet \quad \text{“To raise and support Armies,” id. cl. 12;} \\
& \bullet \quad \text{“To provide and maintain a Navy,” id. cl. 13;} \\
& \bullet \quad \text{“To make Rules for the Government and Regulation of the land and naval Forces,” id. cl. 14;} \\
& \bullet \quad \text{“To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” id. cl. 15;} \\
& \bullet \quad \text{“To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” id. cl. 15;} \\
& \bullet \quad \text{“To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” id. cl. 15;} \\
& \bullet \quad \text{“To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” id. cl. 15;} \\
& \bullet \quad \text{“To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” id. cl. 15;}
\end{align*}\]

Supreme Court precedent, Colonel Winthrop’s influential treatise and our constitutional history all support the proposition that the Congress’s authority to specify law-of-war offenses triable by military commission is also supported by its broader war powers.

\(^{18}\) My colleagues’ reliance on *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960), and *Reid v. Covert*, 354 U.S. 1 (1957) (plurality), suffers from the same deficiency as Biafra’s reliance on *John*. The only difference is that in *Singleton* and *Reid*, the subjects of the attempted courts martial were the civilian spouses of service members, not servicemen. *See Singleton*, 361 U.S. at 235; *Reid*, 354 U.S. at 3.
55

Supreme Court Precedent

The Supreme Court has recognized the breadth of the Congress's war powers, both individually and in combination. See, e.g., Rostker, 453 U.S. at 65 ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping"); Wayne v. United States, 470 U.S. 598, 612 (1985) ("Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning. Recognizing this fact, the Framers listed "providing for the common defense" [in the Preamble] as a motivating purpose for the Constitution ... "). The Congress's war powers include the creation and use of military commissions. "Since our nation's earliest days, such commissions, also called "our common law war courts," have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war." Madsen, 343 U.S. at 346-47. Historically, "their procedure" and "their jurisdiction" have been "adapted in each instance to the need that called [them] forth." Id. at 347-48 (citing Yamashita, 327 U.S. at 18-23 (emphasis added)).

The Supreme Court has never expressly held that the Congress's power to provide for law-of-war military commissions stems from the Define and Punish Clause alone. Instead, its limited jurisprudence indicates that the combined effect of the Congress's war powers allows for military-commission trials as their need arises. A century before Madsen, four Justices opined that "the power of Congress . . . to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war." Ex parte Milligan, 71 U.S. 2, 142 (1866) (Chase, C.J., concurring in judgment).

Moreover, nothing in Quirin suggests that the Supreme Court intended to limit the Congress's war powers to the Define and Punish Clause in setting the jurisdiction of military commissions. In fact, the Quirin Court took pains to emphasize that "[w]e have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war." 317 U.S. at 45-46. Quirin held only, on the facts of that case, that the Congress's power under the Define and Punish Clause provided sufficient authority to support the charges made against the Nazi saboteurs. See id. at 46 ("We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission."). (emphasis added). Quirin did not purport to read out the Congress's other war powers, in fact, it expressly recognized and listed them. See id. at 26. The Quirin Court also observed, consistent with Chief Justice Chase's words nearly a century earlier, Milligan, 71 U.S. at 142 (Chase, C.J., concurring in judgment), that "[i]n important incident to the conduct of war is the adoption of measures by the military command . . . to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." Quirin, 317 U.S. at 28-29 (emphasis added).

To the extent Quirin's scope may be debatable, the Yamashita Court made plain that Quirin does not limit the Congress's power to codify law-of-war offenses to the Define and Punish Clause. Although it recognized Quirin's holding that the Define and Punish Clause provided the Congress with sufficient power to authorize the trial of the Nazi saboteurs by military commission, Yamashita, 321 U.S. at 7, the Yamashita Court reiterated that military-commission trials are "[a]n important incident to the conduct of war." Id. at 11 (citing Quirin, 317 U.S. at 28). The Court continued.
The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed. The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced.

Id. at 11–12 (emphases added) (citations omitted); see also Toth, 350 U.S. at 13–14 & n.4 (describing Yamashita as holding about Congress’s war powers); Howard S. Friedman, Comment, The Offenses Clause: Congress’ International Penal Power, 8 Colum. J. Transnat’l L. 279, 303 (1969) (Yamashita “put the military prosecution of war criminals squarely within the war powers of Congress”).

Yamashita’s words are not mere rhetoric. To determine whether Yamashita had committed a war crime triable by military commission, the Supreme Court looked not only to international sources but also to the practice of “our own military tribunals” to conclude that Yamashita’s dereliction could be “penalized” as a violation of the law of war. Yamashita, 327 U.S. at 16 (emphases added). In other words, the Yamashita Court cited domestic law to supplement, not merely “limit[,]” the law of war. Cf. Maj. Op. 12. Justice Murphy, in dissent, likewise examined whether “the laws of war heretofore recognized by this nation . . . impute[d] responsibility to a fallen commander for excesses committed by his disorganized troops while under attack.” Yamashita, 327 U.S. at 37 (Murphy, J., dissenting) (emphasis added). Thus, both the Yamashita majority and dissent agreed that, in the absence of international agreement that an offense constituted a violation of the law of war, “the principal offenses under the laws of war recognized by the United States could also constitute cognizable war crimes triable by military tribunal. Id. (emphasis added).

The shift from Quirin’s reliance on the Define and Punish Clause to Yamashita’s recognition that military-commission jurisdiction of law-of-war offenses—including law-of-war offenses denominated as such by the Congress—derives from the broader war powers occurred in just four years, from 1942 to 1946. And it was that shift that led, six years later, to the Supreme Court’s conclusion that the “jurisdiction” of military commissions had traditionally been, and should be, “adapted in each instance to the need that called it forth.” Mochon, 343 U.S. at 347–48 (citing Yamashita, 327 U.S. at 18–23). There can be no doubt that the war on terror, begun in response to the September 11, 2001, attacks, constitutes the next “need” to which the jurisdiction of law-of-war military tribunals must adapt. Id. Recognizing the adaptive nature of the Congress’s war powers, the Supreme Court has, in a variety of contexts, referred to the broad war powers of both political branches in conducting this ever-evolving war.10

10 See, e.g., Hamdan, 548 U.S. at 541 (listing branch war powers); Hamdi, 542 U.S. at 518 (plurality) (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by universal agreement and practice, are ‘important incidents of war.’” (quoting Quirin, 317 U.S. at 28, 39)), accord id. at 579 (Thomas, J.).
I believe my colleagues have incautiously interfered with the reasoned decisions of the political branches based solely on 
Quirin, a case in which the Supreme Court affirmatively failed to draw the line they today draw. See 317 U.S. at 45-46.
Because they apparently see Quirin as the alpha and omega of the Congress’s Article I war powers, they conclude that 
Bailtul’s conspiracy conviction cannot stand. But Yamashita belies their conclusion that Quirin set the “contours” of
law-of-war jurisdiction, Maj. Op. 11, that those contours are defined exclusively by express international agreement,
Maj. Op. 15–16, and that “[t]he Supreme Court has adhered to Quirin’s understanding of the meaning of the

b. Winthrop’s Treatise

As discussed, neither the plain text of the Congress’s Article I war powers nor Supreme Court precedent examining the
contours of law-of-war military-commission jurisdiction supports the “clear conviction” needed to invalidate Bailtul’s
conspiracy charge. Quirin, 317 U.S. at 25. Secondary authority also weighs against him. Almost one hundred years
ago, Colonel William Winthrop, considered the “Blackstone
dissenting”) (“The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional
approval, has determined that Yaser Hamdi is an enemy combatant and
should be detained. This detention falls squarely within the Federal
Government’s war powers, and we lack the expertise and capacity to
(Kennedy, J., concurring in judgment) (“The decision in Hamdi
indicates that there is a realm of political authority over military
affairs where the judicial power may not enter. The existence of this
realm acknowledges the power of the President as Commander in Chief, and the
joint role of the President and the Congress, in the conduct of military
affairs.”)

of Military Law,” Reed, 354 U.S. at 19 n.38 (plurality), authored the definitive treatise on these matters. In his
chapter “Authority and Occasion for the Military
Commission,” Winthrop made plain that, “in general, it is
those provisions of the Constitution which empower Congress
to ‘declare war’ and ‘raise armies,’ and which, in authorizing the
initiation of war, authorize the employment of all
necessary and proper agencies for its due prosecution, from
which the military tribunal derives its original sanction.”

WILLIAM WINTHROP, MILITARY LAW & PRECEDENTS 831
(1920) (emphasis in original). According to Winthrop, a
military tribunal “is simply an instrumentality for the more
efficient execution of the war powers vested in Congress and
the power vested in the President as Commander-in-chief in
war.” Id. (emphasis added).

Notwithstanding his reference to the “Law of War” as
“intended to refer to” that branch of International Law which
prescribes the rights and obligations of belligerents,” he
further observed that the “Law of War in this country is not a
formal written code, but consists mainly of general rules
derived from International Law, supplemented by acts and
orders of the military power and a few legislative provisions.”
Id. at 773 (first emphasis in original). Winthrop, it appears,
had no issue with Congressional “supplementation” of law-of
war offenses proscribed by international agreement. In his
treatise, Winthrop listed* the “offences in violation of the

WINTHROP, supra, at 839–40;

*Breaches of the law of non-intercourse with the enemy, such as
running or attempting to run a blockade, unauthorized
contracting, trading or dealing with, emeising, or furnishing
them with money, arms, provisions, medicines, &c: conveying
to or from them dispatches, letters, or other communications,
passing the lines for any purpose without a permit, or coming
laws and usages of war" and described them as "those principally, in the experience of our wars," that have been "cognizable by military tribunals." WINTHROP, supra, at 839 (emphasis added). The most natural reading of Winthrop's expertise—a reading also consistent with Article 1's multiple war powers and the Supreme Court's analyses in both Yamashita, 327 U.S. at 11-12, and Madsen, 545 U.S. at 346-48—is that the Define and Punish Clause is one grant of power to the Congress to determine the law-of-war offenses triable by military commission but is not the exclusive one.

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back after being sent through the lines and ordered not to return; aiding the enemy by harboring his spies, emissaries, &c.; assisting his people or friends to cross the lines into his country, acting as guide to his troops; aiding the escape of his soldiers held as prisoners of war, secretly recruiting for his army, negotiating and circulating his currency or securities—as counterfeit notes or bonds in the late war, hostile or disloyal acts, or publications or declarations calculated to excite opposition to the federal government or sympathy with the enemy, &c.; engaging in illegal warfare as a Guerrilla, or by the deliberate burning, or other destruction of boats, trains, bridges, buildings, &c.; acting as a spy, taking life or obtaining any advantage by means of treachery, abuse or violation of a flag of truce, violation of a parole, or of an oath of allegiance or amnesty, breach of bond given for loyal behavior, good conduct, &c.; resistance to the constituted military authority, bribing or attempting to bribe officers or soldiers or the constituted civil officials; kidnapping or returning persons to slavery in disregard of the President's proclamation of freedom to the slaves, of January 1, 1863.

Elsewhere, Winthrop included conspiracy among these offenses. See id. at 842 ("[C]onspiracy is "... a crime against society and a violation of the laws of war."), WILLIAM WINTHROP, A DISCOURSE OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 328-29 (1881) ("[C]onspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy" is an "offense[] against the laws and usages of war").

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c. Historical Practice

My colleagues note that our nation lacks "a long-standing historical practice" of conspiracy trial and conviction by military commission, dismissing it as "thin . . . and equivocal at best." Maj. Op. 18. There is no dispute that the "military commission . . . was born of military necessity." HAMMOND, 548 U.S. at 500. Fortunately, military necessity has occurred only sporadically since the creation of the military commission. But what history exists demonstrates that, each time military necessity has resulted in subjecting war criminals to military court jurisdiction, conspiracy has been among the charges tried.

The majority takes issue with the example of the Lincoln conspirators, see WILLIAM H. RHEINQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 144 (1998) ("Edwin Stanton personally directed the investigation of Lincoln's assassination and the pursuit of the conspirators."); id. at 145 ("The administration . . . decided to try the alleged conspirators before a military commission rather than in the civil courts."); concluding that the charging document "referred to conspiracy" but did not in fact charge conspiracy. Maj. Op. 18. According to the charging document, however, the Lincoln conspirators were charged with "combining, confederating, and conspiring together . . . to kill and murder Abraham Lincoln." J. HOLTS & T. EWING, CHARGE AND SPECIFICATION AGAINST DAVID E. HEROLD, ET AL. (1865) (emphasis added); see also RHEINQUIST, supra, at 143 ("Obviously, Booth had not acted alone in this enterprise, and the stage was now set for the trial of those who were charged with having conspired with him."). The circumstances surrounding the Lincoln assassination also make indisputable that the defendants could only have been charged with conspiracy. Because John Wilkes Booth was
the lone assassin and was himself killed while a fugitive, the remaining eight necessarily could have been tried and convicted based solely on their conspiracy. One of those eight individuals—Mary Surratt, who was hanged for her role—participated in the conspiracy by allowing the others to use her boarding house as a meeting place. See REHNQUIST, supra, at 165. And two other Lincoln conspirators—Michael O'Laughlin and Samuel Arnold—could have been convicted only of inchoate conspiracy because, “[b]efore the final plot to assassinate Lincoln was hatched, O’Laughlin and Arnold appear to have abandoned the enterprise.” Id. at 162. Indeed, Arnold had apparently “told the others he wanted nothing more to do with the affair” one month before the assassination and, when Arnold withdrew, the remaining conspirators planned to kidnap—not assassinate—Lincoln. Id. at 160. Nevertheless, both O’Laughlin and Arnold were convicted and sentenced to life imprisonment at the conclusion of their military-commission trial. See id. at 162. Today, their withdrawal would have immunized them from the “post-withdrawal acts of [their] co-conspirators,” Smith v. United States, 133 S. Ct. 714, 719 (2013), and they would not have been convicted of a completed offense. But abandonment without also preventing the object offense is not a defense to inchoate conspiracy. See MODEL PENAL CODE § 5.03(6).

My colleagues respond by describing the military commission that tried the Lincoln conspirators as “a mixed martial law and law of war military commission.” Maj. Op. 19. Its description, however, does not withstand scrutiny. True, at the time of the Lincoln conspirators’ trial, Washington, D.C., was under limited martial law. Nevertheless, the civilian courts remained open and operational. 11 U.S. Op. Att’y Gen. at 297 (“Martial law had been declared in the District of Columbia, but the civil courts were open and held their regular sessions, and transacted business as in times of peace.”). But because the military cannot exercise martial-law jurisdiction unless civilian courts are closed, Milligan, 71 U.S. at 127, the Lincoln conspirators’ military court necessarily was purely a military commission with law-of-war (including conspiracy) jurisdiction. See also Hamilton, 548 U.S. at 597 (plurality) (noting that military courts have at times “substituted for civilian courts at times and in places where martial law has been declared” (emphasis added)).

My colleagues, then, would retroactively undermine the constitutionality of at least two of the Lincoln conspirators’ convictions. Contra Bahlul, 767 F.3d at 25 (“the Lincoln conspirators’ trial [i]s a particularly significant precedent because it “was a matter of paramount national importance and attracted intense public scrutiny”).

My colleagues’ attempt to distinguish Bahlul from the Nazi saboteurs in Quirin fares no better. Quirin marked the first time in our nation’s history that the Supreme Court addressed the jurisdiction of a law-of-war military

38 My colleagues object to my reliance on Milligan, having been decided after the military-commission trial of the Lincoln conspirators. See Maj. Op. 19. Three Lincoln conspirators petitioned for a writ of habeas corpus in 1866, however, relying on Milligan to argue that “military tribunals have no authority to try civil offenses in districts where the regularly organized civil courts of the country are in uninterrupted possession of all their powers.” Ex parte Milligan, 17 F. Cas. 954, 954 (S.D. Ind. 1868). The district court dismissed the petition, Milligan notwithstanding. See id. (“I do not think that ex parte Milligan is a case in point here.”). Regardless whether the courts were open, the conspirators’ offense “transgressed the laws of war” and, thus, “the proper tribunal for the trial of those engaged in it was a military one.” Id.; see also id. (describing “charge on which Lincoln conspirators were convicted as ‘conspiracy to commit the military crime which one of their number did commit and some of them … more or less’ participated in”).
commission. See Haridimos V. Thravalos, History, Hamdan, and Happenstance: “Conspiracy by Two or More to Violate the Laws of War by Destroying Life or Property in Aid of the Enemy”, 3 HARY Nat’l Sec. J. 223, 277 (2012) (referring to Quirin as “the first time in civil litigation” that “the Court explicitly recognized the existence of law-of-war jurisdiction enforceable through criminal proceedings conducted by pure law-of-war military commissions, a source of jurisdiction that had long been recognized by the practice of our own military authorities” (quotation marks omitted)). Before Quirin, the Executive Branch had provided most of the legal authority prescribing offenses cognizable as law-of-war offenses. See id. at 240–41. Although the Supreme Court did not reach the conspiracy charge in Quirin, the petitioners’ conspiracy convictions secured the imprint of President Roosevelt. Because the President heads “a coequal branch of government” and “take[s] the same oath we do to uphold the Constitution of the United States,” his judgment is entitled to deference. Rostker, 453 U.S. at 64; see also United States v. Nixon, 418 U.S. 683, 703 (1974) (“In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.”).

My colleagues also distinguish the conspiracy charges in Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956). See Maj. Op. 20. The Colepaugh petitioners, described as the “1944 Nazi Saboteurs,” were charged with nearly identical offenses to those of the Quirin petitioners, including conspiracy. See Colepaugh, 235 F.2d at 431. Thravalos, supra, at 241. As with the Quirin saboteurs, the Colepaugh petitioners’ convictions arrived at the court with the Executive Branch’s full sanction. In fact, their convictions were deemed lawful by (1) a special Board of Review in the Office of the

65 Judge Advocate General of the Army, (2) the Judge Advocate General himself and (3) President Harry Truman, who “personally approved” their convictions. Thravalos, supra, at 241–42. The Tenth Circuit in Colepaugh affirmed “the charges and specifications before us.” 235 F.2d at 432 (emphasis added). My colleagues read Colepaugh as affirming only “the law of war acts of belligerency,” and not “addressing the conspiracy charge.” Maj. Op. 20. But the Tenth Circuit put no such limitation on its holding. And even if it had, “[t]he U.S. Army continued to follow Colepaugh “to try conspiracy in overseas theaters of war during the concluding months of World War II” 22 and to authorize trial of conspiracy by military commission during the Korean War. 23 Thravalos, supra, at 242–43.

Rather than meet this—to me—robust history, my colleagues instead take issue with the Government’s (admittedly) paltry submission. See Maj. Op. 16–21. But we are “called upon to judge the constitutionality of an Act of Congress—the gravest and most delicate duty that this Court is called upon to perform.” Rostker, 453 U.S. at 64 (quoting

22 See United States Army Forces, Pacific, Regulations Governing the Trial of War Criminals (Sept. 24, 1945) (making “participation in a common plan or conspiracy” punishable by military commission in Pacific Theater of Operations during World War II); United States Army Forces, China, Regulations Governing the Trial of War Criminals (Jan. 21, 1946) (same for China theater of operation).
Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.), and I, accordingly, take issue with—and indeed reject—my colleagues' languid dismissal of the Government's submission without more.

In sum, I would hold that Bahul's case has not carried his burden of establishing—"clearly" or otherwise—that his military trial and conviction are unconstitutional. Quirin, 317 U.S. at 25. The Congress has ample authority under the Define and Punish Clause—especially when supplemented by the Necessary and Proper Clause and the broader war powers and supported by judicial precedent, Wintrop's treatise and history—to authorize a military-commission trial charging conspiracy to commit war crimes.

Before moving to Article III, one final point is in order. Both of my colleagues contend that, unless we stringently police the Congress's Article I powers, the Government will possess "virtually unlimited authority" to try enemy combatants by military commission. Concur. Op. 8; see also Maj. Op. 26–27. Yet, when it comes to issues of national security and foreign affairs, abstention—not aggressive policing—has always been our watchword. See Egan, 484 U.S. at 530; Lost. 677 F.3d at 1182. In addition, several limitations on military commissions remain, including the other jurisdictional requirements identified by Wintrop, see Hamilon, 548 U.S. at 597–98 (plurality) (citing Wintrop, supra, at 836–39); the Bill of Rights (for U.S. citizens); and—at the very least—the existence of an ongoing war, see Yamasaki, 327 U.S. at 11–13. This last requirement should not be minimized. We would be wise to remember that, in a democracy like ours, not every question calls for a judicial answer. See Mots, K. & T. Ry. Co. of Tex. v. May, 194 U.S. 267, 270 (1904) ("It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."). Al-Bihani v. Obama, 619 F.3d 1, 11–12 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc) (discussing potential "serious consequences, such as subjecting the United States to sanctions, undermining U.S. standing in the world community, or encouraging retaliation against U.S. personnel abroad" should political branches "ignore or disregard international-law norms" but nonetheless maintaining that "in our constitutional system of separated powers, it is for Congress and the President—not the courts—to determine in the first instance whether and how the United States will meet its international obligations").

B. Article III

The heart of Bahul's appeal is his claim that the Congress violated Article III when it made conspiracy triable by military commission. In my view, Bahul invokes two separate provisions of Article III: the Judicial Power Clause, U.S. Const. art. III, § 1, and the Criminal Jury Clause, id. § 2, cl. 3. I analyze both arguments below.

1. Judicial Power Clause

The Judicial Power Clause of Article III provides:

The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. art. III, § 1. The Clause mirrors similar grants of power to the Congress in Article I and to the President in Article II. See id. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress."); id. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President.").
Together, the Vesting Clauses erect "walls" that separate the three branches, Plant, 514 U.S. at 239, and prevent them from "shar[ing]" their respective powers, Nixon, 418 U.S. at 704. The walls, however, are not "hermetically sealed;" Stern, 131 S. Ct. at 2609, and they must bend a little to ensure we remain "a Nation capable of governing itself effectively," Buckley v. Valeo, 424 U.S. 1, 121 (1976). See also Mistretta v. United States, 488 U.S. 334, 381 (1989) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government" (quoting Youngstown, 343 U.S. at 635 (Jackson, J., concurring)); Mo. K. & T. Ry., 194 U.S. at 270 ("Some play must be allowed for the joints of the machine . . . .").

Section 1 of Article III vests the "judicial Power" in the federal courts, whose judges enjoy life tenure and fixed salaries. See U.S. Const. art. III, § 1. The "judicial Power," as relevant here, extends to "Cases . . . arising under . . . the Laws of the United States" id. § 2, cl. 1. Axiomatically, these provisions require Article III cases to be adjudicated by Article III judges in Article III courts. See Stern, 131 S. Ct. at 2608–09. And they restrain the Congress's authority to assign the judicial power to federal tribunals lacking the insulting protections of Article III. See id.

Despite this analytic simplicity, however, "the literal command of Art. III . . . must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole." N. Pipeline, 458 U.S. at 64 (plurality); see also id. at 94 (White, J., dissenting) ("At this point in the history of constitutional law the Article III question can no longer be answered by looking only to the constitutional text."). The Supreme Court has recognized several historical—albeit

ataxual—"exception[s]" to the Judicial Power Clause. See id. at 63–76 (plurality). The deviations are justified by longstanding historical practice and "exceptional constitutional grants of power to Congress" over particular subject matters. Id. at 70 & n.25.

The military commission is one such exception. See Eisentrager, 339 U.S. at 785–90; Quirin, 317 U.S. at 39–41; Ex parte Vallandigham, 68 U.S. 243, 251–53 (1863). Like courts martial and occupational courts, the constitutionality of the law-of-war military commission is "well-established." Eisentrager, 339 U.S. at 786. Military tribunals predate the ratification of our Constitution and were used—without constitutional incident—during the Revolutionary, Mexican–American, and Civil Wars. See Madsen, 343 U.S. at 346 & nn.8–9; Quirin, 317 U.S. at 31 & nn.9–10. Moreover, the Constitution vests broad war powers in the Congress, Eisentrager, 339 U.S. at 788, and military-commission trials are part of waging war. See Yamashita, 327 U.S. at 11–12. Accordingly, placing the military commission outside the confines of Article III is "consistent with, rather than threatening to, the constitutional mandate of separation of powers." N. Pipeline, 458 U.S. at 64 (plurality), see also Abourezk v. Hagel, 738 F.3d 312, 334 (D.C. Cir. 2013) ("The prosecution of our wars is committed uniquely to the political branches . . . .").

As discussed earlier, supra Part II.A, the Congress acted well within its Article I powers when it made conspiracy triable by military commission. The challenged provision therefore falls within a historical exception to the Judicial Power Clause. The Supreme Court said it well more than 150 years ago:
Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and ... the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States, indeed, .... the two powers are entirely independent of each other.


For this reason alone, Balbtl's Article III challenge should fail.

My colleagues suggest that, because inchoate conspiracy is not an expressly recognized international law-of-war offense, the challenged provision falls outside the historical safe harbor for military-commission jurisdiction and therefore violates Article III. See Maj. Op. 30–32; Concur. Op. 3. But this syllogism is faulty, even under their cramped view of the Congress's Article I authority. A statute does not automatically violate the Judicial Power Clause simply because it falls outside a historical exception to Article III. See _Thomas v. Union Carbide Agric. Prods. Co._, 473 U.S. 568, 587 (1985) ("[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III"); _Schor_, 478 U.S. at 851 ("Although [formalistic and unbundling] rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers."). Instead, we apply the general standard for Judicial Power Clause challenges: the Schor balancing test. See _Schor_, 478 U.S. at 851 (announcing "practical" test for courts to apply "in reviewing Article III challenges"). Criminal cases are not exempt from this framework. See _United States v. Seals_, 130

F.3d 451, 459 n.8 (D.C. Cir. 1997) ("While Schor addressed ... a state-law counterclaim in an administrative reparation proceeding, there is no reason that the structural constitutional analysis should be any different in the criminal context." (citing _Abstention_, 488 U.S. at 382–83)). And they do not enjoy any special significance under Article III. As the Supreme Court has explained:

It was neither the legislative nor judicial view ... that trial and decision of all federal questions were reserved for Art. III judges. Nor, more particularly, has the enforcement of federal criminal law been deemed the exclusive province of federal Art. III courts. Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges in Art. III.

_Palmare v. United States_, 411 U.S. 389, 402 (1973); see also id. at 407 ("neither this Court nor Congress has read the Constitution as requiring ... every criminal prosecution for violating an Act of Congress[] to be tried in an Art. III court").

The Supreme Court's decision in _Stern v. Marshall_ does not alter the analysis. There, the Supreme Court held that the Congress could not constitutionally authorize the bankruptcy courts to hear a debtor's compulsory state-law counterclaim. See 131 S.Ct. at 2620. The _Stern_ Court emphasized that its holding was "narrow" and "isolated." Id.; see also _Short_, No. 13-935, slip op. at 16 ("An expansive reading of _Stern_ ... would be inconsistent with the opinion's own description of its holding."). Its decision followed quite naturally from _Northern Pipeline_—another bankruptcy case. See 131 S.Ct. at 2615 ("Northern Pipeline ... directly covers this case.").
Despite the dissent’s concern that the majority had not faithfully applied the balancing approach from earlier cases, including Schor, see Stern, 133 S. Ct. at 2622 (Breyer, J., dissenting), the Stern Court did not overrule, or even call into question, those precedents. See id. at 2615. In fact, the Court faithfully applied Schor’s multi-factor balancing approach. See id. at 2614–19; see also id. at 2623 (Scalia, J., concurring) (“I count at least seven different reasons given in the Court’s opinion for concluding that an Article III judge was required to adjudicate this lawsuit.”). Indeed, Schor—the Supreme Court’s latest pronouncement on the Judicial Power Clause—confirmed that the Schor balancing test remains the correct one. See Sharf, No. 13-935, slip op. at 12–15.

My colleagues suggest, however, that the proper allocation of power between the Congress and the Judiciary turns on the latter’s interpretation of international law. See Maj. Op. 11–15; Concur. Op. 3–7. This approach is troubling enough under Article I, but the notion that international law dictates the operation of the separation of powers under our Constitution is outlandish. Indeed, the notion “runs counter to the democratic accountability and federal structure envisioned by our Constitution.” Hon. J. Harvie Wilkinson III, The Use of International Law in Judicial Decisions, 27 Harv. Int’l L. & Pub. Pol’y 423, 429 (2004). Instead, if the challenged provision falls outside a historical exception to Article III, we must still assess it under Schor. Schor’s balancing test is the only one that considers factors that are relevant to the separation-of-powers concerns underlying the Judicial Power Clause. We should look to separation-of-powers interests to decide separation-of-powers questions.

Applying the Schor balancing test here, I believe the challenged provision does not violate the Judicial Power Clause. Granted, on one side of the Schor balance, a military trial for conspiracy implicates “private,” as opposed to public, rights. See Hart & Wechsler’s The Federal Courts & The Federal System 336 (6th ed. 2009) (noting criminal cases are private rights cases under Schor). This observation “does not end our inquiry,” Schor, 478 U.S. at 853, but it means our review must be “searching.” Id. at 854. Further, military commissions exercise many, but not all, of the “ordinary powers of district courts.” N. Pipeline, 458 U.S. at 85 (plurality). But see Sharf, No. 13-935, slip op. at 11 n.9 (non–Article III tribunal’s power to enter final judgment is relevant but not decisive).

It is unclear whether Bahlul “consented” to trial by military commission. Although he resisted being tried at all, he never raised an Article III objection to the military commission. Compare Sharf, No. 13-935, slip op. at 19 (“[T]he key inquiry is whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non–Article III adjudicator.”) (emphasis added) (quotation marks omitted), with id. at 17 (“[T]he cases in which this Court has found a violation of a litigant’s right to an Article III decisionmaker have involved an opposing defendant forced to litigate involuntarily before a non–Article III court.”) (emphasis added), and United States v. Underwood, 597 F.3d 661, 669–73 (5th Cir. 2010) (in criminal case, failure to raise Article III objection can constitute implied consent). In my view, “consent” from an enemy combatant like Bahlul does not meaningfully tip the scales one way or the other.

On the other side of the balance, several factors indicate that conspiracy to commit war crimes can be constitutionally tried by military commission. First, and most importantly, the
Congress has subjected the military commission to judicial review. The 2009 MCA, like its 2006 predecessor, allows the enemy combatants held at Guantanamo Bay, Cuba, to appeal their convictions to this Court. 10 U.S.C. § 950g(e) (after intermediate review by the CMCR, id. § 950f). We then review de novo all "matters of law" that an enemy combatant preserves for appeal, id. § 950g(d), with the opportunity of certiorari review by the Supreme Court, id. § 950g(e). This safeguard "provides for the appropriate exercise of the judicial function in this class of cases" and keeps the military commission within the bounds of law. Crowell v. Benson, 285 U.S. 22, 54 (1932). As the Supreme Court has repeatedly recognized, the availability of de novo review of questions of law by an Article III court substantially allays any Judicial Power Clause concerns with a given statutory arrangement. See Schor, 478 U.S. at 855; Union Carbide, 473 U.S. at 592; Crowell, 285 U.S. at 54; see also N. Pipeline, 458 U.S. at 115 (White, J., dissenting) ("the presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers"). Granted, we review the military commission's verdict—i.e., its findings of fact—only for "sufficiency of the evidence." 10 U.S.C. § 950g(d). But, contrary to my colleagues' assertion, Maj. Op. 33–34, Article III requires very little—perhaps zero—judicial review of ordinary questions of fact. See Crowell, 285 U.S. at 51 ("[I]n [private rights] cases . . . . there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges."). The Francis Wright, 105 U.S. 381, 386 (1881)

Branch can only be termed *de minimis.*” *Schor,* 478 U.S. at 856.

Third, “the concerns that drove Congress to depart from the requirements of Article III” tilt in favor of the challenged provision’s constitutionality. *Id.* at 851. The Congress chose the military commission over Article III court for one overriding reason: national security. Among the discussed concerns were the potential disclosure of highly classified information; the efficiency of military-commission proceedings; the military’s expertise in matters of national security; the inability to prosecute enemy combatants due to speedy-trial violations; the inadmissibility of certain forms of evidence; and, later, the risk of terrorist attacks on domestic courts. Unlike my concurring colleague, who believes that Article III courts are well-suited to try conspirators like Bahgdad, see Concur. Op. 8–9, I would defer to the choice made by the Congress—an institution with real-world expertise in this area that has rejected a one-size-fits-all choice of forum. In any event, the Congress’s concerns are plainly legitimate, indeed, “no governmental interest is more compelling than the security of the Nation.” *Ham v. Agee,* 453 U.S. 280, 307 (1981). And these legitimate interests demonstrate without question that the Congress did not “transfer jurisdiction to [a] non-Article III tribunal[] for the *purpose* of emasculating constitutional courts.” *Schor,* 478 U.S. at 850 (emphasis added) (alterations and quotation marks omitted).

Finally, the system that the Congress has established—military-commission proceedings in the Executive Branch, appellate review in the Judicial Branch—“raises no question of the aggrandizement of congressional power at the expense of a coordinate branch.” *Schor,* 478 U.S. at 856. As the Supreme Court explained in *Mistretta,* “encroachment and aggrandizement” are the hallmarks of cases in which the Court has invalidated a congressional statute for violating the separation of powers. 488 U.S. at 382. “By the same token,” the Supreme Court has “upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or

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encroachment." Id. (citing, as examples, *Morrison v. Olson*, 487 U.S. 654 (1988) and *Schor*, 478 U.S. 833). In the 2006 MCA, the Congress has assigned conspiracy to the military for trial and sentencing and to the Judiciary for review "without appreciable expansion of its own power," *Schor*, 478 U.S. at 856-57, and while "retain[ing] for itself no powers of control or supervision," *Morrison*, 487 U.S. at 694. This is not the sort of legislation that raises separation-of-powers hackles.

Notably, the Supreme Court has found a violation of the Judicial Power Clause in only two cases—both involving bankruptcy courts. See *Stern*, 131 S. Ct. at 2620; *Northern Pipeline*, 458 U.S. at 87 (plurality). Outside the bankruptcy context, however, the Court has repeatedly upheld congressional statutes against such attacks. See, e.g., *Mistretta*, 488 U.S. at 393-97 (U.S. Sentencing Commission); *Schor*, 478 U.S. at 851-58 (CFTC); *Union Carbide*, 473 U.S. at 582-93 (mandatory arbitration); *Pulman*, 411 U.S. at 407-10 (District of Columbia courts); *Williams v. United States*, 289 U.S. 553, 568-81 (1933) (Court of Claims); *Crowell*, 285 U.S. at 48-65 (workmen’s compensation board); *Ex parte Bubalis Corp.*, 279 U.S. 438, 452-61 (1929) (Court of Customs Appeals); *Dynes*, 61 U.S. at 79 (courts martial); *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 546 (1828) (territorial courts). The bankruptcy cases are an anomaly in this area of the law and I do not believe they provide a relevant analog. Military commissions are a recognized exception to Article III whereas bankruptcy courts are not. See *N. Pipeline*, 458 U.S. at 71 (plurality) (Congress’s bankruptcy power is not “exceptional grant of power” subject to Article III exception). *Stern*, 131 S. Ct. at 2514 (bankruptcy courts do not fall under “public rights” exception to Article III). This case, then, is much easier than *Stern* and *Northern Pipeline*: the historical exceptions to Article III are exceptions not because they are close to the constitutional line but because they are far from it. See *Dynes*, 61 U.S. at 79. Historically, courts martial and military commissions are thought to pose no Article III problem, notwithstanding they are subject to little judicial review. See 28 U.S.C. § 1259; *Burns v. Wilson*, 346 U.S. 137, 140-41 (1953) (plurality); *Vallandigham*, 68 U.S. at 252-53. The availability of *de novo* appellate review under the 2009 MCA keeps the challenged provision in the constitutional fold, even if *arguendo*, inchoate conspiracy were to venture beyond the historical Article III exception for military-commission jurisdiction.

For these reasons, I believe the challenged provision satisfies the Schor balancing test. Moreover, irrespective of Schor, the statute falls comfortably within the Congress’s Article I authority and, concomitantly, under the military-commission exception to Article III. Bahul’s Judicial Power Clause challenge therefore fails.

2. Criminal Jury Clause

In addition to ensuring the separation of powers, Article III also protects individual rights. The Criminal Jury Clause broadly requires that “[t]he Trial of all Crimes . . . shall be by Jury . . . in the State where the said Crimes shall have been committed” or where the “Congress may by Law have directed.” U.S. Const. art. III, § 2, cl. 3. Like the Sixth Amendment, the Criminal Jury Clause preserves the right to a jury only as it existed at common law. *Quirin*, 317 U.S. at 39 (“It was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial.”).

Bahul—an enemy combatant tried by military commission—has no right to a jury. At common law, “trial by a jury” was a “familiar part[] of the machinery for criminal
trials in the civil courts.” Id. But it was “unknown to military tribunals, which are not courts in the sense of the Judiciary Article, and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures.” Id. (citations omitted). For example, the Continental Congress passed a resolution ordering the trial of alien spies in military courts without a jury. See id. at 41 (citing Resolution of the Continental Congress of Aug. 21, 1776, 5 J. Cont’l Cong. 693). The resolution—a “contemporary construction” of the Constitution “entitled to the greatest respect”—manifests that the Founders did not see juries as a limitation on military-commission trials. Id. at 41–42; see also Kahn v. Anderson, 255 U.S. 1, 8 (1921) (rejecting idea that military courts must use jury because it would “directly deny[ ] the existence of a power [that] Congress exerted from the beginning”). Moreover, members of our own military are tried by court martial without a jury; thus, the Constitution plainly presents “no greater obstacle” to trying enemy combatants by military commission. Qurin, 317 U.S. at 44, see also Welsch v. McDonald, 340 U.S. 122, 127 (1951) (“The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions.”); Sanford v. United States, 586 F.3d 28, 35 (D.C. Cir. 2009) (“[T]he Sixth Amendment right to a criminal jury trial does not, itself, apply to the military.”). As discussed earlier, supra Part II.A, the Congress has the Article I authority to require Bahul to be tried by military commission. He therefore has no right to a jury. See Qurin, 317 U.S. at 40 (“[section] 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission”); id. at 41 (“trials before military commissions . . . are . . . no[ ] within the provisions of Article III, § 2”); accord Colepaugh, 235 F.2d at 433 (“Qurin . . . removes any doubt of the inapplicability of the Fifth or Sixth Amendments to trials before military commissions.”).

Bahul contends, however, that the Criminal Jury Clause, like the Judicial Power Clause, is a structural limitation on military-commission jurisdiction. Specifically, he believes—and my colleagues at one point appear to agree, see Maj. Op. 14—that a military commission has no jurisdiction of offenses triable by jury at common law. Bahul is mistaken. The right to a jury is not a “structural” constraint but an individual right that can be both forfeited and waived. Johnson, 520 U.S. 461, 465–66 (1997); see also B & B Hardware, 135 S. Ct. at 1304 (jury-trial right “does not strip competent tribunals of the power to issue judgments,” no matter “the nature of the competent tribunal”); Genna v. Meyden, 413 U.S. 665, 677 (1973) (plurality) (denial of jury-trial right does not deprive military tribunal of jurisdiction or render its judgments void). Even Schor recognized this difference:

[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 158 (1968) (waiver of right to trial by jury in criminal case).

478 U.S. at 848–49 (some citations omitted). The right to a jury—regardless of its location in Article III—is no more a structural limitation on military-commission jurisdiction than are the myriad personal safeguards in the Bill of Rights. Cf. Scales, 120 F.3d at 456 n.3 ("constitutional safeguards associated with Article III supervision of federally-inducing grand juries . . . implicated[ ] personal, not structural, constitutional rights" (citations omitted)).
The Supreme Court's Seventh Amendment jurisprudence makes doubly clear that the right to a jury is not an independent constraint on the Congress's authority to use non-Article III tribunals. In *Granfinanciera*, the petitioners argued that their Seventh Amendment right to a civil jury prevented the Congress from assigning certain claims to the bankruptcy courts. See 492 U.S. at 36–37. According to the Court, whether the petitioners had a right to trial by jury "requires the same answer as the question whether Article III allows Congress to assign adjudication... to a non-Article III tribunal." *Id.* at 53 (emphasis added). In other words, the Judicial Power Clause—not the Seventh Amendment—is the only structural limit on the Congress's authority. "[I]f Congress may assign the adjudication... to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury forum." *Id.* at 53–54 (emphasis added). The same is true here. As noted, supra Part II.B.1, the Judicial Power Clause allows the Congress to authorize the trial of conspiracy by military commission. Accordingly, Bahlul has no right to a jury and the Criminal Jury Clause poses "no independent bar" to his conviction. *Id.* at 54.11

Even if the Criminal Jury Clause did limit military-commission jurisdiction, it has no application here because Bahlul is neither a U.S. citizen nor present on U.S. soil. The Supreme Court has repeatedly held that the Constitution offers no protection to noncitizens outside the United States. See, e.g., *Eisenmenger*, 339 U.S. at 784–85; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273–75 (1990); *Zubayr*.

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11 Notably, the *Hamdan* Court cited only the Judicial Power Clause, not the Criminal Jury Clause, as a limitation on the Congress's authority to employ military commissions. See 548 U.S. at 591.
v. Shearson Am. Exp., Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

Bahalul has no constitutional right to a jury and neither the Criminal Jury Clause nor the Judicial Power Clause of Article III can invalidate his conspiracy conviction.

C. EQUAL PROTECTION & FIRST AMENDMENT

Bahalul's two remaining challenges are frivolous. He contends that the 2006 MCA violates the equal protection component of the Fifth Amendment Due Process Clause because it applies only to aliens, not U.S. citizens, and that he was convicted because of his speech in violation of the First Amendment. Two of my colleagues have already considered these arguments and rejected them. See Bahalul, 767 F.3d at 62 (Brown, J., concurring/dissenting); id. at 75-76 (Kavanaugh, J., concurring/dissenting). I fully endorse their reasoning.

For the foregoing reasons, I respectfully dissent.
United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff–Appellant, v. Adel DAoud, Defendant–Appellee.

No. 14–1284.

Decided: June 16, 2014


The defendant, Adel Daoud, was indicted first in September 2012 for attempting to use a weapon of mass destruction and attempting to damage and destroy a building by means of an explosive, in violation of 18 U.S.C. §§ 2332a(a)(2)(D) and 844(i), and next in August 2013 for having, in addition, later solicited a crime of violence, murder for hire, and witness tampering, in violation of 18 U.S.C. §§ 373(a), 1958(a), and 1512(a)(1)(A), respectively.

The first indictment arose out of an investigation that began in May 2012 when Daoud, an 18–year-old American citizen and resident of Hillside, Illinois, a suburb of Chicago, joined an email conversation with two undercover FBI employees posing as terrorists who had responded to messages that he had posted online. The ensuing investigation, based in part on a series of surveillance warrants, yielded evidence that Daoud planned “violent jihad”—terrorist attacks in the name of Islam—and had discussed his plans with “trusted brothers.” He expressed interest in committing such attacks in the United States, utilizing bombmaking instructions that he had read both in Inspire magazine, an organ of Al Qaeda that is published in English, and through internet searches.

One of his FBI correspondents put him in touch with an undercover agent (a “cousin”) whom the correspondent represented to be a fellow terrorist. After meeting six times with the “cousin,” Daoud selected a bar in downtown Chicago to be the target of a bomb that the agent would supply him with. The agent told him the bomb would destroy the building containing the bar, and warned him that it would kill “hundreds” of people. Daoud replied: “that's the point.”

On September 14, 2012, Daoud parked a Jeep containing the bomb in front of the bar. In a nearby alley, in the presence of the agent, he tried to detonate the bomb. Nothing happened, of course, because the bomb was a fake. Daoud was immediately arrested. It was while in jail a month later that, according to the second indictment, he tried to solicit someone to murder the undercover agent with whom he had dealt.

The government notified the defendant, pursuant to 50 U.S.C. §§ 1806(c) and 1825(d)—sections of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801 et seq.—that it intended
to present evidence at his trial derived from electronic surveillance that had been conducted under the authority of the Act. Daoud responded through counsel with a motion seeking access to the classified materials submitted in support of the government's FISA warrant applications. Counsel hoped to show that the "evidence obtained or derived from such electronic surveillance" had been based on "information [that] was unlawfully acquired" or that "the surveillance was not made in conformity with an order of authorization or approval," 50 U.S.C. § 1806(e), both being grounds for suppression.

The government filed two responses: a heavily redacted, unclassified response, accessible to Daoud and his lawyers, and a classified version, accessible only to the district court, accompanied by an unclassified statement by the Attorney General that disclosure of the classified material, or an adversarial hearing with respect to it, "would harm the national security of the United States"; the harm was detailed in a classified affidavit signed by the FBI's Acting Assistant Director for Counterterrorism.

