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# Rule of Law

In This Issue

<b>Introduction</b> .....	1
By Deputy Attorney General Jeffrey A. Rosen	
<b>OPDAT Advancing the Department Mission and Rule of Law Across the Globe</b> .....	3
By Catherine Newcombe and Jill Westmoreland Rose	
<b>Rule of Law in Time of War: The Trial of Saddam Hussein</b> .....	19
By David M. DeVillers	
<b>Uncivil Disobedience: A Selfish Threat to the Rule of Law</b> .....	47
By John W. Huber and David Backman	
<b>Homicide on the High Seas and Navigable Waters: The Seaman’s Manslaughter Statute, 18 U.S.C. § 1115</b> .....	55
By Gretchen C.F. Shappert	
<b>Human Trafficking Enforcement and the Rule of Law</b> .....	93
By Hilary Axam and Soumya Silver	
<b>The Meaning, Measuring, and Mattering of the Rule of Law</b> .....	103
By Elizabeth Anderson and Ted Piccone	
<b>A Brief History on the Formation of Government Ethics and its Importance to the Rule of Law</b> .....	125
By Krystal Walker and Rebecca Mayer	
<b>The Role of Internal Oversight in Preserving the Rule of Law</b> .....	139
By Office of Professional Responsibility	

# Rule of Law

## In This Issue

**You're Not in Kansas Anymore: On the Ground with OPDAT** .....149

By Beth Sreenan

**Living Outside the Rule of Law: The Data on Department of Justice Human Trafficking Prosecutions and Where We Go From Here** .....169

By Elliott B. Daniels

**The Rule of Law Collaborative: A Center of Practical, Interdisciplinary Research, and Engagement on Pressing Rule of Law Issues Around the World** .....191

By Joel H. Samuels

**Rule of Law and Human Rights in Military Stability Operations: Clarifying the Military's Role in Rule of Law Development** .....211

By Ronald T.P. Alcala

**Rule of Law Development and the Need for a Whole of Government Team** .....229

By Major General (Retired) Patrick J. Reinert

**Legitimacy and Rule of Law: A Military Practitioner's Point of View** .....245

By Lieutenant Colonel Nathan J. Bankson

**National Security Data Access and Global Legitimacy** .....257

By Dylan Cors

**Understanding Misunderstanding: Lessons Learned from the Negotiation and Implementation of the Security Agreement Between the United States and Iraq** .....287

By Brigadier General Susan Escallier

# Rule of Law

In This Issue

<b>Francis Fukuyama and the Rule of Law: A Book Review of <i>Political Order and Political Decay</i> by Francis Fukuyama .....</b>	<b>319</b>
By Tate Chambers	
<b>Note from the Editor-in-Chief.....</b>	<b>331</b>
By Chris Fisanick	



# Introduction

*Jeffrey A. Rosen*

*Deputy Attorney General of the United States*

There are few concepts more fundamental to our system of government than the rule of law. The safety, security, and prosperity we enjoy are rooted in the principle that we are all accountable under a set of clearly established laws that apply equally to everyone.

In the late seventeenth century, political philosopher John Locke advocated for a rule-of-law system in which government was “directed to no other end but the peace, safety, and public good of the people” and citizens were governed by “established standing laws, promulgated and known to the people, and not by extemporary decrees.”<sup>1</sup> The founders enshrined this principle in our constitutional system by creating “a government of laws, not of men.”<sup>2</sup> This commitment to the rule of law formed the foundation that has enabled our society to thrive.

In the United States, our rule-of-law system includes checks and balances to ensure that no one part of government becomes too powerful. It provides for due process and equality before the law. It promotes peace by providing a predictable mechanism for resolving disputes. And it affords us a sense of security by setting expectations for behavior, supplying a system to adjudicate violations, and establishing penalties to punish those who break the law. As President Dwight D. Eisenhower aptly put it, “The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law.”<sup>3</sup>

At the Department of Justice (Department), promoting and protecting the rule of law is at the heart of our mission. As employees of the Department, we are called upon “[t]o enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just

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<sup>1</sup> JOHN LOCKE, TWO TREATISES ON CIVIL GOVERNMENT 258–59 (1689).

<sup>2</sup> MASS. CONST. pt. 1, art. XXX (1780); John Adams, *Essay 7, in* Novanglus; Or, a History of the Dispute with America from Its Origin, In 1754, to the Present Time (1775).

<sup>3</sup> Dwight D. Eisenhower, President of the United States, United States Law Day Address (May 1, 1958).

punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.”<sup>4</sup> This directive places us on the front lines of the effort to promote and preserve the rule of law.

Given its centrality to our work, I am delighted that this issue of the *Department of Justice Journal of Federal Law and Practice* centers on the rule of law. This diverse set of articles explores different aspects of the rule of law and highlights ways in which Department employees work to promote the rule of law both domestically and abroad. For example, in *Uncivil Disobedience: A Selfish Threat to the Rule of Law*, United States Attorney John W. Huber and Criminal Chief David Backman from the District of Utah describe efforts the Department is taking to combat the emerging threat posed by the normalization of criminal behavior. In *Rule of Law in Time of War: The Trial of Saddam Hussein*, United States Attorney David M. DeVillers from the Southern District of Ohio tells the compelling story of his work promoting the rule of law in Iraq through the Regime Crimes Liaison Office following the fall of Saddam Hussein. And in *A Brief History on the Formation of Government Ethics and its Importance to the Rule of Law*, Krystal Walker and Rebecca Mayer from the General Counsel’s Office of the Executive Office for United States Attorneys discuss how important it is that those of us in government adhere to the highest ethical standards.

I want to thank all of the authors who contributed articles to this volume, as well as the editors who compiled it. At the Department of Justice, we have been entrusted with the awesome responsibility of enforcing the law. I am grateful for the work the Department’s more than 110,000 employees do every day to carry out that critical mission and to uphold the rule of law.

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<sup>4</sup> *About DOJ*, DEPT OF JUSTICE, <https://www.justice.gov/about> (last visited Nov. 19, 2019).



# OPDAT: Advancing the Department Mission and Rule of Law Across the Globe

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*Jill Westmoreland Rose  
Counsel for Global Counterterrorism  
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Training (OPDAT)*

*Having been an OPDAT Resident Legal Advisor, not only am I a better, more knowledgeable and well-rounded prosecutor, but I have gained a worldwide network of law enforcement contacts that I draw upon to this day. Simply put, the OPDAT experience for an AUSA is an invaluable asset to any and every U.S. Attorney's Office.*

U.S. Attorney Peter Strasser (E.D. La.)

U.S. prosecutors deployed overseas by the Criminal Division's Office of Overseas Prosecutorial Development, Assistance, and Training (OPDAT) provide invaluable assistance to partner countries in identifying, disrupting, and dismantling criminal activities that threaten U.S. interests at home and abroad. With funding from the Departments of State and Defense, OPDAT works directly with the partner countries to strengthen their criminal justice systems; promote the rule of law; and enhance their capacities to effectively investigate, prosecute, and adjudicate complex crimes. As a result, partner countries are addressing corruption, economic crimes, trafficking, and cyber and intellectual property crimes, and thousands of violent gang members and hundreds of terrorists have been arrested and convicted. This work, and that of OPDAT's sister office, the International Criminal Investigative Training Assistance Program (ICITAP), aligns with and reinforces U.S. national security and law enforcement goals. The effect? America and her citizens are much safer and our national security is strengthened.

## **I. OPDAT: the basics**

OPDAT deploys prosecutors on detail from U.S. Attorney's Offices (USAOs) and the Department of Justice (Department) litigating components to serve as Resident Legal Advisors (RLAs), Intermittent Legal Advisors (ILAs), and International Cyber and Computer Hacking and Intellectual Property Advisors (ICHIPs) at U.S. Embassies around the world.

OPDAT's overseas advisors develop a high level of trust and cooperation with local counterparts. In this role, they utilize their unique expertise and experience to furnish timely and direct advice, case-based mentoring, legislative drafting assistance, and skills development programming to foreign justice sector and government officials across a range of issues. Such issues include transnational criminal organizations (TCOs) and gangs, terrorist organizations and their financing, and cyber-related and intellectual property crimes—representative examples of which are included herein. Importantly, RLAs are viewed as the embassy experts on the local criminal justice system, as well as critical liaisons for U.S. government interaction with host government justice officials.

The presence of RLAs, ILAs, and ICHIPs within embassies also encourages foreign counterparts to more effectively engage with U.S. law enforcement, including sharing of important information and evidence in furtherance of investigations and prosecutions aimed at disrupting or dismantling transnational criminal and terrorist networks or groups. This interaction has compelling case impacts. U.S. Attorney John Bash (W.D. Tex.) noted, "I have observed firsthand the incredibly impactful work that OPDAT does in Mexico, Guatemala, and El Salvador. Modern-day crime does not respect national boundaries. For that reason, it is critical to DOJ's mission that we promote the rule of law and effective law-enforcement strategies in other nations."

## **II. Transnational organized crime and gangs**

TCOs engage in all forms of illicit activity (often through violent means), including human smuggling, kidnapping, money laundering, extortion, bribery, cybercrime, and drug trafficking. These global organizations are among the most pernicious and sophisticated in the world and pose a significant threat to the United States. OPDAT's

work to improve foreign law enforcement’s capacity to identify, investigate, and prosecute criminal groups at their source ensures our foreign partners are better able to combat transnational organized criminal networks that either threaten the United States or are already operating in our country. As the Criminal Division’s Principal Deputy Assistant Attorney General noted recently: “[W]e are most effective in our fight against transnational crime when we work across borders. . . . [I]nternational coverage is a practical necessity today.”<sup>1</sup>

## A. Anti-gang initiatives

In the Northern Triangle of Central America, OPDAT, alongside the FBI, facilitates regular regional meetings and conducts mentoring sessions where prosecutors and investigators exchange best practices and strategies in combating transnational, organized gang operations. To date, in El Salvador alone, this coordinated effort has resulted in the indictment of a significant number of gang members and associates, including members of the MS-13 and 18th Street Gang. These operations have also strengthened law enforcement cooperation among the Northern Triangle countries and, importantly, their cooperation with the United States.



**OPDAT RLA-mentored prosecutors in Central America indict multiple gang members**

Complementing these efforts, one of OPDAT’s Mexico RLAs provides support to state and federal anti-gang police and prosecutors as they confront the recent influx of MS-13 and 18th Street Gang members in

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<sup>1</sup> John P. Cronan, Principal Deputy Assistant Attorney General, Remarks at the AMIA 25th Anniversary: Improving Regional Counterterrorism Cooperation in the Wake of a Tragedy (July 25, 2019).

their country. The RLA provides regional anti-gang and interagency coordination workshops, case-based mentoring, and skills training programs. These programs have led to numerous arrests and convictions of high-priority organized crime and gang targets, particularly in Central America and Mexico.



An 18th Street gang member arrested by OPDAT-trained investigators in Mexico

In July 2018, U.S. Attorney Erin Nealy Cox (N.D. Tex.) visited Mexico to acknowledge the collaboration of the Mexican Attorney General's Office, the Federal Police, and Department officials posted at the U.S. Embassy, with the Northern District of Texas in convicting La Familia Michoacana's leader, Arnoldo Rueda Medina, known as "Jefe de Sicarios." Medina and the cartel established a sophisticated network of methamphetamine distribution in the Dallas-Fort Worth area, along with a system of bulk cash smuggling and electronic remittances to Mexico.<sup>2</sup> OPDAT's capacity-building assistance facilitated the sharing of investigative information and furthered the extradition process. U.S. Attorney Nealy Cox expressed her gratitude for demonstrating how binational cooperation leads to successful prosecutions against TCOs. She also discussed and recognized the

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<sup>2</sup> Press Release, U.S. Immigrations & Customs Enf't, 'La Familia Michoacán' Drug Cartel Leader Sentenced to 43 Years in Federal Prison for Trafficking Thousands of Kilograms of Methamphetamine into US (Apr. 11, 2018).

importance of OPDAT's work in encouraging cross-border collaboration.

In furtherance of these cross-border collaborations, OPDAT, through the San Juan, Puerto Rico-based Judicial Studies Institute (JSI), addresses the adjudication of transnational organized crime and gangs, narcotics trafficking, and corruption cases by enhancing the capacity of judges from Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Mexico, Panama, and Peru. As a result of their participation in this program, judges in the region have increased the efficiency of criminal proceedings and issued a number of significant convictions with significant terms of imprisonment. Additionally, the JSI serves as a model for similar judicial development programs.

## **B. Corruption**

Corruption strengthens the grip of transnational organized crime and terrorism in source countries and significantly impacts the work of investigators, prosecutors, and judges, each of whom are committed to combatting organized crime and public corruption. Corruption also hampers the development of strong democratic justice institutions and their credibility with the public—both of which are essential to the establishment of an effective justice sector.

OPDAT's anti-corruption assistance, whether in the form of legislative drafting assistance or case-based mentoring, helped curb the power and influence of organized crime in the Balkans and thus reduced its transnational reach. For example, OPDAT RLAs assisted in crafting constitutional reforms that now require the vetting of judges and prosecutors to prevent organized crime connections and influence. In Serbia, anti-corruption units are prosecuting hundreds of corruption cases, which are likely to lead to more high profile corruption prosecutions, including of those with connections to organized crime. In North Macedonia, OPDAT facilitated the effective development of a special prosecutor's office, which has had significant impact on attacking public corruption. Many experts opine that it may be the brightest spot in the Balkans in terms of improved capacity to combat corruption.

## **C. Drug trafficking**

OPDAT, through programming, mentoring, and capacity building, provides anti-drug trafficking assistance throughout the world.

Recently, OPDAT, along with the combined efforts of many U.S. government officials, engaged with Chinese authorities through multiple meetings, presentations, and events focused on fentanyl importation. As a result of these efforts, China’s Ministry of Public Security recently announced that it added fentanyl-related substances to the Supplementary List of Controlled Narcotic Drugs and Psychotropic Substances with Non-Medical Use.<sup>3</sup> This listing is essentially the same definition that is used by the United States in its classification of fentanyl as a controlled substance. The change became effective on May 1, 2019.<sup>4</sup>



**OPDAT-trained investigators in Colombia arrested individuals involved in a drug organization trafficking cocaine to Mexico and Europe**

In Africa, OPDAT RLAs also engaged in a five-year collaborative effort to develop country-specific manuals used to teach best practices for narcotics trafficking enforcement in Benin and Togo. As a result, there were a number of successful interdictions of narcotics traffickers, demonstrating successful law enforcement collaboration. The Beninese government credited the OPDAT best practices manual and training for the country’s recent successes combating drug trafficking in its territory.

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<sup>3</sup> Michael Martina, *U.S. Welcomes China’s Expanded Clampdown on Fentanyl*, REUTERS (Mar. 31, 2019), <https://www.reuters.com/article/us-usa-trade-china-fentanyl/china-expands-curbs-on-fentanyl-blames-u-s-for-its-abuse-idUSKCN1RD137>.

<sup>4</sup> *Id.*

## **D. Trafficking in persons**

Trafficking in persons is a global issue. OPDAT RLAs work with prosecutors and investigators in source, destination, and transit countries, including dedicated programs in Asia and Mexico, on issues ranging from interviewing witnesses, collection and preservation of evidence, witness and trial preparation, and legal arguments related to jurisdiction.

## **E. Trafficking in wildlife**

Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Thailand, and Vietnam have each been named as a “Focus Country” pursuant to Congress’s Eliminate, Neutralize, and Disrupt Wildlife Trafficking Act.<sup>5</sup> This designation means that each country has been found to be a major source, destination, or transit point for illegal wildlife or illegal wildlife products. Consequently, OPDAT placed an RLA in Asia to address the adequacy of these countries’ respective investigative, prosecution, judicial, and legislative frameworks in the Countering Wildlife Trafficking arena.

## **III. Terrorism and terrorist financing**

OPDAT’s work to build the capacity of foreign partners to combat terrorism in line with international standards and best practices, complements and fortifies the Department’s broader efforts to address the sophisticated and global threat posed by terrorist groups and those who provide financing and other material support. Counterterrorism (CT) RLAs posted in strategic locations around the world not only help to improve laws and enforcement skills, but develop strong credibility and productive relationships with foreign investigators, prosecutors, and judicial officials. This work builds a foundation, which enables the Department to seize the money that fuels transnational crime groups and terrorists that threaten the United States.

OPDAT RLAs provide assistance to foreign prosecutors and investigators on a variety of topics:

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<sup>5</sup> Eliminate, Neutralize, and Disrupt Wildlife Trafficking Act of 2016, Pub. L. No. 114-231, 130 Stat. 949.

- Best practices in fraud, money laundering, and terrorism financing cases;
- Exploitation of suspicious activity reports (SAR) in furtherance of financial investigations;
- Collection and preservation of evidence in terrorism and terrorism financing investigations; and
- Other technical aspects to support successful prosecutions.

According to Chief District Court Judge Frank Whitney for the Western District of North Carolina, who has participated in OPDAT programs in the Philippines and Bangladesh:

The RLA program is an international bridge from the Justice Department to prosecutors and judges in developing countries. I saw firsthand the RLA program train prosecutors and judges on transnational crimes such as money laundering, while at the same time emphasizing the importance of a fair and impartial criminal justice system, meeting fundamental standards of due process.



**With the benefit of OPDAT RLA assistance and training, a Philippine judge sentenced an Islamic State of Iraq and Syria (ISIS) terrorist to a significant term of imprisonment**

In Kuwait, Qatar, and the United Arab Emirates, OPDAT RLAs have developed close working relationships with investigators, prosecutors, judges, and financial intelligence units to address terrorist financing and money laundering, as well as to help these countries strengthen their counterterrorist financing regimes by designating persons as terrorist financiers and enhancing the monitoring of suspicious financial transactions.



OPDAT's Gulf Region RLAs have been central to improving anti-money laundering (AML)/Counter Terrorism Financing (CTF) and CT regimes through technical workshops focused on financial fraud, money laundering, exploitation of banking documents, and SARs.



**Members of the Kuwait Financial Intelligence Unit during an OPDAT workshop on countering the financing of terrorism**

## **A. Foreign terrorist fighters**

CT RLAs are developing law enforcement's capacity throughout the world to effectively investigate, prosecute, and adjudicate foreign terrorist fighter (FTFs) cases. For example, in the Western Balkans (Albania, Bosnia, Kosovo, and North Macedonia), with OPDAT-supported case-based mentoring, foreign partner prosecutions in those countries have resulted in numerous guilty dispositions. A major U.S. government policy concern is facilitating other countries' repatriation and prosecution of their citizens, both men and women, captured in Syria and Iraq as FTFs. To help those countries pursue prosecutions of FTFs, OPDAT RLAs, with support from the Department's National Security Division, provide case-based mentoring and training in the Balkans region. Recently, OPDAT provided assistance to prosecutors in North Macedonia in the first successful case of repatriated FTFs from detention in Syria. They used battlefield evidence from the Department of Defense (DOD) as part of the prosecution effort. CT RLAs in the Near East are likewise working with host countries and U.S. Embassies to establish effective frameworks to address repatriation and prosecution of FTFs.



OPDAT RLAs help Balkans secure guilty dispositions of FTFs

## B. Lebanese Hizballah

OPDAT supported a number of meetings and workshops that brought together regional and global criminal justice officials with an enforcement interest in Lebanese Hizballah, the Islamic Revolutionary Guard Corps-Qods Force, and the Ministry of Intelligence and Security. Also, through OPDAT workshops, Department attorneys are using case-based mentoring to assist foreign counterparts in prosecutions of Hizballah operatives.

## C. Specialized counterterrorism programs

OPDAT RLAs have helped establish specialized CT prosecutors and investigators throughout the world. One specialized unit in Indonesia successfully prosecuted a large number of terror suspects over the past decade, including Umar Patek, the mastermind behind the 2002 Bali bombings,<sup>6</sup> and Aman Abduraman, the head of the Indonesian branch of ISIS, known as Jamah Ansharut Daulah (JAD). Abduraman was responsible for planning and organizing the 2016 bomb attacks at a Starbucks and a police station in central Jakarta.<sup>7</sup> Currently,

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<sup>6</sup> See Sara Schonhardt, *Militant Gets 20 Years in Prison for Bali Bombing*, N.Y. TIMES (June 21, 2012), <https://www.nytimes.com/2012/06/22/world/asia/indonesian-militant-gets-20-years-in-prison-for-bali-bombing.html>.

<sup>7</sup> See Anita Rachman, *Terror Leader's Death Sentence Highlights Indonesia's Hard Mood*, WALL ST. J. (June 22, 2018), <https://www.wsj.com/articles/islamic-state-terror-leader-sentenced-to-death-1529645422>.

OPDAT-trained prosecutors are working in conjunction with Indonesian National Police to investigate and prosecute JAD terrorists who were involved in the 2018 suicide bombing of churches and police stations in Surabaya, Indonesia.<sup>8</sup>

In addition, there is an RLA at the International Institute for Justice and the Rule of Law (IIJ) and two RLAs embedded with the DOD commands for both U.S. Africa Command and the U.S. European Command. Workshops supported by the IIJ and DOD commands have been instrumental in teaching foreign partners about the various issues and best practices related to the collection, exploitation, storage, use, and sharing of battlefield evidence in criminal terrorism prosecutions, as well as how to coordinate military and civilian responses to terrorism. Importantly, the capacity-building assistance of OPDAT's CT RLAs around the world facilitates the exchange and sharing of valuable intelligence and evidence for U.S. investigations and prosecutions, directly impacting our efforts against global terrorism.

## **IV. Money laundering/asset recovery**

Engaging with prosecutors, investigators, and other justice sector interlocutors abroad on best practices in anti-money laundering, financial crimes, and asset recovery is central to OPDAT's work. RLAs have been instrumental in helping countries, through specialized workshops and advice on legislative drafting, to comply with international standards and practices, often resulting in their removal from Financial Action Task Force gray or black lists. OPDAT also partners with international public and private entities in the financial sector to share information and best practices. For example, since 2014 OPDAT and the Central Bank of Bangladesh have held a regular dialogue on AML/CFT for representatives from the private, state, Islamic, and public financial sectors of Bangladesh—now known simply as “The Banking Dialogue.” This unique initiative provides a platform for an ongoing discourse among OPDAT, senior-level decision makers, CEOs from U.S. and Bangladeshi banks, public and private

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<sup>8</sup> See *Indonesian Police Arrest Terror Suspects in East Java Linked to Surabaya Bombings*, CNA INT'L (Aug. 27, 2019, 12:20AM, updated Aug. 27, 2019, 12:30AM), <https://www.channelnewsasia.com/news/asia/surabaya-bombings-indonesian-police-terror-suspects-east-java-11843596>.

financial entities, and both foreign and domestic banking regulators. OPDAT, in conjunction with the USAO for the Western District of North Carolina, will host the fall 2019 dialogue in Charlotte.

## V. Cybercrime and intellectual property rights enforcement

Intellectual property (IP) crime and cybercrime are at the forefront of U.S. government concerns. As discussed in the current National Security Strategy, the need to deter and disrupt cybercrime and IP crime is key to safeguarding the homeland and protecting U.S. innovation, business, and economic security.<sup>9</sup> Indeed, criminal threats against computers and networks cause enormous harm to U.S. businesses, citizens, and government entities. The lack of IP enforcement around the world has led to increased safety risks to consumers. Rampant theft and infringement of U.S. intellectual property, including trade secrets, threaten to undermine the U.S. competitive advantage.

At the same time, TCOs are expanding their criminal activities into new areas. A major area of expansion is cybercrime, including intrusions and denial of service attacks, as well as cyber-enabled crime (for example, use of internet and cell phones to commit fraud or market and distribute illegal opioids). In addition, online copyright piracy and counterfeit pharmaceuticals have become moneymakers for TCOs. Such money is, in turn, used to fund other illicit activity. The National Security Strategy considers countering TCO cybercriminal activity a priority, and the Department's Strategic Plan for Fiscal Years 2018–2022 places an emphasis on protecting America by disrupting and dismantling TCOs and combating cyber threats.<sup>10</sup> Key components to countering cybercrime globally are the G7 24/7 Network and the Budapest Convention on Cybercrime—both of which provide a framework for combating cyber offenses, as well as the collection of electronic evidence and international cooperation.

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<sup>9</sup> See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2017).

<sup>10</sup> See *id.*; U.S. DEP'T OF JUSTICE, DOJ STRATEGIC PLAN FOR FISCAL YEARS 2018–2022.



**OPDAT Mali and Benin train Malian Magistrates on evidence-based prosecutions and digital evidence**

## **A. Cybercrime**

OPDAT's intensified engagement, in partnership with the Computer Crime and Intellectual Property Section (CCIPS), to help improve foreign counterparts' capacity to combat cybercrime and cyber-enabled crime has led to a significant upsurge in enforcement actions by foreign partners, which has benefited both U.S. consumers and companies. It is also helping to curb the expansion of terrorist and TCO activity in the virtual arena. In light of the current global nature of TCOs and terrorism, whose reach and impact are significantly amplified by digital technology, the important nexus between OPDAT's assistance work and the Department's law enforcement mandate is critical.



Attendees at an OPDAT cybercrime workshop in Kuala Lumpur, Malaysia

## **B. Criminal intellectual property rights enforcement**

OPDAT—in partnership with CCIPS—posts ICHIPs in Africa, Asia, Europe, and the Western Hemisphere. All experienced prosecutors, the ICHIPs maintain a regional portfolio and work to advance the intellectual property rights (IPR) enforcement efforts of partner nations by developing the skills, connections, structures, critical interoperability, and transnational law enforcement cooperation. Such cooperation is necessary to effectively combat not only intellectual property violations, but also cybercrimes, such as hacking and cyber-enabled crime, including online fraud.

For example, the ICHIP for the Western Hemisphere, based in Sao Paulo, Brazil, has significantly improved the capacity of police, prosecutors, customs officials, and judges throughout the region to identify, investigate, and prosecute a variety of digital and physical IPR crimes by mobilizing public and private stakeholders. This has produced impressive results: millions in seized goods, a large number of arrests, the rescue of forced laborers, the shutdown of leading digital piracy sites, and the closure of a U.S. Trade Representative-designated notorious markets for counterfeit goods, thus helping to combat transnational crime.

Over the past year, the ICHIP has continued to build a regional cadre of prosecutors, police, customs officials, and judges through case-based mentoring and topical, innovative programming. The ICHIP-mentored Anti-Piracy Unit of Rio de Janeiro's Civil Police recently seized hundreds of thousands of dollars' worth of counterfeit



JBL, Nike, and Disney products, arresting multiple persons for distributing the counterfeit goods, among other offenses.



**ICHIP counterparts in Brazil removing tons of seized counterfeit athletic apparel from a notorious counterfeit market in Sao Paulo**

## **VI. Mutual legal assistance and extradition**

Working in close coordination with the Department's Office of International Affairs (OIA), OPDAT has provided capacity-building programs for partner countries on mutual legal assistance (MLA) and extradition. Additionally, in coordination with OIA, OPDAT serves as an important conduit in linking U.S. and foreign law enforcement offices to facilitate MLA and extradition requests in appropriate circumstances.

## **VII. Conclusion**

While OPDAT impacts justice sectors and the rule of law throughout the world, the OPDAT experience is also an important one among the U.S. Attorney community. As Chief Judge John R. Tunheim of the U.S. District Court in Minnesota observed:

The experience gained by AUSAs who serve overseas as RLAs is exceptionally important to our own criminal justice system. I have worked closely with many RLAs. Not only do they provide valuable assistance to foreign prosecutors and judges in understanding how to do their

work better, but they return to their AUSA positions with an incredible learning experience that makes them much better prosecutors. They return feeling like they have learned much more than they have given, but the truth is that they have contributed much to the development of the rule of law in our world today.

For more information on OPDAT's global activities, please visit our website.<sup>11</sup> OPDAT RLA/ICHIP opportunities are also posted on the Department's vacancy announcements.<sup>12</sup>

## About the Authors

Since 2001, **Catherine Newcombe** has managed OPDAT justice sector assistance programs in Europe/Eurasia and more recently a number of OPDAT's global programs focused on counterterrorism, discrimination/hate crime, and cybercrime/IPR enforcement. She is also an adjunct professor at American University's Washington College of Law. Ms. Newcombe is a graduate of Amherst College and the Faculty of Law, McGill University.

**Jill Westmoreland Rose** is the Counsel for Global CounterTerrorism at OPDAT. She joined OPDAT HQ in July 2019 following her deployment, in January 2018, as the Resident Legal Advisor for Kuwait, Saudi Arabia, and Bahrain. Mrs. Rose is on detail to OPDAT from the U.S. Attorney's Office for the Western District of North Carolina where she was the United States Attorney (March 2015–December 2018), as well as former First Assistant United States Attorney, Criminal Chief, Deputy Criminal Chief and OCDETF Chief. She has served in the Department of Justice since July 1999.

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<sup>11</sup> *Office of Overseas Prosecutorial Development Assistance and Training (OPDAT)*, U.S. DEP'T OF JUST., [www.justice.gov/criminal/opdat](http://www.justice.gov/criminal/opdat) (last visited Aug. 30, 2019).

<sup>12</sup> *Legal Careers*, U.S. DEP'T OF JUST., <https://www.justice.gov/legal-careers> (last visited Aug. 30, 2019).



# Rule of Law in Time of War: The Trial of Saddam Hussein

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## I. Introduction

Nuremberg, Tokyo, Freetown, Arusha, Phnom Penh, and The Hague are all examples of trials after the conflict. But what happens when a nation attempts to prosecute crimes against humanity during the conflict? What effect does that have on the rule of law?

In 2004, a post-Baathist Iraq prosecuted Saddam Hussein and members of the former regime for crimes against humanity even though Iraq had no legal infrastructure to do so and no substantive criminal law that applied. In addition, Iraq lacked the finances and court personnel to prosecute the case.

Iraq and the United States were also in the middle of an ongoing war. In order to advance the prosecution under these conditions, the Iraqi High Tribunal (IHT) was created to prosecute the former regime within international standards and under the rule of law. The United States created the Regime Crimes Liaison Office (RCLO) to assist and advise the IHT's investigation and prosecution of Saddam Hussein and his former regime.

I served in the RCLO from summer 2006 to spring 2007 during the Anfal trial (Kurdish genocide trial). Hussein and his co-defendants were charged with genocide, crimes against humanity, and war crimes, and I witnessed the daily struggle between the rule of law and the realities of war in a nation struggling to survive. This article will explore the imperfect trial of Saddam Hussein and the personal experiences of an Assistant United States Attorney (AUSA) who had a small part in it.

I was one of dozens of AUSAs and Department of Justice (Department) prosecutors from all over the United States working in the RCLO. The RCLO also included personnel from the U.S. Marshals Service (USMS), the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and the Department of Defense (DOD), as well as U.S. and Iraqi contractors. My time with the RCLO

may have been one of the more interesting periods to work as a prosecutor in Iraq.

Although I will not use the names of many of my American and Iraqi colleagues in this article because I do not have their permission, I hope that does not dilute my respect and appreciation for the roles these unnamed individuals played in this difficult mission. Indeed, a number of AUSAs and Department prosecutors spent far more time and sacrificed far more than I did in an attempt to bring justice to a place that had little of it.

## II. Background

In 2006, the IHT began its trial of former Iraqi dictator Saddam Hussein and six other members of his regime for their part in the Anfal Campaign, which was waged against Iraq's Kurdish population from 1988–1989.<sup>1</sup> During the Anfal genocide, Hussein's regime killed roughly 180,000 people; destroyed countless Kurdish villages; and deployed chemical weapons<sup>2</sup> in an effort to wipe out the entire Kurdish population in various parts of northern Iraq.<sup>3</sup>

The Anfal trial was also a rare opportunity to examine the inherent challenges of trying genocidal mass murderers in a country that—before the Iraq War—lacked any semblance of an independent judiciary. As such, the IHT and RCLO had to deal with the all-too-familiar criticisms brought by an international community content to editorialize from the sidelines.<sup>4</sup> While many of these criticisms were legitimate, most seemed to ignore the reality of an ongoing Iraqi insurgency and the inherent problems that went along

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<sup>1</sup> ELIZABETH WILMSHURST, DISCUSSION GROUP SUMMARY, THE IRAQI TRIBUNAL: THE POST-SADDAM CASES, CHATHAM HOUSE 1, 3 (2008).

<sup>2</sup> *1988: Thousands Die in Halabja Gas Attack*, BBC (Mar. 16, 2005), [http://news.bbc.co.uk/onthisday/hi/dates/stories/march/16/newsid\\_4304000/4304853.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/march/16/newsid_4304000/4304853.stm).

<sup>3</sup> See WILMSHURST, *supra* note 1, at 3.

<sup>4</sup> *Id.* at 6 (“International participation had proved impossible because the international community would not cooperate where the death penalty was an available sanction.”); cf. *Q & A: The Anfal Trial*, HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2007/06/22/q-anfal-trial> (last visited June 28, 2019) (“Based on extensive observation of the IHT’s conduct of its first trial, Human Rights Watch believes that it is presently incapable of fairly and effectively trying genocide in accordance with international standards and current international criminal law.”).

with it. Not the least of these problems was the heightened risk of individuals assassinating judges, prosecutors, or defense lawyers. By the time verdicts were handed down in the first trial, a number of defense lawyers had been assassinated.<sup>5</sup> The Anfal trial also increased the risk of political interference and, indeed, one of the chief criticisms of the Anfal trial was that it had been tainted by the machinations of various Iraqi politicians seeking to further their own agendas at the expense of justice.<sup>6</sup>

Rather than trying all the defendants in a single trial or holding a series of trials for different defendants based on their respective roles in the overthrown regime, like the Nuremberg trials,<sup>7</sup> the IHT held several trials. Each of these trials dealt with different crimes that occurred during Saddam Hussein's time in power.<sup>8</sup>

The second of these trials was for the Anfal Campaign. While the proceedings were not flawless, they represented a very real—and largely successful—effort to obtain justice for the victims of one of the worst atrocities committed against the Iraqi people by Saddam Hussein's regime.

### III. Creation of the Iraqi High Tribunal

Despite some support for conducting mass extrajudicial executions,<sup>9</sup> there was never any doubt a special tribunal would be convened to try the leading members of Saddam Hussein's regime. There was, however, some early disagreement about how the tribunal should be structured and administered.<sup>10</sup> Most non-governmental organizations (NGOs) called on the United Nations National Security Council to

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<sup>5</sup> See Patrick J. McDonnell, *The Prosecution of Saddam Hussein, Part Two*, L.A. TIMES (Aug. 22, 2006), <https://www.latimes.com/archives/la-xpm-2006-aug-22-fg-saddam22-story.html>.

<sup>6</sup> See WILMSHURST, *supra* note 1, at 6.

<sup>7</sup> FAMOUS WORLD TRIALS, NUREMBERG TRIALS 1945–1949, <http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/nuremberg.htm> (last visited June 28, 2019).

<sup>8</sup> See WILMSHURST, *supra* note 1, at 3–6.

<sup>9</sup> *Id.* at 6.

<sup>10</sup> M. Cherif Bassiouni & Michael Wahid Hanna, *Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein*, 39 CASE W. RES. J. INT'L L. 21, 35–36 (2007).

create an ad hoc international tribunal along the lines of the one created in response to the Rwandan genocide.<sup>11</sup>

The crux of most arguments in favor of this approach was ostensibly that the severity of the Hussein regime's crimes meant that the legal complexities involved in any trial of its leading members were too great a burden for a country that had gone decades without any semblance of an independent judiciary.<sup>12</sup> Although this concern was certainly legitimate, and any Iraqi tribunal would need to effectively address it, every Iraqi I met took issue with the paternalistic implication that they could not handle trying their society's worst criminals and, as a result, should let the international community handle the matter.

At the same time, many in the international community had a second reason for opposing an Iraqi-administered tribunal—the death penalty.<sup>13</sup> Not only did relatively few Iraqis share the international community's opposition to the death penalty, many saw the ability to impose death sentences as a non-negotiable prerequisite for any tribunal.<sup>14</sup> That is why the creation of a tribunal without the ability to impose death sentences, while more in line with the moral and cultural views of the international community, would have disregarded the Iraqi people's views on the matter.<sup>15</sup>

Given that many of the Middle East's problems since the end of World War I were—either directly or indirectly—caused by Europe's disinterest in the opinions of the people living there, it was prudent for the international community to exercise caution before dismissing the Iraqi people's cultural norms and moral values. And yet, rather

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<sup>11</sup> *Id.* at 36.

<sup>12</sup> *Id.* at 37.

<sup>13</sup> See WILMSHURST, *supra* note 1, at 7; cf. *Q & A: The Anfal Trial*, HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2007/06/22/q-anfal-trial> (last visited June 28, 2019) (“Human Rights Watch opposes the death penalty. From a human rights perspective, the death penalty constitutes a cruel and inhuman punishment. The trend in international law is towards abolition of the death penalty. However horrific the alleged crimes, the death penalty is unwarranted.”).

<sup>14</sup> See WILMSHURST, *supra* note 1, at 7.

<sup>15</sup> Cf. *id.* at 7 (“International participation had proved impossible because the international community would not cooperate where the death penalty was an available sanction, yet the Iraqis had refused to proceed with a tribunal that did not have the power to hand down a death sentence.”).

than apply the lessons of the past, much of the world stubbornly refused to participate in even a hybrid tribunal unless the death penalty was taken off the table, regardless of how the Iraqi people felt about the issue.<sup>16</sup>

Ultimately, when forced to choose between establishing a tribunal that would appease the rest of the international community and one that could potentially have at least some meaningful degree of legitimacy in the eyes of the Iraqi people, the United States opted for the latter.<sup>17</sup> Thus, the Iraqi government would administer the Iraqi High Tribunal with American assistance.<sup>18</sup> The defendants at the trials it conducted—including the Anfal trial—were prosecuted under an amended version of the Iraqi High Criminal Court (IHCC) statute drafted by the Iraqi Governing Council (IRC) and the Coalition Provisional Authority (CPA) in December 2003. This statute gave the Iraqi High Tribunal—then known as the Iraqi Special Tribunal—jurisdiction over all war crimes, crimes against humanity, and violations of Iraqi law committed by Iraqi citizens in Iran, Iraq, and Kuwait.<sup>19</sup>

## IV. Regime Crimes Liaison Office

The concerns about the independence and capabilities of the Iraqi judicial system voiced by many NGOs were legitimate, but they were not impossible to overcome or at least mitigate. To accomplish this task, the United States created the Regime Crimes Liaison Office (RCLO). The RCLO was to assist the IHT's investigations and prosecutions; help the Iraqi High Tribunal obtain assistance from other countries and NGOs; and oversee efforts to protect witnesses, lawyers, and judges.<sup>20</sup>

The RCLO's and the IHT's ultimate mission was to investigate and prosecute the highest members of the former Iraqi Regime for approximately six major atrocities and a number of smaller crimes. Each AUSA assigned to the RCLO was in charge of an investigation into one of these atrocities. I was assigned to the Marsh Arabs case.

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<sup>16</sup> *Id.*

<sup>17</sup> *See* Bassiouni & Hanna, *supra* note 10, at 39.

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

<sup>19</sup> *Id.* at 39–40.

<sup>20</sup> THE WHITE HOUSE, U.S. ASSISTANCE TO THE IRAQI SPECIAL TRIBUNAL (2004).

By the time I started my tour in Iraq, these investigations were well under way, and the Anfal case was the first of the major atrocities where the investigation was complete and ready for trial. The Anfal trial, however, would be in session for a week or two, then in recess for a week or two. As a result, we would work on the trial for half of the time and, for the other half, we would work our other investigations.

One of those investigations included the crimes committed against the Marsh Arabs. The Marsh Arabs inhabited large marshlands between the Tigris and Euphrates rivers in southern Iraq. They have lived there for thousands of years and were relatively independent of the Iraqi government, mostly because the marshlands were incredibly difficult to travel through. In an effort to control the Marsh Arabs, and in response to a large scale uprising in the south following the First Gulf War, Saddam Hussein increased efforts to drain the marshes.<sup>21</sup>

In the 1990s, Saddam Hussein was able to stop the flow of water from the Tigris and Euphrates Rivers and systematically turn the marshes into desert. He was then able to send his army in to attack and destroy Marsh Arab villages.<sup>22</sup> It is estimated the number of Marsh Arabs fell from a population of a half million in the 1950s to 20,000 by the time of the U.S. invasion, with up to 120,000 fleeing to refugee camps in Iran.<sup>23</sup>

While investigating the crimes committed against the Marsh Arabs, I teamed up with an IHT investigative prosecutor. I was extremely fortunate to have him as a partner, as he was hardworking and had no hesitations about traveling with Americans to interview witnesses, interrogate defendants, and review evidence. Virtually all of this work had to be done outside the relevant safety of the Green Zone. The Green Zone was a heavily fortified, foursquare-mile area in central Baghdad that housed both the Iraqi government and the international community. Everything else, except military bases, was considered the Red Zone.

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<sup>21</sup> Michael Wood, *Saddam Drains the Life of the Marsh Arabs: The Arabs of Southern Iraq Cannot Endure Their Villages Being Bombed and Their Land Being Poisoned, and are Seeking Refuge in Iran*, INDEPENDENT (Aug. 28, 1993),

<http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/nuremberg.htm>.

<sup>22</sup> Heather Sharp, *Iraq's "Devastated" Marsh Arabs*, BBC NEWS ONLINE (Mar. 3, 2003), [http://news.bbc.co.uk/2/hi/middle\\_east/2807821.stm](http://news.bbc.co.uk/2/hi/middle_east/2807821.stm).

<sup>23</sup> *Id.*

In 2006, the Red Zone was not a good place for Americans or Iraqis working with Americans. An Iraqi captured with Americans not only had to be concerned about his own safety, but also reprisals against his family. My partner was “all in” on working with the RCLO, primarily because he realized the atrocities committed by Hussein’s regime could not be prosecuted by Iraq alone and certainly not at a time when a war was still very much raging.

Most of the AUSAs, Department, and JAG Corps attorneys had multiple duties in the RCLO. I was no different. In addition to the Marsh Arabs case, I supervised the translators. It was especially rewarding to work with the translators. They were all Iraqis with varied backgrounds: ethnic Arabs, Kurds, Assyrian, Sunni, Shiite, and even Christian. I learned more about complicated social, political, and religious issues from this group than from any other group. Their voices were heard around the world in the news media during the trial. There were teams simultaneously translating to and from Arabic, Kurdish, and English, and I am proud to say nearly all of them now live in the United States as naturalized citizens. We all worked the Anfal trial in some capacity when it was in session. In the beginning, I worked primarily with the Iraqi Kurdish attorneys who represented the interests of the victims in the courtroom. Eventually, I was placed in the prosecution chamber, where I was responsible for assisting and advising Chief Prosecutor Munqth Takleef Mibdir Al-Faraoon (Munqth) and other Iraqi prosecutors.

I also worked with a number of U.S., Canadian, and United Kingdom (U.K.) contract attorneys within the RCLO. Many of these contracted RCLO attorneys worked for years in Iraq, and we relied heavily on their experience. The single most important person in the RCLO while I was there was a contract attorney who was originally from Iraq and became a U.K. citizen. He spoke perfect Arabic, Kurdish, and English and was our primary liaison between the IHT and RCLO. He seemingly worked 24 hours a day and resolved many issues before they became problems. He also seemed to know more about the evidence we were presenting and the people we were prosecuting than anyone else in the RCLO.

## **V. Relations between RCLO and IHT**

American prosecutors are used to an adversarial system with citizen jurors. After my tour in Iraq, I spent many years working for the Department overseas, and I came to learn that, in other parts of the

world, an adversarial system with citizen jurors is extremely rare. Iraq was no exception. Because we have jurors in the United States, it is necessary to try cases with little to no breaks. That is, we start in the morning and end in the evening, day after day, until there is a verdict to allow jurors to go on with their lives as quickly as possible.

That type of trial is not necessary in non-adversarial, juryless systems. In those systems, a court can hear from one witness, memorialize that witness's statement, and then hear from another witness on an entirely different case. In a given month, a court may hear from many different witnesses on many different cases. Once all of the witnesses are heard, the court can read all of the memorialized statements and come to a verdict. The concepts of hearsay and authentication of evidence are also relaxed in many of these systems. For that reason, live testimony is not as common, and it is normal for parties to simply submit reports for the court to consider.

That was the culture in the IHT, and it drove the RCLO attorneys absolutely crazy. The IHT had agreed that the atrocities would be tried one at a time and with as few breaks as possible. The IHT did so because it had limited cases and defendants to try, an obvious incentive to get the cases to verdict as soon as possible, and the RCLO was paying for virtually all of it. But the agreement was in principle only and had limited success.

Sometimes, the court would abruptly end the session for the week with no notice to the RCLO. These delays were extremely burdensome because, in conjunction with the Iraqi prosecution team, we had witnesses lined up and ready to go. These witnesses were often difficult to find and protect, and the USMS and U.S. military were responsible for their housing and security.

Two other AUSAs and I were imbedded at the IHT, which was located in the old Baath Party headquarters that contained the courtroom where all of the cases were tried. Hussein was the leader of the Baath Party, the only party that governed Iraq during his regime.<sup>24</sup> We lived and worked for the RCLO at the U.S. Embassy and traveled daily to the IHT by car.

Working in the same building as our Iraqi colleagues was extremely productive, and it allowed us to establish personal relationships. It also helped us navigate the complicated political factions within the

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<sup>24</sup> Tarik Kafala, *The Iraqi Baath Party*, BBC NEWS ONLINE (Mar. 25, 2003), [http://news.bbc.co.uk/2/hi/middle\\_east/2886733.stm](http://news.bbc.co.uk/2/hi/middle_east/2886733.stm).



IHT and explain to the RCLO who we could trust and how to move forward. A number of the judges and prosecutors were loyal to Shia cleric and militia leader Muqtada al-Sadr, who hated Saddam Hussein and the United States. His militia killed American soldiers on a daily bases.

Normally, IHT judges and prosecutors would remove photos of Muqtada al-Sadr before I entered their offices. If they forgot, I would remind them or walk out—diplomacy does not trump dead Americans. The AUSAs assigned to work with al-Sadr loyalists found the mutual distrust so prevailing they often worked parallel investigations and rarely communicated with the persons they were assigned to. I was fortunate I was not one of the AUSAs assigned to an al-Sadr loyalist.

The Green Zone was relatively safe for IHT personnel, but it often lacked basic needs—medical care and medicine in particular—and Iraqis did not like asking us for help. We were slow to realize that, and many of our IHT colleagues and their families were in urgent need of medical help. Once we became aware, we arranged a military convoy to an American medical center near the airport.

For example, some of the children had developed rickets because their diet lacked vitamins. Once we arrived, the American medical center treated the children and provided us with medicine to bring back to the Green Zone. The medical center also helped develop a long-term health plan. Arranging that medical assistance helped us gain the trust of many of our colleagues in the IHT.

## **VI. Pressure and political interference**

The United States and our allies were fighting three different enemies at the end of 2006: (1) Sunni extremists, including al-Qaeda in Iraq; (2) Iranian-backed Shia militia, including al-Sadr's forces; and (3) Sunni forces loyal to Saddam Hussein. A conviction and likely execution of Saddam Hussein and members of his former regime would virtually eliminate this third enemy. It would also give credibility to the newly elected Iraqi government.

As a result, there was pressure in the RCLO to move forward with the trial as quickly as possible. Much of the pressure was self-imposed. We could see the war all around us. At night, the medical choppers with wounded soldiers flew right over us. Exhausted soldiers in full gear slept in any hallway with air conditioning to escape the 115-degree temperature. And, of course, there were times when we were attacked. All of this reminded us that time was a real

issue. We also knew, however, that the world was watching, and it was our responsibility to bring the rule of law to a place where it had not existed.

The pressure on the IHT was far more intense—all of the IHT bet on the survival of the newly elected Iraqi government and the success of the United States and its allies. Even those loyal to al-Sadr counted on the removal of the former regime and the Baathists. As unlikely as it now sounds, I heard many Iraqis voice concerns that the United States would simply give up, leave, and restore Saddam Hussein to power. This, of course, would mean the entire IHT would be slaughtered.

Political interference in the way of judicial independence was a legitimate concern during the Anfal trial. As discussed below, many of the complaints lodged by NGOs seemed more grounded in their loathing of the death penalty than in judicial independence and the fairness of the trial.

The Dujail trial was the first IHT case tried in 2005. Political interference seemed more prevalent in the Dujail trial than in the Anfal trial. Considered a minor atrocity—certainly not to the people of Dujail—it was a relatively isolated incident the IHT and RCLO could “cut its teeth on.” The facts of the trial were based on a 1982 event. A small group of Iraqis attempted to assassinate Saddam Hussein when he went to Dujail. In retaliation, the Iraqi government rounded up many of the citizens, executed them via a series of show trials, and bulldozed the entire town to the ground.<sup>25</sup> Saddam Hussein was ultimately executed for the atrocity at Dujail.

To ensure former regime members and high-level Baathists did not have a part in the new government, the Iraqi government established the Higher National De-Baathification Commission. Starting in 2005, the Commission attempted to remove IHT personnel and judges assigned to the Dujail case. Whether these IHT personnel were truly loyal Baathists, or simply not considered tough enough on the former regime, was always in question by the RCLO. The Commission was successful in removing some of the IHT personnel, and the effect on those who remained was uncertain, but some of the judges may have

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<sup>25</sup> WILMSHURST, *supra* note 1, at 3.

modified their stances or refused positions that would have been scrutinized by the Commission.<sup>26</sup>

While most of the Commission's interference with the IHT was finished by the time the Anfal trial started in the middle of 2006, the Prime Minister's Office certainly had ways to influence the Anfal court. For example, the IHT's budget for housing and security came directly from the Prime Minister's Office.<sup>27</sup> In addition, all of the IHT was housed in the somewhat-protected Green Zone, where space was limited. IHT staff risked being moved to less comfortable or even unsafe housing should they anger the Prime Minister's Office.

The Prime Minister's Office removed the Anfal trial's initial presiding judge, Abdullah al-Amiri, after he stated in open court that Saddam Hussein was not a dictator.<sup>28</sup> Unlike many of the international community's criticisms of the Anfal trial, the backlash against Judge al-Amiri's removal was not criticized. While Judge al-Amiri made a number of remarks that suggested he was somewhat sympathetic to the defense,<sup>29</sup> even judges in the American legal system will sometimes make comments that are—rightly or wrongly—perceived as being indicative of a certain degree of sympathy for one side in a particular case.<sup>30</sup> To be sure, such comments are not ideal, but they are not grounds to reassign a case to another judge, particularly in the absence of significant evidence the comments were prejudicial. Consequently, Judge al-Amiri's removal needlessly lent credence to those who were already skeptical of the Iraqi High Tribunal's independence.<sup>31</sup>

Even at the RCLO, we were not immune to pressure from the Prime Minister's Office. Nouri al-Maliki was the Prime Minister of Iraq from

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<sup>26</sup> MIRANDA SISSONS & ARI S. BASSIN, *Was the Dujail Trial Fair?*, 5 J. OF INT'L CRIM. JUST. 272 (2007).

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

<sup>28</sup> CNN Library, *Saddam Hussein Trial Fast Facts*, CNN (updated Mar. 4, 2019), <https://www.cnn.com/2013/10/30/world/meast/saddam-hussein-trial-fast-facts/index.html>.

<sup>29</sup> *Id.*

<sup>30</sup> Rachel Weiner, *Federal Judge Says Special Counsel Wants Manafort to 'Sing' About Trump*, WASH. POST (May 4, 2018), [https://www.washingtonpost.com/local/public-safety/manafort-to-appear-in-virginia-court-in-bid-to-have-fraud-charges-dismissed/2018/05/03/c3b0acb0-4ca2-11e8-b725-92c89fe3ca4c\\_story.html](https://www.washingtonpost.com/local/public-safety/manafort-to-appear-in-virginia-court-in-bid-to-have-fraud-charges-dismissed/2018/05/03/c3b0acb0-4ca2-11e8-b725-92c89fe3ca4c_story.html).

<sup>31</sup> See WILMSHURST, *supra* note 1, at 5.

2006–2014.<sup>32</sup> By December 2006, Saddam Hussein had been convicted in the Dujail case and sentenced to death. The appeal, however, was still pending, and the RCLO was assisting the IHT in the appeal. The agreement between the RCLO and the Iraqi government was that the U.S. military would not turn over any of the defendants until their cases were resolved. That included verdict, sentence, and appeal. They would then be turned over to Iraqi officials to serve their sentence.