The district judge studied the classified materials to determine whether they should be shown to the defendant's lawyers, who have security clearances at the level at which these materials are classified. The judge noted that counsel was seeking "disclosure of classified documents that are ordinarily not subject to discovery," that "no court has ever allowed disclosure of FISA materials to the defense," and that a court may order such disclosure only where "necessary" for "an accurate determination of the legality of the surveillance," 50 U.S.C. § 1806(f), or of the "physical search" if that was how the FISA materials were obtained. § 1825(g). Nevertheless, remarking that "the adversarial process is integral to safeguarding the rights of all citizens," that the Sixth Amendment presupposes "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing," and that "the supposed national security interest at stake is not implicated where defense counsel has the necessary security clearances," the judge ruled that "the probable value of disclosure and the risk of nondisclosure outweigh the potential danger of disclosure to cleared counsel." And so she ordered the materials sought by defense counsel turned over to them. The order, though interlocutory, was appealable immediately, and the government appealed. 50 U.S.C. § 1806(h) 18 U.S.C.App. III § 7.

She acknowledged that the Attorney General's submission—stating that disclosure of the classified material, or an adversarial hearing with respect to it, "would harm national security"—had "trigger[ed] an in camera, ex parte procedure [in the district court] to determine whether the surveillance of the aggrieved person [Daoud] was lawfully authorized and conducted." FISA is explicit about this. It provides that "if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, [the court shall] review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. § 1806(f) (emphasis added).
So first the district judge must, in a non-public ("in camera"), nonadversarial ("ex parte") proceeding, attempt to determine whether the surveillance was proper. If in attempting to determine this the judge discovers that disclosure to the defendant of portions of the FISA materials is "necessary," the judge may order disclosure, provided there is adequate security. The defendant's brief tries to delete the statutory requirement of sequential ex parte in camera district court analysis by a cropped quotation from the statute: "the court must review the FISA application, order, and related materials ex parte and in camera, unless 'disclosure [to the defendant] is necessary to make an accurate determination of the legality of the surveillance.' " The defendant's misreading of the statute would permit the district judge to avoid conducting an ex parte review if the defendant's lawyers believed disclosure necessary, since if the judge does not conduct the ex parte review she will have no basis for doubting the lawyers' claim of necessity. The statute requires the judge to review the FISA materials ex parte in camera in every case, and on the basis of that review decide whether any of those materials must be disclosed to defense counsel. The judge did not do that. She did not find that disclosure was necessary, only that it "may be necessary." Although she read the FISA materials and concluded that she was "capable of making such a determination [an 'accurate' determination, as is apparent from a previous sentence in her order] of the legality of the surveillance," she refused to make the determination, which if she was right in thinking she could make an accurate determination would have obviated the necessity for—and therefore the lawfulness of—disclosure of the classified materials to defense counsel.

The judge appears to have believed that adversary procedure is always essential to resolve contested issues of fact. That is an incomplete description of the American judicial system in general and the federal judicial system in particular. There are ex parte or in camera hearings in the federal courts as well as hearings that are neither or both. And there are federal judicial proceedings that though entirely public are nonadversarial, either partly or entirely. For example, a federal district judge presiding over a class action is required to determine the fairness of a settlement agreed to by the parties even if no member of the class objects to it. Eubank v. Pella Corp., 2014 WL 2444388, at *2 (7th Cir. June 2, 2014). And when in a criminal case the prosecutor and the defendant agree on the sentence to recommend, the judge must make an independent determination whether the sentence is appropriate. If, though it is within the range fixed by Congress, he thinks the agreed-upon sentence too harsh or too lenient, he is empowered (indeed required) to reject the agreed-upon sentence and impose a different one within the statutory range. United States v. Siegel, 2014 WL 2210762, at *5 (7th Cir. May 29, 2014). Another familiar example of nonadversarial federal procedure involves the "Anders brief"—a brief in which a criminal defendant's lawyer states that the appeal is frivolous and therefore moves to be allowed to withdraw from representing the defendant. See Anders v. California, 386 U.S. 738 (1967). If the appellate court agrees, his motion is granted and the appeal dismissed. Unless the defendant expresses disagreement with the position taken by his lawyer in the Anders brief (the court always invites the defendant to respond to the brief but defendants often do not), there is no adversary process. Yet the court proceeds to make its own determination whether an appeal would be frivolous. If the court disagrees, it denies the lawyer's motion to withdraw and so retains the appeal.

Not only is federal judicial procedure not always adversarial; it is not always fully public. Child witnesses, especially in sexual abuse cases, are often allowed to testify behind a screen. Criminal
defendants typically are allowed to conceal from the jury most or even all of their criminal history. (Notice that in such a case, and in many other cases, secrecy inures to the defendant's benefit.) Objections to questions to witnesses when sustained keep from the jury evidence that jurors might be very interested in. Documents placed in evidence may be redacted to conceal embarrassing material. Trade secrets—and classified materials are a form of "trade secret"—are routinely concealed in judicial proceedings. And of course judicial deliberations, though critical to the outcome of a case, are secret.

The propriety of government confidentiality is not limited to judicial proceedings. Though the Freedom of Information Act provides broad access to information collected by or generated within government, it has many exceptions. 5 U.S.C. § 552(b). The government's records of people's finances, collected by the Internal Revenue Service and other agencies, are secret. So are medical records of persons enrolled in Medicaid, Medicare, and the Veterans Administration's hospital system. Employment files for the millions of federal employees are secret, as are public school teachers' evaluations of children, government social workers' judgments about their clients, and deliberations of a wide range of government officials, not limited to judges—for example, the doctrine of executive privilege shields many of the internal communications of executive-branch officials. The methods used by police to audit and investigate, to decide where to set up roadblocks and hide plainclothes officers, are secret, as are their communications with and the names of their confidential informants unless the informants testify.

Everyone recognizes that privacy is a legally protectable interest, and it is not an interest of private individuals alone. The Foreign Intelligence Surveillance Act is an attempt to strike a balance between the interest in full openness of legal proceedings and the interest in national security, which requires a degree of secrecy concerning the government's efforts to protect the nation. Terrorism is not a chimera. With luck Daoud might have achieved his goal of indiscriminately killing hundreds of Americans—whom he targeted because, as he explained in an email, civilians both "pay their taxes which fund the government's war on Islam" and "vote for the leaders who kill us everyday."

Conventional adversary procedure thus has to be compromised in recognition of valid social interests that compete with the social interest in openness. And "compromise" is the word in this case. Daoud was first indicted almost two years ago. Defense counsel have been conducting discovery and have submitted extensive factual allegations to the district court. Those allegations—made in an extensive proffer by the defendant—were before the district judge when she was considering whether to disclose any of the classified FISA materials to defense counsel, along with the factual allegations made by the government as the result of its investigation. It was her obligation to evaluate the parties' allegations in light of the FISA materials to determine whether she could assess the legality of those materials herself, without disclosure of them to Daoud's lawyers.

The defendant's lawyers place great weight on the difficulty of conducting a Franks hearing to determine the legality of a warrant to conduct FISA surveillance. Franks v. Delaware, 438 U.S. 154 (1978), held that a defendant can challenge a search or arrest warrant on the ground that it was procured by a knowing or reckless falsehood by the officer who applied for the warrant. Id.
at 155–56. Defense counsel would like to mount such a challenge in this case. But that's hard to
do without access to the classified materials on which the government relied in obtaining a
warrant to obtain access to Daoud's communications. The drafters of the Foreign Intelligence
Surveillance Act devised a solution: the judge makes the additional determination, based on full
access to all classified materials and the defense's proffer of its version of events, of whether it's
possible to determine the validity of the Franks challenge without disclosure of any of the
classified materials to the defense. The judge in this case failed to do that.

She seems to have thought that any concerns about disclosure were dissolved by defense
counsel's security clearances. She said that “the government had no meaningful response to the
argument by defense counsel that the supposed national security interest at stake is not
implicated where defense counsel has the necessary security clearances”—as if disclosing state
secrets to cleared lawyers could not harm national security. Not true. Though it is certainly
highly unlikely that Daoud's lawyers would, Snowden-like, publicize classified information in
violation of federal law, they might in their zeal to defend their client, to whom they owe a duty
of candid communication, or misremembering what is classified and what not, inadvertently say
things that would provide clues to classified material. Unless and until a district judge performs
his or her statutory duty of attempting to determine the legality of the surveillance without
revealing any of the fruits of the surveillance to defense counsel, there is no basis for concluding
that disclosure is necessary in order to avert an erroneous conviction.

It's also a mistake to think that simple possession of a security clearance automatically entitles its
possessor to access to classified information that he is cleared to see. (The levels of classification
differ; someone cleared for Secret information is not entitled to access to Top Secret
information.) There are too many leaks of classified information—too much carelessness and
irresponsibility in the handling of such information—to allow automatic access to holders of the
applicable security clearances. More than a million and a half Americans have security
clearances at the Top Secret level, which is the relevant level in this case. Office of Management
3, www.whitehouse.gov/sites/default/files/omb/reports/suitability-and-security-process-review-
467, 568 (5th Cir.2011), “we are unpersuaded by the defendants' argument that the Government's
interest [in confidentiality] is diminished because defense counsel possess security clearance to
review classified material.”

So in addition to having the requisite clearance the seeker must convince the holder of the
information of the seeker's need to know it. If the district judge's threshold inquiry into whether
Daoud's lawyers needed any of the surveillance materials revealed that they didn't, their security
clearances would not entitle them to any of those materials. The statute says that disclosure of
such materials to them must be “necessary”; even without that word (the vagueness of which in
legal contexts is legendary, as lucidly explained in Cellular Telecommunications & Internet
Ass'n v. FCC, 330 F.3d 502, 509–12 (D.C.Cir.2003)), the judge in this case would have had to
determine the lawyers' need for the materials—more precisely, her need for them to have access
to the materials so that she could make an accurate determination of the legality of the
challenged surveillance. Rather than asserting such a need, she affirmed her capability of making
an accurate determination without disclosing any classified materials to defense counsel.
Because she was "capable" of making the determination, disclosure was not "necessary" under any definition of that word. We conclude regretfully that the judge thus disobeyed the statute.

Our own study of the classified materials has convinced us that there are indeed compelling reasons of national security for their being classified—that the government was being truthful in advising the district judge that their being made public "would harm the national security of the United States"—and that their disclosure to the defendant's lawyers is (in the language of section 1806(f)) not "necessary" for "an accurate determination of the legality of the surveillance." So clear is it that the materials were properly withheld from defense counsel that there is no need for a remand to enable the district judge to come to the same conclusion, because she would have to do so.

Not only do we agree with the district judge that it is possible to determine the legality of the government's investigation of Daoud without disclosure of classified materials to his lawyers; our study of the materials convinces us that the investigation did not violate FISA. We shall issue a classified opinion explaining (as we are forbidden to do in a public document) these conclusions, and why therefore a remand to the district court is neither necessary nor appropriate.

One issue remains to be discussed. After the first oral argument, we held a brief in camera hearing at which questions were put by the panel to the Justice Department's lead lawyer on the case concerning the classified materials. Only cleared court and government personnel were permitted at that hearing. The defendant's lawyers, before leaving the courtroom as ordered, objected to our holding such a hearing and followed up their oral objection with a written motion. Their objecting to the classified hearing was ironic. The purpose of the hearing was to explore, by questioning the government's lawyer on the basis of the classified materials, the need for defense access to those materials (which the judges and their cleared staffs had read). In effect this was cross-examination of the government, and could only help the defendant.

Defense counsel's written motion cites no authority for forbidding classified hearings, including classified oral arguments in courts of appeals, when classified materials are to be discussed. We don't think there's any authority it could cite. The propriety of such hearings was confirmed in United States v. Sedaghaty, 728 F.3d 885, 891 and n.2 (9th Cir.2013); cf. American Civil Liberties Union v. Department of Justice, 681 F.3d 61, 66, 70 (2d Cir.2012). But we are granting the request of the defendant's lawyers for a redacted transcript of our classified hearing.

Finally, for future reference we suggest that when a district judge is minded to disclose classified FISA materials to defense counsel—a decision bound to precipitate an appeal by the government—the judge issue a classified statement of reasons, as it probably will be impossible to explain in an unclassified opinion all the considerations motivating her decision. In this case, however, our review of the materials persuades us both that there was no basis for disclosure and that a remand would be of no value.

The order appealed from is

Reversed.
I join the court's opinion in full. I write separately to address the difficulty of reconciling Franks v. Delaware, 438 U.S. 154, 155–56, 98 S.Ct. 2674, 2676 (1978), with a proceeding in which the defense has no access to the FISA application that resulted in court-authorized surveillance of the defendant. As the court has recognized, ante at 9, this is one of the principal arguments that Daoud made in support of his request for disclosure of the FISA application.

Franks holds that a search warrant must be voided and the fruits of the search excluded from evidence when (1) a defendant proves by a preponderance of the evidence that the affidavit on which the search warrant was based contained false statements that were either deliberately or recklessly made, and (2) the court determines that the remainder of the affidavit was insufficient by itself to establish probable cause. Id. at 155–56, 98 S.Ct. at 2676. The Franks framework applies to misleading omissions in the warrant affidavit (so long as they were deliberately or recklessly made) as well as to false statements. E.g., United States v. McMurtrey, 704 F.3d 502, 508–09 (7th Cir. 2013) (collecting cases).

Daoud asserted that the government's FISA application might contain material misstatements or omissions; but, of course, because the application is classified and his counsel has not seen it, he could present this only as a possibility. He therefore made a pro forma request for a Franks hearing, but argued principally that, without access to the FISA application, he could not make the preliminary showing that is ordinarily required before the court will conduct such a hearing. R. 52 at 18–19.

In making a blind request for a hearing and relief under Franks, Daoud is presented with the same conundrum that every defendant charged on the basis of FISA-acquired evidence encounters. A Franks motion is premised on material misrepresentations and omissions in the warrant affidavit; but without access to that affidavit, a defendant cannot identify such misrepresentations or omissions, let alone establish that they were intentionally or recklessly made. As a practical matter, the secrecy shrouding the FISA process renders it impossible for a defendant to meaningfully obtain relief under Franks absent a patent inconsistency in the FISA application itself or a sua sponte disclosure by the government that the FISA application contained a material misstatement or omission. To date, courts have either overlooked the problem or acknowledged it without being able to identify a satisfactory work-around.

I believe it is time to recognize that Franks cannot operate in the FISA context as it does in the ordinary criminal case. To pretend otherwise does a disservice to the defendant and to the integrity of the judiciary. We must recognize both that the defendant cannot make a viable Franks motion without access to the FISA application, and that the court, which does have access to the application, cannot, for the most part, independently evaluate the accuracy of that application on its own without the defendant's knowledge of the underlying facts. Yet, Franks serves as an indispensable check on potential abuses of the warrant process, and means must be found to keep Franks from becoming a dead letter in the FISA context. The responsibility for identifying a solution lies with all three branches of government, but as the branch charged with applying Franks, the duty falls to the judiciary to acknowledge the problem, make such accommodations as it can, and call upon the other branches to make reforms that are beyond our power to implement.
Toward that end, I think it useful to devote some attention to the holding and rationale of Franks, what it requires of the defendant in the ordinary criminal case, what courts have said about Franks in the FISA context, how ex parte, in camera proceedings hobble the Franks inquiry, and possible solutions to the problem.

1.

It was in Franks that the Supreme Court first acknowledged the right of a criminal defendant to attack the veracity of the affidavit underlying a search warrant and to have the fruits of the search suppressed if the warrant would not have issued but for misrepresentations made in the affidavit. Prior to that holding, although a majority of courts had come to the conclusion that such challenges should be permitted, there remained a division of authority on this point at both the federal and state levels. See id. at 159–60 nn.3–4 & App. B, 98 S.Ct. at 2678 nn.3–4 & App. B; (collecting conflicting rulings). In Franks itself, the Delaware Supreme Court had altogether foreclosed impeachment of the warrant affidavit, reasoning in part that it was “the function of the issuing magistrate to determine the reliability of information and credibility of affiants in deciding whether the requirement of probable cause has been met” and that “[t]here has been no need demonstrated for interfering with this function.” Franks v. State, 373 A.2d 578, 580 (Del.1977), rev’d, 438 U.S. 154, 98 S.Ct. 2674. The United States Supreme Court resolved the conflict in favor of permitting impeachment, holding that where a defendant can establish that the warrant affidavit made intentional or reckless material misstatements to the issuing judge, the results of the search must be suppressed if the remainder of the warrant would have been insufficient to establish probable cause. Id. at 155–56, 98 S.Ct. at 2676.

The Franks Court rested its holding on the Warrant Clause of the Fourth Amendment:

In deciding today that, in certain circumstances, a challenge to a warrant’s veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant’s good faith as its premise: “[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation.” Judge Frankel put the matter simply: “[W]hen the Fourth Amendment demands a factual showing sufficient to comprise ‘probable cause,’ the obvious assumption is that there will be a truthful showing” (emphasis in original). This does not mean “truthful” in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant’s own knowledge that sometimes must be garnered hastily. But surely it is to be “truthful” in the sense that the information put forth is believed or appropriately accepted by the affiant as true. It is established law that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. Because it is the magistrate who must determine independently whether there is probable cause, it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment.

438 U.S. at 164–65, 98 S.Ct. at 2681 (citations omitted). Later in its opinion, in the course of addressing Delaware's objections to any after-the-fact inquiry into the veracity of the warrant
affidavit, the Court explained further why it rejected a rule that would foreclose any attempt to challenge the accuracy of the affidavit:

[A] flat ban on impeachment of veracity could denude the probable-cause requirement of all real meaning. The requirement that a warrant not issue "but upon probable cause, supported by Oath or affirmation," would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile. It is this specter of intentional falsification that, we think, has evoked such widespread opposition to the flat nonimpeachment rule from the commentators, from the American Law Institute in its Model Code of PreArraignment Procedure, from the federal courts of appeals, and from state courts.

438 U.S. at 168, 98 S.Ct. at 2682–83 (citations & footnote omitted).

2.

Although Franks allows a defendant to challenge the truthfulness of a warrant affidavit, he must surmount a significant threshold before the court is obliged to conduct an evidentiary hearing and to decide whether the search warrant was the product of an intentionally or recklessly false or misleading affidavit. In his Franks motion, the defendant must make a "substantial preliminary showing" that he is entitled to relief. Id. at 155, 98 S.Ct. at 2676. This requires him to do much more than point out inaccuracies in the warrant affidavit.

There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of a deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Id. at 171–72, 98 S.Ct. at 2684–85 (footnote omitted).

The "substantial preliminary showing" that Franks requires of the defendant is thus an onerous one. See, e.g., McMurtrey, 704 F.3d at 509; United States v. Johnson, 580 F.3d 666, 670 (7th Cir.2009); United States v. Swanson, 210 F.3d 788, 790 (7th Cir.2000). Consequently, although Franks motions are standard fare in criminal cases, evidentiary hearings are granted infrequently. Nonetheless, hearings do occur with a modicum of regularity. See, e.g., United States v. Spears,
673 F.3d 598, 602–3 (7th Cir.), cert. denied, 133 S.Ct. 232 (2012); United States v. Clark, 668 F.3d 934, 938–39 (7th Cir.2012); United States v. Wilburn, 581 F.3d 618, 621–22 (7th Cir.2009); United States v. Merritt, 361 F.3d 1005, 1010–11 (7th Cir.2004), cert. granted & judgment vacated on other grounds, 543 U.S. 1099, 125 S.Ct. 1024 (2005); United States v. Whitley, 249 F.3d 614, 617–19 (7th Cir.2001). Cases in which a motion to suppress is ultimately granted after such a hearing are even more uncommon, but they too occur. See, e.g., United States v. Brown, 631 F.3d 638, 649–50 (3d Cir.2011) (affirming suppression); United States v. Foote, 413 F.3d 1240, 1244 (10th Cir.2005) (noting but not ruling on partial suppression ordered by district court); United States v. Wells, 223 F.3d 835, 839–40 (8th Cir.2000) (affirming suppression); United States v. Hall, 113 F.3d 157, 159–61 (9th Cir.1997) (affirming suppression).

Despite the high bar to relief that Franks imposes, it has proven to be more than a lofty statement of principle that is often recited but in practice never results in relief. My experience as both a trial and appellate judge has convinced me that it is a vital part of the criminal process that subjects warrant affidavits to useful adversarial testing, and occasionally, if not often, results in the suppression of evidence seized as a result of the false or misleading warrant application, as Franks itself envisioned. 438 U.S. at 156, 98 S.Ct. at 2676. (Whether the same or a different form of relief would be appropriate in a case involving alleged terrorism is an issue that must be reserved for a case that presents it: To the best of my knowledge, no defendant has yet succeeded in getting to a Franks hearing in a criminal prosecution resulting from FISA surveillance.) And, no doubt, the prospect of a Franks hearing and the possibility of suppression serves as a meaningful deterrent to an overzealous law enforcement official who might be tempted to present a misleading account of the facts to the judge from whom he seeks a warrant.

3.

However, notwithstanding the presumed applicability of Franks to the FISA framework, defendants in FISA cases face an obvious and virtually insurmountable obstacle in the requirement that they make a substantial preliminary showing of deliberate or reckless material falsehoods or omissions in the FISA application without having access to the application itself. Franks, as I have discussed, requires such a showing before the court is obliged to convene an evidentiary hearing. And the necessary first step in that showing is to identify specific portions of the warrant affidavit that the defendant believes are false or misleading. Franks, 438 U.S. at 171, 98 S.Ct. at 2684.

In the typical criminal case, the defendant has access to the warrant affidavit. Coupled with his own knowledge of what he or his accomplices said and did, the defendant can at least show that the government's affiant misstated or omitted facts pertinent to the probable cause determination—although he is, of course, required to go further and give the court reason to believe that the misstatement or omission was deliberate or reckless, see id. But without access to the FISA application, the defendant has no idea how the government represented the facts to the Foreign Intelligence Surveillance Court (“FISC”), let alone whether and how the government may have misstated the facts in some way. Practically speaking, the defense can only make a blind suggestion that there is a possibility that the FISA application may contain false statements or omissions and that a Franks hearing may be necessary, and cite this possibility as a reason for ordering disclosure. That is essentially what Daoud did here.

Some courts have acknowledged the inherent difficulty that defendants face without access to the FISA application; but those courts have insisted nonetheless that defendants must somehow make the same preliminary showing—that the government presented a distorted set of facts to the judge issuing the warrant—that Franks would require in the usual criminal case. The court’s remarks in Kashmiri represent a thoughtful example:

The Court recognizes the frustrating position from which Defendant must argue for a Franks hearing. Franks provides an important Fourth Amendment safeguard to scrutinize the underlying basis for probable cause in a search warrant. The requirements to obtain a hearing, however, are seemingly unattainable by Defendant. He does not have access to any of the materials concerning the FISA application or surveillance; all he has is notice that the government plans to use this evidence against him.

Nevertheless, to challenge the veracity of the FISA application, Defendant must offer substantial proof that the FISC relied on an intentional or reckless misrepresentation by the government to grant the FISA order. The quest to satisfy the Franks requirements might feel like a wild-goose chase, as Defendant lacks access to the materials that would provide this proof. This perceived practical impossibility to obtain a hearing, however, does not constitute a legal impossibility. If Defendant obtains substantial proof that the FISC relied upon an intentional or recklessly false statement to approve the FISA order, he could obtain a hearing.

recognizes the defendant's difficulty in making such a preliminary showing where the defendant has no access to the confidential FISA-related documents here."); United States v. Abu-Jihaad, 531 F.Supp.2d 299, 311 (D.Conn.2008) ("Since defense counsel has not had access to the Government's submissions they—quite understandably—can only speculate about their contents."); j. aff'd, 630 F.3d 102; Mubayyid, 521 F.Supp.2d at 131 (see quoted passage below); Hassoun, 2007 WL 1068127, at *4 ("Defendants admit that their allegations are purely speculative, in that they have not been given the opportunity to review the classified applications.").

I note that in Mubayyid, the court expressly rejected this difficulty as a ground sufficient to warrant disclosure of the FISA application to the defense:

The Court obviously recognizes the difficulty of defendants' position: because they do not know what statements were made by the affidavit in the FISA applications, they cannot make any kind of a showing that those statements were false. See Belfield, 692 F.2d at 148. Nonetheless, it does not follow that defendants are entitled automatically to disclosure of the statements. The balance struck under FISA—which is intended to permit the gathering of foreign intelligence under conditions of strict secrecy, while providing for judicial review and other appropriate safeguards—would be substantially undermined if criminal defendants were granted a right of disclosure simply to ensure against the possibility of a Franks violation.

521 F.Supp.2d at 131 (citing United States v. Belfield, 692 F.2d 141, 148 (D.C.Cir.1982) (expressing sympathy for similar difficulty defendant would have in attempting to show case was so complex that disclosure of FISA materials is warranted)). The Mubayyid court went on to note that Congress was aware of the difficulties posed to the defense by a presumption against disclosure of FISA materials, but nonetheless "chose to resolve them through means other than mandatory disclosure." Id. (quoting Belfield, 692 F.2d at 148).

One tactic that some defendants have attempted in order to trigger either a Franks hearing, or disclosure of the FISA materials so that the defense can make a proper preliminary showing under Franks, is to cite reports which take note of various misrepresentations that have been made to the FISC over the years and which have been confessed by the government after the fact. These disclosures, defendants reason, demonstrate that the possibility of a material misrepresentation or omission in the FISA application is more than a theoretical one. Most relevant in this regard is In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F.Supp.2d 611, 620 (Foreign Int. Surv. Ct.2002), abrogated by In re Sealed Case, 310 F.3d 717 (For.Intel.Surv.Ct.Rev.2002), in which the court recounted the government's revelation that 75 prior FISA applications related to major terrorist attacks directed against the United States contained misstatements and omissions of material facts (concerning such topics as whether the target of FISA surveillance was under criminal investigation, whether overlapping criminal and intelligence investigations were being appropriately compartmentalized in terms of information-sharing, and the prior relationship between the FBI and the FISA target). That disclosure led the FISC to bar one FBI agent from ever appearing before the court again as a FISA affiant. 218 F.Supp.2d at 621. Daoud has relied on this opinion and others to demonstrate why disclosure of the FISA application to the defense is warranted for purposes of assessing the
truthfulness of the application and, if discrepancies are found, to make the substantial preliminary showing that Franks requires. See R. 52 at 24–26.

Pointing to prior instances of falsehoods may be useful as a means of demonstrating a need for a Franks procedure or an equivalent in the FISA context, but it is of little use in satisfying the Franks standard, as it sheds no light on the truth or falsity of the particular FISA application under review. See, e.g., Hassoun, 2007 WL 1068127, at *4. Nor does it substantiate the necessity of disclosure of a FISA application in a particular case, unless there is reason to think that the FISA affiant is one who has been found to have made misleading applications before. See id. (noting the government's representation that the affiant was not the one who had been barred from appearing before the FISC).

A potential alternative was addressed by both the government and the members of the court at the oral arguments in this case. Although a defendant may not know what specific allegations were made in the FISA application, he necessarily does know what he has done and said. A savvy defense attorney might be able to surmise from the materials produced in discovery roughly when FISA surveillance began and what general types of information the government likely relied on in its warrant application. Counsel could in turn ascertain from his client which of his actions and statements—and those of his accomplices—the government might have known about and relied on to establish probable cause before the FISC. In theory, the defense could present that information to the court and the court could compare the defense information with the representations in the FISA application and see if there are any important differences that might implicate the FISC's probable cause determination. Any such discrepancies might be grounds for disclosure of the FISA application to the defense so that it might attempt to make a proper Franks showing.

However, there are multiple problems posed by this scenario. To begin, rather than being able to rebut specific representations in the application, the defendant would have to supply the court with a narrative of his own conduct. In doing so, the defendant would run the risk that he might disclose inculpatory facts about himself or an accomplice of which the government was not previously aware.

Second, it will often be difficult for a defendant to recall and reconstruct all of the many communications and statements that the FISA application may have relied on to establish probable cause. Where it seems obvious that a discrete and recent event triggered a FISA application (something like the 2013 bombing at the Boston marathon, for example), recollecting and documenting a defendant's acts and statements before and after that event may present a straightforward task. But in the modern era, people have at their disposal an almost unlimited means of communicating (phone, text, email, and all manner of social media), and young people like Daoud are often parties to many dozens of such communications per day. See, e.g., Amanda Lenhart, Pew Research Center, Teens, Smartphones & Texting (Mar. 19, 2012) (“The median number of texts . sent on a typical day by teens [was] 60 in 2011.”), available athttp://pewinternet.org/Reports/2012/Teens-and-smartphones.aspx (last visited June 12, 2014). Recalling everything that one might or might not have said in the vast universe of his electronic chatter—and likewise what his accomplices have said—would pose a daunting task for anyone not gifted with total recall.
Third, a narrative-based approach allows for manipulation of the court, by giving the defense an incentive to present the most exculpatory (and incomplete) version of his actions and statements in order to maximize the chances that the court will order disclosure of the FISA application. If the defendant's threshold burden is to convince the court simply that the application may not have accurately described the defendant's actions, then his best shot at carrying that burden is to present the most self-serving version of events that he can without outright lying to the court. Balance and candor would work against him, because the more inculpatory things he acknowledges, the more likely it is that the court will conclude there is no material factual dispute justifying disclosure of the FISA application—that the gist of the FISA application is consistent with the gist of the defendant's factual narrative.

Setting that point aside, let us suppose that a defendant in good faith presents a counter-narrative of the facts that convinces the court that disclosure of the FISA application is appropriate so that defense counsel may further pursue a Franks claim. It should be noted that producing the application to security-cleared defense counsel would pose the same risk of inadvertent disclosure to the defendant, and possible injury to national security, that the government has cited in challenging the disclosure that was ordered in this case.

More to the point, putting a copy of the FISA application in the defense counsel's hand would not necessarily enable a truly adversarial and robust Franks process. The defendant's attorney would not be authorized to disclose any classified material to his or her client; so the attorney would not be able to examine each material statement in the FISA application and discuss with the client whether it is accurate from the client's perspective. Even by asking the client generic, non-leading questions, counsel might inadvertently tip off the client to the classified evidence or sources the government may have relied on in the FISA application. And yet it would be difficult, if not impossible, for counsel to test the accuracy of the FISA application without disclosing the classified material to the client. In the end, the defense might be just as hamstrung in pursuing a Franks motion with disclosure of the FISA application to defense counsel as it would be without such disclosure.

Finally, even if it were possible for a defendant to make a preliminary Franks showing despite these obstacles, in cases involving sensitive information (which is most FISA cases, I would think), one wonders whether there could realistically be the sort of full-fledged, adversarial Franks hearing that takes place in a more typical criminal case, cf. United States v. Whitley, supra, 249 F.3d at 617–19 (recounting the extensive testimony bearing on defendant's Franks motion), even if the hearing were conducted in secrecy. Such a hearing would potentially expose the government's sources and methods of investigation to scrutiny that might jeopardize national security.

5.

Without access to the FISA application, it is doubtful that a defendant could ever make a preliminary showing sufficient to trigger a Franks hearing. The court in Kashmiri said that “[t]his perceived practical impossibility to obtain a hearing . does not constitute a legal impossibility,” 2010 WL 4705159, at *6, but it is not clear to me why this is so. It seems to me that only if the government itself somehow disclosed to the court or to the defense a material misrepresentation
or omission in the FISA application, the court itself noticed a patent inconsistency in the application and pursued it, or a court reviewing many such applications noticed a suspicious pattern, could that showing be made. Those instances will be rare indeed, and they will occur wholly independently of the adversarial process that Franks envisions.

What courts sometimes say is that they have conducted their own careful review of the FISA materials and discovered no material misrepresentations or omissions in the FISA application. Thus, the Kashmiri court, after noting the difficulty the defendant would have in making the threshold showing that Franks requires, noted that it had “already undertaken a process akin to a Franks hearing through its ex parte, in camera review of the FISA materials” and detected no basis for further inquiry under Franks. 2010 WL 4705159, at *6 (citing 50 U.S.C. § 1806(f)). See also Gowadia, 2009 WL 1649714, at *3; Abu-Jihaad, 531 F.Supp.2d at 311–12.

Yet, although a court may be able to discover inconsistencies in the FISA materials, its ability to discover false statements and omissions is necessarily limited, as it has only the government's version of the facts. Franks itself recognizes that an ex parte inquiry into the veracity of the warrant affidavit is necessarily “less vigorous” than an adversarial hearing, as the judge “has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations.” 438 U.S. at 169, 98 S.Ct. at 2683. The defendant is in the best position to know whether the government's version of events is inaccurate, as the defendant knows what he said and did, when, where, and to whom, and the defendant will often know the same about what his accomplices said and did.

If disclosure of the FISA application is to be the exception rather than the rule, then we must look for a means of ensuring that FISA affiants act in good faith and that the Fourth Amendment's probable-cause requirement is not “denude[d] of all real meaning.” Franks, 438 U.S. at 168, 98 S.Ct. at 2682.

6.

I indicated earlier that I view it as mistaken to believe that a judge will be able on his or her own to ferret out any potential misrepresentations or omissions in the FISA application, given that the judge lacks a defendant's knowledge as to the facts underlying the application and has only the government's version of the facts as a reference point. There may be a subset of FISA cases, however, in which a judge could make a meaningful effort to confirm the accuracy of the application and thus serve the same interest in ensuring truth and candor in the warrant process that a Franks motion serves. These would be cases in which the FISA application is based in part on a defendant's documented statements. If, for example, the defendant has communicated his terrorist sympathies or plans in an email or a text to someone who turns a copy over to the government, or has posted such thoughts online, as the criminal complaint in this case notes that Daoud did (see R. 1 at 5 ¶ 7), and those statements are cited in the FISA application, the court could ask the government to produce complete copies of those statements for review in camera. Having those statements in hand would enable the court to verify that they were fairly recounted in the FISA application—both in the sense that the defendant was not misquoted and in the sense that the government did not omit portions of a statement that were critical for context. Taking that step would permit the court to conduct something akin to a Franks inquiry albeit without
defense input—perhaps something very much like the district court in Kashmiri referenced. 2010 WL 4705159, at *6.

Even such a modest step may strike some as a departure from the judge's usual detached role, and indeed it does require a judge to act as something more than a passive umpire. But it strikes me as a reasonable measure that respects both the national security interest as well as the practical obstacles that the defense faces in pursuing a Franks motion without access to those materials. As Judge Posner has pointed out today, there are any number of proceedings which are not wholly adversarial and which call on the court to exercise its judgment independently of the arguments presented to it. Ante at 6–7. To my mind, a Franks motion filed in a case involving FISA surveillance presents just such a situation, given that the defense cannot litigate that motion in the usual way. The court, which has unrestricted access to the FISA application, can make limited and reasonable efforts to do what the defense cannot: determine if the face of the FISA application is consistent with whatever documented statements of the defendant (or his accomplices) that the government might have in its possession.

There may be other steps that the judge can take to try and confirm the accuracy of the FISA application, but my essential point is this: courts cannot continue to assume that defendants are capable of carrying the burden that Franks imposes when they lack access to the warrant application that is the starting point for any Franks inquiry. Courts must do what they can to compensate for a defendant's ignorance as to what the FISA application contains. Otherwise, Franks will persist in name only in the FISA setting.

Beyond this, it remains for Congress and the Executive Branch to consider reforms that might address some of the concerns I have raised here. If, as a pragmatic matter, Franks cannot function as a check on potential abuses of the warrant process in FISA cases, then there may be other institutional means of addressing the Fourth Amendment and due process rights that Franks is meant to protect in the standard criminal setting. Privacy concerns, for example, have resulted in multiple proposals before Congress calling for the creation of a “Special Advocate,” with appropriate security clearance, whose job it would be to serve as a privacy advocate and to oppose the government in certain FISC proceedings.3 The practical obstacles to impeaching the veracity of FISA applications warrant exploration of comparable measures that respect the spirit, if not the letter, of Franks.

7.

Imagining ways to make Franks workable in a classified setting is difficult, as the foregoing discussion demonstrates and as the government's counsel candidly acknowledged at oral argument. My purpose in engaging in this discussion has been to acknowledge a problem that thus far has not been addressed as deeply as it should be by the judiciary. Thirty-six years after the enactment of FISA, it is well past time to recognize that it is virtually impossible for a FISA defendant to make the showing that Franks requires in order to convene an evidentiary hearing, and that a court cannot conduct more than a limited Franks review on its own. Possibly there is no realistic means of reconciling Franks with the FISA process. But all three branches of government have an obligation to explore that question thoroughly before we rest with that conclusion.
FOOTNOTES

1. I am assuming that, as with a defendant’s testimony in support of a motion to suppress, the defendant’s narrative could not be introduced against him at trial on the issue of guilt over his objection. See Simmons v. United States, 390 U.S. 377, 394, 88 S.Ct. 967, 976 (1968).

2. Permitting the defendant to submit his narrative ex parte for review by the court in camera presumably would resolve that problem.

3. See, e.g., Steve Vladeck, Judge Bates and a FISA “Special Advocate,” LAWFARE (Feb. 4, 2014), http://www.lawfareblog.com/2014/02/judge-bates-and-a-fisa-special-advocate/ (last visited June 12, 2014); The Constitution Project, The Case for a FISA “Special Advocate,” (May 29, 2014), available at http://www.constitutionproject.org/wp-content/uploads/2014/05/The-Case-for-a-FISA-Special-Advocate-FINAL.pdf. (last visited June 12, 2014). The continuity of such a position might allow the Special Advocate to recognize patterns of suspect behavior that would otherwise go unnoticed, and bring them to the court’s attention before they reach the extent noted in In re All Matters Submitted to the Foreign Intelligence Surveillance Court, supra, 218 F.Supp.2d at 620–21, which came to light only because the government itself informed the court after the fact. argument occurred in a high-profile case involving serious criminal charges.

POSNER, Circuit Judge.

- See more at: http://caselaw.findlaw.com/us-7th-circuit/1669992.html#sthash.8HVErG3c.dpuf
Alison Frankel

Can Saudi government once again evade suit by 9/11 families?

By Alison Frankel
April 14, 2015

Tags:

#911attacks | #SaudiArabia

(Reuters) – In dueling briefs filed Friday, the Kingdom of Saudi Arabia and the families of people killed in the attacks of September 11, 2001 made their last written arguments to U.S. District Judge George Daniels of Manhattan, who will decide later this year whether the families can bring claims against Saudi Arabia for allegedly helping al Qaeda operatives carry out the 9/11 attacks.

The two briefs present a starkly different view of what’s known about Saudi Arabia’s involvement with the 9/11 operatives – and what standard the plaintiffs must meet to continue litigating claims against the Saudi government. The government’s lawyers at Kellogg Huber Hansen Todd Evans & Figel, as well Robbins Russell Engler Orseck Untereiner & Sauber, which represents a Saudi charity alleged to have acted as an agent of the government, argue that exhaustive U.S. investigations of alleged ties between of purported Saudi operatives and the al Qaeda hijackers haven’t turned up solid evidence that the Saudi government knowingly and directly supported the attacks. Without that evidence, their brief argues, the 9/11 families cannot overcome the presumption that foreign sovereigns are immune from litigation in U.S. courts and their case against Saudi Arabia must be dismissed.

“Plaintiffs have attempted to meet their burden of production by submitting thousands of pages of inadmissible and irrelevant materials,” the Saudi brief said. “If they had a single piece of evidence that would stand up in court, they would highlight it in their papers. Instead, they focus heavily on witnesses manifestly lacking personal knowledge, and on newspaper articles, blog posts, and similar multiple hearsay. They thus reveal that they have nothing better.”

The plaintiffs’ brief, on the other hand, contends that even U.S. government officials who served on bodies that investigated 9/11 believe Saudi Arabia’s role needs more scrutiny – and they should be permitted to amend their complaint and proceed with discovery in their case.

The plaintiffs have obtained affidavits from former Navy Secretary John Lehman and former U.S. Senator Bob Kerrey, both of whom served on the 9/11 Commission, asserting that the commission did not exonerate Saudi Arabia and its report expressly left room for additional investigation of the Saudi government’s possible ties to the attackers. In addition, Senator Bob Graham, who co-chaired a congressional investigation of the attacks, said in an affidavit for the
plaintiffs that, in his view, two Saudi officials in the U.S. at the time of the attacks lent support to the attackers.

The plaintiffs – represented by Cozen O'Connor, Motley Rice, Simmons Hanly Conroy, Kreindler & Kreindler, Anderson Kill, Adams Holcomb, Dickstein Shapiro and Ferber Chan Essner & Coller – argue that Saudi Arabia is asking Judge Daniels to answer the wrong question. The judge should not be deciding whether to grant Saudi Arabia’s motion to dismiss their suit but simply deciding whether to permit the plaintiffs to amend their complaint under the liberal guidelines for such amendments.

“The court need not, and should not, enter the rabbit hole defendants have constructed, whether for purposes of deciding the present motion to amend or defendants’ renewed motion to dismiss,” their brief said. “To the contrary, the court’s inquiry in the present context focuses solely on whether the proposed amended pleading presents a colorable grounds for relief that is not patently frivolous. Because it clearly does, and other factors also demonstrate that justice so requires, plaintiffs’ motion to amend should be granted.”

The two sides are also divided about the significance of deposition testimony the plaintiffs obtained from Zacarias Moussaoui, whom the Saudi brief described as a “convicted, mentally ill terrorist.” The plaintiffs, who interviewed Moussaoui at the supermax prison in Colorado where he is incarcerated, assert that his testimony establishes that “senior Saudi officials made direct financial contributions to al Qaeda” and that he personally traveled to Saudi Arabia to deliver communiqués from Osama bin Laden to onetime Saudi intelligence chief Turki al-Faisal and other Saudi government officials.

Saudi Arabia’s brief said that the judge shouldn’t believe a word from Moussaoui, who has himself previously described his own testimony about 9/11 as “a complete fabrication.” And however “colorful” Moussaoui’s “tangled, self-contradictory tale,” may be, according to the defendants, it is immaterial even if true.

“Colorful is when Zacarias Moussaoui testifies in a courtroom in New York and we watch the color drain out of the faces of the defendants,” said plaintiffs’ lawyer Jerry Goldman of Anderson Kill. Goldman said that Saudi Arabia essentially wants Judge Daniels to decide the merits of the plaintiffs’ case based on these motions, rather than letting the families gain access to discovery such as the documents seized from bin Laden’s hideaway in Pakistan. “The 9/11 Commission never spoke to Khalid Sheikh Mohammed,” Goldman said. “They want to hide witnesses from the American people.”

Saudi Arabia was previously dismissed as a defendant in the 9/11 families’ litigation back in 2005 but the judgment was vacated in 2013 after the 2nd U.S. Circuit Court of Appeals partly overturned its precedent on the tort exception to foreign sovereign immunity.
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I. INTRODUCTION

The opposition of defendants Kingdom of Saudi Arabia and the Saudi High Commission for Relief of Bosnia & Herzegovina ("SHC"), to plaintiffs' motion for leave to file a consolidated amended pleading of facts and evidence (motion to amend), amounts to no more than a plea that the Court ignore the well-settled standards favoring liberal amendment of pleadings. Without even acknowledging the controlling authorities providing that an amendment should be allowed so long as it alleges colorable grounds for relief, defendants demand that the Court engage in a burdensome examination of a vast spectrum of facts and evidence, in what amounts to a proposed trial on the papers, simply to decide a motion to amend the pleadings.

In connection with this proposed (and entirely improper) inquiry into the ultimate merits of the claims, defendants urge the Court to draw unwarranted conclusions from selective facts and evidence favored by defendants, and to disregard plaintiffs' allegations, facts and evidence wholesale, based on alleged conflicts with other sources of information (which may or may not even qualify as evidence). In every instance, defendants urge the Court to accept defendants' preferred interpretations of the record, and to draw every imaginable inference in their favor, even though plaintiffs are entitled to the benefit of all inferences at this stage of the litigation.

To be sure, the Court need not, and should not, enter the rabbit hole defendants have constructed, whether for purposes of deciding the present motion to amend, or defendants' renewed motion to dismiss.1 To the contrary, the Court's inquiry in the present context focuses solely on whether the proposed amended pleading presents a colorable grounds for relief that is not patently frivolous. Because it clearly does, and other factors also demonstrate that justice so requires, plaintiffs' motion to amend should be granted.

II. ARGUMENT

Defendants' opposition is conspicuous in its failure to engage plaintiffs' request for leave to amend in accordance with the liberal standards applicable to such proposed amendments under Rule 15(a). Instead, defendants urge that the Foreign Sovereign Immunities Act (FSIA) requires the Court to engage in a trial-like weighing of the evidence and evaluation of the ultimate merits of plaintiffs' claims, simply to determine whether an amendment to conform the pleadings to that evidence should be allowed at the preliminary motion to dismiss phase. Not surprisingly, the standard of review defendants advocate is manifestly incorrect, under both Rule 15(a) and the FSIA.