In early December 2006, I met with Prime Minister al-Maliki to discuss the progress on the Marsh Arabs case. The Prime Minister, however, was more interested in discussing the handover of Saddam Hussein. I reminded the Prime Minister of the agreement between the United States and Iraq. This discussion did not go over well, and I believe my translator was paraphrasing the gist of the Prime Minister's statements for the sake of politeness. In the end, it was clear the Prime Minister was encouraging the RCLO and IHT to move swiftly on the appeal. I am certain the Prime Minister's statements had no effect on the RCLO. Nonetheless, Saddam Hussein was executed by hanging after being convicted of crimes against humanity based on the Dujail murders.

## VII. How the trial operated

One of our fears during the Anfal trial was that a member of the IHT court staff would try to kill Hussein or one of his co-defendants. As a result, all of the individuals subject to prosecution by the IHT were guarded by the U.S. military and kept at Camp Cropper, just outside of Baghdad. At the courthouse, the U.S. military and U.S. Marshals were in charge of the defendants' security. The only time a defendant was turned over to the Iraqis was at the entrance of the courtroom. An armed U.S. Marshal would hand the defendants to an unarmed Iraqi guard at the doorway to the courtroom when the session began, and the defendant was returned when the session ended.

To avoid any unfavorable optics of American participation in the trial, we took great lengths to ensure there were no Americans in the courtroom when the trial was in session. There was, however, a sea of Americans surrounding the courtroom. As for me, I usually watched from a one-way window behind the defendants or a camera in the

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<sup>32</sup> Louay Bahry, *Nuri al-Maliki*, ENCYCLOPEDIA BRITANNICA, [www.britannica.com/biography/Nuri-al-Maliki](http://www.britannica.com/biography/Nuri-al-Maliki) (last visited Sept. 16, 2019).

prosecution chambers just outside the courtroom. But the trial rarely began on time—it started when Judge Mohammed Irebi Majeed Al-Khalefa was ready.

The other RCLO attorneys and I looked much like Secret Service agents during trial. We wore suits and earpieces connected to a microphone in our sleeves to communicate with the marshals and ourselves. A dozen moving parts were coordinated during the countdown prior to starting court every day. We were all in different rooms ready to give a “go” or “no go.” I was in the prosecution chamber. Other RCLO attorneys were with defense attorneys, the judges, the Kurdish attorneys, and the translators; the marshals were with the defendants.

Once Judge Mohammed was ready, we would all indicate if our parties were ready. It usually took three or four tries before everyone was a “go.” Then, the parade of parties entered the courtroom. No Iraqi was allowed outside their particular chamber without one of us within arm’s reach. I was not sure what I was supposed to do if one of my prosecutors actually tried to kill one of the defendants, but I knew I was supposed to do something.

Overall, our relationships with the defense attorneys were fairly good. For the Anfal trial, all the defense attorneys were Iraqi. We had two different teams of defense attorneys: the privately retained attorneys, and a team of IHT public defenders. We had open discovery and would meet with both sets of attorneys, usually at the Al Rasheed Hotel, and present them with exhibits and witness summaries of what we intended to present that week.

Because our discovery process was open, there was a certain amount of trust between the RCLO and defense counsel. Nonetheless, there were times when the IHT prosecutors came up with evidence the morning of trial that we had no idea was going to be presented. In addition to our discovery process, the RCLO set up and traveled with defense counsel to Camp Cropper when they needed to visit their clients. Defense counsel was always present when we interviewed their clients, and the defendants had the right to remain silent, although they rarely did.

To ensure the trial ran smoothly, we had public defenders in a room behind the courtroom watching from a closed circuit camera. When privately retained attorneys stormed out of the courtroom in protest, which was relatively often, we moved IHT public defenders into the courtroom and continued with the trial. There were various reasons

for these walkout protests—usually it was the “illegitimacy” of the IHT—but they were not as spontaneous as they appeared. Privately retained attorneys often gave us a warning beforehand. Those warnings, of course, gave us time to get IHT public defenders up to speed on the witnesses we were presenting during the protest period.

Some of these defense attorneys even discussed strategy with us. For example, at the time of the Anfal campaign, Iraq was in a bloody war with Iran, and some defense attorneys argued the Iraqi Kurds assisted the Iranians, and thus, they were enemy combatants. This argument, however, could not justify the mass internments, attacks, executions, and other atrocities committed against a civilian population.

In another instance, one of Hussein’s attorneys sought my advice on a strategy he was considering. He asked about the internment of our Japanese–American population during World War II. In essence, he was looking for some semblance of a historical justification. It may seem strange, but I was heartened by the fact that he was going to make a substantive argument about the case, as opposed to just screaming the IHT was illegitimate. I told him the U.S. internment of Japanese Americans was considered a national shame and reparations were paid. Nevertheless, I encouraged him to make the argument, which he did. The defense was getting overwhelmed by the evidence—and the overall impact of his argument was minimal—but for a while, it felt like a traditional adversarial trial.

## VIII. Dangers

During my time with the RCLO, the Green Zone was attacked quite often. In 2007, the U.S. military began a “surge” that reduced attacks in the Green Zone. Most often, the attacks occurred early in the morning, just before dawn: rockets and mortar rounds fired into the Green Zone from various spots in the Red Zone. Because we slept in “hooches”—trailers with sandbags along the outside walls—our only option was put on our helmets and Kevlar, lie on our bunks near the sandbags, and hope that a round did not go through the top of the hooch. Fortunately, the attacks did not last long, and the “all clear” notice would alert us when it was safe to go outside. It was obvious these attacks were attempts to hit the U.S. Embassy grounds where we were located.

Despite all of that, the scariest thing during my time was we—the AUSAs—were armed. We carried 9mm Glocks and were armed

everywhere except in the courthouse, where only the marshals were armed. We, or at least I, had little weapons training outside of PlayStation games.

In addition to frequent attacks and AUSAs with guns, traveling outside of the Green Zone was dangerous. It was also exhausting, but necessary. We had to travel to interview witnesses, interrogate defendants, and prioritize the translation of a massive amount of government documents. Travel was by armed convey or Blackhawk helicopters.

When we traveled by convoy, the biggest concerns were suicide car bombers and Improvised Explosive Devices (IEDs). The IEDs and car bombs were massive and sounded completely different from the rockets and mortar attacks. My colleagues and I were fortunate we were not casualties of these attacks, but we often heard and felt them from the other side of the Tigris River. The attacks caused an unmistakable “deep thunder” noise, and you could feel the concussion from miles away. You also knew that they caused massive casualties to Iraqi civilians.

Travel by Blackhawk, on the other hand, was more confusing than scary. I was never in a Blackhawk that was on the ground more than a minute, either when picking me up or dropping me off. We met at the landing zone, jumped in, and strapped in the moment the Blackhawk touched the ground. We could not hear anything over the propeller noise, and we never orally communicated with the Blackhawk crew. But once we reached our destination, a crewmember gave hand signals to get out. After we were out of the door and cleared, the Blackhawk took off.

But there were times of danger. On one occasion while traveling with two RCLO colleagues over Baghdad, our Blackhawk shot out countermeasures (flares) and dove toward the Tigris River. Flying low, we followed the Tigris out of Baghdad. I looked at one of the young crewmembers, and he calmly mimed that there was enemy ground fire. Once we were on the ground, the Blackhawk took off. We never found out if the Blackhawk was actually hit by the ground fire.

Finally, along with the frequent attacks and the dangers of traveling, we had to deal with the daily fear of finding a bomb in the IHT’s headquarters. Working with the RCLO was hands-on, and everyone had to pitch in for security. When the trial was not in session, few Americans were in the building. Generally, our Iraqi colleagues had free reign, except the fifth floor, where a couple of

other AUSAs and I worked. Hundreds of Iraqis worked for the IHT on the lower floors, and the courtroom was just above them.

In the evenings, before court was back into session, the marshals sealed off the courtroom, and the entire RCLO staff searched for bombs. We had no high-tech instruments or protective gear—it was just AUSAs and others looking in drawers and behind desks like a childhood game of hide-and-seek. Fortunately, we never found a bomb.

## IX. The Anfal trial and its key participants

Munqith al-Faroon served as the chief prosecutor at the Anfal trial, which lasted from August 21, 2006, to June 24, 2007.<sup>33</sup> There were two other prosecutors on the case, but they rarely spoke in court. Munqith was a middle-aged chain-smoker with jet back hair and a mustache. He always looked completely exhausted, and he suffered from high blood pressure. It seemed like there was always an army medic in chambers taking his vital signs to make sure he would not pass out during trial. But once in the courtroom, Munqith, despite his medical condition, was energetic, aggressive, and effective. He was particularly effective in rebutting claims that the Anfal campaign was a military campaign to defend Iraq from Iran.

On one occasion, we recovered a Hussein regime memorandum discussing the role of Dutch businessman Frans van Anraat in acquiring banned chemical weapons for the Anfal Campaign. Van Anraat was convicted of complicity to commit war crimes in The Hague and sentenced to 15 years' incarceration.<sup>34</sup> Munqith presented evidence on how the chemical weapon was used on the Kurdish civilian population.<sup>35</sup> He played numerous graphic videos of dead civilians, including children gassed to death in the middle of Kurdish villages.<sup>36</sup> He then stood up and told the court, "I want you to view these dead children because these are the 'honorable battles' that Sultan Hashim [one of the defendants] speaks of."<sup>37</sup>

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<sup>33</sup> *Timeline: Anfal Trial*, BBC NEWS (June 24, 2007), [http://news.bbc.co.uk/2/hi/middle\\_east/5272224.stm](http://news.bbc.co.uk/2/hi/middle_east/5272224.stm).

<sup>34</sup> Pub. Prosecutor v. Frans Cornelis Adrianus van Anraat, No. 09/751003-04 (Dist. Ct. of The Hague Dec. 23, 2005).

<sup>35</sup> *Saddam Prosecutors Show Graphic Video of the Dead*, MAIL & GUARDIAN (Dec. 19, 2006), <https://mg.co.za/article/2006-12-19-saddam-prosecutors-show-graphic-video-of-the-dead>.

<sup>36</sup> *Id.*

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



Munqith was also brave. Both Munqith and Judge Mohammed were the faces of the Anfal trial, which was televised. They were seen by millions of Iraqis every day, exposing the crimes perpetrated by the Hussein regime. This exposure did not sit well with the Baathist loyalists, who were still very much in the fight at that time.

In October 2006, Munqith's brother, a prominent attorney living in the Red Zone, was assassinated.<sup>38</sup> Afterwards, I traveled to Munqith's apartment to attend a ceremony honoring his brother and measure his resolve. His brother was killed because of Munqith's role in the trial. At the time of the assassination, we were in the second month of the trial, and because the war was still ongoing, the logistics of transporting and protecting witnesses, court personnel, prosecutors, Kurdish attorneys, defense counsel, and the defendants was complex.

While I felt cold approaching Munqith to inquire if he could continue, I also knew that any delay could jeopardize the trial and the safety of the participants. Munqith knew these dangers more than anyone else, and he assured the RCLO and me that he would continue with the trial on schedule. Munqith's brother was killed on a Monday—he was back in trial on Wednesday.

After the Prime Minister removed Judge Arif Abdul Razaq Al-Shaheen, the Anfal court consisted of Presiding Judge Mohammed Irebi Majeed Al-Khalefa, Judge Taher Taleb Al-Tokmachi, and Judge Hawar Hama Khursheed Al-Jaf.<sup>39</sup> Judge Mohammed ran the show. It was *his* courtroom, and he showed no fear of the defendants. He was not afraid to admonish the parties, as well as prosecutors and witnesses, if he felt they were violating procedure.

Judge Mohammed was quite social outside the courtroom. I was invited to his apartment for dinner not long after he was appointed presiding judge. He was intrigued by American culture and had a great knowledge of American cinema. Through him, I saw how isolated the judges and other IHT personnel were. He had his immediate family living in the Green Zone with him, but most of his extended family, friends, and past life were in the Red Zone. Like

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<sup>38</sup> Jomana Karadsheh & Mohammed Tawfeeq, *Ministry: Iraq Families Join Exodus to Escape Violence*, CNN.COM INT'L (Oct. 18, 2006), <http://edition.cnn.com/2006/WORLD/meast/10/18/iraq.main/index.html>.

<sup>39</sup> *Transcript of Anfal Trial Judges 1/29/08 Presentation at Case Western Reserve*, GROTIAN MOMENT BLOG (Feb. 10, 2008), <https://law.case.edu/Academics/Centers-and-Institutes/Cox-International-Law-Center/Grotian-Moment/ArtMID/804/ArticleID/673>.

Munqith, Judge Mohammed's role in the Anfal trial was well known, and only weeks after being named presiding judge, his brother-in-law was murdered.<sup>40</sup> He, too, continued with the trial without delay.

The trial began with the complaint phase, during which the judges heard testimony from 77 witnesses, many of whom were survivors of the Anfal campaign.<sup>41</sup> These witnesses testified about three aspects of the Anfal genocide, the first of which was the Hussein regime's efforts to depopulate Kurdish villages by repeatedly gassing Kurdish civilians, destroying buildings and homes with bulldozers and explosives, and attempting to destroy the Kurdish food supply by killing all of their livestock.<sup>42</sup> Some of these witnesses also testified about the executions of their family members who, like most victims of the Anfal campaign, were often buried in mass graves.<sup>43</sup> Finally, some of the witnesses testified about the conditions at the de facto death camps, where many Iraqi Kurds were sent during the Anfal campaign.<sup>44</sup> Many of the prisoners at these camps were beaten, raped, or tortured, and virtually all were starved and denied even the most basic medical care.<sup>45</sup>

The testimony of these victims was extremely emotional. As I watched, many of these victims went from terrified to vindicated and back again. The way the courtroom was set up, the witnesses sat in a wooden well with curtains along the side and back. Witnesses had the option of having the curtains closed so they were not seen by the defendants or the cameras, which were broadcasting the trial all over the world. Few chose to have the curtains drawn.

The seven defendants, including Saddam Hussein, sat in gated boxes in the middle of the courtroom only a few feet from where the witnesses testified. After the judge, prosecution, Kurdish civil attorneys, and defense counsel had the opportunity to ask questions, each defendant could ask questions. These questions were directed at Judge Mohammed, who could modify or not allow the question—but that did little to mitigate the intimidation of a dictator standing up and challenging the testimony of a victim of his genocide. These brave

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<sup>40</sup> Karadsheh & Tawfeeq, *supra* note 38.

<sup>41</sup> Jennifer Trahan, *A Critical Guide to the Iraqi High Tribunal's Anfal Judgement: Genocide Against the Kurds*, 30 MICH. J. INT'L L. 305, 310 (2009).

<sup>42</sup> *Id.* at 311.

<sup>43</sup> *Id.* at 312.

<sup>44</sup> *Id.* at 311.

<sup>45</sup> *Id.*

people told the story of atrocities knowing there were still Baathists in Iraq who would retaliate against them.

Once the complaint phase ended, the prosecution presented recorded testimony from fact witnesses and visual evidence to establish two things: (1) the Anfal genocide was a state-sanctioned ethnic cleansing campaign; and (2) the defendants acted with the mens rea required to convict them.<sup>46</sup> The defense then called five witnesses: the four character witnesses who were willing to appear in court and former Iraqi Deputy Prime Minister Tariq Aziz.<sup>47</sup> My tour was over by the end of February 2007, and I missed much of the defense case.

Initially, there were seven defendants at the Anfal trial, but the charges against Saddam Hussein were withdrawn after he was convicted at the Dujail trial and executed.<sup>48</sup> Of the remaining defendants, the most infamous was Ali Hassan al-Majid, one of Saddam Hussein's cousins and then-Secretary General of the Baath Party's Northern Bureau—the man who oversaw the Anfal genocide.<sup>49</sup>

I, along with my IHT prosecutor, interviewed al-Majid at Camp Cropper on a number of occasions for the Marsh Arabs investigation. He was old, frail, and did not seem very intelligent. He never invoked his right to remain silent, and his attorney rarely intervened. We usually asked open-ended questions and let him talk. He bragged about perceived accomplishments and attempted to justify much of his conduct, but he denied the most incriminating of his acts—blaming the Iranians. It appeared that his role in the regime was that of a high-ranking thug willing to go to extremes to maintain authority.

From interviewing al-Majid and other regime members, it seemed the regime's mindset was simply to enrich its members and remain in power. There was little to no real political ideology or dogmatic philosophy. The Baathists seemed more like a criminal enterprise than a political party.

Ali Hassan al-Majid was known as “Chemical Ali” for ordering numerous chemical weapons attacks on Kurdish villages during the Anfal genocide. He also signed a 1987 decree stating that the Iraqi

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<sup>46</sup> *Id.* at 310.

<sup>47</sup> *Id.* at 313.

<sup>48</sup> Int'l Ctr. for Transitional Justice, *The Anfal Trial and the Iraqi High Tribunal Update Number Three: The Defense Phase and Closing Stages of the Anfal Trial* 3, <http://ictj.org/sites/default/files/ICTJ-Iraq-Anfal-Tribunal-2006-English2.pdf>.

<sup>49</sup> Trahan, *supra* note 41, at 310.

forces “must kill any human being or animal” in the Kurdish villages.<sup>50</sup> Fortunately for us, Hussein’s regime recorded many of their cabinet meetings. During the trial, we played a tape recording of al-Majid speaking with other members of the cabinet in which he said:

We continued the deportations. I told the mustashars [village heads] that they might say that they like their villages and that they won’t leave. I said I cannot let your village stay because I will attack it with chemical weapons. Then you and your family will die. You must leave right now. Because I cannot tell you the same day that I am going to attack with chemical weapons. I will kill them all with chemical weapons! Who is going to say anything? The international community? [F\*\*\*] them! The international community and those who listen to them. . . . This is my intention, and I want you to take serious note of it. As soon as we complete the deportations, we will start attacking them everywhere according to a systematic military plan.<sup>51</sup>

Ultimately, al-Majid was convicted of three counts of genocide, seven counts of committing crimes against humanity, and three war crimes charges in connection to the Anfal campaign.<sup>52</sup> Not only was there nothing that could be said in mitigation, but the evidence of his guilt was so overwhelming that not even the NGO-affiliated critics of the Anfal trial showed any real inclination to challenge al-Majid’s convictions.<sup>53</sup> For overseeing this brutal, multi-year genocide, Ali Hassan al-Majid was sentenced to death by hanging.

Sultan Hashim Ahmad, the chief military commander of the Anfal campaign, was—along with al-Majid—one of only two defendants with

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<sup>50</sup> Profile: ‘Chemical Ali’, BBC NEWS (Jan. 25, 2010), [http://news.bbc.co.uk/2/hi/middle\\_east/2855349.stm](http://news.bbc.co.uk/2/hi/middle_east/2855349.stm).

<sup>51</sup> *The Ali Hassan Al-Majid Tapes*, HUMAN RIGHTS WATCH, <https://www.hrw.org/legacy/campaigns/iraq/chemicalali.htm> (last visited July 25, 2019).

<sup>52</sup> Trahan, *supra* note 41, at 320.

<sup>53</sup> *Cf. id.* (“[T]he facts found by the IHT clearly suggest that genocide was committed. Majid’s convictions for committing genocide, as a participant in a joint criminal enterprise, and for ordering genocide appear warranted. His crimes against humanity and four of the five war crimes convictions also appear well-founded.”).

the dubious distinction of being on the United States' original list of most-wanted Iraqis. During the Anfal trial, the evidence proved Ahmad had been all too willing to spend years working to turn al-Majid's genocidal dreams into a reality by instructing his soldiers to systematically depopulate one village after another like an assembly line of death.<sup>54</sup> Despite his claims to the contrary, it became clear Ahmad knowingly, deliberately, and repeatedly used chemical weapons against Kurdish civilians in an effort to kill every Iraqi Kurd between the ages of 15 and 70 whom his forces encountered.<sup>55</sup>

Ahmad also oversaw the destruction of countless villages and worked to make certain targeted areas uninhabitable for any living organisms.<sup>56</sup> For his part in this multi-year genocide against the Kurdish people, the Hussein regime awarded Ahmad a Medal of Bravery.<sup>57</sup> Ahmad was sentenced to execution by hanging after being convicted of three counts of genocide,<sup>58</sup> five counts of committing crimes against humanity, and four counts of committing war crimes.<sup>59</sup>

Overall, to obtain these convictions, the most powerful evidence we had were bureaucratic documents. For the most part, signed orders and government memorandums were not destroyed during the U.S.-led invasion. Millions of documents were gathered up and sent out of the country, and hundreds of translators filtered through the documents. Initially, they were looking for evidence of weapons of mass destruction, but they also red-flagged any documents that might be evidence of crimes against humanity.

Those documents were then sent to a RCLO facility in Kadhimiya. Kadhimiya was a northern Baghdad neighborhood in the Red Zone on the Tigris River. Dozens of translators filtered through the documents again and categorized them based on the category of atrocity. We traveled to Kadhimiya often to communicate what we were looking for based on the particular atrocity or defendant we were investigating. This undertaking was a manpower-intensive project because search-engine software was not fully developed.

Hussein Rashid Mohammed, the Deputy Chief of Staff of the Iraqi army during the Anfal campaign, helped develop the Iraqi military's

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<sup>54</sup> *See id.* at 358–59.

<sup>55</sup> *See id.* at 358.

<sup>56</sup> *Id.* at 359.

<sup>57</sup> *Id.* at 358.

<sup>58</sup> *Id.* at 360.

<sup>59</sup> *Id.* at 357.

tactical strategy for the genocide's implementation.<sup>60</sup> We were able to produce documents which indicted that Mohammed both knew about and—at the very least—implicitly supported the use of chemical weapons against Kurdish civilians in northern Iraq.<sup>61</sup> Mohammed himself eventually admitted to having personal knowledge of the plans to use chemical weapons, despite his claims to the contrary earlier in the trial.<sup>62</sup> Just as it did with Ahmad, the Iraqi High Tribunal rejected Mohammed's "Superior Orders" defense and sentenced him to execution by hanging<sup>63</sup> after convicting him of committing genocide,<sup>64</sup> war crimes, and crimes against humanity.<sup>65</sup>

There were some within the NGO community who—despite conceding Ahmad and Mohammed were clearly guilty of most, if not all, of the crimes for which they had been convicted—argued there were mitigating factors that made the death penalty an inappropriately harsh sentence.<sup>66</sup> Some of these critics asserted that they were simply following a superior's orders and that, as mere soldiers, they had no choice but to do so without question.<sup>67</sup>

To be clear, the NGO community was treating "Superior Orders" arguments as a mitigating factor and not a defense. It had been well established by numerous international tribunals since Nuremberg that this argument was not a legally valid defense for war crimes or crimes against humanity, and they were not arguing otherwise. In this case, the "Superior Orders" defense seemed more aggravating than mitigating. Both Ahmad and Mohammed did not argue they were coerced or intimidated into following orders; rather, both showed a moral apathy to the massacre of countless civilians through one of the most horrible weapons devised by man.

Furthermore, many of the critics in the NGO community were not at the trial and did not hear the testimony. Ironically, in the end, the political interference the NGO community was so critical of ended up saving the lives of both Ahmad and Mohammed. Although Ahmad and

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<sup>60</sup> *See id.* at 376–77.

<sup>61</sup> *Id.* at 375–76.

<sup>62</sup> *See id.* at 376.

<sup>63</sup> *Cf. id.* at 375 (“ . . . the Tribunal’s imposition of a death sentence seems too harsh.”).

<sup>64</sup> *See id.*

<sup>65</sup> *Id.* at 381–84.

<sup>66</sup> *See id.*

<sup>67</sup> *See id.* at 376.

Mohammed were both sentenced to death, the sentences were not carried out. The reason for not enforcing their sentences was their executions could further antagonize Iraq's Sunni community, a group with whom they, Mohammed in particular, remained quite popular.<sup>68</sup>

Sabir Abd al-Aziz al-Douri, the Hussein regime's Director of Military Intelligence at the time of the Anfal genocide, became one of two defendants sentenced to life in prison after he was convicted of genocide, war crimes, and crimes against humanity.<sup>69</sup> Ultimately, al-Douri's fate was sealed once Munqith produced records showing that he explicitly ordered the General Military Intelligence Directorate to comply with the Hussein regime's instructions regarding chemical weapons and helped develop a strategic plan to engage in chemical warfare against Kurdish civilians.<sup>70</sup>

Additionally, al-Douri signed a document that divided the Anfal campaign's estimated death toll into various civilian categories, such as "farmers," which suggested he was well aware many of the Iraqi Kurds being killed were civilians.<sup>71</sup> Curiously—perhaps because al-Douri did not receive a death sentence—the NGO community seemingly had far fewer reservations about al-Douri's sentence or doubts about whether he received a fair trial than they did about Ahmad's and Mohammed's trials and sentences.<sup>72</sup>

Farhan Mutlaq al-Jabur was the Director of Military Intelligence for northern (and later eastern) Iraq during the Anfal campaign, and he was sentenced to life in prison.<sup>73</sup> During the Anfal genocide, al-Jabur was in charge of the forced deportations of Iraqi Kurds from their homes and villages.<sup>74</sup> Documentary evidence introduced at the Anfal trial showed al-Jabur had helped oversee the destruction of Kurdish villages and numerous extrajudicial executions.<sup>75</sup> As with al-Douri, the NGO community was conspicuously restrained in its criticisms of

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<sup>68</sup> *See id.*

<sup>69</sup> *See id.* at 386–87, 400.

<sup>70</sup> *Id.* at 387.

<sup>71</sup> *See id.*

<sup>72</sup> *Cf. id.* at 386 (“The Tribunal’s convictions of al-Douri appear justified based on the facts as found by the Trial Chamber.”).

<sup>73</sup> *Id.* at 397, 400.

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

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

the sentence al-Jabur received for committing genocide and crimes against humanity.<sup>76</sup>

The final defendant and Governor of Mosul during the Anfal campaign, Tahir Tawfiq al-Ani, was acquitted due to lack of evidence.<sup>77</sup>

## X. The last days of Saddam Hussein

As discussed above, Saddam Hussein was tried by the Dujail court in 2005. The Dujail court deliberated for all of 2006, finishing in November. Thus, in the middle of the Anfal trial, on November 5, 2006, we recessed for a day so the Dujail court could announce its verdict and sentence. In the courthouse with me that day was my RCLO friend and colleague, Rodney Brown. Rodney is an AUSA in the Middle District of Florida. In preparing to write this article, I contacted Rodney and solicited his help in jogging my memory of many of the events above. Rodney kept a journal of his time with the RCLO. With his permission, here is his journal entry for verdict day:

Today was the long-awaited day of the verdict and sentencing in the *Dujayl*[sic] trial, which had commenced in October 2005. My RCLO colleagues and I were notified, left our office in the U.S. Embassy, and rushed to the IHT courthouse to assume our duties. We arrived around 0800 and took our assigned posts. I first reported to the ISOC (an acronym for “Internal Security Operations Center”), which was the nerve center of the IHT building. We were all connected by radios with ear pieces. When the verdict and sentencing hearing began, I took a position in the prosecutors’ office and watched the court proceedings on the live video feed. After a while, the Court began to address Saddam Hussein as the lead defendant and the other defendant were

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<sup>76</sup> Cf. *id.* at 396–97 (“The Tribunal’s conviction of al-Jaburi for genocide appears to be supported by the facts found by the Trial Chamber. . . . While there are gaps in the Tribunal’s legal analysis, the factual findings generally support a conviction of aiding and abetting genocide and participating in a joint criminal enterprise as to crimes against humanity.”).

<sup>77</sup> ‘*Chemical Ali*’ Sentenced to Hang, ORANGE CTY. REGISTER (June 24, 2007), <https://www.ocregister.com/2007/06/24/chemical-ali-sentenced-to-hang/>.



escorted out of the courtroom. At that time, RCLO attorneys Greg Bordenkircher, David DeVillers, and I moved quickly from our respective posts and took positions in the media room so that we could directly observe the proceeding. This room had a large floor-to-ceiling window that looked into the IHT courtroom from its rear wall, and was serviced by an audio feed. Except for us, the room was eerily empty. We were standing about 40 feet behind Saddam, who was initially seated in his usual chair within the defendants' dock in the middle of the courtroom. The bench where the panel of IHT judges were seated was about 40–45 feet in front of Saddam's chair. From our spot in the media room, we had the "best seats in the house" as we watched as history being made that day.

The chief judge ordered Saddam to stand but he initially refused to do so. The judge then ordered two IHT bailiffs to "make him stand up." The bailiffs approached Saddam and one of them grasped his arm. Ever defiant, Saddam exclaimed, "You will not touch me in that manner!" That said, he complied, stood up, and faced the bench. He was dressed, as he did during entire course of the trial, in black trousers, a black jacket, and a white dress shirt with no tie. As the chief judge read the verdict, Saddam began to shout "Death to the Occupiers!" and pointed skyward with his right hand. The sentence imposed was execution by hanging. Saddam was led out of the courtroom by the two bailiffs. As he walked toward our position at the rear of the courtroom, he looked into the media gallery and smiled right at me. He was about 20 feet from us on the other side of the window. He did not speak as he exited the courtroom and was transferred back into the custody of the U.S. Marshals.<sup>78</sup> In late December 2006, the conviction and sentence of death for the Dujail trial was affirmed on appeal. Other than some procedural issues, there was little left but for the United States to deliver Saddam Hussein to the Iraqis for execution. I traveled from the Green Zone to Camp Cropper with one of Hussein's attorneys to deliver the message. This attorney was a pleasant young man who happened to be the son of Barzan al-Tikriti, the former chief judge of the Revolutionary Court. Barzan al-Tikriti was also sentenced to death in the Dujail trial.

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<sup>78</sup> Journal entry from D. Rodney Brown (Nov. 5, 2006).

Once we reached a secure area outside of Camp Cropper, we were transferred to a small bus with blacked-out windows. At the time, Camp Cropper was the secret prison that held Hussein and other high-level regime members. We did not want anyone to know its precise location, so we travelled in circles and backtracked while sirens blasted. This attorney seemed stoic as we traveled in the darkness of the blacked-out bus.

I looked at him trying to imagine what was going through his mind—his father was sentenced to death, and he was going to inform a dictator he had days to live. This was the last time I saw Saddam Hussein. He was hanged on December 30, 2006. Barzan al-Tikriti was executed 15 days later.

## **XI. The legacy of Anfal**

There is no doubt that, for a myriad of reasons, the rule of law suffered in the IHT and the Anfal trial. The war impacted every aspect of life in Iraq, and the justice system was no exception. But upon reflection, the only other options were to delay justice or try the regime outside of Iraq. I am convinced the people of Iraq would not have tolerated either of those options.

Understandably, the people of Iraq demanded and deserved swift justice in Iraq by Iraqis. The RCLO and, for the most part, the IHT endeavored to give fair trials under intolerable conditions to despots who would never have done the same themselves. Make no mistake—these defendants were guilty of the crimes they committed, and the evidence submitted proved their guilt beyond a reasonable doubt.

Perhaps the most important product of the Anfal trial and the work of the IHT was the historic record of the atrocities committed. Because of the work of the IHT, no one can whitewash the history of the regime of Saddam Hussein. Rule of law is a product of the evolution of a nation's culture, jurisprudence, and political will. For a new Iraq, the IHT was the genesis of that nation's rule of law. There can be no doubt Iraq is a better nation for it.

### **About the Author**

**David M. DeVillers** was sworn in as U.S. Attorney for the Southern District of Ohio on November 1, 2019. He served as an AUSA in the same district since 2002. As an AUSA, DeVillers has lead numerous task forces involving the FBI, ATF, DEA, IRS, and the Columbus

Division of Police in investigating and prosecuting organized crime. In 2016, DeVillers prosecuted the largest federal murder case in Ohio's history, charging 20 members of the Short North Posse with RICO and 14 separate murders. After a two-and-half month trial, each defendant was convicted of all counts.

DeVillers also worked as the Department's Resident Legal Advisor to the Republic of Georgia, living in the capital city of Tbilisi from 2010–2012 to combat trans-national crime, corruption, and international money laundering. He has also traveled for the Department to countries including Ukraine, Albania, Bangladesh, Kyrgyzstan, Azerbaijan, Bulgaria, and Romania to combat terrorism, transnational crime, and corruption.

DeVillers received the Mark Losey Distinguished Service Award by the Ohio Attorney General in 2018. He was awarded the J. Michael Bradford Memorial Award by the National Association of Former United States Attorneys in 2008. He was voted the Outstanding Assistant Prosecutor of the Year for 1999 by the Ohio Prosecuting Attorney's Association.

*The author would like to thank AUSA Rodney Brown and summer intern Jacob Becker for their valuable insights and assistance with this article.*

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# Uncivil Disobedience: A Selfish Threat to the Rule of Law

*John W. Huber*  
*United States Attorney*  
*District of Utah*

*David Backman*  
*Chief, Criminal Division*  
*District of Utah*

It is high time to expose an emerging threat to the rule of law: the normalization of criminal behavior. A recent example is the harm reduction philosophy that even hard-core drug use is a personal lifestyle choice that should not be judged or stigmatized and that the role of government is to create a safe, nonjudgmental environment in which to use. Advocates push for “safe injection sites,” or to sound even more value-neutral, “safe consumption sites,” which are legally sanctioned facilities for drug users to ingest their illicit drugs. Seriously? Approximately 100 “safe consumption sites” operate across the world, and efforts are underway to open the first such facilities in several cities in the United States.

We in the Department of Justice (Department) can have a loud voice in combatting the normalization of criminal behavior. For example, when government authorities in Chittenden County, Vermont, were pushing to open “safe injection facilities (SIFs),” U.S. Attorney Christina Nolan issued a press release warning that “the proposed SIFs would violate several federal criminal laws” and that “exposure to criminal charges would arise for users and SIF workers and overseers.”<sup>1</sup> Ms. Nolan’s stance was recently cited in an NPR piece as the primary reason “many safe injection site proposals [in the United States] seem to be waylaid in community debate and legal uncertainty.”<sup>2</sup>

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<sup>1</sup> Press Release, U.S. Dep’t of Justice, Statement of the U.S. Attorney’s Office Concerning Proposed Injection Sites (Dec. 13, 2017).

<sup>2</sup> Bobby Allyn, *Cities Planning Supervised Drug Injection Sites Fear Justice Department Reaction*, NPR (July 12, 2018), <https://www.npr.org/sections/health-shots/2018/07/12/628136694/harm-reduction-movement-hits-obstacles>.

On August 27, 2018, the New York Times published an op-ed, *Fight Drug Abuse, Don't Subsidize It*, authored by then Deputy Attorney General Rod J. Rosenstein.<sup>3</sup> Mr. Rosenstein made clear that “cities and counties should expect the Department of Justice to meet the opening of any injection site with swift and aggressive action.”<sup>4</sup>

After a federal district judge recently ruled that a provision of the Controlled Substances Act aimed at closing crack houses does not apply to “safe injection sites,”<sup>5</sup> Deputy Attorney General Jeffrey A. Rosen pointedly responded, “The Department is disappointed in the Court’s ruling and will take all available steps to pursue further judicial review. Any attempt to open illicit drug injection sites in other jurisdictions while this case is pending will continue to be met with immediate action by the Department.”<sup>6</sup> The strong voice of the Department will continue to serve as the primary resistance to any “safe consumption sites” in the United States.

We have an even louder voice than words alone when we do what we do best: consistently, fairly, and aggressively prosecute violations of the law. We in the Department have a proud tradition of serving as the life force behind the rule of law.

One area where combatting the normalization of criminal behavior is especially important is when lawbreakers attempt to cloak their criminal conduct in civil disobedience. In a civilized society, there are myriad ways to express disagreement with offending policies, rules, and laws. Uncivil disobedients step outside of social expectations to advance their own agendas. When charged with crimes, they often unsuccessfully resort to the “necessity” or “choice of evils” defense and claim as a higher purpose that if they do not commit the crime, a perceived future harm will occur.

Such self-declared moral high ground does not justify acts outside the rule of law. “[E]xercise of a moral judgment based upon individual standards does not carry with it legal justification or immunity from

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<sup>3</sup> Rod J. Rosenstein, *Fight Drug, Don't Subsidize It*, N.Y. TIMES (Aug. 27, 2018), <https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html>.

<sup>4</sup> *Id.*

<sup>5</sup> *United States v. Safehouse*, No. 19-0519, 2019 WL 4858266 (E.D. Pa. Oct. 2, 2019).

<sup>6</sup> Press Release, U.S. Dep’t of Justice, Statement from Deputy Attorney General Jeffrey A. Rosen on the *United States v. Safehouse* Ruling (Oct. 2, 2019).

punishment for breach of the law.”<sup>7</sup> “Toleration of such conduct would not be democratic . . . but inevitably anarchic.”<sup>8</sup>

In our civilized society, we lawfully express disagreement and opposition. We can file a lawsuit, engage in grassroots politics, petition elected representatives, rally, parade, and enlist celebrities, champions, and spokespersons. Such lawful expressions, however, require persistence, patience, and vision—characteristics that may not be strengths of uncivil disobedients. “Those who wish to protest in an unlawful manner frequently are impatient with less visible and more time-consuming alternatives.”<sup>9</sup>

The rule of law provides the forum wherein all can express their positions and beliefs. Those who engage in uncivil disobedience hijack the forum and selfishly—sometimes dangerously—deny others the security of a civilized society. The offenders may claim a higher purpose, but their self-centered criminal acts damage the foundations designed to protect all voices.

Four cases our office has handled illustrate the importance of prosecuting criminal obstructionists and upholding the rule of law.

## **I. Disruption of a BLM auction**

On the morning of a competitive oil and gas lease auction, a group of protesters gathered outside the U.S. Bureau of Land Management (BLM) office in Salt Lake City, peacefully and lawfully. A college student went inside, represented himself as a bidder, and participated in the auction. Initially, he drove up prices by bidding on parcels of land. After he inadvertently won two auctions, he constantly held up his bidder paddle until he won 12 more parcels in a row, at which point the auction was cancelled. His winning bids on the 14 parcels of land totaled nearly \$1.8 million, none of which he ever intended to pay.

After a hard fought trial, a jury convicted the defendant of two felonies for violating the Federal Onshore Oil and Gas Leasing Reform Act and making false statements. At the sentencing hearing, the defendant insolently declared to the court, “[T]here is the possibility

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<sup>7</sup> United States v. Moylan, 417 F.2d 1002, 1008 (4th Cir. 1969).

<sup>8</sup> *Id.* at 1009.

<sup>9</sup> United States v. Dorrell, 758 F.2d 427, 431 (9th Cir. 1985).

that my future will involve civil disobedience[.]”<sup>10</sup> His attorney compared his client to renowned historical figures, including Rosa Parks, the Dalai Lama, Mahatma Gandhi, and Jesus Christ.

The Assistant United States Attorney (AUSA) countered, “This premise that disobedience is the only way to effect change is a very dangerous prospect. . . . The law protects all of us regardless of our background or persuasion, our opinion, our insights, it protects all of us. When one of us chooses to step outside the bounds of the law, it impacts all of us.”<sup>11</sup>

The seasoned, savvy judge was “at a loss to see how we’re going to govern ourselves” if it is “up to the personal point of view and the moral compass of every American on what is important enough to cause one to undertake an act of civil disobedience as it is being called, which . . . is another way of saying . . . breaking the law.”<sup>12</sup> “This was not a case of Rosa Parks. . . . I think there are many episodes . . . slavery and certain civil rights measures, that we look back on as being pretty repugnant.”<sup>13</sup> The judge did not see “the environmental situation in that state of affairs. . . . In the last 20 years [multiple] environmental laws . . . have been passed, from the Clean Water Act to the Clean Air Act to [the Federal Land Policy and Management Act] and to [the Resource Conservations and Recovery Act] . . . the Endangered Species Act [and] the Wilderness Act, and they are being vigorously defended and vigorously pursued.”<sup>14</sup>

The judge expounded, “I think the greatest gift of America to the world . . . is the rule of law. If anything under girths our democracy it is the ability to agree with and obey the rule of law.”<sup>15</sup> “[T]his country in the history of the world provides a better place . . . to help develop freedom and liberty and give more liberty to human beings than any other country yet devised, and its anchor is the rule of law and it is what makes us different from most other systems of government that existed before the Founding Fathers gave us this system.”<sup>16</sup>

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<sup>10</sup> Sentencing Transcript at 31, *United States v. DeChristopher*, No. 2:09-cr-183 (D. Utah July 26, 2011), ECF No. 87.

<sup>11</sup> *Id.* at 32–33.

<sup>12</sup> *Id.* at 54.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 54–55.

<sup>15</sup> *Id.* at 55.

<sup>16</sup> *Id.* at 60–61.



The judge sentenced the defendant to two years in prison, forthwith, and a fine of \$10,000.<sup>17</sup>

## **II. Contempt for repeated refusals to testify before the grand jury**

The founder of the Animal Defense League of Salt Lake City, still in his early 20s, was subpoenaed to testify before a grand jury about his knowledge regarding two recent attacks on mink farms. During his three appearances before the grand jury, he repeatedly took the Fifth, often mockingly, in response to all questions. He persisted in his obstinance even after he was ordered to testify, given immunity, and jailed for approximately 100 days for contempt of court. Ironically, another grand jury indicted him for criminal contempt.

After the defendant pleaded guilty, the AUSA argued:

The defendant consistently judges himself to be above the rules and laws that govern others, and when authority points out the contrary, he holds tighter to those rash assessments. This pattern results in the defendant locking himself in a position of un-retractable defiance that lands him outside the expectations and norms of society.<sup>18</sup>

The judge sentenced the defendant to spend 10 more months in prison.

## **III. Three arsons by a serial arsonist**

After a leather store and a restaurant in Salt Lake City were set on fire and a sheepskin factory in Denver was burned to the ground, a person sent messages to local news outlets claiming responsibility for the arsons in the name of an animal extremist element. The arsonist's brother outed him to authorities.

The defendant pleaded guilty to all three arsons. His presentence report outlined his previous two convictions for burning a pentagram symbol near a church altar and burning down a drug house, killing a pet inside.

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<sup>17</sup> *Id.* at 63.

<sup>18</sup> Sentencing Memorandum at 10, *United States v. Halliday*, No. 2:09-cr-413 (D. Utah Oct. 29, 2010), ECF No. 47.

During his brash allocution in the Colorado case, the defendant expressed no remorse, made several disrespectful statements directly to the victim, and encouraged fellow extremists to continue to break the law.

The judge admonished the defendant, “I hope that you realize that by acting as judge, jury and executioner, you are no better than the people that you criticize.”<sup>19</sup> The judge recognized the defendant’s education, intelligence, and writing skills, and emphasized, “I truly believe that the pen is mightier than the sword, and that you would have much greater impact on your cause by devoting yourself to educating others about these issues through your writings than you will have by continuing your role as an arsonist.”<sup>20</sup>

The judge sentenced the defendant to five years in prison and \$1.17 million in restitution.

In the Utah case, the AUSA argued, “[A]ll past indicators suggest that [the defendant] will re-offend, most likely in the form of arson. Five known fires have been set ablaze in the name of whatever may be the defendant’s cause *du jour*.”<sup>21</sup> The AUSA expounded, “The rule of law is the bedrock of our civilized society, not ‘direct action’ committed in the name of the cause of the day and designed to intimidate and coerce law-abiding civilians.”<sup>22</sup>

The judge sentenced the defendant to a consecutive 87-month prison term.

## **IV. County commissioner’s ride through a closed canyon**

After BLM banned the use of off-road vehicles in a canyon containing multiple archeological sites, a county commissioner used official meetings and other venues to organize and promote a protest ride designed to trespass onto the restricted area. On the day of the event, he gave a speech to a large group of protesters and accompanied them on the ride through the canyon.

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<sup>19</sup> Sentencing Transcript at 21, *United States v. Bond*, No. 10-cr-00389 (D. Colo. Feb. 11, 2011).

<sup>20</sup> *Id.* at 23.

<sup>21</sup> Sentencing Memorandum and Motion for Upward Departure from Variance from Guideline Range at 5, *United States v. Bond*, No. 2:10-cr-844 (D. Utah Oct. 7, 2011), ECF No. 31.

<sup>22</sup> *Id.* at 16–17.

A jury convicted the defendant of two misdemeanors for operating all-terrain vehicles on closed lands. At sentencing, the AUSA argued, “[T]he United States is and always had been a nation of laws. When the law is violated[,] justice requires a consequence.”<sup>23</sup> The AUSA cited an editorial the defendant wrote before the ride in which he exclaimed, “I have heard too many people say that I took an oath to obey the law. I didn’t. I feel a stronger moral obligation to defend the customs and culture of the people of [the county].”<sup>24</sup> The AUSA reasoned that the defendant “used protest as an excuse to engage in crime.”<sup>25</sup>

The sage judge described the “common thread” in cases like this as the “misperception that one person or a small group genuinely frustrated can then use that excuse to ignore the law based on personal preference or perceived necessity or interpretation.”<sup>26</sup> He expressed concern about how the protest ride caused “serious damage to the area, and possibly more importantly[,] to the relations of federal land managers and federal population not only in your community, but everywhere in the state and maybe nationwide.”<sup>27</sup>

The judge sentenced the defendant to 10 days in jail, a \$1,000 fine, and nearly \$96,000 in restitution.

## V. Conclusion

We in the Department, the front line protectors of the rule of law, honorably “preserve and enlarge freedom” because “where there is no law, there is no freedom”<sup>28</sup>; “[w]here-ever law ends, tyranny begins. . . .”<sup>29</sup> We should hold our heads high, always remembering our greater purpose, as we continue to use our strong voice and litigative efforts to uphold, preserve, and further the very foundation of the United States of America—the rule of law.

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<sup>23</sup> Sentencing Transcript at 12, *United States v. Lyman*, No. 2:14-cr-00470 (D. Utah Dec. 18, 2015), ECF No. 269.

<sup>24</sup> *Id.* at 15.

<sup>25</sup> *Id.* at 17.

<sup>26</sup> *Id.* at 59.

<sup>27</sup> *Id.* at 61.

<sup>28</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ch. VI, sec. 57 (1689).

<sup>29</sup> *Id.* at ch. XVIII, sec. 123.

## About the Authors

**John W. Huber** has served as the U.S. Attorney and lead federal law enforcement official in Utah since June 2015. Mr. Huber is serving in his second appointment to the Attorney General's Advisory Committee (AGAC). He served in that capacity in the previous administration, and in 2017, Attorney General Jeff Sessions extended leadership responsibilities to Mr. Huber as the AGAC's vice-chair. Prior to confirmation as the United States Attorney, Mr. Huber served in leadership roles within the U.S. Attorney's Office as the National Security Section Chief and the Executive Assistant United States Attorney.

**David Backman** has served as Criminal Chief since January 2017. He was recently selected as Chair of the Criminal Chiefs Working Group. While serving two United States Attorneys as their Executive Assistant United States Attorney, Mr. Backman had the honor of prosecuting Brian David Mitchell for the senseless crimes he perpetrated on Elizabeth Smart. Mr. Backman has been an AUSA since 2001.

# Homicide on the High Seas and Navigable Waters: The Seaman’s Manslaughter Statute, 18 U.S.C. § 1115

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## I. Introduction

The seaman’s manslaughter statute, 18 U.S.C. § 1115,<sup>1</sup> holds ship officers, maritime vessel owners, and maritime corporate management criminally responsible for conduct that results in death on a vessel within the special maritime and territorial jurisdiction (SMTJ) of the United States<sup>2</sup> and within the general admiralty jurisdiction of the federal courts.<sup>3</sup> Ship officers—“[e]very captain, engineer, pilot or other person employed on any . . . vessel”—are accountable for “misconduct,

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<sup>1</sup> 18 U.S.C. § 1115 provides:

Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.

When the owner or charterer of any steamboat or vessel is a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who has knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.

<sup>2</sup> 18 U.S.C. § 7, discussed in section III, *infra*.

<sup>3</sup> *United States v. Allied Towing Corp.*, 602 F.2d 612, 615 (4th Cir. 1979).

negligence, or inattention to . . . duties” that result in a loss of life.<sup>4</sup> Vessel owners, charterers, inspectors, “or other public officer[s], through whose fraud, neglect, connivance, misconduct, or violation of law” causes a loss of human life are also criminally culpable.<sup>5</sup> Finally, corporate management—those who are “charged with the control and management of the operation, equipment, or navigation” of the vessel—are also criminally liable, but are held to a different level of scrutiny. Unlike the first two categories of persons who may be prosecuted for criminal negligence, corporate managers are culpable for “knowingly and willfully” causing or allowing misconduct or negligence that leads to a loss of life from the “operation, equipment, or navigation” of a vessel.<sup>6</sup>

The same possible penalties apply to all three categories of persons. Violation of the seaman’s manslaughter statute carries a sentence of up to 10 years’ imprisonment and a fine of up to \$250,000.<sup>7</sup>

The seaman’s manslaughter statute applies exclusively to commercial carriers. It has no application to recreational boaters, *per se*.<sup>8</sup> As outlined in this article, the statute applies to the owners of

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<sup>4</sup> 18 U.S.C. § 1115.

<sup>5</sup> *Id.*; *see* *United States v. Mitlof*, 165 F. Supp. 2d 558, 559–62 (S.D.N.Y. 2001) (ruling that section 1115 was not unconstitutionally vague when applied to the owner of a water ferry which capsized resulting in a passenger’s death; owner allegedly operated the vessel as a water taxi even though he knew the vessel did not have a valid certificate of inspection (COI) from the Coast Guard; the vessel was not suited for commercial use on the Hudson River; the vessel had serious mechanical and structural issues that rendered it unsuitable for ferry service; and the vessel lacked sufficient reliable life-saving vests).

<sup>6</sup> 18 U.S.C. § 1115; *see* *United States v. Harvey*, 54 F. Supp. 910 (D. Or. 1943) (ruling that in a section 1115 prosecution, executive officers of the corporate owner of the vessel could not be charged as principals for acts and omissions of the captain or other operators of the vessel, without an allegation of corporate guilt; corporate officers may be charged personally where they knowingly and willfully caused or allowed the corporate acts or omissions).

<sup>7</sup> 18 U.S.C. § 1115; 18 U.S.C. § 3571(b)(3).

<sup>8</sup> *See* *United States v. LaBrecque*, 419 F. Supp. 430, 435–36 (D.N.J. 1976) (holding that captain of noncommercial pleasure vessel could not be held criminally responsible for deaths of two crewmembers under section 1115, which imposes criminal sanctions on employees of commercial vessels whose negligence causes deaths of other persons). *But see* *Hoopengartner v. United States*, 270 F.2d 465 (6th Cir. 1959) (affirming the prosecution of

vessels and to public officials responsible for the vessels' operations. The statute and its long history underscore a congressional intent to hold specific classes of maritime operators and owners<sup>9</sup> responsible for the well-being of persons on the high seas and within several specifically designated jurisdictions involving the admiralty, maritime, and territorial waters of the United States.<sup>10</sup>

## II. History of the seaman's manslaughter statute

The current version of section 1115 was enacted in 1948, but earlier versions of the statute date back to the 1800s. The statute was enacted in response to a sudden increase in steamboat travel during the Industrial Revolution and the accompanying frequency of accidents due to steamboat collisions and steamboat boiler explosions.<sup>11</sup> The 1838 version of the statute was enacted to address "boiler explosions on steamboats plying 'the bays, lakes, rivers, or other navigable waters of the United States'" and provided for prosecution of certain officers and crew members whose negligence causes the death of any person aboard "any steamboat or vessel propelled in whole or in part by steam."<sup>12</sup> Subsequent versions of the statute expanded the statute's reach to include all maritime vessels engaged in commerce and to modify and ultimately expand the statute's territorial jurisdiction beyond the "special maritime and

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owner of a pleasure boat operating in Lake St. Clair for recklessly operating his motorboat while drunk, thus causing the death of another person in a second boat with which his boat collided; the issue, however, of whether a pleasure boat operator fell within the ambit of section 1115 was not raised by the parties, and this is the only noncommercial section 1115 prosecution reported).

<sup>9</sup> *United States v. Kaluza*, 780 F.3d 647, 664–68 (5th Cir. 2015) (finding that well site leader involved in BP oil spill did not qualify as "other person employed on any vessel" and thus could not be prosecuted under section 1115 for deaths that occurred when mobile drilling rig exploded).

<sup>10</sup> See section III, *infra*.

<sup>11</sup> See generally Allison Fish, *The Potential Application of 18 U.S.C. § 1115 to Offshore Drilling Disasters: A Requiem for the Seaman's Manslaughter Act?*, 39 TUL. MAR. L. J. 241, 242–49 (2014); Jeanne M. Grasso, *Law and Order: The Emergence of the Seaman's Manslaughter Statute*, 3 BENEDICT'S MAR. BULL. 170, 170–71 (2005).