A. Plaintiffs' Amended Pleading Presents "Colorable Grounds for Relief"

Pursuant to Rule 15(a), leave to amend "shall be freely given when justice so requires."

Fed. R. Civ. P. 15(a). As the Supreme Court has entreated, "this mandate is to be heeded."

Foman v. Davis, 371 U.S. 178, 182 (1962). Accordingly, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Williams v. Citigroup, Inc., 659 F.3d 208, 213 (2d Cir. 2011) (emphasis supplied). Consistent with this standard, the Court's inquiry under Rule 15(a) focuses solely on whether the plaintiff's proposed pleading presents a colorable claim that is not patently frivolous, and does not involve an extensive evaluation of the ultimate merits of the claims and theories set forth in the proposed pleading. Arbuckle Mut. Ins. Co. v. National Union Fire Ins. Co., 1995 U.S. Dist. LEXIS 11, at *8 (S.D.N.Y. Jan. 4, 1995) ("[W]hen a proposed amendment raises a colorable claim, a comprehensive legal analysis should be deferred"); Chace v. Bankers Trust Co., 1990 U.S. Dist. LEXIS 17353, at *7-8 (S.D.N.Y. Dec. 18, 1990) ("On a motion for leave to amend, the court need not finally determine the merits of a
proposed claim or defense, but merely satisfy itself that it is colorable and not frivolous.”)


The fact that the present claims implicate the FSIA does not alter the “colorable grounds for relief” standard of review applicable to plaintiffs’ motion to amend under Rule 15(a).

Indeed, as a court in this district observed in rejecting FSIA-based futility arguments analogous to those advanced by the defendants here:

On a Rule 15 motion, any inquiry into the merits of the claim is very limited. To overcome objections of futility the plaintiff must merely show that it has at least colorable grounds for relief.

Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 1996 U.S. Dist. LEXIS 10430 (S.D.N.Y. July 24, 1996). Consistent with that standard, the Zappia court granted plaintiffs leave to amend to present allegations relating to additional facts learned in discovery, even though it remained unclear whether those allegations sufficiently alleged a basis of jurisdiction under the FSIA. Id.

Here, plaintiffs’ proposed amended pleading provides a comprehensive statement of plaintiffs’ claims predicated upon: (1) the attributable tortious acts of individual agents of the Saudi government, who provided direct assistance and support to the September 11th hijackers, in the United States and elsewhere; and (2) the attributable tortious acts of the Saudi government’s charity alter-egos and agents, including the SHC itself, involving their provision of material support and resources directly to al Qaeda for more than a decade leading up to the September 11th attacks. MTA at 4. As discussed at greater length in plaintiffs’ opposition to defendants’ renewed motion to dismiss, the allegations of the proposed amended pleading describe in detail the U.S.-based tortious acts of agents of the Saudi government in support of the September 11th attacks (including Omar al Bayoumi, Fahad Al Thumairy, Osama Basnan, Saleh al Hussayen, U.S.-based employees of the Kingdom’s Ministry of Islamic Affairs, and U.S. branches of the Kingdom’s charity alter-egos). MTD Opp. at 10-17. The amended pleading’s allegations concerning those tortious actors’ status as agents or alter-egos of the Saudi government are, in turn, detailed and well-supported. MTD Opp. at 17-18. Further, the allegations of the amended pleading also describe how the tortious acts of the Saudi government’s agents directly assisted the 9/11 hijackers in their heinous mission, and how the acts of the Kingdom’s charity alter-egos provided al Qaeda with the resources necessary to carry out the attacks. MTD Opp. at 22-25.

These allegations concerning the direct support provided by agents of the Saudi government to the 9/11 hijackers and al Qaeda present claims that are far from “frivolous,” and more than sufficient to state a “colorable grounds for relief” within the ambit of the FSIA’s tort exception. See 28 U.S.C. § 1605(a)(5) (providing that U.S. courts have jurisdiction “in any case” against a foreign state “for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state” or one of its employees or agents); see also Doe v. Bin Laden, 663 F.3d 64 (2d Cir. 2011) (Doe II) (finding allegations that Afghanistan provided material support to al Qaeda satisfied
requirements of tort exception for 9/11 claims, and affirming the denial of Afghanistan’s motion to dismiss under FSIA). Indeed, the defendants’ own extensive arguments relating to the ultimate merits and import of the parties’ “evidence” reinforce this conclusion. In a word, were plaintiffs’ allegations “frivolous” and thus insufficient to state “a colorable grounds for relief,” defendants would not need to spend the bulk of their opposition brief attempting to persuade the Court to disregard them on the basis of other, purportedly conflicting, evidence.

In sum, because plaintiffs’ amended pleading most clearly presents colorable grounds for relief, the proposed amendment is authorized by Rule 15(a).

B. Defendants Do Not Contest That The Proposed Amendment Presents The Most Efficient Means To Conform The Pleadings To The Evidence

Defendants also fall entirely to address the range of practical considerations raised in plaintiffs’ motion that overwhelmingly favor plaintiffs’ proposed amendment. In this regard, plaintiffs noted in their motion to amend that the allegations relevant to their claims against defendants presently reside in at least nine separate complaints, and numerous RICO and More Definite Statements. MTA at 1-3. Plaintiffs further noted that those allegations have been supplemented over the course of these proceedings by numerous evidentiary filings, and would be further augmented by extensive additional evidence plaintiffs intended to file in support of their opposition to defendants’ renewed motion to dismiss. Id. In light of these considerations, plaintiffs argued in their motion to amend that their proposed amendment “represents the most practical means.” MTA at 3, to offer a “focused statement of the factual allegations and evidence,” id. at 12, and “provide the clearest possible record for further proceedings” in this litigation. Id. at 2.

Defendants do not even attempt to rebut these important points, which further demonstrate that “justice so requires” plaintiffs’ proposed amendment. See Fed. R. Civ. P. 15 (Federal Rules of Civil Procedure should be construed and administered to “secure the just, speedy, and inexpensive determination of every action and proceeding”).

C. Defendants’ Undue Delay And Prejudice Arguments Are Without Merit

Defendants’ half-hearted arguments that plaintiffs’ proposed amendment should be denied on the basis of alleged “undue delay” or potential “prejudice” are entirely without merit. For example, defendants’ suggestion that plaintiffs “unduly delayed in seeking leave to file” the amended pleading rests entirely on their contention that “a large majority of the allegations in the pleading were available to plaintiffs from publicly available sources when this case was litigated before Judge Casey.” MTA Opp. at 6. The defendants go on to assert that approximately 70% of the allegations in plaintiffs’ amended pleading “contain either no factual information at all or information from sources publicly available in 2004 or earlier.” Id. These arguments suffer from a number of obvious defects.

First, even accepting defendants’ statistical analysis at face value, it merely serves to confirm that approximately 1/3 of the allegations of the amended pleading are based on information that was not available to plaintiffs during the proceedings before Judge Casey. That represents an extensive amount of new evidence, and there is no rational basis under Rule 15(a) to deny plaintiffs leave to amend their pleadings to include that additional information.

Second, the fact that the amended pleading includes allegations relating to evidence that was available at the time of the proceedings before Judge Casey is to be expected. Once again, the objective of plaintiffs’ amended pleading is to provide a comprehensive statement of the facts and evidence supporting plaintiffs’ claims. Given that goal, the amended pleading includes allegations that appeared in plaintiffs’ earlier pleadings, and facts set forth in extrinsic materials filed during the proceedings before Judge Casey. For that reason, it is entirely natural that the
amended pleading contains extensive allegations relating to evidence that was disclosed before 2005, and the defendants’ “analysis” proves nothing.

Third, the allegations based on evidence that was not previously available are particularly significant. For instance, plaintiffs’ amended pleading presents extensive allegations relating to the tortuous acts of Omar al Bayoumi, an agent of the Saudi government who provided direct support to the 9/11 hijackers from within the United States. Those allegations are based on a range of information, including approximately 52 documents consisting primarily of FBI reports and witness statements and other U.S. intelligence reports. Of note, 43 of those documents were made publicly available in 2005 or later, after the proceedings before Judge Casey concluded. A chart identifying further evidence that was released after 2004, and relied upon in preparing the amended pleading, is attached hereto as Exhibit “A.”

Finally, defendants’ passing argument relating to potential “prejudice” hardly warrants comment. On that issue, the entirety of defendants’ argument is contained in a single sentence, in which they say they are “primarily concerned” about potential delay in the resolution of their motion to dismiss. MTA Opp. at 8. However, briefing on plaintiffs’ motion to amend and defendants’ motion to dismiss will conclude simultaneously, pursuant to an agreement between the parties, so no such potential for delay exists.

D. Even For Purposes Of Defendants’ Renewed Motion To Dismiss Under The FSIA, Plaintiffs Are Under No Burden To Produce Evidence In Support Of Their Allegations

Defendants also err in their characterizations of the burden regime governing this Court’s evaluation of their motion to dismiss under the FSIA, which is in any case distinct from the framework governing the evaluation of plaintiffs’ motion for leave to amend. See supra Sec. A.

Initially, it is important to note that defendants’ opposition does not offer any focused statement of the burden-shifting regime applicable to motions to dismiss under the FSIA, or how the procedural setting of the dispute impacts the applicable burdens (as was true of their renewed motion to dismiss). Instead, defendants sprinkle fragmentary language referencing the nature of FSIA “burdens” throughout their briefs, completely out of context and without regard for the procedural postures of the cases cited. The result is a schizophrenic collage of inconsistent standards, selectively invoked to serve particular arguments.

For example, defendants at times acknowledge (correctly) that plaintiffs may meet their burden through allegations satisfying the requirements of the tort exception. See, e.g., MTA Opp. at 9 (“Under the Second Circuit’s rule, Plaintiffs must properly allege ‘that the torts committed by [Defendants] occurred in the United States.’”) (“Accordingly, Plaintiffs must allege [a tortious act by a Saudi agent] while acting within the scope of his office or employment.”). However, where confronted with unambiguous factual allegations demonstrating the applicability of the tort exception, defendants eschew that (correct) standard, urging instead that plaintiffs are required to support their allegations with “evidence.” Id. at 2. When such evidence is offered (to include affidavits of members of the 9/11 Commission and 9/11 Joint Inquiry, FBI and intelligence reports, and like materials), defendants pivot yet again, arguing that the Court should simply disregard it, based on defendants’ view that it is inconsistent with other evidence, favored by defendants.4 Id. at 9-19.

As the thorough discussion of the analytical framework for deciding motions to dismiss under the FSIA presented in plaintiffs’ opposition to the renewed motion to dismiss confirms, MTD Opp. at 21-28, defendants’ articulation of the nature of plaintiffs’ burden is entirely inaccurate, and the novel trial on the papers they propose is most clearly inappropriate (even in the context of the Court’s resolution of defendants’ renewed motion to dismiss). As a primary matter, defendants have not presented any affirmative evidence of their own, such as an affidavit,

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4 Defendants’ motion to dismiss thus rests on the contention that a plaintiff in an FSIA case is required to: (1) prove its claims; (2) by unequivocal and definitive evidence; (3) at the motion to dismiss phase; (4) without the benefit of discovery or a hearing; (5) even where the foreign state defendant has raised no competent challenge to the plaintiffs’ allegations or evidence.
directly refuting any of plaintiffs' allegations. At best, defendants point to alleged contradictions between plaintiffs' allegations and statements in government reports and other materials. But merely pointing to such inconsistencies does not serve to raise a competent factual challenge to plaintiffs' allegations. Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123, 1132 (D.C. Cir. 2004). As a result, plaintiffs' allegations must be accepted as true, and all reasonable inferences drawn in plaintiffs' favor, in deciding defendants' renewed motion to dismiss. Saudi Arabia v. Nelson, 507 U.S. 349, 351 (1993); Robinson v. Gov't of Malaysia, 269 F.3d 133, 140 (2d Cir. 2001).

Even if defendants could be credited as having met their burden of production to raise a competent factual challenge to certain of plaintiffs' allegations, plaintiffs have more than met any potential burden required of them in response. As surveyed in detail in their opposition to defendants' renewed motion to dismiss, plaintiffs have presented particularized facts (through both their amended pleading and averment of facts and evidence) in support of their allegations that agents of the Kingdom provided direct support to the September 11th hijackers and al Qaeda, from within the United States and elsewhere. Plaintiffs have also presented extensive evidence (spanning over 4,000 pages) including affidavits and sworn testimony, intelligence reports, diplomatic cables, and other materials that support their particularized factual allegations. Such facts and evidence more than satisfy any burden of production plaintiffs might be subject to in the present pre-discovery setting. Robinson, 269 F.3d at 141-43; Moran v. Saudi Arabia, 27 F.3d 169, 172 (5th Cir. 1994) ("Once a prima facie showing of immunity has been made, the plaintiff seeking to litigate in the district court bears the burden of coming forward with facts showing that an exception applies"); Human Rights in China v. Bank of China, 2003 U.S. Dist. LEXIS 16436, at *4 (S.D.N.Y. 2003) (same). Furthermore, any conflicts that may exist between the

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1 For example, defendants have not presented the Court with an affidavit denying that Omar al Berrum was an agent or employee of the Saudi government, as alleged in plaintiffs' pleadings.
Kingdom of Saudi Arabia for any culpability for the events of September 11, 2001 or the funding of al Qaeda. In their most recent filing, defendants argue that this sentence represents an “emphatic, considered finding” that requires the Court to ignore the affidavit testimony of actual members of the 9/11 Commission. MTA Opp. at 13.

The affirmations and statements of the 9/11 Commissioners who have squarely and unambiguously addressed the issue confirm that the Kingdom’s proposed interpretation of this isolated sentence is plainly incorrect, and that the sweeping conclusions the Kingdom asks the Court to draw from it are baseless. Indeed, 9/11 Commission members Bob Kerrey and John Lehman have both filed affidavits emphatically rejecting the Kingdom’s characterizations of the Commission’s findings, and confirming that “the 9/11 Commission did not exonerate Saudi Arabia for the events of September 11, 2001.” Affirmation of John F. Lehman at ¶ 4 (ECF No. 2927-3). Interviewed in the wake of the recent filing of the Lehman and Kerrey Affirmations, 9/11 Co-Chair Lee Hamilton joined the chorus of Commissioners rejecting Saudi Arabia’s misrepresentations concerning the Commission’s findings and report, telling CNN that “the commission never claimed to give the final word on Saudi involvement and that sentence was written in [Hamilton’s] words very carefully to allow for the remaining questions.” See CNN Transcript, available at http://www.cnn.com/TRANSCRIPTS/1502/04/aoc.02.html.

The record now available confirms that the “remaining questions” the sentence was “very carefully” drafted to allow include those raised by plaintiffs’ claims against the Kingdom of Saudi Arabia. Of particular note, the authoritative historical account of the 9/11 Commission recounts that the staff members who investigated the evidence pertaining to Saudi government involvement in the 9/11 attacks “felt strongly that they had demonstrated a close Saudi government connection to the two hijackers in San Diego,” consistent with plaintiffs’ claims here. Aver. ¶ 191. The evidence supporting this “close Saudi government” connection to the hijackers encompassed “explosive material” concerning the actions of “Omar al Bayomi, the Saudi ‘ghost employee’ who played host to the hijackers in San Diego, and Fahad al-Thumairy, the shadowy Saudi diplomat in Los Angeles.” Exh. 44. The affidavit testimony of Secretary Lehman and Senator Graham is consistent with the conclusions of these investigators, and further demonstrates the plausibility of plaintiffs’ allegations. See Affirmations at ECF Nos. 2927-2 and 2927-3.

In sum, defendants’ characterizations of the 9/11 Commission investigation and report are grossly inaccurate, inconsistent with the testimony and statements of the actual members of the 9/11 Commission, and in conflict with historical accounts of the Commission’s work.

2. The Record Conclusively Establishes That Omar al Bayomi Was an Agent of the Saudi Government

The Kingdom’s contention that “plaintiffs fail properly to allege that Al Bayomi was an agent of Saudi Arabia” is equally baseless. As reflected in plaintiffs’ amended pleading and discussed in their opposition to defendants’ renewed motion to dismiss, plaintiffs’ express allegation that al Bayomi was an agent of the Saudi government is supported by at least thirteen separate categories of evidence. MTD Opp. at 16. This evidence includes the express assertion by Dallah Avco, al Bayomi’s ghost employer, that al Bayomi was an employee of the Saudi government at all relevant times. Id. The additional evidence, documenting the nature and scope

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5 A more recent government report, issued by the 9/11 Review Commission, further confirms that plaintiffs’ theories relating to the various actions of Omar al Bayomi and Fahad al Thumairy have not been remotely debunked by the FBI, and that the government’s investigation of the matter remains open. Specifically, in a passage addressing the evidence pertaining to al Bayomi and al Thumairy, “the Review Commission notes that there is ongoing internal debate within the FBI between the original PENTTBOM team and the substitute teams. The Review Commission recommends that the FBI leadership review both perspectives and continue the investigation accordingly.”
of al Bayoumi’s pervasive dealings with Saudi officials and offices, and the conclusions of U.S. officials who examined al Bayoumi’s relationship to the Saudi government, amply support Dallah Aveco’s express statement on the issue.

Defendants’ challenge to plaintiffs’ extensive allegations demonstrating al Bayoumi’s status as an agent of the Kingdom focuses almost entirely on an irrelevant question – whether al Bayoumi was a Saudi intelligence agent. MTA Opp. at 2, 9-12, 19. Of course, the pertinent question is whether plaintiffs have adequately alleged that al Bayoumi was an agent of the Saudi government, not whether he was an intelligence agent specifically. And on the question that matters, defendants have admitted the point, arguing in their brief that the evidence relating to al Bayoumi’s relationship with Dallah Aveco “is consistent with Al Bayoumi’s being a PCA [Saudi Civil Aviation Authority] employee.” MTA Opp. at 11. This admission settles the matter.

Defendants’ remaining arguments relating al Bayoumi’s status as an agent of the Kingdom, concerning the significance of certain aspects of the FBI’s investigations of al Bayoumi and weight to be afforded to the conclusions of U.S. officials, do not withstand scrutiny. For example, defendants attach significance to the fact that the FBI’s first investigation of al Bayoumi in 1998-99 was closed. MTA Opp. at 12. But the fact that the investigation was closed, purportedly because the report that prompted it turned out to be inaccurate, simply does not say anything about al Bayoumi’s relationship to the Saudi government.


The possibility of [Basnan] being affiliated with the Saudi Arabian Government or the Saudi Arabian Intelligence Service is supported by [REDACTED] ... indicating he succeeded Omar Al-Bayoumi and may be undertaking activities on behalf of the Government of Saudi Arabia.”

Exh. 51. A FBI special agent describes Basnan and al Bayoumi as “the closest of friends” and indicates that Basnan was in contact with senior al Qaeda member and key facilitator for the 9/11 attacks, Ramzi Binalshibh, at least a year before the attacks. Exh. 33.

Moreover, a September 4, 2002 FBI report detailing Fahad al Thumairy’s relationship with Bayoumi and 9/11 hijackers Hazmi and Mihdhar also supports al Bayoumi’s status as an agent of the Kingdom, acting on behalf of the Saudi government:

San Diego investigation indicated that [Bayoumi] has extensive ties to the Saudi government. He was being supported in the U.S. with a stipend from his employer, the Saudi Arabian Civil Air Administration, and/or the Saudi government. There is speculation that [Bayoumi] could be a Saudi intelligence officer based on numerous factors and circumstances. Therefore, there remains the possibility that the meeting was planned or [Bayoumi] was directed by someone at the Saudi Consulate to meet the two hijackers at the restaurant in LA.

Exh. 35.

Defendants’ related request that the Court simply ignore Senator Graham’s testimony identifying al Bayoumi as a Saudi agent should be disregarded, under the theory that his affidavit presents “conclusions, not facts,” MTA Opp. at 13, further underscores the folly of their attempted trial on the papers. While that characterization of the testimony is incorrect, the argument ignores that Senator Graham is more than qualified to offer opinion testimony, based
on his direct involvement in leading the 9/11 Joint Inquiry, personal familiarity with the relevant intelligence reports, and decades of experience in intelligence matters. See Fed. R. Evid. 702.9

3. The Kingdom's Individual Agents Engaged in Tortious Conduct in Support of the 9/11 Attacks

Again preferring their own carefully selected evidence, and ignoring other aspects of the record, defendants implausibly argue that the allegations in the amended pleading (and inferences to be drawn from those allegations) fail to sufficiently allege that al Bayoumi, al Thumairy, Basnan, or Saleh al Hassayen, engaged in any tortious actions.10 As was true of the nearly identical arguments offered in their renewed motion to dismiss, defendants’ criticisms of the sufficiency of plaintiffs’ pleadings relating to the tortious acts of these Saudi agents ignore the specific content of plaintiffs’ allegations, and the logical inferences that necessarily flow from those allegations.11 They also rest on defendants’ mistaken view that plaintiffs are required to prove their allegations through trial-phase evidence at the pleading phase.

As a preliminary matter, the Second Circuit has already confirmed the sufficiency of the allegations relating to al Bayoumi’s tortious activities in support of the 9/11 attacks, through its ruling restoring Dallah Avco to the case. O’Neill v. Ass’t Trust Regy., 714 F.3d 659, 679 (2d Cir. 2013). In that ruling, the Court recognized that plaintiffs’ claims and theories of jurisdiction relating to Dallah Avco rested on plaintiffs’ allegation that it “provided ‘cover employment’ for al Bayoumi while he was in the United States and allegedly supporting two September 11, 2001 hijackers.” Id. The court concluded that “plaintiffs’ allegations suggest that Dallah Avco may have directed its activities, related to Bayoumi’s cover employment, toward the United States,” and “suggest a closer nexus [than presented by allegations against other defendants] between [Dallah Avco’s] alleged support of al Qaeda and the September 11, 2001 attacks.” Id. In so holding as to Dallah Avco, the Court necessarily endorsed the sufficiency of plaintiffs’ underlying allegations that al Bayoumi engaged in tortious acts in support of the September 11th attacks.

While the Second Circuit’s prior ruling conclusively resolves the issue, an examination of defendants’ arguments relating to the sufficiency of the allegations relating to al Bayoumi’s mental state serves to illustrate the deeply flawed approach they take in evaluating plaintiffs’ pleadings. Defendants begin by arguing that the specific allegation presented in plaintiffs’ amended pleading that an FBI agent involved in the investigation stated that al Bayoumi “had knowledge” of the 9/11 plot should be ignored, MTA Opp. at 16, even though they elsewhere invoke the conclusions of other unidentified FBI agents in support of their arguments. Id. at 1, 2, 12, 13, 16, 18, 19. From there, defendants assert that the pleading as a whole is deficient as to al Bayoumi’s state of mind, without even addressing the nature or the relationships and actions described in the amended pleading, or the obvious inferences that arise from those allegations.

In fact, plaintiffs’ extensive allegations concerning the nature of al Bayoumi’s interactions with Fahad al Thumairy, Khalid al Mihdhar, Nawaf al Hazmi, Anwar al Aulaqi, and Osama Basnan most certainly give rise to a clear inference that al Bayoumi acted with the requisite state of mind in providing material support to the September 11th hijackers. Most simply, the allegations confirm that al Bayoumi met in the morning with al Thumairy (a known terrorist with ties to al Qaeda) at the Saudi consulate; proceeded from that meeting to a restaurant where he met al Hazmi and al Mihdhar (two of the September 11th hijackers); promptly offered to help those al Qaeda hijackers settle in San Diego; assisted them in making contact with Aulaqi.
(another al Qaeda member) immediately upon their arrival in San Diego; and provided various forms of assistance that enabled them to begin preparation for the September 11th attacks, despite being ill-prepared for their mission. From these and other allegations demonstrating their extensive and focused engagements with a range of al Qaeda members, and contemporaneous provision of assistance to the 9/11 hijackers, an obvious inference that al Bayoumi acted knowingly (and that al Thumairy directed al Bayoumi to assist the hijackers), readily arises.12

Defendants also quibble over the “substantiality” of the assistance provided by al Bayoumi, but here again their arguments simply fail to meet the content of the pleadings and facts of record. Plaintiffs clearly allege that al Bayoumi intervened at the most crucial moment, immediately after the hijackers arrived in the United States, and provided a broad array of assistance “which enabled them to establish themselves in the United States despite their lack of preparation for that transition, and to begin their operational preparations for the attacks.” The substantiality of this assistance is self-evident from the 9/11 Commission’s observation, quoted in the amended pleading, that al Hazmi and al Mihdhar were “ill prepared for a mission in the United States” and therefore “unlikely that Hazmi and Mihdhar – neither of whom, in contrast to the Hamburg group, had any prior exposure to life in the West – would have come to the United States without arranging to receive assistance from one or more individuals informed in advance of their arrival.”13 Aver. ¶¶ 146-47.

12 Secretary Lehman has specifically testified that “Fahd al Thumairy and Omar al Bayoumi knew that al Mihdhar and al Hazmi were bad actors who intended to do harm to the United States.”

13 Further, the various forms of assistance al Bayoumi provided to the hijackers all constitute “material support and resources” within the meaning of the Anti-Terrorism Act. As such, his actions were not only tortious, but criminal under federal law. 18 U.S.C. § 2339A. (“The term ‘material support or resources’ means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include crewmen), and transportation, except medicine or religious materials.”)

F. Plaintiffs Have Adequately Alleged The Charities’ Alter-Ego Status

Defendants are further mistaken in their claim that plaintiffs have failed to adequately allege that the Kingdom’s da’awa organizations (charities) are alter-egos of the Saudi government. Beyond the fact that the amended pleading expressly alleges that those entities are alter-egos, it offers specific factual allegations concerning the means through which the Kingdom exercises its complete control over those entities. For example, plaintiffs allege that the charities receive a vast majority (if not all) of their funding from the Saudi government; that senior Saudi officials head the charities; that the charities operate under the supervision of the Ministry of Islamic Affairs; that the charities conduct field operations under the direct supervision of the local Saudi embassies; that employees of the charities view themselves to be government employees; and that the charities have described themselves as “instrumentalities” of the Kingdom in this litigation. MTD Opp. at 26-27.14

Although the allegations of plaintiffs’ amended pleading are themselves sufficient to carry their burden on this point, they have also presented expert testimony demonstrating that the da’awa organizations operate under the direct and rigid control of the Saudi government, both within the Kingdom and abroad. See Affirmation of Evan Francois Kohlmann, ECF No. 2927-9. According to Kohlmann, the da’awa organizations serve as the primary “government arm” through which the Kingdom fulfills its self-described duty to propagate Islam throughout the world under the direct supervision of the Ministry of Islamic Affairs.

14 Here again, the Kingdom has never come forward with any affirmative evidence, such as an affidavit, refuting any aspect of plaintiffs’ allegations concerning the charities’ alter-ego status, or the Kingdom’s complete domination of those charities. For that reason alone, plaintiffs’ allegations that the charities are alter-egos of the Saudi government must be accepted as true, and plaintiffs are entitled to all reasonable inferences arising from those allegations. Nelson, 507 U.S. at 351; Robinson, 269 F.3d at 140. Moreover, even if the Court were to conclude that the allegations are insufficient to establish alter-ego status as a matter of law, plaintiffs have presented sufficient detail and facts to raise a reasonable expectation that discovery will provide additional evidence relevant to the issue. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).
G. The Allegations Concerning The U.S.-Based Tortious Acts Of The Saudi Charities Satisfy The Entire Tort Rule

Contrary to the Kingdom’s assertions, plaintiffs’ amended pleading also adequately alleges tortious acts by the Saudi da’awa organizations in the United States, sufficient to satisfy the entire tort rule. For instance, plaintiffs’ amended pleading cites the U.S. government’s express statement that it’s “investigation [of al Haramain] shows direct links between the U.S. branch and Usama bin Laden.” Exh. 206. See also Aver. ¶ 490; Exh. 204 (U.S. Treasury officials stating that al Haramain “field offices and representatives operating throughout Africa, Asia, Europe and North America appeared to be providing financial and material support to the al Qaida network.”) (emphasis supplied). Similarly, plaintiffs’ amended pleading describes numerous federal terrorism investigations of the U.S. offices of the MWL, IIBO, and WAMY, relating to their funding of al Qaeda from within the United States.15

Relatively, in suggesting that plaintiffs’ allegations concerning the charities’ intimate collaborations with al Qaeda outside of the United States are irrelevant, defendants err in two significant respects. First, the additional allegations concerning the charities’ terrorist activities outside of the United States confirm the intimacy of their collaborations with al Qaeda, and thus reinforce the plausibility of plaintiffs’ express claims that they used their U.S. offices to advance al Qaeda’s terrorist agenda, as specifically alleged in the amended pleading. Second, so long as the defendant engages in some tortious act in the United States, the Second Circuit’s entire tort rule is satisfied, and the defendant is not entitled to immunity with respect to related tortious activities carried out from beyond U.S. borders. See O’Neill v. Saudi Joint Relief Comm., 714 F.3d 109, 117 (2d Cir. 2013) (claims are barred by the entire tort rule because defendants are not alleged to have “committed a single tortious act in the United States” and “all of the tortious conduct” allegedly occurred abroad) (emphasis in original). Thus, because the charities provided support to al Qaeda from their U.S. offices as part of their global campaign to advance al Qaeda’s targeting of the United States, all of their tortious acts in support of al Qaeda are encompassed within the scope of the claims authorized by the tort exception.16

II. Plaintiffs’ Claims Are Not Barred By The Discretionary Function Clause Or Modest Causation Requirements Of The FSIA

Defendants’ opposition to plaintiffs’ motion to amend also rehashes the misguided discretionary function and causation arguments presented in their renewed motion to dismiss. Plaintiffs have thoroughly addressed those arguments in their opposition to the renewed motion to dismiss, MTD Opp. at 28–30, and incorporate those discussions herein by reference.

III. CONCLUSION

For these reasons, plaintiffs respectfully submit the Court should exercise its discretion and grant plaintiffs leave to file their proposed amended pleading.

Dated: April 10, 2015

Respectfully submitted,

[Signature]
Stephen A. Cozen, Esq.
Elliott R. Feldman, Esq.
Sean P. Carter, Esq.
Scott Tarbuton, Esq.
COZEN O’CONNOR
1900 Market Street
Philadelphia, PA 19103
(215) 665-2000

Attorneys for Federal Insurance Plaintiffs

Jodi W. Flowers, Esq.
Robert T. Haefer, Esq.
MOTLEY RICE LLC
27 Bridgeview Boulevard
P. O. Box 1792
Mount Pleasant, SC 29465
(843) 216-9000

15 The U.S.-based torts of the Kingdom’s individual agents also satisfy the entire tort rule. Significantly, their acts also were carried out pursuant to the program of support administered by the Ministry of Islamic Affairs, of which the charities’ torts were a related part.
-and-

Andrea Bierstein, Esq.
SIMMONS HANLY CONROY, LLC
112 Madison Avenue
7th Floor
New York, NY 10016
(212) 784-6400

Attorneys for Burnett Plaintiffs and Euro Brokers
Plaintiffs

James P. Kreindler, Esq.
Justin T. Green, Esq.
Andrew J. Maloney III, Esq.
KREINDLER & KREINDLER LLP
750 Third Avenue
32nd Floor
New York, NY 10017
(212) 687-8181

Attorneys for Ashton Plaintiffs

Jerry S. Goldman, Esq.
ANDERSON KILL, P.C.
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000

Attorneys for O'Neill Plaintiffs

Chris Leonardo, Esq.
ADAMS HOLCOMB LLP
1875 Eye Street, NW
Suite 810
Washington, DC 20006
(202) 580-8803

- and -

Howard N. Feldman
Dickstein Shapiro LLP
1825 I Street NW
Washington, DC 20006
(202) 420-2200

Attorneys for Cantor Fitzgerald
Plaintiffs

Robert M. Kaplan, Esq.
FERBER CHAN ESSNER &
COLLER, LLP
530 Fifth Avenue, 23rd Floor
New York, NY 10036-5101
(212) 944-2200

Attorneys for Continental Casualty
Plaintiffs
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Plaintiffs’ Reply in Further Support of Their
Motion to File a Consolidated Amended Pleading of Facts and Evidence as to the Kingdom of
Saudi Arabia and the Saudi High Commission for Relief of Bosnia & Herzegovina was filed
electronically this 10th day of April 2015. Notice of this filing will be sent to all parties in 03
MDL 1570 by operation of the Southern District of New York’s Electronic Case Filing (“ECF”)
system. Parties may access this filing through the Court’s ECF system.

/s/
J. Scott Tarbott
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: TERRORIST ATTACKS ON SEPTEMBER 11, 2001

Civil Action No. 03 MDL 1570 (GDB)
ECF Case

This document relates to:
Federal Insurance Co., et al v. al Qa'ida, et al., Case No. 03-cv-6978
Fidgiant Insurance Co., et al v. Kingdom of Saudi Arabia, et al., Case No. 03-cv-8591
Pacific Employers Insurance, et al v. Kingdom of Saudi Arabia, et al., Case No. 04-cv-7216
Thomas Burnett, Sr., et al v. Al Baraka Inv. & Dev. Corp., et al., Case No. 03-cv-9849
Euro Brokers Inc., et al v. Al Baraka, et al., Case No. 04-cv-7279
Kathleen Ashton, et al v. al Qaeda Islamic Army, et al., Case No. 02-cv-6977
Estate of John P. O'Neill, Sr., et al v. Kingdom of Saudi Arabia, Case No. 04-cv-1922
Continental Casualty Co., et al v. al Qaeda, et al., Case No. 04-cv-5970
Cantor Fitzgerald Assocs. v. Al Qaeda Invest. Co., Case No. 04-cv-7065

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OF THE KINGDOM OF SAUDI ARABIA AND THE SAUDI HIGH COMMISSION FOR RELIEF OF BOSNIA & HERZEGOVINA

Lawrence S. Robbins (LR8917)
Roy T. Engleart, Jr.
ROBBINS, RUSSELL, ENGLEART, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500
(202) 775-4510 (fax)

Michael K. Kellogg (MK4579)
Mark C. Hansen (MH0359)
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036-3209
(202) 326-7900
(202) 326-7999 (fax)

Attorneys for the Saudi High Commission for Relief of Bosnia & Herzegovina

Attorneys for the Kingdom of Saudi Arabia

April 10, 2015

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INTRODUCTION

Plaintiffs have accused the Kingdom of Saudi Arabia ("Kingdom") and the Saudi High
Commission ("SHC") of perpetrating a terrorist attack against the United States that killed
thousands of innocent people. After 12 years, they have failed to turn those inflammatory and
irresponsible accusations into viable claims supported by evidence sufficient to defeat the
Kingdom's and the SHC's presumptive immunity from suit. The United States, after repeated
investigations, has repudiated attempts to recast a terrorist attack by al Qaeda as an unprovoked
act of war by a foreign state that is also an important ally; and a comprehensive review,
mandated by Congress and performed in close coordination with the FBI, recently found that
there is "no new information . . . since the 9/11 Commission 2004 report [that] would change the
9/11 Commission's findings regarding responsibilities for the 9/11 attacks."1

Plaintiffs can offer no document or witness that supports their attempt to invoke this
Court's jurisdiction. They rely instead on affidavits from former politicians with no personal
knowledge of any relevant events; on colorful but immaterial hearsay statements from convicted,
mentally ill terrorist Zacarias Moussaoui; and on thousands of pages of recycled, patently
inadmissible speculation. They fail to establish any genuine issue of fact as to three dispositive
points: first, there is no evidence of any tortious act by the Kingdom or the SHC in the United
States; second, there is no evidence that the Kingdom or the SHC knowingly or directly supported
the September 11 attacks; and, third, there is no evidence that the Kingdom or the SHC caused
those attacks. Plaintiffs have had enough chances to make their case. This Court should reject
their (previously waived) requests for discovery and grant the motions to dismiss.

ARGUMENT

I. Plaintiffs' Case Is Both Legally and Factually Insufficient

Plaintiffs' allegations (whether in their operative complaint or in the new pleading they
seek belatedly to file) are legally insufficient to defeat the presumptive immunity from suit that
raised those two procedurally distinct challenges, legal and factual, in their Motion to Dismiss, see Dkt. No. 2894, at 12, 13-18. Plaintiffs have now shown that they can withstand neither.

A. Plaintiffs' Complaint and Averment Cannot Withstand a Legal Challenge

To survive a legal challenge under the FSIA, Plaintiffs must show that they have properly
pleaded, under the standards of Federal Rule of Civil Procedure 8, facts which if proved would
fit their case within an exception to foreign sovereign immunity. That familiar pleading standard
is applied with special care when sovereign immunity is at stake, so that a "foreign government

Defendants showed in their opening memorandum that Plaintiffs' operative complaint --
the First Amended Complaint filed by the Federal Insurance Plaintiffs 11 years ago, which all
the other Plaintiffs stipulated was representative of their claims -- is legally insufficient. See Dkt.
No. 2894. Plaintiffs do not seriously dispute the point. Instead, they rely on a filing styled an
"Averment of Facts and Evidence" that is -- except for its title -- identical to the "Proposed
Amended Pleading" they have sought leave to file. Plaintiffs' Pleading is composed almost
entirely of recycled material repeated at greater length and is legally futile. See Dkt. No. 2928.
Nothing changes because Plaintiffs have restyled it as an "Averment" rather than a "Pleading."

B. Plaintiffs Must Present Evidence – Not Mere Allegations – To Withstand a Factual Challenge Under the FSIA

To survive a factual challenge under the FSIA, Plaintiffs must come forward with admissible evidence to establish the subject matter jurisdiction of this Court. The Kingdom and the SHC must initially make out a prima facie defense by establishing foreign sovereign or instrumentality status, see Virtual Countries, Inc. v. Republic of South Africa, 300 F.3d 230, 241 (2d Cir. 2002), but Plaintiffs admit that here. Plaintiffs thus have the “burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted.” In re Terrorist Attacks on September 11, 2001, 714 F.3d 109, 114 (2d Cir. 2013) (internal quotations omitted). Because Plaintiffs have not met that burden, the Kingdom and the SHC can and should prevail on the basis of their uncontroverted prima facie showing.

Plaintiffs must come forward with evidence that is admissible, competent, and sufficient to “create a material issue of fact” on key jurisdictional issues. Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 253 (2d Cir. 2000); Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1011 (2d Cir. 1986) (explaining that a court “ruling on a [s] 12(b)(1) motion may not rely on ‘conclusory and hearsay statements’”). Useful guidance is provided by cases applying Federal Rule of Civil Procedure 56 at summary judgment. See Kamen, 791 F.2d at 1011; RSM Prod. Corp. v. Friedman, 643 F. Supp. 2d 382, 396 n.9 (S.D.N.Y. 2009), aff’d, 387 F.3d 72 (2d Cir. 2010).

Plaintiffs incorrectly contend (at 7-9) that they can carry their burden with their averments. The counsel who signed that document do not claim – and plainly do not have – personal knowledge of its contents. Thus, aside from its shortcomings as a pleading, the averments are not the type of evidence required to meet or rebut a motion to dismiss.

Averment is no response to Defendants’ factual challenge. See, e.g., Friedman, 643 F. Supp. 2d at 369 n.9 (no affidavits without personal knowledge on motion to dismiss under the FSIA); see generally Patterson v. County of Oneida, 375 F.3d 206, 219 (2d Cir. 2004) (pleadings create no genuine issue of fact unless verified with personal knowledge).

In seeking to rest on the mere allegations of their Averment, Plaintiffs erroneously draw analogies (at 7-8) to challenges to personal jurisdiction by non-sovereign defendants. FSIA plaintiffs, as explained by Virtual Countries and Terrorist Attacks, have a special burden to come forward with evidence to survive a motion to dismiss. See, e.g., Smith Rocke Ltd. v. Republica Bolivariana de Venezuela, No. 12-cv-7316 (LGS), 2014 WL 2887075, at *1 (S.D.N.Y. Jan. 27, 2014) (“While typically a Court does not wade into the facts or merits on a motion to dismiss and accepts well-pleaded allegations as true, the inquiry is different in a challenge . . . under the [FSIA].”). That is why the Averment is not enough.

II. Plaintiffs Have Neither Plead nor Provided Evidence on Key Points

Plaintiffs’ inability to answer either one of the legal and factual challenges raised by the Kingdom and the SHC is highlighted by focusing on several specific points that they must both plead and support by admissible evidence in order to invoke this Court’s jurisdiction. Those required points consist of (a) a tortious act by an agent of the Kingdom in the United States; (b) that is distinct from any discretionary function; and (c) that caused the 9/11 attacks, and so caused Plaintiffs’ injuries. Plaintiffs have neither pleaded nor proved those things.

1 Mukaddam v. Permanent Mission of Saudi Arabia, 136 F. Supp. 2d 257 (S.D.N.Y. 2001), on which Plaintiffs rely (at 8), is not to the contrary. In that case, the sovereign defendant raised only a legal challenge. See 136 F. Supp. 2d at 260 (“Defendant sought dismissal on the complaint alone.”). The Court thus reserved any factual challenge. See id. at 261-62. Here, the Kingdom has expressly raised a factual challenge. see Dkt. No. 2984, at 12, 13-18. Plaintiffs have attempted (unsuccessfully) to come forward with evidence to meet that challenge, see Dkt. No. 2928, at 2 & n.1, and so this Court should consider whether Plaintiffs have met their burden.

---

2 See First Am. Compl. ¶¶ 63, 181, Federal Ins. Co. v. al Qaid, No. 03-cv-6978 (filed Sept. 30, 2005) (ECF No. 772) (the Kingdom is a “foreign state” and the SHC is its “instrumentality”), Aver. ¶ 4, 5.
A. Plaintiffs Have Failed To Satisfy the Entire-Tort Rule

The entire-tort rule requires Plaintiffs to plead and to provide evidence that an agent of the Kingdom or the SHC committed a tortious act in the United States. See Terrorist Attacks, 714 F.3d at 117.1 Because the act must be tortious, Plaintiffs must establish that such an agent assisted the 9/11 hijackers despite knowing that the hijackers planned an act of terrorist violence. See Dkt. No. 2928, at 14 & n.17. The Kingdom and the SHC have already shown that Plaintiffs’ Proposed Amended Pleading (identical to their Averment) fails to state a claim on these issues. See id. at 9-24. Plaintiffs also have no evidence to support their assertions.3

1. Hussayen. Plaintiffs offer no evidence concerning Abdul Rahman Hussayen, who they allege stayed at the same hotel as three of the 9/11 hijackers the night before the attacks. The paragraphs of their Averment relevant to him are ¶¶ 231-240; according to their Index, the only Exhibits that support those paragraphs are two newspaper articles. See Index 5 (citing Ind. Exhs. 64 and 65). Neither article is remotely admissible, see infra pp. 17-18, and even if they were admissible they are both useless to Plaintiffs.

First, neither article states that Hussayen held any official position with the Kingdom in September 2001; both refer to his later appointment as a minister in 2002. See Ind. Exh. 64, ¶703; Ind. Exh. 65, ¶708. Plaintiffs thus have no evidence that Hussayen was a Kingdom official at the time, much less acting in any official capacity.7

Second, neither article states that Hussayen did anything wrong. Both clarify that Hussayen was “accused of no wrongdoing” and that “there is no evidence that he had contact with” the three hijackers. Ind. Exh. 64, ¶703; see Ind. Exh. 65, ¶709. Even Plaintiffs’ Averment does not allege that Hussayen did or said anything to assist the September 11 plot. They instead rely on the mere allegation of his presence in the hotel.

Plaintiffs also mischaracterize the decision of the Second Circuit ordering jurisdictional discovery against Hussayen. See In re Terrorist Attacks on September 11, 2001, 714 F.3d 659, 679 (2d Cir. 2013), cert. denied, 134 S. Ct. 2870 (2014). That decision did not address Hussayen’s alleged status as an agent of the Kingdom and did not find that Plaintiffs had properly alleged any tortious act in the United States. Instead, the court of appeals ordered jurisdictional discovery against Hussayen personally based on his allegedly intentional “indirect support” for al Qaeda as a director of Al Rajhi Bank. Id. It found that Plaintiffs had plausibly alleged such intent because he allegedly “switch[ed] hotels” to stay near the three hijackers. Id. It did not find that Plaintiffs had plausibly alleged he did anything to help the hijackers at that time.8

2 Plaintiffs rely (at 15-16) on Hussayen’s motion to dismiss, in which his counsel argued that he was a “governmental official during the entire period in question.” Dkt. No. 83, at 6. Hussayen’s declaration did not say he was an official of the Kingdom itself in 2001. See Dkt. No. 83-2, ¶¶ 5, 6 (stating that, from 1974 to 2002, after retiring from a post with the Kingdom’s Council of Prime Ministers, Hussayen worked for several charitable organizations; Plaintiffs have not argued that any of those charities were alter egos of the Kingdom).

3 In an opinion that assumed Hussayen was an official, the Court has already found that the claims against him “alleged conduct . . . outside the scope of his government duties.” In re Terrorist Attacks on September 11, 2001, 718 F. Supp. 2d 456, 475 (S.D.N.Y. 2010), aff’d, 714 F.3d 109 (2d Cir. 2013).

4 The Second Circuit stated that Plaintiffs had “suggested the possibility that [Hussayen] might have provided direct aid to members of al Qaeda.” 714 F.3d at 679. Allegations that “do not permit a court to infer more than the mere possibility of misconduct” do not state a claim for relief. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (emphasis added).
In any event, a plausible inference that the director of a private bank knowingly aided al Qaeda is not enough for Plaintiffs on this motion. They must come forward with evidence that Hussayen, acting on behalf of the Kingdom, helped the hijackers in the United States. It is now clear that Plaintiffs have no support at all—neither hearsay newspaper articles—nor their allegation that Hussayen “decided” to switch hotels to stay in the same hotel as at least three of the hijackers.” Dkt. No. 2926, at 11. The Second Circuit’s decision thus does not help them.

2. **Al Bayoumi.** Plaintiffs offer no evidence to support their contention (rejected by the FBI, see Dkt. No. 2928, at 12-13 & n.15) that Omar Al Bayoumi was an intelligence agent of the Kingdom. They err in relying on the affirmation of Senator Bob Graham, who lacks personal knowledge, see infra pp. 13-14; on purported FBI or “intelligence” reports, inadmissible on their face and relying on anonymous sources, see infra pp. 17-18; and on books and news articles that are not even colorable evidence, see id. Plaintiffs cannot even support their (facially inadequate) allegations that Al Bayoumi did too little work for the aviation company Dallah Aero or made too many phone calls to the Saudi consulate—much less their assertions that unnamed “source[s]” and “witnesses” thought he was a “spy.” Aver. ¶ 187-189.

Plaintiffs also offer no evidence that Al Bayoumi provided any material assistance to Nawaf Al Hazmi or Khalid Al Mihdhar, the two individuals he met in San Diego who later participated in the September 11 attacks. Plaintiffs cannot meet their burden merely by showing that Al Bayoumi helped the two men find an apartment or held a welcome party for them. See Dkt. No. 2928, at 13-16. Their assertions that he did more lack any meaningful support.\(^9\)

Finally, Plaintiffs also have no evidence that, when Al Bayoumi allegedly helped Al Hazmi or Al Mihdhar, he knew they were planning a terrorist attack. The 9/11 Commission and the FBI both credited Al Bayoumi’s denial of such knowledge, and Plaintiffs’ own affiant Senator Graham has agreed. See Dkt. No. 2928, at 12-13, 14-15 & n.20, 16, see also 9/11 Review Report 101-03 (recently concluding that no new evidence changes this finding). Citing an FBI memorandum, Plaintiffs assert that “U.S. officials” have “concluded” that Al Bayoumi was “tasked” to help Al Hazmi and Al Mihdhar. Dkt. No. 2926, at 12 (citing Ind. Exh. 35, ¶397-399). That is a mischaracterization. The memorandum states that it is “unknown” whether a meeting between someone whose name is redacted (Plaintiffs apparently believe it was Al Bayoumi) and the two men “was a planned event or a chance meeting.” Ind. Exh. 35, ¶398 (emphasis added).\(^10\) Plaintiffs’ other attempts to support their allegations that Al Bayoumi knowingly assisted the 9/11 plot likewise fall short.\(^11\) Their unsupported claims about Al Bayoumi remain—as the United States said in 2009—“inadequate to sustain [their] burden.”\(^12\)

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\(^9\) Plaintiffs cite (at 12 n 13) ¶ 177 of their Averment for the proposition that Al Bayoumi provided “significant funds” to the hijackers and “paid their rent.” Their Index states that ¶ 177 is supported by Averment Exhibits 35, 37-39, and 49-51. Those documents contain conclusory statements attributed to unnamed FBI agents. None contain any statement from personal knowledge about any transfer of funds from Al Bayoumi to the two men. Likewise, Plaintiffs

\(^10\) Plaintiffs also cite ¶ 162 of their Averment to support their statement that Al Bayoumi was “tasked” to help the two men. The Averment itself is not evidence. Other than the mischaracterized memorandum, the only sources they cite to support ¶ 162 are Senator Graham’s book and an anonymous blog post. Index 3, 4.

\(^11\) Those consist of an anonymous quote attributed to a “top FBI official” in a newspaper, Aver. ¶ 152; Ind. Exh. 26; and Lehman’s speculation that “al Bayoumi knew that Al Mihdhar and Al Hazmi were bad actors,” Carter Exh. 3, ¶ 8. Neither is evidence. See infra pp. 13-14, 17-19.

\(^12\) Brief for the United States as Amicus Curiae 16 n.4, Federal Ins. Co. v. Kingdom of Saudi Arabia, No. 08-840 (U.S. filed May 29, 2009) (“U.S. Amicus Br.”).
3. **Al Thumairi.** Plaintiffs have no evidence that Fahad Al Thumairi did anything to help Al Hazmi or Al Mihdhar. Plaintiffs assert (at 12) that Al Bayoumi helped the two at Al Thumairi’s direction, but that assertion is grounded solely in (a) affirmations with no basis in personal knowledge, see infra pp. 13-14; and (b) the FBI memorandum discussed above, which states only that “there remains the possibility that . . . [redacted] was directed by someone at the Saudi Consulate to meet the two hijackers at the restaurant in L.A.” Ind. Exh. 35, ¶398. That in 2002 the FBI thought there was a “possibility” that someone had done something wrong – a possibility that the 9/11 Commission later rejected as “speculation,” 9/11 Report 216-17 – is not evidence of anything, much less enough to pierce foreign sovereign immunity.

4. **Bassnan and “Unnamed Officials.”** Plaintiffs have no evidence that Osama Bassnan was a “Saudi agent.” Dkt. No. 2928, at 14. They cite only a largely redacted passage from a purported FBI memorandum. See id.13 Their further assertions that Bassnan and unnamed “Saudi officials” purportedly “funneled” money “through [Al] Bayoumi and his family,” id., are based solely on Senator Graham’s book. None of this is evidence.

5. **Unnamed Charity Officials.** Plaintiffs further argue (at 15) that “U.S.-based Saudi officials working in . . . al Haramain, WAMY, MWL, and the IIRO” help them satisfy the entire-tort rule. That argument fails because those charities are not alter egos of the Kingdom, see infra pp. 10-11, and because Plaintiffs cannot show that any charity employee committed a tortious act inside the United States. Plaintiffs offer only three paragraphs of legally insufficient allegations about conduct by the charities in this country. See Dkt. No. 2928, at 24. Even after discovery from those four charities, Plaintiffs cannot support those allegations with evidence. As for MWL, IIRO, and WAMY, Plaintiffs can point to no act in the United States at all. As for Al Haramain, Plaintiffs have only hearsay statements that funds raised here went to militants in Chechnya – there is no showing that any went to al Qaeda or helped fund the 9/11 attacks.15

**B. Plaintiffs Have Failed To Establish that the Charity Defendants Were Alter Egos of the Kingdom**

Plaintiffs also cannot attribute the actions of the charity defendants to the Kingdom. Most of the relevant charities (MWL, IIRO, WAMY, and Al Haramain) are non-governmental organizations, not instrumentalities of the Kingdom. Even for those charities that are instrumentalities (SHC, the Red Crescent, and the SJRC) – and even if Plaintiffs were correct that all of the charities are instrumentalities – they must still persuade this Court to “overrule[e] the presumption of independent status” between sovereign and instrumentality, an unusual act to which courts have a “strong aversion.” EM Ltd. v. Republic of Argentina, 473 F.3d 463, 478 (2d Cir. 2007) (internal quotations omitted). That requires proof of the sovereign’s “day-to-day control” of the instrumentality. Doe v. Holy See, 557 F.3d 1066, 1079-80 (9th Cir. 2009) (per curiam). See Dkt. No. 2928, at 21, see also U.S. Amicus Br. 17 n.14 (explaining in 2009 that Plaintiffs had failed to overcome “the law’s respect for corporate personality, which the FSIA recognizes”).

13 Plaintiffs' Index identifies no document even purportedly supporting Averment ¶ 424, which concerns the MWL and the IIRO. Plaintiffs assert (at 15) that some of their allegations concern the IIRO’s operations “on a global basis,” but such generalized characterizations do not meet their burden. The Index identifies only two newspaper articles purportedly supporting Averment ¶ 462, which concerns WAMY. See Index J, 14 (citing Ind. Exhs. 64, 188). Those articles describe only investigations, not any specific acts by WAMY in U.S. territory.

15 Plaintiffs' Index identifies five documents relevant to Plaintiffs’ allegations concerning Al Haramain’s U.S. activities (at Aver. ¶¶ 492-501). See Index 15-16 (citing Ind. Exhs. 206-210). None helps them. See Ind. Exh. 206 (press release; hearsay), Ind. Exh. 207 (diplomatic cable; hearsay), Ind. Exh. 208-209 (tax records and corporate documents; immaterial), Ind. Exh. 210 (search warrant affidavit that discusses alleged transfers of funds to Chechen militants, with no suggestion of a link to al Qaeda; also hearsay).
Plaintiffs attempt (at 26-27) to carry that heavy burden with the Kohlmann Affirmation; but that is inadmissible because Kohlmann lacks relevant expertise and recites hearsay without meaningful analysis. See infra pp. 15-16. Further, his Affirmation does not suggest day-to-day control of the charities by the Kingdom. It instead addresses control of the non-governmental charities' branch offices by their own central headquarters. That is immaterial.

C. Plaintiffs’ Claims Are Barred by the Discretionary-Function Exemption

Plaintiffs have also neither pleaded nor proved any allegedly wrongful act that is not embraced by the discretionary-function exemption. Judge Casey concluded 10 years ago that the Kingdom’s “treatment of and decisions to support Islamic charities” were discretionary functions. In re Terrorist Attacks on September 11, 2001, 349 F. Supp. 2d 765, 803-04 (S.D.N.Y. 2005), on recon. in part, 392 F. Supp. 2d 539 (S.D.N.Y. 2005), aff’d, 538 F.3d 71 (2d Cir. 2008). Nothing would support a contrary conclusion today. To the contrary, Plaintiffs’ heavy emphasis on so-

Kohlmann’s discussion of the SHC, SJRC, and Red Crescent is much shorter and features little if any discussion of day-to-day control. See Carter Exh. 9, ¶¶ 110-129.

7 See Carter Exh. 9, ¶¶ 39-54 (Al Haramain); id. ¶¶ 65-68 (MWL); id. ¶¶ 81-90 (IIRO); id. ¶¶ 104-109 (WAMY). Kohlmann’s sole attempt to show day-to-day control of one non-governmental charity by “Saudi government officials,” id. ¶¶ 96-99 (unredacted version), involves only minor financial assistance and the resolution of a dispute.

8 Plaintiffs also make (at 27-28) the remarkable argument that, because promoting Islam is a “core policy and function” of the Kingdom, and the non-governmental charities promote Islam, the charities somehow must be legally identical to the Kingdom. The case they cite for this novel proposition, Garb v. Republic of Poland, 440 F.3d 579 (2d Cir. 2006), says nothing of the kind. That case held that Poland’s Ministry of the Treasury could not be sued under the “‘takings’ exception” to foreign sovereign immunity because it was part of the Republic of Poland rather than a mere “agency or instrumentality.” Id. at 598. Garb reached that conclusion only after considering Polish law showing that the Ministry “does not hold property separately from the Polish State.” Id. at 595 (internal quotations omitted). Plaintiffs have presented nothing remotely similar here.

9 Judge Casey likewise determined that the SHC’s alleged actions were discretionary functions and that “undisputed evidence” submitted by the SHC showed that all of the SHC’s decisions were guided by the Kingdom’s policies regarding Bosnia-Herzegovina. In re Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539, 555 (S.D.N.Y. 2005), aff’d, 538 F.3d 71 (2d Cir. 2008).

called “Wahhabism” as a purported link between the Kingdom, the non-governmental charities, and various terrorist organizations only underscores how unsuitable their claims are for judicial resolution. It would be deeply inappropriate for this Court to consider evidence of the Kingdom’s efforts to support and promote the Islamic religion and to provide charity in accordance with the dictates of that religion as somehow showing wrongful conduct.

In attempting to distinguish Judge Casey’s ruling, Plaintiffs assert (at 28-29) that they have provided evidence of “operational level” acts that “directly support[ed] the 9/11 hijackers and al Qaeda.” (Emphasis omitted.) They have no such evidence. The allegations concerning Hussayen, Al Bayoumi, Al Thumairy, and Bannan are insufficient for the reasons already given. Their assertion (at 28) that the charity defendants provided “funding for training camps and facilities used for the attacks” is unsupported by any citation. It appears to rest on the same mischaracterization of hearsay within hearsay that is endemic to Plaintiffs’ submissions.

D. Plaintiffs Have Failed To Establish Causation

Even if Plaintiffs had established a tortious, nondiscretionary act by the Kingdom or the SHC within the territory of the United States — which they have not done — they still have not met their burden to plead and prove that the September 11 attacks were “caused by [that tortious act].” 28 U.S.C. § 1605(a)(5). Plaintiffs argue that they must only establish a vaguely defined “reasonable connection” between an act of the Kingdom or the SHC and the attacks. To the contrary, when Congress uses ordinary language such as “because of,” “results from,” “based on,” or “by reason of” to establish a causal requirement, it thereby “imposes a
requirement of but-for causation.” Barrage v. United States, 134 S. Ct. 881, 889 (2014). The phrase “caused by” in § 1605(a)(5) is of the same kind and should be given the same effect.21

Even if they had evidence of some tort by the Kingdom or the SHC, Plaintiffs could neither establish but-for causation nor trace any reasonable connection to the September 11 attacks. Plaintiffs argue: (1) that the Kingdom or the SHC conspired with or abetted the 9/11 attackers, which requires a showing of intent they have not made, see supra pp. 5-9; (2) that Al Bayoumi, Al Thumairy, or Basnan provided substantial funding for the attacks, which again they have not shown, see id.; or (3) that Plaintiffs can rely on alleged overseas actions by charities – allegations barred by the entire-tort rule, unsupported by evidence, and (for charities other than the SHC) immaterial in light of Plaintiffs’ failure to establish alter-ego status, see supra pp. 10-11. They do not come close to establishing the extraordinary proposition that the September 11 attacks were “caused by,” 28 U.S.C. § 1605(a)(5), the Kingdom or the SHC.

III. Plaintiffs’ Purported Evidence Is Immaterial and Inadmissible

Plaintiffs have attempted to meet their burden of production by submitting thousands of pages of inadmissible and irrelevant materials. If they had a single piece of evidence that would stand up in court, they would highlight it in their papers. Instead, they focus heavily on witnesses manifestly lacking personal knowledge, and on newspaper articles, blog posts, and similar multiple hearsay. They thus reveal that they have nothing better.

A. The Carter Exhibits Are Immaterial and Inadmissible

1. The Politicians’ Affirmations. Plaintiffs rely on affirmations from three

21 Kilburn v. Socialist People’s Libyan Arab Jamahirya, 376 F.3d 1123, 1129 (D.C. Cir. 2004), and Raou v. Republic of Sudan, 461 F.3d 461, 472 (4th Cir. 2006), on which Plaintiffs rely, predates Barrage, and in any event both courts affirmed that an FSLA plaintiff must establish proximate cause. See Kilburn, 376 F.3d at 1127-30; Raou, 461 F.3d at 473. For the reasons given in text, Plaintiffs can no more establish proximate causation than they can but-for causation.

22 Otherwise, his statements would be inadmissible hearsay because the Kingdom and the SHC had no “opportunity” for “cross-examination” Fed. R. Evid. 804(b)(1)(B).

considered it “okay to lie in court as part of jihad,”23 as well as evidence of his mental illness.24

The Court can be spared the burden and spectacle of such a proceeding. Even if (again for argument’s sake) Moussaoui’s statements were true, they would be immaterial. He says that in Afghanistan, in or around 1998, as part of a group that did not yet call itself al Qaeda,25 he made a computerized list of alleged “donors” to bin Laden. Carter Exh. 5, at 7-11. He received some information for the list orally from other members of the group, see id. at 9:25-10:1, and some from documents that he needed help to interpret.26 He claims the list included the SHC and certain members of the Kingdom’s royal family (though not the Kingdom itself). See id. at 12:1-4. Nevertheless, he does not claim to know the dates or purposes of any alleged donations, he cannot link any to the 9/11 attacks, of which he admittedly has no personal knowledge, and, dispassionately, he never suggests that any alleged donation occurred in the United States.27

3. The Kohlmann Affirmation. Plaintiffs rely on an affirmation by Evan Francois Kohlmann, a self-styled “International Terrorism Consultant” who has written a book about al Qaeda and worked as a part-time analyst for NBC News. Carter Exh. 9, at 1. Plaintiffs seek to use his testimony to contend that various Islamic charities were legal alter egos of the Kingdom.

23 Trial Tr. 2382:11-24, Moussaoui (Mar. 27, 2006).
24 Addendum to Evaluation of Adjudicative Competence 1-2, attached as Exh. C to Standing Counsel’s Memorandum Regarding Rule 11 Considerations, Moussaoui (July 24, 2002) (Dkt. No. 556) (under seal) (“paranoia,” “thought disorder,” and “persecutory and grandiose delusions”).
25 See Carter Exh. 5, at 7:22-25 (stating that it was then called “Group bin Laden”).
26 See id. at 10:1-3 (“Some of the document[s] were in Arabic, so I would ask them to – to tell me what does that mean exactly.”)
27 Moussaoui also contends that he carried letters between bin Laden and members of the Saudi Royal family in 1998. See Carter Exh. 7, at 23:8-25:17. Moussaoui denies knowing the contents of those alleged letters, see id. at 27:14-19; his statements about them are meaningless. Finally, he conjures up a spurious plot to shoot down Air Force One, again in 1998, involving an individual who purportedly worked in the Saudi Embassy in Washington, D.C. See Carter Exh. 8, at 9:9-21. Even Moussaoui admits that no such plot was ever “put into action,” id. at 10:10, and that he never met with the other individual in the United States, id. at 12:14-19.

Kohlmann, however, does not claim to be an expert in Saudi law or about Saudi charitable institutions, and gives no example where he has written or testified on such matters in the past. Further, Kohlmann’s affirmation contains practically no analysis; it merely quotes and characterizes hearsay sources, followed by generalized conclusions. Before an expert can use hearsay, the proponent of his testimony must show that “experts in the particular field” would “reasonably rely,” Fed. R. Evid. 703, on such sources. That is not so here, and Plaintiffs make no attempt to show otherwise. Also, the Second Circuit has disapproved “‘calling] an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony ’” Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 136 (2d Cir. 2013) (citation omitted), cert. dismissed, 135 S. Ct. 42 (2014), see also United States v. Mejia, 545 F.3d 179, 197 (2d Cir. 2008) (expert violates Rule 703 by “‘repeating hearsay evidence without applying any expertise whatsoever ’”) (citation omitted). Kohlmann’s testimony has previously been rejected for this reason,28 and should be again here.

4. The Remaining Carter Exhibits. The remaining Carter exhibits include:

(a) the Kingdom’s Basic Law, royal decrees, and speeches and newspaper articles concerning the importance of the Islamic religion to the Kingdom and its support of charitable activities abroad, Carter Exhs. 10-16;

(b) an unauthenticated document that purports to be a “Matrix of Threat Indicators” used in assessing detainees at Guantanamo Bay, which mentions the SHC, Carter Exh. 17;

(c) a declaration from a former member of al Qaeda that he received assistance from the SHC in Bosnia in 1994 or 1995, before he was imprisoned in 1997, Carter Exh. 18;

(d) a report of a German prosecutor alleging that in 1993 and 1994 the SHC transferred $28.5

28 See Straus v. Credit Lyonnais, S.A., 925 F. Supp. 2d 414, 446 (E.D.N.Y. 2013) (excluding parts of Kohlmann’s report that were “nothing more than a recitation of secondary evidence” as to which he “made no attempt to bring his expertise to bear”); United States v. Amari, 541 F. Supp. 2d 945, 955 (N.D. Ohio 2008) (excluding his testimony about terrorist recruitment materials because the jury could “view [any admissible] materials” for itself), aff’d, 695 F.3d 457 (6th Cir. 2012), cert. denied, 133 S. Ct. 1474 (2013).
million to an organization called the Third World Relief Agency, Carter Exh. 19, which the 9/11 Report mentions in one sentence as having been linked to Osama bin Laden at an unspecified time; see 9/11 Report 58.

(e) an audit, or minutes for an audit, of the SHC’s books in Sarajevo that does not mention terrorism, but that alleged deficiencies in the SHC’s accounting, Carter Exh. 20;

(f) a radio interview of two U.S. senators in which they urge the Kingdom to do more to stop funds from flowing to terrorist groups, Carter Exh. 21;

(g) an op-ed from October 2001 that speculates without basis whether the Kingdom had advance knowledge of the 9/11 attacks and then concludes: “[t]he current view among Saudi-watchers is probably not,” Carter Exh. 22; and

(h) a web page about a press conference from the Kingdom’s Embassy describing increased cooperation with the United States in cutting off funds to terrorist groups, Carter Exh. 23.

None of these materials is evidence against the Kingdom or the SHC. All are plainly immaterial.

B. The Index Exhibits Are Inadmissible and Immaterial

Plaintiffs have also submitted 273 documents (more than 4,000 pages) they inaccurately call “Evidence Supporting [their] Averments.” Exhibit A to this Reply sets forth which of the following eight points apply to which documents.30

1. Unsworn Hearsay. 219 (80%) of the documents are unsworn hearsay such as newspaper articles, web pages, and blog posts. Courts do not consider such material in Rule 56 proceedings. See, e.g., Century Pac., Inc. v. Hilton Hotels Corp., 328 F. Supp. 2d 206, 217 (S.D.N.Y. 2007) (“Newspaper articles offered for the truth of the matter asserted are inadmissible hearsay.”), aff’d, 354 F. App’x 496 (2d Cir. 2009). Similarly inadmissible are documents purportedly from various government agencies, many of which are heavily redacted.

2. Hearsay Without Cross-Examination. 38 (14%) of the documents are hearsay statements made under oath but without cross-examination, and so inadmissible. See Fed. R. Evid. 804(b)(1)(B); supra p. 14 n.22. Plaintiffs also have not shown that any of the declarants

30 The percentages listed above add up to well over 100% because many (indeed, nearly all) of Plaintiffs’ documents have more than one of the listed flaws.
7. **Events Outside the United States.** 178 (65%) of Plaintiffs’ 273 documents relate solely to events that allegedly occurred outside the territory of the United States. Those alleged events are immaterial under the entire-tort rule. See supra p. 5 & n.4. Notably, every document that mentions the SHC falls into this category – consistent with Plaintiffs’ repeated failure to allege any tortious act by the SHC within the United States.

8. ** Allegations of Indirect Funding.** 194 (70%) of the documents relate solely to alleged **indirect** funding of terrorist groups – allegations that the Kingdom “funded . . . those who funded . . . those who carried out the September 11th attacks.” *Barnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9, 20 (D.D.C. 2003). Examples include documents concerning the Kingdom’s or its nationals’ support for various Islamic charities, or concerning transfers of funds from the charities to terrorist organizations. Plaintiffs’ attempt to hold the Kingdom liable for funding charitable organizations or for failing to police alleged leaks of funding from those organizations to terrorists is barred by the discretionary-function exception. See supra pp. 11-12.

**IV. Jurisdictional Discovery Has Been Waived Twice and Is Unjustified**

Contrary to Plaintiffs’ apparent belief (at 8-9), jurisdictional discovery under the FSIA is not available to them automatically or as a matter of right. Instead, “in the FSIA context, ‘discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.’” *EM Ltd.*, 473 F.3d at 486 (quoting *First City, Texas–Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998)). The exercise of this Court’s discretion should, moreover, be part of a “delicate balancing” process that takes into account a “‘sovereign’s . . . legitimate claim to immunity from discovery.’” *Rafidain Bank*, 150 F.3d at 176 (quoting *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992)); *Freund v. Republic of France*, 592 F. Supp. 2d 540, 564 (S.D.N.Y. 2008) (denying discovery based in part on “[a]ppropriate deference to principles of international comity.”), *aff’d*, 391 F. App’x 939 (2d Cir. 2010). Plaintiffs themselves admit (at 9 n.10) that “discovery should be limited to disputed facts the Court deems material to the FSIA analysis.”

Accordingly, to properly request discovery, Plaintiffs must – at a minimum – identify “specific facts” into which they will inquire, *EM Ltd.*, 473 F.3d at 486, so that this Court may conduct the appropriate discretionary balancing. They failed to do this before Judge Casey, see Dkt. No. 2894, at 22-23 & n. 14, and likewise fail to do it in their present Opposition. Instead, they argue (at 9 n.10) that they should receive “discovery as to any fact the Court deems to be in dispute and material to the FSIA analysis,” and assert without citation that at some point they made a similar request to Judge Casey. Plaintiffs’ request is an inappropriate attempt to burden this Court with sifting through their voluminous filings to find allegations that might warrant inquiry. This Court should find that they have now twice waived jurisdictional discovery.

Even if Plaintiffs had made a more appropriate request for discovery, it would do them no good. There is no basis for further investigation into the facts of September 11, which have been the subject of an extraordinarily thorough investigation across multiple branches of government. The individuals whom Plaintiffs baselessly accuse of complicity, such as Al Bayoumi and Al Thumairy, were all interviewed multiple times, and the Kingdom cooperated in making such witnesses available to the 9/11 Commission and to the FBI. Plaintiffs’ suggestion that, more than 10 years later, they could find new and different evidence is implausible – especially after a recent review found “no new evidence to date that would change the 9/11 Commission’s findings regarding responsibility for the 9/11 attacks.” 9/11 Review Report 117.

**CONCLUSION**

The motion to dismiss should be granted.
Respectfully submitted,

/s/ Michael K. Kellogg
Michael K. Kellogg (MK4579)
Mark C. Hansen (MH0359)
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
Sunner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036-3209
(202) 326-7900
(202) 326-7999 (fax)

Attorneys for the Kingdom of Saudi Arabia

April 10, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of April 2015, I caused copies of the foregoing document to be served electronically pursuant to the Court’s ECF system and by United States first-class mail on any parties not participating with the Court’s ECF system as thereafter advised by the Court.

/s/ Michael K. Kellogg
Michael K. Kellogg
Panel III:

Legal Issues in the South China Sea Controversy

Moderator: John Norton Moore
The Legal Rationale for Going Inside 12

While China conducts innocent passage around real U.S. islands of Alaska, the U.S. is apparently unable to do so around China’s take islands in the South China Sea. The transit by Chinese warships in innocent passage through the territorial sea of Alaska in the Asiatic chain has added another wrinkle to U.S. policy in the South China Sea.

On May 12, The Wall Street Journal reported that Secretary of Defense Ash Carter had asked his staff to “look at options” for exercising the rights and freedom of navigation and overflight in the SCS to include sending maritime patrol aircraft and sending China’s new artificial islands off the coast. Later that month, a P-8 surveillance aircraft with a CNH crew on board, was reportedly warned to “be ready to dodge” from Fiery Cross Reef, as it flew below 12 nm from the feature. Fiery Cross Reef is a Chinese-occupied feature that has been fortified by a massive 2.7 million square meter land reclamation into an artificial island with a 3,110-meter airstrip and harbor works capable of servicing large warships.

Warships and commercial vessels of all nations are entitled to conduct transit in innocent passage in the territorial sea of a rock or island of a coastal state, although aircraft do not enjoy such a right. Ironically, the website POLITICO reported on July 17 that the White House blocked plans by Admiral Harry Harris, Commander, U.S. Pacific Command, to send warships within 12 nm of China’s artificial islands – features that may not even qualify for a territorial sea. By blocking such transits, military officials apparently suggested that the White House faculty accepts China’s unlawful claim to control shipping around its occupied feature in the South China Sea. Senator John McCain complained that the United States was making a “preposterous mistake” by granting the facto recognition of China’s man-made “seven islands” claim.

It is unclear whether features like Fiery Cross Reef are rocks or merely low-tide elevations that are submerged at high tide, and after China has so radically transformed them, it may now be impossible to determine their natural state. Under the terms of the law of the sea, states with ownership over naturally formed rocks are entitled to claim a 12 nm territorial sea. Under the other hand, low-tide elevations in the mid-ocean do not qualify for any maritime zone whatsoever. Likewise, artificial islands and installations also generate no maritime zones of sovereignty or sovereign rights in international law, although the owner of features may maintain a 500-meter vessel traffic management zone to ensure navigational safety.

Regardless of the natural geography of China’s occupied features in the South China Sea, China does not have clear legal title to them. Every feature occupied by China is challenged by another claimant state. Often, states share the same legal borders from China. The United States has no clear legal title to these features. It is not obligated to observe requirements of a territorial or territorial sea. Since the territorial sea is in function of state sovereignty of each rock or island, and not a function of simple geography. If the United States does not recognize any state having title to the feature, then it is not obligated to observe a territorial or territorial sea and may treat the feature as an island. Not only do U.S. warships have a right to transit within 12 nm of Chinese features, they may do so as an exercise of high seas freedoms under article 87 of the Law of the Sea Convention. As a result of the limited regime of innocent passage. Furthermore, whereas innocent passage does not permit overflight, high seas freedoms do, and U.S. naval aircraft lawfully may overfly such features.

In its response, it might be suggested that while the United States may not recognize Chinese ownership of the rocks, it must realize that some country, perhaps one of the coastal states actually located in the vicinity of the feature, has lawful title, and therefore the U.S. Navy is bound to observe a putative territorial sea.

It is possible, however, that there is no state that has lawful title, and indeed the swirling debate and paucity of evidence rendered by claimants suggests this may be the case. Before World War II, few if any of the features were effectively governed by anyone, except Japan, which illegally occupied them during war. Tokyo gave up its claim after World War II. Similarly, actions taken by states after 1945 to some maritime features using armed aggression are prima facie unlawful under article 2(4) of the Charter of the United Nations. Furthermore, actions taken by a state to fortify its claim after there is a dispute are similarly void of legal effect. In any event, the strongest claims appear to flow from the doctrine of self-preservation, which stipulates that lawful possession is assumed by occupiers after they become independent states. Prior to 1945, conquest was a lawful means of acquiring title to territory, so the European colonial powers clearly enjoyed legal title to the features they controlled. The Philippines, Malaysia and Indonesia, and Vietnam derive their title to features from Spain, Great Britain, the Netherlands, and France.

More importantly, even assuming that one or another state may have lawful title to a feature, other states are not obligated to confer upon that nation the right to unilaterally adopt and enforce measures that interfere with navigation, until lawful title is resolved. Indeed, observing any nation’s rules pertaining to features under dispute legitimizes that country’s claim and takes sides. This point is particularly critical for commercial overflight since states already manage international air traffic through the International Civil Aviation Organization and the worldwide air traffic control systems. Finally, there is no policy reason that supports this approach. Given the proliferation of claims over the hundreds of rocks, reefs, shingles and cays in the South China Sea, it if the international community recognizes the maximum theoretic rights generated by each of them, the oceans and airspace will come to look like Swiss cheese and be practically closed off to free navigation and overflight.

Distinguished American historian Samuel Flagg Bemis is called the doctrine of freedom of the seas the “ancient birthright” of the American Republic.[12] This birthright faces its gravest risk since uncontrolled submarine warfare. Woodrow Wilson brought the United States into World War I to vindicate a Fourteen Point program for peace. Point number 2 was for “freedom of navigation.”[13] Similarly, Franklin D. Roosevelt and Winston Churchill signed the Atlantic Charter in 1941 that set forth principles for a new world order—a united nations. Principle Seven committed them to freedom of the seas. Maritime freedoms and the law of the sea are at an inflection point. The United States and the international community must take action now to operate with regularity on, under, and above the surface of the South China Sea; persistently and routinely in the vicinity of China’s artificial islands. Only a normalized presence today will ensure predictability and stability tomorrow.


About James Kraska

Dr. James Kraska is Professor in the Stockton Center for the Study of International Law, where he previously served as Howard S. Levie Chair in International Law from 2008-13. During 2013-14, he was a Mary Denickson McCurdy Visiting Scholar at Duke University, where he taught international law of the sea. He also is a Senior Fellow at the Center for Oceans Law and Policy at the University of Virginia School of Law, Guest Investigator at the Marine Policy Center, Woods Hole Oceanographic Institution, Senior Fellow at the Foreign Policy Research Institute, and a Senior Associate at the Naval War College’s Center on Irregular Warfare and Arma Groups.
CML/17/2009

New York, 7 May 2009

The Permanent Mission of the People’s Republic of China to the United Nations presents its compliments to the Secretary-General of the United Nations and, with reference to the Joint Submission by Malaysia and the Socialist Republic of Viet Nam dated 6 May 2009, to the Commission on the Limits of the Continental Shelf (hereinafter referred to as “the Commission”) concerning the outer limits of the continental shelf beyond 200 nautical miles, has the honor to state the position as follows:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government, and is widely known by the international community.

The continental shelf beyond 200 nautical miles as contained in the Joint Submission by Malaysia and the Socialist Republic of Viet Nam has seriously infringed China’s sovereignty, sovereign rights and jurisdiction in the South China Sea. In accordance with Article 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf, the Chinese Government seriously requests the Commission not to consider the Joint Submission by Malaysia and the Socialist Republic of Viet Nam. The Chinese Government has informed Malaysia and the Socialist Republic of Viet Nam of the above position.


The Permanent Mission of the People’s Republic of China to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.

H.E. Mr. BAN KI-MOON
Secretary-General
The United Nations
NEW YORK
Defense

Obama team, military at odds over South China Sea
Washington maintains the Navy has the right to sail or fly by the series of artificial islands that China is outfitting with military equipment.

By Austin Wright, Philip Ewing and Bryan Bender | 7/31/15 2:54 PM EDT

Protesters brandish placards at a rally in front of the Chinese Consulate in Manila, Philippines. I Getty
Some U.S. naval commanders are at odds with the Obama administration over whether to sail Navy ships right into a disputed area in the South China Sea — a debate that pits some military leaders who want to exercise their freedom of navigation against administration officials and diplomats trying to manage a delicate phase in U.S.-China relations.

The Pentagon has repeatedly maintained it reserves the right to sail or fly by a series of artificial islands that China is outfitting with military equipment. The Navy won’t say what it has or hasn’t done, but military officials and congressional hawks want the U.S. to make a major demonstration by sending warships within 12 miles of the artificial islands and make clear to China that the U.S. rejects its territorial claims.

By not doing so, they charge, Washington is tacitly accepting China’s destabilizing moves, which are seen by U.S. allies in the region such as Japan, the Philippines and Vietnam as highly threatening.

“We continue to restrict our Navy from operating within a 12 nautical mile zone of China’s reclaimed islands, a dangerous mistake that grants de facto recognition of China’s man-made sovereignty claims,” Sen. John McCain, the Republican chairman of the Armed Services Committee, told POLITICO.

Sources in the military and within the administration acknowledge the difference of opinion privately, but would not go on the record to discuss
the differences between Navy leaders and the administration. The internal
debate within the U.S. government comes as leaders of Pacific nations,
including Secretary of State John Kerry and his Chinese counterpart, are
set to convene for a regional security conference next week in Malaysia and
ahead of the state visit to the United States in September of Chinese
President Xi Jinping.

POLITICO PRO
Full coverage of defense policy

The dispute is more than just a naval territorial dispute — there are global
economic implications if China claims ownership of this part of the sea,
which sees trillions in goods shipped between Asia and the rest of the
globe.

It centers on a group of man-made islands in the South China Sea that
China has created by dumping thousands of tons of sand on coral reefs and
shoals. Over the last 18 months, Chinese engineers have created about
3,000 acres of new land, the Pentagon says, where they have deployed
artillery, built aircraft runways and buildings and positioned radars and
other equipment. This week, the chief of the Philippine military, General
Hernando Iriberri, told journalists in Manila it was investigating reports
China had reclaimed three more reefs in the South China Sea.

China claims it has exclusive control over waters hundreds of miles off its
coast, and U.S. officials say Beijing believes the man-made islands
strengthen its claim to the disputed Spratly Islands chain, which China and
several Southeast Asian countries claim as their own.

"China is changing the facts on the ground, literally, by essentially building
man-made islands on top of coral reefs rocks and shoals," Adm. Harry
Harris, head of the U.S. Pacific Command, said last week at the Aspen
Security Forum. “I believe that China’s actions to enforce its claims within the South China Sea could have far-reaching consequences for our own security and economy, by disrupting the international rules and norms that have supported the global community for decades,” Harris warned.

China shot back on Thursday, with a Ministry of Defense spokesman saying it is the United States that is “militarizing” the South China Sea.

“China is extremely concerned at the United States’ pushing of the militarization of the South China Sea region,” the spokesman said, according to Reuters. “Recently they have further increased military alliances and their military presence, frequently holding joint drills.”

The U.S. Navy has so far been deliberately ambiguous about where it has operated in the South China Sea, not responding to questions about where exactly it has operated. When the warship USS Fort Worth encountered a Chinese vessel near the contested Spratly Islands in May, for example, officials declined to say exactly where.

Yet it is Harris, the top U.S. military commander in the region, who in private has been one of the biggest proponents of sailing U.S. warships within 12 miles of the islands, according to a government official directly familiar with his thinking. Harris’ staff did not respond to a request for an interview, but a senior Pentagon official who asked not to be named confirmed the differing viewpoints and Harris’ — and the wider Pacific Command’s — position.

The admiral signaled his view when he appeared before the Senate Armed Services Committee in December, telling lawmakers in answers to a series
of written questions that “it is essential for the U.S. Navy to maintain its presence and assert its freedom of navigation and overflight rights in the South China Sea in accordance with customary international law.”

The artificial islands have added to a broader disagreement between Washington and Beijing over freedom of navigation. The United States and most other countries, citing the United Nations Convention on the Law of the Sea, maintain that a coastal nation has the right to regulate economic activities such as fishing and oil exploration within a 200-mile economic exclusionary zone and that it cannot regulate foreign military forces except within 12 nautical miles off its shores. China, however, has insisted it can regulate economic and military activities out 200 nautical miles.

But in the case of the artificial islands, China has no rights at all, in the view of a senior Pentagon lawyer, who last month urged the U.S. to “not go wobbly on freedom of navigation in the South China Sea.”

Raul Pedrozo, a former legal adviser to the Pacific Command now a deputy general counsel at the Department of Defense, maintained in a journal article published by the East Asia Forum at Australian National University that “man-made islands constructed on submerged features are not entitled to a 12- nautical mile territorial sea. Therefore, US ships and aircraft can legally conduct operations within 12 [nautical miles] of the feature. “

Pedrozo, who said he was providing his personal views and not those of the Department of Defense, concluded his article with a vow.

“The U.S. will not acquiesce in unilateral acts designed to restrict the rights and freedoms of the international community.”

More than $5 trillion worth of international trade, from Middle East oil bound for Asian markets to children’s toys bound for Wal-Mart stores in the U.S., pass through the South China Sea each year. If China can restrict
the passage of ships through what today are considered international waters, that could cause shockwaves for the world economy, U.S. officials warn.

Defense Secretary Ash Carter tried to illustrate this point on a visit to Singapore in May, when he took a flight with reporters over the vital Strait of Malacca, which was crowded with ships traveling between the Indian and Pacific Oceans. On that visit, Carter vowed that the U.S. would continue to observe freedom of navigation everywhere it believes law permits its ships and aircraft to travel.

He took direct aim at China’s man-made island plan. “The United States will fly, sail, and operate wherever international law allows, as U.S. forces do all over the world. America, alongside its allies and partners in the regional architecture, will not be deterred from exercising these rights — the rights of all nations. After all, turning an underwater rock into an airfield simply does not afford the rights of sovereignty or permit restrictions on international air or maritime transit.”

Around the same time, the Navy drew heavy TV news coverage when it sent a P-8 Poseidon patrol aircraft on a flight near the disputed artificial islands — with CNN reporter Jim Sciutto on board. True to form, Chinese air controllers warned the American crew on the radio to turn away from what they called a restricted military zone. The Navy released its own full-length video of the flight, which showed some of the improvements on one island and the crew members listening to the Chinese warnings.

A Pentagon spokesman insisted that the military’s policy remains unchanged.

“The U.S. military has, and will continue to operate consistent with the rights, freedoms, and lawful uses of the sea in the South China Sea,” said Navy Cmdr. William Urban. “Freedom of navigation and overflight is a
linchpin of security, peace and commerce in the Pacific and no claimant should impede lawful activities by others."

But asked about the internal discussion about how to address the 12-nautical mile area around China's artificial islands, he demurred.

"We're not going to discuss specific parameters of the freedom of navigation operations we conduct, or the internal U.S. government decision-making process for these operations."

The National Security Council also declined to discuss the dispute or outline the White House's view, referring questions to the Pentagon.

But the Obama administration is increasingly seen as eager to avoid a confrontation by actually doing so — at least publicly — and Republicans are trying to pressure President Obama ahead of the Chinese leader's visit to more aggressively assert himself in the face of China's controversial behavior.

On Thursday, Sen. Dan Sullivan of Alaska, a freshman Republican on the Armed Services panel, pressed Obama’s nominee for chief of naval operations on the issue at his confirmation hearing.

"There seems to be some confusion in the policy," Sullivan told Adm. John Richardson.

"The administration looks to clearly be sitting on this policy decision," added a congressional aide, "because it would be a bad news story ahead of the Xi visit in September. At what point are our efforts to gain Chinese goodwill and contributions to the international system upended by their very blatant effort to undermine the rules-based order in Asia?"

"We need a robust freedom of navigation plan that includes joint patrols and exercises across the first-island chain, and specifically in the South
China Sea,” the aide added.

But at the same time U.S. military leaders are advocating for something else — for the U.S. Senate to ratify the UN Law of the Sea treaty that it repeatedly cites as as the international framework for navigation of the high seas.

“We undermine our leverage by not signing up to the same rule book by which we are asking other countries to accept,” Gen. Joe Dunford, the new chairman of the Joint Chiefs of Staff, told the Senate earlier this month.
The Lost Dimension: Food Security and the South China Sea Disputes

James Kraska*

I. Introduction

The rationale for establishment of the Exclusive Economic Zone (EEZ) in the United Nations Convention on the Law of the Sea (UNCLOS) has profound implications for the maritime disputes in the South China Sea. The EEZ was created to ensure that coastal subsistence fishing communities had access to offshore fish stocks adjacent to their coast. Developing States joined with a handful of artisanal fishing States such as Iceland to propose a 200-mile zone to protect living marine resources from distant water fishing nations, such as Japan, the Soviet Union, and the United States. As 90 percent of all fish stocks are within 200 miles of shore, the EEZ was designed to safeguard a basic human right to food security. The human right to food security is the lost dimension of the maritime boundary disagreements in the South China Sea.

The legal structure of the EEZ informs the dispute between China on the one hand and the Philippines, Vietnam, Malaysia, Brunei, and Indonesia over sovereign rights and jurisdiction in the South China Sea. In these disputes China plays the role of a distant water fishing nation, as the southern tip of Hainan Island is some 1200 kilometers from the farthest extent of Beijing’s claims in the South China Sea. The maritime zones in UNCLOS are predicated on the concept that the land dominates the sea, so coastal States are entitled to a 12 nm territorial sea over which it exercises sovereignty, a 24 nm contiguous zone for customs purposes, a 200 nm EEZ for exclusive access to living and non-living resources, and a continental shelf of 200 nm or more, over which the coastal State has rights to seabed oil minerals. Each of these zones was codified from customary international law, except the EEZ, which emerged from the mood of decolonization and national sovereignty that permeated the negotiations as well as the drive for food security and economic development.

First, the coastal States surrounding the South China Sea enjoy sovereign rights to the marine resources of their EEZ based on the legal theory of construction of the zone. The EEZ was produced during UNCLOS negotiations that spanned 9 years principally to give coastal States competence to protect subsistence coastal fishing populations, rather than as a zone of national aggrandizement or offshore industrial development. The large coastal populations of Vietnam, the Philippines, and the other States in close proximity to the seashore of the South China Sea are in contrast with China’s physically remote population and distant coastline.

Second, despite physical occupation of selected land features, such as rocks, islets, reefs and cays in the South China Sea, China does not enjoy legal title to territories located there, and therefore lacks concomitant maritime rights to an EEZ generated by them. Regardless of the resolution of the disputes over legal title to the insular rock and island features, however, the five coastal States with large populations in proximity to and adjacent to the South China Sea are entitled to a normal 200-mile EEZ to fulfill the rationale for the origin and purpose of the zone.

II. The Emergence of the EEZ

The process of creation of the EEZ in the United Nations Convention on the Law of the Sea (UNCLOS) provides a unique vantage point from which to evaluate the disputes in the South China Sea. China relies on the theory of discovery and historic title over the water and land features that dot the seascape to lay claim to over 90 percent of the South China Sea. These claims incorporate vast areas of the Exclusive Economic Zone (EEZ) of five neighboring States – Vietnam, the Philippines, Malaysia,
Indonesia, and Brunei – approximately 1.2 m$^2$ of 1.4 m$^2$. China and its five antagonists are party to UNCLOS.