<sup>12</sup> S. 5, 25th Cong. §§ 304, 306 (1838).

territorial jurisdiction of the United States”<sup>13</sup> so to include “the general admiralty and maritime jurisdiction of the federal courts.”<sup>14</sup>

The extensive history of the Seaman’s Manslaughter Act makes clear Congress’s intent to hold specific individuals accountable for deaths resulting from maritime actions on vessels engaged in commerce within the jurisdiction of the federal courts. Changes in the statute reflect an express intention to account for technological advancements and to broaden the statute’s application.<sup>15</sup>

The first prosecution under the statute, *United States v. Warner*, ensued following the deaths of several passengers onboard a steamboat that collided with a schooner and sank. The captain, first mate, second mate, and wheelman were charged with seaman’s manslaughter violations. The court in its jury charge emphasized that simple neglect was sufficient to meet the government’s burden of proof: “the legislature seem[ed] studiously to have avoided the use of any terms, or words, making the intention of the party an ingredient of the offense.”<sup>16</sup> Indeed, “misconduct, negligence or inattention” on the part of a person involved in steamboat navigation, the result of which lead to a loss of life, was guilty under the statute. Charges against the wheelman were subsequently dismissed, and the other three defendants were acquitted.<sup>17</sup>

Following the *Warner* case, there were only a handful of major prosecutions under the Seaman’s Manslaughter Act until the 1990s.<sup>18</sup> One of the most noteworthy early seaman’s manslaughter

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<sup>13</sup> 18 U.S.C. § 7.

<sup>14</sup> *United States v. Allied Towing Corp.*, 602 F.2d 612, 614 (4th Cir. 1979) (discussing the history of the Seaman’s Manslaughter Act).

<sup>15</sup> See Nicholas S. Bergeron, *Expanding Application: The Immediate Need for Revision of the Seaman’s Manslaughter Act in Light of the BP Deepwater Horizon Tragedy and United States v. Kaluza*, 16 LOY. MAR. L. J. 127, 140–43 (2017).

<sup>16</sup> *United States v. Warner*, 28 F. Cas. 404, 407 (D. Ohio 1848).

<sup>17</sup> *Id.* at 406.

<sup>18</sup> See Grasso, *supra* note 11, at 170–71 & n.2 (citing *United States v. Farnham*, 25 F. Cas. 1042 (S.D.N.Y. 1853); *United States v. Hilger*, 867 F.2d 566 (9th Cir. 1989); *Hoopengartner v. United States*, 270 F.2d 465 (6th Cir. 1959); *United States v. Van Schaick*, 134 F. 592 (S.D.N.Y. 1904), *aff’d*, 159 F. 847 (2d Cir. 1908); *United States v. Holmes*, 104 F. 884 (N.D. Ohio 1900); *United States v. Keller*, 19 F. 633 (D. W.Va. 1884); *United States v. Collyer*, 25 F. Cas. 554 (S.D.N.Y. 1855)).



prosecutions arose from the June 15, 1904 *General Slocum* disaster. The *General Slocum*, a steamboat owned by the Knickerbocker Steamboat Co., burst into flames on the East River in New York, causing the death of over 1,000 passengers. Trial testimony indicated that notwithstanding the loss of life, all of the officers and crew were spared.<sup>19</sup> This incident was the most deadly peacetime maritime disaster in American history. The subsequent investigation revealed that the fire resulted from a carelessly discarded match that ignited a barrel of straw. The captain, executives of the Knickerbocker Steamboat Company, and the boat's inspector were indicted for violations of the Seaman's Manslaughter Act. The captain was convicted and received a 10-year sentence, but was pardoned three years later by President Taft. The company incurred only a nominal fine notwithstanding evidence that its officers falsified records to conceal a failure to ensure passenger safety.<sup>20</sup>

Evidence presented at the trial revealed a host of deficiencies by the captain and corporate management. Life preservers were unsafe and unserviceable. Hoses and accompanying pumps were unfit to fight an onboard fire. Lifeboats were not launched or prepared for launching. The crew was largely untrained to address emergencies.<sup>21</sup> The Second Circuit in *United States v. Van Schaick* summarily rejected defense arguments that government inspectors had failed in their duty to properly inspect the vessel and its safety appliances and had wrongfully issued inspection certifications. The court stated "that the inspectors failed in their duty is no reason why the defendant should be exculpated if he failed in his."<sup>22</sup> The Second Circuit concluded that "the law required the defendant to maintain an efficient fire drill, to see that the proper apparatus for extinguishing fire was provided and maintained in efficient order and ready for immediate use and to exercise at least ordinary care in seeing that the life-preservers were in fit condition for use."<sup>23</sup> Vessel owners and ship captains "should be held to the strictest accountability and required to exercise the highest degree of skill and care."<sup>24</sup>

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<sup>19</sup> *Van Schaick v. United States*, 159 F. 847, 850 (2d Cir. 1908).

<sup>20</sup> Grasso, *supra* note 11, at 171.

<sup>21</sup> *Van Schaick*, 159 F. at 849–51.

<sup>22</sup> *Id.* at 850.

<sup>23</sup> *Id.* at 851.

<sup>24</sup> *Id.* at 855.

### III. Federal jurisdiction of the seaman’s manslaughter statute: the SMTJ of the United States and general admiralty jurisdiction

The U.S. Constitution grants Congress the power to “define and punish Piracies and Felonies committed on the High Seas and offenses against the Law of Nations.”<sup>25</sup> Courts generally agree<sup>26</sup> that jurisdiction for prosecution of seaman’s manslaughter offenses is defined in 18 U.S.C. § 7.<sup>27</sup> The “special maritime and territorial

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<sup>25</sup> U.S. CONST., art. I, § 8, cl. 10.

<sup>26</sup> *Hoopengartner v. United States*, 270 F.2d 465 (6th Cir. 1959) (one of the few federal cases that discusses the reach of federal jurisdiction under section 1115, concluding that the incident occurred within the SMTJ described in section 7; most courts simply accept that premise without further analysis.). *But see* *United States v. Allied Towing Corp.*, 602 F.2d 612, 615 (4th Cir. 1979), discussed *infra*.

<sup>27</sup> The term “special maritime and territorial jurisdiction of the United States” as used in this title includes:

- (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
- (2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.
- ...
- (7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.
- (8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from

jurisdiction of the United States” covers federal crimes committed on “[t]he high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.”<sup>28</sup> Federal jurisdiction applies to any vessel owned, in whole or in part, by the United States or any American citizen or corporation when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state.<sup>29</sup> Courts interpret the jurisdiction provided in section 7 as extending to the open and the unenclosed waters of the Great Lakes and to coastal waters seaward of the low water mark.<sup>30</sup>

The operative language extending jurisdiction covers crimes aboard foreign vessels as well.<sup>31</sup> The term “high seas” is a technical term, generally familiar to seamen, and its use in a federal criminal law statute satisfies the notice requirement of the Due Process Clause.<sup>32</sup> The “high seas” lie seaward of a nation’s territorial sea, which is the bank of water that extends up to three miles from the coast.<sup>33</sup> The territorial sea was extended from 3–12 nautical miles by Presidential Proclamation 5928 of December 27, 1988.<sup>34</sup>

The term “State” and phrase “out of the jurisdiction of any particular state,” when used in the context of 18 U.S.C. § 7(1), means

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or arrival in the United States with respect to an offense committed by or against a national of the United States.

<sup>28</sup> 18 U.S.C. § 7(1).

<sup>29</sup> *Id.*

<sup>30</sup> *United States v. Rodgers*, 150 U.S. 249 (1893); *Hoopengartner*, 270 F.2d at 470–71; *see also* 1 ADMIRALTY & MAR. LAW § 3–12 at pg.1, n.4 (5th ed. Nov. 2017 update).

<sup>31</sup> 18 U.S.C. § 7(1)–(2); *see* 1 ADMIRALTY & MARITIME LAW § 3–12 at pg.1, n.1.

<sup>32</sup> *United States v. Newball*, 524 F. Supp. 715, 720 (E.D.N.Y. 1981); *United States v. Angola*, 514 F. Supp. 933 (S.D. Fla. 1981). *See generally* 23 FED. PROC., L. ED. § 53:288 (June 2019).

<sup>33</sup> *United States v. Romero-Galue*, 757 F.2d 1147, 1150 & n.1 (11th Cir. 1985). *See* 33 C.F.R. § 2.32(a): “For purposes of special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. § 7, high seas means all waters seaward of the territorial sea baseline.” The “territorial sea baseline” refers to the line defining “the shoreward extent of the territorial sea of the United States.” 33 C.F.R. § 2.20.

<sup>34</sup> JUSTICE MANUAL § 9-20.100; Proclamation 5928, Territorial Sea of the United States of America, 103 Stat. 2981 (1989); CRIMINAL RES. MANUAL § 670.

“State of the United States” and does not limit the “high seas” jurisdiction, but only “the other waters within the admiralty and maritime jurisdiction of the United States.”<sup>35</sup> Therefore, the fact that a state may demarcate its boundary beyond the low-water mark, thereby making a claim of state jurisdiction over the marginal sea,<sup>36</sup> has no bearing on federal jurisdiction.<sup>37</sup> The states may exercise jurisdiction over the marginal part of the ocean to the extent that there is no conflict with federal law or the rights of foreign nations.<sup>38</sup>

Federal jurisdiction under 18 U.S.C. § 7 covers offenses committed on American vessels in the territorial waters, harbors, and inland waterways of foreign nations. Section 7(7) defines the scope of SMTJ with respect to any offense by or against a national of the United States. For example, in *United States v. Flores*, the Supreme Court was asked to determine whether the Constitution confers authority on Congress to define and punish offenses perpetrated by one U.S. citizen upon another U.S. citizen on board an American vessel located within the territorial limits of another sovereign. The High Court answered in the affirmative, upholding prosecution in the Eastern District of Pennsylvania of an American citizen for murder of another American citizen on board an American vessel at anchor in the Port of Matadi, in the Belgian Congo, at a point 250 miles inland from the mouth of the Congo River.<sup>39</sup> The Court held that in the absence of a controlling treaty provision to the

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<sup>35</sup> See *Hoopengartner*, 270 F.2d at 470; see also JUSTICE MANUAL § 9-20.100; CRIMINAL RES. MANUAL § 670.

<sup>36</sup> The “marginal sea” is defined as “waters adjacent to a state and under its jurisdiction and extending outward from the coast about 3½ statute miles.” *Marginal sea*, MERRIMAN-WEBSTER DICTIONARY (2019).

<sup>37</sup> See *United States v. California*, 332 U.S. 19, 34 (1947) (holding that “protection and control of [the three-mile belt the marginal sea] has been and is a function of national external sovereignty”).

<sup>38</sup> *Skiriotes v. Florida*, 313 U.S. 69, 78–79 (1941) (“When its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances.”).

<sup>39</sup> *United States v. Flores*, 289 U.S. 137, 146–57 (1933); accord *Skiriotes*, 313 U.S. at 73 (“ . . . the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.”).

contrary and any assertion of jurisdiction by the territorial sovereign, “it is the duty of the courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in the light of recognized principles of international law.”<sup>40</sup>

Section 7(2) extends SMTJ to vessels operating on the Great Lakes and waters connecting the Great Lakes, as well as to the Saint Lawrence River where that river constitutes the international boundary line with Canada.<sup>41</sup> Section 7(8) addresses the scope of SMTJ, “[t]o the extent permitted by international law” for foreign vessels departing from or arriving in the United States regarding crimes committed by or against American nationals.<sup>42</sup>

Virtually all federal courts have taken the position that the prosecution of a ship’s officers or owners for loss of life resulting from their misconduct requires that the underlying events occurred within the SMTJ of the United States.<sup>43</sup> The Fourth Circuit, however, has adopted a different jurisdictional analysis. After reviewing the history of section 1115, the court in *United States v. Allied Towing Corp.* concluded that Congress made section 1115 a statute of general application, not limited to homicides within the SMTJ, but also applicable to homicides occurring on navigable waters within federal admiralty jurisdiction.<sup>44</sup>

*United States v. Allied Towing Corp.* followed the death of two employees of Allied Towing who were welding the hull of an Allied tank barge at a pier on the Elizabeth River in Norfolk, Virginia. Evidence presented in court showed that Allied Towing permitted the welding without securing the gas-free certification required by U.S. Coast Guard regulations and that the ignition of gases within the barge caused the fatal explosion. The original indictment was

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<sup>40</sup> *Flores*, 289 U.S. at 159.

<sup>41</sup> 18 U.S.C. § 7(2); see *United States v. Hoopengartner* 270 F.2d 465, 470 (6th Cir. 1959) (seaman’s manslaughter prosecution; federal jurisdiction was premised upon the fact that the vessel was registered, licensed, and enrolled under the laws of the United States, and was, at the time of the accident, on a voyage upon the waters of St. Clair, a connecting waterway of the Great Lakes); see also JUSTICE MANUAL § 9-20.100.

<sup>42</sup> This assertion of extraterritorial jurisdiction is supported by the international law principle of “objective territoriality.” 1 ADMIRALTY & MAR. LAW §§ 3–12 (5th ed. Nov. 2017 update).

<sup>43</sup> See 23 FED. PROC. L. ED § 53:288 (June 2019).

<sup>44</sup> 602 F.2d 612, 615 (4th Cir. 1979).

dismissed for lack of jurisdiction. In a second indictment, the government charged that the offense occurred “on the Elizabeth River, a navigable water of the United States, within the Eastern District of Virginia, and within the admiralty jurisdiction of the United States.”<sup>45</sup> Allied Towing again sought dismissal for lack of jurisdiction and on double jeopardy grounds. The district court denied both motions and rendered a judgment of conviction on the basis of a stipulation identical to the one filed before the first dismissal.<sup>46</sup>

Although the express wording of 18 U.S.C. § 1115 contains no jurisdictional limitation, Allied Towing urged that the statute proscribes only homicides committed within the SMTJ of the United States as defined in 18 U.S.C. § 7. The SMTJ does not include navigable waters within the federal admiralty jurisdiction that are also within the territorial jurisdiction of a given state. Allied Towing argued that since the Elizabeth River is within Virginia’s territorial jurisdiction, the federal court lacked jurisdiction and the case should be dismissed.<sup>47</sup>

The government, in turn, conceded that the Elizabeth River is within Virginia’s jurisdiction, but contended that section 1115 is not subject to the definition of jurisdiction as provided in section 7. Rather, Congress intended that section 1115 reach homicides committed anywhere within the federal admiralty and maritime jurisdiction, regardless of a given state’s authority to punish the offense. The issue for the Fourth Circuit was whether the limiting language in section 7 prevented general application of section 1115 to homicides committed within federal admiralty and maritime jurisdiction, regardless of a state’s concurrent power to punish the offense.<sup>48</sup> If answered in the negative, the United States district court had jurisdiction because the admiralty and maritime jurisdiction of the United States includes all navigable waters within the country, which would include the Elizabeth River in Virginia.<sup>49</sup>

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<sup>45</sup> *Id.* at 613.

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

<sup>47</sup> *Id.* at 613–14.

<sup>48</sup> *Id.* at 614.

<sup>49</sup> *Id.*; see *Southern S.S. Co. v. National Labor Relations Bd.*, 316 U.S. 31, 41 (1942) (citing *The Genessee Chief et al. v. Fitzhugh*, 53 U.S. 443 (1851)); *Madole v. Johnson*, 241 F. Supp. 379, 380 (W.D. La. 1965); see also *Aqua Log, Inc. v. Lost & Abandoned Pre-Cut Logs & Rafts of Logs*, 709 F.3d 1055 (11th Cir. 2013).

The Fourth Circuit began its analysis by noting that section 1115 contains no express jurisdictional provision. Therefore, the court looked to the statute's history in order to ascertain its reach. As noted above, the earliest version of the statute dated to 1838 and criminalized negligence by officers or crewmembers whose negligence caused the death of any person aboard a vessel operating in "the bays, lakes, rivers, or other navigable waters of the United States."<sup>50</sup> A more comprehensive version of the statute enacted in 1871 regulated "steamers navigating the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States, when such waters are common highways of commerce, or open to general or competitive navigation."<sup>51</sup> Subsequent versions of the statute enacted by Congress in 1874, 1909, and 1926 contained a variety of jurisdictional limitations.<sup>52</sup> Of significance to the Fourth Circuit was the current version of section 1115, enacted in 1948. In this version, the previous statutory jurisdictional restrictions disappeared: "[a]lthough the old jurisdictional qualification was preserved by adding new language to other sections taken from the chapter on maritime offenses, § 1115 became a statute of general application."<sup>53</sup>

After reviewing the Congressional record, the Fourth Circuit concluded that the history of the statute makes clear "that Congress enacted this statute as an integral part of its regulation of the nation's maritime commerce"<sup>54</sup> intended to reach "homicides committed anywhere within the general admiralty jurisdiction of the federal courts."<sup>55</sup> Therefore, the holdings of the district court regarding jurisdiction and the convictions under section 1115 were affirmed.<sup>56</sup>

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<sup>50</sup> *Allied Towing Corp.*, 602 F.2d at 614 (citing Act of July 7, 1838, ch. 191, § 2, 5 Stat. 304).

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

<sup>52</sup> *Id.* at 614–15 (citations omitted).

<sup>53</sup> *Id.* at 615 (citations omitted).

<sup>54</sup> *Id.*

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

<sup>56</sup> *Id.*

## IV. Establishing venue for seaman's manslaughter prosecutions

Article III of the Constitution requires that the trial of all crimes “be held in the State where the said Crimes shall have been committed.”<sup>57</sup> When a crime is “not committed within any State, the Trial shall be at such Place . . . as the Congress may by Law have directed.”<sup>58</sup> Accordingly, Congress enacted 18 U.S.C. § 3238 to define venue for crimes “begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district . . . .”<sup>59</sup> The first clause of section 3238 provides that the trial of all offenses committed on the high seas or elsewhere outside the jurisdiction of any particular state or district shall be in the district where the offender is found or into which he is arrested or is first brought.<sup>60</sup> The government bears the burden of establishing venue for the prosecution by a preponderance of the evidence.<sup>61</sup>

A key question for purposes of ascertaining venue: Where was the defendant placed under arrest or “first brought” into the district? In *United States v. Han*, for example, the defendant was a South Korean national who worked aboard a U.S.-flagged commercial fishing vessel charged with failure to comply with the Act to Prevent Pollution from Ships, arising out of a Coast Guard inspection of a U.S.-flagged vessel, upon which he was the chief engineer. The defendant was indicted in the District of Columbia in 2016 for an offense that occurred in America Samoa. He moved to dismiss the federal charges, alleging improper venue and failure to state an offense. A hearing before the D.C. district court established the facts of the case, and the court granted defendant’s motion to dismiss for improper venue. Having determined that Han was in the functional equivalent of “custody”

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<sup>57</sup> U.S. CONST. art. III, § 2, cl. 3; *see also* FED. R. CRIM. P. 18 (“[T]he government must prosecute an offense in a district where the offense was committed.”). The Sixth Amendment also provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. CONST. amend. VI.

<sup>58</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>59</sup> 18 U.S.C. § 3238. *See generally* *United States v. Han*, 199 F. Supp. 3d 38, 45–46 (D.D.C. 2016).

<sup>60</sup> *Id.*

<sup>61</sup> *United States v. Robinson*, 275 F.3d 371, 378 (4th Cir. 2001).



while in Hawaii, the court concluded that he was “first brought” to the District of Hawaii under section 3238, thereby depriving the District of Columbia of venue.<sup>62</sup>

In order to understand the court’s reasoning in *Han*, a detailed review of the record is necessary. The U.S. Coast Guard conducted an inspection of a U.S.-flagged vessel, the *Pacific Breeze*, in American Samoa in July 2015. At the time of the inspection, a Coast Guard official confiscated the crew’s passports. Upon discovering deficiencies in the boat’s management and record keeping, the Coast Guard’s Captain of the Port for Honolulu issued an order exercising control over the vessel, which prohibited the boat from leaving port until issues associated with the inspection were resolved. The defendant Han, a native of South Korea who spoke and understood only limited English, was effectively detained onboard the ship for a month. His repeated requests to return to his home in South Korea were denied, both during and after the Coast Guard inspection. The government also placed an immigration “hold” on Han through the American Samoa Immigration Office. In September 2015, U.S. Immigration and Customs Enforcement granted the Coast Guard’s request for a Significant Public Benefit Parole (SPBP) on Han’s behalf, allowing him to be paroled into the United States for a period of six months. His passport, which had been confiscated from him in early July 2015, was not returned to him until October 2015, when Han was about to board a plane bound for the United States. Han’s travel to the United States was arranged pursuant to an agreement entered into by his employer (the owner of the *Pacific Breeze*), and the U.S. government. While the Security Agreement acknowledged that Han was not bound by its terms, it nevertheless required that his employer request that Han surrender his passport for “safe keeping” and that the government be informed immediately if Han refused to relinquish his passport. Han was not privy to the terms of the Security Agreement. During his trip to the United States, Han was not under law enforcement escort, but he was escorted by an employee of Pacific Breeze Fisheries, LLC, his employer, consistent with terms negotiated between Han’s employer and the government. At the hearing, Han testified that he was not free to travel where he wanted to while en route to Washington, D.C., including while he was in Hawaii.<sup>63</sup>

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<sup>62</sup> *Han*, 199 F. Supp. 3d at 54–55.

<sup>63</sup> *Id.* at 48–50.

After reviewing all of the relevant facts, the district court concluded that Han was transported from American Samoa to Hawaii and then to Virginia “in part due to his alienage and inability to speak English” and “that he was compelled to undertake the journey by the United States Government” which was “the functional equivalent of custody or arrest.”<sup>64</sup> Therefore, the court concluded that Han was “first brought” to the District of Hawaii, within the meaning of 18 U.S.C. § 3238, and venue was appropriate in Hawaii, not the District of Columbia.<sup>65</sup>

The express language of section 3238 requires that prosecutors ask at least two other questions in order to correctly identify the appropriate venue for prosecution pursuant to the statute. First, was the defendant “arrested or first brought” to the district or did he initially proceed to the district on his own accord? In *United States v. Hilger*, a ship’s captain was charged in 1986 with violating the seaman’s manslaughter statute when a tanker, the *Golden Gate*, collided with a fishing vessel, the *Jack, Jr.*, off the coast of California, killing all three crewmembers of the *Jack, Jr.* A bill of indictment was returned in the Northern District of California, charging the defendant with violations of section 1115. The defendant complied with a summons issued following the return of the indictment. As the Ninth Circuit made clear: “Hilger was *arrested* in the Northern District of California *only because* he was responding to a summons.”<sup>66</sup> In other words, the defendant traveled to the district on his own accord. The court concluded that the two clauses of section 3238 should be read in the disjunctive: “[T]rial is proper in the district where the offender is first brought, *or* in the district of his last known residence if an indictment is filed before the offender is first brought

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<sup>64</sup> *Id.* at 54.

<sup>65</sup> *Id.*; see *United States v. Lee*, 472 F.3d 638, 644–45 (9th Cir. 2006) (finding that defendant’s alleged federal crimes occurred in American Samoa, which is not a judicial district; therefore, venue for prosecution lay in Hawaii, the district to which the defendant was first brought, following his arrest); *Chandler v. United States*, 171 F.2d 921, 932–33 (1st Cir. 1948) (holding that venue lay in Massachusetts when a defendant, charged with treason against the United States in Germany and traveling by plane to Washington, D.C., made an emergency landing in Massachusetts because it was the district to which he was “first brought” for purposes of section 3238).

<sup>66</sup> *United States v. Hilger*, 867 F.2d 566, 567–68 (9th Cir. 1989).

into any district.”<sup>67</sup> According to the Ninth Circuit, proper venue for filing the indictment before the captain’s arrest was in the district of his last known residence, the District of Massachusetts. The court affirmed the district court’s dismissal of the indictment.<sup>68</sup>

The second question—where was the defendant last known to reside?—pertains to the second prong of section 3238, which provides for venue in the district of the defendant’s last known residence or in the district of anyone one of two or more offenders, or if no residence is known, in the District of Columbia.<sup>69</sup> In *United States v. Holmes*, for example, the defendant was a former member of the U.S. Air Force charged with two counts of aggravated sexual abuse of a minor that allegedly occurred while he was stationed in Japan. Following his tour of duty in Japan and a tour of duty in Qatar, he voluntarily returned to Langley Air Force Base in the Eastern District of Virginia. Upon returning to Virginia, Holmes made admissions regarding the sexual molestation in Japan, and the Air Force ordered a general court-martial. Because of statute of limitations issues, the court-marshal was subsequently dismissed. An indictment returned in the Eastern District of Virginia for aggravated sexual abuse of a minor was also dismissed, because the defendant was still on active duty and could not be prosecuted due to the Military Extraterritorial Jurisdiction Act (MEJA).<sup>70</sup>

After the Air Force discharged Holmes, he returned to his home in Illinois, where he remained, except for travel to North Carolina for a

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<sup>67</sup> *Id.* at 568. *But see* *United States v. Slatten*, 865 F.3d 767, 786–87 (D.C. Cir. 2017) (location of the “arrest” for purposes of section 3238 means location where the defendant is first restrained of his liberty in connection with the offense charged (citing *United States v. Wharton*, 320 F.3d 526, 537 (5th Cir. 2003) (quoting *United States v. Erdos*, 474 F.2d 157, 160 (4th Cir. 1973))).

<sup>68</sup> *Hilger*, 867 F.2d at 568.

<sup>69</sup> *See generally* *United States v. McRary*, 616 F.2d 181, 185 (5th Cir. 1980) (rejecting defendant’s argument that because the Southern District of Florida (SDFL) was not his home, venue in SDFL was improper when he was arrested in SDFL and noting that the permissive language of the second prong of section 3238 makes clear that the “language was intended to relieve the prosecution of the burden of demonstrating that an offender who remained without the territorial jurisdiction of the U.S. was a ‘person fleeing from justice’ under 18 U.S.C. § 3290, for purposes of tolling any applicable statute of limitations”).

<sup>70</sup> *United States v. Holmes*, 672 F. Supp. 2d 739, 739–42 (E.D. Va. 2009).

child custody hearing. Meanwhile, he was indicted for a second time in the Eastern District of Virginia. At the time that the indictment was returned, Holmes was appearing in the child custody hearing in North Carolina. He was arrested and brought before a federal magistrate judge in North Carolina before being transferred to the Eastern District of Virginia. The defendant entered a conditional guilty plea and, following numerous procedural machinations, the district court decided to revisit the issue of venue.<sup>71</sup>

The district court began its analysis by noting that the criminal allegations occurred on an Air Force base in Japan, thereby establishing that section 3238 governed the venue considerations. The defendant argued that because his arrest occurred in North Carolina, the district court in Virginia lacked venue under the terms of the statute. The government countered that the defendant's first arrest for purposes of the venue question occurred in Virginia and pertained to the earlier federal indictment that was dismissed. In what the court described as a matter of first impression, the court was asked to decide: For a matter subject to section 3238, does a defendant's *prior* arrest for the same charges under a subsequently dismissed indictment constitute a "first arrest" for purposes of venue in a criminal prosecution? The court answered its own question in the negative, concluding that the arrest for the previously dismissed indictment was without any legal consequence because there was no jurisdiction to support the earlier prosecution. Hence, defendant's arrest was in North Carolina, and the Eastern District of Virginia lacked jurisdiction. The court concluded that the defendant's last known address was Chicago, Illinois.<sup>72</sup>

## **V. Seaman's manslaughter versus the general federal manslaughter statute: simple negligence as the burden of proof for employees on the vessel**

With regard to criminal prosecution of ship officers and ship employees, the seaman's manslaughter statute requires the government to prove misconduct, negligence, or inattention to duties—a lesser degree of criminal culpability than is required by the

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<sup>71</sup> *Id.* at 742.

<sup>72</sup> *Id.* at 747–52.

more general federal manslaughter statute, 18 U.S.C. § 1112.<sup>73</sup> The common law crime of manslaughter, codified in 18 U.S.C. § 1112, includes involuntary manslaughter, an unintentional killing that “evinces a wanton or reckless disregard for human life but not of the extreme nature that will support a finding of malice.”<sup>74</sup> At common law, the requisite mental state for involuntary manslaughter is reduced to “gross” or “criminal” negligence, a culpability far more serious than ordinary tort negligence, but still short of the most extreme recklessness and wantonness required for “depraved heart” malice.<sup>75</sup> Section 1112 adopts the common law approach, describing manslaughter as “an unlawful killing . . . [i]n the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.”<sup>76</sup>

The Fifth Circuit, for example, has defined the requisite culpability for involuntary manslaughter under 18 U.S.C. § 1112 to require “that the defendant (1) act with gross negligence, meaning a wanton or reckless disregard for human life, and (2) have knowledge that his or her conduct was a threat to the life of another or knowledge of such circumstances as could reasonably have enabled the defendant to foresee the peril to which his or her act might subject another.”<sup>77</sup>

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<sup>73</sup> See *United States v. O’Keefe*, 426 F.3d 274, 278–79 (5th Cir. 2005).

<sup>74</sup> *United States v. Paul* 37 F.3d 496, 499 (9th Cir. 1994) (citing *United States v. Lesina*, 833 F.2d 156, 159 (9th Cir. 1987)); see *United States v. Skinner*, 667 F.2d 1306, 1309–10 (9th Cir. 1982) (“Involuntary manslaughter is an unintentional homicide.”); see also *United States v. Garcia*, 729 F.3d 1171 (9th Cir. 2013) (holding that an involuntary manslaughter conviction under section 1112 also requires: “(1) that the defendant acted with ‘gross negligence,’ defined as ‘wanton or reckless disregard for human life;’ and (2) that the defendant had actual knowledge that his conduct was a threat to the lives of others, . . . or had knowledge of such circumstances as could reasonably be said to have made foreseeable to him the peril to which his acts might subject others (citing *United States v. Keith*, 605 F.2d 462, 463 (9th Cir. 1979))). See generally *United States v. Shortman*, 91 F.3d 80, 81 (9th Cir. 1996) (“It is well-settled that ‘gross negligence’ is an element of involuntary manslaughter under § 1112.”); *United States v. Crowe*, 563 F.3d 969, 973 (9th Cir. 2009) (quoting *United States v. Keith*, 609 F.2d 462, 463 (9th Cir. 1979)).

<sup>75</sup> *United States v. Browner*, 889 F.2d 549, 553 (5th Cir. 1989).

<sup>76</sup> 18 U.S.C. § 1112(a).

<sup>77</sup> *Browner*, 889 F.2d at 553 (citing *United States v. Fesler*, 781 F.2d 384, 393 (5th Cir. 1986)).

Criminal defendants have, on occasion, attempted to argue that the common law meanings of negligence utilized in the general manslaughter provisions of section 1112 are applicable to section 1115. The best analysis of this issue appears in the Fifth Circuit's *United States v. O'Keefe* opinion. On March 13, 2001, Captain Richard A. O'Keefe was operating a tugboat, *MY AMY ANN*, on the Mississippi River when an accident occurred, causing the boat to capsize. As a result, O'Keefe's ex-wife, an unauthorized passenger onboard the tugboat, drowned. Within hours of the accident, O'Keefe was ordered to take a drug test, which revealed that he had cocaine in his system at the time of the accident. O'Keefe was charged with one count of misconduct or negligence by a ship officer, in violation of 18 U.S.C. § 1115 and one count of obstruction of justice, in violation of 18 U.S.C. § 1512(b)(1) for attempting to corruptly influence a witness.<sup>78</sup>

Evidence presented at the trial showed that the defendant admitted to using cocaine three or four days before the voyage. O'Keefe testified, however, that he was not under the influence at the time of the accident. Expert testimony contradicted the defendant's assertions and suggested that O'Keefe ingested cocaine on the day of the accident and was, therefore, under the influence at the time that his ex-wife died.<sup>79</sup>

The defendant, through counsel, requested the district court to instruct the jury that in order to convict him of a violation of 18 U.S.C. § 1115, the government needed to prove either "gross negligence" or "heat of passion." The district court rejected defendant's request. The defendant was convicted of seaman's manslaughter and was found not guilty of the obstruction charge. On appeal, the Fifth Circuit reviewed the district court's refusal to give the requested charge.<sup>80</sup>

The Fifth Circuit began its analysis by reviewing the jury charge delivered by the district court:

[f]or you to find the Defendant guilty of this crime, you must be convinced that the Government has proved each of the following beyond a reasonable doubt: . . . [I]f a person lost his or her life, the loss of life was

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<sup>78</sup> *O'Keefe*, 426 F.3d at 276.

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

<sup>80</sup> *Id.* at 277–78.

proximately caused by the misconduct, negligence or inattention of the Defendant to his duties upon the vessel, upon which he was employed.<sup>81</sup>

The defendant-appellant argued that in the absence of malice, under the common law definition of manslaughter and the companion statutory definition of manslaughter contained in 18 U.S.C. § 1112,<sup>82</sup> the government was required to prove gross negligence or heat of passion to sustain a conviction under section 1115. Mere negligence, he insisted, was insufficient to meet the government's burden of proof.<sup>83</sup>

The Fifth Circuit noted that the district court conducted a historical analysis of how other courts have applied section 1115. The district court determined that "Congress did not intend that proof of negligence or heat of passion would be required for a conviction under § 1115."<sup>84</sup> The Fifth Circuit concurred with the district court, noting that the purpose of the statute, its legislative history, and the ensuing case law support the conclusion that "any degree of negligence is

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

<sup>82</sup> 18 U.S.C. § 1112 provides:

- (a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
  - Voluntary—Upon a sudden quarrel or heat of passion.
  - Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.
- (b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of voluntary manslaughter, shall be fined under this title or imprisoned not more than 15 years, or both; Whoever is guilty of involuntary manslaughter, shall be fined under this title or imprisoned not more than 8 years, or both.

<sup>83</sup> *O'Keefe*, 426 F.3d at 278.

<sup>84</sup> *Id.* (citing *United States v. Warner*, 28 F. Cas. 404, 407 (D. Ohio 1848)); *Van Schaick v. United States*, 159 F. 847, 850 (2d Cir. 1908); *United States v. Keller*, 19 F. 633, 638 (D. W.Va. 1884); *United States v. Collyer*, 25 F. Cas. 554, 578 (S.D.N.Y. 1855); *United States v. Farnham*, 25 F. Cas. 1042, 1044 (S.D.N.Y. 1853).

sufficient to meet the culpability threshold” necessary to sustain a conviction under section 1115.<sup>85</sup>

The Fifth Circuit also affirmed the district court in rejecting defendant-appellant’s argument that Congress is presumed to have incorporated the section 1112 common law definitions of negligence into section 1115. It emphasized that the two statutes are different laws, addressing different crimes with different penalties. The court reasoned that “the plain meaning of the statute [§ 1115] is clear on its face, [and] courts are required to give effect to the language of the statute according to its terms.”<sup>86</sup> Nothing in the statute’s terms suggested that the words “misconduct, negligence or inattention” were meant to imply gross negligence or heat of passion. The plain language of section 1115 is clear, and the Fifth Circuit, therefore, affirmed the district court.<sup>87</sup>

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<sup>85</sup> *Id.* at 278. *See generally* United States v. Pruett, 681 F.3d 232, 242 (5th Cir. 2012) (discussing *O’Keefe*, 426 F.3d 274).

<sup>86</sup> *Id.* at 279.

<sup>87</sup> *Id.* The only identified court decision contrary to the *O’Keefe* holding that prosecutions of seamen under section 1115 requires only a showing of simple negligence, is the unpublished decision in *United States v. Thurston*, No. 2:02-CR-7-FTM-29DNF (M.D. Fla. June 13, 2003), discussed in *United States v. Thurston*, 362 F.3d 1319 (11th Cir. 2004). Gilbert Charles Thurston, the chief mate on the *S.S. Trinity*, was originally charged with causing the death of a crewmember through misconduct, negligence, or inattention to duties, in violation of section 1115. He pleaded guilty to causing the death as a result of simple negligence. At sentencing, the district court determined that section 1115 required a finding of gross negligence and that the court had initially erred in denying defendant’s motion to dismiss the indictment alleging only simple negligence. Based upon its finding, the court set aside the defendant’s plea and dismissed the indictment as defective. The government secured a second indictment that charged Thurston with gross negligence in violation of section 1115. The defendant moved to dismiss the second indictment alleging double jeopardy, and the district court denied the motion. The Eleventh Circuit affirmed the district court. Thurston proceeded to trial on the section 1115 charge and was acquitted in December of 2004. *See* Def. Thurston J. of Acquittal, Dec. 16, 2004, 2:02-CR-121-FTM-29DNF, ECF No. 128; *see also* United States v. Hilger, 867 F.2d 566 (9th Cir. 1989) (declining to address issue of whether simple negligence was sufficient to establish violations of section 1115 and concluding that the case must be dismissed because the Northern District of California was not a proper venue).



## VI. Recent seaman's manslaughter prosecutions

As noted above, there were very few significant seaman's manslaughter statute prosecutions during most of the twentieth century. In recent years, however, the statute has returned to prominence. Several recent cases highlight recurring issues in these prosecutions.

### A. *United States v. Fei*/alien smuggling

The deaths of 10 alien smuggling victims onboard the *Golden Venture* in New York in 1993 resulted in a two-year manhunt and 22 convictions for seaman's manslaughter and related human smuggling offenses.<sup>88</sup> Lee Peng Fei organized and financed the transportation of 300 undocumented Chinese nationals to the United States from Kenya onboard the cargo ship, *Golden Venture*. Conditions during the voyage were brutal and inhumane. Fei initially hoped to arrange for small boats to rendezvous with the *Golden Venture* in the Atlantic in order to offload the passengers and transport them to shore. Upon arrival in Queens, New York, Fei's plans fell through, and he ordered one of his coconspirators to deliberately run the vessel to ground. In the ensuing pandemonium, at least 10 passengers died from either drowning or hypothermia. Because four bodies were not found until much later, the defendant was charged with six counts of seaman's manslaughter.

Fei pleaded guilty to three counts of conspiracy to smuggle aliens, smuggling aliens, and seaman's manslaughter. Following his plea allocution, he filed pleadings with the district court, claiming that he had not correctly described the underlying events and moving to withdraw his pleas as to the seaman's manslaughter counts. At a subsequent hearing on his motion, Fei testified that he instructed the ship to ground on the *bay* side, not the *ocean* or surf side of Rockaway Point. He said that he made that distinction because he had visited the area and observed that the bay side was much calmer.<sup>89</sup>

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<sup>88</sup> *United States v. Fei*, 225 F.3d 167 (2d Cir. 2000); *United States v. Hui*, 83 F.3d 592 (2d Cir. 1996) (per curiam); *United States v. Moe*, 65 F.3d 245 (2d Cir. 1995); *United States v. Lee*, 122 F.3d 1058 (2d Cir. 1995).

<sup>89</sup> *Fei*, 225 F.3d at 171.

The Second Circuit was unimpressed with Fei's explanation: "[R]egardless of whether the beach was sandy or rocky at the point of impact, the multiple deaths that in fact occurred were an entirely foreseeable result of Lee's arrangements and orders to his subordinates."<sup>90</sup> The Second Circuit affirmed the district court's upward departure for the district court's stated reasons: dangerous or inhumane treatment; the death of at least six individuals and the bodily injury of many others; the involvement of substantially more than 100 aliens; and the possession of weapons. According to the court, it elected to publish this opinion because the affirmances of Fei's conviction "marks the end of this cruel saga, and also because of public concern with the growing trade in illegal immigration and with those like this defendant who profit hugely from it."<sup>91</sup>

## **B. *United States v. Mitlof* / conspiracy to violate 18 U.S.C. § 1115?**

The prosecution of the owner and operator of a New York water taxi following the drowning of one of its passengers is an excellent example of how prosecutors can effectively develop proof of a seaman's manslaughter violation. The case also raises an important legal question: Can the government charge a conspiracy to violate 18 U.S.C. § 1115? For purposes of establishing substantive criminal violations of the seaman's manslaughter statute, for example, criminal negligence of boat owners and operators can be premised upon a failure to obtain the required COI, as well as upon their knowing operation of a vessel with mechanical and structural deficiencies. Can the government also use this fact pattern to prosecute a conspiracy to engage in negligence? Is it legally possible for defendants to conspire to act unintentionally? Most legal scholars agree that criminal conspiracy is a specific intent offense. Can coconspirators agree (with specific intent) to commit a crime that results from an unintended consequence? The district court in *United States v. Mitlof* grappled with each of these questions.<sup>92</sup>

Joseph Mitlof was the owner of Hudson Valley Waterways, a water taxi and tour service that operated on the Hudson River in New York. Daniel Sheehan was a licensed U.S. merchant marine officer

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 169.

<sup>92</sup> *United States v. Mitlof*, 165 F. Supp. 2d 558 (S.D.N.Y. 2001).

employed by Mitlof's business who served as captain of the *Conservator*, a vessel previously certified by the U.S. Coast Guard to operate on the Norwalk River in Virginia. On August 23, 1998, the *Conservator* embarked on a voyage along the Hudson River while carrying 29 passengers, more than was authorized under the vessel's Norwalk COI, which specified conditions for the boat's operation on the Norwalk, not the Hudson, River. Shortly after leaving the dock, the boat began taking on water and capsized, resulting in the drowning death of one of the passengers.<sup>93</sup>

The subsequent investigation revealed that the *Conservator* did not have a valid COI; that the vessel was not suited for commercial use on the Hudson River; that the vessel had serious structural problems; and that there were too few operational life preservers on the boat at the time of the accident. Mitlof and Sheehan were also charged with wire fraud in connection with his false advertising that his company operated COI-compliant vessels. Mitlof was convicted of the seaman's manslaughter count and wire fraud at trial and Sheehan pleaded guilty.<sup>94</sup>

A significant issue addressed by the district court during the pendency of the case was the sufficiency of Count One of the indictment, conspiracy to violate section 1115. The district court noted that it was unable to locate a single instance where the government charged a defendant with conspiracy to violate this statute. The defendant urged that to allow the government to proceed would be to authorize criminal prosecution based upon a conspiracy to commit negligence. The defendant argued that a conspiracy to violate section 1115 "would require an agreement in advance to act negligently or recklessly, and thereby cause an unintentional death."<sup>95</sup>

The defendant raised three arguments as to why the district court should dismiss the conspiracy to commit a violation of section 1115. First, many state courts have held that, under their respective state laws, it is not possible to conspire to achieve an unintended consequence and that the district court should adopt those courts' analyses. Second, many respected commentators have concluded that

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<sup>93</sup> *Id.* at 559–60.

<sup>94</sup> *Id.*; Def. Mitlof J., No. 7:01-cr-00466-CM (S.D.N.Y.); Def. Sheehan J., No. 7:01-cr-00466-CM (S.D.N.Y.); Office of Inspector Gen., *Investigations: Vessel Owner Sentenced in Drowning Case*, U.S. DEP'T OF TRANSP. (May 17, 2002), <https://www.oig.dot.gov/library-item/31717>.

<sup>95</sup> *Mitlof*, 165 F. Supp. 2d at 563.

because conspiracy is a specific intent crime, it is not possible to conspire to commit a crime that results from an unintended consequence.<sup>96</sup> Third, federal courts that have considered the issue in civil cases have dismissed the idea that one can conspire to act unintentionally.<sup>97</sup>

The government responded that a conspiracy requires proof of two distinct mental states, one associated with the *agreement* and the other with the *criminal object*, and that different elements of the same offense can require different mental states. The mental state required for the criminal object is the same as the mental state required to commit the underlying substantive offense. The government supported its position that the conspiracy count to violate the Seaman's Manslaughter Act was viable, citing cases in which courts have sustained conspiracy convictions where the mental state for the object of the conspiracy was, not intent, but the substantive offense,<sup>98</sup>

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<sup>96</sup> *Id.* at 563–64 (citing ROBERT LAFAVE, CRIMINAL LAW §§ 580–81, 583 (3d ed. 2000)).

<sup>97</sup> *Id.* (citations omitted).

<sup>98</sup> *Id.* at 565 (citing *United States v. Rosa*, 17 F.3d 1531, 1545–46 (2d Cir. 1994) (stating that in a conspiracy to receive stolen goods: “[i]f the goods had in fact traveled interstate or across a United States border as stolen property, that would suffice despite the coconspirators’ ignorance of that travel, since if, as in *Feola*, the acts performed or planned are clearly criminal, the coconspirators need not have been aware of the crime’s federal nature”)); *United States v. Gurary*, 860 F.2d 521, 524–25 (2d Cir. 1988) (stating that in a conspiracy to defraud the United States and to evade taxes, “[i]mpeding the IRS, though not defendants’ primary purpose, was part and parcel of the scheme. At a minimum, defendants knew the fictitious invoices would be recorded in corporate books and records, records on which corporate tax returns are based”); *United States v. Eisenberg*, 596 F.2d 522, 525 (2d Cir. 1979) (stating that in a conspiracy to transport stolen checks, it was not necessary for the government to prove that the defendant knew specifically that the counterfeit checks were to be transported in interstate commerce); *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976) (holding that where defendants’ alleged coconspirators intended to hijack a truckload of men’s suits, but actually obtained a load of hats, girdles, lamps, and children’s clothes, the variance in items stolen from defendants’ initial intent was no defense to charges of conspiracy to steal, receive, and possess goods from a shipment moving in interstate commerce and charge of knowing possession of goods which had been stolen from an interstate shipment).

only one of which involved a conspiracy to do a negligent act.<sup>99</sup> The government also relied on the Supreme Court’s reasoning in *United States v. Feola*,<sup>100</sup> where three defendants were charged with conspiracy to assault federal law enforcement officers. At the time of the assault, the *Feola* defendants were unaware that the victims were law enforcement officers. Defendants argued that they could not be convicted of conspiring to assault federal officers, because they did not know that assaulting law enforcement officers was, in fact, what they were planning to do. The Supreme Court rejected defendants’ argument and “declined to require a greater degree of intent for conspiratorial responsibility than for the underlying substantive offense.”<sup>101</sup>

Following its careful review of the government’s arguments and current case law, the district court acknowledged that “[o]ne could easily . . . by-pass defendant’s highly persuasive authorities by relying on the literal words of *Feola*.”<sup>102</sup> The general federal conspiracy statute, 18 U.S.C. § 371, makes it unlawful to conspire to commit *any* offense against the United States. There is no delineated exception for offenses based upon a mens rea of negligence or recklessness. Therefore, focusing squarely on the wording of section 371, the court agreed that a conspiracy to violate the Seaman’s Manslaughter Act is a viable criminal offense.<sup>103</sup>

The court was not satisfied with the limited scope of its statutory analysis, however. The conduct actually prohibited in section 1115 “is causing a homicide, not negligence on the navigable waters of the United States.”<sup>104</sup> The district court proceeded to emphasize that *Feola* did not govern the case before it because *Feola* left open the very question that the district court felt compelled to address: “whether it

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<sup>99</sup> *United States v. Thomas*, 887 F.2d 1341 (9th Cir. 1989) (holding that defendant could be convicted of agreeing to do an act that he should have known was illegal—taking an elk without a properly issued hunting permit and transporting it in interstate commerce). Note that this decision has been roundly criticized for the Ninth Circuit’s incomprehensible conclusion that the defendant was guilty not of “conspiring to be negligent, rather he was charged with negligently conspiring.” *Id.* at 1347.

<sup>100</sup> *United States v. Feola*, 420 U.S. 671, 688 (1975).

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

<sup>102</sup> *Mitlof*, 165 F. Supp. 2d at 566.

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

<sup>104</sup> *Id.*

is fair to punish parties to an agreement to engage intentionally in ‘apparently innocent conduct’ where the unintended result of engaging in that conduct is the violation of a criminal statute.”<sup>105</sup> The government, in its rejoinder, argued that there is nothing innocent about a deliberate decision to operate a structurally damaged ferry without a proper license in water for which this vessel was never designed.<sup>106</sup>

The district court was not prepared to address the remaining question, because a decision about whether defendant’s conduct was “apparently innocent” cannot be addressed on a defendant’s motion to dismiss the indictment for facial insufficiency. The court, however, delivered a clear admonition to the government: “The Government has not yet apprised me that it intends to put on any evidence suggesting that defendants intended to accomplish ‘the results that made their actions criminal.’”<sup>107</sup>

The district court urged the government to consider the court’s analysis carefully and “bear this in mind as it prepares to argue the inevitable Rule 29 motion.”<sup>108</sup> But there was no Rule 29 motion. One of the two defendants entered a guilty plea, and the government dismissed the conspiracy count.<sup>109</sup>

### **C. *United States v. Ryan et al.*/prosecution of non-crew members for seaman’s manslaughter**

As noted above, section 1115 provides for different levels of culpability, depending upon the individual’s roles and responsibilities in relation to the vessel. Crewmembers, vessel owners, charters, inspectors, and other public officials whose fraud, neglect, or misconduct results in the loss of human life can be prosecuted under the statute for simple negligence. When a corporation owns the vessel, corporate officers can be held criminally liable for knowingly and willfully causing or allowing fraud, neglect, or misconduct resulting in loss of life.<sup>110</sup> Before 2004, there were only three known prosecutions

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<sup>105</sup> *Id.* (quoting *Feola*, 420 U.S. at 691).

<sup>106</sup> *Id.* at 566–67.

<sup>107</sup> *Id.* at 567.

<sup>108</sup> *Id.* at 569.

<sup>109</sup> J., *United States v. Mitlof*, No. 7:01-cr-00466 (S.D.N.Y. May 20, 2002), ECF No. 30; J., *United States v. Sheehan*, No. 7:01-cr-00466 (S.D.N.Y. Dec. 20, 2001), ECF No. 25.

<sup>110</sup> 18 U.S.C. § 1115.

of persons other than ship's officers for seaman's manslaughter. The first resulted from the 1904 *General Slocum* fire and ensuing death of over 1,000 people. That episode, previously discussed, led to the indictment of several company executives.<sup>111</sup> The second involved the 1993 *Golden Venture* smuggling of 300 illegal aliens, where 10 passengers drowned following the deliberate beaching of the vessel. As a result, the owner was indicted and convicted.<sup>112</sup> The third followed the 1998 capsizing of the *Conservator* in the Hudson River in New York, the death of an elderly passenger, and the prosecution of the ship's owner, Joseph Mitlof, discussed above.<sup>113</sup> The fourth, and most recent successful prosecution of a non-crew member, involved the prosecution of the Director of Ferry Operations for the City of New York, following a fatal accident of a city-owned commuter ferry.<sup>114</sup>

The Staten Island Ferry Service operated the *Andrew J. Barberi* (*Barberi*) as a public commuter ferry in New York City. On October 15, 2003, Assistant Captain Richard Smith was operating the vessel while Captain Michael Gansas was in another area of the boat preparing for an upcoming inspection. When the ferry was approximately 1,000 yards from its intended docking area, it passed the KV buoy. This was the point at which the pilot was supposed to reduce speed, slow the engines, and begin preparing for docking. The crewmembers relied on the backing down of the engines as the signal to begin preparing for docking. On this day, however, the Assistant Captain had lapsed into a state of diminished consciousness as a result of fatigue and medication. The vessel veered off course for approximately two minutes and crashed into a concrete pier. Eleven passengers died and many more were injured.<sup>115</sup>

Following a lengthy investigation, the Captain, Assistant Captain (Pilot), Director of Ferry Operations, Port Captain, and the Pilot's physician were indicted for a variety of criminal offenses. Both the

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<sup>111</sup> *Van Schaick v. United States*, 159 F. 847 (2d Cir. 1908); Grasso, *supra* note 11, at 170–71.

<sup>112</sup> *United States v. Fei*, 225 F.3d 167 (2d Cir. 2000).

<sup>113</sup> *Mitlof*, 165 F. Supp. at 558.

<sup>114</sup> Michael Luo, *Ferry Director is Charged by U.S. in Fatal Accident*, N.Y. TIMES (Aug. 5, 2004), <https://www.nytimes.com/2004/08/05/nyregion/ferry-director-is-charged-by-us-in-fatal-accident.html>.

<sup>115</sup> Verdict & Settlement Summary, *In re Complaint of the City of New York, as Owner and Operator of M/V Andrew J. Barberi*, 534 F. Supp. 2d 370 (E.D.N.Y. 2008).