The construction of the regime of the EEZ in the *travaux préparatoires* of UNCLOS, however, suggests that the EEZ was created principally to protect coastal subsistence fishermen from distant water fishing fleets. Yet the founding purpose and function of the regime of the EEZ has been virtually ignored in the South China Sea disputes, to the detriment of the human rights and subsistence of coastal fishing communities. This paper reintroduces the key motivation for creation of the EEZ and places it in the context of contemporary disputes in the region. It concludes that large parts of the EEZs of Vietnam, the Philippines, Malaysia, Indonesia, and Brunei are at risk of being stripped away, circumventing subsistence rights of coastal fishing communities in Southeast Asia and diminishing the regime of the EEZ worldwide.

After World War II, industrial fishing from distant water fleets grew tremendously. Global catch was only 15 million tons in 1938, but by 1989 it had grown to 86 million tons. Beginning in the late 1950s, distant water fishing fleets from the USSR, Japan, and the United States expanded substantially. Large fishing vessels roamed the seas far from their native shores and began to land catch on an industrial scale. Fish stocks declined as factory fleets swept distant coastlines, driving some species to extinction (*UN Doc, A/CONF.62/C.2/SR.27*). Factory ships displaced local fishermen around the world, undermining the human right of food security (*E/C.12/1999/5*). Armadas of factory-fishing vessels capable of staying at sea for months at a time were constructed around enormous deep freezers. Fish catch was brought on board, cleaned, and frozen to market – all from the ship. These commercial vessels incorporated sophisticated technology, including sonar, to search the depths for schools of fish. The degradation of fish stocks prompted some coastal States to combine efforts to resist encroachment by distant water fleets.

In 1952, Chile, Ecuador and Peru signed the *Santiago Declaration* to preserve local fish stocks as sustenance for their coastal populations. This regional declaration affirmed that governments had an “obligation” to “ensure for their peoples the necessary conditions of subsistence…” The coastal States acknowledged a duty to prevent exploitation of marine resources within and beyond their jurisdiction. The States accepted that by virtue of their long coastlines, fish stocks were an “irreplaceable means of subsistence” to their coastal communities. In light of these needs, the governments of Chile, Ecuador, and Peru proclaimed a new norm that coastal States should have exclusive competence to manage living resources seaward to a distance of 200 miles. The Santiago Declaration formed the intellectual and philosophical underpinning for the 200 nm EEZ, which was incorporated into UNCLOS during years of multilateral negotiations in the 1970s.

Before UNCLOS, the 1958 Geneva *Convention on Fishing and Conservation of the Living Resources of the High Seas* recognized the coastal State’s superior interest in the resources adjacent to its coast. The agreement defined conservation of living resources as “the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products.” The special interest of coastal States in the conservation and management of fisheries in adjacent waters was incorporated into the text, allowing them to take “unilateral measures” for conservation on high seas adjacent to territorial waters. It required that if six months of prior negotiations with foreign fishing nations to divide the catch on the adjacent high seas had failed to reach a formula for sharing, the coastal State unilaterally could impose terms on foreign-flagged fishing vessels. It was never clear, however, whether coastal States could prescribe and enforce such rules, which in any event were never broadly implemented by coastal States.[I] Without specific authority to ensure food security, the 1958 treaty was ineffective and, like the other 1958 Geneva Conventions on the law of the sea, largely a disappointment. The *Convention on the Territorial Sea and Contiguous Zone*, for example, had its own shortcomings in that it failed to delimit the breadth of the territorial sea or specify the meaning of “innocent passage.”

The problem of distant water fleets was particularly acute for small island developing states. Foreign-owned distant-water fishing fleets from Japan, the United States, the Soviet Union, and other flag States were taking massive amounts of fish from the waters surrounding small-island developing states such as Fiji (*A/CONF.62/ SR.29*). If the waters near these islands became depleted, distant-water fleets
would move elsewhere, but the inhabitants could not. Exploitation and abuse by States with huge fishing fleets led directly to the establishment of the EEZ (A/CONF.62/WS.23).

Industrial fishing from these fleets generated some amount of envy, as well as anger, among coastal States in the developing world. Furthermore, the “Cod Wars” of the 1950s and 1970s illustrate that such feelings were present in developed states as well. In the Cod Wars, the United Kingdom and West Germany resisted efforts by Iceland to progressively expand its fishing zone, resulting in a series of confrontations over fishing rights in the waters surrounding Iceland. In three major iterations, 1958, 1972-1973, and 1975, Iceland increased its claimed exclusive fishing zone from 4 to 12, then 50 and finally 200 miles offshore, pushing out distant water fleets from the United Kingdom and West Germany. The population of Iceland was at the time almost entirely dependent on fishing as a source of income. The conflict ended only after the United Kingdom accepted a 200 mile Icelandic fishing zone.

Similarly, by the early 1970s, the United States had accepted the efforts by South American states to exclude U.S. fishing fleets from tuna fishing their offshore areas. A discussion on the “tuna war” between Henry Kissinger and Richard Nixon in the White House in 1971 captures the sentiment at the time:

_**Kissinger:** We have other technical [unclear] connected with Latin America. The Brazilians have established a 200 mile limit, and they want to start enforcing it as of June 1st [1971].

_**Nixon:** [unclear]

_**Kissinger:** Now, our problem is that unless we get them — unless we tell them that we’re willing to negotiate the fisheries issue with them, they will have to start enforcing it. We’ve already agreed to negotiate, but we don’t have a formal position yet. And so there’s some debate. The State Department wants to negotiate now, but the Defense Department wants to have a showdown. They’re not so concerned about fisheries, but they’re concerned about law of the seas [sic]. I would recommend that we tell them that we’re willing to negotiate this fall. That if we — because if we don’t do it on fisheries, the Latin Americans will oppose us on the more important issues of navigation, which comes up on the law of the sea conference later this year. While if we can settle Brazil, it’s not basically a hostile country to us [sic].

_**Nixon:** I don’t give a damn about fisheries anyway. Let everybody have 200 miles to fish. They’re all poverty-stricken down there anyway.

_**Kissinger:** If we dig in on fisheries, we’ll lose on navigation —

_**Nixon:** Navigation we want. Let them fish if they want. That’s my view.

_**Kissinger:** Well, that’s my recommendation, Mr. President.

The pressure to preserve national fishing resources was no less powerful in the United States, which adopted a 200-mile zone under the Magnusson Fishery Act in 1976 — six years before the EEZ was adopted by the Conference. The United States acted even against the advice of the Pentagon, which correctly warned that a unilateral announcement of a fishery zone would weaken the U.S. hand in negotiations to ensure high seas freedoms in the zone, as well as transit passage through straits used for international navigation.

Between 1974 and 1979 alone there were some 20 other disputes over cod, anchovies or tuna and other species among, for example, the United Kingdom and Iceland, Morocco and Spain, and the United States and Peru. As long-utilized fishing grounds began to show signs of depletion, and as long-distance ships came to fish waters local fishermen claimed by tradition, competition increased; so too did conflict.
III. The Third United Nations Conference

Consequently, the concept that every coastal State was entitled to management and exploitation of an exclusive fishing zone was a major impetus for negotiations on UNCLOS. Soon after the opening of the Third UN Conference on the Law of the Sea in 1973, Nigerian representative J. D. Ogundere stated that the high rate of world population growth, especially in Africa, meant that developing States were turning to the sea to feed their populations and earn foreign exchange (A/CONF.62/C.2/SR.31). African nations were strong proponents of the zone. Somalia, for example, argued that only a 200-nm territorial sea could protect the coastal State fisheries from distant water fleets (A/CONF.62/C.2/SR.26).

During UNCLOS negotiations, Indonesian Ambassador Hasim Djalal stated that from the view of adjacency or coastal proximity, coastal States have a superior right to the resources of the EEZ than distant countries (A/CONF.62/C.2/SR.26). Many States benefited from wider coastal zones, including a majority of seafarers and fishermen in coastal States, for whom such zones represented more food, more jobs and higher standards of living (A/CONF.62/C.2/SR.30).

Fishing states proposed that the right of distant water nations to access coastal State fisheries be included in the terms of the Convention. In rejecting this approach, Mr. Akyamac of Turkey objected to “...proposals ... that the traditional distant-water fishing States be granted fishing rights within the economic zones of ocean States. The creation of such a privileged club would be highly detrimental to the developing States,” as they too would have to turn toward distant-water fishing to sustain economic and social development (A/CONF.62/C.2/SR.27).

By the beginning of the Second Session of the Third UN Conference on the Law of the Sea in the summer of 1974, most of the major distant-water fishing countries had accepted the idea of the 200-mile zone in which fish stocks would be managed by the coastal State. Valencia Rodriguez of Ecuador recalled, “No one now denied that the 200-mile limit was the only means of relieving the acute and growing subsistence problems of the developing world.” (A/CONF.62/C.2/SR.27)

Distant water fishing nations ceded that coastal States that depended on coastal fisheries had a right to establish exclusive rights over the resources located there. Poland, for example, recognized that despite its distant-water fishing interests, developing coastal States and States dependent mainly on coastal fisheries should have the right to establish a zone within which they could exercise special rights with respect to living marine resources (A/CONF.62/C.2/SR.26).

The needs of distant-water fishing countries and of other states in- terested in fishing in the EEZs were taken into account in the final text. These interests flowed from a joint Australian-New Zealand fisheries paper submitted to the Seabed Committee in 1972 that made its way into the UNCLOS negotiations. The paper provided that the portion of allowable catch not taken by the coastal State would be available for the fishing vessels of third countries. By the time the UNCLOS negotiators picked up the issue of the EEZ at the 21st session of the Second Meeting on 31 July 1974, most distant water states already had accepted this approach (A/CONF.62/C.2/SR.21).

Sponsors of the working paper recognized the need for equitable rights of access for developing States to EEZ resources of neighboring coastal states (A/CONF.62/L.4). Access could be negotiated on the basis of regional, sub-regional or bilateral agreements. Most importantly, coastal States had a duty to accommodate the interests of other States that had historically fished in waters adjacent to their coastline, but no longer were entitled to because of the creation of the EEZ. China is such a distant water State in the areas beyond it 200 nm EEZ in the South China Sea, and as such, it has certain rights.

Coastal States such as Vietnam and the Philippines, have a duty to “take into account” the right of access of other States, and in particular, “States which have habitually fished in the zone.” (A/CONF.62/C.2/L.40 and Add.1) If China seeks to fish in the EEZs of the coastal States of the South China Sea, it must do so through the process developed in UNCLOS. This approach firmly rejected colonial, imperialist or foreign domination of the EEZ. “It should also be made clear that such rights could
not be exercised, profited from or in any way infringed by a metropolitan or foreign power administering or occupying such a territory.” (A/CONF.62/C.2/SR.21)

IV. The EEZ Regime

The outer limit of the EEZ extends a maximum of 200 nm from the baselines from which the territorial sea is measured. More than 150 coastal States have an EEZ. Unlike the continental shelf, which was an inherent part of the coastal State, the EEZ was based on a claim through proclamation or declaration. Most coastal States lack the ability to enforce their resource jurisdiction. They will “obtain the full benefit of their EEZ only if . . . more powerful States respect them” (A/CONF.62/SR.190).

The EEZ is a generous grant of community ocean space to the coastal state; the zone, indeed, was cut out of the high seas and ceded willingly. “Coastal States also seemed willing now to accept the obligation to allow fishermen from other countries to enter the 200-mile zone on reasonable terms and conditions to take the balance of the allowable catch not harvested by the local industry” (A/CONF.62/C.2/SR.21).

Coastal States have sovereign rights in the EEZ with respect to natural resources and certain economic activities, and exercise jurisdiction over marine science research and environmental protection. All other States enjoy freedom of navigation and overflight in the EEZ, as well as freedom to lay submarine cables and pipelines.

Most ocean activities are located in EEZs, which encompass 36 percent of the total area of the sea. Ninety percent of commercially exploitable fish stocks are located in the zone because the “richest phytoplankton pastures lie within 200 miles of the continental masses.” Phytoplankton, the basic food of fish, is brought up from the deep by currents and ocean streams at their strongest near land, and by the upwelling of cold waters where there are strong offshore winds. The area also has almost all of the major shipping routes and a high proportion of marine scientific research. The continental shelf under the EEZ contains over 80 percent of the known offshore oil and gas deposits.

The EEZ is a sui generis regime – neither a territorial sea nor residual high seas, but a distinct third type of zone established in Part V. The Law of the Sea Convention governs the rights and jurisdiction of the coastal State and the rights and freedoms of other States in the zone (arts. 55, 56, 58). The treaty also contains a formula for attribution of rights and jurisdiction that do not fall within either of coastal or other States (art. 59).

The coastal State enjoys in the EEZ sovereign rights – but not sovereignty – over resources and economic activities, sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources and with regard to other activities for the economic exploitation and exploration of the zone, sovereign rights with regard to the seabed and subsoil (art. 56). Coastal States also have sovereign rights for rules aimed at conservation of the living resources (art. 61), utilization of the living resources (art. 62), special rules for shared and straddling stocks, highly migratory species, marine mammals, anadromous stocks, catadromous species, and sedentary species (arts. 63-68), the right of land-locked and geographically disadvantaged states (arts. 69-70), and marine enforcement of laws and regulations of the coastal State (art. 73). The International Tribunal for the Law of the Sea recognized these authorities in the M/V Virginia G Case.

Because of their adjacency or proximity, coastal States were afforded special authority to develop and manage a conservation regime in the EEZ. The coastal State has a duty to determine the total allowable catch (TAC) for EEZ fisheries that “takes into account” the “best available” scientific information (UNCLOS, art. 61). Coastal States also shall adopt measures to prevent “overexploitation” of the fishery, and maintain or restore stocks at levels that can produce “maximum sustainable yield” (MSY), “as qualified by relevant environmental and economic factors.” These factors include the economic needs of coastal fishing communities and the special requirements of developing States. Management measures must consider “effects on species associated with or dependent upon harvested species” to ensure such species
do not become “seriously threatened.” The objective of the management regime is to optimize utilization of the fishery “without prejudice” to the coastal State’s rights in article 61 (art. 62).

As coastal States, Vietnam, the Philippines, and Malaysia, should accommodate neighboring States, such as China, with access to surplus catch in the fishery. Surplus catch (SC) is determined by total allowable catch (TAC) minus the capacity to harvest (CTH), with TAC qualified by maximum sustainable yield (MSY). Thus, TAC (based on MSY) – CTH = SC.

To fulfill its obligations, Vietnam should acknowledge the significance of living resources of the area to the economy of Southern China and China’s “other national interests,” the requirements of developing States in the sub-region or region, and the need to minimize economic dislocation in States whose nationals historically have fished in the zone. (Vietnam also must consider the provisions regarding geographically disadvantaged and land-locked States in articles 69 and 70 of UNCLOS, but these do not apply vis-à-vis China and Vietnam). If Vietnam opens access to Chinese distant water fishermen, these guests have a duty to comply with the conservation measures and other terms and conditions established in Vietnamese law (art. 62). Even if one accepts the validity of China’s claim to historic fishing grounds off the coast of Vietnam, the problems occurring offshore emanate from a reversal of roles between the two States. In this regard, China’s attempt to impose annual fishing bans from April to August and fishing management regimes in areas throughout the South China Sea that are distant from its coastline—and in fact within the EEZs of its neighbors—are unlawful, ineffective, and perverse.

The EEZ is one of the most revolutionary features of UNCLOS, and it has had a profound impact on the management and conservation of the resources of the oceans. The regime of the EEZ recognizes the right of coastal States to jurisdiction over the resources of some 38 million nm² of ocean space. The coastal State inherited right to exploit, develop, manage and conserve all resources—fish or oil, gas or gravel, nodules or sulfur in the waters, on the ocean floor and in the subsoil of an area extending 200 miles from its shore.

V. China as a Distant Water Nation

In 1980, China had the fourth largest fishing catch in the world, behind Japan, the USSR, and the United States [2]. Today, China has the third largest merchant marine fleet in the world and it is the world’s top fishing nation, currently taking nearly 20 percent of the total world catch. China has almost 300,000 motorized fishing vessels and approximately eight million fishermen. With a total take of over 17 million tons in 2007, China lands four times the catch of its nearest competitor, and far exceeds the catch of Japan, the United States and other major Pacific maritime powers. The largest catch is from the East China Sea, followed by the South China Sea and Yellow Sea. The catch is increasing, however, only in the South China Sea.

Chinese fishermen predominately catch finfish, species such as anchovy, Japanese scad, hairtail and small yellow croaker, and also harvest large amounts of shrimp, crab and squid. They use trawlers, purse seines, gill nets, set nets, and line and hook. Chinese fleets are located mostly in Guangdong and Shandong provinces, with Fujian and Zhejiang also major regions for fishing. As waters close to home become depleted, Chinese fishermen have moved farther south to exploit the waters of the South China Sea. First, China seized the Paracel Islands from Vietnam, which inherited title from France, and laid claim to the waters surrounding them.

The features of the Paracel Islands do not generate zones of sovereignty or sovereign rights and jurisdiction for China since it does not have valid title to them. Legal title may be obtained through accretion, cession, conquest, occupation, or prescription. Under the Charter of the United Nations, after 1945 conquest is not a lawful means to acquire territory. Consequently, China’s military capture[3] of the Hoàng Sa/Paracel Islands in January 1974 is devoid of legal effect. China has not perfected any claim through one of these five methods in a manner that would confer legal title. Similarly, prescription to title to territory is effected through long-term occupation of another state’s territory, but it requires a display of governmental authority that is continuous, peaceful, public, and uninterrupted – criteria that China also does not meet. China’s reliance on ancient discovery is similarly lacking in legal effect, and cannot be the
basis for EEZ rights. Even if China discovered regional rocks and islands in vicinity of Vietnam, mere inchoate title is incomplete without subsequent acts of effective occupation that evidence an intention and will to act as sovereign.

In December 2014, Beijing renewed its claims to virtually all of the South China Sea, but it does not have a valid legal claim to sovereignty over either the disputed features or waters. Yet China is increasingly using its fishing fleet for strategic purposes to control the region. Beijing will continue to use the Chinese strategy of “defeating harshness with kindness” (yi rou ke gang) and thus deploy unarmed fishing vessels or fisheries enforcement vessels to confront foreign vessels operating in its EEZ and claimed waters. In March 2009, for example, several Chinese fishing vessels operated in coordination with Chinese state vessel in the South China Sea to harass and impede the USNS Impeccable, a special mission military survey ship. In the incident that occurred 120 km from Hainan, the fishing vessels were accompanied by two maritime law enforcement ships and at least one Chinese naval vessel.

Shortly thereafter, Yu-zheng 311, China’s largest fishery enforcement vessel, deployed off the coast of the Philippines after that country passed legislation to formalize its off-shore claims to several islets in the South China Sea. In June 2009, Vietnam protested abusive treatment of its fishermen by Chinese fishery enforcement authorities. That same month, the Indonesian Navy seized eight Chinese fishing vessels and detained 75 Chinese fishermen, who were fishing illegally in the country’s EEZ.[4] Fifty-nine of the fishermen were released to China the following month.

The exercise of Chinese jurisdiction in its neighbors EEZs is incompatible with the original design and structure of UNCLOS to protect food security for developing coastal states. This lost dimension of the maritime disputes has not been recognized, but it completely upends Chinese claims. The dispute should be settled in light of the food security impetus that drove the initial UNCLOS negotiations. China’s fishing activities in the South China Sea are permissible only to the extent that they have been authorized by the coastal State to land surplus catch (SC).

VI. Conclusion

Today, the benefits brought by EEZs are evident. Ninety-nine percent of the world’s fisheries are conducted within some coastal State’s jurisdiction. Archipelagic States and large nations endowed with long coastlines naturally acquire the greatest areas under the EEZ regime. Among the major beneficiaries of the EEZ regime are the United States, France, Indonesia, New Zealand, Australia and the Russian Federation. Using normal baselines for calculation, Vietnam has an EEZ of 210,000 m² or more than 417,000 km² (Limits in the Seas No. 46). With exclusive rights come responsibilities and obligations, and Vietnamese law provides for foreign access to the country’s EEZ based on treaties concluded between Vietnam and “interested parties.”[5]

Each coastal State is to determine the total allowable catch for each fish species within its EEZ, and estimate its harvest capacity and what it can and cannot catch. These States should give access to other States, particularly neighboring States and land-locked countries, to the surplus of the allowable catch. In the South China Sea, Vietnam should consider whether it has jurisdiction over surplus catch that might be shared with the Chinese fishing community. Such access must be done in accordance with the conservation measures established in the laws and regulations of Vietnam. In turn, Vietnam is obligated to manage the fisheries, and adopt measures to prevent and limit pollution and to facilitate marine scientific research in its EEZs. This balanced structure should govern the relationship between coastal fishermen of Vietnam and distant-water fishermen from China (A/CONF.62/SR.185).

The issue of subsistence fishing is one element of a broader mosaic of thinking in terms of human security, rather than purely national security. In this respect, the push by developing countries during UNCLOS negotiations for creation of the EEZ was prescient, as it foretold the rise in the 1990s of human security as a basis for policy.[6]

For its part, China has a legal obligation to comply with the terms of UNCLOS, including regulations by Vietnam, Malaysia, Brunei, the Philippines, and Indonesia, within their respective EEZs.
The doctrine of *pacta sunt servanda* ("agreements must be kept") is a brocard, or cornerstone principle of international law, and is reflected in article 26 of the *Vienna Convention on the Law of Treaties*. [7] For all its fanfare, the rise of the New China is incomplete without commitment to a rules-based order of the oceans.

* Dr. James Kraska is a Professor of International Law at the Stockton Center for the Study of International Law, U.S. Naval War College. He is also a Distinguished Fellow at the Law of the Sea Institute, University of California Berkeley School of Law, and a Senior Fellow at the Center for Oceans Law and Policy, University of Virginia School of Law. I am indebted to Professor Brian Wilson and the HNSJ editors for their valuable review and comments.


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Commentary: Defend Freedom of Navigation

By James Kraska Defense News

For the first time since the 1980s, the United States and the world are fixated on the right of freedom of navigation. When Moammar Gadhafi claimed sovereignty over the Gulf of Sidra in the Mediterranean Sea and declared a "line of death," US naval fighter jets challenged the claim. Similarly, US warships asserted their right to innocent passage in the territorial sea of the Soviet Union in the Black Sea backing incident.

In recent years, Chinese ships and aircraft have aggressively intercepted US naval forces in the South China Sea, most recently by warning a US P-8A Poseidon maritime patrol aircraft to "go away quickly" from artificial installations constructed in the Spratly Islands.

In 2009, China resurrected an historic claim to "indisputable sovereignty" over the South China Sea, and last year began aggressively building artificial islands there on seven features. With airstrips emplaced on these enhanced reefs and islets, China is positioning to assert control over the South China Sea to back up its maritime claims. The US has indicated that it may send ships and aircraft within 12 nautical miles of the features in the South China Sea controlled by China.

To defuse a spiraling crisis, some have argued the world that the United States has not yet challenged China's new territorial claims. But US naval aircraft and warships are doing just that at several levels every time they operate in the South China Sea.

First, US forces in the region continually challenge China's nine-dashed-line claim of "indisputable sovereignty" over 90 percent of the water and features of the South China Sea. Second, US forces challenge China's illegal claim to restrict military activities within its 200 nautical mile exclusive economic zone, measured either from mainland China or one of China's islands.

Third, the US challenges China's right to claim a 12-nautical mile territorial sea from submersed features. Under international law, the construction of artificial islands confers no right of sovereignty over neighboring waters, and the US has made it clear that it will not respect China's claims improperly based on reefs.

Fourth, even small rocks that are above water at high tide may generate a 12-nautical mile territorial sea and national airspace. So far, US forces have not entered within 12 nautical miles of features claimed by China, but they should. All surface ships are entitled to innocent passage inside the territorial sea of any state, and US warships should conduct the same type of patrols in the South China Sea today that they did in the Black Sea in the 1980s.

Furthermore, state sovereignty and a territorial sea are not automatically created by a remote rock, but rather are a function of lawful title to feature by a sovereign state. China has not demonstrated lawful title to any feature located south of Hainan Island, and therefore US aircraft need not give those features the effect of national airspace.

Until the sovereignty disputes are resolved, the United States is not bound to observe any maritime zones that might be theoretically generated from a maritime feature. The islands and features of the South China Sea are devoid of national maritime zones under the UN Convention on the Law of the Sea until sovereignty over them is adjudicated and recognized by the international community. Until China works to resolve its claims through negotiations under international law, the United States should conduct operational challenges against China's illegal claims.

Since President Jimmy Carter began the freedom of navigation program in 1979, the US naval and air forces have tangibly demonstrated non-acquiescence of unlawful maritime claims. The program contains three elements: military-to-military engagement, official State Department diplomatic demarches, and operational assertions by ships and aircraft into areas purportedly claimed by coastal states.

During its heyday in the 1980s, the program challenged 35-40 coastal states each year. As recounted in my study, "Maritime Power and Law of the Sea," in recent years the program has fallen on hard times due to lack of adequate force structure and a dearth of political will inside the Beltway.

Many of China's illegal claims have not been subject to challenge by US ships and aircraft in more than a decade. China's unlawful internal-waters claims in the Paracel Islands and around Hainan Island, for example, were last challenged in 1997. An effective program requires capability and willpower. Capability springs from an adequate force structure and willpower requires interagency commitment to plan and conduct the operations, even at the risk of recrimination from Beijing.

After years of neglect, the legal and policy importance of freedom of navigation in the global commons is being understood as important not just for commercial shipping but for strategic stability and military security. Now that Australia, Japan, India and other states have reawakened to its importance, the US should coordinate with these states and conduct operational challenges in the South China Sea.

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The Nine Ironies of the South China Sea Mess

China's policies in the region have created a dangerous mess, and an ironic one.

By James Kraska
September 17, 2015

Since 2009, when China asked the secretary-general of the United Nations to circulate its nine-dashed line claim to the community of nations, the world has stood in bewilderment at Beijing’s actions in the South China Sea. Vietnam, Malaysia, and the Philippines have the most to lose over China’s gambit, and the disparity in power between them and China leaves them confounded and stunned — and privately, apoplectic. China’s policies have created a dangerous mess in the South China Sea. The irony is palpably bitter on nine distinct levels. Vietnam, Malaysia, and the Philippines hold the key to the best chance to fix the mess.

The first irony is that during negotiations for the UN Convention on the Law of the Sea (UNCLOS), the developing states reluctantly ceded freedom of navigation through straits and in the exclusive economic zone (EEZ) for exclusive offshore resource rights. Malaysia and Indonesia, in particular, were averse to free transit through the litany of straits that cut through their nations, such as the Strait of Malacca and Sunda Strait. They relented, however, because the benefits of the package deal, foremost of which included a 200 nm EEZ, overcame their hesitancy on free navigation. If you want to get something in maritime diplomacy — exclusive control over an area of ocean — you have to give something in return if the rest of the world is going to cede its rights.

China’s seizure of its neighbors' EEZs shatters that bargain. The Third UN Conference on the Law of the Sea that produced UNCLOS was convened after Ambassador Avid Pardo issued a
clarion call in the UN General Assembly in 1967 to designate the riches of the seabed as the common heritage of all mankind as a source of development for the world’s poorest nations. Similarly, since 90 percent of the world’s fisheries lie within 200 nm of shore, the EEZ was created to ensure food security for developing states. Today the maritime states of Southeast Asia, more reliant on the sea than most, face the real prospect of losing their rightful bounty, even as they accepted they navigational provisions.

Second, China was a leader among the developing states pushing for increased and secure offshore fishing and mineral rights for coastal states. Now a first order power, China takes it all back. It is as though the United States, Japan and Russia, who successfully bargained for liberal rules to protect freedom of navigation in exchange for recognizing the EEZ, agreed to give up the right to distant water fishing. Then decades after signing the treaty, the maritime powers began again sending industrial factory fishing vessels to scour the EEZs of the developing world.

The United States, which initially opposed creation of the EEZ and is not a party to UNCLOS, promotes and respects other countries’ EEZ rights; China, which championed the EEZ, is a party to UNCLOS and yet does not respect the EEZ rights of its neighbors.

**Strategic Hegemony**

Third, at its core, the dispute between China and its neighbors is not about China’s voracious appetite for resources, but rather about fortifying Beijing’s power and strategic hegemony in East Asia. The irony is that there are few resources to be had in the South China Sea. Only CNOOC, the Chinese state-controlled offshore oil company, suggests there are large reservoirs of oil and gas in the South China Sea. The U.S. Energy Information Administration, in contrast, believes that although the South China Sea contains perhaps 11 billion barrels of oil and 190 trillion cubic feet of natural gas, those resources mostly reside in undisputed areas along the coastline outside of China’s nine-dashed line claim. Likewise, while the fisheries of the South China Sea once were rich, in recent years they have been grossly depleted. China operates the largest fishing fleet in the world, and is principally to blame. While the hydrocarbons and fishing resources are not enough to move the dial on the Chinese economy, they are critically important for the smaller populations and economies of Vietnam, Malaysia, the Philippines, Indonesia, and Brunei. The resource angle is a Chinese canard to mask a bold and strategic move.

Fourth, China serially insists on heartfelt and unique “interpretations” of international law to justify its South China Sea policy that lack any support outside China. We are told to abandon ethnocentric notions of international law and accommodate China’s outcome-based, albeit relatively recent way of thinking. Yet Beijing has demonstrated a sophisticated and patient adherence to the international law of land boundary disputes and signed fair and balanced treaties with 13 of 14 of its neighbors. It is as though there are two sets of Chinese Foreign Ministry lawyers – one informed by principles of international law and accepted norms, and another that appears incredulous to the most basic rules of the history, norms, and practices in the law of the sea. Chinese officials and scholars have been subject to an onslaught of tutorials and protests on maritime law by foreign lawyers and policy makers at countless official and Track II conferences and dialogues. The predictive pattern: The rest of the world
argues until it is blue in the face, and Chinese representatives appear not to get it.

The only impediment to this theory, however, is that ironically China appears to actually understand the law of the sea when it is in its interest to do so. China has quietly reached amicable and even-handed agreements with both Vietnam and South Korea in the Gulf of Tonkin and Yellow Sea, respectively, to responsibly and equally divide fisheries and conduct joint enforcement patrols that reduce tension. Cooperation in these areas is strong and enduring, yet it attracts no media attention and elicits no question why China understands law of the sea norms in these areas, but utterly fails to grasp them in the South China Sea.

The fifth irony is that China has pocketed the rights it gained in UNCLOS, but had dodged its responsibilities. As a leader in offshore enclosure, China was a leader among a group of states from Asia, Africa, and Latin America, to expand the territorial sea from 3 nm to 12 nm and create the 200 nm EEZ. As a package deal, China and other state parties have a legal obligation to accept the obligations of the treaty along with the newly created rights. China has failed to observe its obligations to other states operating in its own territorial seas and EEZ. For example, China attaches conditions to the right of innocent passage in the territorial sea and freedom of navigation in the EEZ that not only are nowhere in UNCLOS, but were specifically rejected by the world community during the negotiations. Just as China fails to accept its obligations toward foreign ships and aircraft in its own EEZ, it has enjoyed the rights and freedoms of UNCLOS in other countries’ EEZs.

**Dubious Claim**

Sixth, even a sweepingly generous and sympathetic application of international law in favor of China’s claims fails to give Beijing anything more than a handful of tiny maritime zones in the region. Although China has declined to clarify the meaning of its nine-dash line claim, the most legally defensible meaning is that it is only a line of allocation to stake a claim to the rocks and islands of the South China Sea. The numerous reefs, low-tide elevations, and skerries, however, are not subject to legal title and belong to the state on whose continental shelf they are located. While China has asserted a claim to the rocks and islands based on historic discovery, it has not put forth even a prima facie case to support such an audacious claim.

A prima facie case is one that asserts material facts and relevant law that would allow a judge to decide the case in favor of the proponent. In this case, however, even if one accepts as true that everything that China has said about its history in the region — a dubious proposition to be sure — China fails to assert a lawful claim. While China claims that its ancient records show that Chinese seafarers visited and named some of the rocks in the Spratly and Paracel Islands, it is not clear that the voyages were made as an official function of state or simple happenstance recorded by anonymous fishermen. As a matter of law, even if agents of the emperor visited the rocks and claimed them on his behalf, the visits are legally immaterial in the same way that the U.S. visits to the moon do not confer upon the United States legal title to that celestial body.

Mere discovery by itself is not a lawful basis for acquisition of territory, as the U.S. learned when it lost the seminal Island of Palmas arbitration in 1928. The island of Palmas lies
between Indonesia and the Philippines, and the governments of the Netherlands and the United States, as colonial powers, submitted the dispute to arbitration. Although the United States asserted a claim of historic discovery on behalf of the Philippines from Spanish explorers, the arbitration panel awarded the island to the Netherlands because simple discovery without effective governance extending over a long period of time was immaterial as a matter of law. Island of Palmas is the most important case to uphold the legal principal that mere historic discovery is immaterial; other precedents include the Clipperton Island arbitration (France v. Mexico, 1933). In that case, Mexico, like the United States in the Palmas case, traced its claim of sovereignty from Spanish discovery. The arbitration, however, awarded the small feature to France based upon French occupation and usage.

Similarly, in the 1953 case at the International Court of Justice over the Minquiers and Écréhous groups in the Channel Islands, the court rejected a French claim based on historic presence and fishing rights that is remarkably similar to Chinese historic claims in the South China Sea. Instead, the court awarded the features to England based on subsequent exercise of jurisdiction over them by the Manorial court of the fief of Noirmont in Jersey. Furthermore, even assuming beyond the evidence that China actually had lawful title to the rocks and islands, it lost them long ago. This has nothing to do with Western imperialism, but rather China’s closure to the rest of the world. Inactivity and lack of official presence in a feature constitutes abandonment of title over time.

Maritime Zones

Seventh, while China has not made a prima facie case, let’s assume that it magically acquired legal title to every one of the rocks and islands in the South China Sea. In this case, under the law, China could be awarded only tiny maritime zones around them. States seek to augment or buttress their claims to tiny features in the vain hope that they can secure large maritime zones of sovereignty, sovereign rights, and jurisdiction over the adjacent waters. The mindset that a nation can strike a bonanza of offshore territory and wealth from a tiny dot of coral is one of those “too good to be true” stories that never seem to die. Apparently, the potential jackpot for making such claims is too great to resist. A mid-ocean low-tide elevation, which is below water at high tide, but above water at low tide, is not entitled to any territorial sea. Zero.

A tiny rock jutting above water at high tide generates a territorial sea of only 452 nm². In contrast, a bona fide island capable of sustaining human habitation or an economic life of its own generates an EEZ of 125,664 nm², an area more than 275 times larger. Of course, if any of these zones overlap with another country’s zones, they have to be adjusted, and in the South China Sea, there’s the rub. International courts have uniformly rejected the idea that small features of any sort are entitled to large maritime zones, but the judgments in cases of overlapping zones are especially harsh. In the 2012 case between Nicaragua and Colombia at the ICJ, for example, the Court awarded legal title to Colombia to two tiny rocks, and then confined them within 12 nm territorial sea enclaves set within Nicaragua’s EEZ. The court did so by comparing the vast disparity of shoreline facing the area of ocean subject to dispute, and noted that while Columbia had minimal shoreline from its rock possessions, Nicaragua’s shoreline generated by its lengthy mainland coast was eight times longer. This principle of shoreline disparity examines only that coast from islands or mainland that actually face
toward the opposing disputant, and it is particularly salient for the ASEAN states vis-à-vis China in the South China Sea. Take Vietnam, for example. Vietnam has a 2,200 km coastline facing the South China Sea, which is hundreds of times greater than the combined coastline of every rock and island in the region that faces Vietnam. Under the ICJ formula, Vietnam is accorded a vast, normal EEZ from its long coast, and whichever country has title to the islands within Vietnam’s EEZ would be afforded a very minimal zone. The precedent suggests that rather than winning the jackpot, the state with title to tiny, insignificant features that lie within another country’s EEZ are awarded rather tiny and insignificant rights over the nearby water.

Eighth, China’s herculean effort to construct and occupy new artificial islands in the South China Sea is also legally nugatory. China has constructed enormous artificial islands from seven reefs: Mischief Reef, Gaven Reef, Hughes Reef, Subi Reef, Fiery Cross Reef, Johnson Reef, and Cuarton Reef. Analysis at Middlebury College identifies each of these reefs appears to be a low-tide elevation; the Philippines has suggested in its arbitration filing against China that the latter three are rocks.

No matter how large an artificial island is constructed, it cannot acquire additional or new legal rights over what it is entitled to in its natural state. While China has expended enormous political capital and scared its neighbors into unprecedented embrace of the United States, India, and Japan, it has actually weakened, rather than strengthened its legal position in the South China Sea. Why? Because the burden of proof of whether a feature is in its natural state a rock entitled to a 12 nm territorial sea and not a low-tide elevation entitled to nothing lies with the claimant. But now that China has so irreparably tampered with the evidence, it is virtually impossible to divine the natural state of its artificial islands. Some sources have recorded all of the features as mere low-tide elevations, whereas others say that at least some may be rocks. We may never know for sure now that China has hideously transformed them.

**Appreciating Irony**

The ninth and final irony in the South China Sea is that the principal coastal states that stand to benefit from the rule of law do not fully appreciate the ironies and so far have been unable to form a coherent approach to preserve their rights, yet the key is solely within their grasp. Brunei and Indonesia do not claim any feature in the South China Sea. Their EEZs are encroached upon by China, but because they claim no rocks, they are secondary to the disputes. Vietnam, Malaysia, and the Philippines all assert far-reaching claims over various reefs, rocks and islands in the region. These three frontline states have the most to gain from cooperation, and the most to lose from Chinese maritime hegemony. These states must recognize now that they face an imminent threat of losing their EEZ to China, but how can they secure their moral and legal inheritance from UNCLOS?

First, Vietnam, Malaysia, and the Philippines should renounce their claim to any feature that is within the natural EEZ generated by a neighboring mainland or large island coastlines, such as Borneo, Mindanao, and Palawan. The same greed and historic hogwash that drives China’s audacious claims also sometimes attracts the frontline states, ruining any chance that they can work together. Only by renouncing legally specious claims against tiny features that generate tiny maritime zones can these states ensure that they preserve the EEZ. For developing states,
the EEZ was the crown jewel of rights and jurisdiction in UNCLOS, and insistence upon unrealistic claims against their neighbors only ensures that they will lose it all. Unless these states work together, they will slowly but surely lose their EEZs, the principal inheritance that the law of the sea conferred on developing states.

If Vietnam, Malaysia, and the Philippines can foreclose a claim of title to any feature within the EEZs of its neighbors, they can present a united front against China. Unity among the three nations is the best bet for galvanizing support within ASEAN, and by the member states of the European Union and NATO, and perhaps even Russia. By further diplomatically isolating China, Vietnam, the Philippines, and Malaysia drastically raise the costs for Beijing, while lowering the costs for states outside the region to support them. American support for such a plan, for example, levels the playing field, while nominally avoiding “taking sides” with a particular claimant. By giving up legally unsupportable claims that encroach on their neighbors EEZs, the frontline states assure they enjoy their rightful legacy of UNCLOS.

*James Kraska is professor in the Stockton Center for the Study of International Law at the U.S. Naval War College and senior associate with the China Maritime Studies Institute, also at the Naval War College.*
March 19, 2015

The Honorable Ashton Carter  
Secretary of Defense  
1000 Defense Pentagon  
Washington, DC 20301

The Honorable John Kerry  
Secretary of State  
2201 C Street, NW  
Washington, DC 20520

Dear Secretary Carter and Secretary Kerry:

We are writing in regard to Chinese strategy in the Indo-Pacific maritime domains, and the alarming scope and pace of the land reclamation now being conducted by the People’s Republic of China (PRC) in the Spratly island chain of the South China Sea. At a recent Senate Armed Services Committee hearing, Director of National Intelligence James Clapper called the extent of the activities “aggressive,” and described it as an effort by China to expand its presence and further consolidate its sovereignty claims. Without a comprehensive strategy for addressing the PRC’s broader policy and conduct to assert its sovereignty claims in the South China Sea and East China Sea, including land-reclamation and construction activities, long-standing interests of the United States, as well as our allies and partners, stand at considerable risk.

The United States maintains vested interests in the Indo-Pacific region, including the security of our allies and partners, in the freedom of navigation, in free and unimpeded commerce, in respect for international law, and the peaceful resolution of disputes. The South China Sea is a critical maritime highway through which some $5 trillion in global ship-borne trade passes each year. Unilateral efforts to change the status quo through force, intimidation, or coercion threaten the peace and stability that have benefited all the nations of the Indo-Pacific region. China’s land-reclamation and construction activities on multiple islands across the Spratly chain, and the potential command and control, surveillance, and military capabilities it could bring to bear from these new land features, are a direct challenge not only to the interests of the United States and the region, but to the entire international community.

It is our understanding that the majority of this work has been completed in the past twelve months alone, and if current build-rates proceed, China could complete the extent of its planned reclamation in the coming year. Gaven Reef has 114,000 square meters of new land since March 2014. Johnson Reef, which was previously a submerged feature, now stands as a 100,000 square meter “island.” Construction and reclamation has increased Fiery Cross in size more than 11-fold since August of last year. Reclamation by any state to enhance their sovereignty rights in the South China Sea complicates these disputes and runs contrary to calls
from the United States and Association of Southeast Asian Nations (ASEAN) for parties to exercise self-restraint. However, while other states have built on existing land masses, China is changing the size, structure and physical attributes of land features themselves. This is a qualitative change that appears designed to alter the status quo in the South China Sea.

China’s Foreign Minister, Wang Yi, recently noted that this extensive reclamation “does not target or affect anyone.” We disagree. At a minimum, the construction activities violate the commitments that China made as part of the 2002 Declaration on the Conduct of Parties in the South China Sea with ASEAN, in which all parties agreed to “exercise self-restraint in the conduct of activities that would complicate or escalate disputes.” If China attempts to militarize the artificial islands it has constructed or otherwise use the creation of these islands to attempt to strengthen its legal standing, such a provocation would likely hold serious consequences for the peace and stability of the region. Moreover, because these land reclamation activities could improve China’s sustainment of its fishing boats, State Oceanic Administration ships, People’s Liberation Army Navy (PLAN) ships, PLA Air Force (PLAAF) fighters, and other logistics and defense material from these completed islands, it could embolden China to declare an Air Defense Identification Zone (ADIZ) in all or part of the South China Sea.

Like President Obama, we believe China can and should play a constructive role in the region. We also acknowledge that the costs of seeking to shape China’s behavior in the maritime commons may affect other elements of our bilateral relationship. But if China continues to pursue a coercive and escalatory approach to the resolution of maritime disputes, the cost to regional security and prosperity, as well as to American interests, will only grow. For the international community to continue benefiting from the rules-based international order that has brought stability and prosperity to the Indo-Pacific region for the last seven decades, the United States must work together with like-minded partners and allies to develop and employ a strategy that aims to shape China’s coercive peacetime behavior.

There is no doubt that the United States must continue to sustain a military balance in the region that secures our long-standing political and economic interests, upholds our treaty commitments, and safeguards freedom of navigation and commerce. At the same time, China’s deliberate effort to employ non-military methods of coercion to alter the status quo, both in the South China Sea and East China Sea, demands a comprehensive response from the United States and our partners. While administration officials have highlighted various speeches and initiatives as evidence of a broader strategy, we believe that a formal policy and clearly articulated strategy to address these forms of Chinese coercion are essential. That is why the National Defense Authorization Act of 2015 includes a requirement for a report on maritime security strategy with an emphasis on the South China Sea and East China Sea.

Specifically, we believe such a strategy should address or consider a number of key items: specific actions the United States can take to slow down or stop China’s reclamation activities in the South China Sea; the possible benefits of releasing intelligence more regularly about China’s destabilizing behavior; what forms of security cooperation with China would be inappropriate to continue if land reclamation activities proceed and what forms of engagement might provide incentives for China to alter its behavior; the region’s Maritime Domain Awareness needs; how to help regional partners enhance their own capacity; and additional
diplomatic engagement with ASEAN countries or others in the international community to support unimpeded access to the Indo-Pacific maritime commons.

The United States faces a myriad of international challenges that inevitably compete for our attention and resources. The slow, calculated competition for sovereignty and influence in the Indo-Pacific region is not currently a crisis that garners international headlines. Yet the impact of this competition will likely reverberate for years to come. The Congress stands ready to support a renewed effort to address this challenge. More specifically, we look forward to working with you on the development and implementation of a comprehensive strategy for the maritime commons of the Indo-Pacific region, and to your thoughts on how the Administration and Congress can best work together on these issues.