Pilot, Richard Smith, and the Director of Ferry Operations, Patrick Ryan, were charged with 11 counts of seaman's manslaughter violations.<sup>116</sup> Allegations contained in the indictment and superseding indictment focused on Ryan's knowing and willful "neglect, connivance, misconduct, and violation of law" in the discharge of his duties.<sup>117</sup> The indictment and superseding indictment discussed, in considerable detail, Ryan's responsibility to ensure that ferry operations guard against the potential hazard of a pilot's sudden disability and to ensure that ferry vessels are in the control of attentive and responsible pilots. According to the indictment and superseding indictment, defendant Ryan failed to implement and enforce the two-pilot rule, which required the presence of two employees capable of piloting the ferry, in the pilothouse, whenever the ferry was underway. As a result, the indictment alleged that he "knowingly and willfully caused and allowed neglect, connivance, misconduct, and violation of law" which resulted in the loss of human life.<sup>118</sup>

Perhaps because of the overwhelming evidence, none of the defendants proceeded to trial. All but the Pilot's physician pleaded guilty to felonies.<sup>119</sup> The pleas in the *Barberi* disaster underscore the

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<sup>116</sup> Indictment, *United States v. Ryan*, No. 1:04-cr-00673 (E.D.N.Y. July 27, 2004), ECF Nos. 79, 83.

<sup>117</sup> Superseding Indictment, *United States v. Ryan*, 365 F. Supp. 3d 338 (E.D.N.Y. 2005) (No. 04-CR-673 (S-1) (ERK)), 2005 WL 5660219, ECF No. 55.

<sup>118</sup> *Id.* at 17, 19–30.

<sup>119</sup> Superseding Indictment, *United States v. Ryan*, 365 F. Supp. 3d 338 (E.D.N.Y. 2005) (No. 04-CR-673 (S-1) (ERK)), 2005 WL 5660219, ECF No. 79. The Captain Michael J. Gansas was not in the wheelhouse at the time of the crash and was charged with lying to investigators. He was placed on a pre-trial diversion sentence and charges against him were dismissed. Req. & Authorization to Dismiss Criminal Case at 1, *United States v. Gansas*, No. 1:04-cr-00671 (E.D.N.Y. Apr. 9, 2008), ECF Nos. 9, 10. Defendant Richard J. Smith, the Assistant Captain and Pilot, and Patrick Ryan, the Director of Ferry Operations, pleaded guilty to seaman's manslaughter and making false statements. Smith was sentenced to 18 months' imprisonment and 3 years of supervised release. J. at 2, *United States v. Smith*, No. 1:04-cr-00700 (E.D.N.Y. Feb. 15, 2006), ECF No. 55. Ryan was sentenced to imprisonment for one year and one day and to six months, to run concurrent. J. at 2, *United States v. Ryan*, No. 1:04-cr-00673 (E.D.N.Y. Feb. 13, 2006), ECF No. 79. John Mauldin, the Port Captain and Patrick Ryan's brother-in-law, pleaded guilty to making false



breadth of the potential application of the seaman's manslaughter statute to vessel operators and owners, who are required by law to uphold both regulatory and ethical obligations to ensure the safety of passengers and crew on maritime vessels.

#### **D. *United States v. Oba*/recklessness or mere negligence?**

Occasionally, the seaman's manslaughter statute's low standard of culpability—mere negligence—is used as a sword, rather than as a shield by defendants who seek to minimize their potential criminal exposure. Such is the case of *United States v. Oba*.<sup>120</sup> The prosecution resulted from a September 19, 2005 charter fishing boat accident involving the *Sydney Mae II*, outside the Umpqua River bar in western Oregon, near where the Umpqua River empties into the Pacific Ocean. The accident occurred at the end of a tuna-fishing trip. The defendant, the owner-operator of Pacific Pioneer Charters, was returning to shore in his 38-foot charter fishing boat with his four passengers.<sup>121</sup>

The waters at the entrance to the port—the Umpqua River bar—became treacherous, and the U.S. Coast Guard closed the bar. The defendant engaged in an extensive series of phone conversations with other fishermen who were on the water that day and with the Coast Guard. According to the defendant, he received conflicting accounts as to the water conditions, but according to the government's

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statements and was sentenced to two years' probation and up to 200 hours of community service. J. at 2, *United States v. Mauldin*, No. 1:04-cr-00673 (E.D.N.Y. Apr. 28, 2006), ECF No. 83. The Pilot's physician, William Tursi, pleaded guilty to one count of making a false statement and was sentenced to one year of probation with special conditions of six months of home confinement and up to 300 hours of community service. J. at 2, *United States v. Tursi*, No. 1:04-cr-00672 (E.D.N.Y. Nov. 9, 2005), ECF No. 29.

<sup>120</sup> 317 F. App'x 698 (9th Cir. 2009) (not precedential).

<sup>121</sup> Gov't Sentencing Mem., *United States v. Oba*, 317 F. App'x 698 (9th Cir. 2009) (No. 05-502-HA), 2007 WL 6862808, ECF No. 31; Soundings Editors, *Captain Gets Six Years for Seaman's Manslaughter*, SOUNDINGS, (Nov. 30, 2007), <https://www.soundingsonline.com/news/captain-gets-six-years-for-seaman's-manslaughter>; Sounding Editors, *Charter Captain Faces Manslaughter*, SOUNDINGS, (June 28, 2006), <https://www.soundingsonline.com/news/charter-captain-faces-manslaughter>.

evidence at the sentencing hearing, he received at least nine warnings that the bar was closed. As a result of the hazardous conditions, the Coast Guard repeatedly instructed the defendant to proceed to the nearest open port, Coos Bay.<sup>122</sup> Notwithstanding the warnings, he continued to pilot the *Sidney Mae II* toward Winchester Bay. Shortly after another phone conversation with the Coast Guard, the defendant's fishing boat was struck from the rear by a large wave. The boat was swamped and turned on its side, as all of the passengers were thrown into the sea. At this point in the voyage, the defendant had been at the helm of the *Sidney Mae II* for over 12 hours, which was in excess of the legal duration of duty.<sup>123</sup>

The defendant and one passenger survived the ordeal. Bodies of two of the passengers were recovered on a nearby beach. The body of the third missing passenger was never found. Only the defendant was wearing a life jacket.<sup>124</sup>

The defendant was charged and subsequently entered guilty pleas to three counts of seaman's manslaughter. At the sentencing hearing, the defendant argued that because the statute criminalizes mere negligence, and because he made efforts to minimize the hazards of his voyage, the court should conclude that he acted negligently, not recklessly. The defendant also presented argument that other seaman's manslaughter prosecutions have not resulted in lengthy prison sentences.<sup>125</sup> The district court was unpersuaded and found that the defendant had in fact acted recklessly. The court imposed a term of imprisonment of 72 months. On appeal, the Ninth Circuit held that sufficient evidence established that the defendant acted recklessly, but remanded the case because the district court failed to address defendant's argument that other convictions for seaman's manslaughter offenses generally resulted in sentences substantially less than 72 months.<sup>126</sup>

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<sup>122</sup> Gov't Sentencing Mem., *supra* note 121; Defense Tr. Mot. & Mem., United States v. Oba, No. 3:05-cr-00502 (D. Or. May 24, 2007), ECF No. 37.

<sup>123</sup> Gov't Sentencing Mem., *supra* note 121.

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

<sup>125</sup> Defense Tr. Mot. & Mem., *supra* note 122.

<sup>126</sup> United States v. Oba, 317 F. App'x 698, 698 (9th Cir. 2009) (not precedential). The defendant was ultimately resentenced to a term of 51 months on each of the three counts, to run concurrently. Am. J., United States v. Oba, No. 3:05-cr-00502 (D. Or. May 15, 2009), ECF No. 74.

## **E. *United States v. Schröder*/ignoring safety issues constitutes criminal negligence**

When the captain of a vessel is advised that the boat's equipment exceeds safety limitations and disregards the information, is he criminally responsible for an ensuing death? According to a Southern District of Alabama jury and sentencing judge, the answer is *yes*.<sup>127</sup> Wolfgang Schröder became the Captain of a container vessel, the *M/V Zim Mexico III*, in November of 2005. The vessel was equipped with a bow thruster to assist in maneuvering in close quarters. The bow thruster was powered by the shaft generator in the boat's main diesel generator. By design, the shaft generator disengaged if there were a fluctuation of more than 10% in the engine's set revolutions-per-minute (RPMs). Demands for full power in maneuvering situations could cause such variations in RPMs and result in a loss of power to the bow thruster. According to the ship's engines and deck logs, on at least two occasions, the bow thruster had lost power during maneuvering situations while the defendant was in charge of the vessel.<sup>128</sup>

In addition to his personal knowledge, a copy of the International Safety Management (ISM) manual, drafted by the owner/operators of the vessel, was kept aboard the *M/V Zim Mexico III*. The manual expressly noted the potential dangerousness if the engine speed were reduced before ensuring that sufficient electrical reserve generating capacity was connected to the switchboard. Furthermore, the chief engineer and the second engineer both warned Schröder that he was operating a vessel that exceeded its safety limitations.<sup>129</sup>

On March 2, 2006, the *M/V Zim Mexico III* prepared to leave the Port of Mobile with Schröder in command. He advised the bar pilot

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<sup>127</sup> Earlier courts had reached similar conclusions. See *Van Schaick v. United States*, 159 F. 847, 851 (2d Cir. 1908) (prosecution for failure to "maintain an efficient fire drill, to see that the proper apparatus for extinguishing fire was provided and maintained in efficient order and ready for immediate use and to exercise at least ordinary care in seeing that the life-preservers were in fit condition for use"); *United States v. Beacham*, 29 F. 284, 285 (D. Md. 1886) (prosecution for absence of a rail on the saloon deck, which lead to a passenger slipping, falling overboard, and drowning).

<sup>128</sup> Defendant's Sentencing Mem., at 1–2, *United States v. Schroeder*, No. 06-0088-CG, 2006 WL 1663663 (S.D. Ala. Feb. 5, 2007), ECF No. 169.

<sup>129</sup> *Id.*

that no tug had been ordered to assist in the process, even though the ship's logs revealed that a tug had been ordered on every prior occasion during the Schröder's command. The bar pilot enquired of Schröder as to the reliability of the bow thruster. Schröder demurred. He did not tell the pilot that the bow thruster was powered by the shaft generator—a practice expressly forbidden by the ISM manual. He did not advise the pilot that his own crew had voiced concerns and warned him of the safety limitations of the boat, nor did he inform the pilot that this precise problem had occurred during two prior maneuvering situations. Rather, Schröder stated that the bow thruster was "fine."<sup>130</sup>

During the turning maneuver, Schröder was at the controls of the main engine when a drop in the engine's RPM was precipitous enough to cause the shaft generator to disengage power to the bow thruster and other electrical systems.<sup>131</sup> The bulbous bow of the ship struck the lower wood dock structure of Alabama State Docks, while the upper bow struck one of the support legs of a gantry crane located on the dock. The force of the impact caused the leg of the crane to buckle and fall shoreward. The upper portion of the crane also fell shoreward and landed atop containers at the port. Two electrical contractors were in the crane box when it fell. One contractor was killed in the crash and another was slightly injured.<sup>132</sup>

The district court made short work of defendant's arguments that the indictment failed to state all the required elements of the offense charged and failed to adequately describe the facts and circumstances of the alleged offense. The court found that neither gross negligence nor knowledge of the risk that defendant's conduct presented to others were necessary elements of proof of a violation of section 1115.<sup>133</sup> Following defendant's conviction at trial for a violation of one count of seaman's manslaughter, the court sentenced him to credit for time served and ordered that he be deported from the United States.<sup>134</sup>

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<sup>130</sup> *Id.* at 2–3.

<sup>131</sup> *Id.*

<sup>132</sup> *Aff. in Support of Criminal Compl., United States v. Schroeder*, No.1:06-cr-00088-CG-M (S.D. Ala. Apr. 14, 2006), ECF No. 1.

<sup>133</sup> *United States v. Schröder*, No. 06-0088-CG, 2006 WL 1663663 (S.D. Ala. June 12, 2006). Note that the Westlaw entry is Schröder and the ECF is Schroeder.

<sup>134</sup> *J., United States v. Schroeder*, 1:06-cr-00088-CG-M (Feb. 7, 2007), ECF No. 174.

## **F. *United States v. Kaluza*/the deepwater horizon oil spill disaster: *ejusdem generis, ex abundanti cautela, or noscitur a sociis*?**

No doubt, the reader is familiar with the April 20, 2010 blowout of the *Deepwater Horizon* drilling rig chartered by BP, PLC (BP) from Transocean Ltd. (Transocean) in the Gulf of Mexico.<sup>135</sup> The blowout resulted in the death of 11 employees and the discharge of millions of barrels of oil into the Gulf of Mexico. The reader may not realize, however, that the government subsequently proceeded to prosecute the two well site leaders, the highest-ranking BP employees working on the rig, for 11 violations each of the Seaman's Manslaughter Act.<sup>136</sup> For federal prosecutors considering potential seaman's manslaughter charges, the Fifth Circuit's *United States v. Kaluza* decision is required reading given the array of issues the court was required to address.

A federal grand jury in the Eastern District of Louisiana returned a 23-count superseding bill of indictment charging the two BP well site leaders, Kaluza and Vidrine, charging 11 counts each for involuntary manslaughter in violation of 18 U.S.C. § 1112; 11 counts each of seaman's manslaughter in violation of 18 U.S.C. § 1115; and one count of negligent discharge under the Clean Water Act in violation of 33 U.S.C. §§ 1319(c)(1)(A) and 1321(b)(3). Defendants filed motions to dismiss arguing: (1) that the *Deepwater Horizon* drilling rig was outside of the territorial jurisdiction of the United States and that section 1115 does not apply extraterritorially; (2) that the section 1115 counts failed to charge an offense because the defendants were not covered by the statute; (3) that all counts of the superseding indictment should be dismissed as unconstitutionally vague as applied. The district court denied the motions to dismiss pertaining to the extraterritorial jurisdiction of the *Deepwater Horizon*, based upon the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(a)(1); dismissed the seaman's manslaughter counts

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<sup>135</sup> See generally Nicholas S. Bergeron, *Expanding Application: The Immediate Need for Revision of the Seaman's Manslaughter Act in Light of the BP Deepwater Horizon Tragedy and United States v. Kaluza*, 16 LOY. MAR. L. J. 127, 140–43 (2017).

<sup>136</sup> *United States v. Kaluza*, 780 F.3d 647, 650 (5th Cir. 2015).

for failure to charge an offense; and denied the motion to dismiss for constitutional vagueness.<sup>137</sup>

Beginning its analysis, the Fifth Circuit made short work of defendant's jurisdictional claim because the issue was not properly appealed. The defendants neglected to cross-appeal the district court's determination that the *Deepwater Horizon* was erected on the seabed of the Outer Continental Shelf and that the OCSLA applied. Therefore, defendants were precluded from receiving affirmative relief, and the Fifth Circuit declined to consider whether the district court erred in deciding that the *Deepwater Horizon* qualified as an OCSLA situs.<sup>138</sup>

The Fifth Circuit next considered the merits of the appeal: was the district court correct in granting defendants' motion to dismiss the section 1115 counts for failure to charge an offense, because neither defendant fell within the meaning of the statute? Did the two BP well site leader defendants qualify as "other person[s] employed . . . on any vessel" within the meaning of section 1115? The Fifth Circuit commenced its analysis by focusing on well-established principles of statutory construction.<sup>139</sup>

In order to ascertain whether the defendants came within the ambit of section 1115, the court began by examining the first line of the statute: "Every captain, engineer, pilot, or other person employed on any steamboat or vessel . . ." The defendants were not captains, engineers, or pilots. The government argued that the plain text was clear: defendants were covered because they were other persons employed on the vessel. The district court below disagreed, concluding that the statute was ambiguous. Therefore, the district court applied the principle of *ejusdem generis* to analyze the critical phrase in the statute.<sup>140</sup>

*Ejusdem generis* provides that where general words follow specific words in an enumeration describing a statute's legal subject, the general words are construed to include only objects similar in nature

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<sup>137</sup> United States v. Kaluza, No. 12-165, 2013 WL 6490341 (E.D. La. Dec. 10, 2013). See generally *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* 808 F. Supp. 2d 943 (E.D. La. 2011).

<sup>138</sup> *Kaluza*, 780 F.3d at 655–56.

<sup>139</sup> *Id.* at 656–57.

<sup>140</sup> *Id.* at 657, 659.

to the objects enumerated by the preceding specific words.<sup>141</sup> Applying this principle, defendants would not be covered by the statute, because the phrase “other person employed on any . . . vessel” would cover only persons with responsibility for the marine operations, maintenance, and navigation of the vessel. The defendants, BP well site leaders, clearly did not fall within that definition.<sup>142</sup>

The government countered with a Latin principle of statutory construction of its own: *ex abundantia cautela*, the abundance of caution principle,<sup>143</sup> to which defendants responded with *noscitur a sociis*: “it is known from its associates.” That is, words may be defined by accompanying words and the coupling of words denotes an intention that they should be understood in the same general sense.<sup>144</sup>

The Fifth Circuit agreed with the district court below that section 1115 was ambiguous, necessitating the use of canons of construction. The wording of the statute: “[e]very . . . other person employed on any . . . vessel” is ambiguous because it is not clear whether the phrase incorporates every other person employed on the vessel. If it does, then the preceding words, “captain, engineer, pilot” are superfluous. For this reason, the Fifth Circuit concluded that *ejusdem generis* was the appropriate canon of construction to apply. Here, the opening text of section 1115 lists three categories of persons—captain, engineer, pilot—to whom the statute applies, followed by a general category: “every . . . other person.” The first three categories suggest a class of persons responsible for the operation, maintenance, and navigation of the vessel. All three categories identify persons involved in the transportation of the vehicle. Thus, “every . . . other person” includes only individuals responsible for marine operation, maintenance, and navigation. By definition the two BP well site leaders did not fit into this category and therefore, section 1115 did not apply.<sup>145</sup>

The Fifth Circuit cited several other points consistent with its conclusion. First, before the *Deepwater Horizon* case, section 1115 had

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<sup>141</sup> *Id.* at 657 & n.29 (citing 2A NORMAN SINGER & J.D. SHAMBIE SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47:17 (7th ed. 2014)).

<sup>142</sup> *Id.* at 657.

<sup>143</sup> *Id.* at 658 & n.30 (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 140 (2001) (Souter, J., dissenting)).

<sup>144</sup> *Id.* at 658 & n.31 (citing SINGER & SINGER at § 47:16).

<sup>145</sup> *Id.* at 660–62.

never been applied to employees on a drilling rig.<sup>146</sup> Second, the title of the statute, “Misconduct or neglect of ship officers” points to the fact that the focus of section 1115 is a person responsible for the maritime functions of the vessel, not the ancillary oil drilling responsibilities. Finally, the court concluded that since the court’s statutory construction and analysis was sufficient to resolve the issue before, there was no need to consider statutory history. Nonetheless, the legislative history of the seaman’s manslaughter act supported the court’s conclusions. Specifically, the legislative history “shows a remarkable continuity” for the phrase “[e]very . . . other person employed on any . . . vessel.” Other provisions in the statute have been modified over time, but this one has remained essentially the same.<sup>147</sup>

Finally, the Fifth Circuit addressed the government’s argument that the district court erred in invoking the rule of lenity. According to the government, the text of section 1115 was clear and contained no ambiguity. Even if there were ambiguity, the government urged that there was no ambiguity left, once *ejusdem generis* was applied and that the district court erred in applying the rule of lenity. According to the Fifth Circuit, the government misapprehended the district court’s order: the district court held that “should there be any remaining ambiguity after application of *ejusdem generis*, the rule of lenity dictated that it be resolved in Defendants’ favor.”<sup>148</sup> “Applying a statute originally developed to prevent steamboat explosions and collisions on inland waters to offshore oil and gas operations” was “approaching a bridge too far.” At some point—and the Fifth Circuit concluded that it was—“the doctrine of lenity takes hold” and dismissing the seaman’s manslaughter counts was not error.<sup>149</sup>

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<sup>146</sup> *Id.* Clearly, the *Deepwater Horizon* was a vessel, “a dynamically-positioned, semi-submersible deepwater drilling vessel.” *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, 808 F. Supp. 2d 943, 950 (E.D. La. 2011), *cited in* *United States v. Kaluza*, 780 F.3d 647, 650–51 & n.1 (5th Cir. 2015).

<sup>147</sup> *Kaluza*, 780 F.3d at 665–66.

<sup>148</sup> *Id.* at 669. The rule of lenity requires ambiguous criminal laws be interpreted in favor of defendants subject to them. *See* *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

<sup>149</sup> *Kaluza*, 780 F.3d at 669.



## VII. Conclusion

The seaman's manslaughter statute is a unique prosecution tool intended to ensure accountability for persons involved in commercial maritime operations where death results. Holding these individuals responsible for negligent conduct clearly puts the impetus for ensuring public safety on those persons most directly involved in the maritime industry. Prosecutors who are considering bringing charges under this statute should begin their analysis by ascertaining the duty of care owed by the ship officers, vessel owners, and corporate management. The accompanying investigation will focus on whether necessary safeguards were in place, the training protocols routinely employed, and the duties created by government regulations and internal company policies, which may have imposed legal duties and responsibilities upon targets of the investigation. In addition, it will be important to understand the actions by individual persons that lead to the loss of life.

The seaman's manslaughter statute is broad, but not without limits. For reasons discussed above, prosecutors should think twice before charging a conspiracy to commit seaman's manslaughter, because of the interplay between the specific intent necessary to prove a conspiracy and the absence of specific intent for the unintended consequences that follow negligent conduct. Certainly, prosecutors will be heartened by the breadth of jurisdictional authority to prosecute seaman's manslaughter crimes, particularly in light of the Fourth Circuit's persuasive analysis that the statute is one of general application. Prosecutors must look closely to the defendant's particular situation in order to ascertain venue. Finally, the slightly archaic wording of the seaman's manslaughter statute creates its own challenges. Prosecutors must be prepared to enlist established principles of statutory construction to interpret the statute correctly.

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Editor's Note: In September 2018, the Deputy Attorney General's Office released a complete revision of the United States Attorneys' Manual and renamed it the Justice Manual. As part of this revision process, all Resource Manuals associated with the Justice Manual, including the Criminal Resource Manual cited herein, were not revised. They will eventually be archived for historical purposes only.

# Human Trafficking Enforcement and the Rule of Law

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## I. Introduction

Human trafficking has been described as a form of modern-day slavery that preys on some of the most vulnerable members of our society, depriving them of their rights, freedom, and dignity by exploiting them for compelled or coerced labor, services, or commercial sex. This insidious crime can take a seemingly infinite variety of forms, exploiting both adults and children, and targeting U.S. citizens, authorized visa holders, and undocumented migrants alike.

Because human trafficking is a crime of exploitation that requires no smuggling, transportation, or movement, victims can be exploited locally within their own communities, lured across state lines, or smuggled over international borders. Traffickers control victims by holding them in fear, using varying combinations of physical force, threats against victims' families, psychological coercion, isolation, intimidation, addictive drugs, debts, deception, fraud, and threats of arrest or deportation. Traffickers then use this control to exploit victims in a wide array of legitimate industries and illicit enterprises, for their labor in hospitality, health care, agriculture, salons, street peddling rings, and domestic service, or for sexual servitude at massage parlors, strip clubs, cantinas, casinos, and migrant labor brothels, as well as over internet sites, at truck stops, and on street corners. In all these contexts, perpetrators reap extensive proceeds, while victims derive next to nothing from their compelled service.

In addition to violating victims' individual rights, these trafficking offenses undermine the rule of law. The beatings, rapes, and forced abortions they often entail present grave risks to public safety, and traffickers engage in wide-ranging criminal conduct in furtherance of their trafficking schemes, including alien smuggling, money

laundering, fraud, racketeering, narcotics, extortion, and witness tampering offenses. Moreover, traffickers often target victims whose histories of drug dependency, prostitution arrests, or immigration issues make them fearful of authorities. They then manipulate these fears by threatening arrest or deportation as a means of exerting control over the victims.

This particularly pernicious form of coercion subverts the rule of law by weaponizing the legal system to silence the victims and perpetuate the criminal conduct, thereby deliberately depriving crime victims of the protection of the laws and intentionally impeding law enforcement. While witness intimidation and obstruction of justice present challenges in combating many criminal threats, their adverse effect on trafficking enforcement can be especially pronounced because, with the exception of sex trafficking of minors which does not require proof of coercion, trafficking crimes require proof of victims' state of mind, which can be difficult to establish without securing victims' cooperation as witnesses. Silencing victims through threats can, therefore, be a particularly powerful means of concealing human trafficking crimes from detection entirely. In many cases, traffickers' abuse of the legal process, such as by threats of arrest or deportation, *both* to control the victims in furtherance of the underlying trafficking offense *and* to prevent victims from cooperating with authorities once they escape, further undermines the rule of law by enabling perpetrators to evade criminal liability.

This article discusses challenges that arise in detecting and combating human trafficking crimes, and the adverse impact on the rule of law associated with trafficking schemes that subvert the legal system to evade detection and prevent victims from reporting to authorities. The article then identifies three strategies that have proven especially effective in countering transnational trafficking threats in order to bring traffickers to justice, restore victims' rights, and uphold the rule of law: (1) interagency and international strategic partnerships; (2) financial investigations into trafficking-derived illicit proceeds; and (3) victim-centered, trauma-informed approaches to securing victim-witness cooperation, including enforcement of the victim protection provisions set forth in the Trafficking Victims Protection Act (TVPA).<sup>1</sup>

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<sup>1</sup> For an overview of human trafficking statutes and the Department of Justice's (Department) anti-trafficking efforts, see Hilary Axam & Steve J.

## II. Strategic partnerships

Trafficking enterprises often perpetrate a multitude of related crimes involving dozens of victims and witnesses, relevant conduct in multiple domestic and international jurisdictions, and continuous violations over numerous years. Dismantling criminal enterprises of this scale requires sustained engagement of multiple law enforcement agencies, each with distinct authorities and areas of specialized expertise, in order to advance complex investigations and prosecutions while maintaining the safety, stability, and cooperation of numerous traumatized victim-witnesses. Interagency enforcement initiatives establish the strategic partnerships that have proven essential to developing these complex prosecutions against extensive transnational trafficking enterprises, streamlining coordination among multiple law enforcement agencies to more effectively leverage their collective enforcement authorities, resources, and specialized expertise.

A key example is the U.S.–Mexico Bilateral Human Trafficking Enforcement Initiative (Bilateral Initiative), launched by the Department and the Department of Homeland Security (DHS) in 2009.<sup>2</sup> This initiative plays a central role in systematically dismantling transnational trafficking enterprises operating across the U.S.–Mexico border. These trafficking organizations severely undermine the rule of law by luring hundreds of vulnerable victims on false promises of love, marriage, and a better life, then using brutal physical and sexual violence, psychological manipulation, threats, and control over the victims' children to smuggle them across the border, compel them into prostitution throughout the United States, and launder the illicit sex trafficking proceeds back to Mexico.<sup>3</sup>

The Bilateral Initiative<sup>4</sup> brings key U.S. anti-trafficking authorities together with their Mexican law enforcement counterparts in order to

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Grocki, *The Civil Rights Division's Human Trafficking Prosecution Unit (HTPU) and the Criminal Division's Child Exploitation and Obscenity Section (CEOS): An Overview*, 65 U.S. ATT'YS BULL., no. 6, 2017, at 17–23.

<sup>2</sup> See, e.g., Press Release, U.S. Dep't of Justice, Five Members of Mexican Sex Trafficking Organization Sentenced to Prison (Jan. 7, 2019).

<sup>3</sup> See, e.g., *id.*

<sup>4</sup> See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS ON THE U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN

facilitate direct exchanges of leads, evidence, intelligence, and expertise. This strategic operational coordination allows U.S. and Mexican officials to secure access to highly relevant evidence and intelligence in both countries, including key victims, witnesses, and criminal associates that are located on both sides of the border, which is imperative to prosecuting these trafficking enterprises effectively. By strengthening investigations and prosecutions in both the United States and Mexico, these bilateral efforts have resulted in successful U.S. federal prosecutions of over 200 defendants, and multiple Mexican state and federal prosecutions of associated traffickers.<sup>5</sup>

Similarly, the Anti-Trafficking Coordination Team (ACTeam) Initiative convenes interagency teams of U.S. federal agents and federal prosecutors to develop complex, high-impact investigations and prosecutions. Recognizing that complex, transnational trafficking investigations are exceptionally resource-intensive, requiring proactive investigation in multiple U.S. and foreign jurisdictions, simultaneously with ongoing efforts to stabilize and protect dozens of victims, the Department launched the ACTeam Initiative in partnership with key federal investigative agencies.<sup>6</sup> This Initiative convenes specialized teams of federal agents and prosecutors in competitively selected districts to develop high-impact trafficking cases in close coordination with national subject matter experts.<sup>7</sup> The ACTeam Initiative has proven highly effective at providing advanced anti-trafficking expertise and streamlining coordination among the multiple federal agents and federal prosecutors necessary to develop complex, high-impact trafficking cases involving transnational sex trafficking and labor trafficking cases.<sup>8</sup>

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PERSONS 18, 64 (2017); U.S. DEP'T OF STATE, 2019 TRAFFICKING IN PERSONS REPORT: UNITED STATES (2019).

<sup>5</sup> See, e.g., U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS ON THE U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 18, 64 (2017); U.S. DEP'T OF STATE, 2019 TRAFFICKING IN PERSONS REPORT: UNITED STATES (2019).

<sup>6</sup> See, e.g., Press Release, U.S. Dep't of Justice, Thirty-Six Defendants Guilty for Their Roles in International Thai Sex Trafficking Organization (Dec. 13, 2018).

<sup>7</sup> See, e.g., *id.*

<sup>8</sup> See, e.g., *id.*

### III. Financial investigations

Human trafficking is an extremely lucrative criminal enterprise that, by some estimates, generates more than \$150 billion in illicit proceeds worldwide each year through the exploitation of victims for labor, services, or commercial sex.<sup>9</sup> Traffickers utilize these ill-gotten gains in furtherance of their continued criminal schemes, displaying their wealth to increase the allure of the false promises they use to recruit more victims, and expending trafficking proceeds to finance the smuggling and transportation of these new victims.

Financial investigations play a significant role in human trafficking enforcement. The financial aspects of human trafficking investigations are essential to identifying and recovering illicit proceeds through forfeiture and restitution orders, both of which are mandatory under the TVPA.<sup>10</sup> Both forfeiture and restitution deprive traffickers of their criminal proceeds, compounding the deterrent effect of criminal penalties by countering the financial motive behind these highly profitable crimes of exploitation. Restitution serves the additional purpose of providing victims a measure of recompense for the violations they endured and a means of rebuilding their lives.

In addition to supporting forfeiture and restitution actions, financial investigations play an important role in identifying additional criminal associates, corroborating aspects of the victims' statements, providing a more complete sense of the broad scope of the multi-faceted criminal enterprise, and proving coercion and control by demonstrating that the traffickers, not the victims, profited from the victims' labor, services, or commercial sex acts.<sup>11</sup> Proactively investigating and analyzing financial transactions can, therefore, provide insights into the operations of the criminal schemes that are particularly important when traumatized victims are reluctant to cooperate out of fear, shame, or misplaced loyalty to their traffickers. In these circumstances, money laundering charges can prove essential

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<sup>9</sup> INT'L LABOUR OFFICE, PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR 13 (2014).

<sup>10</sup> See 18 U.S.C. § 1593(a) (noting "the court shall order restitution for any offense under this chapter"); 18 U.S.C. § 1594; see also William E. Nolan, *Mandatory Restitution: Complying with the Trafficking Victims Protection Act*, 65 U.S. ATT'YS BULL., no. 6, 2017, at 95.

<sup>11</sup> Elizabeth G. Wright, *Follow the Money: Financial Crimes and Forfeiture in Human Trafficking Prosecutions*, 65 U.S. ATT'YS BULL., no. 6, 2017, at 79.

to ensuring that perpetrators are brought to justice even if evidentiary challenges present obstacles to proving the coercion element of the trafficking charges beyond a reasonable doubt.<sup>12</sup>

Accordingly, many of the significant cases produced through the strategic enforcement partnerships discussed above have involved extensive financial investigations and financial analysis, led by enforcement partners with specialized expertise in tracing illicit proceeds, analyzing financial intelligence, initiating forfeiture and restitution actions, and formulating money laundering charges. The engagement of financial enforcement experts from the Department's Money Laundering and Asset Recovery Section and the Treasury Department's Internal Revenue Service and Financial Crimes Enforcement Network has proven to be a mission-essential element of effective strategies for building high-impact prosecutions against transnational trafficking enterprises.<sup>13</sup>

## **IV. Victim-centered, trauma-informed approaches**

Because traffickers frequently target victims with underlying vulnerabilities, such as undocumented status, drug dependency, or histories of prior sexual abuse and prostitution arrests and then manipulate these vulnerabilities to prevent victims from coming forward, effective human trafficking enforcement requires affirmative efforts to protect and stabilize victims and earn their trust. In fact, anti-trafficking experts have overwhelmingly recognized that securing victims' cooperation as witnesses requires the use of victim-centered, trauma-informed approaches to stabilizing and protecting victims, earning their trust, recognizing and understanding their trauma responses, and empowering them as active participants in the criminal justice process.<sup>14</sup>

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<sup>12</sup> *Id.* at 80–82.

<sup>13</sup> *See, e.g.*, 12/13/18 Press Release, *supra* note 6; Press Release, U.S. Dep't of Justice, Oregon Restaurant Owner Sentenced to Prison in Connection With Immigration-Related Forced Labor Scheme (Dec. 18, 2018).

<sup>14</sup> *Victim-Centered Approach*, OFF. OF JUST. PROGRAMS, <https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/> (last visited Sept. 6, 2019); *Using a Trauma-Informed Approach*, OFF. OF JUST. PROGRAMS, <https://www.ovcttac.gov/taskforceguide/eguide/4-supporting-victims/41-using->



The TVPA recognizes the importance of stabilizing and protecting victims to enable them to come forward, report trafficking crimes, and cooperate as witnesses and therefore provides temporary immigration status and subsistence benefits to undocumented victims.<sup>15</sup> The TVPA authorizes federal law enforcement to issue Continued Presence, a form of short-term immigration status available to qualifying trafficking victims. Continued Presence serves as a law enforcement tool intended to stabilize victims who *may be potential witnesses* to a trafficking crime, so they can remain available to law enforcement during the pendency of an investigation and prosecution, as many such investigations would be virtually impossible for authorities to pursue if the witnesses were repatriated.<sup>16</sup> While law enforcement must apply for Continued Presence, the TVPA also permits victims to self-petition DHS's Citizenship and Immigration Services for a four-year T Visa, a form of non-immigrant visa available to a victim of a Severe Form of Trafficking who meets additional criteria involving the nexus between the trafficking and their presence in the United States, assistance to law enforcement, and extreme hardship if removed.<sup>17</sup>

These protections have played a significant role in expanding the victim-centered approach to trafficking enforcement that produced sharp increases in federal trafficking investigations and prosecutions following enactment of the TVPA. In fact, prosecutions of transnational trafficking enterprises depend directly and extensively on victim-witnesses whose willingness and continued cooperation with law enforcement against their traffickers depended directly on their

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a-trauma-informed-approach/ (last visited Sept. 6, 2019); U.S. DEP'T OF HOMELAND SEC.: BLUE CAMPAIGN, INFORMATION FOR LAW ENFORCEMENT OFFICIALS: IMMIGRATION RELIEF FOR VICTIMS OF HUMAN TRAFFICKING AND OTHER CRIMES.

<sup>15</sup> 22 U.S.C. § 7105(c)(3); 8 U.S.C. § 1101(a)(15)(T).

<sup>16</sup> 22 U.S.C. § 7105(c)(3); DEP'T OF HOMELAND SEC.: BLUE CAMPAIGN, CONTINUED PRESENCE: TEMPORARY IMMIGRATION STATUS FOR VICTIMS OF HUMAN TRAFFICKING (Aug. 2010).

<sup>17</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464; *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status> (last visited Sept. 6, 2019).

ability to secure temporary immigration status pursuant to these TVPA-mandated victim protection provisions.<sup>18</sup> Successful detection, investigation, and prosecution efforts depend on victims' continued access to these protections, without which foreign victims will remain reluctant to come forward, and transnational trafficking networks will continue luring and smuggling more victims into the United States, capitalizing on reduced risks of detection and prosecution.

Granting temporary immigration status to undocumented crime is fully consistent with vigorous immigration enforcement—and is essential to furthering immigration enforcement priorities—because it aids authorities not only in combatting transnational trafficking networks but also in countering smuggling threats. Trafficking drives smuggling pipelines and induces demand for smuggling schemes by luring victims who otherwise had neither the intention nor the means to enter the United States, absent the traffickers who lured them on false promises and then facilitated and financed their smuggling. Securing the cooperation of these victims as witnesses against larger trafficking and smuggling enterprises can be far more effective at countering both trafficking and smuggling threats, rather than removing the victims, leaving authorities without essential witnesses against the trafficking and smuggling perpetrators. Accordingly, affording access to TVPA victim protections can play a critical role in vindicating the victims' individual rights, combatting transnational trafficking and smuggling threats, protecting the integrity of the border, bringing perpetrators to justice, and upholding the rule of law.

## V. Conclusion

Human trafficking poses serious threats to the rule of law. This crime of exploiting vulnerable victims inherently relies on denying them the rights and freedoms otherwise guaranteed to all individuals under the law, and in many instances, traffickers further erode the rule of law through witness intimidation and abuse of the legal process to isolate victims from the protection of the legal system. While countering these threats presents many challenges, the strategies discussed above—building strong strategic partnerships, leveraging financial investigations, and using victim-centered, trauma-informed approaches—have proven to be highly effective in

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<sup>18</sup> See, e.g., 12/13/18 Press Release, *supra* note 6; 1/7/19 Press Release, *supra* note 2.

our continued efforts to bring traffickers to justice, dismantle transnational trafficking enterprises, restore the rights of trafficking victims, and uphold the rule of law.

## **About the Authors**

**Hilary Axam** has served as the Director of the Civil Rights Division's Human Trafficking Prosecution Unit since 2009. Before assuming this role, Ms. Axam served as Special Litigation Counsel on the Unit since its formation in 2007. Ms. Axam joined the Department as a Trial Attorney in the Civil Rights Division's Criminal Section in 2001. During her tenure with the Criminal Section, she prosecuted and supervised human trafficking cases of national significance involving sex trafficking and forced labor. Before joining the Department, Ms. Axam served as Counsel to the Judiciary of the Republic of Palau, as a Fulbright Fellow at the Centre for Applied Legal Studies in Johannesburg, South Africa, and as a law clerk on the U.S. District Court for the Eastern District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit.

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# The Meaning, Measuring, and Mattering of the Rule of Law

*Elizabeth Andersen*  
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*Ted Piccone*  
*Chief Engagement Officer*  
*World Justice Project*<sup>1</sup>

“Traditionally, the rule of law has been viewed as the domain of lawyers and judges. But everyday issues of safety, rights, justice, and governance affect us all; everyone is a stakeholder in the rule of law.”<sup>2</sup>

“[I]t is essential, if man is not . . . to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law[.]”<sup>3</sup>

## I. Introduction

Respect for the rule of law in all its dimensions is critical to the fair administration of justice, public order, and protection of fundamental freedoms. It is also increasingly understood to be a vital ingredient for effective progress on a number of other economic and social policy fronts. Yet around the world, the concept of rule of law is being contested, manipulated, and weakened by a slew of direct and indirect pressures. In this context, this article seeks to present a comprehensive definition of the rule of law based on universal principles and explain how it is being measured through quantitative surveys of legal experts and representative households in 128 countries. It then summarizes the survey data, highlighting the

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<sup>1</sup> The views expressed in this article represent those of the authors and not those of the U.S. Department of Justice or any other part of the U.S. government.

<sup>2</sup> *About Us*, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/about-us> (last visited Aug. 15, 2019) (quoting William H. Neukom, Founder and Chief Executive Officer, World Justice Project).

<sup>3</sup> *Universal Declaration of Human Rights: Preamble*, UNITED NATIONS (Dec. 10, 1948), <https://www.un.org/en/universal-declaration-human-rights/> (last visited Aug. 16, 2019).

United States' record, and sets forth why it matters to policymakers and citizens.

## II. Defining the rule of law

The rule of law—in theory and in practice—has become front page news around the world in both new and familiar ways. Its genesis, however, is as old as human civilization, dating back at least to the written Code of Babylonian King Hammurabi in seventeenth century BC and ancient Greece. Definitions and practices have evolved since then, although core principles, like presumption of innocence and limits on executive power remain essential features. At a minimum, it encompasses the idea that all individuals, regardless of their status in society, “are bound by and act consistent with the law.”<sup>4</sup> This formal definition also requires that laws be prospective, be made public, be general and clear, and be stable and certain.<sup>5</sup>

At the global level, international consensus on a more comprehensive definition has been growing gradually. The United Nations General Assembly (UNGA) adopted a definition of rule of law in 2012, declaring that “all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.”<sup>6</sup> Various United Nations (U.N.) bodies and agencies have carried out programs and meetings to build upon this more substantive definition and support greater adherence to it: notably, the U.N. Development Program, the Office of the High Commissioner for Human Rights (OHCHR), and the U.N. Office on Drugs and Crime (UNODC). Various U.S. government agencies have embraced and elaborated on the U.N. definition. For example, in its *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework*, United States Agency for International Development (USAID) cites the U.N. definition and goes further to incorporate “democracy” into the rule of law notion: “the term usually refers to a state in which citizens, corporations and the state itself obey the law,

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<sup>4</sup> Brian Z. Tamanaha, *A Concise Guide to the Rule of Law* 3 (St. John's Legal Studies Research Paper No. 07-0082) (Sept. 13, 2007).

<sup>5</sup> *Id.*

<sup>6</sup> G.A. Res. 67/1, ¶2 (Nov. 30, 2012).

and the laws are derived from a democratic consensus.”<sup>7</sup> USAID’s Framework identifies five key elements of the rule of law: order and security; legitimacy; checks and balances; fairness (including four sub-elements “(1) equal application of the law, (2) procedural fairness, (3) protection of human rights and civil liberties, and (4) access to justice”); and effective application of the law.<sup>8</sup>

As a contribution to this definitional work, the World Justice Project (WJP), under the leadership of then-President of the American Bar Association William H. Neukom, set out to develop a comprehensive definition of the rule of law that captures its core substantive and procedural elements, consistent with internationally accepted norms and vetted by thousands of individuals in over one hundred countries. The definition for the rule of law developed through this effort is

[a durable system of laws, institutions, and community commitment that delivers] four universal principles: (1) [t]he government as well as private actors are accountable under the law; (2) [t]he laws are clear, publicized, stable, and just[,] are applied evenly[,] and protect fundamental rights, including the security of persons, contract and property rights, and certain core human rights; (3) [t]he processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient; and (4) [j]ustice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.<sup>9</sup>

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<sup>7</sup> GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK, U.S. AGENCY FOR INT’L DEV. 5 (2008).

<sup>8</sup> *Id.* at 1–2; *see also* USER’S GUIDE TO DEMOCRACY, HUMAN RIGHTS AND DEMOCRACY PROGRAMMING, U.S. AGENCY FOR INT’L DEV. 64 (2019) (adopting the 2008 Rule of Law Strategic Framework); RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES, U.S. ARMY CENTER FOR LAW AND MILITARY OPERATIONS 1 (2015) (“[T]he Rule of Law (RoL) exists when a society administers (or aspires to administer) itself through a set of transparent, ostensibly fair rules applied by impartial adjudicators.”).

<sup>9</sup> WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2019 INSIGHTS (2019) (cleaned up).

Such a comprehensive definition has several advantages. It encompasses concepts of both legality and morality, that is, it contains structural features like general and prospective application of laws in clear and public language along with concepts of substantive justice reflecting fundamental rights of property, due process, non-discrimination, and procedural legitimacy.<sup>10</sup> It also reflects historical experience as these principles, also codified in post-World War II international law, were a direct and necessary outgrowth of the many horrors witnessed during the twentieth century when millions of innocents around the world were subjected to unjust laws wielded by unaccountable rulers. The elements of this definition are rooted deeply in the Magna Carta, the American experiment of self-government, and the French Revolution.<sup>11</sup> In each case, these historical rule of law efforts, at the core, aimed to ensure order while constraining arbitrary power, generally through laws enforced by independent and neutral actors. In more contemporary thinking, these actors (prosecutors, judges, and attorneys), in turn, are held accountable to laws and rules of ethical and professional behavior, public and press scrutiny, and legislative oversight.

For an American audience, particularly those on the frontlines at the Department of Justice (Department) and other law enforcement agencies, these concepts are as normal as baseball and apple pie. As countries turned toward more democratic forms of government in the wake of the end of the Cold War, a growing international movement of rule of law experts and advocates embraced these ideas as the baseline for advancing justice for all in their own communities. In Europe, for example, implementation of rule-of-law standards became a prerequisite to membership in the European Union (EU). Around

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<sup>10</sup> Theo J. Angelis & Jonathan H. Harrison, *History and Importance of the Rule of Law* (World Justice Project 2003) (White Paper accompanying the Final Report of the Task Force on ABA Goal VIII).

<sup>11</sup> Rule of law norms constraining government authority have important resonance in non-Western traditions as well. *See, e.g.*, Miranda Brown & Yu Xie, *Between Heaven and Earth: Dual Accountability in Han China*, 1 CHINESE J. SOC. 56–87 (2015) (describing factors creating local, as well as central accountability for centrally-appointed officials during the Han Dynasty, 206 BCE–220 CE); Muhammad Hashim Kamali, *Appellate Review and Judicial Independence in Islamic Law*, 29 ISLAMIC STUDIES 215–49 (1990) (tracing elements of judicial review and independence to the early Islamic Caliphs).



the world, however, these principles are under growing pressure from a variety of sources—economic dislocation that undermines trust in institutions, transnational organized crime and terrorism, rising migration and conflict, and authoritarian populism bent on appeals to majority rule at the expense of minorities. Autocrats, elected or otherwise, are doubling down on *rule by law*, rather than *rule of law*, by manipulating formal legal mechanisms to subvert key principles of human rights and open government. In this context, lawyers have a special responsibility to guard against such trends by understanding and upholding the fundamental pillars of a rule of law system.

### III. Measuring the rule of law

Defining rule of law to capture its complexity in clear and coherent terms is one thing. Measuring it is something else, but is nonetheless a worthy goal, for anything worthwhile needs not only to be defined, but to be measured in order to know if progress is happening.

One of the core challenges in the burgeoning field of public policy scorecards and rankings is to measure respect for general norms in the form of quantitative data that can be compared cross-nationally. This is especially true in the legal domain where it is relatively easy to identify whether a country has adopted the formal rules and procedures on the books, without reference to actual practice.

To address this challenge, the WJP developed a widely recognized WJP Rule of Law Index (Index) to examine how countries around the world perform against a set of indicators that reflect how the rule of law is actually experienced by citizens in those countries.<sup>12</sup> Launched in 2009 and released annually since then, the Index relies on 8 factors and 44 sub-factors developed in consultation with academics, practitioners, and community leaders from around the world.<sup>13</sup> The Index goes beyond general principles to probe specific outcomes that reflect how these principles are respected in practice as reported by

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<sup>12</sup> The WJP Rule of Law Index methodology was developed by Mark David Agrast, Juan Carlos Botero, and Alejandro Ponce. For a detailed discussion of the methodology, see Juan Carlos Botero & Alejandro Ponce, *Measuring the Rule of Law* (World Justice Project Nov. 30, 2011).

<sup>13</sup> The WJP Rule of Law Index also collects data on informal justice mechanisms through its household and expert surveys, but due to the diverse features of informal justice systems, these data are not used to construct Index scores and rankings for the WJP Rule of Law Index.

legal experts and the general public in the countries themselves. The 2019 Index scores were built from surveys of more than 120,000 households and 3,800 legal experts in 126 countries, which are administered using a standard methodology across all jurisdictions.<sup>14</sup> The results, comparative across factors and countries, are then made available in ways that policy makers and citizens can use to develop and promote reforms.

The eight factors measured by the Index are listed in Figure 1 below.<sup>15</sup>



**Fig. 1: Eight factors measured by the WJP Rule of Law Index**

Each factor comprises multiple sub-factors that measure a more detailed subset of rule of law outcomes for each of the eight primary dimensions of the Index. The Index scores and rankings are constructed using two primary sources of data collected by WJP: (1) Qualified Respondents Questionnaires (QRQs) administered to experts knowledgeable about how the rule of law is practiced in their countries;<sup>16</sup> and (2) a General Population Poll (GPP) administered to representative samples of the general public conducted by leading polling companies.<sup>17</sup> The QRQ survey is completed annually by a vetted group of legal and subject matter experts, academics, and practitioners who interact frequently with legal institutions (government officials, however, are not surveyed); the GPP is administered bi-annually to a nationally representative probability sample of 1,000 households in each country in all relevant local languages, and adapted to reflect commonly used terms and expressions.<sup>18</sup> Between the QRQs and the GPP, WJP uses a set of five

<sup>14</sup> WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2019 (2019).

<sup>15</sup> *Id.*

<sup>16</sup> WJP invites over 40,000 qualified experts worldwide to participate in the survey. The total response of approximately 3,800 completed surveys amounts to an average of 30 per country, substantially higher than comparable indices in this field.

<sup>17</sup> RULE OF LAW INDEX 2019.

<sup>18</sup> *Id.* at 161.

questionnaires in each country to collect data on more than 500 question-level variables.<sup>19</sup> This two-part design allows researchers to raise more technical questions that practicing lawyers and other experts are more qualified to answer, while also probing how people experience and perceive justice in their everyday lives.

Following data collection, WJP's Index team then maps the data onto the 44 sub-factors. This entails codifying the questionnaire items as numeric values on a scale of 0–1; producing raw country scores by aggregating the responses; normalizing the raw scores; aggregating the normalized scores using simple averages; and producing the final normalized scores and global rankings.<sup>20</sup> The data is then subjected to a series of tests to identify possible biases and errors. For example, the Index team cross-checks all sub-factors against more than 70 third-party sources, including quantitative data and qualitative assessments drawn from local and international organizations.<sup>21</sup> A further check of the methodology was conducted by the Econometrics and Applied Statistics Unit of the European Commission's Joint Research Centre.<sup>22</sup>

To understand how each factor is measured, it is worth discussing a few examples in more detail. The first factor, Constraints on Government Powers, for instance, measures to what extent those who govern are held accountable under the law.<sup>23</sup> This includes constitutional and institutional means, as well as nongovernmental checks, such as a free and independent press.<sup>24</sup> The key question is whether authority is distributed in ways that ensure no single branch of government has the practical ability to exercise unchecked power. Are executive powers effectively limited by the legislature, the

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<sup>19</sup> The questionnaires include the general survey for households (the GPP) plus more specific surveys for legal experts (the QRQs) on civil and commercial law, criminal and constitutional law, labor law, and public health. *Id.* They are publicly available on WJP's website, see *2019 Rule of Law Index Questionnaires*, WORLD JUSTICE PROJECT (2019), <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019/2019-rule-law-index-questionnaires>.

<sup>20</sup> WORLD JUSTICE PROJECT, *RULE OF LAW INDEX 2019 INSIGHTS* (2019).

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

<sup>22</sup> Michaela Saisana & Andrea Saltelli, *JRC Statistical Audit of the WJP Rule of Law Index® 2014* (THE WORLD JUSTICE PROJECT 2014).

<sup>23</sup> See *RULE OF LAW INDEX 2019*.

<sup>24</sup> *Id.*

judiciary, and independent auditing and review agencies, as well as by nongovernmental oversight by civil society and the media? Are government officials sanctioned for misconduct and are transitions of power conducted in accordance with the law? This latter question is addressed regardless of the holding of free and fair elections, but where they are held, questions about electoral fraud and intimidation are posed. As discussed below, this overall factor on checks and balances has seen a significant decline globally in the last four years according to WJP's data.

The second WJP Index factor evaluates corruption, which is notoriously difficult to measure because it is an intentionally hidden phenomenon. Ironically, as efforts to expose corruption gain traction, publics perceive the problem is getting worse, even though prosecutions are moving forward against the highest levels of government and business. WJP's Index addresses this issue by using both experience- and perception-based questions on three forms of corruption: bribery, improper influence by public or private interests, and misappropriation of public funds or other resources (embezzlement).<sup>25</sup> The behavior of officials from the executive (the judiciary, the police, and military) and the legislature is examined to gauge situations involving petty and grand corruption, procurement procedures, and administrative enforcement of environmental, labor, health, and safety regulations.<sup>26</sup> Specific questions include: Do politicians solicit or accept money or other benefits in exchange for political favors or favorable votes on legislation?<sup>27</sup> Are judges free from improper influence by public or private interests, including criminal organizations? Are public works contracts awarded through an open and competitive bidding process?<sup>28</sup> Do ordinary citizens pay bribes to receive assistance from the police or to access public health services?

The Index addresses procedural justice in several ways, principally through factor three on open government. This factor measures whether basic laws and information on legal rights are publicized, requests for information are properly granted, and civic participation mechanisms, such as freedom of association are ensured.<sup>29</sup> These

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

<sup>26</sup> *Id.*

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

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

procedural rights are crucial to empower citizens to voice their complaints and demand accountability from their governments. Citizens in a rule of law society need to know what the law is in clear and accessible languages and what conduct is permitted and prohibited. To ensure citizen voice and participation, government proceedings should be open to the public with timely notice, and results should be made readily available to the public.<sup>30</sup> Factor four on fundamental rights covers, *inter alia*, equal treatment, rights of the accused, and freedom of expression as both substantive and procedural rights.<sup>31</sup> Factor six on regulatory enforcement includes questions regarding respect for due process in administrative proceedings and compensation for government takings of private property.<sup>32</sup> Due process rights also appear in factor seven on civil justice and factor eight on criminal justice.<sup>33</sup>

The Department plays a major role as a guarantor, at the federal level, of a number of these elements of rule of law in the United States. Order and security, for example, reflected in factor five, includes whether three dimensions of crime are effectively controlled—conventional crime, political violence (including terrorism), and “vigilante justice” as an alternative (and, except for instances of self-defense, illegal) means to redress personal grievances.<sup>34</sup> Factor eight on criminal justice measures whether justice systems are able to investigate and adjudicate criminal offenses successfully, in a timely manner, without discrimination, free of corruption, and protective of the rights of the victim and the accused.<sup>35</sup> Are correctional systems effectively reducing criminal behavior? Do respondents perceive discrimination based on gender, income, or ethnicity when encountering the police?<sup>36</sup> (See Figure 2 for

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<sup>30</sup> *Id.*

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

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

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> For example: “Imagine that the local police detain two persons equally suspected of committing a crime. In your opinion, which of the following characteristics would place one of them at a disadvantage?” (*e.g.*, a poor person, a female, a person from an ethnic group or religion other than that of the police officer involved, a homosexual, etc.) Questions also cover a respondent’s personal experience with discrimination in their everyday lives.

an example of survey question on discrimination from the GPP.) The Index covers the full criminal justice spectrum from police to prosecutors, judges and prison officials, and at both the federal and state levels where relevant.



Experts' Questionnaire  
Constitutional Law, Civil Liberties, and Criminal Law

### Constitutional Law, Civil Liberties, and Criminal Law

The World Justice Project (WJP) is honored to count on your expertise for this questionnaire, which will be answered by highly qualified individuals around the world.

The questionnaire consists of 43 questions, and will take approximately 35 minutes to complete. Your responses will be aggregated with those of other experts and supplemented by the results of a randomized general population poll (GPP) conducted in the three largest cities of your country of practice. Together, this data will be used to evaluate adherence to the rule of law. The results will be published, alongside those of over 100 other countries worldwide, in the WJP Rule of Law Index® 2018-2019 report, and in other reports produced by the WJP.

Your contribution will be acknowledged in the WJP Rule of Law Index® 2018-2019 report, as well as on The World Justice Project's web page and other WJP materials (unless you choose to remain anonymous).

Thank you in advance for your time and attention. With your participation, this joint endeavor will contribute to strengthening the rule of law worldwide.

**INSTRUCTIONS**

Please answer the following 43 questions in this questionnaire according to your perception of how the laws are applied in practice in your country. Please indicate in the box below which country you are responding to in this survey:

#### Illustrative WJP General Population Poll Question on Discrimination

READ: Imagine that the local police detain two persons equally suspected of committing a crime. In your opinion, which of the following characteristics would place one of them at a disadvantage? The suspect is:

q18a	A poor person	Yes .....1 No .....2 (DON'T READ) Don't know/No answer .....99
q18b	A female	Yes .....1 No .....2 (DON'T READ) Don't know/No answer .....99
q18c	A person from an ethnic group or tribe other than that of the police officer involved	Yes .....1 No .....2 (DON'T READ) Don't know/No answer .....99
q18d	A person from a religion other than that of the police officer involved	Yes .....1 No .....2 (DON'T READ) Don't know/No answer .....99
q18e	A foreigner (immigrant)	Yes .....1 No .....2 (DON'T READ) Don't know/No answer .....99
q18f	A homosexual	Yes .....1 No .....2 (DON'T READ) Don't know/No answer .....99

**Fig. 2: Example Survey**

These methodological highlights reflect the multi-dimensional nature of the rule of law captured in the Index. As illustrated below for the United States, the results are presented in a spider graph format that allows the reader to see a snapshot of how each surveyed country performs on each indicator and sub-indicator across time and compared regionally and by income level. Data presented in the spider graph can be explored in more detail on the bottom half of the country

profile. The fact that it is designed to allow cross-national comparisons regardless of political system or regime type is a major breakthrough in making rule of law public policy decision-making more objective and evidence-based. Its focus on actual lived experiences rather than administrative data on inputs and outputs, such as the number of courts or cases, makes it a more practical tool for evaluating how the rule of law is actually experienced and perceived at the national level.

## IV. The WJP Rule of Law Index 2019

Since its inception, the Index has captured the attention of lawmakers, researchers, and citizens around the world as they consider how to strengthen adherence to the rule of law in their own countries. It is widely accepted as the leading benchmark for measuring rule of law performance, and it is used to guide analysis and decision-making by the World Bank,<sup>37</sup> the Millennium Challenge Corporation (MCC),<sup>38</sup> the State Department,<sup>39</sup> the Organization for Economic Cooperation and Development (OECD),<sup>40</sup> the U.S. Chamber

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<sup>37</sup> The World Bank cites the Rule of Law Index as a data source for their Worldwide Governance Indicators, a widely used resource for evaluating trends in governance in over 200 countries and territories. *See Rule of Law, WORLDWIDE GOVERNANCE INDICATORS* (2019), <http://info.worldbank.org/governance/wgi/Home/downloadFile?fileName=rl.pdf>.

<sup>38</sup> MCC utilizes WJP's Rule of Law Index as one benchmark to determine which countries are eligible to receive Millennium Challenge grants. *See Rule of Law Indicator, MILLENNIUM CHALLENGE CORP.*, <https://www.mcc.gov/who-we-fund/indicator/rule-of-law-indicator> (last visited Oct. 4, 2019).

<sup>39</sup> The State Department uses the Rule of Law Index in a variety of ways, including to evaluate programs to strengthen rule of law or to analyze a country's legal regime. For example, see their analysis of Finland: *2017 Investment Climate Statements: Finland*, U.S. DEP'T OF STATE (June 29, 2017), <https://www.state.gov/reports/2017-investment-climate-statements/finland/>.

<sup>40</sup> The OECD uses WJP's Rule of Law Indicators to evaluate a prospective member's commitment to OECD values and membership obligations, specifically to measure a country's economic openness and governance. *FRAMEWORK FOR THE CONSIDERATION OF PROSPECTIVE MEMBERS, MEETING OF THE OECD COUNCIL AT MINISTERIAL LEVEL 8 n.6* (2017). WJP's Rule of Law Index also has been cited in multiple OECD reports, most recently in *GOVERNMENT AT A GLANCE 2017*, ORG. FOR ECON. COOPERATION AND DEV. 218–19, 228, 230, 238–39, 250–51 (2017).

of Commerce,<sup>41</sup> and the U.S. Agency for International Development (USAID),<sup>42</sup> the European Commission,<sup>43</sup> the Open Government Partnership,<sup>44</sup> and Transparency International's Corruptions Perception Index.<sup>45</sup> Most recently, the WJP Rule of Law Index has been prominently used in Hong Kong Special Administrative Region (SAR) to draw important comparisons between the quality of rule of law in the semi-autonomous region, which ranks 16th in the Index, and mainland China, which ranks 82nd.<sup>46</sup> Not surprisingly, the Index is not without its detractors as politicians unhappy with their governments' scores seek to undermine WJP's credibility, for example, in Hungary, whose score dropped by 7.3% since 2015.<sup>47</sup>

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<sup>41</sup> The U.S. Chamber of Commerce has used the *Rule of Law Index* to shape its Rule of Law Coalition, and regularly cites it as a key input in its Global Rule of Law Business Dashboard. See LAYING THE FOUNDATION FOR PROSPERITY: THE GLOBAL RULE OF LAW AND BUSINESS DASHBOARD 2019, U.S. CHAMBER OF COMMERCE, COAL. FOR THE RULE OF LAW IN GLOBAL MARKETS 20, 49, 58–59, 67 (2019).

<sup>42</sup> USAID lists the Open Government factor of the Rule of Law Index as one of its primary metrics for determining a country's progress toward self-reliance. See USAID SELF-RELIANCE METRICS FY 2019 METHODOLOGY GUIDE, U.S. AGENCY FOR INT'L DEV. (2018).

<sup>43</sup> The European Commission's science and knowledge service has used the *Index* to inform policy decisions on governance in Europe. See MICHAELA SAISANA ET AL., ON GOVERNANCE—WHAT IT IS, WHAT IT MEASURES AND ITS POLICY USES, CENTRE FOR INT'L GOVERNANCE INNOVATION EDITIONS 109–134 (2015). In 2014, the European Commission's Joint Research Centre conducted a favorable audit of WJP's Rule of Law Index.

<sup>44</sup> The Rule of Law Index was cited extensively in the OPEN GOVERNMENT PARTNERSHIP GLOBAL REPORT: DEMOCRACY BEYOND THE BALLOT BOX, OPEN GOV'T P'SHIP 31, 74, 77, 98–99, 131, 13, 152–153, 244 (2019).

<sup>45</sup> WJP's Rule of Law Index data is used by Transparency International as an input to their annual Corruption Perceptions Index. MARCOS ÁLVAREZ-DÍAZ ET AL., CORRUPTION PERCEPTION INDEX 2017 STATISTICAL ASSESSMENT, EUROPEAN COMM'N (2018).

<sup>46</sup> Marcelo Duhalde, *The Rule of Law: Hong Kong vs China*, S. CHINA MORNING POST, (Aug. 20, 2019), <https://multimedia.scmp.com/infographics/news/world/article/3023351/rule-of-law/?src=social>.

<sup>47</sup> In addition to its production of the Rule of Law Index, WJP has worked closely with the government of Mexico to analyze surveys of over 58,000 inmates on their experience with the criminal justice system, revealing alarmingly high levels of abuse and mistreatment in prisons; new efforts are



The main findings of the 2019 Index underscore the steady deterioration in rule of law over the last several years. The latest scores show that more countries declined than improved in overall rule of law performance for the second year in a row, continuing a negative slide toward weaker rule of law around the world.<sup>48</sup> In a sign suggesting rising authoritarianism, the factor score for “Constraints on Government Powers” declined in more countries than any other factor worldwide over the last year (61 countries declined, 23 stayed the same, 29 improved).<sup>49</sup> Over the past four years, Poland, Bosnia and Herzegovina, and Serbia have lost the most ground in this dimension of the rule of law; other decliners over this period include Egypt, China, Nicaragua, Honduras, and Hungary.<sup>50</sup> The second largest decline over last year was seen in the area of “Criminal Justice,” followed by “Open Government” and “Fundamental Rights.”<sup>51</sup> This last category saw declines in an alarming 70% of the countries, the biggest four-year decline of any factor since 2015.<sup>52</sup> On a positive note, more countries improved than declined in “Absence of Corruption” for the second year in a row.<sup>53</sup>

The top three overall performers in the 2019 Index were Denmark, Norway, and Finland; the bottom three were the Democratic Republic of the Congo, Cambodia, and Venezuela.<sup>54</sup> Countries leading their regions in overall rule of law scores included: Nepal (South Asia), Georgia (Eastern Europe and Central Asia); Namibia (Sub-Saharan

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underway to translate these findings into actionable reforms. *See, e.g.*, World Justice Project, *In the Name of Justice: Sexual Torture of Women in Mexico*, JUSTICE FOR ALL (Aug. 28, 2018), <https://www.justiceforall2030.org/name-justice-sexual-torture-women-mexico/>. In 2017, the Mexican legislature adopted a new law to prevent, investigate and punish torture and other cruel punishments, including through reforms to professionalize police and public prosecutor services. *Id.* WJP has also carried out specialized surveys on criminal and civil justice in Afghanistan and Pakistan, with the support of the State Department’s Bureau of International Narcotics and Law Enforcement, and on access to justice in 101 countries.

<sup>48</sup> *See* RULE OF LAW INDEX 2019.

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

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

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

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

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

Africa); Uruguay (Latin America and the Caribbean); United Arab Emirates (Middle East and North Africa); New Zealand (East Asia and Pacific); and Denmark (Western Europe and North America, defined as EU + EFTA + North America). Countries that recorded the largest one-year drop in their rule of law scores were Nicaragua (-6.9%), Iran (-6.2%), Jordan (-4.8%), and Venezuela (-3.5%), while Zimbabwe (7.1%), Guatemala (4.6%), Ethiopia (3.3%), and Malaysia (3.1%) improved the most.<sup>55</sup>

The United States, which has long sought to champion rule of law and human rights abroad, evidences both rule of law strengths and weaknesses in the Index. Its overall score of 0.71 places it number 20 out of 126 countries surveyed; within its regional and income classes, it places 14 out of 24 and 20 out of 38, respectively.<sup>56</sup> It performs well on open government and regulatory enforcement, but significantly below its peers on order and security, criminal justice, civil justice, and fundamental rights. On access to civil justice, for example, the United States' score for accessibility and affordability places it at 103 out of 126 countries worldwide, which is similar to its ranking on discrimination in the civil justice system (102).

The United States' score on criminal justice, its lowest numerical score for the eight factors measured, places it at 23rd out of 126 countries. While violent crime in the United States has declined over the last 20 years, there is growing awareness of persistent challenges facing the criminal justice system. Further investigation of the WJP polling data, for example, reveals that over the last four years, Americans surveyed for the Index have consistently viewed the U.S. criminal justice system as discriminatory, leading to a much lower score on the sub-factor measuring impartiality and discrimination.<sup>57</sup> The U.S. score of 0.36 on this sub-factor places it at 91 out of 126 countries globally and 23 out of 24 countries within the European/North America region.<sup>58</sup> With the 2018 passage by an overwhelming bipartisan majority of the First Step Act, which, *inter alia* aims to reduce recidivism and ease mandatory minimum sentence requirements, the United States has an opportunity—at least at the federal level—to redress practices that tend to perpetuate

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<sup>55</sup> See WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2019 INSIGHTS (2019).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

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

discrimination in its criminal justice system while also protecting public safety.

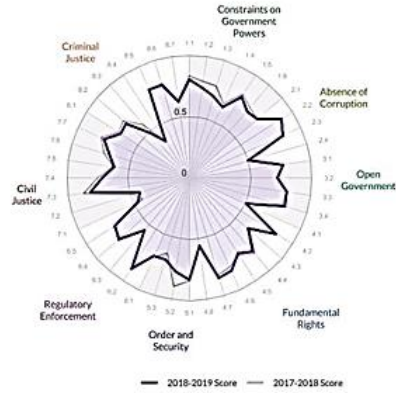
## United States

Region: EU & EFTA & North America  
Income Group: High

Overall Score	Regional Rank	Income Rank	Global Rank
0.71	14/24	20/38	20/126

Score Change	Rank Change
-0.02	-1

Factor	Trend	Factor Score	Regional Rank	Income Rank	Global Rank
Constraints on Government Powers	▼	0.73	15/24	18/38	19/126
Absence of Corruption	—	0.74	13/24	20/38	20/126
Open Government	—	0.77	11/24	13/38	13/126
Fundamental Rights	—	0.72	18/24	26/38	27/126
Order and Security	—	0.76	21/24	29/38	49/126
Regulatory Enforcement	—	0.73	13/24	19/38	19/126
Civil Justice	—	0.64	17/24	27/38	30/126
Criminal Justice	—	0.63	16/24	23/38	23/126



▲ Trending up ▼ Trending down ■ Low ■ Medium ■ High  
— United States — EU & EFTA & North America — High

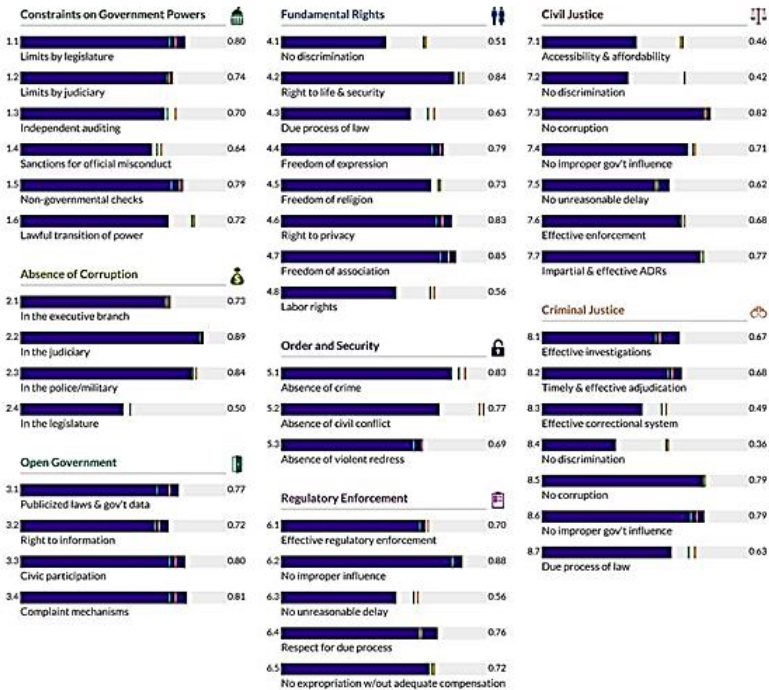


Fig. 3: United States Rule of Law Index

Another dimension of rule of law that has risen to the top of the international agenda is access to civil justice, which refers to the

ability of people to navigate their everyday legal problems, ranging from problems relating to legal identity to land title and consumer debt.<sup>59</sup> Improving access to justice is one element of the U.N. Sustainable Development Goals, a set of benchmarks that all U.N. member states have agreed to meet by 2030.<sup>60</sup> These issues go to the heart of an individual's social, economic, and physical well-being, for they often determine if someone can get a job, go to school, visit a doctor, travel, or build capital. But until recently, there was no methodologically rigorous, cross-national data to evaluate how countries were faring on this fundamental aspect of rule of law.

In 2019, the World Justice Project released *Global Insights on Access to Justice 2019*, the first-ever effort to capture comparable data on legal needs and access to justice on a global scale, representing the voices of more than 100,000 people in 101 countries.<sup>61</sup> Key findings from the surveys include:

- **Justice problems are ubiquitous and frequent.** Approximately half (49%) of people surveyed experienced at least one legal problem in the last two years. While the prevalence and severity of problems varies by country, the most common problems relate to consumer issues, housing, and money and debt. These can include problems with a landlord over rent, repairs, or payments; problems with neighbors over noise or litter; becoming homeless; disputes over poor or incomplete professional services; problems with a utility bill or supply; insurance claims being denied; threats from debt collectors; extortion from a gang or other criminal organization; difficulty collecting money owed to you; and more.
- **Justice problems negatively impact people's lives.** 43% of those surveyed reported that their legal problem adversely impacted their lives. More than 1 in 4 people (29%) reported that they experience physical or stress-related ill health as a result of their legal problem, and more than 1 in 5 people (23%) reported that they lost their job or had to relocate.

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<sup>59</sup> See RULE OF LAW INDEX 2019.

<sup>60</sup> *Progress of Goal 16 in 2019*, UNITED NATIONS, <https://sustainabledevelopment.un.org/sdg16> (last visited Aug. 7, 2019).

<sup>61</sup> *Global Insights on Access to Justice 2019*, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/our-work/research-and-data/global-insights-access-justice-2019> (last visited Aug. 16, 2019).

- **Most people do not turn to lawyers and courts.** Less than a third (29%) of people who experience a legal problem sought any form of advice to help them better understand or resolve their problem, and those who did seek assistance preferred to turn to family members or friends. Even fewer (17%) took their problem to an authority or third party to mediate or adjudicate their problem, with most preferring to negotiate directly with the other party.
- **People face a variety of obstacles to meeting their justice needs,** beginning with their ability to recognize their problems as having a legal remedy. Indeed, fewer than 1 in 3 people (29%) understood their problem to be legal in nature as opposed to “bad luck” or a community matter. As mentioned above, less than a third of those surveyed obtained advice from a person or organization that could help them better understand or resolve their problem, and 1 in 6 (16%) reported that it was difficult or nearly impossible to find the money required to resolve their problem. About the same proportion (17%) reported that their justice problem persists but they have given up any action to try to resolve it further, with another 39% reporting that their problem is still ongoing.<sup>62</sup>
- **Results for the United States show a mixed picture.** The top three civil justice problems people face involve money and debt, housing, and consumer affairs, comparable to other countries, but at higher rates. More than three quarters of respondents (76%) knew where to get advice and information for their legal problems, with 71% of respondents confident that they could achieve a fair outcome. These percentages are significantly higher than the global averages, which are 53% and 65%, respectively. Nearly half of those with a legal problem chose a family member or friend to help understand or resolve their legal problems, with 38% turning to a lawyer or professional advice service. This is notably higher than the global average of 28%. While 48% of respondents reported their legal issue was resolved, almost one fifth (17%) reported that their problem still persists but they have given up any action to resolve it further, percentages that match the global average almost exactly (47% and 17%, respectively). Notably, almost half

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<sup>62</sup> *Id.*

of survey respondents (45%) experienced a hardship as a result of their unmet justice needs. This percentage is slightly higher than the global average (43%).

Other recent research underscores the magnitude of the global access to justice problem. According to WJP's recent report, *Measuring the Justice Gap* (published in May 2019), 1.4 billion people worldwide have unmet civil and administrative justice needs. Of the estimated 36% of people in the world who have experienced a non-trivial legal problem in the last two years, more than half (51%) are not able to meet their civil justice needs. Vulnerable groups—including low-income populations, recipients of government benefits, and the unemployed—are affected disproportionately; they are more likely to have legal problems and to experience a hardship as a result of their legal problem.<sup>63</sup>

## V. Why the rule of law matters

It will come as no surprise to readers of this journal that adherence to the rule of law, defined broadly, is essential to building communities of justice, opportunity, and peace. Rule of law is a quintessential public good in its own right, for it controls arbitrary abuse of power, upholds fair and equal treatment for all, and punishes wrongdoers through competent and independent bodies. A society without the rule of law lives in fear of chaos and revenge. But the rule of law is also instrumental to a series of other public goods, from health and education to economic development and opportunity.

Over the last two decades, for example, a number of published academic studies have found strong correlations between variables associated with the rule of law and economic growth. A World Bank study from 1997, which queried more than 3,800 enterprises in 73 countries, considered such factors as processes for making and changing legal rules, security of persons and property, reliability of bureaucratic decision-making, and the predictability of judicial enforcement.<sup>64</sup> It found that the aggregate rule of law measure significantly correlated with economic growth, with predictability of

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<sup>63</sup> *Id.*

<sup>64</sup> Aymo Brunetti et al., *Credibility of Rules and Economic Growth: Evidence from a Worldwide Survey of the Private Sector*, 12 THE WORLD BANK ECONOMIC REVIEW 353–84 (1997).

judicial enforcement being the most robust indicator.<sup>65</sup> A similar study, based on an index of economic freedom developed by the Fraser Institute of Canada and the Heritage Foundation in the United States, found that factors such as property rights, the rule of law, contract viability, and guaranteed political liberties were strongly associated with economic growth, outweighing other factors such as limited government.<sup>66</sup>

More recently, the World Bank has updated its analysis of the relationship between law and development by focusing on the overarching importance of governance and the law for equitable growth. “Growth requires an environment in which firms and individuals feel secure in investing their resources in productive activities[,]” according to its 2017 World Development Report.<sup>67</sup> The authors also emphasize the importance of power asymmetries as drivers of exclusion from economic opportunity for women and other marginalized groups. A robust approach to rule of law, in which all groups and citizens are empowered to participate in society and have legal recourse when unfairly denied such opportunities, can reshape the policy arena in important ways. “Ultimately, the *rule of law*—the impersonal and systematic application of known rules to government actors and citizens alike—is needed for a country to realize its full social and economic potential.”<sup>68</sup>

WJP’s own rule of data confirm these general findings. Its 2019 data, for example, graphed against GDP per capita rates from 2017,

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

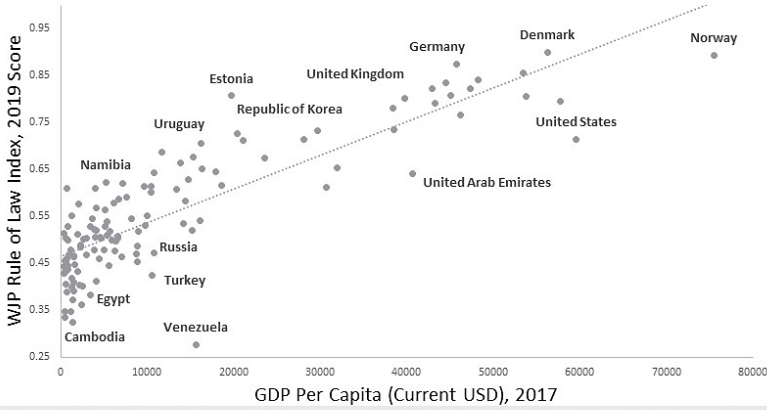
<sup>66</sup> Martin Leschke, *Constitutional Choice and Prosperity: A Factor Analysis*, 11 CONST. POL. ECON. 265 (2000); see also *Order in the Jungle*, THE ECONOMIST (Mar. 13, 2008), <https://www.economist.com/briefing/2008/03/13/order-in-the-jungle> (summarizing how economists have repeatedly found that the better the rule of law, the richer the nation).

<sup>67</sup> WORLD BANK GROUP, WORLD DEVELOPMENT REPORT 2017: GOVERNANCE AND THE LAW 5 (2017).

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

show that societies with high scores for rule of law also have higher rates of economic growth, and vice versa.

## Economic Development



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Source: WJP Rule of Law Index 2019, World Bank national accounts data, and OECD National Accounts data files (<http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>)

**Fig. 4: 2017 GDP Per Capita rates**

These positive correlations between rule of law and healthy communities do not stop there. The rule of law, for example, matters a great deal for predicting a society's overall state of peace, as measured by the Global Peace Index, which incorporates 23 indicators of the absence of violence and fear of violence.<sup>69</sup> Similarly, the data reveal a positive correlation between rule of law and school life expectancy (primary to tertiary), quality of democracy (as measured by the Economist Intelligence Unit), and multiple indicators of health (for example, infant mortality, maternal mortality, life expectancy, and cardiovascular disease),<sup>70</sup> as well as positive though somewhat less robust correlations with lower rates of inequality. While correlation is not a substitute for causation, it is fair to say that communities that share better practices of rule of law also tend to exhibit higher levels of human development, less violence, and greater economic opportunity.

For the justice community in the United States and around the world, these insights are already well known. The difference now is

<sup>69</sup> INSTITUTE FOR ECONOMICS & PEACE, GLOBAL PEACE INDEX 2019: MEASURING PEACE IN A COMPLEX WORLD (June 2019).

<sup>70</sup> Angela Maria Pinzon-Rondon et al., *Association of Rule of Law and Health Outcomes: An Ecological Study*, BMJ OPEN (2015).



that a widening circle of important change-makers from the worlds of business, media, public health, education, security, and religion are beginning to understand the importance of the rule of law in their own activities. We have seen a steady upward trend of leaders from various disciplines interested in how they can work with rule of law experts on a mutually reinforcing set of policies and programs to inculcate a rule of law culture in their professions, from engineering to information technology and public health. This is particularly true in the private sector, where both vertical and horizontal pressures are growing to adhere to ethical principles and guidelines to respect human rights, reject corruption, and invest in local communities. Drawing on WJP Rule of Law Index data, the U.S. Chamber of Commerce, for example, has developed a global rule of law and business dashboard that evaluates how 90 countries perform on a business-friendly set of rule of law indicators, premised on the understanding that “business is less effective, less efficient, and less predictable without the rule of law.”<sup>71</sup>

## VI. Conclusion

The concept of the rule of law is neither abstract nor immeasurable. As explained above, the WJP has developed a comprehensive definition based on universal principles and a sophisticated methodology for measuring it in countries around the world. Correlating this data with empirical findings in other disciplines also shows why it is highly relevant to public policy reforms from health care to finance. By defining and measuring the rule of law in this way, and explaining why it matters, the justice community can take on the next challenge of understanding what reforms work to strengthen the rule of law in its various dimensions. The WJP looks forward to working closely with colleagues at the Department and its partners at home and abroad as we advance this important work.

### About the Authors

**Elizabeth Andersen** is Executive Director of the World Justice Project. She served previously as Director of the American Bar Association Rule of Law Initiative (ABA ROLI) and its Europe and Eurasia Division, as Executive Director of the American Society of

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<sup>71</sup> U.S. CHAMBER OF COMMERCE, LAYING THE FOUNDATION FOR PROSPERITY: THE GLOBAL RULE OF LAW AND BUSINESS DASHBOARD 2019 8 (2019).

International Law, and as Executive Director of Human Rights Watch's Europe and Central Asia Division. Ms. Andersen received a B.A. from Williams College, an M.P.A. from Princeton University's Woodrow Wilson School of Public and International Affairs, and a J.D. from Yale Law School.

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# A Brief History on the Formation of Government Ethics and its Importance to the Rule of Law

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*Ethics is knowing the difference between knowing what you have a right to do and what is right to do.<sup>1</sup>*

Government ethics and the rule of law are important topics that have become hot button talking points in today's news media. Questions about whether government employees are acting in an ethical manner or whether the law applies equally to them as it does to other citizens often arise. This article will discuss the origin and development of ethical standards for federal employees in the United States and how these ethical standards reinforce the rule of law. The first section will discuss the formation of government ethics, whereas the second section will address why government ethics are important to rule of law principles.

## **I. The formation of government ethics**

For many years, the U.S. government operated without a formal set of ethical standards for its employees and officials. As can be imagined, corruption and fraud existed in our young nation. The first known appearance of a code of ethics for government employees came about in 1829 when Amos Kendall, then auditor of the Department of Treasury, created rules of conduct for his staff.<sup>2</sup> Kendall's rules set

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<sup>1</sup> Thomas A. Young, *On Linking Ethics and Quality at Martin Marietta*, 12 NAT'L PRODUCTIVITY REV. 133 (1993) (quoting Former Supreme Court Justice Potter Stewart).

<sup>2</sup> Stuart C. Gilman, *Presidential Ethics and the Ethics of the Presidency*, 537 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 58, 64 (1995); Bradley

forth employee work hours; limited newspaper reading and use of office supplies to only that necessary for the job; and prohibited gambling, drunkenness, acceptance of gifts, disclosure of investigation details, and outside employment.<sup>3</sup> These rules in one form or another still exist and are included in current government ethical standards, but it would be well over a century before any formal government-wide ethical standards were developed.

Before his presidency, Theodore Roosevelt was a U.S. Civil Service Commissioner and “the primary force behind a higher standard of conduct in federal agencies.”<sup>4</sup> As Commissioner, Roosevelt undertook efforts to “investigate fraud and political abuse in government and expose corrupt government officials.”<sup>5</sup> This belief in holding federal employees to a higher standard was echoed by political scientist and president, Woodrow Wilson, who once observed:

A sense of highest responsibility, a dignifying and elevating sense of being trusted, together with a consciousness of being in an official status so conspicuous that no faithful discharge of duty can go unacknowledged or unrewarded, and no breach of trust undiscovered and unpunished,—these are the influences, the only influences, which foster practical, energetic, and trustworthy statesmanship.<sup>6</sup>

It was not until the 1940s that concerns were raised about the “lack of specific standards of conduct” and/or financial disclosure requirements for government employees.<sup>7</sup> Congress had been

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J. Birzer, *Amos Kendall: A Great, Unremembered American*, THE IMAGINATIVE CONSERVATIVE (Aug. 2, 2017), <https://theimaginativeconservative.org/2017/08/amos-kendall-unremembered-nineteenth-century-american-bradley-birzer.html>.

<sup>3</sup> Birzer, *supra* note 2 (citing Amos Kendall, *Autobiography of Amos Kendall* 319–20 (William Stickney ed. 1949)).

<sup>4</sup> Gilman, *supra* note 2, at 68.

<sup>5</sup> *Our Mission, Role & History: Theodore Roosevelt*, OFF. PERSONNEL MGMT., <https://www.opm.gov/about-us/our-mission-role-history/theodore-roosevelt/> (last visited Aug. 10, 2019).

<sup>6</sup> Gilman, *supra* note 2, at 68 (quoting WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 187* (Meridian Books 1961)).

<sup>7</sup> JACOB R. STRAUS, CONG. RESEARCH SERV., *ENFORCEMENT OF CONGRESSIONAL RULES OF CONDUCT: AN HISTORICAL OVERVIEW 2* (2011)

operating with an informal code of behavior, wherein it handled obvious wrongdoings on a case-by-case basis.<sup>8</sup> During Dwight D. Eisenhower's administration, Senator Paul Douglas of Illinois established a subcommittee on ethical standards in government.<sup>9</sup> The subcommittee's work, however, may not have made its expected impact, as indicated by President Eisenhower's statement in a 1957 interview that, as a government official, "[t]he conflict-of-interest laws do not apply to [him]."<sup>10</sup> Nevertheless, on July 11, 1958, the 85th Congress adopted, by congressional resolution, a Code of Ethics for Government Service, applicable to all government employees and officials.<sup>11</sup> The first charge in the code was for government officials and employees to "[p]ut loyalty to the highest moral principles and to [put] country above loyalty to persons, party, or Government department."<sup>12</sup>

Ethics became a focus of John F. Kennedy's administration. On May 5, 1961, President Kennedy issued Executive Order 10939, *To Provide a Guide on Ethical Standards to Government Officials*.<sup>13</sup> The Order primarily applied to presidential appointees and White House staff, rather than all government employees.<sup>14</sup> It prohibited employees from engaging in outside employment and accepting gifts or other compensation for any outside engagement related to the employee's official responsibilities, the programs or operations of the employee's agency, and/or any nonpublic information.<sup>15</sup> President Lyndon B. Johnson continued the path toward forming

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(citing *Ethics*, CONGRESS AND THE NATION: A REVIEW OF GOVERNMENT AND POLITICS IN THE POSTWAR YEARS, 1945–1964 1409 (1965)).

<sup>8</sup> *Id.* at 1 (internal footnote omitted).

<sup>9</sup> Gilman, *supra* note 2, at 70 (citing U.S. SENATE, COMM. ON LABOR & PUB. WELFARE, SUBCOMMITTEE ON LABOR & PUB. WELFARE, ETHICAL STANDARDS IN GOVERNMENT, 82D CONG., 1ST SESS. (1951)).

<sup>10</sup> DANIEL M. FRIEDENBERG, SOLD TO THE HIGHEST BIDDER: THE PRESIDENCY FROM DWIGHT D. EISENHOWER TO GEORGE W. BUSH 28 (Prometheus Books 2002); PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER 1957 580–81 ¶ 145 (1958).

<sup>11</sup> STRAUS, *supra* note 7, at 2 (citing H.R. CON. RES. 175, 85th Cong., 72 Stat. B12 (1958)).

<sup>12</sup> H.R. CON. RES. 175 at B12.

<sup>13</sup> Exec. Order No. 10939, 26 Fed. Reg. 3951 (1961).

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

<sup>15</sup> *Id.*

government-wide standards of ethics. On May 8, 1965, President Johnson issued Executive Order 11222, *Prescribing Standards of Ethical Conduct for Government Officers and Employees*.<sup>16</sup> Section 101 of the Order stated:

Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.<sup>17</sup>

This language makes clear that government employees are rightfully held to a higher standard. Included in the 1965 Order were “standards of conduct” for all employees, “standards of ethical conduct for special government employees,” financial interest reporting requirements, and presidential delegating authority related to conflicts of interest.<sup>18</sup>

After promulgation of the 1965 Order, there was limited development in government ethics rules until public distrust of the federal government peaked during President Richard Nixon’s administration. The Watergate Scandal in the early 1970s had a large and lasting impact on federal ethics legislation and rules.<sup>19</sup> In the years following President Nixon’s resignation, Congress passed the Ethics in Government Act of 1978<sup>20</sup> to “preserve and promote the accountability and integrity of public officials. . . .”<sup>21</sup> The Act implemented financial disclosure requirements for all public sector employees,<sup>22</sup> placed limitations on outside earned income and employment,<sup>23</sup> and created the Office of Government Ethics (OGE).<sup>24</sup>

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<sup>16</sup> Exec. Order No. 11222, 30 Fed. Reg. 6469 (1965).

<sup>17</sup> Exec. Order No. 11222 at § 101.

<sup>18</sup> Exec. Order No. 11222.

<sup>19</sup> *Effects of Watergate: The Good and the Bad*, U.S. NEWS (Aug. 8, 2014), <https://www.usnews.com/news/articles/2014/08/08/effects-of-watergate-the-good-and-the-bad>.

<sup>20</sup> 5 U.S.C. app. 4 §§ 101–505.

<sup>21</sup> S. REP. NO. 95-170 at 1 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 4216, 4217.

<sup>22</sup> 5 U.S.C. app. 4 §§ 101–111.

<sup>23</sup> 5 U.S.C. app. 4 §§ 501–505.

<sup>24</sup> 5 U.S.C. app. 4 §§ 401–408.

The importance and implementation of government ethics standards truly took off after the launch of OGE. Created during the Jimmy Carter administration,

OGE was to coordinate policy through designated agency ethics officials . . . who would be appointed within every department and agency in government. The [designated agency ethics official] was to be a senior-level official in the agency responsible to the agency head, but ultimately the head of the department or agency was responsible for the program.<sup>25</sup>

At its inception, OGE fell within the Office of Personnel Management and was responsible for providing overall leadership of and direction for the ethics program within the Executive Branch.<sup>26</sup> OGE became its own executive agency apart from the Office of Personnel Management when Congress passed the Office of Government Ethics Reorganization Act of 1988.<sup>27</sup> Other key legislation enacted during this time also highlighted the importance of government accountability, including: (1) the Inspector General Act of 1978,<sup>28</sup> which created Offices of Inspectors General in certain Executive departments and agencies to, among other things, “prevent and detect fraud and abuse”;<sup>29</sup> (2) the Civil Service Reform Act of 1978,<sup>30</sup> which created the Merit Systems Protection Board (MSPB), an entity authorized to study and report on “whether the public interest in a civil service free of prohibited personnel practices is being adequately protected”;<sup>31</sup> and (3) the Whistleblower Protection Act of 1989,<sup>32</sup> which made the Office of Special Counsel, an independent Executive Branch agency, that among other responsibilities investigates federal whistleblower complaints and prosecutes disciplinary actions for prohibited personnel practices before the MSPB.

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<sup>25</sup> Gilman, *supra* note 2, at 72.

<sup>26</sup> 5 U.S.C. app. 4 § 402(a); 5 C.F.R. § 2600.101(b).

<sup>27</sup> Act of Nov. 3, 1988, Pub. L. No. 100-598, 102 Stat. 3031 (Act of Nov. 3, 1988).

<sup>28</sup> 5 U.S.C. app. 3 §§ 1–13.

<sup>29</sup> 5 U.S.C. app. 3 § 2(2)(B).

<sup>30</sup> 5 U.S.C. §§ 1101–1222.

<sup>31</sup> 5 U.S.C. § 1204(a)(3).

<sup>32</sup> 5 U.S.C. § 2302(b)(8)–(9).

The most significant changes to federal ethics laws came during President George H.W. Bush's administration. On January 25, 1989, President Bush issued his first Executive Order, establishing the President's Commission on Federal Ethics Law Reform (Commission).<sup>33</sup> He charged the Commission with reviewing federal ethics laws, executive orders, and policies, as well as making recommendations to the president on legislative, administrative, and other reforms to ensure public confidence in the integrity of government officials and employees.<sup>34</sup> On March 9, 1989, the Commission submitted its first report to President Bush wherein it made recommendations on: (1) "ethics issues during [federal] employment"; (2) "post-employment restrictions"; (3) "financial disclosure" requirements; (4) "structure of federal ethics regulation[s]"; and (5) "remedies and enforcement mechanisms."<sup>35</sup> Two important Commission recommendations were for revision of the 1965 Order to emphasize the President's commitment to the highest ethical standards for Executive Branch employees<sup>36</sup> and for OGE to consolidate all Executive Branch standards of conduct into a single set of regulations.<sup>37</sup> In addition, the Commission made recommendations for OGE to issue interpretive regulations related to financial conflicts of interest under 18 U.S.C. § 208 and for the enactment of legislation authorizing OGE to issue rules that provide for general waivers under 18 U.S.C. § 208(b)(2) (criminalizing acts affecting a personal financial interest).<sup>38</sup>

Following the Commission's report, on April 12, 1989, President Bush issued Executive Order 12674, *Principles of Ethical Conduct for Government Officers and Employees*.<sup>39</sup> This order set forth 14 principles of ethical conduct, directed OGE to establish a uniform set of Executive Branch standards of conduct, directed Executive

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<sup>33</sup> Exec. Order No. 12668, 54 Fed. Reg. 3979 (1989).

<sup>34</sup> *Id.*

<sup>35</sup> PRESIDENT'S COMM'N ON FED. ETHICS LAW & REFORM, TO SERVE WITH HONOR, REPORT AND RECOMMENDATIONS TO THE PRESIDENT (U.S. Dep't of Justice 1989) (listing the chapter headings in the Table of Contents).

<sup>36</sup> *Id.* at 89 ("Executive Order 11222, 'Prescribing Standards of Ethical Conduct for Government Officers and Employees,' was promulgated by President Lyndon B. Johnson on May 8, 1965.").

<sup>37</sup> *Id.* at 92.

<sup>38</sup> *Id.* at 17.

<sup>39</sup> Exec. Order No. 12674, 54 Fed. Reg. 15159 (1989).



agencies to coordinate with OGE to develop and conduct annual ethics trainings, and revoked Executive Order 11222, which had governed conduct for Executive Branch employees since 1965.<sup>40</sup> President Bush later signed Executive Order 12731, *Principles of Ethical Conduct for Government Officers and Employees*, which made minor modifications to Executive Order 12674 but kept the same substantive provisions.<sup>41</sup>

When the Ethics Reform Act of 1989 was enacted,<sup>42</sup> OGE became the supervising ethics office for all Executive Branch officers and employees.<sup>43</sup> The Ethics Reform Act of 1989 made other ethics law changes such as expanding coverage of post-employment law, amending criminal conflict of interest statutes, prohibiting gift solicitation and/or acceptance from certain sources, and imposing outside earned income limitations and employment restrictions on senior officials.<sup>44</sup> Pursuant to its directive from President Bush, OGE issued a final rule promulgating uniform standards of conduct in August 1992. Known as the Standards of Ethical Conduct for Employees of the Executive Branch and codified at 5 C.F.R. Part 2635, these uniform regulations became effective on February 3, 1992, and are applicable to all Executive Branch agencies.<sup>45</sup> President Bush was a catalyst in the formation of government ethics, and the principles he listed in Executive Order 12674 are the foundation of today's uniform ethical standards.<sup>46</sup>

Subsequent U.S. Presidents have issued executive orders on government ethics. On January 20, 1993, the first day of his administration, President Bill Clinton signed Executive Order 12834, *Ethics Commitments by Executive Branch Appointees*, requiring certain senior Executive Branch appointees and trade negotiators to sign an ethics pledge committing to certain temporary

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

<sup>41</sup> See Exec. Order No. 12731, 55 Fed. Reg. 42547 (1990).

<sup>42</sup> Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716.

<sup>43</sup> 5 C.F.R. § 2600.101(b).

<sup>44</sup> Ethics Reform Act of 1989, Pub. L. No. 101-194; Stuart Gilman, *The Management of Ethics and Conduct in the Public Service*, ORG. FOR ECON. COOPERATION & DEV., <http://www.oecd.org/governance/ethics/2731902.htm> (last updated July 2, 2001).

<sup>45</sup> 5 C.F.R. pt. 2635.

<sup>46</sup> Compare Principles of Ethical Conduct for Government Officers and Employees, Exec. Order No. 12674, 54 Fed. Reg. 15159 sec. 101(a)–(n), with 5 C.F.R. § 2635.101(b).

post-employment restrictions.<sup>47</sup> President Clinton revoked the order effective the last day of his presidency.<sup>48</sup> On January 20, 2001, the first day of his administration, President George W. Bush issued a Presidential Memorandum on Standards of Official Conduct directing each agency head to ensure that all personnel within their departments and agencies were familiar with, and faithfully observed, applicable ethics laws and regulations.<sup>49</sup> The memorandum included a specific reiteration of the 14 Principles of Ethical Conduct for Government Officers and Employees set forth in Executive Order 12674.<sup>50</sup> On January 21, 2009, President Barack Obama issued Executive Order 13490, *Ethics Commitments by Executive Branch Personnel*.<sup>51</sup> The order required all Executive Branch appointees to sign an ethics pledge agreeing to certain restrictions during and after their appointment to federal service.<sup>52</sup> On January 28, 2017, President Donald Trump signed Executive Order 13770, *Ethics Commitments by Executive Branch Appointees*, revoking Executive Order 13490 and requiring political appointees to agree to expanded restrictions by signing an ethics pledge.<sup>53</sup>

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<sup>47</sup> Exec. Order No. 12834, 58 Fed. Reg. 5911 (1993).

<sup>48</sup> Revocation of Executive Order 12834, Exec. Order No. 13184, 66 Fed. Reg. 697 (2000).

<sup>49</sup> Memorandum from Amy L. Comstock, Dir., Office of Governmental Ethics, to Designated Agency Ethics Officials on the Presidential Memorandum on Ethical Conduct (Jan. 22, 2001), [https://www.oge.gov/Web/OGEnsf/All+Advisories/E61BD1F56A30128385257E96005FBDA5/\\$FILE/DO-01-004.pdf?open](https://www.oge.gov/Web/OGEnsf/All+Advisories/E61BD1F56A30128385257E96005FBDA5/$FILE/DO-01-004.pdf?open) (memorandum included as an attachment).

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

<sup>51</sup> Exec. Order No. 13490, 74 Fed. Reg. 4673 (2009).

<sup>52</sup> *Id.* Among the restrictions were a lobbyist gift ban for the duration of an appointee's service and two-year revolving door bans for entering and leaving government service. Appointees were also required to agree to hire staff and make employment decisions based on a candidate's qualifications (for example, precluding employment decisions based on personal relationships).

<sup>53</sup> Exec. Order No. 13770, 82 Fed. Reg. 9333 (2017). Some of the restrictions include not engaging in lobbying activity with the agency in which the appointee serves for five years after appointment, not engaging in lobbying activity with any covered executive agency for the remainder of the administration, and not engaging in activity on behalf of a foreign government or political party.

## II. The importance of government ethics to the rule of law

The rule of law is a principle by which everyone is held accountable to a set of publicly promulgated, equally enforced, and independently adjudicated laws.<sup>54</sup> It is defined as “the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws.”<sup>55</sup> Aristotle captured this point when he observed, “[I]t is more proper that law should govern than any one of the citizens.”<sup>56</sup> A society in which “government officials and citizens are bound by and abide by the law” is a society that lives under the rule of law.<sup>57</sup> The United States is one such society. As stated by John Adams in 1780, the United States is “a government of laws and not of men.”<sup>58</sup> The law is the controlling authority within the United States. The late Supreme Court Chief Justice Warren E. Burger noted that

[The rule of law] places restraints on individuals and governments alike. This is a delicate, a fragile, balance to maintain. It is fragile because it is sustained only by an ideal that requires each person in society, by an exercise of free will, to accept and abide the restraints of a structure of laws.<sup>59</sup>

As an example of the proper exercise of the rule of law, government-wide ethical standards are necessary to make clear the ethical requirements of government employees, to hold the government and its employees accountable to the American people, and to prevent fraud and corruption. Without ethical standards, the arbitrary exercise of power by those in the government would not be restricted, and the public would likely view the federal government

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<sup>54</sup> Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, 2012 SING. J. LEGAL STUD. 232, 233 (2012); Joshua W. Dansby, *Rule of Law in the United States. Stability is one of the World’s Most Valued Commodities*, 17 INT’L & COMP. L. REV., 147, 149 (2017); *Overview—Rule of Law*, U.S. COURTS, <https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law> (last visited Aug. 11, 2019).

<sup>55</sup> *Rule of law*, *Dictionary*, GOOGLE.COM.

<sup>56</sup> Aristotle, *Politics* Book 3 Ch. 16 § 1287a (William Ellis trans., 1912).

<sup>57</sup> Tamanaha, *supra* note 54, at 233.

<sup>58</sup> MASS. CONST. art. XXX.

<sup>59</sup> 138 THE EPISCOPALIAN, 1973, at 12.

and its employees as unrestrained, corrupt, and unaccountable. The rule of law checks the disparity between the power of the government versus the power of the individual citizen. It is part of the social compact in which citizens cede certain powers or rights to the sovereign in exchange for the sovereign agreeing to conduct itself in accordance with the rule of law to ensure a vindication of citizens' individual liberties against the power of the sovereign.

The U.S. Constitution created the federal government with three independent branches, each serving as a check and balance on the others to carry out the rule of law. The Department of Justice (Department), an Executive Branch department, has a duty to enforce the law in an equal manner to everyone: persons, institutions, and governments. Equal enforcement of laws furthers the rule of law principle that no one is above the law and everyone is subject to it. This principle would be difficult to uphold if there were no government ethical standards to which federal employees themselves could be held. The Standards of Ethical Conduct for Employees of the Executive Branch, first set forth in 1989 by President Bush,<sup>60</sup> establish the regulatory ethical requirements for all government employees and provide the rule of law for the exercise of proper ethical conduct. The implementation of these government-wide ethical standards reflects that the rule of law applies not only to the government's interactions with citizens, but also to the government itself, as well as federal officials and employees. The intent behind these standards is set forth in 5 C.F.R. § 2635.101(a), which captures government ethics and the rule of law perfectly when it states that "[p]ublic service is a public trust."<sup>61</sup> Federal employees often are entrusted with tremendous authority and responsibility to act on the public's behalf. The manner in which they exercise that authority has significant implications for citizens, public and private institutions, and society itself. It is the federal employee's recognition of the importance of his or her role and the need to exercise that role with the utmost integrity that ensures the public faith in our government that is essential to the rule of law. The implementation of government ethics demonstrates that federal employees are held accountable to a higher standard, rather than to no standard at all, so that the public can have confidence in the government performing its duties.

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<sup>60</sup> See *supra* note 35 and accompanying text.

<sup>61</sup> 5 C.F.R. § 2635.101(a).

While the rule of law establishes the requirements with which all government employees are required to comply, a culture of ethical values extends the impact of the rule of law through precepts that motivate employees to do the right thing. These values are core beliefs that motivate attitudes and actions. Ethical values relate to the strict rules of what is right and what is wrong and such values demand that our actions not only comply with the rule of law but also promote public confidence in all of our actions.

These ethical values help us navigate the “gray areas” when it is difficult to follow the rule of law because the law is either silent or requires subjective judgment to determine the propriety of a proposed activity. Thus, when making an ethical decision, a conscientious government employee will ask two questions. First, do the government ethics rules permit me to take the proposed action? But second, if I am permitted, should I nevertheless still refuse to take the action? The employee should consider whether taking that action would cause a reasonable person with knowledge of all of the relevant facts to question that employee’s impartiality in the exercise of their official duties. The path to being able to answer these two questions and make this crucial decision is formed through a lifetime of decision-making. Or in the words of President Reagan in a speech at the Citadel, the Military College of South Carolina:

[T]he character that takes command in moments of crucial choices has already been determined. It has been determined by a thousand other choices made earlier in seemingly unimportant moments. It has been determined by all the little choices of years past—by all those times when the voice of conscience was at war with the voice of temptation—whispering the lie that it really does not matter. It has been determined by all the day-to-day decisions made when life seemed easy and crises seemed far away—the decisions that, piece by piece, bit by bit, developed habits of discipline or of laziness, habits of self-sacrifice or of self-indulgence, habits of duty and honor and integrity—or dishonor and shame.<sup>62</sup>

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<sup>62</sup> Ronald Reagan, 40th President of the United States, Commencement Address at The Citadel (May 15, 1993).