Sincerely,

Jack Reed
Ranking Member
Senate Armed Services Committee

John McCain
Chairman
Senate Armed Services Committee

Bob Menendez
Ranking Member
Senate Foreign Relations Committee

Bob Corker
Chairman
Senate Foreign Relations Committee
China's Shifting Sands in the Spratlys

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Insight:
Introduction

Since 2014 China has been constructing features atop seven coral reefs in the disputed Spratly/Nansha Islands of the South China Sea by dredging sand and coral from existing coral reefs. At last count China's new features total more than 2,000 acres.[1] (/print/2954#_edn1)

This activity has produced much commentary.[2] (/print/2954#_edn2) However, none of the commentary addresses all of the issues arising under international law from this activity. This Insight discusses all of those legal issues: (1) the zonal entitlements of each feature; (2) the zonal entitlements of each of the constructed features (artificial islands); (3) Chinese and U.S. claims as to use of the airspace and water within 12 nautical miles (nm) of the features; (4) the effect of China's construction on the Philippine arbitration with China, including the construction of lighthouses on some of them; (5) China's *tu quoque* defense that other claimants have done the same thing; (6) whether China's reclamation and construction is consistent with the Declaration on the Conduct of Parties in the South China Sea (DOC) and the consistency of China's position on DOC vis-à-vis the Philippines; (7) the parties' obligation not to tamper with the evidence; and (8) the reclamations' compliance with international environmental law. This Insight examines each of these issues in turn.

The Spratly/Nansha Features in Question

Public reports of China's activities from satellite imagery show the seven reefs on which China has been filling and constructing are Hughes Reef, Mischief Reef, Subi Reef, Fiery Cross Reef, Gaven Reefs, Johnson South Reef, and Cuarteron Reef.[3] (/print/2954#_edn3) Satellite imagery shows that the dredging has been from ten other reefs as well as these seven.

Given that each of the seven reefs are naturally formed areas of coral surrounded by water,[4] (/print/2954#_edn4) the maritime zonal entitlements of each reef depends on whether it is (1) above water at all times, and can sustain human habitation or have an economic life of its own, in which
case it is a "full-fledged island"; (2) above water at all times but cannot sustain human habitation or have an economic life of its own, known as a "rock"; (3) below high tide but above water at low tide, known as a "low-tide elevation" (or LTE); or (4) below water at all times.

What are the Maritime Zonal Entitlements of the Features?

If the feature is what I call a "full-fledged island," it is entitled to a full suite of maritime zones[5] (/print/2954#_edn5) and subject to sovereignty claims.[6] (/print/2954#_edn6) This includes a 12 nm territorial sea, a 200 nm exclusive economic zone (EEZ), and a continental shelf.

If the feature is above water at all times, no matter how small, but cannot sustain human habitation or economic life of its own, it is a rock, and subject to sovereignty claims.[7] (/print/2954#_edn7) A rock is entitled to a territorial sea but no EEZ or continental shelf of its own.[8] (/print/2954#_edn8)

If the feature is a low-tide elevation, it has no maritime zone of its own, but if it lies within 12 nm of an island, it may be used as a basepoint for extending seaward the territorial sea of the island.[9] (/print/2954#_edn9) Sovereignty over an LTE lying within the territorial sea of an island belongs to whoever has sovereignty over the island.[10] (/print/2954#_edn10) However, no LTE is subject to appropriation (i.e., sovereignty claim).[11] (/print/2954#_edn11)

If the feature is below water at all times, it generates no maritime zone of its own and is not subject to appropriation (i.e., claim of sovereignty).[12] (/print/2954#_edn12) This follows from the principle that "the land dominates the sea," (i.e., maritime rights derive from the coastal state's sovereignty over land).[13] (/print/2954#_edn13)

What then is the Legal Status of the Seven Features?

There does not appear to be agreement as to the legal status of all of these features, but there seems to be agreement as to some of them, as set out below. Of note is the assertion by the Philippines in its arbitration case brought against China in 2013 that "[n]one of the Spratly features occupied by China is capable of sustaining human habitation or an economic life of its own,"[14] (/print/2954#_edn14) (i.e., that they are no more than rocks).

Gaven Reef, Hughes Reef, Mischief Reef, and Subi Reef: The Philippine claim against China lists these four features as below water at high tide[15] (/print/2954#_edn15) and not capable of a separate claim of sovereignty.[16] (/print/2954#_edn16) The 2011 Digital Gazetteer of the Spratly Islands, which lists all Spratly features known to be occupied and/or above water at low tide and the sources it cites, agrees, identifying these four features as LTEs.[17] (/print/2954#_edn17) Mischief Reef and Subi Reef are more than 12 nm from any island and cannot be used as basepoints.

Fiery Cross Reef, Johnson South Reef, and Cuarteron Reef: The Philippine claim against China lists these three features as rocks above water at high tide.[18] (/print/2954#_edn18) The 2011 Digital Gazetteer of the Spratly Islands, disagrees, identifying these three features as LTEs.[19] (/print/2954#_edn19)

It has been reported that Johnson South Reef is less than 4 nm from Collins Reef and less than 12 nm from Sin Cowe Island, and that Cuarteron Reef is less than 12 nm from London East Reef; Collins Reef, Sin Cowe Island, and London East Reef are occupied by Vietnam.[20] (/print/2954#_edn20) If those distances are correct, the three reefs could be used as basepoints.

If any of the seven features is a rock, it would be entitled to a 12 nm territorial sea. However, it appears that neither a territorial sea nor baselines have been effectively claimed around any of the seven features.[21] (/print/2954#_edn21)

What are the Entitlements of Artificial Islands?

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The constructions on the Spratly/Nansha LTEs and fully submerged features are known as "artificial islands," which do not possess the status of islands.[22] They have no territorial sea of their own and their presence does not affect the delimitation of the territorial sea, the EEZ, or the continental shelf.[23] While artificial islands are not subject to sovereignty claims,[24] the coastal state has the exclusive right to construct and to regulate their construction, operation, and use.[25] The coastal state has exclusive jurisdiction over them.[26] The coastal state is permitted, where necessary to establish reasonable safety zones around them, normally not to exceed 500 meters radius from the outer edges of the artificial island.[27]

Artificial islands and their safety zones may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.[28]

As they do not have the status of islands and have no territorial sea of their own, artificial islands do not change the legal status of the features on which they are constructed. For example, an artificial island constructed on a submerged feature or LTE has no territorial sea around either feature[29] and is not subject to appropriation (i.e., sovereignty), although the coastal state has jurisdiction over the artificial island itself.[30]

The construction of lighthouses on these artificial islands, as has been reported,[31] has no effect on their zonal entitlements or sovereignty.[32]

As to the seven features in the Spratly/Nansha Islands and the artificial islands being constructed on them, who is the coastal state having jurisdiction over the artificial islands and any sovereignty over the features on which they are constructed is disputed in each case, and the Law of the Sea Convention (LOS Convention) provides no rules for making that decision. Rather, international courts and tribunals have clarified the rules for making that decision in those cases where all the disputants consent to the jurisdiction of the court or tribunal.[33] In the case of the Spratly/Nansha there has been no such agreement.[34]

China's Sovereignty Claims

China routinely claims that it "has indisputable sovereignty over the Nansha [Spratly] Islands and their adjacent waters."[35] This continues even though it is facially false, given the repeatedly strong claims of sovereignty by the other claimants, including the Philippines and Vietnam. The sovereignty over the Spratly features is indisputably disputed.[36]

China appears to have recently asserted its claim that the airspace over the artificial islands is Chinese sovereign airspace in which no one may overfly without its permission. China has most recently demanded that U.S. military aircraft not fly in its airspace.[38] A U.S. Department of Defense (U.S. DoD) spokesman on May 21, 2015 asserted the U.S. does not "navigate" within 12 nm of any of these features.[39] Since nothing in the provisions of the LOS Convention on artificial islands (Article 60) regulate overflight of artificial islands, and the features are either not entitled to a territorial sea or no territorial sea has been effectively claimed around them, the U.S. DoD statement appears to reflect either a deliberate decision made for other reasons (e.g., policy discretion, not opinio juris) or a non-lawyer spokesperson's lack of knowledge of the law as applied to the nature of the features in question.[40]

China's tu quoque Defense

China claims that its dredging and filling in the Spratlys is simply catching up to the prior and continuing reclamations by Vietnam, the Philippines, and Taiwan.[41] There are several difficulties with this argument. First, the Vietnamese, Philippine, and Taiwan reclamations are
qualitatively different from China’s efforts, that is, they are not being done on LTES or submerged features. One scholar has stated that the Vietnamese, Philippine, and Taiwan efforts are being conducted on features that are true islands, normal activities that are of a defensive nature, do not threaten regional peace and stability, and are not seeking to convert the features into islands.[42] (/print/2954#_edn42)

Second, their reclamations are quantitatively different. Vietnam’s land reclamation amounts to 0.19% of the land created by China.[43] (/print/2954#_edn43) The Philippines built an airstrip on the second largest island in the Spratlys, Thitu (Pagasa), in the 1970s. Taiwan has constructed an airstrip on the largest island in the Spratlys, Itu Aba.

Third, unlike the recent reports of China broadcasting warnings to foreign military aircraft operating lawfully in international airspace to depart the "military alert zones" near these features,[44] (/print/2954#_edn44) no other claimant state involved in reclamation activities on Spratly features has issued such warnings.

**Declaration of Code of Conduct in South China Sea**

The 2002 non-binding DOC signed by China and the ASEAN states, including the Philippines, provides in part:

3. The Parties reaffirm their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.

* * * *

5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.

* * * *

8. The Parties undertake to respect the provisions of this Declaration and take actions consistent therewith.[45] (/print/2954#_edn45)

It is evident that China has not complied with these provisions of the DOC. However, China’s Position Paper of December 7, 2014 asserts that, in addition to bilateral undertakings by the Philippines and China, the DOC is legally binding on the Philippines, in an effort to support its claim that the tribunal has no jurisdiction over the Philippines claim.[46] (/print/2954#_edn46) By this reasoning China’s dredging and fillings are violations of its legally binding undertakings in the DOC and its obligation to act in good faith. It should be noted that most of the reclamations by Vietnam, the Philippines and Taiwan predate the DOC.

**Effect on the Philippines-China Arbitration**

In this arbitration the Philippines requests that the tribunal:

- Declare that Mischief Reef is a submerged feature that forms part of the continental shelf of the Philippines under Part VI of the LOS Convention;
- Require that China end its occupation of and activities on Mischief Reef;
- Declare that Gaven Reef and Subi Reef are submerged features in the South China Sea that are not above sea level at high tide, are not islands under the LOS Convention, and are not located on China’s continental shelf, and that China’s occupation of and construction activities on these features are unlawful;
• Require China to terminate its occupation of and activities on Gaven Reef and Subi Reef;
• Declare that Johnson Reef, Cuarteron Reef, and Fiery Cross Reef are submerged features that are below sea level at high tide, except for small protrusions which are "rocks" under Article 121 (3) of the LOS Convention and which therefore generate entitlements only to a territorial sea no broader than 12 nm, and that China has unlawfully claimed maritime entitlements beyond 12 nm from these features.[47] (/print/2954#_edn47)

China's dredging and filling on these features make it impossible for the tribunal to evaluate firsthand the physical nature of the features. Some have asserted that this amounts to tampering with the evidence.[48] (/print/2954#_edn48) This activity is not likely to be viewed favorably by the members of the tribunal. In its Order on Malaysia's Request for Provisional Measures in the Land Reclamation Case in the Straits of Johor, the International Tribunal for the Law of the Sea (ITLOS) noted "the obligation of the parties not to aggravate the dispute pending its settlement," and that "the parties have the obligation not to create an irremediable situation and in particular not to frustrate the purpose" of the arbitration.[49] (/print/2954#_edn49)

Compliance of China's Reclamation Efforts with International Environmental Law

The Chinese Foreign Ministry has asserted that its reclamation work "is lawful . . . [and] does not impact or target any country, and is thus beyond reproach." The spokesperson added:

China's construction projects on the islands and reefs have gone through scientific assessments and rigorous tests. We put equal emphasis on construction and protection by following a high standard of environmental protection and taking into full consideration the protection of ecological environment and fishing resources. The ecological environment of the South China Sea will not be damaged. We will take further steps in the future to monitor and protect the ecological environment of relevant waters, islands and reefs.[50] (/print/2954#_edn50)

Experts and others disagree with China's assertion.[51] (/print/2954#_edn51) For example, one report states:

China's piling of sand on atolls and rocks in the Spratlys has disrupted an already fragile marine ecosystem. The area, which hosts part of Southeast Asia's most productive coral reef ecosystems, has long been known as a treasure trove of biological resources. Fish breed and replenish in these reefs and migrate across vast distances to and from littoral coasts as they follow plankton and other organisms in the water. . . . The prospect of a reef apocalypse in the South China Sea should weigh heavily on claimant countries, all of which need to rely on fish protein to feed a burgeoning population of roughly 1.9 billion people.[52] (/print/2954#_edn52)

International law is pretty clear as to states' duties in this regard. States have the obligation to protect and preserve the marine environment.[53] (/print/2954#_edn53) States are further obligated to take measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened, or endangered species and other form of marine life.[54] (/print/2954#_edn54) States are also required to conduct environmental assessments and publicize their results.[55] (/print/2954#_edn55) The International Court of Justice has stated that the "general obligation of States to ensure that activities under their jurisdiction and control respect the environment or other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[56] (/print/2954#_edn56) The Seabed Disputes Chamber of ITLOS concurs.[57] (/print/2954#_edn57) China's assessment has not been made public.
Spratly Islands Outposts & Facilities

South China Sea

Source: http://amti.csis.org/island-tracker/ (http://amti.csis.org/island-tracker/)

About the Author:

J. Ashley Roach, an ASIL member, Captain, JAGC, USN (retired), Office of the Legal Adviser, U.S. Department of State (retired), is a Global Associate and Senior Visiting Scholar at the Centre for International Law (CIL) (2014–2015), National University of Singapore. The views expressed in the Insight are not intended to reflect the position of any government. Thanks to the CIL oceans team and former colleagues at State, Defense, and elsewhere for their helpful comments.


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[5] (http://amti.csis.org/island-tracker/) LOS Convention, supra note 4, art. 121(1)–(2).


[8] (http://amti.csis.org/island-tracker/) LOS Convention, supra note 4, art. 121(3).


[12] (http://amti.csis.org/island-tracker/) James Crawford, Brownlie’s Principles of Public International Law 262 (8th ed. Oxford 2012) (“Permanently submerged banks and reefs generally do not produce a territorial sea”). This was written before the ICJ said, supra note 11, that LTEs are not subject to appropriation. It follows that no submerged feature is subject to appropriation.


[19] (http://amti.csis.org/island-tracker/) Sarr, supra note 17. China has stated that it will not comment on the
nature of these features. China Position Paper, infra note 46, ¶ 24.


[23] /print/2954#_ednref23 LOS Convention, supra note 4, art. 60(8); Continental Shelf Convention, supra note 22, art. 5(4).


[25] /print/2954#_ednref25 LOS Convention, supra note 4, art. 60(1).

[26] /print/2954#_ednref26 Id. art. 60(2). It should be noted that some of the seven features are within 200 nm of the Philippines.

[27] /print/2954#_ednref27 Id. art. 60(5); Continental Shelf Convention, supra note 22, art. 5(3).

[28] /print/2954#_ednref28 LOS Convention, supra note 4, art. 60(7); Continental Shelf Convention, supra note 22, art. 5(6).

[29] /print/2954#_ednref29 LOS Convention, supra note 4, art. 13(2); Territorial Sea Convention, supra note 4, art. 11.

[30] /print/2954#_ednref30 LOS Convention, supra note 4, art. 60(8).


[32] /print/2954#_ednref32 Article 7(4) of the LOS Convention provides that straight baselines may not be drawn to and from LTES unless lighthouses or similar installations which are permanently above water have been built on them. No baselines have been drawn for these features, and no straight baselines can be drawn on these features in compliance with Article 7.

[34] (print/2954#_ednref34) China has exercised its right in article 298(1)(a)(i) of the LOS Convention to opt out of the procedures entailing compulsory conciliation for sovereignty disputes associated with sea boundary disputes. The award in the Mauritius/United Kingdom arbitration noted that while neither of the parties had exercised its right under Article 298, it found that the Tribunal lacked jurisdiction because the dispute fundamentally involved a dispute of sovereignty over the Chagos Archipelago, not the application or interpretation of the LOS Convention as required by Article 288(1). In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Award, ¶ 221 (Perm. Ct. Arb. 2015), available at http://www.pca-cpa.org/showasp.asp?pag_id=1429 (http://www.pca-cpa.org/showasp.asp?pag_id=1429) [12].


[40] (print/2954#_ednref40) See the discussion supra of zonal entitlements. Article 3 of China's Law on the Territorial Sea and the Contiguous Zone of February 25, 1992, permits only the drawing of straight baselines, and no straight baselines of the territorial sea have been promulgated for any of the Nansha Islands. There is no right of innocent passage over the territorial sea as there is for ships on the surface of the water. See Gregory Poling, Carter on the South China Sea: Committed and


[42] (print/2954__/ednref42) Thayer, supra note 41, at 1, referring to Sand Cay and West London Reef which Vietnam has occupied since 1956.

[43] (print/2954__/ednref43) Id. at 2. Thayer stating 0.03 square miles of Vietnamese reclaimed land divided by 1.55 square miles of Chinese reclaimed land.


[50] (print/2954__/ednref50) Hua Chuying's Press Conference, supra note 35. The assessments have not been made public.

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[53] (print/2954#_ednref53) LOS Convention, supra note 4, art. 192.

[54] (print/2954#_ednref54) Id. art. 194(5).

[55] (print/2954#_ednref55) Id. arts. 206, 205.


[57] (print/2954#_ednref57) Responsibilities and Obligations of States with Respect to Activities in the Area, Case No. 17, Advisory Opinion, 2011 ITLOS Rep. 10, 51 (Feb. 1).

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Air Defence Identification Zones
J Ashley Roach

A. Concept and Definitions

1. An Air Defence Identification Zone (‘ADIZ’) is a defined area of → airspace within which civil aircraft are required to identify themselves. These zones are established above the → exclusive economic zone (‘EEZ’) or → high seas adjacent to the coast, and over the → territorial sea, → internal waters, and land territory. The legal basis for such zones is the right of States, under the Convention on International Civil Aviation of 1944 (→ Chicago Convention [1944]), to establish conditions and procedures for entry into their national airspace, i.e., the airspace over their territory, territorial sea, and in the case of an archipelagic → State, over its → archipelagic waters (see para. 13 below). A declaration of an ADIZ does not constitute a claim of sovereign rights (→ Sovereignty). Accordingly, an aircraft approaching national airspace can be required to identify itself while seaward thereof in international airspace as a condition of entry approval.

B. Historical Evolution of Legal Rules

2. Arts 1 and 2 Convention on the Territorial Sea and the Contiguous Zone (1 done 29 April 1958, entered into force 10 September 1964) 516 UNTS 205) provide that the sovereignty of a coastal State extends, beyond its land territory and internal waters, to an adjacent belt of sea, described as the territorial sea, and that this sovereignty extends to the air space over the territorial sea. Art. 2 UN Convention on the Law of the Sea (→ Law of the Sea) confirms this rule and extends it, in the case of an archipelagic State, to its archipelagic waters. Under both treaties, aircraft do not enjoy the right of → innocent passage over the territorial sea. Art. 2 (4) Convention on the High Seas (1 done 29 April 1958, entered into force 30 September 1962) 450 UNTS 11) provides that all States have the ‘freedom to fly over the high seas’. Art. 87 (1) (b) UN Convention on the Law of the Sea confirms that all States, both coastal and land-locked (→ Land-Locked States), as part of the freedom of the high seas, have freedom of → overflight of the high seas. Both treaties provide that these freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas. Art. 58 (1) UN Convention on the Law of the Sea provides that all States have freedom of overflight over the EEZ. Art. 58 (3) UN Convention on the Law of the Sea imposes a similar due regard obligation on them.

3. Art. 12 Chicago Convention provides in part that for aircraft flying over the high seas, the rules in force shall be those established under the Chicago Convention. Individual States have taken unilateral action with substantial practical effect on aircraft flying over the high seas (→ Unilateral Acts of States in International Law); temporary restrictions on the use of defined danger areas over the high seas (→ Safety Zones; → Security Zones), and extension of traffic control, or air traffic identification, by a coastal State to areas adjacent to, but outside that State’s territorial airspace. Art. 11 Chicago Convention expressly recognizes the right of each State to establish laws and regulations relating to the admission to or departure from its territory of aircraft engaged in international air navigation (→ Air Law).

4. However, for safety and national defence purposes, aircraft operating in airspace adjacent to a State but not intending to enter that State’s airspace have been required to comply with identification and control procedures similar to those imposed by the adjacent State on aircraft intending to enter its airspace.

C. Current Legal Situation
There are no treaty provisions governing the establishment or operation of ADIZs per se. States that have established standing ADIZs include Canada, France, Japan, the United States, and Indonesia (over Java). Australia has, from time to time, declared an ADIZ for military exercise purposes. These unilateral claims have not been objected to and it may be presumed that the right to declare an ADIZ is now recognized as a right under → customary international law.

D. Special Problems

6 ADIZ regulations promulgated by the States apply to aircraft bound for their territorial airspace and require the filing of flight plans and periodic position reports. The coastal State has no right to require a foreign aircraft to identify itself or otherwise to apply its ADIZ procedures if it does not intend to enter national airspace. 7 Falling voluntary identification, an aircraft can be expected to be identified by interceptor aircraft, and not be fired upon as a Soviet fighter aircraft did on 1 September 1983 against Korean Airline flight 007 when it strayed into Soviet airspace (→ Korean Air Lines Incident [1983]). As a result of this incident, Art. 3bis Chicago Convention was adopted in 1984 (Protocol relating to an Amendment [Article 3bis] to the Convention on International Civil Aviation) and the procedures for identification of civil aircraft have been set out in an attachment to the International Civil Aviation Organization Rules of the Air in implementation of Art. 3bis Chicago Convention (‘Attachment A: Interception of Civil Aircraft’ in Annex 2 to the Convention on International Civil Aviation: International Standards and Recommended Practices-Rules of the Air [ICAO 10th ed Montreal 2005] ATT A-1). 8 The declaration of an ADIZ does not confer on an intercepting pilot the right to engage an aircraft. The international law of → self-defence (→ Self-Defence, Anticipatory) and national rules of engagement will provide guidance on the circumstances in which an aircraft may be engaged in peacetime. 9 It should be emphasized that the foregoing contemplates a peacetime or non-hostile environment. In the case of imminent or actual hostilities, a State may find it necessary to take measures in self-defence that will affect overflight in international airspace (→ Air Warfare).

10 The → International Civil Aviation Organization (ICAO) has considered whether the Chicago Convention should be amended to take into account developments in the law of the sea, including recognition of the status of the airspace over certain archipelagic waters as national airspace wherein foreign aircraft have the right of archipelagic sea lanes passage over archipelagic sea lanes. In its 1987 study of the implications of the UN Convention on the Law of the Sea on the Chicago Convention (ICAO Legal Committee, Secretariat Study ‘United Nations Convention on the Law of the Sea: Implications, if any, for the Application of the Chicago Convention, its Annexes and other International Law Instruments’ [ICAO document C-WP/7777 done 1984, reproduced 1987 as Working Paper LC/26-WP/5-1] reprinted in [1987] 3 NILOS Yearbook 243 para. 10.8) and other international air law instruments, the ICAO Secretariat concluded that there was no need for a textual amendment of the Chicago Convention, that Art. 2 Chicago Convention will have to be read as meaning that the territory of a State shall be the land areas, territorial sea adjacent thereto and its archipelagic waters. In 2008 the ICAO’s Legal Committee considered an Indonesian proposal to amend Art. 2 Chicago Convention to recognize the archipelagic State’s sovereignty over its archipelagic waters and superjacent airspace (ICAO Legal Committee, ‘Proposal to Amend Article 2 of the Chicago Convention’ [Working Paper LC/33-WP/4-7 ICAO Legal Committee 17 April 2008]). At the recommendation of the ICAO Legal Committee at its 33th session, the ICAO Council
decided that, as the rights of aircraft in designated air routes were not impinged upon, no amendment to Art. 2 Chicago Convention was necessary.

E. Significance

11 The evolution of ADIZs since World War II has been a natural outcome of the growth in capabilities of aircraft, especially their speed that materially reduces coastal State reaction time to perceived threats. The balance of interests now reflected in the rules governing the operation of ADIZs and interception of aircraft is likely to be maintained in the foreseeable future, except in those geographic areas where the political and defence interests of States with national airspace contiguous to international airspace are not in harmony, eg → China and → Taiwan (see also → Straits, International).

12 In December 2007 China announced its intention to designate an ADIZ within the Taiwan Strait, and to begin a new air route on the Chinese side of, but close to, the median line. The authorities on Taiwan responded that this plan would undermine the stability in the strait and international aviation safety. Chinese authorities subsequently denied having such a plan.

13 Effective 10 am 23 November 2013 China declared an ADIZ covering much of the East China Sea, overlapping the Taiwan, Japanese and South Korean ADIZs, and including the disputed → Senkaku/Diaoyu Islands and leed claimed by South Korea and China. Accompanying the Government Statement announcing the ADIZ was the Ministry of National Defense (MND) announcement of Aircraft Identification Rules for the East China Sea ADIZ. Unlike other ADIZ rules, the Chinese rules apply to all aircraft flying in the ADIZ, requiring them to report flight plans to the MFA or the Chinese CAA and identify themselves to the MND. The rules also state that "China's armed forces will adopt defensive emergency measures to respond to aircraft that do not cooperate in the identification or refuse to follow instructions." Unlike other ADIZ rules, the rules make no exception for aircraft not intending to enter Chinese national airspace. Further, unlike other ADIZs, the rules do not distinguish between civil and state aircraft. Japan, Korea and the United States promptly protested these Chinese actions. While China is free to intercept aircraft in flight in its ADIZ, it must do so in accordance with international procedures described above. Any threat or use of force against aircraft exercising their high seas freedom of overflight would be unlawful. On 28 November 2013 an PLA spokesman said the ADIZ was neither a no fly zone nor territorial airspace and that it was incorrect to suggest China would shoot down planes in the zone.

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Limits in the Seas

No. 143

China: Maritime Claims in the South China Sea
LIMITS IN THE SEAS

No. 143

CHINA

MARITIME CLAIMS IN THE SOUTH CHINA SEA

December 5, 2014

Office of Ocean and Polar Affairs
Bureau of Oceans and International Environmental and Scientific Affairs
U.S. Department of State

This study is one of a series issued by the Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs in the Department of State. The purpose of the series is to examine a coastal State’s maritime claims and/or boundaries and assess their consistency with international law. This study represents the views of the United States Government only on the specific matters discussed therein and does not necessarily reflect an acceptance of the limits claimed.

This study, and earlier studies in this series, may be downloaded from http://www.state.gov/e/oes/ocns/opca16065.htm. Comments and questions should be emailed to LimitsInTheSeas@state.gov. Principal analysts for this study are Kevin Baumert and Brian Melchior.
Introduction

This study analyzes the maritime claims of the People’s Republic of China in the South China Sea, specifically its “dashed-line” claim encircling islands and waters of the South China Sea.¹

In May 2009, the Chinese Government communicated two Notes Verbales to the UN Secretary General requesting that they be circulated to all UN Member States.² The 2009 Notes, which contained China’s objections to the submissions by Vietnam and Malaysia (jointly) and Vietnam (individually) to the Commission on the Limits of the Continental Shelf, stated the following:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese government, and is widely known by the international community.

The map referred to in China’s Notes, which is reproduced as Map 1 to this study, depicted nine line segments (dashes) encircling waters, islands, and other features of the South China Sea. Vietnam, Indonesia, and the Philippines subsequently objected to the contents of China’s 2009 Notes, including by asserting that China’s claims reflected in the dashed-line map are without basis under the international law of the sea.³ In 2011, China requested that another Note Verbale be communicated to UN Member States, which reiterated the first sentence excerpted above, and added that “China’s sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence.”⁴

China has not clarified through legislation, proclamation, or other official statements the legal basis or nature of its claim associated with the dashed-line map. Accordingly, this Limits in the Seas study examines several possible interpretations of the dashed-line claim and the extent to which those interpretations are consistent with the international law of the sea.

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¹ This claim is referred to by commentators by various names, including the “Nine-Dash Line,” “Dotted Line,” “Cow’s Tongue,” and “U-Shaped Line.”
Map 1: China's Dashed-Line Map from Notes Verbales of 2009
The Dashed-Line Maps

Origins and Evolution

Although China has not provided an official account, the first dashed-line map is widely reported by scholars and commentators to pre-date the existence of the People’s Republic of China, having been published in 1947 by the Nationalist government of the Republic of China. That map, which shows 11 dashes, is reproduced as Map 2 to this study. Scholarly accounts indicate that the 1947 map, titled “Map of South China Sea Islands,” originated from an earlier one titled “Map of Chinese Islands in the South China Sea” (Zhongguo nanhai daoyu tu) published by the Republic of China’s Land and Water Maps Inspection Committee in 1935, and that Chinese maps produced after the establishment of the People’s Republic of China in 1949 “appear to follow the old maps.” The maps published by the People’s Republic of China, however, removed the two dashes originally depicted inside the Gulf of Tonkin. Although not visible on the 2009 map (Map 1), modern Chinese maps since at least 1984, including the vertically oriented maps published by China in 2013 and 2014, also include a tenth dash located to the east of Taiwan.

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6 See, e.g., “China’s New Weapon in the Battle for the South China Sea is ... a Vertical Map,” Wall Street Journal, ChinaRealTime blog, Jun. 25, 2014. This “vertical map” was first published by Sinomaps in 2013 and later reproduced by Hunan Map Publishing House in 2014.
Geographic Description

The map included in China’s 2009 Notes Verbales contains nine dashes that encircle islands, waters, and other features of the South China Sea. China has not published geographic coordinates specifying the location of the dashes. Therefore, all calculations in this study relating to the dashed line are approximate.

The dashed line encompasses approximately 2,000,000 square kilometers of maritime space, an area equal to about 22 percent of China’s land area. This constitutes a significant percentage of the maritime space in the South China Sea. Excluding Taiwan and Pratas Island (referred to by China as Dongsha Qundao), the dashed line encompasses approximately 13 square kilometers of land area. This land area includes the three groups of land features within the South China Sea: (1) the Paracel Islands (referred to by China as Xisha Qundao), (2) the Spratly Islands (Nansha Qundao), and (3) Scarborough Reef (Huangyan Dao). The largest of these islands is Woody Island in the Paracel Islands, with an area of 2.4 square kilometers. The dashes likewise encompass numerous submerged features such as Macclesfield Bank (Zhongsha Qundao) and James Shoal (Zengmu Ansha).

Map 3 to this study depicts the dashed line with a number assigned next to each dash for descriptive purposes only. It should be noted that China does not assign numbers to the dashes. The dashes are not uniformly distributed and are separated from one another by between 106 (dashes 7 and 8) and 274 (dashes 3 and 4) nautical miles (nm). The

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9 Calculations for this study were conducted in ESRI ArcMap 10. The dashes used in geographic depictions and calculations for this study were digitized from 1:10,600,000 scale (2009) and 1:12,000,000 (approx.) scale (1947) maps and assumed a Mercator projection.

10 This same caveat applies to the calculations referring to the dashed line on the 1947 map, coordinates for which have also not been published by either the People’s Republic of China or the Republic of China.

11 Media reports frequently refer to estimates of 80 percent or higher. The exact percentage depends upon the assumed geographic extent of the South China Sea. The dashed line encompasses 62 percent of the waters in the South China Sea when using the limits that are described in the International Hydrographic Organization’s (IHO) S-23 Limits of the Oceans and Seas (1953), available from IHO at: http://www.ilo.int/ilo_pubs/IHO_Download.htm/S-23. The S-23 describes the limits for the South China Sea as including the Taiwan Strait, the Gulf of Tonkin, and what is sometimes referred to as the Natuna Sea.

12 CIA World Factbook entries for Spratly and Paracel Islands, at: https://www.cia.gov/library/publications/the-world_factbook/

13 Nothing in this study is intended to take a definitive position regarding which features in the South China Sea are “islands” under Article 121 of the LOS Convention or whether any such islands are “rocks” under Article 121(3).
dashes are located in relatively close proximity to the mainland coasts and coastal islands of the littoral States surrounding the South China Sea. Dash 1 is 50 nm from the mainland coast of Vietnam and 36 nm from Vietnam’s coastal island of Ly Son. Dash 3 is 75 nm from the closest Indonesian island, Pulau Sekatung. Dash 4 is 24 nm from the coast of Malaysia on the island of Borneo. Dash 5 is 35 nm from the closest point on the Philippines’ southeastern island of Balabac. Dash 9 is 26 nm from Y’Ami Island, Philippines’ northernmost island in the Luzon Strait.

Map 4: Distances between Dashes and Land Features

As shown on Map 4 to this study, the dashes are generally closer to the surrounding coasts of neighboring States than they are to the closest islands within the South China Sea. In other words, the distances between the dashes and the islands are generally farther than the aforementioned distances to the surrounding coasts. At their closest points, the dashes are 84 nm from the nearest island within the Paracel Islands (dash 1 to Triton Island), more than 46 nm from the nearest island within the Spratly Islands (dash 5 to Half Moon Shoal), and nearly 75 nm from Scarborough Reef (dash 7). Some of the dashes are far from the nearest islands within the South China Sea. For instance, dash 3 is 235 nm from the nearest such island, which is Spratly Island. Dash 4 is 133 nm from Louisa Reef. Dash 8 is 179 nm from the closest island on Scarborough Reef.

A geographic description of China’s dashed line is complicated by inconsistencies between China’s 2009 map and other Chinese maps, such as the 1947 map. The geographic description above is applicable to the 2009 map, but not to the 1947 map or even contemporary Chinese maps because those maps appear to depict the dashes in varying sizes and locations. Map 5 to this study depicts the dashed line from both the 2009 and 1947 maps, indicating that the sizes and locations of the dashes from the 2009 map are generally shorter and closer to the coasts of
Map 5: Comparison of Dashed Line in 2009 and 1947 Maps

China Dashed Lines
- China dashed line (1947)
- China dashed line (2009)

10°N
Tenth dash (not depicted on 2009 map)

0 80 160 320 Miles

Gulf of Tonkin
Hainan Island

Paracel Islands

Macclesfield Bank

South China Sea

Spratly Islands

Sulu Sea

Brunei

Malaysia

Indonesia

Philippines

Vietnam

Cambodia

Laos

Taiwan
neighboring States than the dashes in the 1947 map. Near the Vietnam coast, dash 2 from the 2009 map is 45 nm closer to Vietnam’s coast than the nearest dash on the 1947 map, and dash 1 is 15 nm closer. Dash 4 is closer (about 8 nm) to the Malaysian coast and dash 8 is likewise closer (about 19 nm) to the northern part of the Philippine island of Luzon. Additionally, dash 5 from the 1947 map is 15 nm closer to Indonesia’s Pulau Sekatung than dash 3 from the 2009 map. Despite having a similar curvature to dash 5 of the 2009 map, dash 7 of the 1947 map is longer and slightly closer to the Philippine island of Palawan, as well as to Malaysia’s and Brunei’s coasts on the island of Borneo. The dashes used in the 1947 map are also spaced such that they are generally closer to one another than those of the 2009 map, with the exception of the distance between dashes 8 and 9, which is about 290 nm. Otherwise, the 1947 dashes are separated from one another by between 31 (dashes 10 and 11) and 225 (dashes 4 and 5) nm of sea.

The dashed-line map distributed by China to the international community in 2009 is also cartographically inconsistent with other published Chinese maps. The dashes from the 2009 map do not appear to be in the identical geographic locations as the dashes from the 2013-2014 maps published by Sinomaps and those of its predecessor, Cartographic Publishing House (Ditu Chubanshe), dating back to at least 1984. Map 6 to this study depicts the difference with respect to dash 4.
Basis of Analysis


Maritime Zones

International law, as reflected in the LOS Convention, contains rules governing a coastal State’s entitlement to maritime zones.

Part II of the Convention sets forth rules governing coastal baselines, from which the seaward limits of maritime zones are measured. The normal baseline is the low-water line along the coast, as described in Article 5 of the Convention. The Convention also permits the method of straight baselines to be used “[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity” (Article 7). Waters on the landward side of the baseline are internal waters (Article 8). Part IV of the Convention contains the rules regarding baselines enclosing archipelagic waters of archipelagic States such as Indonesia and the Philippines.\footnote{An “‘archipelagic State’ means a State constituted wholly by one or more archipelagos and may include other islands.” LOS Convention, \textit{supra} note 14, Art. 46(a). Archipelagic States therefore do not include continental States such as China or the United States.}

Part II of the Convention also sets forth the rules governing the territorial sea, which may extend up to 12 nm from the baselines, and in which the coastal State exercises sovereignty subject to the right of innocent passage and other rules of international law. In addition, Part II describes a contiguous zone, extending beyond the territorial sea to a maximum of 24 nm from the baselines, within which a coastal State may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea.

Part V of the Convention sets forth provisions related to the exclusive economic zone (EEZ), which may extend to a maximum of 200 nm from the baselines. Within the EEZ, the coastal State has enumerated rights, notably, “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources” and “jurisdiction as provided for” in the Convention with regard to “the establishment and use of artificial islands, installations and structures” as well as “marine scientific research” and “the protection and preservation of the marine environment” (Article 56). At the same time, the freedoms of navigation, overflight, laying and maintenance of submarine cables, and other uses related to these freedoms are preserved in the EEZ (Article 58).
Part VI of the Convention sets forth provisions relating to the continental shelf, which extends to the outer edge of the continental margin or to a distance of 200 nm from the baselines, as described in Article 76. The coastal State exercises sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources; these rights are “exclusive” and “do not depend on occupation, effective or notional, or on any express proclamation” (Article 121(3)).

Part VIII of the Convention defines an island as “a naturally formed area of land, surrounded by water, which is above water at high tide” (Article 121(1)). It provides that islands have the same entitlements to the foregoing maritime zones as other land territory, except that “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf” (Article 121(3)).

Submerged features that do not emerge above water at high tide are not “islands” and are not entitled to maritime zones. They form part of the seabed and subsoil, and are subject to the regime of the maritime zone in which they are found. The Convention also makes clear that “[a]rtificial islands, installations, and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the [EEZ] or the continental shelf” (Article 60(3)). They too are subject to the regime of the maritime zone in which they are located.

Maritime Boundaries

Maritime boundary delimitation issues arise when the maritime zones of neighboring States overlap. Articles 15, 74, and 83 of the Convention set forth provisions regarding the delimitation of maritime boundaries between opposite and adjacent States. Article 15, concerning delimitation of the territorial sea, provides that “failing agreement . . . to the contrary,” one State is not entitled “to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.” However, this provision “does not apply . . . where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.”

With respect to the delimitation of the EEZ and continental shelf, Articles 74 and 83 provide, respectively, that the delimitation “shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.” In recent years, international courts and tribunals have generally delimited the EEZ and continental shelf by drawing a provisional equidistance line and then adjusting that line if necessary in light of the coastal configuration and features, including rocks and other small islands.

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16 However, the LOS Convention, supra note 14, Art. 13, provides: “Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.” A “low-tide elevation” is defined as “a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.” Id.

“Historic” Bays and Title

The substantive provisions of the LOS Convention refer to “historic” bays or title in two instances. First, Article 10 (“Bays”) provides that the provisions of that article concerning juridical bays “do not apply to so-called ‘historic’ bays.” Second, Article 15, as mentioned above, provides that the general rule governing delimitation of overlapping territorial seas does not apply in instances of “historic title or other special circumstances.” These provisions are substantially identical to those contained in Articles 7 and 12 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.18

The burden of establishing the existence of a historic bay or historic title is on the claimant. The United States has taken the view that, in order to establish the existence of a historic bay or historic title, a State must demonstrate (1) open, notorious, and effective exercise of authority over the body of water in question; (2) continuous exercise of that authority; and (3) acquiescence by foreign States in the exercise of that authority.19 These limitations are consonant with the views of influential international legal authorities, including the International Court of Justice and the 1962 study on the “Juridical Régime of Historic Waters, Including Historic Bays,” commissioned by the Conference that adopted the 1958 Geneva Conventions on the law of the sea.20 International jurisprudence addressing historic claims has been limited to (1) disputes concerning maritime boundaries and sovereignty over land territory21 and (2) other disputes over near-shore waters which, under the current law of the sea, could be enclosed using the method of straight baselines.22

Articles 10 and 15 are strictly limited geographically and substantively. They apply only with respect to bays and similar near-shore coastal configurations, not in areas of EEZ, continental shelf, or high seas. In the past, prior to the emergence of today’s maritime zones, the high seas regime applied very close to the low-water line along the coast, animating desires for broader protection of coastal State interests—desires which previously informed the “historic waters” and other claims of coastal States in derogation of that classic high seas regime. The LOS Convention regimes and their geographic limits accommodated those desires, and set forth the framework governing all parts of the sea from which no reservations are permitted (Article 309).

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19 See, e.g., Limits in the Seas No: 112: “United States Responses to Excessive National Maritime Claims,” U.S. Dept. of State, Mar. 9, 1992; Memorandum from Bernard H. Oxman, Dep’t of State Asst Legal Adviser for Ocean Affairs (Sept. 17, 1973), excerpted in Digest of U.S. Practice in International Law 1973, at 244 (A.W. Rovine ed.).
22 Fisheries Case, supra note 20.
23 “By ‘historic waters’ are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title.” Fisheries Case, supra note 20, p.130.
Analysis

China’s possible claims related to the dashed-line maps can be divided into two categories: claims to land and claims to water. With respect to land claims, China’s position is clear; it is claiming sovereignty over the islands within the dashed line. China’s 2009 Notes Verbales state that “China has indisputable sovereignty over the islands in the South China Sea.” This assertion, while disputed by neighboring States with competing sovereignty claims over these islands, is consistent with previous official pronouncements of the People’s Republic of China, dating back to at least its 1992 territorial sea law.\footnote{Law on the Territorial Sea and the Contiguous Zone of 25 February 1992, available from DOALOS at: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf. See Article 2.} Thus, it is apparent that China intends its dashed-line maps to indicate the islands in the South China Sea over which it claims sovereignty.\footnote{This study makes no attempt to examine the merits of claims by China or other States to land features in the South China Sea. The United States has repeatedly reaffirmed that it takes no position as to which country has sovereignty over the land features of the South China Sea. See, e.g., Statement by the Acting U.S. Dept. of State Spokesperson, May 10, 1995 (“The United States takes no position on the legal merits of the competing claims to sovereignty over the various islands, reefs, atolls and cays in the South China Sea”). This continues to be the position of the United States, and nothing in this study should be construed as a U.S. Government position regarding the merits of competing claims of sovereignty over any island in the South China Sea, which is not a matter governed by the law of the sea. See id.}

With respect to maritime claims, China’s position is unclear. Therefore, this study examines below three possible interpretations of the dashed-line claim and the extent to which those interpretations are consistent with the international law of the sea.\footnote{In assessing the position of the Government of China with respect to the scope of its maritime claims in the South China Sea, this study has, by necessity, focused on the views asserted by that Government and has not attempted to attribute to China the views or analysis of non-governmental sources, such as legal or other Chinese academics.} These alternative interpretations are identified with reference to primary sources, notably the official statements and acts of the People’s Republic of China.\footnote{See id.}

1. Dashed Line as a Claim to Islands

Discussion

Under this possible interpretation, the dashed line indicates only the islands over which China claims sovereignty. It is not unusual to draw lines at sea on a map as an efficient and practical means to identify a group of islands. If the map depicts only China’s land claims, then China’s maritime claims, under this interpretation, are those provided for in the LOS Convention. China’s statement accompanying the map in its 2009 Notes Verbales could be read to support this meaning:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map).
The “sovereignty” over the waters “adjacent” to the islands could refer to the 12-nm territorial sea, which is indeed a zone of “sovereignty” under international law. Likewise, the “sovereign rights and jurisdiction” could be understood to refer to the legal regimes of the EEZ and continental shelf under the LOS Convention, which uses the same terminology to describe coastal State authority within those zones. The “relevant waters” and the “seabed and subsoil thereof” likewise could be understood to refer to the EEZ and continental shelf.

Support for this interpretation can be found in China’s laws and statements. Article 2 of China’s 1992 territorial sea law claims a 12-nm territorial sea around the “Dongsha [Pratas] Islands, Xisha [Paracel] Islands, Nansha (Spratly) Islands and other islands that belong to the People’s Republic of China.” China’s 1958 Territorial Sea Declaration makes similar claims. With respect to the “relevant” areas seaward of the territorial sea, China’s 1998 EEZ and continental shelf law establishes a 200-nm EEZ and describes China’s continental shelf rights and jurisdiction. Indeed, China’s 2011 Note Verbale clarified its view that “China’s Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ), and Continental Shelf,” and no mention was made of any other maritime claims.