When it comes to forming this culture of ethical values that supplement the clear rule of law, Department components should work to foster an atmosphere in which truth, objectivity, fairness, and good judgment drive decision-making. They should try to encourage transparency whenever possible and strive to make sure their decisions always reflect the concepts of fairness and impartiality. In every situation, they should be concerned about whether their decisions will encourage or erode the public's confidence or faith in the work of the federal government generally, or the Department specifically.

The General Counsel's Office (GCO) for the Executive Office for United States Attorneys (EOUSA),<sup>63</sup> focuses on the rule of law in its guidance to EOUSA and U.S. Attorney's Offices (USAOs) throughout the country. But GCO analyzes all ethical inquiries under the light of a culture of ethical values, always asking whether the final result is the right thing to do, even if it is legal under the ethics rules.

There are many ethical issues which GCO must regularly analyze, such as whether a conflict between an employee's personal life and official duties exists, whether a proposed activity is prohibited, and/or whether other action is permissible. For example, a federal employee may build a collegial relationship with a non-federal employee through the exercise of his official duties. Once the underlying action is complete, the non-federal employee may want to show gratitude for the federal employee's work by sending a gift or offering to pay for a meal. Under the ethical standards and laws, there may be an exception that allows the employee to accept the offered gifts. Nonetheless, under the concept of a culture of values, GCO would advise the federal employee that while he could accept the gift under a strict reading of the ethics rules, under a culture of ethical values, it may be far more prudent to graciously decline the offer because it could create an appearance that the federal employee would not be impartial in his duties going forward involving this non-employee.

In sum, strict adherence to the rule of law as set forth in the ethical standards of conduct is largely premised on black and white (that is, whether an action violates the law), whereas a culture of ethics is

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<sup>63</sup> Each component within the Department has a deputy designated agency ethics official, who administers the ethics program within their component. Jay Macklin is General Counsel for EOUSA and administers its ethics program.

premised on gray (that is, whether an action compromises integrity). Michael Josephson of the Josephson Institute of Ethics explains this dichotomy perfectly. He states:

[T]here are two aspects to ethics: discernment (knowing right from wrong) and discipline (having the moral will power to do what's right). A code can help define what's right and acceptable and provide a basis for imposing sanctions on those who don't follow it. But unless it reinforces an established ethical culture, it won't do much to assure that people do what's right.<sup>64</sup>

Government officials and employees must exercise good judgment and make appropriate decisions in a way that demonstrates they deserve the authority with which they have been entrusted.

### III. Conclusion

Although it took centuries to get here, government ethics and the rule of law are imperative to a strong, functioning government. Without the codification of ethical standards which stem from this nation's commitment to the rule of law, and without a strong culture of ethical values that reflect a commitment to do the right thing, it is likely that the public would be distrustful of its government. Public service is a public trust, and it is crucial that all federal employees carry out that ideal on a daily basis for the efficient running of our country. It is incumbent on all of us to maintain the integrity of the public trust.

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<sup>64</sup> Michael Josephson, *Ethics Codes Don't Make People Ethical*, APPLESEEDS.ORG, [http://www.appleseeds.org/Ethics-Codes\\_Josephson.htm](http://www.appleseeds.org/Ethics-Codes_Josephson.htm) (last visited Aug. 20, 2019).

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# The Role of Internal Oversight in Preserving the Rule of Law

*Office of Professional Responsibility  
U.S. Department of Justice*

*If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.<sup>1</sup>*

At its most elementary level, a reference to the rule of law in relation to the criminal justice system brings to mind the phrase “law and order”—the idea that every citizen must obey the written law or face the consequences for breaking it.<sup>2</sup> The rule of law, however, also operates to check the exercise of power by police, prosecutors, and courts, by compelling these institutional actors to comply with the criminal justice system’s norms when exercising their considerable discretion to investigate, prosecute, and adjudicate crimes. This article focuses on one particular actor in the criminal justice system—the prosecutor—and examines how a fair and consistent internal oversight process operates to ensure the prosecutor’s adherence to the rule of law.<sup>3</sup>

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<sup>1</sup> THE FEDERALIST No. 51 (James Madison).

<sup>2</sup> Donna Spears, *The Criminal Justice System and the Rule of Law*, 84 PRECEDENT 18 (Jan.–Feb. 2008) (“In everyday use, the rule of law is often equated with law and order—the idea that people should obey the law.”).

<sup>3</sup> The Oxford Dictionary defines “oversight” as “to oversee” or “to supervise.” As used in this article, an internal oversight process is one administered by a prosecutorial office to ensure that individual line prosecutors, and their supervisors, maintain the standards of professional responsibility in the day-to-day performance of their work. The Department of Justice (Department) Office of Professional Responsibility (OPR) is one of two agencies with oversight authority over the nation’s federal prosecutors. OPR has jurisdiction to investigate allegations of misconduct against Department attorneys and law enforcement personnel that relate to the attorneys’ exercise of their authority to investigate, litigate, or provide legal advice. The Office of the Inspector General (OIG) has jurisdiction to investigate alleged

For clarity's sake, the "rule of law" can and should be distinguished from the "rules of law"—the codified rules that alert individuals to conduct the law prohibits. The "rule of law," by contrast, is defined in the *Oxford English Dictionary* as: "The authority and influence of law in society, esp. when viewed as a constraint on individual and institutional behaviour; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes."<sup>4</sup> The rule of law has two components: (1) norms, or the principles that govern a system and operate to cabin the exercise of discretion; and (2) processes, which create the framework by which these norms are administered. An oversight system must exist to ensure accountability when the prosecutor intentionally or recklessly violates these norms.

There are several essential factors that contribute to a successful oversight process. First, the process must be fair and consistently applied. Fair procedures are an essential component of effective oversight because fairness ensures adherence to the rule of law.<sup>5</sup> One feature of a fair system is neutrality.<sup>6</sup> Commentators generally favor "independent" review—that is, review which is conducted by an agency or actor unconnected to the individual whose conduct is being evaluated—on the theory that an internal review process may be

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criminal, civil, and administrative violations by Department employees and to conduct audits and inspections of Department programs in keeping with its mission to detect and deter waste, fraud, and abuse.

<sup>4</sup> *Rule of law*, OXFORD ENGLISH DICTIONARY (3d ed. 2011).

<sup>5</sup> See Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1993 (2015) ("A central virtue of the rule of law is procedural fairness, that is, the set of institutional arrangements that provide an unbiased determination of one's rights and duties through transparent procedures with determinations based on evidence."). In the related context of state bar disciplinary proceedings, courts have recognized the importance of fairness. See *In re Barach*, 540 F.3d 82, 85 (1st Cir. 2008) ("It suffices to satisfy due process if a state adopts procedures that collectively ensure the fundamental fairness of the disciplinary proceedings."); *The Fla. Bar v. Committe*, 916 So. 2d 741, 748 (Fla. 2005) (noting that sanction resulting from a bar disciplinary proceeding must be fair to society and fair to the attorney).

<sup>6</sup> See Stack, *supra* note 5, at 2015 ("At a most basic level, the rule-of-law value of procedural fairness requires an impartial decider in adjudications.").

biased against a finding of misconduct.<sup>7</sup> Although at first blush this assumption seems well-founded, a deeper analysis suggests otherwise. Independence does not equate with neutrality. Internal oversight can be sufficiently neutral as long as those conducting the oversight are free from influence in conducting their review.<sup>8</sup> In addition, to achieve neutrality, the review process must be grounded in procedural due process, which helps to assure that investigations are undertaken and conclusions are reached in a disciplined fashion.<sup>9</sup>

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<sup>7</sup> See Christopher R. Smith, *I Fought the Law and the Law Lost: The Case for Congressional Oversight Over Systemic Department of Justice Discovery Abuse in Criminal Cases*, 9 CARDOZO PUB. L., POL'Y & ETHICS J. 85, 92 (2010) (noting that the “biggest concern with OPR oversight is the ‘fox in the henhouse’ argument”). This same commentator acknowledges, however, that “[w]hen it is operating in the manner designed, OPR serves to expose individual prosecutorial misconduct, as well as to promote DOJ policy reforms” aimed at eliminating discovery abuse. *Id.* at 101.

<sup>8</sup> On the other hand, even an independent examiner’s analysis can be tilted by considerations external to the facts of the case, as, for example, when the reviewer unconsciously leans towards finding misconduct in order to justify having undertaken the investigation in the first place. One commentator has theorized that bar authorities may be reluctant to find prosecutorial misconduct because of separation of power concerns, or trepidation that such action will be viewed as too political. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 761 (2001).

<sup>9</sup> The extent of procedural due process protection varies with the character of the interest and the nature of the proceeding involved. See *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (“It is by now well established that ‘due process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.”) (internal quotation marks and citation omitted). OPR’s framework and process correlates with its primary mission to ensure that Department attorneys perform their duties in accordance with the high professional standards expected of the nation’s principal law enforcement agency. Bar disciplinary boards also accord procedural due process, consistent with their role as licensing authorities and with the nature of the penalty that they may impose. See *In re Ruffalo*, 390 U.S. 544, 550 (1968) (because disbarment is a punishment or penalty, the lawyer subject to bar proceedings is “accordingly entitled to procedural due process, which includes fair notice of the charge”); *Board of Prof'l Responsibility v. Custis*, 348 P.3d 823, 829 (Wyo. 2015) (“In as much as [disciplinary proceedings] are concerned with property rights of respondent-bar members, due process safeguards must be observed.”). *But see In re Cordova-Gonzalez*, 996 F.2d 1334, 1336 (1st Cir. 1993) (“[T]he due

In this regard, the use of an established analytical framework and accompanying standards to review a prosecutor's conduct is essential.<sup>10</sup> The framework and standards should be publicly available, as well as clear and easy to understand. The framework should explain the steps the entity performing the review will take to investigate a claim, as well as the principles that will be employed in resolving it.<sup>11</sup> Procedural fairness is also ensured by providing the subject of the review an opportunity to be heard and receive respectful treatment. These procedural mechanisms establish reasonable expectations about the process and help inspire confidence in the ultimate outcome.

A second necessary component of an oversight process is consistency. Consistency is at the heart of the rule of law, that is, the idea that like cases should be treated alike.<sup>12</sup> Without consistent interpretation of a set of rules over time, an individual actor cannot determine with any confidence whether a proposed action adheres to the desired standard. Perfect symmetry is unattainable, but society expects that the criminal justice system generally will apply the law uniformly and that differing results are justified only by articulable differences in the facts. This expectation of uniformity gives

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process rights of an attorney in a disciplinary proceeding 'do not extend so far as to guarantee the full panoply of rights afforded to an accused in a criminal case.'") (citation omitted).

<sup>10</sup> The rule of law "insists that the government should operate within a framework of law in everything it does . . ." STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *The Rule of Law* § 2 (2016).

<sup>11</sup> OPR employs an analytical framework in conducting its review of misconduct claims. See *Office of Professional Responsibility*, U.S. DEPT OF JUST., <https://www.justice.gov/opr> (last visited Aug. 27, 2019). That framework, which is of long-standing and is publicly available on OPR's webpage, explains the three stages of an OPR review and delineates the three potential outcomes of an investigation. OPR's analytical framework also establishes the standard of review that will be applied (preponderance of the evidence) and articulates the essential elements of a professional misconduct finding.

<sup>12</sup> "Some see consistency as a barrier to undiscoverable bias or caprice; others deem it necessary to uphold the majesty of the law in the eyes of the public." John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 61 (1987).

legitimacy to legal process.<sup>13</sup> It would be ironic, to say the least, if the review of the propriety of a prosecutor’s discretionary decisions was devoid of the same consistency that the prosecutor is expected to utilize in exercising that discretion in the first place.

The need for consistency extends, moreover, not just to the outcome of an oversight inquiry, but also to the procedure by which that outcome is achieved.<sup>14</sup> An agency can further consistent results by delegating the oversight responsibility to identified personnel who have familiarity with and experience applying the principles at issue and the agency’s framework for review. Uniform application of the same principles and standards over time helps to cement an understanding in both the reviewer and those subject to oversight of the norms that govern behavior in a particular arena. In this way, a review system that is consistent helps build the norms required to sustain the rule of law. In addition, application of a consistent procedure helps lead to more efficient decision-making.<sup>15</sup>

An internal system of accountability—such as OPR provides for Department attorneys—has several important advantages in ensuring that a review process is fair and consistent. The first such advantage is perspective. Internal agency perspective of prosecutorial misconduct claims is both broader and more focused than most external systems. Bar disciplinary authorities limit themselves to enforcing the applicable codes of professional responsibility. Courts often address “prosecutorial misconduct” in the context of the impact of a prosecutor’s conduct on the fairness and reliability of the trial and generally do not engage otherwise in the process of attorney

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<sup>13</sup> “Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law.” See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 UNIV. OF CHIC. L. REV. 1175, 1179 (1989).

<sup>14</sup> See *id.* at 1177 (noting that the Supreme Court can affect the specificity of the rules it announces as much by the mode of analysis it applies as by the outcome it reaches in a given case).

<sup>15</sup> See Todd S. Aagaard, *Agencies, Courts, First Principles, and the Rule of Law*, 70 ADMIN. L. REV. 771, 784 (2018) (opining that a well-functioning administrative system can effectively produce efficient and predictable decisions in the domain of cases it adjudicates).

discipline.<sup>16</sup> An internal agency review fills these gaps by addressing holistically a broad range of conduct that falls short of the norm.<sup>17</sup>

An internal agency review is also more adept at evaluating the appropriateness of prosecutorial decision-making. A prosecutor's role is made complicated by the various parties whose interests he must protect: the tension between his obligation to "do justice" while serving as a zealous advocate and the multitude of legal directives with which he must comply.<sup>18</sup> An outside reviewer is unlikely to be able easily to undertake a fair evaluation of the appropriateness of the prosecutor's navigation of these various factors.<sup>19</sup> To complicate the problem, misconduct allegations are not always raised in real time.<sup>20</sup> A claim of misconduct can be made long after the conduct at issue took place, and in that time the criminal justice system's understanding of

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<sup>16</sup> See Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 58–59 (2016) (explaining that court review of prosecutorial conduct typically addresses error without consideration of the intent behind the prosecutor's action).

<sup>17</sup> OPR, for example, has broad jurisdiction to investigate allegations of misconduct by Department attorneys "that relate to the exercise of their authority to investigate, litigate or provide legal advice." Att'y Gen. Order No. 1931-94, Investigation of Allegations of Misconduct by Justice Department Employees Sec.I.A.

<sup>18</sup> See NAT'L DIST. ATTORNEY'S ASS'N, NAT'L PROSECUTION STANDARDS, pt. I cmt. (3d ed. 2009) (discussing the competing interests a prosecutor must serve); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L. Q. 713, 728–29 (1999) (observing that criminal prosecutions are subject to various laws and rules, and noting "a potentially irreconcilable conflict between doing justice—which the ethical codes do not define—and the prosecutor's role as the government's primary advocate in the criminal justice system"); see also *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . .").

<sup>19</sup> See M. ELAINE NUGENT-BORAKOVE, *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 96 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008) ("Any attempt to establish performance measures in prosecution must be cognizant of the various external influences on the prosecutor's office.").

<sup>20</sup> See, e.g., *Turner v. United States*, 137 S. Ct. 1885 (2017) (seven defendants convicted of a brutal murder in Washington D.C. filed motions nearly 25 years after trial seeking to have their convictions vacated because of an alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963)).

the prevailing norms may have changed.<sup>21</sup> A competent reviewer must be familiar with the evolution of applicable principles and capable of taking into account historical policies and practices that may have shaped the prosecutor's past conduct. Familiarity with the terrain makes it much easier to determine accurately whether a line was crossed, and if so, whether that transgression amounted to misconduct in the circumstances presented.

A second advantage is access. The availability of the full and complete set of circumstances that elucidate the prosecutor's action is essential to the ultimate fairness and validity of the conclusion reached by a reviewer. An external reviewer, however, may not have ready access to facts or considerations relevant to an understanding of the prosecutor's action, such as a subject or witness's private employment files, grand jury information, information relating to national security, privileged material, or law enforcement sensitive information. The prosecutor generally faces no such restriction in articulating the full explanation for his decision-making to others within his agency. In addition, witnesses who become entangled in a disciplinary review process often have concerns about the confidentiality of the information they provide about a current or former colleague. An agency, however, can require employee compliance with an internal review procedure.<sup>22</sup>

The third advantage that an internal review process presents in furthering the rule of law is that it helps to ensure uniformity. Department attorneys prosecute cases in every federal district throughout the country, among which there are variations in practice and procedure, as well as in ethical standards, with which prosecutors

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<sup>21</sup> For example, a prosecutor's disclosure obligations have evolved over time as successive court decisions have refined the *Brady* doctrine. Even today, "[a]pplication of the *Brady* doctrine varies widely across federal and state jurisdictions . . ." Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L. J. 1321, 1325 (2011). Moreover, a prosecutor's obligation under the Rules of Professional Conduct to disclose exculpatory information to the defense may be broader than the material-to-outcome disclosures that *Brady* dictates. See *In re Kline*, 113 A.3d 202, 206 (D.C. 2015).

<sup>22</sup> All Department employees have an obligation to cooperate with OPR investigations and to provide complete and candid information. JUSTICE MANUAL § 1-4.200.

must comply.<sup>23</sup> Thus, prosecutors litigating in a particular locale may be subject to different rules, or judicial interpretations of those rules, than their counterparts in offices in other judicial districts.<sup>24</sup> Moreover, only an agency can effectively enforce its own internal standards. The Department imposes obligations on its attorneys that go well beyond the professional standards established by state licensing authorities or local court rules, and OPR is better equipped than any external reviewer to evaluate compliance with internal Department policies.<sup>25</sup> Thus, an internal review is better situated to ensure that federal prosecutors comport with the prevailing practice in each jurisdiction in a way that adheres to national prosecutorial priorities and policies, which are among the norms that shape prosecutors' behavior. More generally, however, an internal review process may be more adept at ferreting out instances of true misconduct from situations where the prosecutor acted in accordance with nationally focused training, policy, and guidance that proved unexpectedly inconsistent with or inadequate to address the litigation practices of a particular jurisdiction or matter.

Finally, an internal review process has a distinct advantage in generating information necessary to the creation of an environment that reinforces compliance.<sup>26</sup> This culture of compliance has two aspects. First, individual prosecutors loath the negative reputational

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<sup>23</sup> See Ryan E. Mick, *The Federal Prosecutors Ethics Act: Solution or Revolution?*, 86 IOWA L. REV. 1251, 1286 (2001) (noting that the diversity among state ethics codes precludes national uniformity in the regulation of prosecutorial ethics). These nuances in local legal culture "can have a significant impact on the performance of the courts and prosecutors in particular." NUGENT-BORAKOVE, *supra* note 19, at 95.

<sup>24</sup> See Mick, *supra* note 23, at 1288 ("In light of the prosecutor's interjurisdictional practice . . . the disjunction of ethics rules simply provides him with insufficient guidance in his day-to-day practice.").

<sup>25</sup> See Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 93 (1995) (suggesting that OPR take principal, if not exclusive, responsibility for enforcing internal Department guidelines "on the theory that, as rule-maker, the Department is best equipped both to interpret these guidelines and to assess appropriate sanctions for noncompliance").

<sup>26</sup> See Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMPLE POL. & CIV. RIGHTS L. REV. 369, 374 (2010) ("[I]nternal prosecutorial norms can develop and consistently shape prosecutors' behavior without any judicial involvement."). Office culture can give these norms "great power." *Id.*



impact attendant upon becoming the subject of an internal review, and fear the potential impact on career advancement that may result. Thus, the existence of a robust internal investigative and disciplinary process tends to motivate a culture of compliance. A second cultural impact relates to the development of better institutional practices.<sup>27</sup> Whether or not an investigation supports the conclusion that a particular prosecutor has engaged in misconduct, evidence, and insights gathered during the investigative process can reveal areas where additional policy, training, or management oversight can have a beneficial effect. The constraints on behavior generated by internal regulation and the social pressure of agency culture can be considerable. This culture is particularly important in a prosecutor's office, where principled decision-making is complicated by the diverse array of interests that must be served.<sup>28</sup> Internal review is a far superior mechanism for ensuring over time the creation of internal agency rules and a culture that ensures agency adherence to the rule of law.<sup>29</sup>

Internal agency review serves an important function in preserving the rule of law. A fair and consistent oversight process helps establish and reinforce expected norms of behavior. An agency's unique internal perspective on its own functions, policies, and practices, and its unrestricted access to comprehensive records relating to matters handled by its employees places it in an ideal position to evaluate fairly claims of misconduct. Internal agency review also assists the

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<sup>27</sup> See Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn From Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2170 (2010) ("An obvious starting point for improving institutional practices would be to identify and acknowledge disclosure errors and attempt to understand why prosecutors committed them."). Professor Green also points out that state bar disciplinary cases "are not a source of learning" in situations where the prosecutor committed error that did not rise to the level of sanctionable misconduct. *Id.* at 2180. An internal review is eminently more suitable to extract from such situations lessons that can avert future errors.

<sup>28</sup> See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 180 (2008) ("The lawyers who work as prosecutors are inclined by training to embrace a group identity, one that assures the actor of consistent and well-justified organizing principles when making troubling choices.").

<sup>29</sup> *Id.* at 129 (opining that "internal regulation can deliver even more than advocates of external regulation could hope to achieve").

agency in ensuring uniformity in operations across jurisdictions. Finally, internal review permits the agency to derive important lessons from the internal investigations it conducts, which can be used to shape future agency culture in a positive way.

## **About the Author**

**The Office of Professional Responsibility** was established in 1975 by Attorney General Edward Levi. During its more than 40-year history, OPR has developed unique expertise conducting internal investigations concerning matters involving alleged professional misconduct. Today, OPR's primary mission is to ensure that Department attorneys perform their duties in accordance with the highest professional standards, as would be expected of the nation's principal law enforcement agency. In addition, through investigations of FBI whistleblower retaliation complaints, OPR seeks to ensure that current, former, and prospective FBI employees are protected from reprisal when they report what they reasonably believe to be misconduct.

# You're Not in Kansas Anymore: On the Ground with OPDAT

*Beth Sreenan*

*Regional Legal Advisor*

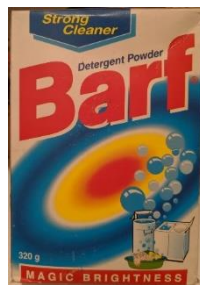
*Office of Overseas Prosecutorial Development, Assistance, and Training (OPDAT)*

*Criminal Division*

*U.S. Department of Justice*

## I. An introduction to overseas life and teaching

So you discovered the “too good to be true” opportunity to get paid to live and work overseas. Now visions of relaxing in a villa in the Maldives, sailing on the Mediterranean Sea, and perusing museums in Paris are distracting you from your prosecution memo, discovery, or trial prep. Before you write those closeout memos and embark on your overseas adventure, let’s explore how you get that position. Will you be a victim of your fantasy, or will you embark on one of the most rewarding career opportunities ever presented? Before you board the flight, let me tell you the truth—it will be a bit of both. As Dorothy said to Toto, “I’ve a feeling we’re not in Kansas anymore.”<sup>1</sup> I hope this article pulls back the curtain on the mysterious and wonderful world of overseas life and teaching and helps prepare you for the unfamiliar, possibly the strange, but the highly rewarding chance to work abroad. For example, would you wash your clothes in barf? I can tell you the answer is “yes” if you get an OPDAT position in the former Soviet Union.



**Barf Laundry Detergent**

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<sup>1</sup> THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

There are many more new and different things to learn and know if you want to excel at your OPDAT assignment, so read along and be prepared for an opportunity like no other.

## II. How does it happen, and why would you leave all the comforts of home?

If you are thinking of giving up an Assistant United States Attorney (AUSA) or trial attorney position to go somewhere where your family and friends may not visit, it will take some planning and patience. The Department of Justice (Department)'s website<sup>2</sup> publishes overseas positions, and the application process seems fairly straightforward.<sup>3</sup> You apply, prepare a great cover letter, send the required resume and writing sample, and wait to be contacted for an interview. Right? Well, before you apply, you might want to fully understand the position description and then do some research on the country. This will not only help you with the interview but might also impact your decision to apply.

You may want to start your research with the Centers for Disease Control and Prevention (CDC) for health, medical, and vaccine information.<sup>4</sup> You should be familiar with the health situation of the country, and if you balk at warnings for the hepatitis A<sup>5</sup> or B,<sup>6</sup> typhoid,<sup>7</sup>

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<sup>2</sup> *Legal Careers*, U.S. DEPT OF JUST., <https://www.justice.gov/legal-careers> (last visited Aug. 19, 2019).

<sup>3</sup> *See also USAJOBS*, <https://www.usajobs.gov/> (last visited Aug. 19, 2019).

<sup>4</sup> *Destinations*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://wwwnc.cdc.gov/travel/destinations/list/> (last visited Aug. 19, 2019).

<sup>5</sup> *Hepatitis A*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://wwwnc.cdc.gov/travel/diseases/hepatitis-a> (last visited Oct. 14, 2019).

<sup>6</sup> *Hepatitis B*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://wwwnc.cdc.gov/travel/diseases/hepatitis-b> (last visited Oct. 14, 2019).

<sup>7</sup> *Typhoid Fever*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://wwwnc.cdc.gov/travel/diseases/typhoid> (last visited Oct. 14, 2019).

cholera,<sup>8</sup> malaria,<sup>9</sup> meningitis,<sup>10</sup> polio,<sup>11</sup> rabies,<sup>12</sup> dengue,<sup>13</sup> or yellow fever,<sup>14</sup> you should not apply for some of the most interesting postings. Also, you and any accompanying family members will have to be medically cleared, and there are some medical conditions that may prevent you from obtaining a medical clearance for some of the posts that do not have access to acceptable health care.

If the medical issues don't discourage you, do more country-specific research. Google or other internet search engines can be great for current events and news. There are a number of online resources that can provide general traveler information, embassy contacts, press reports, and fact sheets, which outline general information on the government and the U.S. relation and concerns for the country.<sup>15</sup> Many embassies also have official Facebook pages.

Besides the official country reports, you should also check other websites, such as *Tales from a Small Planet* and *InterNations*.<sup>16</sup> Even

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<sup>8</sup> *Cholera*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://wwwnc.cdc.gov/travel/diseases/cholera> (last visited Aug. 19, 2019).

<sup>9</sup> *Malaria*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://wwwnc.cdc.gov/travel/diseases/malaria> (last visited Aug. 19, 2019).

<sup>10</sup> *Meningococcal Disease (Neisseria meningitidis)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://wwwnc.cdc.gov/travel/diseases/meningococcal-disease> (last visited Oct. 14, 2019).

<sup>11</sup> *Polio*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://wwwnc.cdc.gov/travel/diseases/poliomyelitis> (last visited Oct. 14, 2019).

<sup>12</sup> *Rabies*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://wwwnc.cdc.gov/travel/diseases/rabies> (last visited Aug. 19, 2019).

<sup>13</sup> *Dengue*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://wwwnc.cdc.gov/travel/diseases/dengue> (last visited Oct. 14, 2019).

<sup>14</sup> *Yellow Fever*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://wwwnc.cdc.gov/travel/diseases/yellow-fever> (last visited Oct. 14, 2019).

<sup>15</sup> See *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/resources/the-world-factbook/> (last visited Aug. 19, 2019); *Travelers*, U.S. DEPT OF STATE, <https://www.state.gov/travelers/> (last visited Aug. 19, 2019).

<sup>16</sup> Francesca Kelly, *What It's Really Like To Live There*, TALES FROM A SMALL PLANET (June 2019); *The Best & Worst Places for Expats in 2018*, INTERNATIONS, <https://www.internations.org/expat-insider/2018/best-and-worst-places-for-expats-39583> (last visited Aug. 19, 2019).

TripAdvisor may have information on the country you are interested in.

If all the online research doesn't deter, what do you do next? Check flights to the country and consider the connecting cities so you can plan a stopover in a glamorous European capital? I would recommend a few more steps first, one being carefully reading the vacancy announcement.

Vacancy announcements will contain information about the length of the assignment (see below). Most positions are for a minimum of 14 months, but some are longer. The length of the assignment is a commitment, which may result in financial consequences if you curtail, such as repaying relocation costs. By way of example, the announcement may read: "This assignment is for a period of at least 14 months, beginning on or about [date], with the possibility of extension, contingent on the availability of funding. Appointment to this position will be effected by reimbursable detail appointment." You may also see this: "This assignment is for a period of at least 24 months, beginning on or about [date], with the possibility of extension, contingent on the availability of funding." This may seem trivial, but if you and your family have never lived abroad, 14- or 24-month details can seem like dog years once you move to a foreign country.

The position description may also have language like this: "Relocation expenses are authorized. This is an accompanied position"; or "Travel to/from [country] and within the country will be required"; or "The applicant must be a fluent Spanish speaker, as well as proficient in reading and writing Spanish."

An "accompanied position" means you can take your family, as well as your personal belongings, a car, consumables (some posts), and pets. The "travel" line means you may be traveling outside of the country and within the country while in the position, meaning even if your family accompanies you, you will be leaving them in a foreign country where they don't know anyone and don't speak the language. This can be very hard on you and your family. Before you apply, make sure your family will, and *wants* to, go with you. Are you and your family prepared for work-related travel and separations? Is your family comfortable with, or prefer, your absence? The latter may be better addressed with a marriage and family counselor than an Office of Overseas Prosecutorial Development (OPDAT) foreign assignment. And the final line should be clear—some positions require you to be fluent in Spanish, French, or Mandarin. Unlike positions with the

Department of State, you will not get paid to learn a language. You and your family can take language lessons at your post, but you should not apply for a position with a language requirement if you only have one year of high school language or only know tourist-level phrases.

Some overseas positions do not allow your family to accompany you. In those instances, the position description will say: “This is an unaccompanied position.” This can be a deal maker, or a deal breaker, depending on your situation. Don’t waste anyone’s time applying for an overseas position that is unaccompanied if you are not willing to live abroad without your family.

Talk to your family and friends. If you are married, have children, parents, close friends, and others who are important to you, now would be a really good time to ask them how they feel about you leaving town—and not just for a vacation. Share your research with them and listen to their concerns. If it is an unaccompanied post, and if your friends, spouse, or children are cool with your leaving for 14 months or more, you may need to do some self-reflection or consider working on your interpersonal and family relationships instead of heading out to a danger post. But there can be a number of very valid reasons to apply for an unaccompanied post or decide that your family will not join you on your overseas assignment. Leaving the family behind doesn’t mean you are not wanted or selfish. It also doesn’t mean you prioritized your overseas career choice over family. But you need to have those tough and frank conversations before you apply for an unaccompanied post or consider leaving the family. Your spouse may have a career that he can’t or shouldn’t put on hold. Your children may be involved in sports or other activities that won’t be available to them overseas. Your children’s ages, particularly the high school years, can make a big difference in their willingness to move overseas, and, more importantly, their ability to adjust to a foreign environment.

Once you have assessed these considerations, prepare that informative cover letter, update your resume, apply, and hope you are contacted for an interview. Some positions require approval of the U.S. Attorney before applying, so be sure to know what your home office thinks of your plans. If you are told, “Go and stay as long as you want,” you may need to re-evaluate your decision, stay put, and improve your job performance. I am not saying that a green light from your office to leave means you are doing a lousy job, but an overseas

position should not be your escape plan or exit strategy from a poor job performance in your home office.

### **III. The interviewing and hiring process**

You will most likely go through a number of interviews. These may be by phone or via video conference. I can't give you any secrets to nailing the interview, but I do have some general advice. Be aware and be prepared. If it is a phone interview—focus. Don't have typing, background noise, or other interruptions while you are on the phone. If it is a video call, prepare beforehand and have your IT folks available in case of technical problems—which unfortunately happens. And be prepared to go forward even if the technical problems can't be fixed. And I mean prepared.

My first video interview was in 2002, and I figured the IT guys on both ends of the call had things organized. I was wrong. I spent much of the video interview staring at a large trash can on the other end while explaining why I was the person for the job. It was a bit disconcerting to talk to a trash can while trying to extol all the qualities and experience I offered for the position.

You may also be invited to have personal interviews in Washington, and this may be at your expense. If you are not selected for the position, let OPDAT know if you are interested in other available positions. Don't be discouraged if you don't get your first choice. OPDAT may think your experience could be more valuable in another country. For example, in 2001, I applied for a position in what is now North Macedonia, but was not selected. A year later, I was offered a position in Albania. After accepting the position in Albania, a number of embassy-related delays resulted in a temporary duty assignment (TDY) in Azerbaijan. Ultimately, after some time in Azerbaijan, I went to Albania and then returned to Azerbaijan for nearly three years. After a two-year return to my home office, I was offered two years in Uganda, a little more than two years in Kosovo, and have now been in Croatia for more than six years. While I eventually and frequently traveled to North Macedonia for TDY work, I was not initially accepted for that position. And overall, I am richer for it!

### **IV. Planning, packing, and embarking**

I won't spend much time on the moving process, but it can be stressful to say the least. You will most likely move into embassy housing with U.S. furniture and appliances. You will need to send



your clothes, bedding, towels, electronics, and perhaps consumables (detergent, shampoos, dog food, etc.). Depending on your family size, you will get an air shipment, a sea and land shipment, and your car transported separately. A company will be assigned your move and will come and pack your household goods. What you don't take can be stored at government expense. You will get a lot of information about this process, but remember the contract is awarded to the low bidder, and nobody ever said they wanted to be a packer or mover when they grow up. Also, there is a federal tax credit for companies who hire a "qualified ex-felon,"<sup>17</sup> so don't be surprised as to who may show up for your pack out team. When the moving van arrives, the packers will come into your house like locusts and start packing *everything* they see, including your trash.

As you prepare, stay organized. Put any valuables, suitcases, and paperwork (including passports and your car title) you want to take with you on the plane, in a secure area the movers don't have access to. I could write a whole article on this process but will restrain myself and just recommend you have several people supervise the pack out as they will wrap and pack at a frantic pace and before you know it your carry on, passport, or trash is crated and heading for a transatlantic shipping. Upon delivery at Post, you will have help unpacking but unfortunately don't be surprised if things broke during packing or in transit.

Most countries use 220 voltage and have different outlets, so stock up on the adaptors, and minimize the number of 110 voltage appliances you take. You will have converters in your embassy housing, but they are limited and heavy. You won't want to be moving the converter each time you want to use your toaster or mixer.

Before you go, the embassy will provide information about your house, number of beds, couches, chairs, etc. You will probably have a home office with office furniture, but some embassies don't provide an office chair. Some housing comes with a vacuum cleaner, and some do not. The furniture is usually from a U.S. distributor so your bed sheets should fit. You will have a welcome kit that provides sheets,

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<sup>17</sup> The Work Opportunity Tax Credit (WOTC) is a Federal tax credit available to employers for hiring individuals from certain targeted groups who have consistently faced significant barriers to employment and includes a person hired within a year of being convicted of a felony or being released from prison from the felony. *See Work Opportunity Tax Credit*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit> (last visited Oct. 14, 2019).

towels, and kitchen items, but often this is removed when your air shipment arrives. Find out before you go, as your air shipment may need to contain your dishes, linens, etc.

In most instances, you are assigned a sponsor before you arrive. This gives you an opportunity to ask questions and get post-specific information on what to bring. Your sponsor may also offer to buy food, so you have something in the house when you arrive. If so, repay the sponsor as this came out of his pocket. And you can always ask if the sponsor needs something from the United States. Your sponsor will help you get adapted in country and show you the grocery stores and other essential places.

## **V. I'm here, now what do I do?**

Most likely your new post will have a different language and possibly a different alphabet. Start by learning people, places, and key words. Google Translate can provide rough translations, and you will probably be able to take language lessons at Post (often at U.S. government expense). If lessons do not fit into your schedule, try to get the Foreign Service Institute language materials from the language office and plan time for self-study.

Once you arrive, there is a formal check in process at the embassy. Expect to receive a lot of information. In addition to learning the embassy acronyms, rules, and regulations, you will need to be familiar with your work plan. It is the map for your program. Know your objectives and plan accordingly. And keep in mind that like Google Maps, you don't always reach your destination—at least not without detours, stops, and asking for directions and help.

It will take some time to get up to speed and make necessary contacts, even for the most meticulous planner. Listen more than you talk, and don't believe everyone and everything. Eventually, you will be able to make informed opinions and know who is reliable. Your local staff will be invaluable and should be your first resource, but seek other and contrary opinions so you can navigate land mines. There are countless online reports that can provide a wealth of information such as the Human Trafficking Reports;<sup>18</sup> the Human

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<sup>18</sup> U.S. DEPT OF STATE, 2019 TRAFFICKING IN PERSONS REPORT (2019).

Rights Report;<sup>19</sup> the Council of Europe;<sup>20</sup> GRECO;<sup>21</sup> MoneyVal;<sup>22</sup> the European Commission;<sup>23</sup> OLAF fraud office;<sup>24</sup> OSCE and ODIHR;<sup>25</sup> the European Commission country reports;<sup>26</sup> European conventions;<sup>27</sup> the European Court of Human Rights;<sup>28</sup> and the United Nations (U.N.),<sup>29</sup> to name a few. Many of these web sites publish laws, conventions, and reports in English (and other languages) on countries that are not in the European Union (EU).

## VI. Legislative reform

There are many challenges in analyzing legislation and proposing amendments or new legislation. The common challenges are related to translation, international standards, political will, and local practices and pride. Be wary of what you are told is in the current legislation. Officials in one country often responded to questions about the content of their laws with, “yes, we have that, but our version is better.” Six months later with an English translation, it was apparent important

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<sup>19</sup> *Country Reports on Human Rights Practices*, U.S. DEP’T OF STATE, <https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/> (last visited Aug. 19, 2019).

<sup>20</sup> COUNCIL OF EUROPE, <https://www.coe.int/en/web/portal> (last visited Aug. 19, 2019).

<sup>21</sup> *Group of States against Corruption*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/greco> (last visited Aug. 19, 2019).

<sup>22</sup> *Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/moneyval> (last visited Aug. 19, 2019).

<sup>23</sup> EUROPEAN COMM’N, [https://ec.europa.eu/commission/index\\_en](https://ec.europa.eu/commission/index_en) (last visited Aug. 19, 2019).

<sup>24</sup> *European Anti-fraud Office*, EUROPEAN COMM’N, [https://ec.europa.eu/anti-fraud/home\\_en](https://ec.europa.eu/anti-fraud/home_en) (last visited Aug. 19, 2019).

<sup>25</sup> *OSCE Office for Democratic Institutions and Human Rights*, ORG. FOR SEC. & CO-OPERATION IN EUROPE, <https://www.osce.org/odihr> (last visited Aug. 19, 2019).

<sup>26</sup> *European Neighborhood Policy And Enlargement Negotiations*, EUROPEAN COMM’N, [https://ec.europa.eu/neighbourhood-enlargement/node\\_en](https://ec.europa.eu/neighbourhood-enlargement/node_en) (last visited Aug. 19, 2019).

<sup>27</sup> *Complete list of the Council of Europe’s treaties*, COUNCIL OF EUROPE (last visited Aug. 19, 2019).

<sup>28</sup> EUROPEAN COURT OF HUMAN RIGHTS, <https://echr.coe.int/Pages/home.aspx?p=home> (last visited Aug. 19, 2019).

<sup>29</sup> UNITED NATIONS, <https://www.un.org/en/> (last visited Aug. 19, 2019).

offenses such as terrorist financing or terrorist fundraising were not criminalized. Follow up conversations led to false directions that it was in another law knowing it would be months before the misdirection was discovered. Was this pride or lack of political will?

Most of the legislation you will be asked to review will be in the local language(s). Some countries have more than one official language, and the English versions can be *very* bad. Before you begin the review, find a good English translation of the local criminal code and criminal procedure code. Be mindful that there may be many separate laws, such as those related to cybercrime, money laundering, terrorism, etc. Once you have an English version, don't jump right in and compare it to Title 18 or Title 22. From the first mention of legislative reform, touch base with the Money Laundering and Asset Recovery Section (MLARS), Coordinator for Counterterrorism (CT), and other partners in Washington, D.C. Often the Department will offer legislative assistance, particularly as it relates to human trafficking, money laundering, and terrorism-related legislation. I would strongly encourage you to run any legislative reform and recommendations by these sections before you offer advice to nationals in your assigned countries.

Don't plan to copy and paste the U.S. model, and be mindful of European and other international standards and norms (EU, U.N., etc.). And do not think online research makes you an "expert." You also need to be respectful, but cautious, of others who self-identify as "experts." Often you will have to work collaboratively with other international assistance providers. Some lack prosecutorial or court experience and may not be familiar with international standards. And if you are working on a criminal code, check several state codes to remind yourself of the usual crimes that are covered by state prosecutors. For example, while working with locals and internationals on the criminal code in a country in the Western Balkans, I noticed there were a number of offenses that were not in the current code, such as burglary, grand theft auto, and driving under the influence (DUI). The working group was receptive to considering proposed drafts of these new offenses, except the DUI proposition. One of the working group members opined, "If you don't hit something, then it's not driving under the influence." The majority of the group agreed!

You will also want to keep the statutes of limitations and privileges in mind. Some countries have short statutes of limitations and if the

accused can avoid arrest for a few years, they cannot be prosecuted. These statutes of limitations do not have a tolling provision for circumstances under which the accused flees, hides, or is a fugitive. In one working group meeting, when the issue was addressed, a law school professor contended that “it is a human right to be a fugitive.”

Often codes provide privileges against testimony for extended family and relatives, and defendants can lie under oath without risking a perjury charge. In one country, the legislative working group argued for days over the prohibition against charging a defendant with perjury. I argued that if the accused has a right to remain silent and to be free from adverse inferences from exercising the right of silence, then the accused must adhere to the rules for witness testimony—under oath and truthful—or risk a perjury charge. One professor insisted it was a human right (you will hear that a lot) to lie in your defense. A German judge said, “We all know he is lying, so let him tell his story; we won’t believe it.” The latter opinion ignores the fact that a defendant lying to the court is an attempt to perpetrate a fraud. It also violates the presumption of innocence an accused is entitled to, but, in the end, I did not win the argument.

Further, plea bargaining and use of cooperating witnesses, if not prohibited or restricted, are often unfamiliar practices. Often, there is no incentive to plea bargain. Convictions are unlikely, and even if a defendant is convicted, sentences are low, and often all parties have a right to appeal the initial verdict. Yes, even the prosecutor can appeal an acquittal in many countries! The trial and appellate processes are long and seem to have no end. Trials often are held witness by witness with days, months, and years in between hearings. Parties are not necessarily required to raise all issues at trial or on appeal to avoid waiver. And court hearings are seldom recorded electronically or by a stenographer.

You may also see crimes such as insult or ridicule. These “offenses” are considered to be necessary for many countries, and you may not be able to convince them to use the civil tort of libel instead of criminalizing insults.

The above issues are not necessarily intuitive, but you need to be prepared to consider them when you are asked to review legislation.

## VII. Teaching

A “famous” Department author wrote an article about teaching abroad so I won’t repeat it here.<sup>30</sup> But I will add some additional thoughts.

### A. Logistics

Your travel is governed by rules and regulations and it will be in economy class unless you pay for an upgrade. Those helping you with the arrangements are truly trying to help you, even if it seems that they are impeding or imploding your travel plans. Rules such as Fly America<sup>31</sup> and contract fares make official travel very different from personal travel. Plan early, get an official passport, and focus on the important things—you have a job to do, you need to get to and from that job safely, and you need to stay healthy.

You have a lot to learn. Sometimes, OPDAT headquarters or the Resident Legal Advisor (RLA) at post will provide all the details you need, but do some independent research on the country. You don’t know what you don’t know, making it difficult to know what questions to ask. Try to learn about the country, including its customs, religion, security, food, local transportation, etc., before you go. And keep learning even after you arrive; get out of the “embassy bubble.”

#### 1. Your presentation and materials

If you are traveling as an instructor, facilitator, or mentor, your materials should be prepared and sent to the RLA long before you leave the United States. As you prepare your materials avoid U.S.-centric terms and practices and instead use international and regional norms and legal instruments. Once the materials are sent to the RLA, you will want to avoid changing them, as they have likely been sent for translation.

Once you are in country, you will most likely present in English with simultaneous translation. If you speak too fast, expect concepts to be lost in translation. If you are working with consecutive translation, be patient and stay focused. Minds tend to wander during the foreign language translation, and soon you are not paying attention. Clichés and jokes often do not translate, so avoid them or ask the local staff if

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<sup>30</sup> Beth Sreenan, *International Training: Challenges and Reward*, 66 U.S. ATT’YS BULL., no. 3, 2018.

<sup>31</sup> 49 U.S.C. § 40118.

they are understandable and appropriate. Avoid U.S. terms and procedures (probable cause, indictment, complaint, information, subpoena, and, especially, “the grand jury”). You will lose your audience if you rely on your U.S. state or federal prosecutor experience, unless you can incorporate it into the procedure or penal codes of your host country.

Make your PowerPoint and hand out materials simple, and number your pages. This will help you be able to point to the relevant material in the foreign language.

## **2. You are not at the National Advocacy Center (NAC)**

International teaching is very different. Your venues may be dismal and your access to electricity, clean water, and restrooms limited. Smoking indoors is common overseas and attention to agenda times may not be enforceable. If you have the opportunity, make sure the breaks are long enough for everyone to smoke, get coffee, mingle, and take care of personal needs. Always set the rules for timely attendance at the beginning of the training.

The food will also be very different from the excellent choices at the NAC. While it is a fantastic opportunity to try something new, know thyself, and plan for the inedible and unsafe. If you are vegetarian, lactose, or gluten intolerant, or otherwise restricted in your diet, bring snacks and let the RLA know in advance that you will need special meals. You may be teaching during hours your body is used to sleeping, and there is no rest for the weary. Not only will there be time zone differences, but you probably won't get a break during the trainings or even in the evenings, particularly if the training is residential. You should try to meet and talk to as many people as you can: You will be wiser and richer for the effort. You may be surprised how knowledgeable the foreign nationals are about U.S. history and politics, and they often like to discuss current events and hot topics such as election debates, presidential policies, gun control, the death penalty, and other uniquely U.S. practices. Keep in mind that U.S. foreign policy is determined by the President and the State Department. The Hatch Act applies overseas, as well as at home. You are representing the United States while overseas and even when “off duty” you should refrain from political activity. Rather than risk a violation or your career, ask for others' opinions on the topic and listen rather than opine!

### **3. Prepare for the audience**

Who are they? How did they get their formal education? What are their experience levels? Who sent them to the training? Do they want to be there? What training methodologies have they been exposed to? Is there a supervisor or colleague there that might impact how they participate in the training? These are all questions you should be asking yourself as you prepare for your audience.

The adult learning methodologies used at the NAC and its best instructors may be new to your audience and you need to be prepared to adjust. If their formal education was mostly memorization and repetition, they probably lack some analytical skills and practice. This will limit their ability or willingness to participate on panels, discuss hypotheticals, or engage in interactive training. Likewise, if a supervisor or colleague is present and they offer an opinion, it might not only be rude, but also career crushing, to offer a different opinion. There are a number of facilitation and faculty development skills you can employ under these circumstances. For example, in the latter case, if someone has spoken and it seems definite and the end of the conversation, ask them to switch hats and pretend to be a defense attorney, judge, non-governmental organization (NGO), or civilian, and make the contrary argument.

### **4. Rules of engagement**



You, or the RLA, should establish the ground rules or procedures for the program up front. This should cover everything, including timely attendance, cell phone use, and side conversations. For example, after introductions and explaining the objectives of the course you could say something along the lines of:


I'd like to establish a few ground rules for our discussion, and I invite you to provide additional suggestions that you think will promote effective outcomes. First, please keep your comments short, no more than one to two minutes for each comment, so we can hear from everyone. Next, please respect everyone's comments, particularly those that are of a different opinion or practice than your own. Finally, be aware that as the instructor/facilitator, I may have to curtail or redirect a conversation to move us towards our outcome.



Even when the ground rules are agreed upon, you may encounter participants who will not want to talk, who will not stop talking, who monopolize every topic, and who throw out the legal or procedural hand grenades. Here are some techniques to help control the monopolizer, procedural guy, or the negative naysayers.

Title	Behavior/ Description	Response	Sample Statements
<p>The Angry Person</p> 	<ul style="list-style-type: none"> <li>Disagrees with almost everything; makes personal attacks</li> <li>Uses the discussion as a chance to vent/complain about individuals or the organization</li> <li>Demands answers</li> </ul>	<p>Redirect to others in the group</p> <p>Redirect discussion to the issue, rather than the players</p> <p>Acknowledge the participant's feelings and move on</p>	<p>"How/what does everyone else feel/ think about that?"</p> <p>"Let's focus on just the <i>issue</i> of X."</p> <p>"You seem angry. Has anyone had a positive experience?"</p>
<p>The Monopolizing Person</p> 	<ul style="list-style-type: none"> <li>Talkative/has an opinion on everything</li> <li>Manipulates the discussion</li> <li>Interrupts others</li> </ul>	<p>Acknowledge their comments and quickly move on</p> <p>Reference the group's ground rules</p>	<p>"Thank you. [To another participant] What are your thoughts on X?"</p> <p>"Let's hear [another participant's] point, and then I'll get to yours."</p>

		Use the time excuse	“In the interest of time/since we have limited time, let’s hear from others.”
<p>The Talkative Person</p> 	<ul style="list-style-type: none"> <li>• Rambles/wanders around and off subject</li> <li>• Uses far-fetched examples of analogies</li> <li>• Tells extremely long, detailed stories</li> </ul>	Refocus attention by restating the relevant points and goals	“If I can refocus on X...”
		Direct questions <i>to the group</i> that are back on subject	“Let’s go back to our discussion about X...” (engage a different participant)
		Ask how their topic relates to the topic being discussed	“Interesting. So how would you see that relating to X...” (engage another)
<p>The Opinionated</p> 	<ul style="list-style-type: none"> <li>• Talkative</li> <li>• Has an opinion on everything</li> <li>• Manipulates the discussion</li> <li>• Interrupts others</li> </ul>	Acknowledge their comments and quickly move on	“Thank you. [To another participant] What are your thoughts on X?”
		Reference the group’s ground rules	“Let’s hear [another participant’s]

			point, and then I'll get to yours.”
		Use the time excuse	“In the interest of time/since we have limited time, let's hear from others.”
<p>The Quiet Person</p> 	<ul style="list-style-type: none"> <li>• Shy/silent</li> <li>• Does not easily jump into conversation</li> <li>• Speaks only when asked</li> </ul>	Involve them by directly asking them their thoughts	“What's your experience with/ opinion about X?”
		Give strong, positive reinforcement for their participation	“Thank you for bringing up that point.”
		Expand upon their discussions	“Let's expand a little on what you said...”

## B. Mentoring

Your overseas assignment may include a case mentoring component. This is not operational work but provides an opportunity for you to work with prosecutors, police, or task forces to enhance investigations or prepare for trial. An effective mentor *must* be familiar with the criminal and procedural codes and avoid the tendency to fall back on U.S. practices. Most U.S. practices are not applicable, available, or viable solutions. You must also change your way of thinking. Many legal systems and practitioners believe that a procedure must be expressly authorized and codified, or it is prohibited. Most American prosecutors think it is worth a try unless it is expressly outlawed.

As you learn the procedure codes you will need to think outside the box.



Many countries have recently transitioned to an adversarial system with prosecutor-led investigations, but the reality of how that works in practice differs from expectations and what is provided for in the code. Many procedural codes require judicial authorization for investigative measures we consider routine, such as consensual monitoring, controlled calls, or controlled deliveries, surveillance, and photos taken in public places. The use of wiretaps is not uncommon, but real-time monitoring is rare. The recorded conversations are usually only of historical value, and you have no way of proving that a suspected drug dealer who is recorded saying, “Meet me, I have your shirts,” isn’t actually picking up his laundry.

Trial practices can also be different and challenging. Often prosecutors do not—or say they cannot—prepare witnesses before trial as it would be considered witness coaching. There is little analytical and strategic trial preparation. There is no procedure or practice for opening statements in most countries. And, in some instances, an opening statement is simply the reading of the indictment. The use of demonstrative exhibits and experts is rare and sometimes very restrictive. Many courts have a list of court experts that either party can use in their case. These court experts are often limited to well-established sciences or fields. Use of an expert not on the list of the court experts is unheard of, and the expert’s testimony is probably inadmissible. So when you are mentoring a prosecutor, don’t suggest the use of an expert to explain battered wife syndrome or to explain the impact of trauma on a human trafficking victim’s ability to recall the events in a chronological and consistent manner.