Cartographic evidence and official statements also provide support for an interpretation that China’s dashed line describes island claims and not distinct maritime claims. As noted above, the original 1930s dashed-line map, on which subsequent dashed-line maps were based, was titled “Map of the Chinese Islands in the South China Sea.” That map was apparently brought into use domestically by the Republic of China in the late 1940s during a time when the international law governing maritime claims by most accounts recognized only a narrow belt of territorial sea. Indeed, China’s own Declaration on its territorial sea of 1958 states:

This provision [a 12-nm territorial sea] applies to all territories of the People’s Republic of China, including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas [emphasis added].

The reference to “high seas”—maritime space under no country’s jurisdiction—separating China’s mainland and coastal islands from “all other islands belonging to China” indicates that in 1958 China made no claim to the entirety of the ocean space within the dashed line.

Assessment

Setting aside issues related to competing sovereignty claims over land features and unresolved maritime boundaries in the South China Sea, if the above interpretation of China’s dashed-line

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28 LOS Convention, supra note 14, Art. 2.
29 LOS Convention, supra note 14, Arts. 56, 77, 79, 80, and 81.
30 Territorial Sea law, supra note 24.
33 Note Verbale, supra note 4.
34 Declaration, supra, note 31, para. 1, at 2.
claim is accurate, then the maritime claims provided for in China’s domestic laws could generally be interpreted to be consistent with the international law of the sea, as follows:

1. **China’s mainland coast and Hainan Island** are entitled to a territorial sea, contiguous zone, EEZ, and continental shelf, including in areas that project into the South China Sea.35

2. **Other islands**, as defined by Article 121(1) of the LOS Convention, claimed by China in the South China Sea would likewise be entitled to the above-mentioned maritime zones. Under Article 121(3) islands that constitute “rocks which cannot sustain human habitation or economic life of their own” would not be entitled to an EEZ and a continental shelf.36

3. **Submerged features**, namely those that are not above water at high tide, are not subject to sovereignty claims and generate no maritime zones of their own.37 They are subject to the regime of the maritime zone in which they are found.

4. **Artificial islands, installations, and structures** likewise do not generate any territorial sea or other maritime zones.38

This assessment is subject to several important caveats.

First, China’s sovereignty claims over islands in the South China Sea are disputed.39 The Paracel Islands are also claimed by Vietnam and Taiwan; Scarborough Reef is also claimed by the Philippines and Taiwan; and some or all of the Spratly Islands are also claimed by Vietnam, the Philippines, Malaysia, Brunei, and Taiwan. Because China’s land claims are disputed, its maritime claims described above that are based on those land claims are likewise disputed.

Second, China has not yet clarified its maritime claims related to certain geographic features in the South China Sea. For instance, China has not clarified which features in the South China Sea it considers to be “islands” (or, alternatively, submerged features) and also which, if any, “islands” it considers to be “rocks” that are not entitled to an EEZ or a continental shelf under paragraph 3 of Article 121 of the LOS Convention. With respect to Scarborough Reef and certain features in the Spratly Islands, these issues are the subject of arbitration proceedings between the Philippines and China under Annex VII of the LOS Convention.40

Third, Vietnam, the Philippines, Malaysia, Indonesia, and Brunei have maritime zones that extend from their mainland shores into the South China Sea. Assuming for the sake of argument

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35 These maritime zones must be drawn from baselines that are consistent with those set forth in the LOS Convention. The United States has protested China’s use of straight baselines (including on its mainland, Hainan Island, and the Paracel Islands) as excessive and not consistent with the Convention. J.A. Roach and R.W. Smith, Excessive Maritime Claims, 3rd ed. (Nijhoff, 2012), at 98 and note 103. See also, Limits in the Seas No. 117: “Straight Baselines Claim: China,” U.S. Dep’t. of State, July 9, 1996.

36 LOS Convention, supra note 14, Art. 121. With respect to United States views, see supra note 13.

37 See supra note 16, referring to the measurement of maritime zones from low-tide elevations.

38 LOS Convention, supra note 14, Art. 60.

39 The United States takes no position regarding these sovereignty disputes. See supra, note 25.

that China has sovereignty over all the disputed islands in the South China Sea, maritime zones generated by South China Sea islands would overlap with those generated by the opposing coastlines of the aforementioned States.

2. Dashed Line as a National Boundary

Discussion

Under this possible interpretation, the dashed line that appears on Chinese maps is intended to indicate a national boundary between China and neighboring States.

As shown on Map 7 to this study, modern Chinese maps and atlases use a boundary symbol to depict the dashed line in the South China Sea. Indeed, the symbology on Chinese maps for land boundaries is the same as the symbology used for the dashes, and the text in the legend of such maps translates the boundary symbol as either “national boundary” or “international boundary” (国界, romanized as guojie). These maps also use another boundary symbol, which is translated as “undefined” national or international boundary (未定国界, weiding guojie), but this symbology is not used for the dashed line. The placement of the dashes within open ocean space would suggest a maritime boundary or limit.

Assessment

Articles 74 and 83 of the LOS Convention provide with respect to the EEZ and continental shelf that boundary delimitation “shall be effected by agreement on the basis of international law . . . in order to achieve an equitable solution.” Because maritime boundaries under international law are created by agreement (or judicial decision) between neighboring States, one country may not unilaterally establish a maritime boundary with another country. Assuming for the sake of argument that China has sovereignty over all the disputed islands, the maritime boundaries delimiting overlapping zones would need to be negotiated with the States with opposing coastlines—Vietnam, the Philippines, Malaysia, Indonesia, and Brunei. The dashes also lack other important hallmarks of a maritime boundary, such as a published list of geographic coordinates and a continuous, unbroken line that separates the maritime space of two countries.

Map 7: Symbology on Modern Chinese Map Depicting Dashed Line

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41 Emphasis added. See discussion under Basis of Analysis, supra.
To the extent the dashed line indicates China’s unilateral position on the proper location of a maritime boundary with its neighbors, such a position would run counter to State practice and international jurisprudence on maritime boundary delimitation. In determining the position of maritime boundaries, States and international courts and tribunals typically accord very small islands far from a mainland coast like those in the South China Sea equal or less weight than opposing coastlines that are long and continuous.42 (Map 4 above shows selected locations where the dashes are considerably closer to the coasts of other States than to the South China Sea islands claimed by China.)

If the dashed line is intended to depict a unilateral maritime boundary claim, this interpretation also does not address the related question of what kind of rights or jurisdiction China is asserting for itself within the line. The dashed line, to be consistent with international law, cannot represent a limit on China’s territorial sea (and, therefore, its sovereignty), as the dashes are located beyond the 12-nm maximum limit of the territorial sea of Chinese-claimed land features. Moreover, dashes 2, 3, and 8 are not only relatively close to the mainland shores of other States, all or part of those dashes are also beyond 200 nm from any Chinese-claimed land feature. The dashed line therefore cannot represent the seaward limit of China’s EEZ consistent with Article 57 of the LOS Convention, which states that the breadth of the EEZ “shall not extend beyond 200 nautical miles” from coastal baselines.43

3. Dashed Line as a Historic Claim

Discussion

Under this possible interpretation, the dashed line that appears on Chinese maps is intended to indicate a so-called “historic” claim. A historic claim might be one of sovereignty over the maritime space (“historic waters” or “historic title”) or, alternatively, some lesser set of rights (“historic rights”) to the maritime space.

Some Chinese government statements and acts could be read to support a version of this historic claim interpretation.44 Most notable is China’s 1998 EEZ and continental shelf law, which states

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42 See, e.g., Continental Shelf (Libya/Malta), 1985 I.C.J. 13, para. 73 (June 3) (considering both the “general geographical context in which the islands of Malta appear as a relatively small feature” and “the great disparity in the lengths of the relevant coasts of the two Parties.”). See also Nicaragua v. Colombia, supra note 17. For a discussion of State practice and jurisprudence, see, e.g., V. Prescott and G. Triggs, “Islands and Rocks and their Role in Maritime Delimitation,” International Maritime Boundaries, 3245-3280 (ASIL, 2005).

43 LOS Convention, supra note 14, Art. 76, paragraph 1, provides that continental shelf limits may extend beyond 200 nm. Considering the geomorphology of the seabed of the South China Sea and the absence of an assertion by China of entitlement to continental shelf beyond 200 nm in the South China Sea, this study assumes that China does not consider that continental shelf generated by Chinese-claimed islands within the SCS extends beyond 200 nm.

44 Considering that the dashed-line maps pre-date the People’s Republic of China, the views of Taiwan are also of interest. In 1993, Taiwan officially approved “Policy Guidelines for the South China Sea,” which state the view that the waters within the dashed line are its “historic water limit” within which Taiwan “possesses all rights and interests.” Cited in K-H. Wang, “The ROC’s Maritime Claims and Practices with Special Reference to the South China Sea,” Ocean Dev’t & Int’l L., 41:237-252 (2010). Subsequent maritime legislation enacted by Taiwan and subsequent public statements, however, suggests that this view may no longer be officially held by Taiwan. See id. and Limits in the Seas No. 127: “Taiwan’s Maritime Claims,” U.S. Dep’t. of State, Nov. 15, 2005.
without further elaboration that “[t]he provisions of this Act shall not affect the historical rights of the People’s Republic of China.”

China’s 2011 Note Verbaile states that China’s position regarding its claims of “sovereignty and related rights and jurisdiction” in the South China Sea is “supported by abundant historical and legal evidence” (emphasis added). Although not attributable to the government of China, some Chinese institutions and commentators have considered that the dashed-line maps depict China’s historic title or historic rights in the South China Sea.

Furthermore, some of the Chinese government’s statements and actions relating to the South China Sea are inconsistent with the LOS Convention. While such statements and actions do not amount to express assertions of a historic claim, they may indicate that China considers that it has an alternative basis—such as historic title or historic rights—for its maritime claims in the South China Sea.

For instance, the Chinese government has stated that China exercises “sovereignty” in certain areas, or even the entirety, of the South China Sea. China’s Ministry of Foreign Affairs (MFA) spokesperson has referred to Second Thomas Shoal as under China’s “sovereignty,” despite its location beyond the limits of any territorial sea. More expansively, an MFA spokesperson has stated: “I would like to reaffirm that China enjoys indisputable sovereignty over the South China Sea and the island[s]” Similarly, Chinese naval vessels reportedly conduct periodic oath-taking ceremonies at James Shoal to affirm “sovereignty” over this bank. Although James Shoal is a submerged feature far from any Chinese-claimed island, China apparently regards this feature as its “southernmost territory.” It is not clear that such references to Chinese “sovereignty” should be taken literally, but if so, their legal basis could not be the LOS Convention because a coastal State’s “sovereignty” under the Convention cannot extend beyond the 12-nm limit of the territorial sea. Accordingly, it is possible that China considers the legal basis for its claimed maritime sovereignty in the South China Sea to be one of historic waters.

In 2012 the China National Offshore Oil Corporation (CNOOC) introduced lease blocks opposite the central coast of Vietnam that purport to be in “waters under [the] jurisdiction of the People’s Republic of China.” However, as illustrated in Map 8 to this study, quite apart from questions...

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45 Act, supra note 32. Article 14 (emphasis added).
49 “Chinese ships patrol southernmost territory,” Xinhua, Jan. 26, 2014. See also, B. Hayton, “How a non-existent island became China’s southernmost territory,” South China Morning Post, Feb. 9, 2013 and “Loss of James Shoal could wipe out state’s EEZ,” Borneo Post, Feb. 5, 2014. These ceremonies reportedly involve dropping steel markers or engraved stones over the side of the ship and onto the submerged bank. Id.
under Article 121 and questions of maritime boundary delimitation, portions of two of these blocks (BS16, DW04) extend without explanation to waters that are beyond 200 nm from any Chinese-claimed island (blue hatch). This is an assertion of maritime jurisdiction that exceeds what is provided for under the LOS Convention.

The domestic laws of China also suggest that China asserts a legal basis for its maritime claims that is separate from, and additional to, the LOS Convention. For instance, China’s 1999 Law on Marine Environmental Protection describes its scope of application as covering “internal waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf of the People’s Republic of China and other sea areas under the jurisdiction of the People’s Republic of China.” Since coastal State jurisdiction under the LOS Convention is limited to the aforementioned maritime zones, it is unclear what “other sea areas” are contemplated, and perhaps this phrase refers to areas where China considers that it has historic claims.

The assessment below examines whether there is a basis under international law for a Chinese claim to historic waters or historic rights to the waters within the dashed line.

Assessment Part 1 – Has China Made a Historic Claim?

As a threshold matter, as the preceding discussion suggests, China has not actually made a cognizable claim to either “historic waters” or “historic rights” to the waters of the South China Sea within the dashed line.

A State making a historic claim must give international notoriety to such a claim. As stated in a recent comprehensive study on historic waters, “formal notification of such [a historic] claim would seem normally to be necessary for it to attain sufficient notoriety; so that, at the very least, other States may have the opportunity to deny any acquiescence with the claim by protest etc.”

51 Law on Marine Environmental Protection, 1999. Articles 2 and 39. Similar references to “other sea areas under the jurisdiction of China” can be found in the Surveying and Mapping Law of the People’s Republic of China, 2002 (Articles 2, 7, 32, 41, and 51) and the Regulations of the People’s Republic of China on the Management of Foreign-Related Marine Scientific Research, 1996 (Articles 2, 4, 9 and 10).
52 See e.g., UN Study, supra note 20, at paras. 125-130 (concluding that there are “strong reasons for holding that notoriety of the exercise of sovereignty . . . is required . . . ”) and para. 96.
With respect to the South China Sea, there appears to be no Chinese law, declaration, proclamation, or other official statement describing and putting the international community on notice of a historic claim to the waters within the dashed line. The reference to “historic rights” in China’s 1998 EEZ and continental shelf law is, as a legal matter, a “savings clause”; the statement makes no claim in itself, and the law contains no reference to the dashed-line map. Although certain Chinese laws and regulations refer to “other sea areas under the jurisdiction of the People’s Republic of China,” there is no indication of the nature, basis, or geographic location of such jurisdiction, nor do those laws refer to “historic” claims of any kind. While China’s 2011 Note Verbale states that “historical and legal evidence” support China’s “sovereignty and related rights and jurisdiction,” that Note, like the 1998 EEZ and continental shelf law, is not a statement of a claim itself. Furthermore, the “historical ... evidence” could refer to China’s sovereignty claim to the islands, and not the waters.

The mere publication by China of the dashed-line map in 1947 could not have constituted official notification of a maritime claim. China’s “Map of South China Sea Islands” made no suggestion of a maritime claim, and its domestic publication in the Chinese language was not an act of sufficient international notoriety to have properly alerted the international community to such a claim, even if it had asserted one. The various maps published by China also lack the precision, clarity, and consistency that could convey the nature and scope of a maritime claim. The International Court of Justice’s (ICJ) “statement of a principle” in the Frontier Dispute between Burkina Faso and Mali describes the legal force of maps as follows:

> Whether in frontier delimitations or international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.

China’s 1958 Territorial Sea Declaration also contradicts the view that China has made a claim of either “historic waters” or “historic rights” within the dashed line. That declaration refers to the “high seas” separating China’s mainland and coastal islands from “all other islands belonging to China.” The notion of “high seas” as juridically distinct from any kind of national waters and not subject to national appropriation or exclusive use was an established rule of international law.

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54 Act, supra note 32, Art. 14 (“The provisions of this Act shall not affect the historical rights...” (emphasis added)).
55 Indeed, historical evidence is relevant under the international law applicable to sovereignty disputes over land, and this body of law is separate and distinct from the law of the sea. See, e.g., Nicaragua v. Colombia, supra note 17, paras. 66-84 (applying concepts of “critical date” and “effectivités” to the sovereignty dispute over islands).
56 Emphasis added. See also, E. Franckx and M. Benatar, “Dots and Lines in the South China Sea: Insights from the Law of Map Evidence,” Asian J. of Int’l L., 2 (2012), 89-118 (commenting on the dashed line that “the map is of doubtful probative value in the light of various factors fleshed out in international jurisprudence regarding map evidence”).
57 Frontier Dispute (Burkina Faso/Republic of Mali), 1986 I.C.J. 554 (Dec. 22), para. 54. The Court’s most recent assessment of the evidentiary value of maps is Nicaragua v. Colombia, supra note 17, paras. 96-102.
for centuries before China’s 1958 Declaration. Further, to the extent the 1958 Declaration makes a historic claim, it is to a different body of water—Bo Hai (Pohai), a gulf in northeastern China. Had China considered in 1958 that the waters within the dashed line published on its maps constituted China’s historic waters, it would presumably have referenced this in its 1958 Declaration along with its claim regarding Bo Hai. Instead, the contents of that Declaration, particularly the reference to “high seas,” indicate that China did not consider the waters within the dashed line to have a historic character.

The international community has largely regarded China’s dashed-line map in a manner consistent with this view. Indeed, a comprehensive study on historic waters published in 2008 did not even discuss China’s dashed line nor has the dashed line been identified in U.S. Government compendiums of historic waters claims in the public domain. Formal international protest of the dashed line began only after China’s issuance in 2009 of its Notes Verbales described earlier in this study.

Assessment Part 2 – Would a Historic Claim have Validity?

China has not advanced a cognizable historic claim of either sovereignty over the maritime space within the dashed line (“historic waters” or “historic title”) or a lesser set of rights (“historic rights”) in that maritime space. If China nevertheless does consider that the dashed line appearing on its maps indicates a historic claim, such a claim would be contrary to international law.

Arguments in favor of China’s historic claims often note that the LOS Convention recognizes such claims. A Chinese claim of historic waters or historic rights within the dashed-line would not be recognized by the Convention, however. The text and drafting history of the Convention make clear that, apart from a narrow category of near-shore “historic bays” (Article 10) and “historic title” in the context of territorial sea boundary delimitation (Article 15), the modern international law of the sea does not recognize history as the basis for maritime jurisdiction. A Chinese historic claim in the South China Sea would encompass areas distant from Chinese-claimed land features, and would therefore implicate the Convention’s provisions relating to the EEZ, continental shelf, and possibly high seas. Unlike Articles 10 and 15, the Convention’s

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58 Fu Chu, Concerning the Question of Our Country’s Territorial Sea (in Chinese), Peking, 1959, translation provided in J.A. Cohen and H. Chiu, People’s China and International Law: A Documentary Study, Princeton Univ. Press (1974), 470-79, 483-84 (stating “if bays or gulfs have important interest with respect to the national defense and economy of the coastal states and for a long time the coastal states have repeatedly exercised jurisdiction over the bays or gulf, they may be regarded as historic bays or gulf, . . . The Gulf of Pohai is . . . a historic bay of our country.”) Keyuan refers to the Fu Chu document as “an official explanatory pamphlet published in China in order to justify China’s Declaration on the Territorial Sea.” Z. Keyuan, “Historic Rights in International Law and in China’s Practice,” Ocean Dev’t & Int’l L., 32:149-168, at 156 (2001).
50 Symons, supra note 53.
60 See, e.g., Limits in the Seas No. 112, supra note 19, at 8-21. The Special Master in U.S. v. Alaska (545 U.S. 75) considered “the absence of publication [on lists] has significance in international disagreements about historic waters claims.” No. 128 Original: Report of the Special Master on Six Motions for Partial Summary Judgment and One Motion for Confirmation of a Disclaimer of Title, Mar. 2004, at 111.
61 Protests, supra note 3 and accompanying text.
62 See, e.g., Xiamen University South China Sea Institute, supra note 46 (describing China’s maps as “high-lighting [China’s] historic title. After all, reference to historic titles is part of the UNCLOS.”)
provisions relating to these maritime zones do not contain any exceptions for historic claims in derogation of the sovereign rights and jurisdiction of a coastal State or the freedoms of all States.\textsuperscript{63}

Because the Convention’s provisions relating to the EEZ, continental shelf, and high seas do not contain exceptions for historic claims, the Convention’s provisions prevail over any assertion of historic claims made in those areas. The 1962 study on historic waters commissioned by the Conference that adopted the 1958 Geneva Conventions reached this same conclusion with respect to interpretation of the 1958 Convention on the Territorial Sea and Contiguous Zone.\textsuperscript{64} The 1982 LOS Convention continued this approach by retaining provisions related to historic bays and titles that are substantively identical to those contained in the 1958 Convention. Had the drafters of the LOS Convention intended to permit historic claims of one State to override the expressly stated rights of other States, the Convention would have reflected this intention in its text. Instead, as with the 1958 Convention, the LOS Convention limits the relevance of historic claims to bays and territorial sea delimitation.

Accordingly, with regard to possible Chinese “historic rights” in the South China Sea,\textsuperscript{65} any such rights would therefore need to conform to the Convention’s provisions that deal with the relevant activities. Rules of navigation are set out in the Convention, and these rules reflect traditional navigational uses of the sea. Rules related to oil and gas development are also set forth in the Convention, without exception for historic rights in any context. Also, rules for fishing are set out in the Convention, including limited rules pertaining to historic uses that do not provide a basis for sovereignty, sovereign rights, or jurisdiction.\textsuperscript{66} As the Gulf of Maine Chamber of the International Court of Justice noted in its 1984 judgment, the advent of exclusive jurisdiction of a coastal State over fisheries within 200 nm of its coast overrides the prior usage and rights of other States in that area.\textsuperscript{67}

\textsuperscript{63} In the parts of the Convention covering maritime zones, the Convention contains some provisions relating to historic or traditional uses of the sea. Article 62(3) requires coastal States to take into account “the need to minimize economic dislocation in States whose nationals have habitually fished” (emphasis added) in the EEZ. Article 51 also requires archipelagic States, within their archipelagic waters, to recognize “traditional fishing rights and other legitimate activities” (emphasis added) of immediately adjacent neighboring States. Such provisions might provide a basis for one coastal State to seek access to the fisheries of another coastal State based on prior usage. They do not, however, provide a basis for sovereignty, sovereign rights, or jurisdiction.

\textsuperscript{64} UN Study, supra note 20, paras 72-76, discussing “historic waters” as an exception to the rules laid down in the general [1958] convention, including how to interpret the 1958 Convention “in cases where the historic title has not been expressly reserved in the Convention.” The Study states that, “if the provisions of an article should be found to conflict with an historic title to a maritime area, and no clause is included in the article safeguarding the historic title, the provisions of the article must prevail as between the parties to the Convention. This seems to follow a contrario from the fact that articles 7 and 12 [of the 1958 Convention] have express clauses reserving historic rights; articles without such a clause must be considered not to admit an exception in favour of such rights” (emphasis added). Id., para. 75.

\textsuperscript{65} See, e.g., references to historic rights by Z. Gao and B.B. Jia, supra note 46, at 14 (stating that the dashed line “preserves Chinese historic rights in fishing, navigation, and such other marine activities as oil and gas development in the waters and on the continental shelf...”) and Keyuan, supra note 58, at 162 (stating that the “most convincing [historic] rights that China could enjoy are fishing rights.”).

\textsuperscript{66} See supra, notes 63 and 64 and accompanying text.

\textsuperscript{67} Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), 1984 I.C.J. 246 (Oct. 12), paras. 233, 235. With respect to the “invocation of historic rights, though that expression has not been used [by the United States]...” the Chamber stated that “to the extent that [areas of U.S. historical fishing
It has also been argued that “historic title” and “historic rights” are “matters not regulated by this Convention [and thus] continue to be governed by the rules and principles of general international law” outside of the LOS Convention. This position is not supported by international law and misunderstands the comprehensive scope of the LOS Convention. The Convention sets forth the legal regimes for all parts of the ocean. As discussed above, matters such as navigation, hydrocarbon development, and fishing are in fact “regulated by the Convention.” Therefore, a State may not derogate from the Convention’s provisions on such matters by claiming historic waters or historic rights under “general international law.” Although one may need to refer to “general international law” to identify the meaning of particular terms in the Convention—such as references to historic bays and historic title in Articles 10 and 15, respectively—the Convention does not permit a State to resort to “general international law” as an alternative basis for maritime jurisdiction that conflicts with the Convention’s express provisions related to maritime zones.

Even assuming that a Chinese historic claim in the South China Sea were governed by “general international law” rather than the Convention, the claim would still need to be justified under such law. In this regard, a Chinese historic waters claim in the South China Sea would not pass any element of the three-part legal test described above under the Basis of Analysis:

1. **No open, notorious, and effective exercise of authority over the South China Sea.** China did not communicate the nature of its claim within the dashed line during the period when China might purport to have established a historic claim; indeed, the nature of Chinese authority claimed within the dashed line still has not been clarified. Likewise, China has not established its claims with geographical consistency and precision. As such, it cannot satisfy the “open” or “notorious” requirements for a valid claim to historic waters.

2. **No continuous exercise of authority in the South China Sea.** There has long been widespread usage of the South China Sea by other claimants in a manner that would not be consistent with Chinese sovereignty or exclusive jurisdiction. Many islands and other features in the South China Sea are occupied not just by China, but by Malaysia, the Philippines, Vietnam, and Taiwan, and the mainland maritime claims of Malaysia, the Philippines, Brunei, Indonesia, and Vietnam also project into the South China Sea. These countries have all undertaken activities, such as fishing and hydrocarbon exploration, in

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predominance) had become part of the exclusive fishery zone of the neighbouring State, no reliance could any longer be placed on that predominance. Clearly, whatever preferential situation the United States may previously have enjoyed, this cannot constitute in itself a valid ground for its now claiming the incorporation into its own exclusive fishery zone of any area which, in law, has become part of Canada’s” (emphasis added). Id.

68 LOS Convention, supra note 14, preamble (“Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law”). See, e.g., Gao and Jia, supra note 46, at 123 (stating that the LOS Convention “...was never intended, even at the time of its adoption, to exhaust international law. On the contrary, it has provided ample room for customary law to develop and to fill in the gaps that the Convention itself was unable to fill in 1982 [which is confirmed] in the UNCLOS preamble, which states that “matters not regulated by this Convention continue to be governed by the rules and principles of general international law.”)
their claimed maritime space that are not consistent with "effective" or "continuous exercise" of Chinese sovereignty or exclusive rights over that space.

(3) No acquiescence by foreign States in China’s exercise of authority in the South China Sea. No State has recognized the validity of a historic claim by China to the area within the dashed line. Any alleged tacit acquiescence by States can be refuted by the lack of meaningful notoriety of any historic claim by China, discussed above. A claimant State therefore cannot rely on nonpublic or materially ambiguous claims as the foundation for acquiescence, but must instead establish its claims openly and publicly, and with sufficient clarity, so that other States may have actual knowledge of the nature and scope of those claims. In the case of the dashed line, upon the first official communication of a dashed-line map to the international community in 2009, several immediately affected countries formally and publicly protested. The practice of the United States is also notable with respect to the lack of acquiescence. Although the U.S. Government is active in protesting historic claims around the world that it deems excessive, the United States has not protested the dashed line on these grounds because it does not believe that such a claim has been made by China. Rather, the United States has requested that the Government of China clarify its claims.

The fact that China’s claims predate the LOS Convention does not provide a basis under the Convention or international law for derogating from the LOS Convention. The Convention’s preamble states that it is intended to “settle ... all issues relating to the law of the sea” and establish a legal order that promotes stability and peaceful uses of the seas. Its object and purpose is to set forth a comprehensive, predictable, and clear legal regime describing the rights and obligations of States with respect to the sea. Permitting States to derogate from the provisions of the Convention because their claims pre-date its adoption is contrary to and would undermine this object and purpose. Just as a State that claimed sovereignty over a 200 nm territorial sea in the 1950s cannot lawfully maintain such a claim today, neither China nor any other State could sustain a claim to historic waters or historic rights in areas distant from its shores. The Convention does not permit such claims, and unless the Convention textually recognizes historic claims—such as Article 10 concerning “bays”—the Convention’s provisions prevail over any such historic claims. The advent of the LOS Convention, both as treaty law and as reflecting customary international law, requires States to conform their maritime claims to its provisions.

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69 Symmons, supra note 53, at 245 (“In order to receive the required acceptance by other nations, the coastal State’s acts of sovereignty must be known to foreign nations.”). See also, UN Study, supra notes 20 and 52.
70 Protests, supra note 3 and accompanying text.
71 See, e.g., Testimony of Scot Marcell, Dep. Asst. Sec’y of State, Subcomm. on East Asian and Pacific Affairs of the Senate Comm. on Foreign Relations, July 15, 2009, Digest of U.S. Practice in International Law 2009, at 460-63 (“It might be helpful to all parties if China provided greater clarity on the substance of its claims”) and Testimony of Daniel Russel, Asst. Sec’y of State, Asia and the Pacific Subcomm. of the House Foreign Affairs Comm., Feb. 5, 2014 (“China could highlight its respect for international law by clarifying or adjusting its claim ...”).
72 Such a notion is reflected in, e.g., Gao and Jia, supra note 46, at 123 (stating that “In the case of the South China Sea as enclosed by the nine-dash line, China’s historic title and rights, which preceded the advent of UNCLOS by many years, have a continuing role to play.”).
73 LOS Convention, supra note 14, preamble.
Conclusion

China has not clarified its maritime claims associated with the dashed-line maps in a manner consistent with international law. China’s laws, declarations, official acts, and official statements present conflicting evidence regarding the nature and scope of China’s claims. The available evidence suggests at least three different interpretations that China might intend, including that the dashes are (1) lines within which China claims sovereignty over the islands, along with the maritime zones those islands would generate under the LOS Convention; (2) national boundary lines; or (3) the limits of so-called historic maritime claims of varying types.

As to the first interpretation, if the dashes on Chinese maps are intended to indicate only the islands over which China claims sovereignty then, to be consistent with the law of the sea, China’s maritime claims within the dashed line would be those set forth in the LOS Convention, namely a territorial sea, contiguous zone, EEZ, and continental shelf, drawn in accordance with the LOS Convention from China’s mainland coast and land features that meet the definition of an “island” under Article 121 of the Convention.74 Because sovereignty over South China Sea islands is disputed, the maritime zones associated with these islands would also be disputed. In addition, even if China possessed sovereignty of the islands, any maritime zones generated by those islands in accordance with Article 121 would be subject to maritime boundary delimitation with neighboring States.

As to the second interpretation, if the dashes on Chinese maps are intended to indicate national boundary lines, then those lines would not have a proper legal basis under the law of the sea. Under international law, maritime boundaries are created by agreement between neighboring States; one country may not unilaterally establish a maritime boundary with another country. Further, such a boundary would not be consistent with State practice and international jurisprudence, which have not accorded very small isolated islands like those in the South China Sea more weight in determining the position of a maritime boundary than opposing coastlines that are long and continuous.75 Moreover, dashes 2, 3, and 8 that appear on China’s 2009 map are not only relatively close to the mainland shores of other States, but all or part of them are also beyond 200 nm from any Chinese-claimed land feature.

Finally, if the dashes on Chinese maps are intended to indicate the area in which China claims so-called “historic waters” or “historic rights” to waters that are exclusive to China, such claims are not within the narrow category of historic claims recognized in Articles 10 and 15 of the LOS Convention. The South China Sea is a large semi-enclosed sea in which numerous coastal States have entitlements to EEZ and continental shelf, consistent with the LOS Convention; the law of the sea does not permit those entitlements to be overridden by another State’s maritime claims that are based on “history.” To the contrary, a major purpose and accomplishment of the Convention is to bring clarity and uniformity to the maritime zones to which coastal States are entitled. In addition, even if the legal test for historic waters were applicable, the dashed-line claim would fail each element of that test.

74 LOS Convention, supra note 14, Article 121. Any limitations imposed by paragraph 3 of Article 121 regarding “rocks” would also apply.
75 See Libya/Malta, supra note 42, Nicaragua v. Colombia, supra note 17, and Prescott and Triggs, supra note 42.
For these reasons, unless China clarifies that the dashed-line claim reflects only a claim to islands within that line and any maritime zones that are generated from those land features in accordance with the international law of the sea, as reflected in the LOS Convention, its dashed-line claim does not accord with the international law of the sea.
THREE DISPUTES AND THREE OBJECTIVES

China and the South China Sea

Peter Dutton

The recent heightening of the competition between China and its neighbors over sovereignty, resources, and security in the South China Sea has drawn the attention of diplomatic and military leaders from many countries that seek to promote stability and security in these globally important waters. For states that ring the South China Sea, its waters represent a zone of rich hydrocarbon and protein resources that are increasingly dear on land as populations exhaust their territories' ability to meet their increasing needs. This resource competition alone could be the basis of sharp-edged disputes between the claimants. However, the South China Sea also represents the projection of the cultural consciousness of the centuries-long relationship that each coastal nation has had with its adjoining seas. This fact fuels competing modern-day nationalist tendencies among claimant-state populations, tendencies that in turn magnify the importance of the disputes and, during times of crisis, narrow the options for quiet negotiation or de-escalation.

As American leaders discuss policies and strategies in support of regional stability, some have described the complex disputes in the South China Sea as essentially a tangled knot of intractable challenges. Actually, however, there are three severable categories of disputes, each with its own parties, rule sets, and politics. There are disputes over territorial sovereignty, in the overlapping claims to the South China Sea's islands, rocks, and reefs; disputes over which coastal states claim rightful jurisdiction over waters and seabed; and disputes over the proper balance of coastal-state and international rights to use the seas...
for military purposes. Unfortunately, the region’s states are currently pursuing win-lose solutions to all three of these disputes. A careful analysis of the nature of each dispute reveals, instead, opportunities for more productive pathways to resolution achieved through win-win problem solving and recognition of the mutuality and commonality of interests in these globally important waters.

THREE DISPUTES
The disputes in these three categories have resulted in recurring flashes of tension and conflict for approximately forty years. Notable incidents over sovereignty include the Chinese attack on the forces of the Republic of Vietnam in the Paracel Islands in 1974, China’s attack on Vietnamese forces near Fiery Cross Reef in 1988, and China’s military ouster of Philippines forces from Mischief Reef in 1995. The overall result of this series of incidents was the coalescence of a unified Association of Southeast Asian Nations (ASEAN) political position in opposition to China’s behavior. A politically unified ASEAN persuaded China to accept the 2002 ASEAN Declaration on the Conduct of Parties in the South China Sea to decrease tensions among neighbors. The declaration includes an agreement by all parties to “resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force.” The Declaration of Conduct became the centerpiece of more than a decade of relative regional calm after 1995, the product of a Chinese shift in policy to pursue improved regional integration with its Southeast Asian neighbors through generous economic, commercial, infrastructural, and cultural programs. The United States repeatedly professed neutrality as to the outcome of the sovereignty and jurisdictional disagreements, as long as all parties continued to pursue peaceful means of resolution.

This stability was shattered by a series of antagonistic Chinese actions that began in 2007. A flare-up in tensions in the South China Sea began when China pressured Vietnam and several oil companies in connection with oil exploration and drilling off the Vietnamese coasts. As the U.S. Deputy Assistant Secretary of State, Scot Marciel, testified before the Senate Foreign Relations Committee in July 2009, “Starting in the summer of 2007, China told a number of U.S. and foreign oil and gas firms to stop exploration work with Vietnamese partners in the South China Sea or face unspecified consequences in their business dealings with China.” The Senate hearing was being held in the wake of the March 2009 Impeccable incident, which had awakened many in the United States to China’s more assertive stance in the South China Sea. In that incident, an American naval research vessel was aggressively harassed approximately seventy nautical miles off Hainan Island by Chinese “fishermen” with the support of Chinese civilian law-enforcement vessels and under the observation of a People’s Liberation Army Navy intelligence ship.
These Chinese actions resulted in a return of tension to the region. In response to China’s new strategy, Secretary of State Hillary Clinton stated at the ASEAN Regional Forum (ARF) in July 2010, “The United States, like every nation, has a national interest in freedom of navigation, open access to Asia’s maritime commons, and respect for international law in the South China Sea…. The United States supports a collaborative diplomatic process by all claimants for resolving the various territorial disputes without coercion…. We encourage the parties to reach agreement on a full code of conduct.”

Until this time, the only attribute common to all South China Sea disputes had been that they involved China as a party. However, China’s turn in 2009 toward an assertive, even aggressive approach—especially in its efforts to control U.S. naval activities in the South China Sea—resulted in new American attention to and interest in all three categories of disputes. In order to find a pathway to return to the desired state of regional stability, it is helpful to examine the attributes of each of the three types.

**Sovereignty**

Disputes over sovereignty center on questions of which coastal states have the right to exercise the full measure of state authority over the physical territory of the islands in the South China Sea. They involve Vietnam, Malaysia, the Philippines, and perhaps Brunei, as well as China and Taiwan. Vietnam claims “indisputable sovereignty” over all of the Spratly (Truong Sa) and Paracel (Hoang Sa) Islands; one possible interpretation of some of its recent submissions to the United Nations (UN), however, is that it might be willing to relinquish its claims, at least as regards the Spratlys, in return for recognition of wider resource rights in the South China Sea. Malaysia claims sovereignty over approximately twelve of the southernmost Spratly Islands, based on their situation on its claimed continental shelf. Likewise, Brunei appears to make a similar claim to sovereignty over Louisa Reef, on the basis of its location within its claimed exclusive economic zone. The Philippines claims sovereignty over many of the easternmost Spratly Islands, a cluster to which it refers as the Kalayaan Island Group.

China and Taiwan maintain overlapping, related claims to all the islands in the South China Sea. In 1947 the Nationalist government of the Republic of China began to publish maps with a U-shaped series of lines in the South China Sea delineating its maritime boundaries (see map). These maps were based on a 1935 internal government report prepared to define the limits of China, many parts of which were dominated by outside powers at the time. Though the exact nature of the claim was never specified by the Nationalist government, the cartographic feature persisted in maps published by the Communist Party after it came to power on the mainland in 1949, and today the U-shaped line’s nine
Sovereign Waters. The first approach taken by some Chinese policy analysts is that the expanse enclosed by the U-shaped line should be considered fully sovereign Chinese waters, subject to the complete measure of the government’s authority, presumably as either internal waters or territorial seas. One group of senior Chinese defense analysts, for instance, describes the nation’s offshore interests as “the area extending out from the Chinese mainland coastline between 200 nautical miles (to the east) and 1600 nautical miles (to the south),” or roughly to four degrees north latitude as claimed in the 1935 report. They consider these “sea domains under Chinese jurisdiction . . . [as] the overlying area of China’s national sovereignty.”11 Another researcher refers to “China’s debates with neighboring countries over China’s maritime sovereignty” in advising that the correct strategy is for China “to struggle rather than to fight.”12 It has been easy for some to dismiss this perspective as based on mistranslation or the failure of non-specialists to appreciate the distinction between sovereignty, sovereign rights, and jurisdiction. However, experienced Chinese legal specialists have specifically used the term “sovereignty” in presentations about China’s claims in the South China Sea delivered to legal practitioners of other nations in international forums.13 The concept that China exercises full sovereignty over all the waters embraced by the U-shaped line is also implicit in the description by at least one military scholar of the seas surrounding China’s shores as “China’s ‘blue-colored land’” and as a region “owned” by China.14

Historic Waters. Some Chinese have suggested that the concept of “historic waters” enables the government legitimately to claim broad control over the South China Sea.15 The concept, a variation on China’s claim of sovereignty in the
South China Sea, reflects the view held by many Chinese academics and policy makers that the nine-dash line represents a claim to historic waters, historic "title," or at least some kind of exclusive rights to administer the waters and territory within the line's boundaries. Perhaps the most authoritative statement of
international law on the point was issued in 1951 by the International Court of Justice in the *Fisheries Case*, in which the United Kingdom challenged before the International Court of Justice a claim by Norway to sovereignty over waters along its craggy coastline beyond the traditional three-mile territorial-sea limit of the time.17

The court considered three relevant factors. The first was the close geographical dependence of the territorial sea upon the land domain—the relevant portions of the Norwegian coastline being deeply indented, with complex geographic features and an estimated 120,000 minor islands, islets, rocks, and shoals. The second factor was the presence or absence of links between the land formations and the sea space sufficiently close to make the region susceptible to a fully sovereign regime of governance. Finally, it considered unique economic interests belonging to the coastal state as clearly evidenced by long usage. Ultimately the court approved Norway’s extension, based on its historic claims, of sovereignty over the sea areas and the features contained within them.

The requirements laid out in the *Fisheries Case* for an extension by a coastal state of sovereignty over water space do not lend support to China’s claim. In particular, there is no close geographical dependence between the sea and the land in this region. Indeed, the land features are so insignificant that they have long been seen more as navigational hazards than as productive territory. Additionally, the islets themselves are more widely dispersed than are the features along the Norwegian coastline. The merely sporadic presence of fishermen and traders and the lack of freshwater and arable land to support an indigenous population in any case strongly suggest that the region is not susceptible to a fully sovereign regime of governance. Accordingly, China’s claim of historic waters has weak support on these bases.

Concerning the question of unique economic interests, China has had well documented contact with the islands of the South China Sea for many centuries through fishermen, traders, and the occasional government official. But the historical record reflects similarly well documented contact by Vietnam. Neither country has a record of sustained, exclusive use of or reliance upon the resources of the South China Sea. The peoples of the Philippines, Malaysia, and Indonesia have also maintained contact with these islands, in support of traditional fishing and local trade. Thus, no evidence points to unique economic interests of China or any other single country in or around the islands of the South China Sea. Rather the evidence suggests the contrary—that the waters of the South China Sea and their sparse islands, islets, rocks, and reefs have for many centuries been the common fishing grounds and trading routes of all regional peoples. Indeed, this long-standing common usage suggests that far from having been supervised as any party’s zone of sovereignty, the South China Sea developed as a sort of
regional common in which all parties pursued their interests without fear of molestation by the authorities of other coastal states.

**Island Claims.** Some Chinese academics and policy makers view the U-shaped line as asserting a claim to sovereignty over all the islands, rocks, sandbars, coral heads, and other land features that pierce the waters of the South China Sea, as well as to whatever jurisdiction international law of the sea allows coastal states based on sovereignty over these small bits of land.\(^\text{18}\) On its face at least, a Chinese claim to sovereignty over the islands and to jurisdiction lawfully derived from it is legitimate, in that it complies with the general provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and other aspects of law of the sea. However, a series of fundamental problems undermine it, including the fact that Vietnam, Malaysia, the Philippines, and Taiwan all maintain claims to sovereignty over some or all of the islands in the South China Sea. Since the 1995 Mischief Reef incident between China and the Philippines, a certain stability has been achieved since the five claimants that occupy certain features have agreed to maintain the status quo.

China, of course, occupies and administers all of the Paracels, though Vietnam still maintains its claim to sovereignty over them. The Spratlys represent a mixed case. Since 1996, Vietnam has occupied or controlled approximately twenty-two features, China roughly ten features, the Philippines eight, Malaysia four, and Taiwan one.\(^\text{19}\) In order to support a claim of sovereignty over an island, international law requires that a coastal state demonstrate effective occupation or continuous administration and control.\(^\text{20}\) Accordingly, China's claim to those of the Spratly Islands that it does not occupy or effectively administer or control is unsupported by international law. The same is true of the claims of any other parties that do not actually occupy features over which they claim sovereignty. Some observers wrongly conclude that the non-Chinese claims are based solely on European claims from the colonial era. In fact, those of Southeast Asian states are at least in part expressions of the contacts all coastal peoples have had with the South China Sea's islands and waters for many centuries and of national consciousness that international law should protect those interests.

**Security Interests.** Finally, a fourth Chinese perspective is that the U-shaped line reflects China's long-standing maritime security interests in the South China Sea and that these security interests should have legal protection. The Chinese have long viewed the Bohai Gulf, the Yellow Sea, the East China Sea, and the South China Sea—the "near seas"—as regions of core geostrategic interest and as parts of a great defensive perimeter established on land and at sea to protect China's major population and economic centers along the coasts. As one
People's Liberation Army (PLA) major general recently put it, the South China Sea constitutes part of China's maritime "strategic stability belt."

China's assertiveness about its claims in the waters of its near seas has grown in tandem with the size of its navy and maritime services. As one Chinese analyst put it, "The Navy is just one of the means of protecting our maritime rights and interests[;] the primary means should be to rely on the law, on international law and internal legislation." To enforce these laws and sovereign interests at sea, "in recent years we have started to carry out periodic patrols to safeguard our rights in the East and South China Seas." Thus, some Chinese see international law, in conjunction with their developing maritime power, as a means to establish the long-desired maritime security buffer throughout the near seas, including the South China Sea. That international law does not provide protection for a coastal state's security interests beyond the narrow territorial sea has not deterred Chinese proponents from seeking to change those norms.