As you prepare to mentor, and until you are more familiar with the codes and practices, the Socratic Method may help you and the

mentee think through a problem and find a solution. Rather than saying, “Wow, that is a tough one,” or “I have no idea what you can do given how restrictive your code is,” you can ask, “What are your options? Have you had this situation before? How have you or others managed this issue in other cases?” But asking questions without offering ideas or solutions will not serve you, or the foreign prosecutor, in the long run. Unless you learn the codes and discuss ideas and solutions with your staff and locals, you will only waste the prosecutor’s time and end up frustrated that nothing works like it did back home.

## VIII. Final thoughts

I hope you are not overwhelmed or discouraged from an overseas career opportunity. It can be addictive; extremely rewarding; give you a new understanding of a country, culture, and practices; and be the adventure of a lifetime. You may be the only American the foreign nationals ever meet and that can give them a different, and hopefully positive, perspective on the United States than what they see in movies, reality TV, and in the media. After your OPDAT tour(s) or teaching experience(s), you will return with a new appreciation for life and work in the United States. But here’s a final warning: While you will be so much richer for the experience, your friends, social circle, and work colleagues may have a short attention for the stories of life aboard. Watch for the eyes to glaze over and do not hold that against them. They don’t know what they don’t know and have no idea of the adventure and opportunity that they missed.

### About the Author

**Beth Sreenan** is a Department trial attorney currently working in Zagreb, Croatia, as a Resident Legal Advisor for an OPDAT implemented rule of law program for the Western Balkans (Albania, Bosnia and Herzegovina, Kosovo, North Macedonia, Montenegro and Serbia). Ms. Sreenan has been with the Department since 1991, and worked as an AUSA in the Southern District of Florida from 1991–2008. Ms. Sreenan also served as an Assistant Director of Training at the NAC and as the Deputy Training Director for the Department’s Criminal Division. Ms. Sreenan also has seven years’ experience as a state prosecutor and five years’ combined experience as a police officer and a probation and parole officer. In addition to her police and prosecutorial experience, Ms. Sreenan has worked in

several countries as part of the Department's OPDAT program. She served more than two years in Kosovo, two years in Uganda, approximately three years in Azerbaijan, and one year in Albania. In addition to her five RLA positions, Ms. Sreenan has taught in East Timor, Indonesia, Turkmenistan, Russia, Georgia, Romania, Bulgaria, Hungary, Pakistan, Kenya, Tanzania, and throughout the Western Balkans.

# Living Outside the Rule of Law: The Data on Department of Justice Human Trafficking Prosecutions and Where We Go From Here

*Elliott B. Daniels*  
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At its core, human trafficking is a violation of our country's most sacred promises: life, liberty, and the pursuit of happiness. Congress has rightly recognized vigorous investigations and prosecutions followed by convictions and sentences as a “minimally adequate response” to trafficking.<sup>1</sup> With its singular qualities, the U.S. Department of Justice (Department) has a special responsibility to prosecute these cases.

But what does the data tell us about trends in the Department's human trafficking prosecutions? What are the rule of law implications when the number of investigations, charged defendants, charged cases, and restitution orders are dropping, but conviction rates are rising? And what does this all mean from the trafficking survivor's perspective? As we work to make our districts a safer place for victims and a more dangerous place for traffickers to operate, where do we go from here?

## **I. Human trafficking: a fundamental promise violated**

“I was a freshman in high school, in a home that didn't provide the support a child needs, my trafficker was laser-focused on my vulnerabilities, and before I knew it was I was being bought and sold for a price,” explained H.C., who was trafficked in South Carolina. “After five years of violence, extreme emotional abuse, and exploitation, I completely believed what I was told—that I would

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<sup>1</sup> 22 U.S.C § 7106(b)(1).

never have another life.” It was 18 years before H.C. gained her autonomy back.

Another survivor, M.C., describes her childhood as stolen from her. A trip to a major city with a trusted couple in the neighborhood turned out to be something very different than what she was promised. She was given a set of clothes and told she would be sexually abused by strangers for someone else’s profit. “While I was 15 years old, instead of turning pages of a book I was forced to turn tricks with a \$2,500 a night quota.” The violence, control, and exploitation continued into adulthood and controlled M.C.’s life for decades.

H.C. and M.C.’s stories are not isolated. At this moment, there are men, women, and children—citizens and foreign nationals alike—in homes, hotels, farms, factories, embassies, and businesses across our country who are being denied their most basic rights. Their experience is a violation of our country’s most sacred promises, demanding a meaningful response from each of our offices.

## **A. Life and liberty: a fundamental promise**

Life and liberty are among our country’s most fundamental promises. As reflected in the Declaration of Independence, our country was founded on the promise that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>2</sup>

The dark irony, of course, is that a nation conceived in liberty left so many in bondage. It was another 86 years before the Emancipation Proclamation extended the most basic concepts of liberty to those enslaved in states of rebellion.<sup>3</sup> President Lincoln saw this as fundamentally “an act of justice” and the crowning achievement of his administration.<sup>4</sup>

Three years later, in late 1865, the Thirteenth Amendment was ratified. The right to be free was for the first time a Constitutional guarantee, and its promise applied to all—not only those enslaved in

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<sup>2</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>3</sup> THE EMANCIPATION PROCLAMATION para. 4 (U.S. 1863).

<sup>4</sup> John Hope Franklin, *The Emancipation Proclamation: An Act of Justice*, <https://www.archives.gov/publications/prologue/1993/summer/emancipation-proclamation.html> (last updated Dec. 7, 2017).



the South.<sup>5</sup> The Thirteenth Amendment has remained a substantive source of rights in forced labor prosecutions through modern times.<sup>6</sup>

Yet, if our history teaches us anything, it is that the law itself is not enough. Words on a page—including life and liberty; the Emancipation Proclamation’s promise that the enslaved “shall be . . . forever free”; and the Thirteenth Amendment’s guarantee that “neither slavery nor involuntary servitude shall exist”<sup>7</sup>—are just that, words, without a government that enforces the law. Rights are only as meaningful as their enforcement. A government must give meaning to the law and vindicate those rights when they are violated. That is the mission of the Department.

## **B. A fundamental promise violated**

Although the days of chattel slavery are gone, threads of its core can be seen in human trafficking today. Concepts of ownership, possession, control, and the theft of labor for profit mark human trafficking and expressions of slavery that came before it.<sup>8</sup>

H.C., who survived nearly two decades of trafficking in South Carolina, described themes of exploitation and ownership throughout her childhood:

When it began, I was a child. My mind was still developing; I didn’t know right from wrong. There was so much missing in my own home, and looking back now, I can see that my abuser saw all of those vulnerabilities and played on every one of them until he had total control over me, and I was his for profit.<sup>9</sup>

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<sup>5</sup> U.S. CONST. amend. XIII.

<sup>6</sup> *See, e.g.*, *United States v. Kozminski*, 487 U.S. 931 (1988).

<sup>7</sup> U.S. CONST. amend. XIII.

<sup>8</sup> Kevin Bales, *Slavery in its Contemporary Manifestations*, in *THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY* 283–84 (2012).

<sup>9</sup> Interviews with trafficking survivors H.C. and M.C. were conducted by the U.S. Attorney’s Office (USAO) for the District of South Carolina in August and September 2019. In the same way their voice as survivors of sex trafficking inform this article, we must incorporate the voice and experience of labor trafficking survivors as we consider the questions raised in this article.

By 19, H.C. had two children, and she believed what her trafficker told her—that the die was cast and there would never be another life for her. “The shame, guilt, hopelessness, addiction, and violence had an absolute hold on me. I just was not free.”

M.C., who was trafficked in the Midwest and in major cities across the United States, described her experience in similar terms:

Are there parallels to slavery? It *is* slavery. It’s very clear. This is not rocket science. Do you know I did not have the freedom to make my own decisions? In our country, where we’re told life is what you make it, but I could go only where he told me I could go, and when he decided it was time for the abuse, that’s when it would happen. There was no freedom.

And this violence is happening on a sweeping scale. Globally, in 2016 there was an estimated 24.9 million people living in modern slavery, more than at any time in human history.<sup>10</sup> That is nearly three times the population of New York City—all currently suffering violence and compelled work for someone else’s profit.

Although the scope of the problem in the United States is significant, the figures are less clear. In 2013, the National Academy of Sciences concluded that “[n]o reliable national estimate exists of the incidence or prevalence of commercial sexual exploitation and sex trafficking of minors in the United States.”<sup>11</sup> Scholars agree, however,—and our casework shows—that “no country appears to be immune,” including ours.<sup>12</sup>

As for what the crime looks like, federal law defines human trafficking as the use of force, fraud, or coercion to compel a person into commercial sex or labor against their will.<sup>13</sup> In addition, the use of a minor in commercial sex is always trafficking, regardless of any

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<sup>10</sup> WALK FREE FOUND., INT’L LABOUR ORG., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 9 (2017).

<sup>11</sup> NAT’L ACAD. PRESS, CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES 73 (2013).

<sup>12</sup> Bales, *supra* note 8, at 286.

<sup>13</sup> *Is it Human Trafficking?*, POLARIS, <https://polarisproject.org/is-it-human-trafficking> (last visited Sep. 20, 2019).

use of force, fraud, or coercion.<sup>14</sup> The sectors most tainted by the crime today include domestic work, construction, manufacturing, agriculture, fishing, the service and hospitality industry, and commercial sexual exploitation.<sup>15</sup>

As for who the victims are, modern slavery disproportionately impacts women and girls, who comprise more than 70% of victims globally.<sup>16</sup> The victims identified in federal prosecutions last year were 94% female, and the average age was 16.<sup>17</sup> The youngest identified victim in a federal prosecution last year was one year old.<sup>18</sup> An estimated 25% of victims globally are children, with the majority of those being children in the commercial sex trade.<sup>19</sup>

There were adult victims of human trafficking in the United States from at least 60 countries of origin in fiscal year 2016, according to immigration relief certifications granted by the U.S. Department of Health and Human Services that year.<sup>20</sup> The top six countries of origin for victims in the United States certified for such relief that year were the Philippines (115 victims), Mexico (108), Guatemala (34), Honduras (29), India (14), and Thailand (13).<sup>21</sup>

In federal sex trafficking prosecutions last year, the most common methods of coercion were physical violence (56.2%), threatened physical violence (42.6%), exploitation of an addiction (36.2%), verbal or emotional abuse (25.4%), and physical isolation (23.3%).<sup>22</sup> In forced labor cases, the most common methods of coercion were the

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<sup>14</sup> *Fact Sheet: Human Trafficking, Administration for Children and Families, Office on Trafficking in Persons*, U.S. DEP'T HEALTH & HUM. SERVS. (Nov. 21, 2017), <https://www.acf.hhs.gov/otip/resource/fshumantrafficking>.

<sup>15</sup> *See, e.g.*, POLARIS, *THE TYPOLOGY OF MODERN SLAVERY* 5 (2017) (analyzing and classifying 25 types of human trafficking from more than 32,000 calls to the National Human Trafficking Hotline from 2007–2016).

<sup>16</sup> WALK FREE FOUND., *supra* note 10, at 5.

<sup>17</sup> ALYSSA CURRIER & KYLEIGH FEEHS, *THE HUMAN TRAFFICKING INSTITUTE, FEDERAL HUMAN TRAFFICKING REPORT* 35–36 (2018).

<sup>18</sup> *Id.* at 35.

<sup>19</sup> WALK FREE FOUND., *supra* note 10, at 5, 10.

<sup>20</sup> *Attorney General's Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons FY 2016 at 26*, U.S. DEP'T OF JUST., <https://www.justice.gov/humantrafficking/page/file/1103086/download> (last visited Nov. 1, 2019).

<sup>21</sup> *Id.* at 27–28.

<sup>22</sup> CURRIER & FEEHS, *supra* note 17, at 11.

withholding of pay (60%), threats of physical abuse (60%), physical violence (57.1%), and threatened deportation (51.4%).<sup>23</sup>

While the number of victims remains elusive, trafficking remains prevalent because it is profitable. Like many expressions of slavery before it, modern slavery is fundamentally an economic crime in nature. It is motivated by profit, and it is big business. Illegal proceeds from forced labor and sex trafficking bring in an estimated \$150 billion globally in profits annually.<sup>24</sup> Of that, \$99 billion in proceeds are from sexual exploitation and the balance from forced labor.<sup>25</sup> For perspective, the combined profits of the five largest American companies—Apple, JPMorgan Chase, Berkshire Hathaway, Wells Fargo, and Alphabet—in 2017 were less than \$150 billion.<sup>26</sup> Our work, in part, is to make it more dangerous than it is profitable for traffickers to operate through robust investigations and prosecutions.

## **II. Human trafficking convictions as a “minimally adequate response” and the Department’s special responsibility to prosecute**

In 2000, Congress passed the Trafficking Victim Protections Act (TVPA), providing federal law enforcement many of the tools we use to combat human trafficking today.<sup>27</sup> The TVPA is the primary federal statute prohibiting sex trafficking,<sup>28</sup> child sex trafficking<sup>29</sup> (which does

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<sup>23</sup> *Id.* at iii.

<sup>24</sup> INT’L LABOUR OFFICE, PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR 13, 45 (2014) [hereinafter ILO: THE ECONOMICS OF FORCED LABOR].

<sup>25</sup> *Id.* at 27.

<sup>26</sup> Jen Wiczner, *The Fortune 500’s 10 Most Profitable Companies*, FORTUNE (June 7, 2017), <https://fortune.com/2017/06/07/fortune-500-companies-profit-apple-berkshire-hathaway/>.

<sup>27</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

<sup>28</sup> See 18 U.S.C. § 1591(a)(2) (prohibiting an individual from causing a person to engage in a commercial sex acts “knowing, or, . . . in reckless disregard of the fact, that means of force, . . . fraud, coercion . . . or any combination of such means will be used”).

<sup>29</sup> See *id.* (prohibiting an individual from causing a person to engage in a commercial sex act “knowing, or, . . . in reckless disregard of the fact . . . that the person has not attained the age of 18 years”). In a section 1591

not require a showing of force, fraud, or coercion), and forced labor.<sup>30</sup> The TVPA and its reauthorizations since have provided increased penalties, restitution for victims, private rights of civil recovery, and immigration relief for victims who cooperate with law enforcement.

The TVPA also established what has become the seminal tool to evaluate what governments around the world are doing to respond to human trafficking. Each June, the State Department's Office to Monitor and Combat Trafficking in Persons (TIP Office) releases the Trafficking in Persons Report (TIP Report), which most recently evaluated whether 187 governments—including ours—were implementing “their domestic laws in a manner that protects all victims and punishes all traffickers.”<sup>31</sup> The report has become a key diplomatic tool, in part because sanctions are triggered for governments with habitually inadequate results.

In determining whether a government has shown a “minimally adequate response,” one of the criteria Congress mandates the TIP Report consider is the *quality of investigations and prosecutions*: “Whether the government of the country vigorously investigates and prosecutes acts of severe forms of trafficking in persons, and convicts and sentences persons responsible for such acts[.]”<sup>32</sup>

That is, adequate investigations and prosecutions are a minimum standard—a starting point—for a governments' meaningful response to trafficking. Good policy alone does not make an effective response. Good policy must be coupled with effective enforcement, and that is

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prosecution, the government need not prove a defendant's knowledge of a child victim's age, only that the defendant had a “reasonable opportunity to observe” the child victim. *Id.* at § 1591(c).

<sup>30</sup> See 18 U.S.C. § 1589(a) (prohibiting an individual from providing or obtaining labor or services by “any one of, or by any combination of, the following means—(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse or threatened abuse of law or legal process; or (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint”).

<sup>31</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 45 (2019) [hereinafter TIP REPORT].

<sup>32</sup> 22 U.S.C § 7106(b)(1).

the work of the Department. Serious and sustained prosecutions, in fact, are a marker of an *effective response* to trafficking.

And the Department has a special responsibility to investigate and prosecute these cases. First, each of us took an oath to protect and defend the Constitution, which includes the right to be free from slavery and involuntary servitude.

Second, our offices have practical advantages relative to our partners in the state and local systems. Our infrastructure is designed to take on long-term and complex cases. Last year, the average federal human trafficking prosecution took over two years to resolve after indictment.<sup>33</sup> Cases that went to trial took an average of 42 months to resolve.<sup>34</sup>

We also have access to a nationwide and global network of agents who can follow up on leads and build cases in ways that few partners in the world are able to. In 2018, the primary investigative agency in 67.8% of federal prosecutions was the FBI, an agency with a presence in every state, territory, and 180 countries.<sup>35</sup> The Department of Homeland Security took the lead on 28.1% of federal cases last year, with the remaining 4.1% investigated by other agencies.<sup>36</sup>

We also have access to subject matter expertise with Department components, like the Civil Rights Division's Human Trafficking Prosecution Unit (HTPU) and the Criminal Division's Child Exploitation and Obscenity Section (CEOS), the Money Launder and Asset Recovery Section (MLARS), and colleagues at offices like the Department of Labor (DOL)'s Wage and Hour Division, who specialize in enforcement efforts against industries that exploit vulnerable workers.

The jurisdictional reach our offices enjoy is also relatively broad, as is the statutory framework available to us. In federal human trafficking prosecutions last year, the Department charged violations of the Mann Act, child pornography, RICO, interstate transportation in aid of racketeering, alien harboring, fraud in recruitment and

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<sup>33</sup> CURRIER & FEEHS, *supra* note 17, at 46.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 13; FED. BUREAU OF INVESTIGATIONS, *International Operations*, <https://www.fbi.gov/about/leadership-and-structure/international-operations> (last visited Oct. 4, 2019).

<sup>36</sup> CURRIER & FEEHS, *supra* note 17, at 13.

contracting, mail fraud, witness tampering, and narcotics and firearm offenses, all in addition to human trafficking statutes.<sup>37</sup>

Taken together, the Department has the mandate, tools, and resources to take on these particularly complex cases.<sup>38</sup> The question, then, is what are our offices doing with that special responsibility? What does the data tell us about Department human trafficking prosecutions?

### III. The data on Department human trafficking prosecutions

One report that offers critical insight into the data on that question comes from the Human Trafficking Institute, which happens to be led by former Department attorneys. In April 2019, the group released an exhaustive review of all criminal and civil human trafficking cases handled by federal courts in 2018, which was then compared to data from critical years since the TVPA was signed into law in 2000.<sup>39</sup> The data gives both cause to celebrate and reason to redouble efforts.

Generally, the federal government has charged more human trafficking cases every year from 2000 to present; there are some exceptions, but the trend line is clear.<sup>40</sup> In 2000, the Department charged 4 human trafficking cases; then 55 in 2007; 223 in 2016; and 241 in 2017.<sup>41</sup>

The trend, however, reversed in 2018, with a 29% drop in human trafficking cases charged last year.<sup>42</sup> Just 171 cases were charged, compared to 241 the year prior.<sup>43</sup> The “significant decrease” in initiated human trafficking prosecutions brought the Department back to levels last seen in 2012.<sup>44</sup>

Of course, a drop in cases one year does not make a trend. A review of preliminary figures, however, shows the trend continuing in 2019,

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<sup>37</sup> *Id.* at 27.

<sup>38</sup> Specialized immigration relief for victims of trafficking is also controlled and administered by the federal government, even if not by our Department. *See* 8 U.S.C. § 1255(l).

<sup>39</sup> CURRIER & FEEHS, *supra* note 17.

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

<sup>41</sup> *Id.* at 2.

<sup>42</sup> *Id.* at 6.

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

<sup>44</sup> TIP REPORT, *supra* note 31, at 485.

with the cases charged dropping further.<sup>45</sup> If the Department keeps pace with the first two quarters of 2019, it will charge 4.8% fewer human trafficking cases this year than in 2018.<sup>46</sup>

The number of districts that charged no human trafficking cases in 2018 climbed up to 38.3%, from 22.3% the year prior.<sup>47</sup> That is, 36 districts charged no human trafficking cases in 2018, compared to 21 the year prior. Also last year, 23.4% of districts (22) charged one new human trafficking case, 36.2% of districts (34) charged 2 to 9 new cases, and the districts that charged 10 or more new cases held steady at 2.1%, representing two districts.

Labor trafficking prosecutions remained a particular challenge, as just 12.7% of districts (representing only seven states and territories) handled a new labor trafficking case last year.<sup>48</sup> Forced labor prosecutions, however, remain a challenge worldwide. Despite there being an estimated 24.9 million in slavery today, 189 countries collectively reported just 457 new labor trafficking prosecutions and 259 convictions in 2018.<sup>49</sup>

As for the number of defendants prosecuted, the Department charged 34% fewer defendants in human trafficking cases last year, despite that figure also generally climbing from 2000 to present.<sup>50</sup> The drop was from 450 defendants charged in 2017 to 297 defendants in 2018.<sup>51</sup>

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<sup>45</sup> Notably, these figures may be consistent with a global trend. The 2018 TIP Report noted 36.4% fewer prosecutions globally than in 2017, a drop from 17,471 prosecutions to 11,096. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* (June 2018).

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

<sup>47</sup> *Id.*

<sup>48</sup> CURRIER & FEEHS, *supra* note 17, at vii.

<sup>49</sup> TIP REPORT, *supra* note 31.

<sup>50</sup> CURRIER & FEEHS, *supra* note 17, at ii, iv.

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



The number of formal investigations also fell<sup>52</sup> in 2018 with the Department opening 16% less formal investigations in 2018 (657) than it did the year prior (783).<sup>53</sup>

Despite the fewer cases initiated, convictions are up. The federal government convicted 5.4% more human traffickers in 2018, than in 2017.<sup>54</sup> In 2018, 526 defendants were convicted in human trafficking cases compared to 499 in 2017.<sup>55</sup>

Restitution data also merits our attention. If convicted under the TVPA, restitution is mandatory in the “full amount of the victim’s losses,” including forward-looking rehabilitative costs.<sup>56</sup> Restitution is a particularly powerful tool in trafficking prosecutions to claw back ill-gotten gains and stolen wages, to financially support victim rehabilitation, and to deter and hold financially accountable traffickers who otherwise would profit off of another’s abuse.

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<sup>52</sup> The reason for the drop in investigations, cases charged, and defendants charged is a critical question we must answer, but that is not the subject of this article. One explanation may be that in April 2018, the Department seized Backpage.com after the website was accused of knowingly facilitating sex trafficking through its online forums. *See* Press Release, U.S. Dep’t of Justice, Justice Department Leads Effort To Seize Backpage.com, The Internet’s Leading Forum For Prostitution Ads, and Obtains 93-Count Federal Indictment (Apr. 9, 2018); *see also* U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, BACKPAGE.COM’S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING (2017). A report analyzed the buying and selling of sex in the United States one year after the seizure, and concluded that the commercial sex and human trafficking economies remained “significantly disrupted” and that a replacement for Backpage.com had not yet emerged. CHILDSAFE.AI, BEYOND BACKPAGE 42 (2019). Despite the merit, data suggests the seizure may have disrupted not only the human trafficking economy, but also the type of investigation we’ve grown accustomed to: last year 94.9% of federal trafficking prosecutions were sex trafficking cases; the primary business model (87.7%) was internet-based commercial sex; most cases (81.5%) involved compelled sex at a hotel; and advertisements on Backpage.com “continued to dominate other methods of online solicitation,” representing 87.7% of cases charged. CURRIER & FEEHS, *supra* note 17, at iii, 7, 9, 14.

<sup>53</sup> TIP REPORT, *supra* note 31, at 485.

<sup>54</sup> *Id.*

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

<sup>56</sup> 18 U.S.C. § 1593.

However, from 2009–2012, mandatory restitution was awarded to human trafficking victims in federal cases just 36% of the time.<sup>57</sup> Restitution was far more likely to be awarded in a forced labor case (93.8% of the time) than a sex trafficking case (30.6%) during that time period.<sup>58</sup> From 2012–2016, while requests from prosecutors for restitution improved from 63% to 67%, federal judges actually awarded mandatory restitution less often—27% of the time instead of 36% of the time.<sup>59</sup>

There was some improvement in 2018, with some form of restitution being awarded 40.1% of the time.<sup>60</sup> More than two-thirds (67.1%) of trafficking cases resolved during 2018, however, resulted in the defendant being ordered to pay no fine and no mandatory restitution.<sup>61</sup>

The data also shows positive trends the Department should be proud of. The rates of conviction in cases charged are strong and continuing to improve. In every year since 2000, the Department has increased its conviction rate in human trafficking cases. The conviction rates continue to climb and peaked in 2018 with a conviction in 96.4% of federal human trafficking cases resolved last year.<sup>62</sup>

The conviction rate was even higher in cases that involved child victims last year, with 97.1% of defendants charged with trafficking a minor ending with a conviction.<sup>63</sup> As for the offense of conviction, in 2018, 57.6% of defendants charged a human trafficking case were convicted of at least one count of human trafficking; the remaining 40.4% were convicted of a non-human trafficking offense.<sup>64</sup>

The trial outcomes are also remarkable. While 86.1% of human trafficking cases last year were resolved by plea, in cases where the

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<sup>57</sup> THE HUMAN TRAFFICKING PRO BONO LEGAL CTR., WILMER CUTLER PICKERING HALE AND DOAR LLP, WHEN “MANDATORY” DOES NOT MEAN MANDATORY: FAILURE TO OBTAIN CRIMINAL RESTITUTION IN FEDERAL PROSECUTION OF HUMAN TRAFFICKING CASES IN THE UNITED STATES 12 (2014) [hereinafter HT PRO BONO LEGAL CTR. AND WILMER HALE].

<sup>58</sup> *Id.* at 11–12.

<sup>59</sup> *Id.* at 1–2.

<sup>60</sup> CURRIER & FEEHS, *supra* note 17, at 32.

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

<sup>62</sup> *Id.* at 24.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 26.

defendant insisted on a jury trial in 2018, the Department saw a 100% conviction rate.<sup>65</sup> That is, every human trafficking case the Department put before a jury in 2018 resulted in a conviction.

The average sentence last year for a defendant in a trafficking case was 135 months.<sup>66</sup> Sentences ranged from two months to 540 months.<sup>67</sup> Convictions arising from a guilty plea carried an average sentence of 117 months, and convictions returned by a jury carried an average sentence more than double that at 268 months.<sup>68</sup> Where the defendant was convicted of at least one count of the TVPA's sex trafficking statute<sup>69</sup> the average sentence was 209 months.<sup>70</sup> Finally, in 2018 federal courts ordered a term of imprisonment following nearly all (91.9%) convictions in human trafficking cases.<sup>71</sup> The high conviction rates followed by substantial terms of imprisonment demonstrate the quality of the cases agents build and the Department prosecutes.

As for the Department's financial investment in combating trafficking, figures show the Department has significantly increased its investment in law enforcement efforts and direct services for victims. During fiscal year 2018, the Department provided \$31.2 million to 45 agencies offering direct services for victims of trafficking in the United States.<sup>72</sup> This is nearly double the \$16.2 million investment (with 18 providers) in fiscal year 2017.<sup>73</sup> Also last year, the Department provided \$2.7 million in training and technical assistance to service providers, a new \$1.2 million for service providers serving labor trafficking survivors, and \$1.8 million for mentoring and direct service provision for child victims of sex trafficking.<sup>74</sup> Department grantees served more victims in 2018 than they did in 2017.

One such worthy investment has played out in the District of South Carolina over the last year. In 2018, the Department's Office of

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<sup>65</sup> *Id.* at 24.

<sup>66</sup> *Id.* at 29.

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

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

<sup>69</sup> 18 U.S.C. § 1591.

<sup>70</sup> CURRIER & FEEHS, *supra* note 17, at 29.

<sup>71</sup> *Id.* at 28.

<sup>72</sup> TIP REPORT, *supra* note 31, at 486.

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

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

Juvenile Justice and Delinquency Prevention awarded a substantial grant to the University of South Carolina’s Children’s Law Center to support a project to collect and analyze state and local data on high risk runaways and system-involved youth. The grant also supports a workgroup comprised of city, county, state, federal, and child welfare agencies who are working together to create an efficient screening tool for road officers, an in-depth tool for investigators, and to develop specialized law enforcement training all with the goal to help better identify and respond to juvenile victims of trafficking. The tools are tailored for South Carolina, and the early results are promising.

Finally, the United States is generally recognized as a global leader in enforcement against human trafficking. The TIP Report gave our government the highest rating for its response to trafficking in 2019.<sup>75</sup> The Global Slavery Index (GSI) found our government was third in taking the most action to respond to trafficking, behind the Netherlands and the United Kingdom.<sup>76</sup> Notably, the GSI indicated governments like ours are most challenged where good policy was not matched with effective enforcement.<sup>77</sup> And that is the work of our Department—matching good policy with effective enforcement.

#### **IV. What are the rule of law implications, and where do we go from here?**

H.C.’s traffickers have never been charged or convicted. Part of the problem, H.C. explained, was that she didn’t understand what happened to her was human trafficking until nine years after she was out of her exploitation. During her 18 years of forced commercial sexual exploitation, she never heard of human trafficking. Instead, she carried the shame and guilt of believing she was not a victim, but instead a criminal breaking the law together with her trafficker.

When asked what it means for her to not see her trafficker convicted, H.C. explained,

I think about it often, and I know they continued to abuse women, causing life-long damage to others for their personal gain. And it’s discouraging to me because I feel like there was a great injustice in my life and

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<sup>75</sup> TIP REPORT, *supra* note 31, at 444–49.

<sup>76</sup> GLOBAL SLAVERY INDEX, MEASUREMENT ACTION FREEDOM 12 (2019).

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

because there has been no justice, there has been no closure. No one has held them accountable for what they did. They have gotten a free ride to continue to hurt others and I'm left to pick up the pieces.

She recognizes that during her abuse, she believed what she was told—that cooperation with law enforcement would never end well for her. H.C. still today, however, wishes a court had looked to her and told her what her trafficker did was wrong and that she is a victim and not a criminal.

H.C.'s perspective today is compelling, "I can't undo what was done to me over the 18 years of abuse, but I will be a voice today for those who don't have theirs. I will speak out for those who are in the shoes I once was."

M.C.'s trafficker, on the other hand, was convicted and is now serving 25 years in federal prison. As with many victims, M.C. was drawn in and out of her trafficking experience for decades. Although M.C. was separated from her trafficker and his abuse for *11 years* before his arrest on federal charges, there was always a feeling that he would reappear and, when he did, the manipulation and control would return as if they never missed a day.

"The fear and intimidation never left. They say we live in a free world, but I was always looking over my shoulder. I was never free as long as he was." M.C. described how she reacted when her trafficker walked with a new victim into a restaurant she was operating: "I couldn't breathe. I couldn't exhale. I knew he couldn't force me to do anything, but with just his presence, his voice, the sight of him, he had total control all over again."

Her trafficker's arrest and conviction changed her life. "The conviction meant I could breathe." She remembers getting the text message that he was sentenced and she asked the attorney if he was sure. She couldn't believe it. She'll never delete that message. "For the first time in my adult life I didn't have to look over my shoulder. His sentence meant I had some measure of safety. I was finally free."

## A. What are the rule of law implications of the data on Department human trafficking prosecutions?

The existence of modern slavery itself “indicates the rule of law . . . is at least threatened.”<sup>78</sup> The idea that there are men, women, and children living today in our districts without the freedom of movement or their most basic rights is a sign that the rule of law does not always rule the day.

Like H.C., a significant portion of victims in our districts may never see their traffickers charged or convicted. A 2004 study, while dated, estimated that in the United States only one-third of human trafficking cases identified by service providers come to the attention of law enforcement, to say nothing of the outcome of that notice.<sup>79</sup> That is, two-thirds of *identified cases* in our country, according to that study, never came to the attention of law enforcement. From the perspective of the victims—maybe even the majority of victims—who never see their traffickers prosecuted, what does the rule of law look like for them?

When victims cannot look to our federal courts and have confidence their traffickers will be held accountable, for them, publically known and stable law does not rule the day.

And when fewer victims are being protected and fewer traffickers are being prosecuted, the public loses confidence in the rule of law.

Finally, consider what the data may tell to the trafficker. What are the costs to society if the threat of detection for the trafficker isn’t much of a risk? What if it is rational to believe that the likelihood of charges resulting and a conviction following are so low that law enforcement doesn’t represent much of a risk?

Against the backdrop of that increasingly low risk, consider the profit a trafficker stands to make from the trade. As long as the risk is low and the reward is high, this particularly cruel violence will continue in our districts. The question, then, is how do we respond?

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<sup>78</sup> U.N. OFFICE ON DRUGS & CRIME, AN INTRODUCTION TO HUMAN TRAFFICKING: VULNERABILITY, IMPACT AND ACTION (2008).

<sup>79</sup> Bales, *supra* note 8, at 285 (citing Free the Slaves and the Human Rights Center, University of California Berkeley, Hidden Slaves: Forced Labor in the United States (2004)).

## B. Where do we go from here?

As for the drop in cases and defendants charged, one model that has delivered results and earned the Department's attention is the Anti-Trafficking Coordination Team (ACTeam) Initiative. Piloted in 2012–2013 by the Civil Rights Division's HTPU and other key federal anti-trafficking enforcement agencies, the program dramatically drove up prosecutions and convictions in the six participating districts (with ACTeams operating in Atlanta, Georgia; El Paso, Texas; Kansas City, Missouri; Los Angeles, California; Memphis, Tennessee; and Miami, Florida).<sup>80</sup> The six participating districts were designated through a competitive, nationwide, interagency selection process. Districts seeking designation were required to submit applications signed by the highest-ranking official of each participating federal agency declaring each agency's commitment to developing complex trafficking prosecutions in close coordination with each other and national partners.

In addition, the program also provided extensive infusions of anti-trafficking expertise from the national anti-trafficking experts at each participating agency's headquarters: HTPU, Executive Office for United States Attorneys (EOUSA), FBI, Homeland Security Investigations (HIS), and DOL. This model aimed to pour subject matter expertise into front line enforcement efforts, including an Advanced Human Trafficking Training Program training for agents, victim specialists and prosecutors, followed by a continuing partnership with the interagency group to brainstorm, troubleshoot, and strategize as investigations and prosecutions moved forward. The streamlined coordination delivered results.

Phase one of the ACTeam program led to dramatic increases in human trafficking prosecutions and convictions. In participating districts, human trafficking cases filed and defendants charged increased 119% and 114% during the pilot, compared to 18% and 12%, respectively, in non-participating districts.<sup>81</sup> ACTeam districts also saw an 86% rise in convictions, compared to 14% rise in

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<sup>80</sup> *Special Initiatives*, U.S. DEP'T OF JUST., <https://www.justice.gov/humantrafficking/special-initiatives#act> (last visited Aug. 31, 2019).

<sup>81</sup> ANTI-TRAFFICKING COORDINATION TEAM (ACTEAM) INITIATIVE FACT SHEET, U.S. DEP'T OF JUSTICE (2015).

non-participating districts.<sup>82</sup> Taken together, in fiscal years 2012 and 2013, although the six participating districts represented just 7% of the districts, they delivered 58% of the national increase in cases filed, 64% of the national increase in defendants charged, and 56% of the national increase in defendants convicted.<sup>83</sup> The ACTeam model equipped these six districts to play outsized roles in the nation's response to human trafficking.

Phase two of the program was launched in 2016 in six additional cities—Portland, Maine; Cleveland, Ohio; Minneapolis, Minnesota; Newark, New Jersey; Portland, Oregon; and Sacramento, California—and it saw similar results.<sup>84</sup> Again, the program's success was dramatic. Participating districts saw a 75% increase in human trafficking defendants charged, compared to a 1% increase in non-participating districts.<sup>85</sup> Cases charged grew at *four times the rate* in participating districts and defendants convicted of human trafficking increased by 106%, compared to 36% in other districts.<sup>86</sup>

These results show that our government has the ability to drive up federal human trafficking prosecutions when the investment is made. Implementing a third iteration of this program without delay would help counteract the drop in human trafficking prosecutions the Department has seen in the last two years. We know that results will follow if key anti-trafficking enforcement partners commit, jointly, to streamline and coordinate the many investigation and prosecution partners necessary to bring high-impact prosecutions.

As for the low rates of mandatory restitution ordered, prosecutors should request mandatory restitution be awarded in every human trafficking case, rather than requesting it just 67% of the time.<sup>87</sup> Prosecutors also should fully educate the court on the elements of restitution and on its mandatory nature. A trafficking victim's right to be made whole is not an option in these cases; it's codified and

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<sup>82</sup> *Id.*

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

<sup>84</sup> *Departments of Justice, Homeland Security and Labor Announce Selection of Phase II Anti-Trafficking Coordination Teams*, U.S. DEP'T OF JUST., <https://www.justice.gov/opa/pr/departments-justice-homeland-security-and-labor-announce-selection-phase-ii-anti-trafficking> (last visited Nov. 1, 2019).

<sup>85</sup> Beth A. Williams, Assistant Att'y Gen. for the Office of Legal Policy, Remarks at 2019 JuST Conference, U.S. Dep't of Justice (2019).

<sup>86</sup> *Id.*

<sup>87</sup> See HT PRO BONO LEGAL CTR. AND WILMER HALE, *supra* note 57, at 1–2.



mandatory under both the Crime Victims' Rights Act and the TVPA.<sup>88</sup> In a human trafficking prosecution, stipulated restitution orders can be included in plea agreements, even in cases where the defendant did not plea to a Chapter 77 trafficking offense. If there is a failure in mandatory restitution being awarded, let it not be on our account.

On the quality of restitution orders, one promising practice that has led to robust awards is to request the court appoint a guardian ad litem (GAL) or pro bono counsel to advocate for the victim's interests as the court considers the value of the victims' services and victims' losses, including the forward-looking costs victims may bear as a result of their abuse. In *United States v. Lewis*, for example, the court relied on the report of a court-appointed GAL, which incorporated an expert report.<sup>89</sup> That expert reviewed foster system records and interviewed every victim and their GALs, probation officers, social workers, therapists, foster parents, and biological parents.<sup>90</sup> The court then ordered Lewis, who trafficked four children into the sex trade, to pay restitution in the amount of \$1,215,000; \$1,151,300; \$845,165; and \$680,590 to the four victims, respectively.<sup>91</sup>

Consider inviting experts to your district, as we have ours, to train stakeholders and prosecutors on investigating and prosecuting human trafficking cases. Find ways to engage district court judges on this question, as well, as the data shows prosecutors' requests for restitution is enjoying less success than in years past.<sup>92</sup>

In many respects, however, the Department should stay the course. The 96.4% conviction rate last year, the 97.1% conviction rate in child victim cases, and the 100% conviction rate in jury trials are remarkable.<sup>93</sup> These figures show the agents and prosecutors are bringing high quality cases and that they are doing so with excellence, and these results deserve our recognition.

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<sup>88</sup> See 18 U.S.C. § 3771(a)(6) (Crime Victims' Rights Act); 18 U.S.C. § 1593 (TVPA, Mandatory Restitution).

<sup>89</sup> 791 F. Supp. 2d 81, 86 (D.D.C. 2011). For further discussion of the restitution award in *Lewis*, see Alexandra F. Levy & Martina E. Vandenberg, *Breaking the Law: The Failure to Award Mandatory Criminal Restitution to Victims in Sex Trafficking Cases*, 60 ST. LOUIS UNIV. L.J. 43, 53–62 (2015).

<sup>90</sup> Levy & Vandenberg, *supra* note 89, at 60.

<sup>91</sup> *Id.* (citing Restitution Order at 1, *United States v. Lewis*, No. 1:09-cr-00213 (D.D.C. Nov. 17, 2010), ECF No. 30).

<sup>92</sup> CURRIER & FEEHS, *supra* note 17, at 2.

<sup>93</sup> See HT PRO BONO LEGAL CTR. AND WILMER HALE, *supra* note 57, at 24, 29.

The challenge, then, is how to scale their good work. Critically, this includes scaling the work of agents who are effective on this issue to colleagues within their own agency. This also means pouring training and technical assistance into our front-line state and local law enforcement partners who are often the first to encounter potential trafficking cases.

Our district has answered that question, in part, by training state and federal agencies and prosecutors. This includes participation in human trafficking workgroups and we welcomed HTPU to our district for a day-long training on human trafficking investigations and prosecutions.

We've also focused on developing close working relationships with state and local agencies, including vice and special victims units, who may be the first to encounter trafficking victims. This includes agencies working on labor issues, licensing, and inspection, who may encounter forced and exploitative labor. When our state and local partners encounter potential human trafficking cases, they should already have a working relationship with the federal agents and Assistant United States Attorneys (AUSAs) who work these cases and remain as available as possible to assist.

The Department should also continue its substantial financial investment in scaling the capacity of law enforcement and service providers to respond to trafficking. Victims who survive this particular type of violence often experience severe forms of trauma and instability. Without a robust community of service providers to provide specialized aftercare and housing, we should expect the same challenges where victims face spiraling instability and trauma. As a Department and on behalf of our individual offices, we should continue to support specialized service providers, including those who provide housing. Many of the group homes our minor victims are placed with are not equipped to handle the particular challenges trafficking victims present, and an inappropriate placement can turn a group home into a recruitment center for minor victims, a lesson South Carolina has learned the hard way. Without robust specialized services, justice from the victim's perspective, and our ability to investigate and prosecute these cases, will be limited.

HTPU has also taken proactive steps to bring together human trafficking prosecutors across the 94 districts. For example, HTPU and EOUSA recently facilitated a multi-day training for human trafficking prosecutors at the National Advocacy Center, and the

Office of the Deputy Attorney General, in coordination with HTPU and CEOS, has initiated a monthly call to engage directly with human trafficking coordinators across the country. These practices aim to develop networks of support as issues arise and further develop subject matter expertise in the U.S. Attorneys' Offices (USAO).

To increase the identification of trafficking cases by the public, consider ways prosecutors in our offices can participate in education and outreach, including through engagement with local and state human trafficking task forces. These groups are often public task forces and are where much of the education and outreach work is organized.

Education, training, and partnerships on this issue must also be shared with state social services agencies. In South Carolina, those are the Department of Social Services, the Department of Juvenile Justice, and stakeholders in the foster system. An overwhelming percentage of minor trafficking victims are system-involved: 88% of the endangered runaways who were likely child sex trafficking victims were in the care of social services or foster care when they ran, as reported in a recent year to the National Center for Missing and Exploited Children.<sup>94</sup> If agencies charged with protecting against abuse and neglect are not able to identify trafficking and collaborate with law enforcement, we will miss actionable cases, traffickers will not be held accountable, and we will continue to hear from minor victims that the system failed to protect them.

The USAO for the District of South Carolina has also had success in training the state family court bench and building relationships with its judges, who preside over the great majority of abuse, neglect, runaway, and juvenile delinquency cases in South Carolina. Anecdotally, through this partnership, family court judges in our state have identified potential cases of human trafficking and proactively reached out to both our office and FBI to investigate further. Where these relationships are strong, it becomes that much harder for a system-involved minor to fall through the cracks without being identified as a victim of trafficking.

While there is much to celebrate, as with any organization, we should welcome data and always be prepared to find ways to improve.

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<sup>94</sup> *The Facts*, POLARIS, <https://polarisproject.org/human-trafficking/facts> (last visited Sept. 24, 2019) (citing data from National Center for Missing and Exploited Children).

This is particularly true when taking on our special responsibility to investigate and prosecute modern slavery.

The greatest challenge, then, may be to expand the success of our Department in combatting human trafficking, so that justice is something victims in our districts come to expect. These cases will always be challenging and complex. But traffickers in our districts should know their trade is dangerous because federal law enforcement will not tolerate human trafficking, and the public should have confidence that publically known and stable law will rule the day. That is the work of our Department and that will be our challenge in the days ahead.

### **About the Author**

**Elliott B. Daniels** is an AUSA for the District of South Carolina, where he serves in the violent crime section and prosecutes human trafficking cases. Before his time with the USAO, he founded and led a statewide network of attorneys providing pro bono counsel to survivors of trafficking, and he has held various leadership roles in the state's response to human trafficking.

# The Rule of Law Collaborative: A Center of Practical, Interdisciplinary Research, and Engagement on Pressing Rule of Law Issues Around the World

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## I. Introduction

Over the past 25 years, a number of academic institutions have developed centers aimed at addressing rule of law challenges around the world. But few have grown as quickly—or had as much of an impact—as the Rule of Law Collaborative (ROLC) at the University of South Carolina (University). Founded in 2010, ROLC is committed to the development of rule of law as a discipline, the advancement of theoretical and research-based applications in the field, and the refinement of policies relating to rule of law development. To those ends, ROLC brings a unique blend of academic and practitioner expertise.

In the years immediately following its founding, ROLC developed a diverse network of on-campus faculty engaged in work on rule of law. Today, over 60 faculty across 18 disciplines form the on-campus ROLC network. Disciplines represented include business, education, law, political science, public health, social work, and many others. The research interests represented are equally diverse, including international business, legal reform, patterns of migration, women's rights, and more. In addition to this network, ROLC has a professional staff with extensive on-the-ground experience implementing a wide variety of rule of law activities around the world in partnership with local and international non-governmental organizations (NGOs), as well as with government and multilateral donors.

To date, ROLC has delivered training courses and symposia to over 2,000 professionals and other attendees; convened over 60 seminars, colloquia, and symposia; developed over 40 rule of law

modules; and engaged representatives from more than 200 organizations around the world in its activities.

Moving forward, ROLC seeks to expand the diversity of its rule of law activities—academic and practice-oriented—both to advance a more robust understanding of the rule of law and to address real-world challenges to it. As ROLC expands its research and programmatic offerings, it remains grounded in a fundamentally interdisciplinary understanding of rule of law, a view that is discussed in more detail below. By bringing together diverse scholarly expertise on issues that impact the rule of law, along with the expertise of its professional staff and extended practitioner network worldwide, ROLC will continue to shape the rule of law field at the intersection of practice and intellectual inquiry.

## II. Mission and vision

### A. Understanding the rule of law

In its approach to rule of law studies and programming, ROLC views the concept of rule of law within a complex system of interconnected inputs and outputs—legal, political, economic, and social. In *Initial Reflections on an Interdisciplinary Approach to Rule of Law Studies*, my colleague and co-author, Aparna Polavarapu, and I describe this conceptualization as akin to a neural network.<sup>1</sup> Much as the brain sends signals to and receives signals from the peripheral nervous system throughout the body, the rule of law influences and is influenced by peripheral factors beyond formal legal institutions.<sup>2</sup> Examples of such factors include conflict, literacy rates, access to potable water, and a society's attitudes towards women, just to name a few.

Put another way, at its core, rule of law concerns the relationship between governing authority and the governed, and that relationship encompasses inputs and outputs across all domains of civic life, everything from political participation and the administration of justice to public health and artistic expression. Across all such domains, ROLC conceives of both *access* and *quality* as important

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<sup>1</sup> Aparna Polavarapu & Joel Samuels, *Initial Reflections on an Interdisciplinary Approach to Rule of Law Studies*, 8 L. AND DEV. REV. 277 (2015).

<sup>2</sup> See *id.* at 285.

measures of the inputs in the neural network analogy, and the law provides a framework for both of those factors.

In that framework, the letter of the law is an important factor in creating space for meaningful public participation in those areas—an important indicator of the rule of law—but *de jure* guarantees are not enough in and of themselves. To illustrate with an example, in a World Resources Institute study that examined rural communities in Mongolia, Indonesia, and Thailand, Excell and Moses found that, despite the existence of laws requiring proactive disclosure of information about water quality and its impact on local communities, disclosure of that information in practice fell short of requirements in all the communities examined.<sup>3</sup> As a result, while those communities reported problems from water pollution, local residents who attempted to advocate for water quality protections not only faced the physical risks of contaminated water supplies, but also the limitations due to the lack of basic information necessary to articulate their needs or demands effectively.<sup>4</sup>

To take another example, during a symposium convened by ROLC in South Africa regarding youth and the rule of law in Sub-Saharan Africa, several experts from the region stressed the effects that *perceptions* have on access to and the quality of justice for young people across the region.<sup>5</sup> They noted that, even in contexts where the laws grant young people access to the justice system, many young people continue to view their countries' justice systems as mysterious, opaque, or distant.<sup>6</sup> In some of these cases, factors well beyond the law or the quality of the justice system itself—such as inadequate access to public information, or a general lack of engagement between the state and its youth—can have a deterrent effect on youth who would otherwise seek to access the justice system.<sup>7</sup> As symposium participants noted, improvements in areas such as education or mass communication could help alleviate this problem, and this dynamic

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<sup>3</sup> CAROLE EXCELL & ELIZABETH MOSES, THIRSTING FOR JUSTICE: TRANSPARENCY AND POOR PEOPLE'S STRUGGLE FOR CLEAN WATER IN INDONESIA, MONGOLIA, AND THAILAND, WORLD RESOURCES INST. 6 (2017).

<sup>4</sup> *Id.* at 18–24.

<sup>5</sup> UNIV. OF S.C. RULE OF LAW COLLABORATIVE & JUSTICE SECTOR TRAINING, RESEARCH & COORDINATION PROGRAM (JUSTRAC), YOUTH AND THE RULE OF LAW IN SUB-SAHARAN AFRICA: FINAL REPORT 4–5 (2017).

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *See id.* at 5.

further illustrates why ROLC chooses to treat such issue areas as integral to the rule of law.<sup>8</sup>

Consistent with this view, ROLC understands rule of law as distinct from the “law and development” movement of the 1950s, 1960s, and 1970s. While law and development focused primarily on the effects of legal reform on economic development, rule of law concerns a broader array of human development factors, as explained above.<sup>9</sup> In addition, as Polavarapu and I argue, the relationship is not a one-way street. Legal developments can influence other human development factors, and vice versa.<sup>10</sup> For example, laws that provide greater access to education or health care for underserved or marginalized segments of a given society—say, women, youth, or indigenous peoples—may not only improve those outcomes for those people, but also reduce obstacles for them to engage in civic advocacy and thereby play a role in shaping legal protections for their rights in those areas. This is an example of precisely the kind of feedback loop that defines the neural network conception of rule of law.

When facing real-world challenges like the one described above, the complexity of these connections between law and other aspects of society can be daunting. Leading scholar Brian Tamanaha argues, for example, that the complexity of this interconnected network is an obstacle to the success of rule of law programs, which tend to be defined relatively narrowly.<sup>11</sup> In this view, those who wish to engage with one particular pathway—for example law and the economy—will be frustrated by the effects of those other pathways that lie outside the scope they have defined for themselves.<sup>12</sup>

In contrast to Tamanaha’s view, ROLC sees this interconnected nature as the starting point from which to begin to understand rule of law and influence meaningful change. As Polavarapu and I explain, ROLC understands the field of rule of law studies in terms of the neural net framework described above.<sup>13</sup> Indeed, while the law and legal institutions are central to the rule of law, factors such as access

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<sup>8</sup> See *id.* at 13.

<sup>9</sup> See Tom Ginsburg, *Does Law Matter for Economic Development? Evidence From East Asia*, 34 L. & SOC’Y REV. 829, 829–30 (2000).

<sup>10</sup> Polavarapu & Samuels, *supra* note 1, at 290–91.

<sup>11</sup> Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT’L L. J. 209, 214, 224 (2011).

<sup>12</sup> *Id.* at 224.

<sup>13</sup> Polavarapu & Samuels, *supra* note 1, at 277.



to education and potable water are equally important, as illustrated by the examples described above.<sup>14</sup>

Similar to the neural network analogy, some academics and practitioners understand rule of law within a “systems” framework. For example, Leroux-Martin and O’Connor argue for a “systems thinking” approach to rule of law because, among other factors, it accounts for the interconnected nature of law with a wide range of other issue areas, it acknowledges the importance of contextual factors beyond the arbitrarily defined scope of a given program or study, and it encourages reevaluation of assumptions and appropriate course correction.<sup>15</sup>

In embracing this complexity, ROLC looks beyond the state and Western tradition in its approach to understanding rule of law. While formal institutions of the state—such as legislatures and courts—are clearly important actors in the rule of law sphere, others—such as religious leaders, tribal leaders, or even vigilante groups—can be as important in some contexts. To take an example, surveys conducted in Kano State, Nigeria by Yahaya and Bello found that community members generally had higher levels of confidence in local vigilante forces than in the police, whom they viewed as ineffective and corrupt.<sup>16</sup>

Even if well-intentioned international rule-of-law efforts by Western countries raise an inherent specter of imperialism, and ROLC seeks to understand and minimize that imperialist quality through its innovative, interdisciplinary approach to rule of law studies. As Polavarapu and I argue, involving voices from a variety of academic disciplines focuses a critical lens on the colonial and imperialist dimensions of international rule of law programming.<sup>17</sup> Scholars whose work centers on such critical analysis can complement and balance those whose work takes a more traditional, state-centered

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<sup>14</sup> *Id.* at 286.