**Jurisdiction**

A second category of disputes involves the delimitation of jurisdictional boundaries between neighboring sea zones, including exclusive economic zones (EEZs) and continental shelves. China complicates these disputes through its ambiguous claims of authority over the water space within the nine-dash line, but it is clear that the claim encompasses aspects of jurisdiction as well as aspects of sovereignty. "Jurisdiction" under international law is something less than full sovereignty, in that it does not include the same degree of absolute and exclusive authority to govern all matters of interest to the state. Like sovereignty, jurisdiction is a reflection of state power within specified boundaries, but the concept of jurisdiction connotes the application of state authority only over a limited, specified set of subject matters. All the disputants involved in the question of sovereignty are also involved in the jurisdictional disputes, plus Indonesia, which has an EEZ claim extending from Natuna Island that overlaps with China's nine-dash line.

The two main sources of jurisdictional disputes in the South China Sea are the boundaries of the various national EEZs and continental-shelf zones over which each state may exercise its authority. Within the geographic limits outlined in UNCLOS article 76 (specified boundaries), coastal states are afforded exclusive authority (state power) to regulate the exploration and exploitation of the resources of the seabed, although the legal character of the water space above the continental shelf remains unchanged (a limited, specified set of subject matters). Thus, international law provides for limited coastal-state jurisdiction within a specified zone known as the continental shelf.
Similarly, one of the key innovations of UNCLOS was that it specified coastal-state authority in the water space beyond the territorial sea, a concept that had been steadily developing over the course of the twentieth century. UNCLOS Part V established coastal-state jurisdiction over a vast littoral swath of water space known as the EEZ, which may extend to two hundred nautical miles from the coastal state’s baselines (specified coastal boundaries), and in which the coastal state has “sovereign rights” to the resources plus related jurisdictional authorities (exclusive state power over the specified resource-related matters), for the purpose of managing those resources. Thus, UNCLOS completed the creation of jurisdictional regimes over resources in littoral waters. Accordingly, this second category of disputes is at its core a disagreement over jurisdictional authority in the South China Sea to explore and exploit the resources on and under the sea’s continental shelf and in its water column.

**China’s Ambiguous Jurisdictional Claims.** All states with coastlines that border the South China Sea claim continental shelves and EEZs; however, very little actual delimitation of the boundaries between coastal-state zones has occurred. China’s nine-dash-line claim presents a particular problem for resolving these disputes, because in addition to relying on the line as a source of sovereignty, Chinese policy makers also refer to it as the basis for China’s South China Sea jurisdictional claims. As noted above, some Chinese scholars and policy makers assert that the concept of historic rights (as an alternative to, or in addition to, China’s claim to historic waters in the South China Sea) applies as a basis for jurisdictional control over water space within the nine-dash line. The concept of historic waters has only the briefest mention in UNCLOS, but it exists in customary international law related to bays. It allows coastal states to claim extended jurisdiction over water space or islands when their claims have been open and long-standing, exclusive, and widely accepted by other states.

China’s claim to a historic right to jurisdiction over the waters of the South China Sea is seriously undermined by similar, overlapping claims maintained by the Philippines, Vietnam, Malaysia, Brunei, and Indonesia, not to mention parallel claims made separately by Taiwan. This demonstrates that however long-standing China’s claims of jurisdiction in the South China Sea may be, clearly they are not exclusive or widely accepted by other states. Nonetheless, Chinese law asserts historic rights as a basis for jurisdiction over the South China Sea. The 1998 Law of the People’s Republic of China on the Exclusive Economic Zone and Continental Shelf claims an exclusive economic zone emanating from all Chinese territory, which would logically mean all relevant Chinese territory as specified in the 1992 Territorial Sea Law, which in turn, as noted above, specifically includes each of the island groups in the South China Sea. Thus, in combination,
these two Chinese laws assert an EEZ and therefore jurisdictional control over nearly the entire South China Sea area within the U-shaped line.

This impression was reinforced in April 2011 when China submitted a note verbale to the Commission on the Limits of the Continental Shelf, formed under the terms of UNCLOS.28 Ostensibly, China’s note protested a Philippines submission that had asserted jurisdiction in the waters surrounding the Kalayaan Islands (i.e., the Philippine-claimed group of Spratly Islands).27 However, these submissions both join a lengthening portfolio of legal briefs submitted by the various claimants to clarify and justify their various South China Sea claims.28 China’s note stated, “Under the relevant provisions of the 1982 UNCLOS, as well as the Law of the People’s Republic of China on Territorial Sea and Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and the Continental Shelf of the PROC (1998), China’s Nansha Islands is [sic] fully entitled to Territorial Sea, EEZ and Continental Shelf.” Given that the domestic laws referred to in China’s note specifically assert additional “historic rights” that are not relinquished by China’s creation of an EEZ or continental shelf, the note verbale does little to clarify the ambiguity with which China has so carefully cloaked its claims, since such historic rights continue to leave room to assert legal protection for maritime sovereignty or security interests.

In addition to its ambiguity and lack of specificity, there are many other problems with China’s approach to jurisdiction in the South China Sea. For instance, only a very few of the South China Sea’s islands qualify under UNCLOS for more than the mere twelve-nautical-mile territorial sea. Article 121 requires that islands support human habitation or economic activity before they can accrue a full two-hundred-mile exclusive economic zone or continental shelf. Smaller islands, referred to as “rocks,” accrue no more than a twelve-mile territorial sea. Virtually all of the features in the Spratly Islands group clearly fall into the latter category. Another weakness of China’s claim of jurisdiction over the South China Sea based on its assertion of sovereignty over the sea’s rocks and sandbars is that it has objected to similar claims made by Japan to an exclusive economic zone and continental-shelf rights around Okinotorishima, a small coral feature in the Pacific Ocean about 1,050 nautical miles south of Tokyo.29 International law prevents a state from claiming legal rights if it objects to the same type of claims by other states. Accordingly, neither the provisions of UNCLOS nor historic rights are especially persuasive sources of law on which China can base its claims.

*Jurisdictional Claims by Other States.* The jurisdictional claims of Vietnam and Malaysia conform much more closely than China’s assertions to international law. Vietnam, for instance, claims an exclusive economic zone that “is adjacent
to the Vietnamese territorial sea and forms with it a 200-nautical-mile zone from the baseline used to measure the breadth of Viet Nam’s territorial sea. In addition to clarity about the boundaries of its claim, Vietnam also specifies the extent of its national jurisdiction. Vietnam’s jurisdictional claims track nearly word for word with the requirements of UNCLOS articles 57 and 56, respectively, although it should be noted that Vietnam’s baselines are considered by the U.S. State Department to be excessive.

Malaysia’s Exclusive Economic Zone Act 1984 make similarly normative EEZ and continental-shelf claims. Additionally, the Joint Submission of Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf makes a reasonable claim to an extended continental shelf beyond the two-hundred-nautical-mile EEZ in accordance with UNCLOS article 76. The submission starts with each coastal state’s baselines and measures two hundred nautical miles without regard to any island features. Concerning the Spratly Islands, the legal approach taken by Vietnam and Malaysia, in contrast with the various Chinese approaches, complies with UNCLOS article 121 concerning the regime of islands and with recent case law. Specifically, the Malaysia-Vietnam approach recognizes that the various islets, reefs, and shoals in the southern part of the South China Sea are too small to form the basis of a claim to an EEZ or a continental shelf (or any other form of jurisdiction other than a territorial sea) of their own right.

Another important aspect of Malaysia’s and Vietnam’s claims is that they are specific and public. They represent a choice made by each government concerning how international law should be interpreted in regard to its jurisdiction over offshore zones. They provide a basis for discussion, negotiation, and even potentially litigation by other states that have different perspectives. They do not rely on power—military or economic—to decide the issue. In these ways, the Malaysia-Vietnam approach provides a basis for a stable resolution to any disputes, which is the point of the comment by the International Court of Justice in the Fisheries Case discussed above.

The government of the Philippines established archipelagic baselines for its main islands in legislation completed in 2009 and filed on deposit with the UN. This legislation also claims a separate, nonspecific regime of islands for its Kalayaan Islands claims and its separate claim to the Scarborough Shoal. The Philippines also maintains an EEZ claim based on a 1978 presidential proclamation. The Philippines EEZ extends two hundred nautical miles from its baselines, which were publicly established by the 2009 legislation. Thus, with regard to its main islands, the Philippines made a specific and public claim concerning the extent of its EEZ.
Concerning its continental-shelf claim, the Philippines retains on file with the UN its Presidential Proclamation of 1968, which claims a continental shelf “to where the depth of the [Philippines] superjacent waters admits of the exploitation of such resources, including living organisms belonging to sedentary species.” This outdated expression of the jurisdictional limits of the Philippines continental-shelf claim stems from the definition that appeared in the 1958 Continental Shelf Convention, the provisions of which were updated by UNCLOS article 76. Additionally, the Philippines made a claim to an extended continental shelf in the Philippine Sea, but not in the South China Sea. The Philippines could improve the clarity of its jurisdictional claims to a continental shelf by bringing its proclamation into alignment with UNCLOS. Additionally, the government of the Philippines should publicly state what, if any, claims to jurisdiction over maritime zones it maintains, based on its claim of sovereignty over some of the Spratly Islands and Scarborough Reef. These steps would promote stability by removing sources of ambiguity and allowing for negotiations or arbitration in concert with international law.

In sum, the jurisdictional claims of Malaysia and Vietnam are fully public and stated with specificity. The claims of the Philippines are improving in clarity, but there continues to be room for improvement in that regard. The claims of Brunei should be made more publicly accessible by placing them on deposit with the UN. The jurisdictional claims of China (and Taiwan) in the South China Sea, however, remain ambiguous and therefore contribute to regional instability and present problems for all states whose vessels operate in the South China Sea.

Control
The third category of disputes relates to attempts to assert coastal-state control over the activities of military vessels operating in the South China Sea and is fundamentally about the correct interpretation of international law concerning the balance of coastal-state and international rights and obligations in the EEZ and other jurisdictional waters. As a practical matter there are only two parties to the dispute in this category, China and the United States. Many other countries around the globe, however, have interests and stakes in its outcome, since this category involves China's various attempts to alter international norms concerning freedom of navigation for military purposes and to roll back the balance of coastal-state and international rights in coastal zones that were negotiated in the development of UNCLOS. This resulted in a series of confrontations between American and Chinese government vessels in the South China Sea between 2001 and 2009 that, although tension producing, were manageable from a political and military perspective. China ended this mutual policy of “managed
friction," however, on 8 March 2009, when it confronted USNS Impeccable (T-AGOS 23) with five vessels—a PLA Navy intelligence ship, a government fisheries patrol vessel, a maritime surveillance service vessel of the State Oceanographic Administration, and two small fishing trawlers. 40

Under the observation of all three Chinese government vessels, the fishing trawlers maneuvered dangerously to within eight meters ahead of Impeccable and then abruptly stopped. This forced Impeccable to take emergency action to avoid a collision. Additionally, the Chinese aboard the fishing trawlers used a grappling hook to try to snag Impeccable's towed cable and its related acoustic equipment. 41 These Chinese actions violated international norms related to the duty to exercise due regard in navigation of vessels at sea and also constituted unlawful interference with a sovereign vessel of another state. Impeccable left the scene in order to reduce immediate tensions but returned to the exact location several days later in the company of an American warship, USS Chung Hoon (DDG 93). 42 Thus, the Chinese escalation from past patterns raised the dispute over navigation issues from "managed friction" to one of "near conflict," thereby initiating renewed American strategic attention to the waters of the South China Sea and to the international norms governing freedom of navigation for military purposes in the EEZ.

The creation of the exclusive economic zone in 1982 by UNCLOS as a region extending beyond the territorial sea to a maximum of two hundred nautical miles from a coastal state's shores was a carefully balanced compromise between the interests of coastal states in managing and protecting ocean resources and those of maritime user states in ensuring high-seas freedoms of navigation and overflight, including for military purposes. Thus while in the exclusive economic zone the coastal state was granted sovereign rights to resources and jurisdiction to make laws related to those resources, high-seas freedoms of navigation were specifically preserved for all states, to ensure the participation of maritime powers in the convention.

Nonetheless, China has persistently attempted to shift this carefully balanced compromise by making more expansive claims of legal protection for its security interests, especially in the South China Sea. For instance, one statement by a Chinese military spokesman concerning international freedoms of navigation in the South China Sea is typical. A Chinese Defense Ministry spokesman, Senior Colonel Geng Yansheng, stated, "We will, in accordance with the demands of international law, respect the freedom of passage of ships or aircraft from relevant countries which are in compliance with international law." 43 When pressed to explain the distinction between "passage" and "navigation," other senior Chinese officials have stated that the Chinese government has not objected to the passing
of U.S. Navy vessels through the Chinese EEZ en route to another destination. However, when such vessels conduct exercises, gather intelligence or other militarily useful data, or undertake activities other than mere passage, these officials argue, they are in violation of international and Chinese domestic law.44

Secretary Clinton, however, made clear at the ASEAN Regional Forum in July 2010 that in the South China Sea the United States will not accept China’s limitations on freedoms of navigation for military purposes. She stated that the United States, like all nations, has “a national interest in freedom of navigation, open access to Asia’s maritime commons, and respect for international law in the South China Sea.”45

THREE OBJECTIVES

China is pursuing three main objectives in the South China Sea and Southeast Asia: regional integration, resource control, and enhanced security. Chinese actions over the past four decades are better understood in relation to its various strategies for achieving these objectives.

Regional Integration

Regional integration between China and the states of Southeast Asia is a priority for China, as part of its overall policy of “Peaceful Rise.”46 Regional integration with other South China Sea states, therefore, has both political and economic aspects. To achieve growth, it is helpful for a state to have peaceful borders so that resources can be channeled into economic development rather than armies and border defense systems.47 Accordingly, in order to focus domestic energy on its rapid economic rise, China entered into a period of “strategic pause” with respect to physical confrontation over the Spratly Islands beginning in the mid-1990s and after the political setbacks China suffered in connection with the Mischief Reef incident. This new strategy, pursued from the late 1990s until at least 2007, resulted in major progress, in that opportunities for regional political and economic integration with China were largely welcomed by Southeast Asian states as promoting region-wide economic growth and counterbalancing other outside powers, such as the United States.

In order to facilitate the political aspects of regional integration, China undertook numerous political relationships with ASEAN. Perhaps the most successful aspects of China’s pursuit of regional integration, however, were the programs of economic, commercial, and infrastructural development. Two-way trade, for instance, soared from less than eight billion dollars in 1991 to $106 billion in 2004 and to $231 billion in 2008. The last figure is higher than the trade between ASEAN states and the United States for the same year, which amounted to $172 billion. For many years, ASEAN enjoyed a trade surplus with China; that
has slipped in recent years, and to compensate, China has agreed to increase its bilateral investment in the region by 60 percent over two years.

Additionally, China has supported major infrastructure projects in the region. One such project, the Nanning–Singapore economic corridor, focuses on the construction of an integrated railway transportation system that links Nanning, Hanoi, Ho Chi Minh City, Phnom Penh, Bangkok, Kuala Lumpur, and Singapore. A second project, the Greater Mekong Subregion, similarly links Kunming, in China's Yunnan Province, with Singapore via high-speed rail. More difficult for China to achieve are Pan Beibu Gulf development and the Hainan Initiative. These programs face the obvious challenge of dealing with areas in which sovereignty and jurisdiction remain in dispute.

Some commentators suggest that China's many initiatives in support of regional integration reflect a "ripe fruit" strategy in which time is on China's side. According to this line of thinking, regional integration efforts were designed to freeze the disputes and create favorable regional political conditions while China increased its economic and military power. In this view, once a high level of comparative development is achieved, "if... [China] continues to press its expansive claims in the South China Sea aggressively, the islands and their attendant maritime space may simply fall into its hands like ripe fruit. At the least, [China] will dominate the issue and obtain the lion's share of any settlement."  

Some Chinese believe that the aims of China's substantial investment in Southeast Asia and of its policy of freezing disputes were to earn gratitude, or perhaps leverage, that would result in willing abandonment, in China's favor, of South China Sea claims by other states. Recent events, however, suggest that Southeast Asian states prefer that no major power, including China, gain too much influence in the region. Thus, in a pendulum swing opposite to the one in the 1990s that led ASEAN states to welcome greater Chinese regional involvement, Southeast Asian states now invite the attention of outside powers, including the United States, to offset China's present rising regional influence, in part to ensure that negotiations over South China Sea disputes proceed on a reasonably equal footing.

**Resource Control**

In addition to regional integration, China is also pursuing the objective of enhancing its long-term resource security by ensuring its control over most of the South China Sea's living and nonliving resources. As one Chinese commentator stated, "What is the major challenge now confronting our nation? It is the question of resources." Zhou Shouwei, vice president of the China National Offshore Oil Corporation, has stated, "Offshore and especially deep-water oil
and gas discoveries have great significance for replenishing China’s and the world’s oil resources.”

Fishing resources are also important to the Chinese leadership. One government publication states, “The . . . Sino-Vietnamese Northern Gulf Fishing Agreement has dramatically compressed the working space for our nation’s fishermen. These new difficulties for our hard-pressed fleets undoubtedly constitute one disaster after another. Not only have [such agreements] worsened the situation, but there is also the possibility that it could touch off social instability in various coastal towns and villages.” Indeed, the Chinese navy sees the importance of sea power as an aspect of this resource security.

In the new century, the oceans are . . . strategic treasure troves of natural resources for the sustainable development of humankind. Humankind’s full exploitation and utilization of the oceans and joint management of the oceans in keeping with the law is essentially a redistribution of the world’s maritime rights and interests. Whoever has the greatest investment in the oceans, whoever has the greatest capacity for exploiting the oceans, and whoever controls the oceans will have the upper hand and will acquire more wealth from the oceans, and that nation will be rich and powerful. Therefore it is inevitable that the oceans will become an important arena for international political, economic, and military struggles as well as an important objective in the struggle of every nation for rights and interests.

Perhaps this unidentified author’s primary intention was to justify expansion of China’s navy. However, that he chose to do so using arguments about resource insecurity and the importance of national control over maritime resources is an indication of anxiety among the Chinese people and leadership over the prospect of providing food and energy for more than 1.3 billion people, especially as expectations rise along with China’s economic status. Thus, an important objective for China is to ensure its future access to the resources of the South China Sea.

Enhanced Security
China’s third objective appears to be to enhance its control over the South China Sea in order to create a maritime security buffer zone that protects the major population centers, industry, and rich cultural sites of China’s developed eastern coastal area.

As a retired PLA major general has stated,

China’s sea area is the initial strategic barrier for homeland security. The coastal area was the front line of growth during China’s economic development and the development of Chinese civil society. China’s most developed regions are along the coastline.
The coastal area also possesses the largest population of any of the country’s regions, the highest concentration of high-technology industries, and the most modernized culture. If coastal defense were to fail into danger, China’s politically and economically important central regions would be exposed to external threats. In the context of modern warfare, military skills such as long-range precision strike develop gradually, which makes the coastal sea area more and more meaningful for homeland defense as a region providing strategic depth and precious early-warning time. In short, the coastal area is the gateway for China’s entire national security.54

The idea that China needs to control its littoral maritime zones is based on the classic approach to geostrategy of a country having security concerns with regard to both land and sea. Such countries generally follow security strategies that balance land and maritime strength in order to develop concentric circles of strategic control, influence, and reach around their central regions of vital national interest.55 Thus, the South China Sea, East China Sea, and Yellow Sea collectively represent an area in which Chinese strategists believe they need to develop military control in order to exclude external threats and thereby to raise the level of security of China’s coastal region.56

However, China’s recent actions to enhance its security by competing with other claimants for sovereignty, jurisdiction, and control over the South China Sea fail to account for the interests of other states. Thus, beginning in March 2009, when China shifted its regional strategy away from integration and resource cooperation toward competition over sovereignty and security, it allowed the “ripened fruit,” the political benefits, gained by more than a decade of cooperation to rot on the vine unharvested. Chinese policy makers would do well to remember that regional integration, resource control, and enhanced security are the shared objectives of all regional states and that in the past cooperation has produced substantial results that the recent turn to competition is unlikely to duplicate. Win-win solutions that focus on mutual interests are more promising than win-lose solutions based on competition for sovereignty, jurisdiction, and control.

NEW THINKING ABOUT AN OLD PROBLEM
It is striking how much the South China Sea interests of China and its Southeast Asian neighbors overlap. Regional political and economic integration has greatly benefited each of them. Each has an interest in sustainable development of the South China Sea’s rich fisheries and other living resources. Each has a growing economy and a similarly growing demand for hydrocarbons to support it. The national security of each depends in part on the security of the waters off its shores. What is also striking, however, is that one of the primary reasons for
the failure to resolve the disputes is that the chosen mechanisms for resolution are all win-lose—that is, exclusive state sovereignty and jurisdiction allow for only one winner and create many losers.

Because the islands and reefs of the South China Sea were for many centuries open to fishermen and traders of all coastal peoples—Vietnamese, Chinese, Malay, and Filipinos alike—each nation developed a connection to and an interest in these islands. Similarly, for many centuries the rich fishing grounds were open to all without fear of exclusion or dominance by others. The present competition for exclusive sovereignty over the islands and for jurisdiction over the resources is shortsighted and self-referential, and it fails to account for the mutuality of the interests at stake. This type of conflict resolution, in fact, fails to resolve anything—losers of one round become incentivized to begin a new campaign to reverse or compensate for their loss. In Asia, where memories are long, a win-lose dynamic would essentially institutionalize tensions rather than reducing them permanently.

Some in China seem to recognize this reality. One Chinese commentator has observed that “as China’s comprehensive national strength has increased along with its military capabilities and its requirements for energy resources, so ASEAN states’ anxiety about a China threat has been increasing by the day since independently they have no prospect to balance against China. . . . [Thus, they have taken steps to] unite together in order to cope with China.” Because it helps overcome the perception that growing Chinese strength is a danger to its neighbors’ interests, this author praises the benefits of joint development. Others are less sanguine. As one military scholar put it, “China’s policy toward the South China Sea is ‘sovereignty is ours, set aside disputes, pursue joint development.’ But ‘setting aside disputes’ does not mean setting aside our sovereignty . . . China is already not a weak country. . . . It is hoped that related countries will not make a strategic miscalculation.”

Although in China there is a rich and varied debate about how best to pursue the nation’s interests in the South China Sea, there is a common center to the range of Chinese perspectives. All reflect dissatisfaction with the status quo, in which the Chinese perceive that only China is exercising restraint while all other claimants actively develop and exploit the resources in the disputed zones. There is also general recognition that China has few good options for protecting its interests. Finally, there is general agreement that militarization would only aggravate the disputes and that improving and energizing China’s civilian enforcement capabilities can best protect Chinese interests.

Thus, there is a kernel of hope that solutions to the Three Disputes can be found in win-win, interest-based approaches that accommodate all and exclude none. A good place to begin would be meaningful implementation of the
principles of the Declaration on the Conduct of Parties in the South China Sea, which emphasize peaceful approaches to the many disputes that currently disturb regional tranquility.61

Win-Win Thinking about Sovereignty Disputes
China’s muscular insistence in the years between 1975 and 1995 on severing the sovereignty interests of other countries in the Paracel and Spratly Islands resulted only in a coalescence of political and military opinion in Southeast Asian states against China. Even China’s policies of the past fifteen years of gaining political and economic rather than military leverage have failed, because they remained focused on obtaining exclusive Chinese domination of territories that China has never in its history fully controlled and in which all other peoples in the region were traditionally able to operate. The policy failed because it would have thwarted the interests of other states in the region to use the physical territory of the Spratly Islands to pursue commercial interests, research, enhanced regional and national security, and recreation. This situation suggests that past proposals for shared regional “ownership” of the islands should be revived.

One such proposal, originally made by Mark Valencia, Jon Van Dyke, and Noel Ludwig, was to establish a form of “regional sovereignty” over the islands themselves—that is to say, shared authority over the islands among regional states, to the exclusion of all others.62 A regional authority established by agreement among the claimants could exercise this authority over the islands, their territorial seas, and sovereign airspace. Representation in the regional authority could take many forms but would be based on a combination of such factors as national population, length of coastline, and extent of current and historical usage—all of which are recognized in international case law as legitimate bases for resolving maritime disputes. This arrangement would allow all regional claimants to pursue their interests in the physical territory in the South China Sea through a political mechanism designed to manage the territory efficiently and effectively on behalf of them all.

A second approach that bears consideration is represented by Svalbard, between the north coast of Norway and Greenland. In order to resolve Svalbard’s indeterminate status and to avoid international conflict over its resources, concerned states attending the Paris Conference in the aftermath of World War I negotiated the Treaty of Spitsbergen of 9 February 1920. The treaty gave primary sovereignty to Norway but allowed resource-related rights to all signatories. Original signatories included Australia, Canada, Denmark, France, Italy, Japan, Netherlands, Norway, Sweden, the United Kingdom, and the United States. The Soviet Union signed in 1924 and Germany in 1925; currently there are more than forty signatories, including China.63 When the treaty came into force on 14
August 1925, Norway took over sovereignty, subject to rights of all parties to fish and hunt, to enjoy "equal liberty of access and entry for any reason, [and] to carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality." This creative approach to sovereignty, which accommodated the mutual interests of the various parties with the support of the international community, has contributed to regional security by avoiding conflict and effectively managing living and nonliving resources, and it has productively contributed to international scientific research. As such, it should be considered a potential model for a negotiated resolution of the disputes over the Spratly Islands.

**Win-Win Thinking about Jurisdiction Disputes**

There are many examples of collaborative regimes to share jurisdiction over maritime resources that could be effectively applied in the South China Sea, including several in East and Southeast Asia. The joint Chinese-Vietnamese fishing zone in the Gulf of Tonkin/Beibu Gulf is one example of an approach to overlapping jurisdictional rights and accommodation of mutual, long-standing interests. Useful elements of this agreement include delimited zones of national jurisdiction, a cooperative-management zone of mutual jurisdiction, and an agreement to cooperative management.

Specifically, the agreement establishes a Joint Fishery Committee (JFC) that includes representatives from each party. Together they manage common functions, such as fisheries research, consultation with members of the fishing industry, and recommendations concerning catch quotas for the different types of species. The JFC is quite powerful, in that it has authority to take binding conservation and management measures in order to ensure that fish stocks do not become endangered through overfishing. Decisions are made on the basis of consensus, which promotes willing compliance among state parties. At annual meetings the JFC employs a "quantity-control approach" that sets a "total allowable catch" per species for each of several target species and specifies the number of vessels that may fish them. The total allowable catch is based on the status of each species, the extent of traditional fishing activity, and the impact of modern fishing and management techniques.

A multilateral entity that could potentially serve as a model for the South China Sea is the Northwest Atlantic Fisheries Organization (NAFO). NAFO manages the high-seas fisheries in a rich fishing ground outside any EEZ in the northwestern Atlantic Ocean. NAFO's "objective is to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fishery resources of the Convention Area." The convention establishes a Fishery Commission whose purpose is to achieve "optimum utilization of the fishery
resources” and to adopt a total annual catch quota based on the recommendations of a Scientific Council. The total annual catch quota, by species, is allocated by the commission among the members, giving special consideration to traditional fishing patterns and coastal communities whose livelihoods are based on resources from fishing regional waters.

The commission is also responsible for the adoption of “international methods of control and enforcement” by which member states may engage in mutual enforcement of quotas. Mutual-enforcement measures include a mandatory vessel-monitoring system that uses satellite tracking to provide position updates every two hours; a mandatory observer program in which every vessel fishing in the regulatory area must carry an independent and impartial observer to report any infringements; and a joint inspection and surveillance scheme in which contracting parties have, in rotation, “inspection presence” responsibilities (currently Canada and the European Union) to monitor compliance by the vessels of all contracting parties and report apparent infringements of any vessel to its government for investigation and administrative or judicial action. NAFO’s well developed scheme for multilateral accommodation of mutual fisheries interests and enforceability shows promise for fisheries cooperation in the South China Sea.

Win-Win Thinking about Disputes Related to Military Activities

There is at least some geostrategic rationale for Chinese antiaccess-oriented norms. China seeks to develop control over its near seas in order to enhance its own security and enjoy a freer hand in Asia to pursue its political objectives. However, China’s approach to the normative relationship between coastal states and foreign military power in the EEZ is shortsighted in that it focuses on China’s regional objectives, seemingly without regard to the importance of naval power to the security of sea-lanes around the globe. China relies for its economic growth and development on those very sea-lanes. Thus there appears to be a gap between China’s expression of antiaccess legal norms and its own global interests, since the logical result of a normative shift from international access to the EEZ toward coastal-state authority to exclude foreign military power would be an expanded zone of instability at sea and increased sanctuary for such destabilizing elements as piracy, human trafficking, and illegal weapons and narcotics trafficking.

It is Chinese pressure on the norms that govern military activities at sea that is now drawing the United States into disputes in the South China Sea in the first place. The United States has long withheld any opinion as to the ultimate disposition of questions of sovereignty and jurisdiction in the region. But freedom of navigation and the freedom to pursue traditionally lawful military activities at
sea are critical interests of the United States. Thus, at the 2010 ASEAN Regional Forum in Hanoi, the United States and ASEAN nations made it clear to China that its excessive claims in this regard are politically and legally unsustainable. Secretary Clinton took the opportunity to remind ARF attendees that freedom of navigation for all purposes, including for military activities, is a vital American national interest and is in the interest of all states that rely on open and secure sea-lanes—and indeed, “all” includes China.

During the tense ARF session in Hanoi, published reports pointed to another by-product of China's policies—a desire, born of rising friction over South China Sea security issues, by many regional states for renewed American attention to regional security dynamics. As one Australian defense scholar stated, “All across the board, China is seeing the atmospherics change tremendously. . . . The idea of the China threat, thanks to its own efforts, is being revived.” Unfortunately, the Chinese policy-making community currently seems unwilling or unable to accommodate the interests of either its regional neighbors or the United States, despite China's pledge in the Declaration on the Conduct of Parties in the South China Sea to “respect . . . freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.” This intractability reflects a national self-assertion that has only reaped instability. More traditional Chinese cultural thinking reflects elements of self-restraint and responsibility for others, especially those who are weaker, elements that appear to have been suppressed from the Chinese political body as present policies were made in 2009 and 2010.

Underlying the concern of other states about China's behavior and international law perspectives is the question of what kind of major power China will become as it continues to rise. Will it use its increased power to achieve only its own interests, at the expense of the important interests of others? If so, this is a win-lose path that is likely to lead to continued tensions and possibly even conflict. Or will China undertake a more active leadership role from within the current architecture of norms, institutions, and international law and seek to develop win-win solutions to problems of overlapping interests? Whether the end of the twenty-first century sees a strong United States or a strong China, or a strong United States and a strong China, a regional partnership to address nontraditional security concerns will have been a win-win approach, accommodating the dynamics of mutual interests among the inevitable tensions of international relations.

The Three Disputes in the South China Sea have been sources of instability and even aggression for more than four decades. Only after the negative reaction to
the 1995 Mischief Reef incident and China’s shift of policy toward regional integration and joint resource development was there a period of relative peace. Future peace and security in the South China Sea require all regional countries to remain focused on mutual interests rather than on the pursuit of national interests alone. This mutuality should include a renewed commitment to political, economic, and commercial integration and joint development of living and non-living maritime resources, which form a common Asian heritage. Nonregional states with regional interests, including the United States, can provide meaningful assistance and support in these endeavors.

Achieving a lasting situation of regional stability will require new approaches. The current pursuits of sovereignty, jurisdiction, and control are by nature win-lose. Power alone may produce settlements, but such settlements may not be final, because they do not account for the long-standing mutual interests of others. New, win-win forms of problem solving are needed today—forms marked by shared rather than exclusive authority and mutual rather than nationalistic interests. Only such approaches will ensure that the twenty-first century does not mirror the rivalry and conflict that dominated the twentieth.

NOTES


10. It should be noted that on Chinese maps there is a tenth dash outside the South China Sea, to the southeast of Taiwan, that clearly indicates China’s claim over that island.

12. Li Haitao, "It Is Appropriate to Struggle Rather than to Fight in Order to Defend Maritime Sovereignty," Ta Kung Po Online, 9 November 2009, OSC CPP200911091010010.

13. For example, a research fellow of the People’s Republic of China’s National Institute for South China Sea Studies asserted at a conference at the Richardson School of Law, University of Hawaii (Manoa), in September 2010, that one Chinese perspective is that these waters are fully sovereign, similar to territorial seas.


16. Hong Nong, National Institute for South China Sea Studies (presentation delivered at the Univ. of Hawaii and the Asia Pacific Center for Strategic Studies, Honolulu, 1 October 2010) [hereafter Hong Nong, presentation].


18. Hong Nong, presentation.

19. Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig, Sharing the Resources of the South China Sea (Honolulu: Univ. of Hawaii Press, 1999), plate 1. Note that statements on occupation and control over various of the Spratlys features vary; for instance, see Rowan, "U.S.-Japan Security Alliance, ASEAN, and the South China Sea Dispute," for a somewhat different count.


23. Valencia, Van Dyke, and Ludwig, Sharing the Resources of the South China Sea, p. 77. The authors note that "China seems to have developed a three-noes policy to deal with the Spratlys issue—no specification of claims, no multilateral negotiations, and no internationalization of the issue, including no involvement of outside powers." China’s policy seems to have remained unchanged over the past eleven years.


27. Philippine Mission to the Secretary-General, 5 April 2011.

28. The entire body of documents submitted by the various disputants, which no doubt will
have grown while this article was in press, can be found at "Oceans and Law of the Sea," United Nations Organization, www.un.org/.


31. Ibid.


34. Malaysia-Vietnam Joint Submission.


44. Dutton, ed., Military Activities in the EEZ.

45. Donald K. Emmerson, China’s "Firm Diplomacy" in Southeast Asia, PacNet 45 (Honolulu: Pacific Forum CSIS, 6 October 2010), csis.org/.

46. I am indebted to my colleague Nan Li for much of the information in this section.


48. Valencia, Van Dyke, and Ludwig, Sharing the Resources of the South China Sea, p. 87.

49. I am indebted to my colleague Lyle Goldstein for much of the information in this section.


51. Comments posted on the company’s website, 10 June 2010.

52. Fisheries Management: Focusing on a Rights-Based Regime (Beijing: 2006) [in English].


54. Peng Guangqian, "China’s Maritime Rights and Interests."


59. My colleague Lyle Goldstein carefully translated and analyzed this range of perspectives in an excellent paper entitled "An Abundance of Noise and Smoke, but Little Fire," which he delivered at the International Studies Association's annual conference in Montreal on 19 March 2011.


61. "Declaration on the Conduct of Parties in the South China Sea."


63. Treaty between Norway, the United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions, and Sweden concerning Spitsbergen signed in Paris 9th February 1920, available at www.lovdata.no/.

64. Ibid., art. 3.


70. Ibid.

NOTIFICATION
AND AMENDED STATEMENT OF CLAIM

I. INTRODUCTION

1. The Republic of the Philippines brings this arbitration against the People’s Republic of China to challenge China’s claims to areas of the South China Sea and the underlying seabed as far as 870 nautical miles from the nearest Chinese coast, to which China has no entitlement under the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”, or “the Convention”), and which, under the Convention, constitute the Philippines’ exclusive economic zone and continental shelf.

2. Despite China’s adherence to UNCLOS in June 1996, and the requirement of Article 300 that States Parties fulfill in good faith their obligations under the Convention, China has asserted a claim to “sovereignty” and “sovereign rights” over a vast maritime area lying within a so-called “nine dash line” that encompasses virtually the entire South China Sea. By claiming all of the waters and seabed within the “nine dash line”, China has extended its self-proclaimed maritime jurisdiction to within 50 nautical miles (“M”) of the coasts of the Philippine islands of Luzon and Palawan, and has interfered with the exercise by the Philippines of its rights under the Convention, including within its own exclusive economic zone and continental shelf, in violation of UNCLOS.

3. Further, within the maritime area encompassed by the “nine dash line”, China has laid claim to, occupied and built structures on certain submerged banks, reefs and low tide elevations that do not qualify as islands under the Convention, but are parts of the Philippines’ continental
shelf, or the international seabed; and China has interfered with the exercise by the Philippines of its rights in regard to these features, and in the waters surrounding them encompassed by China’s designated security zones.

4. In addition, China has occupied certain small, uninhabitable coral projections that are barely above water at high tide, and which are “rocks” under Article 121(3) of UNCLOS. China has claimed maritime zones surrounding these features greater than 12 M, from which it has sought to exclude the Philippines, notwithstanding the encroachment of these zones on the Philippines’ exclusive economic zone, or on international waters.

5. In June 2012, China formally created a new administrative unit, under the authority of the Province of Hainan, that included all of the maritime features and waters within the “nine dash line”. In November 2012, the provincial government of Hainan Province promulgated a law calling for the inspection, expulsion or detention of vessels “illegally” entering the waters claimed by China within this area. The new law went into effect on 1 January 2013.

6. In response to these and other unlawful acts in contravention of UNCLOS, the Philippines seeks an Award that: (1) declares that the Parties’ respective rights and obligations in regard to the waters, seabed and maritime features of the South China Sea are governed by UNCLOS, and that China’s claims based on its “nine dash line” are inconsistent with the Convention and therefore invalid; (2) determines whether, under Article 121 of UNCLOS, certain of the maritime features claimed by both China and the Philippines are islands, low tide elevations or submerged banks, and whether they are capable of generating entitlement to maritime zones greater than 12 M; and (3) enables the Philippines to exercise and enjoy the
rights within and beyond its exclusive economic zone and continental shelf that are established in the Convention.

7. The Philippines does not seek in this arbitration a determination of which Party enjoys sovereignty over the islands claimed by both of them. Nor does it request a delimitation of any maritime boundaries. The Philippines is conscious of China’s Declaration of 25 August 2006 under Article 298 of UNCLOS, and has avoided raising subjects or making claims that China has, by virtue of that Declaration, excluded from arbitral jurisdiction.

8. All of the Philippines’ claims in this arbitration have been the subject of good faith negotiations between the Parties. There have been numerous exchanges of views. The requirements of Article 279 have been satisfied. There is, therefore, no bar to the Arbitral Tribunal’s exercise of jurisdiction over the claims asserted by the Philippines.

II. FACTUAL BACKGROUND

A. Maritime Areas

9. The South China Sea, part of which is known in the Philippines as the West Philippine Sea, is a semi-enclosed sea in Southeast Asia that covers approximately 2.74 million square kilometers. The Sea is surrounded by six States and Taiwan. To the north are the southern coast of mainland China, and China’s Hainan Island. To the northeast lies Taiwan. To the east and southeast is the Philippines. The southern limits of the sea are bounded by Brunei, Malaysia and Indonesia. And to the west is Vietnam.

10. There are many small insular features in the South China Sea. They are largely concentrated in three geographically distinct groups: the Paracel Islands in the northwest;
Scarborough Shoal in the east; and the Spratly Islands in the southeast. The Paracel Islands are not relevant to this arbitration. Scarborough Shoal, located approximately 120 M west of the Philippines’ coast and more than 350 M from China, is a submerged coral reef with six small protrusions of rock above sea level at high tide. The Spratly Islands are a group of approximately 150 small features, many of which are submerged reefs, banks and low tide elevations. They lie between 50 and 350 M from the Philippine island of Palawan, and more than 550 M from the Chinese island of Hainan. None of the Spratly features occupied or controlled by China is capable of sustaining human habitation or an economic life of its own.

11. Notwithstanding its adherence to UNCLOS, China claims almost the entirety of the South China Sea, and all of the maritime features, as its own. Specifically, China claims “sovereignty” or “sovereign rights” over some 1.94 million square kilometers, or 70% of the Sea’s waters and underlying seabed within its so-called “nine dash line.” China first officially depicted the “nine dash line” in a letter of 7 May 2009 to the United Nations Secretary General. It is reproduced below. According to China, it is sovereign over all of the waters, all of the seabed, and all of the maritime features within this “nine dash line”.
12. In the east, the “nine dash line” depicted in China’s letter is less than 50 M off the Philippine island of Luzon. In the southeast, it is within 30 M from Palawan. In both respects, it cuts through -- and cuts off -- the Philippines’ 200 M exclusive economic zone and continental shelf, in violation of UNCLOS. Within the area encompassed by the “nine dash line”, China has
What Lies in the South China Sea
China’s claims rely on historical fiction and face an imminent challenge from the U.S. Navy.

By
David Feith
Oct. 13, 2015 1:22 p.m. ET

The U.S. and China are headed for a showdown at sea. U.S. officials say that within days the U.S. military will conduct “freedom of navigation” patrols to challenge Beijing’s territorial claims in the South China Sea’s strategic Spratly archipelago. That area lies more than 700 miles off China’s coast, between Malaysia, the Philippines and Vietnam, but China’s government has warned that it is “seriously concerned” about U.S. action and “will absolutely not permit any country to infringe on China’s territorial waters.”

Now’s a good time, then, to clarify what’s going on. The U.S. and its Asian partners are trying to curb a Chinese campaign to conquer one of the world’s most vital international waterways. The South China Sea is home to rich natural resources and half of all global shipborne trade: some $5 trillion a year in oil, food, iPhones and more. By asserting “indisputable sovereignty” over its nearly 1.35 million square miles, including vast swaths of sea belonging to its neighbors, Beijing threatens to hold hostage—and to wage war over—the economic heart of East Asia.

The U.S. position is to support open seas and the peaceful resolution of disputes, while taking no stance on who owns what in disputed waters. Yet that’s not because China’s claims are as valid as those of its neighbors. On the contrary, China’s claims are dubious, often laughably so. That Beijing backs them aggressively—sending oil rigs, fishing boats and maritime militia into its neighbors’ exclusive economic zones, transforming rocks and reefs into artificial islands for military bases—only underscores the importance of deterring further such revisionism.

“Islands in the South China Sea since ancient times are China’s territory,” Chinese leader Xi Jinping said last month at the White House, giving President Obama and the Washington press corps some typical Beijing spin. The real story is otherwise.

Beijing officially registered its South China Sea territorial claims by submitting a map to the United Nations in 2009. With a huge dashed line swooping south from mainland China in the shape of a U, the map derives from one issued in 1947, when China’s Nationalist government wanted to answer Japan’s World War II claims to dominion over the sea. In 1949 the Nationalists fell to Mao’s Communists and fled to Taiwan. But their ahistorical maritime claim based on Japanese Imperial precedent is today a sacred tenet of China’s Communist Party.

China’s U-shaped map is more an assertion of power than an exercise in cartography. Originally it had 11 dashes. Then Beijing made it nine dashes, as in the version filed to the U.N. Still other official Chinese maps have 10 dashes, with one swallowing Taiwan.

Beijing is vague about the map’s meaning. Does it claim sovereignty over just the rocks, islands and other land features within the nine-dash line, or over all the water and natural resources too? Beijing often acts as though the whole area is a Chinese lake in which foreigners can operate only with permission, but it hasn’t clarified its views to the U.N. or its neighbors. Nor has it deigned to publish geographic coordinates for the dashed line, or to explain why at different times the map has had dashes of different sizes, in different locations.
Beijing often speaks of “historical rights,” yet history shows China never ruled the South China Sea. Until the 1930s the Chinese government didn’t have maps of the Spratly archipelago, let alone control of the territory. After France occupied several of the Spratlys in 1930, it took Beijing three years just to notice—at which point China’s consul in nearby Manila had to ask U.S. diplomats for a map. The first country to object to France’s move was Japan, not China.

When the Chinese government in 1935 published a list claiming ownership of 132 pieces of land in the South China Sea, the assertion was so groundless—Beijing’s attachment to the area so imagined—that Chinese officials didn’t have Chinese names to use. So they translated or transliterated names from Western atlases, such as Antelope Reef and James Shoal. (BBC reporter Bill Hayton documents this in a recent book.)

In the case of James Shoal they made a translation error that echoes loudly today. Shoals are underwater rock or sand masses, and James Shoal lies 70 feet under water in the far southern South China Sea. But China’s 1935 list identified it as a beach or sandbank that rises out of the water. From that, Beijing now claims sovereignty over an area that is more than 1,000 miles from China yet within some 50 miles of Malaysia. What Beijing claims today as “the southernmost point of Chinese territory,” Mr. Hayton notes, “doesn’t exist.”

So China historically didn’t exercise authority over the South China Sea, and foreign states have never acquiesced to Chinese claims to the area. That disposes of Beijing’s historical case as a matter of the international Law of the Sea Treaty, to which China is a party. But of course Beijing’s essential strategy is to bully, not respect any law. As China’s foreign minister told a regional summit in 2010, “China is a big country and other countries are small countries, and that is just a fact.”

Mr. Xi, who rose to power in 2012, is even more than his predecessors an ambitious revisionist keen to press Beijing’s advantage as long as its neighbors are weak and the U.S. unable or unwilling to impose costs for destabilizing behavior. A la Vladimir Putin.

Hence the imperative for the U.S. to protect freedom of navigation, as basic a pillar of international order as there is. Any U.S. military mission in the Spratlys entails risk, as China’s diplomatic and military responses are unpredictable. But the harms of U.S. inaction are mounting. While Mr. Xi tells tales at White House press conferences, his civilian and military forces are tightening control over Asia’s most sensitive waterway.

Mr. Feith is a Journal editorial writer based in Hong Kong.