<sup>15</sup> PHILIPPE LEROUX-MARTIN & VIVIENNE O’CONNOR, UNITED STATES INSTIT. FOR PEACE, SYSTEMS THINKING FOR PEACEBUILDING AND RULE OF LAW: SUPPORTING COMPLEX REFORMS IN CONFLICT-AFFECTED ENVIRONMENTS (2017).

<sup>16</sup> Jibrin Ubale Yahya & Musa Mohammed Bello, *The Impact of Vigilantism and Crime Control in Contemporary Nigeria: A Case Study of Gezawa Local Government Area, Kano State, Nigeria (2010–2015)*, 3 INT’L J. OF RECENT INNOVATIONS IN ACAD. RES. 115, 120, 136 (2019).

<sup>17</sup> Polavarapu & Samuels, *supra* note 1, at 288.

approach. ROLC embraces this view in its events, as well. For example, in the April 2017 Bridging the Divide symposium, described above, ROLC turned the conventional model of exchange on its head by inviting policing experts from countries in the Global South—South Africa, Peru, and Kenya—to impart lessons from their own experiences to a U.S. audience, rather than asking U.S. or European experts to lecture a Global South audience.<sup>18</sup>

## B. The institution

In a concrete sign of its interdisciplinary view of rule of law, ROLC reports directly to the Office of the Provost at the University. Casual observers sometimes assume that ROLC reports to the Dean of the School of Law, but this is not the case. A direct reporting line to the Office of the Provost helps ROLC ensure no primary affiliation with any particular academic unit, as well as maintain an interdisciplinary network of faculty. ROLC's affiliated faculty network currently contains over 60 members from all across the University, and it includes a small number from outside institutions. Among these experts are 23 core faculty, for whom rule of law is at the core of their teaching and research interests.

In its activities, ROLC seeks ways to support the research of its affiliated faculty, such as by including them in on-campus symposia and panel discussions, as well as by supporting individual research projects. The Justice Sector Training, Research and Coordination (JUSTRAC) program, for example, supported eight research projects<sup>19</sup>

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<sup>18</sup> Symposium, *Bridging the Divide: African-American Communities and Law Enforcement*, Univ. of S.C. Rule of Law Collaborative (2017).

<sup>19</sup> See PAYAL SHAH, UNIV. OF S.C. RULE OF LAW COLLABORATIVE & JUSTRAC, WOMEN'S EDUCATION, EMPOWERMENT, AND HUMAN RIGHTS EDUCATION: THE MAHILA SAMAKHYA PROGRAM IN GUJARAT, INDIA (2015); APARNA POLAVARAPU, UNIV. OF S.C. RULE OF LAW COLLABORATIVE & JUSTRAC, BEYOND ACCESS: THE ADMINISTRATION OF JUSTICE FOR WOMEN IN UGANDA (2015); BENJAMIN ROTH, UNIV. OF S.C. RULE OF LAW COLLABORATIVE & JUSTRAC, PREVENTING CRIME AND PROMOTING DEVELOPMENT: THE CASE OF YOUTH OUTREACH CENTERS IN EL SALVADOR (2016); UNIV. OF S.C. RULE OF LAW COLLABORATIVE, ESTABLISHING AND MAINTAINING RIPARIAN RIGHTS IN CONSTRUCTED WETLANDS IN SOUTHERN IRAQ (2016); BREANNE LEIGH GRACE, UNIV. OF S.C. RULE OF LAW COLLABORATIVE & JUSTRAC, COMPLEX VULNERABILITY AND ACCESS TO JUSTICE FOR FORMER REFUGEE POPULATIONS: THE CASE OF THE SOMALI ZIGULA IN TANZANIA (2018); FIONA B. MANGAN, UNIV. OF S.C. RULE OF

conducted by members of ROLC's network on topics ranging from human rights education and access to justice for women to security sector reform and youth violence prevention. And while the research spanned a diverse range of topics, the academic disciplines informing the analysis were also diverse, including, for example, education, law, and sociology.

In ROLC's view, integrating a diverse array of academic methodologies into its activities helps advance a robust understanding of the rule of law by accounting for the complexity described in the preceding section. While some may equate methodological diversity with conceptual incoherence, ROLC views it as a pragmatic approach and a core strength.<sup>20</sup> Where a legal scholar may be able to identify shortcomings in the legal framework for access to justice, for example, an anthropologist may be better equipped to understand access to justice as a function of the perceptions and lived experience of a particular community. Every discipline has strengths and limitations in approaching questions of the rule of law, but ROLC seeks to create synergy through those strengths—as well as checks and balances on those limitations—by bringing a constellation of expertise together for a common purpose. Indeed, as Polavarapu and I note, given the practical role that scholarship can play in accompanying and informing programs that seek to address real-world rule of law problems, adopting a single, exclusive methodology would constrain growth.<sup>21</sup> In their words, “[d]rawing from a broad range of disciplines using different methodologies, rule of law scholarship is able to offer a more accurate picture of the state of affairs in a given country or realm and hopefully, in turn, encourage the development of better policies and programs.”<sup>22</sup>

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LAW COLLABORATIVE & JUSTRAC, CONSIDERING THE ROLE OF SECURITY SECTOR REFORM AND POLICE REFORM WHEN TACKLING ORGANIZED CRIME IN POST-CONFLICT ENVIRONMENTS (2018); E. DOYLE STEVICK, UNIV. OF S.C. RULE OF LAW COLLABORATIVE & JUSTRAC, HOW CAN SCHOOLS PROMOTE RULE OF LAW NORMS IN TRANSITIONING SOCIETIES? LESSONS FROM POST-COMMUNIST EUROPE (2019); BENJAMIN ROTH, JUSTRAC, EXPLORING THE LOCAL ORGANIZATIONAL RESPONSE TO VENEZUELAN MIGRANTS IN COLOMBIA (Sept. 2019).

<sup>20</sup> Polavarapu & Samuels, *supra* note 1, at 287.

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

<sup>22</sup> *Id.*

ROLC's mission is at once intellectual and practical, and in addition to its extensive network of faculty, ROLC also relies on the experience and expertise of its professional staff. Together, the ROLC staff have experience in government, academia, and international organizations; as grant recipients and grant administrators; and in virtually every major region of the world. Just as a multitude of academic methodologies complement and temper one another, so do the perspectives and expertise of the ROLC staff.

### **III. Overview of activities**

#### **A. U.S. government engagement**

In its early years—between 2010 and 2014—ROLC worked with the U.S. Department of Defense (DOD) through a contract under which ROLC provided training courses and workshops for the DOD and its interagency counterparts with rule of law mandates. ROLC provided rule of law short courses throughout the contract period, as well as thematic rule of law workshops, with attendance ranging from 35–60 participants per session. ROLC used the expertise of its faculty network, as well as that of outside experts, to increase the skills and knowledge of practitioners from the DOD, as well as the Department of State, Department of Justice (Department), and the Agency for International Development (USAID). The rule of law short courses were coordinated with the periodic pre-deployment training sessions held at the Pentagon, enabling DOD attendees to benefit from the training as part of their preparation for deployment. It was during this time that ROLC began partnering and collaborating with other federal agencies to expand its engagement with the U.S. government.

Soon, ROLC's role as a leading center for U.S. government interagency rule of law training expanded significantly. In 2014, ROLC began implementing activities as part of the JUSTRAC program,<sup>23</sup> through a cooperative agreement with the Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL).

From 2014–2019, under the rubric of JUSTRAC, ROLC designed and delivered 19 JUSTRAC training courses and 15 JUSTRAC symposia, all designed to enhance the ability of those engaged in rule

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<sup>23</sup> See JUSTRAC, <http://justrac.org/> (last visited Sept. 18, 2019).

of law and justice sector reform assistance to be more effective in their work. ROLC's training offerings ranged from an introductory curriculum—which introduced participants to foundational concepts in rule of law and justice sector reform—to advanced and specialized courses that delved into such topics as anti-corruption, security sector reform, and the dynamics of major families of legal systems present in countries around the world.

In addition to the training programs, during that same period, ROLC held nine thematic symposia in Washington, D.C., covering such topics as the rights of women in mixed legal systems, rule of law and the environment, and innovation in rule of law programming. ROLC also held six geographically focused symposia in countries abroad, covering Latin America, Sub-Saharan Africa, the Middle East and North Africa, and Eastern Europe and the former Soviet Union. Through these various symposia, ROLC not only exposed practitioners to diverse views on these topics, but also produced several white papers that present actionable policy recommendations generated through focused working groups comprising leading experts in the field.<sup>24</sup>

In 2018, ROLC was awarded a follow-on cooperative agreement from INL, for the Justice Sector Training, Research, and Coordination Plus (JUSTRAC+) program. Through the JUSTRAC+ program, ROLC will build on past successes and continue working with the U.S. government to design and deliver knowledge and skill-building activities for interagency rule of law and justice sector reform

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<sup>24</sup> UNIV. OF S.C. RULE OF LAW COLLAB. & JUSTRAC, PROMOTING THE RULE OF LAW IN THE POST-SOVIET REGION THROUGH STATE AND NON-STATE COLLABORATION: FINAL REPORT (2019); UNIV. OF S.C. RULE OF LAW COLLABORATIVE & JUSTRAC, TRANSITIONING TO THE ACCUSATORIAL MODEL: ADDRESSING CHALLENGES FOR LEGAL EDUCATION AND TRAINING IN LATIN AMERICA: FINAL REPORT (2018); UNIV. OF S.C. RULE OF LAW COLLABORATIVE & JUSTRAC, YOUTH AND THE RULE OF LAW IN SUB-SAHARAN AFRICA: FINAL REPORT (2017); UNIV. OF S.C. RULE OF LAW COLLABORATIVE & JUSTRAC, EXPLORING THE RELATIONSHIP BETWEEN THE RULE OF LAW AND VIOLENT EXTREMISM IN THE MIDDLE EAST: FINAL REPORT (2016); UNIV. OF S.C. RULE OF LAW COLLABORATIVE & JUSTRAC, ENDURING PROSPERITY AND THE RULE OF LAW FOR THE NORTHERN TRIANGLE: FINAL REPORT (2015); UNIV. OF S.C. RULE OF LAW COLLABORATIVE & JUSTRAC, A FORUM ON ELIMINATING CORRUPTION AND PROMOTING ECONOMIC DEVELOPMENT IN UKRAINE: FINAL REPORT (2015).

practitioners. Under JUSTRAC+, ROLC will further develop, refine, and expand its offerings, such as including program design workshops for small groups, in which participants are challenged with applying the principles and concepts learned to design a hypothetical rule of law program, which is evaluated and critiqued by the instructors.

In addition to these activities, ROLC has engaged the Department of State through the Combatting Corruption in Conflict Countries (C-4) initiative, which was awarded to ROLC by INL in 2018. Under the C-4 initiative, ROLC has conducted research and developed an innovative methodology to understand and challenge corrupt networks, schemes, and perpetrators in conflict and post-conflict environments.

## **B. International initiatives**

Since its founding, ROLC has enhanced the impact of its work by increasing its footprint worldwide. In late 2017, ROLC was selected by Chemonics to partner with it on its USAID-funded New Justice project.<sup>25</sup> In partnership with Chemonics/New Justice, ROLC has led the development of a unique, high-level Rule of Law Certificate Program for Ukrainian judicial and legal practitioners.<sup>26</sup> This program is a first-of-its-kind course for justice sector professionals. The course included 40 teaching modules, over 80 hours of in-class instruction, and an out-of-class independent research project.

After conducting a needs assessment, ROLC worked with the Chemonics/New Justice team to identify a local partner university to design and deliver the program. Having selected a partner institution (Yaroslav Murdiy University in Kharkiv), ROLC worked with both Chemonics/New Justice and Yaroslav Mudriy to devise a locally relevant rule-of-law master class for judges, prosecutors, lawyers, justice sector NGO leaders, Ministry of Justice officials, and others. The purpose is to reach the present and future leaders in the judicial/legal worlds and to provide them with a private, intellectually

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<sup>25</sup> UNIV. OF S.C. RULE OF LAW COLLABORATIVE 2 (2019), <http://rolcsc.org/wp-content/uploads/2019/06/ROLC-One-Page-2019.pdf>.

<sup>26</sup> *The First in the World International Certificate Program in Rule of Law was Launched to Help Improve the Administration of Justice and Protection of Human Rights in Ukraine*, USAID (Nov. 12, 2018), <https://newjustice.org.ua/en/news/first-world-international-certificate-program-rule-law-launched-help-improve-administration-justice-protection-human-rights-ukraine/>.

challenging forum to discuss and learn about important daily issues in their work and develop solutions, while offering them tools to better address those issues.

The resulting two-week Rule of Law Certificate course was developed jointly by ROLC and law faculty at Yaroslav Mudiry with input from Chemonics/New Justice. The class is capped at 30 participants and uses interactive, adult-learning teaching methods. The emphasis is on practical issues such as ethics, judicial independence, anti-corruption, human rights, criminal justice, as well as key skills, such as the “IRAC” method of legal reasoning, understanding and using precedence (for ECHR and other jurisprudence), interviewing and counseling, and negotiation/mediation. ROLC designed unique interactive methods, specially tailored for experienced judicial and legal professionals. In addition, the course incorporates a Capstone Project whereby each participant is challenged to develop and, if possible, implement a reform initiative. The ideas generated by this Capstone Project will form the basis for future rule of law interventions.

Now in its second year, the Ukraine Rule of Law Certificate course will be offered in fall 2019 to a second cohort. Based on the demand for the first iteration of the course (in which 320 applicants from across the Ukrainian landscape applied for the 30 spots) and the success of the program based on participant feedback, this course should become a fixture in the Ukrainian landscape. The course is successful in large measure, because it effectively bridges the gap between the academy and the justice system. Legal and judicial professionals are able to develop actionable reform ideas in a respectful and collaborative setting.

In future years, ROLC intends to step back to allow Yaroslav Mudiry to implement the program, creating a sustainable, locally driven program for long-term rule of law training to justice sector professionals. ROLC will remain engaged as a resource partner when needed, but the goal from the outset was to work together to develop a program that did not rely on external resources or experts to succeed in the long term. This approach is consistent with ROLC’s vision for meaningful, long-term rule of law development. In the future, ROLC hopes to work in other countries, both in the post-Soviet region and beyond to develop similar programs that meet local needs.

In addition to the innovative Ukraine Rule of Law Certificate Program, ROLC has been engaged in other major international

initiatives. In late 2018, ROLC became a partner of the Task Force on Justice,<sup>27</sup> an initiative of the Pathfinders for Peaceful, Just and Inclusive Societies. The Task Force on Justice is a group of international justice leaders and experts who work together to help achieve the Sustainable Development Goals (SDGs) and promote justice among vulnerable societies. The partners include the World Bank, UN Women, the U.N. Office on Drugs and Crime, the U.N. Development Programme, the Organisation for Economic Co-operation and Development, and the Elders, among others. The Task Force seeks to understand and address the challenges facing at-risk societies and the challenges they face in ensuring access to justice.

This partnership with the Task Force has allowed ROLC to work with governments in the implementation of effective strategies and to engage in research to collect the information and data necessary to realize the SDGs, particularly SDG 16: “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”<sup>28</sup> ROLC assisted the Task Force in organizing a meeting in Freetown, Sierra Leone and in preparing the flagship report, which is aimed at informing policy and other decision-makers about new developments and effective strategies called “Justice for All.”<sup>29</sup> This report was launched at the High-Level Political Forum on Sustainable Development at the United Nations in July 2019.

With support from the Ministry of Foreign Affairs of the Government of the Netherlands, ROLC organized the June 2019 “Access to Justice for All in Conflict-Affected Countries” ministerial meeting in The Hague, Netherlands.<sup>30</sup> This was an invitation-only

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<sup>27</sup> See *Task Force on Justice*, PATHFINDERS FOR PEACEFUL, JUST, AND INCLUSIVE SOCIETIES, <https://www.justice.sdg16.plus/> (last visited Sept. 18, 2019).

<sup>28</sup> U.N. Secretary-General, *Special Edition: Progress Towards the Sustainable Development Goals*, U.N. Doc. E/2019/68 (May 9, 2019).

<sup>29</sup> TASK FORCE ON JUSTICE: PATHFINDERS FOR PEACEFUL, JUST AND INCLUSIVE SOCIETIES, JUSTICE FOR ALL: THE TASK FORCE ON JUSTICE: FINAL REPORT (2019).

<sup>30</sup> See *Conference, g7+ Ministerial Meeting on Access to Justice for All in Conflict-Affected Countries*, Univ. of S.C. Rule of Law Collaborative,



event for the Ministers of Justice/Attorneys General of the countries of the g7+, a voluntary association of countries currently or previously affected by conflict that seeks to provide a collective voice to those countries in the international development sphere.<sup>31</sup> The meeting was an opportunity to share experiences among g7+ member states on innovative models that have succeeded in delivering enhanced access to justice in g7+ countries and others.

Although it is unusual for a university to play such an important role on the international stage, ROLC developed the concept and organized all aspects of the event. “The Rule of Law Collaborative has become a recognized thought leader on developing and advancing solutions to complex rule of law challenges,’ explain[ed] Priscilla Schwartz, Minister of Justice of Sierra Leone, who chaired the meeting.”<sup>32</sup> She further stated, “Indeed, the Government of Sierra Leone sees the Collaborative as an important partner not only in its own work at home but in achieving an agenda that captures the attention of countries around the world facing similar problems.”<sup>33</sup> The meeting employed plenary discussions aimed at identifying common challenges and opportunities, as well as interactive peer-to-peer learning sessions organized around various thematic topics.

The final outcome of the two-day meeting was a joint Action Plan agreed upon by the g7+ ministers in attendance that was presented at the High-Level Political Forum held at the United Nations in July 2019. The Action Plan recognizes the role of access to justice as a fundamental pillar for sustainable peace, stability, and development, and outlines g7+ member state commitments to take concrete steps toward achieving more inclusive and people-centered justice. It also recognizes that conflict-affected countries are best positioned to learn from one another and collectively advocate for development policies for their countries. In the coming months and years, the g7+ members

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<http://rolcsc.org/activities/g7-ministerial-meeting-access-justice-conflict-affected-countries/> (last visited Sept. 18, 2019).

<sup>31</sup> See *Who We Are*, G7+ SECRETARIAT, <http://g7plus.org/who-we-are/> (last visited Sept. 18, 2019).

<sup>32</sup> *ROLC Co-hosts International Conference on Access to Justice*, OFFICE OF THE PROVOST, UNIV. OF S.C., [https://www.sc.edu/about/offices\\_and\\_divisions/provost/about/news/2019/rolc\\_g7\\_accesstojustice.php](https://www.sc.edu/about/offices_and_divisions/provost/about/news/2019/rolc_g7_accesstojustice.php) (last visited Sept. 18, 2019).

<sup>33</sup> *Id.*

states have undertaken to pursue this action plan, and ROLC intends to do its part to ensure that the steps taken advance sustainable solutions to pressing justice needs for all citizens.

### C. Leadership in global conversations

In an effort to highlight a topic of central importance to its own campus—while simultaneously connecting to the broader national and global rule of law community—in February 2018, ROLC organized a symposium on Women as Agents of Change in the Rule of Law. In partnership with the University’s Women’s and Gender Studies Program, examined the specific strategies women have employed to effect change in the rule of law.<sup>34</sup> The event welcomed a Keynote Conversation with Dr. Mamphela Ramphele, a South African anti-apartheid activist, businesswoman, medical pioneer, academic, and author, as well as panel discussions.<sup>35</sup> Panels were organized to highlight the specific strategies women have used in achieving progress in different areas: “Human Rights Education for All Women,” “Access to Justice,” “Good Governance,” and “Participation and Leadership in the Justice Sector.”<sup>36</sup> The symposium enabled women from various countries around the world to share their experiences and lessons learned, as well as form networks and lasting connections. The symposium was shared in real time on Facebook Live with participants from around the world engaging in the conversation on the roles women have played—and should be playing—as agents of change in rule of law. As with all ROLC activities, the conversation initiated through the February 2018 symposium has been sustained through ongoing engagement with both speakers and participants to encourage the ongoing exchange of ideas and experiences long after the event itself has come to a close.

ROLC has been at the center of other important conversations, as well. In 2019, ROLC launched a series of activities under the umbrella of a policing initiative. Setting itself apart from others engaged in programs focused on police-community relations, however, ROLC has drawn on its extensive international network to bring to the

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<sup>34</sup> See Symposium, *Women as Agents of Change in the Rule of Law*, Univ. of S.C. Rule of Law Collaborative, <http://rolcsc.org/activities/women-agents-change-rule-law/> (last visited Sept. 18, 2019).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

United States valuable perspectives on police-community relations from the experiences of other countries around the world.

ROLC has established the Global Initiative for Justice and Policing, a suite of projects that together provided empirically-based strategies for understanding the complexities of American policing and police-community relations. These projects inform external advocacy efforts to ensure accountability and also provide the support necessary for meaningful internal reform. Together, by taking on these three needs, the Initiative works to foster beneficial, collaborative relationships between police and the communities they serve.

The Global Initiative for Justice and Policing was launched with three innovative projects: Bridging the Divide, the Policing and Society Project, and the Sheriff Accountability Project.<sup>37</sup> This suite of projects combines academic research, community engagement, and police training in ways that will accelerate reform efforts already underway. Of equal importance, there are components aimed at empowering communities to advocate for their rights and empowering police officers to be agents of change within their own departments.

Focused on understanding local advocacy movements and helping to shape effective reform strategies, Bridging the Divide blends empirical study with a practical focus on improving advocacy at the community level. This project has promoted empirically validated strategic thinking into one of the most vital social movements of our time, allowing key leaders in the movement to develop a clearer understanding of the dynamics in their communities and others, and reflect together on the best strategies for improving police conduct in communities of color.

The Bridging the Divide Project began with a high-profile symposium at the University in 2017, which brought together academics, activists, and current and former police officials to examine the challenges facing relations between police and African-American communities, as well as explore potential solutions.<sup>38</sup> That symposium also featured experts who had dealt with tension between police and local communities in other places around

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<sup>37</sup> Press Release, Univ. of S.C. Rule of Law Collaborative, Rule of Law Collaborative Receives Funding from Vital Projects Fund, Inc. to Support Sheriff Accountability Project (Aug. 24, 2018).

<sup>38</sup> Symposium, *Bridging the Divide: African-American Communities and Law Enforcement*, Univ. of S.C. Rule of Law Collaborative (2017).

the world, including South Africa, Peru, Northern Ireland, and Kenya. Following that symposium, ROLC worked closely with key civil rights leaders and law enforcement officials in five U.S. cities to seek funding to carry out applied research into the local causes of poor police-community relations, as well as the most effective efforts being undertaken to improve them. ROLC's partners in the project included the Baltimore Community Mediation Center, the Baton Rouge Dialogue on Race in Louisiana, the Charleston Area Justice Ministry, the Deaconess Foundation in Ferguson, and Restorative Justice for Oakland Youth.

The efforts of community activists are essential, but ultimately, successful efforts to reduce tension between law enforcement and the communities they protect must include reforms introduced and championed by police officers and leaders themselves to change the culture of police work. In places where these reforms are most needed, tensions between the police and the community can hamper the development of effective internal measures to reduce police violence.

In this vein, the Policing and Society Project is an effort to apply an innovative new police training methodology that fosters a deep understanding by officers of the role of law enforcement in upholding the rule of law. This project will be carried out by ROLC and The Anne Frank House in the Netherlands, which has worked extensively with Dutch police departments across the country to ensure that officers can work effectively in communities that are diversifying rapidly in an age of increased immigration. While it was developed by Anne Frank House staff, crucially, the program is centered not on trainings provided *to* police, but thoughtful exchanges *among* officers, in a safe environment of their professional peers. The Policing and Society Project aims to guide a cultural shift in the departments where it is adopted, exposing officers to situations that elicit a deeper commitment to the rule of law, and enabling them to rely on their own critical thinking skills to apply these ideals in practice.

Finally, the Sheriff Accountability Project looks at the role of sheriffs across the United States with particular focus on their unique roles, powers, and funding structures. This project is intended to offer an objective understanding of the role that sheriffs play in ensuring that the rule of law is upheld in communities across the United States.

## IV. Paths forward

In the years to come, ROLC intends to support, design, and deliver research and activities that further a holistic, interdisciplinary understanding of rule of law and that contribute to the development of laws, policies, and practices that address practical rule of law challenges. Building on the success of its initiatives so far, ROLC will continue and expand its engagement with a wide variety of stakeholders, including the U.S. government practitioner community, international donors and experts, leaders in civic advocacy, and others.

Under the JUSTRAC+ program, ROLC will continue to foster a community of practitioners in agencies across the U.S. government who take an active role in developing and refining the knowledge and skills necessary to grapple with justice sector and rule of law challenges around the globe. Drawing on the extensive expertise of the ROLC staff, ROLC's extended network of experts, and its successes in designing and delivering training under the original JUSTRAC program, ROLC will develop new training modules, new pedagogical tools for a professional audience, and a tiered system of course offerings that allow participants to develop skills at the appropriate levels. ROLC will also use electronic resources, such as a redesigned program website and interactive social media tools, to enhance professional learning between in-person events.

Following the success of the g7+ ministerial meeting in June 2019, ROLC is seeking ways to work together with the g7+ countries to address challenges of access to justice, which are all the more acute in conflict-affected countries. With the successful adoption of the Action Plan at the ministerial meeting, ROLC expects to play a key role in convening follow-on discussions and activities that can increase access to justice for all in light of the unique circumstances faced by the various g7+ countries. Indeed, access to justice is a key component of the SDGs, specifically SDG 16.<sup>39</sup>

Access to justice is a critical piece of ROLC's neural network view of rule of law, as it facilitates the feedback loop by which the beneficiaries of improved rule of law conditions can take an active role in championing rights protections for themselves and their community members. By focusing on the conflict-affected states that make up the

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<sup>39</sup> U.N. Secretary-General, *supra* note 28.

g7+, ROLC can help to ensure that access to justice are given the priority they deserve—not only to serve citizens but to ensure long-term state stability.

With increased international engagement, such as the initiative just described, in the coming years, ROLC also plans to establish a presence in The Hague. The “International City of Peace and Justice” is a natural locus for many of ROLC’s current and future activities, and a presence in The Hague will allow ROLC to create synergy between its existing expert network and the wealth of expertise and resources that The Hague has in peace, justice, and rule of law. In The Hague, ROLC hopes to partner with other organizations to offer collaborative strategic and solutions to specific rule of law challenges, both at the national and regional levels.

While ROLC’s mission is in part practice-oriented, ROLC also seeks to create an independent space for in-depth scholarship. Closing the gap between scholarship and practice can often mean that scholars have to produce work under tight time constraints or dedicate time to addressing questions that are related to but not at the core of their research interests. ROLC plans to continue to support scholarship that is at the core of the scholars’ interests, such as article workshops and public talks. One future goal of ROLC is multi-week residencies that give scholars engaged in rule of law research the time and space necessary to delve meaningfully into the topics they are working on.<sup>40</sup> Indeed, ROLC already routinely hosts informal faculty workshops over lunch with visiting scholars, designed to provide those scholars with diverse feedback on their works in progress. In the future, ROLC hopes to integrate those workshops into residencies, with multiple iterations per scholar in residence, so that they can continue to refine their work and engage with a scholarly network of their peers.

In less than a decade, ROLC has grown from a staff of two implementing a single program to a full-time staff of nine with the variety of activities described above—from interagency rule of law training and community policing initiatives to securing access to justice for all in the world’s conflict-affected countries. This growth is a testament not only to the dedication and hard work of the organization’s staff, but also its mission, as informed by its interdisciplinary view of the rule of law. In the coming years, ROLC looks forward to continuing its two-track mission—marrying the

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<sup>40</sup> Polavarapu & Samuels, *supra* note 1, at 288.

academic and the practical—while increasing the diversity of its activities and expanding the scope of its work both at home and abroad.

## **About the Author**

**Joel H. Samuels** is Professor of Law and Director of the Rule of Law Collaborative at the University of South Carolina. As Director of the Rule of Law Collaborative, he oversees programming focused on rule of law development across the globe. In addition, he regularly lectures to U.S. government officials from the State Department, the U.S. Agency for International Development, the Department of Justice, and the Department of Defense on rule of law development abroad. In addition, Professor Samuels has authored articles on international boundary disputes, maritime piracy, and domestic civil procedure, and he is a lead co-author of one of the premier casebooks on international law, *Transnational Law* (West Academic Press). Professor Samuels also lectures extensively on litigation matters involving foreign parties involved in cases in U.S. courts.

Honored by the University of South Carolina School of Law student body in 2007 and 2016 as the Outstanding Faculty Member for teaching excellence, Professor Samuels received his A.B., magna cum laude, in politics from Princeton University in 1994. At Princeton, he also received certificates in Russian Studies and European Cultural Studies and was awarded the Asher Hinds Prize in European Cultural Studies, the Montgomery Raiser Prize in Russian Studies, and the Caroline Picard Prize in Politics. Professor Samuels received his J.D., cum laude, from the University of Michigan Law School in 1999, where he was a Clarence Darrow Scholar. While at Michigan, he also earned a master's degree in Russian and East European Studies.

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# Rule of Law and Human Rights in Military Stability Operations: Clarifying the Military's Role in Rule of Law Development

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## I. Introduction

In January 2007, Iraq was reeling from a spate of sectarian attacks that seemed to presage the beginning of a civil war.<sup>2</sup> Weeks earlier, Baghdad had suffered the worst sectarian violence since the U.S.-led invasion in 2003.<sup>3</sup> A coordinated attack involving five car bombs and a mortar shell devastated the crowded Shiite neighborhood of Sadr City, resulting in 144 dead and 206 wounded.<sup>4</sup> Shiite fighters retaliated by firing mortar shells into the largely Sunni neighborhood of Adhamiya in northern Baghdad, injuring even more.<sup>5</sup> By the end of 2006, thousands of Iraqis were dying every month as a result of sectarian

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<sup>1</sup> The views expressed here are his personal views and do not necessarily reflect those of the Department of Defense (DOD), the United States Army, the United States Military Academy, or any other department or agency of the U.S. government. The analysis presented here stems from his academic research of publicly available sources, not from protected operational information.

<sup>2</sup> See, e.g., NICHOLAS J. SCHLOSSER, *THE SURGE 2007–2008* (Center for Military History 2017); Emma Sky, *Iraq, from Surge to Sovereignty*, FOREIGN AFF. (Mar./Apr. 2011), <https://www.foreignaffairs.com/articles/middle-east/2011-03-01/iraq-surge-sovereignty>.

<sup>3</sup> Kirk Semple, *Sectarian Attack is Worst in Baghdad Since Invasion*, N.Y. TIMES (Nov. 24, 2006), <https://www.nytimes.com/2006/11/24/world/middleeast/24iraq.html>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

fighting, and the deteriorating security situation had become an existential threat.<sup>6</sup>

President George W. Bush responded by ordering additional forces to Iraq to quell the violence and restore security.<sup>7</sup> The “surge,” as the campaign came to be called, resulted in an initial deployment of nearly 20,000 additional servicemembers to Iraq.<sup>8</sup> The troop increase led to a reduction in sectarian violence, and as security increased, reconstruction and stabilization efforts became a greater priority.<sup>9</sup> The U.S. military adopted its current approach to stabilization in 2009, shortly after the surge, at a time when U.S. troop strength in Iraq and Afghanistan was at an apex.<sup>10</sup> Since then, however, the military’s interest in stabilization has waned as resources have dwindled and the prospect of conflict with near-peer adversaries has increased.<sup>11</sup> The importance of military involvement in stabilization efforts, nevertheless, remains high. A 2018 RAND report observed:

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<sup>6</sup> See, e.g., SCHLOSSER, *supra* note 2, at 15; Ivo H. Daalder, *Iraq After the Surge*, BROOKINGS (Dec. 8, 2007), <https://www.brookings.edu/opinions/iraq-after-the-surge/>.

<sup>7</sup> Office of the Press Secretary, *President’s Address to the Nation*, THE WHITE HOUSE—PRESIDENT GEORGE W. BUSH (Jan. 10, 2007), <https://georgewbush-whitehouse.archives.gov/news/releases/2007/01/20070110-7.html> (noting the surge consisted of nearly five additional Army brigades and the extensions of existing deployments for other U.S. servicemembers).

<sup>8</sup> David E. Sanger, *Bush Adds Troops in Bid to Secure Iraq*, N.Y. TIMES (Jan. 11, 2007), <https://www.nytimes.com/2007/01/11/world/middleeast/11prexy.html>; see also SCHLOSSER, *supra* note 2.

<sup>9</sup> See, e.g., SCHLOSSER, *supra* note 2, at 93–94 (noting that “the surge helped to dampen the sectarian war that nearly destroyed Iraq in 2006” but could not “eradicate the tensions and institutional weaknesses that had fanned the violence in the first place”); Daalder, *supra* note 6 (“Clearly, having more troops helps in providing security . . .”).

<sup>10</sup> See HEIDI M. PETERS & SOFIA PLAGAKIS, CONG. RESEARCH SERV., R44116, DEPARTMENT OF DEFENSE CONTRACTOR AND TROOP LEVELS IN AFGHANISTAN AND IRAQ: 2007–2018 (2019); see also LINDA ROBINSON ET AL., FINDING THE RIGHT BALANCE: DEPARTMENT OF DEFENSE ROLES IN STABILIZATION, RAND CORP. ix n.5 (2018) (noting that by the fourth quarter of fiscal year 2009, the number of servicemembers deployed to Iraq and Afghanistan peaked at 191,500).

<sup>11</sup> See, e.g., ROBINSON, *supra* note 10, at iii, 1–2 (“DoD has downgraded its focus on stabilization as it has shifted to increasing capability and readiness

The lessons from the past 15 years of war suggest that, to conclude these conflicts successfully, as well as to prevent or mitigate emerging conflicts, stabilization must be embraced as a U.S. policy priority. Given the resources of the U.S. military and the fact that demand for stabilization often arises in insecure environments, there is a likely requirement for some types of military participation.<sup>12</sup>

As the U.S. military reevaluates its role in stabilization, the Army should take the opportunity to clarify its own guidance with respect to stabilization. One area where greater clarity is particularly needed is rule of law development. More specifically, the Army should clearly define what it means by “rule of law” and what objectives it expects to achieve coincident with rule of law operations. To clarify its approach, the Army should separate activities designed to improve structural aspects of the legal system from those focused on substantive law development. This division would bring greater conceptual clarity to the Army’s rule of law activities while ensuring substantive ideals, such as human rights, remain a priority during military stabilization efforts.

## II. Army doctrine and rule of law development

The DOD considers stabilization a core military mission and mandates that U.S. armed forces should be prepared to conduct stability operations “with proficiency equivalent to combat operations.”<sup>13</sup> In 2016, *Joint Publication 3-07* replaced the term “stability operations” with “stabilization.”<sup>14</sup> Accordingly, U.S. joint

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to conduct major combat operations against near-peer adversaries.”); Jeff Goodson, *Department of Defense Wants Out of Stability Operations*, THE HILL (Aug. 7, 2018), <https://thehill.com/opinion/national-security/400662-defense-department-wants-out-of-stability-operations>.

<sup>12</sup> ROBINSON, *supra* note 10, at x.

<sup>13</sup> U.S. DEPT OF DEFENSE, INSTRUCTION 3000.05, STABILITY OPERATIONS ¶ 4(a) (Sept. 16, 2009) [hereinafter DODI 3000.05].

<sup>14</sup> CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-07, STABILITY ix (Aug. 3, 2016) [hereinafter JP 3-07]; *see also* DODI 3000.05, *supra* note 13, at ¶ 3 (defining “stability operations” as “an overarching term encompassing various military missions, tasks, and activities conducted

doctrine now defines “stabilization” as “the process by which military and nonmilitary actors collectively apply various instruments of national power to address drivers of conflict, foster host-nation resiliencies, and create conditions that enable sustainable peace and security.”<sup>15</sup>

Within the U.S. government’s greater stabilization effort, U.S. Army doctrine identifies the establishment of rule of law as one of five end state conditions for stability operations and associates a number of stability tasks with the achievement of rule of law.<sup>16</sup> This emphasis on rule of law, however, is undercut by a degree of vagueness about what “rule of law” means and what rule of law development should entail. Army doctrine suggests that rule of law includes formal, procedural, and substantive components even though most definitions conceive of rule of law as consisting of only formal and procedural requirements. These formal and procedural requirements address structural aspects of the legal system but do not prescribe the content of the law. Substantive requirements, on the other hand, define ideals considered essential to rule of law.

Army Field Manual 3-07 (FM 3-07), which outlines the Army’s current tactical guidance on stability-related operations, states, “The rule of law means that all persons, institutions and entities—public and private, including the state itself—are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated, and consistent with international human rights principles.”<sup>17</sup> FM 3-07’s characterization of rule of law draws from a

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outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential government services, emergency infrastructure reconstruction, and humanitarian relief.”).

<sup>15</sup> JP 3-07, *supra* note 14, at ix.

<sup>16</sup> *See, e.g.*, U.S. DEP’T OF ARMY, ARMY DOCTRINE REFERENCE PUBLICATION 3-07, STABILITY 1-78 (Aug. 31, 2012) (change 1, Feb. 25, 2013) [hereinafter ADRP 3-07].

<sup>17</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY (June 2, 2014) [hereinafter FM 3-07]; *see also* CTR. FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, RULE OF LAW HANDBOOK 3 n.9 (2015) (noting that FM 3-07’s guidance “is based in part on the definition contained in the *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*”); JP 3-07, *supra* note 14, at xiii (similarly stating that “[r]ule of law requires

U.N. Secretary-General report that similarly defined rule of law as comprising formal, procedural, and substantive aspects.<sup>18</sup> FM 3-07's suggestion that rule of law requires compliance with "international human rights principles," however, is problematic for several reasons. First, the assertion that rule of law includes a substantive dimension is contested among legal theorists.<sup>19</sup> Second, FM 3-07's own guidance on rule of law is contradictory. Despite FM 3-07's evocation of human rights, the field manual does not definitively embrace a substantive approach to rule of law. Instead, it appears to endorse a formalist view of rule of law that does not incorporate human rights.

Ultimately, if the Army is expected to conduct stability operations with a proficiency equivalent to combat operations, Army doctrine should clearly define what it means by "rule of law" and whether it considers substantive ideals, such as human rights, to be part of rule of law or a separate element of military stabilization.<sup>20</sup> To improve conceptual and mission clarity, the Army should consider separating the formal and procedural aspects of rule of law development from substantive law development. Adopting a formalist view would help clarify the objectives of the rule of law mission while further ensuring the content of host nations laws are scrupulously reviewed for compliance with international legal obligations, including international principles of human rights.

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laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles.”).

<sup>18</sup> See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter U.N. Secretary-General Report].

<sup>19</sup> Jeremy Waldron, *The Rule of Law*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 22, 2016), <https://plato.stanford.edu/entries/rule-of-law/#OneIdeaAmonOthe>.

<sup>20</sup> More generally, RAND's review of the DOD's roles in stabilization found that army, joint, and U.S. interagency guidelines "do not always specify the relevant subactivities" of the constituent elements of stabilization. ROBINSON, *supra* note 10, at 8. The report further concluded that "[m]ost confusion stems from the ways that the rule-of-law function overlaps with both the security and governance functions, although other functions overlap somewhat as well." *Id.*

### III. Formal, procedural, and substantive requirements of rule of law

Most rule of law theorists conceptualize rule of law as consisting of formal or procedural elements but not substantive ideals.<sup>21</sup> Others believe rule of law incorporates a substantive dimension, such as a commitment to property rights or the observance of human rights.<sup>22</sup> The recognition of a substantive component to rule of law, however, remains contested, in part because there is little agreement regarding what values are essential to rule of law.<sup>23</sup> As Jeremy Waldron observes:

Once we open up the possibility of the Rule of Law's having a substantive dimension, we inaugurate a sort of competition in which everyone clamors to have their favorite political ideal incorporated as a substantive dimension of the Rule of Law. Those who favor property rights and market economy will scramble to privilege their favorite values in this regard. But so will those who favor human rights, or those who favor democratic participation, or those who favor civil liberties or social justice. The result is likely to be a general decline in political articulacy, as people struggle to use the same term to express disparate ideals.<sup>24</sup>

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<sup>21</sup> See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* 210–29 (2d ed. 1979).

<sup>22</sup> See, e.g., Waldron, *supra* note 19; Ronald Cass, *The Property Rights Systems and the Rule of Law*, in *THE ELGAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHT* 131 (Enrico Colombatto ed. 2004) (“A critical aspect of the commitment to the rule of law is the definition and protection of property rights[.]”); TOM BINGHAM, *THE RULE OF LAW* (Penguin Books 2011); Evan Fox-Decent, *Is Rule of Law Really Indifferent to Human Rights?*, 27 *L. & PHIL.* 533, 577–78 (2008) (“[B]y securing us from the power of others, the rule of law affirms that we are not to be treated as mere means to their ends. Thus, the rule of law affirms our dignity, and this affirmation entails a commitment to human rights.”).

<sup>23</sup> See, e.g., RAZ, *supra* note 21, at 210–29; BINGHAM, *supra* note 22, at 66 (acknowledging that the principle that the law must afford adequate protection of fundamental human rights “is not a principle which would be universally accepted as embraced within the rule of law”).

<sup>24</sup> Waldron, *supra* note 19.

In contrast, the formal and procedural aspects of rule of law are less contentious and more widely accepted.<sup>25</sup> Simon Chesterman explains that formal theories of rule of law emphasize “instrumental limitations on the exercise of State authority” and tend to be minimalist and positivist.<sup>26</sup> Although there is no definitive list of formal requirements, Lon Fuller outlined eight general principles of rule of law.<sup>27</sup> The principles—which Fuller described as “demands of the law’s inner morality”—are that law be general, public, prospective, intelligible, consistent, practicable, constant, and congruent.<sup>28</sup> In comparison, procedural aspects of rule of law address the processes by which the norms governing society are administered.<sup>29</sup> These could include adjudication by an impartial and independent judiciary, compliance with due process (including the recognition of certain rights, such as the right to counsel and the right to present evidence), or the reviewability of decisions according to pre-established rules.<sup>30</sup> In addition to compliance with international human rights principles, the U.N. Secretary-General’s report cites several formal and procedural requirements when it explains that rule of law requires “measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>31</sup>

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<sup>25</sup> See, e.g., RULE OF LAW HANDBOOK, *supra* note 17, at 10 (“Projects with formalist goals are, all other things being equal, less likely to result in controversy and confusion among both international and host-nation participants than projects with substantive goals simply because there is less disagreement over criteria.”).

<sup>26</sup> Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 340 (2008).

<sup>27</sup> LON L. FULLER, *THE MORALITY OF LAW* 33–94 (rev. ed. 1969); see also, e.g., RAZ, *supra* note 21, at 214–18; JOHN RAWLS, *A THEORY OF JUSTICE* 208–10 (1999); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270–71 (1980).

<sup>28</sup> FULLER, *supra* note 27, at 33–94; see also, e.g., Waldron, *supra* note 19.

<sup>29</sup> See Waldron, *supra* note 19.

<sup>30</sup> See A. Wallace Tashima, *The War on Terror and the Rule of Law*, 15 ASIAN AM. L. J. 245, 264; Waldron, *supra* note 19.

<sup>31</sup> U.N. Secretary-General Report, *supra* note 18, at ¶ 6.

## IV. Human rights as a substantive dimension of rule of law

Undoubtedly, the legitimacy of any legal system must be evaluated through the lens of human rights.<sup>32</sup> On the other hand, if rule of law is a matter of formal and procedural requirements rather than conformity with substantive ideals, mandating compliance with “international human rights principles” as an element of rule of law is misguided. Joseph Raz argues, “[T]he rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.”<sup>33</sup> Raz contends that at its most basic level, rule of law requires that “the law must be capable of guiding the behaviour of its subjects.”<sup>34</sup> He further notes that “[m]ost of the requirements which were associated with the rule of law before it came to signify all the virtues of the state can be derived from this one basic idea.”<sup>35</sup>

Admittedly, as Raz pointed out, it is tempting to smuggle substantive ideals within the ambit of rule of law—and if we were to accept that rule of law includes a substantive component, the protection of human rights would undoubtedly qualify as a candidate for incorporation.<sup>36</sup> Excluding substantive considerations from rule of law, however, should not be mistaken for an indifference to liberal values. As Chesterman observed, “thin” theories of rule of law—those that emphasize the formal features of rule of law—“must necessarily exist within a political context.”<sup>37</sup> Meanwhile, the formal requirements that help define legality under rule of law also help establish

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<sup>32</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. Doc. A/810 (Dec. 10, 1948).

<sup>33</sup> RAZ, *supra* note 21, at 211.

<sup>34</sup> *Id.* at 214.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 210–11 (“Not uncommonly when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated.”).

<sup>37</sup> Chesterman, *supra* note 26, at 341 (additionally noting that “[s]ubstantive theories are typically built on the back of formal ones”).



conditions for the achievement of liberty, the fulfillment of individual autonomy, and respect for human dignity.<sup>38</sup>

Fuller's principles are illustrative. Formal principles, like Fuller's, do more than guide behavior. They can also protect individuals from arbitrary exercises of governmental power and ensure a degree of predictability in the conduct of daily life. Fuller's principles serve as a check on public power by ensuring the government itself is constrained by law that is generally applicable, accessible, prospective, and clear, and they promote individual autonomy by enabling people to make decisions based on laws that are relatively certain, stable, and predictable. Fuller asserted in *The Morality of Law*, "To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults."<sup>39</sup> He further insisted that departures from these formal principles are an "affront to man's dignity as a responsible agent" and reflect an "indifference to his powers of self-determination."<sup>40</sup> The formal features of rule of law, therefore, can serve as more than basic requirements for legality. As Waldron suggested:

[e]ven if the principles of the Rule of Law are purely formal in their application, we don't just value them for formalistic reasons. Most fundamentally, people value the Rule of Law because it takes some of the edge off the power that is necessarily exercised over them in a political community.<sup>41</sup>

The same could be said for procedural aspects of rule of law. Procedural principles, such as the requirement for equal enforcement of laws and independent adjudication, acknowledge that people have agency and evince respect for individual decision making, personal autonomy, and human dignity. Accordingly, like formal requirements, procedural principles help moderate the inherent imbalance of political power between individuals and government.

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<sup>38</sup> See, e.g., Waldron, *supra* note 19; GERANNE LAUTENBACH, THE CONCEPT OF THE RULE OF LAW AND THE EUROPEAN COURT OF HUMAN RIGHTS (2013).

<sup>39</sup> FULLER, *supra* note 27, at 162.

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

<sup>41</sup> Waldron, *supra* note 19.

## V. Stability operations and rule of law

Given these effects, suggesting rule of law requires compliance with international human rights principles would seem reasonable, yet as noted above, substantive theories of rule of law and the competing values they champion tend to diminish the analytic clarity of the concept.<sup>42</sup> Why, then, does FM 3-07 appear to describe human rights as a substantive dimension of rule of law rather than characterizing it as a substantive requirement of the law itself? Wouldn't the observance of human rights principles be better expressed as a legal obligation to be incorporated into host nation domestic law?

References to “rule of law” in FM 3-07 suggest the Army has not settled on a definitive interpretation of rule of law, and this may account for the field manual's erratic use of the term. “Rule of law” was first defined in an earlier edition of FM 3-07, published in 2008.<sup>43</sup> That version of FM 3-07 described rule of law in terms nearly identical to the ones used in the current field manual.<sup>44</sup> Accordingly, it incorporated compliance with international human rights principles as a substantive element of rule of law. Despite virtually restating the 2008 field manual's definition, however, the current version of FM 3-07 expressly rejects the use of a formal definition of rule of law. The introduction to FM 3-07 states up front that “rule of law” is “[n]o

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<sup>42</sup> *Id.*

<sup>43</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS, at G-3 (Oct. 6, 2008) [hereinafter FM 3-07 (2008)] (identifying “rule of law” as one of several “New Army terms”).

<sup>44</sup> Compare FM 3-07 (2008), *supra* note 43, at G-9 (defining “rule of law” as “[a] principle under which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated, and that are consistent with international human rights principles”), with FM 3-07, *supra* note 17, at ¶ 1-12 (“The rule of law means that all persons, institutions and entities—public and private, including the state itself—are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated, and consistent with international human rights principles.”).

longer formally defined.”<sup>45</sup> Instead, the field manual asserts, the term should be understood “based on common English usage.”<sup>46</sup>

Given the theoretical debate over the meaning of rule of law and the field manual’s unwillingness to embrace a set definition of the term, exactly what the field manual means by the “common English usage” of “rule of law” is not entirely clear. Presumably, dictionaries could provide some insight into the term’s common usage, though ultimately, most dictionary definitions conflict with FM 3-07’s proposed conception of rule of law, at least regarding human rights. The *Oxford English Dictionary*, for example, defines “rule of law” as “[t]he authority and influence in society, esp. when viewed as a constraint on individual and institutional behaviour; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and process.”<sup>47</sup> The *Merriam-Webster Dictionary* similarly defines “rule of law” as “a situation in which the laws of a country are obeyed by everyone.”<sup>48</sup> Significantly, these definitions do not incorporate a substantive component or express a requirement to comply with human rights principles.

How, then, should FM 3-07’s guidance on rule of law be understood? Does the army currently consider “international human rights principles” essential to rule of law development? Arguably, FM 3-07’s abandonment of the 2008 field manual’s definition signifies a rejection

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<sup>45</sup> FM 3-07, *supra* note 17, at vi. The introduction to FM 3-07 states, “Certain terms for which the legacy FM 3-07 (2008, now obsolete) had been proponent were modified by change 1 to ADRP 3-07 (2013).” *Id.* Introductory table 1 to FM 3-07 identifies “rule of law” as one of the terms modified by Army Doctrine Reference Publication (ADRP) 3-07. *Id.*; see also ADRP 3-07, *supra* note 16, at G-3 (stating that “[b]ased on current doctrinal changes, certain terms for which ADRP 3-07 is proponent have been modified for purposes of this manual” and identifying “rule of law” as one of the modified terms).

<sup>46</sup> FM 3-07, *supra* note 17, at vi. ADRP 3-07, which augments the army’s doctrine for stability tasks as outlined in Army Doctrine Publication 3-07, similarly states “rule of law” should be understood “based on common English usage.” ADRP 3-07, *supra* note 16, at v.

<sup>47</sup> *Rule of Law*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/277614?redirectedFrom=rule+of+law> (last visited Aug. 30, 2019).

<sup>48</sup> *Rule of Law*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/rule%20of%20law> (last visited July 29, 2019).

of a substantive approach to rule of law. To begin with, despite adopting the U.N. Secretary General’s definition almost verbatim, the 2008 version of FM 3-07 never seemed entirely comfortable incorporating human rights as an aspect of rule of law. The 2008 field manual’s summary of major changes, for example, stated it had been revised to “[p]rescribe[] the term rule of law as the principle that ensures accountability to laws that are politically promulgated, equally enforced, and independently adjudicated.”<sup>49</sup> Remarkably, this description entirely failed to acknowledge human rights as a component of rule of law.

Additionally, although human rights are mentioned frequently throughout the 2008 field manual, outside the definitions provided in chapter 1 and repeated in the glossary, human rights are directly linked to rule of law in only one other instance. In chapter 3, the 2008 field manual describes five primary stability tasks that compromise military stability operations.<sup>50</sup> The five primary stability tasks are to establish civil security, establish civil control, restore essential services, provide support to governance, and provide support to economic and infrastructure development. Under the third primary stability task—“restore essential services”—the manual states, “Military forces play a critical role in promoting the rule of law in preventing human rights abuses within its [sic] own ranks.”<sup>51</sup> Here, the emphasis appears to be on the military’s role in preventing more immediate violations of human rights rather than on instilling longer term compliance with human rights principles as a dimension of rule of law.<sup>52</sup> Moreover, while the 2008 field manual is clear that military forces support other agencies engaged in long-term human rights development, it is unclear why FM 3-07 conceptualizes those initiatives as part of rule of law. The remainder of the 2008 field manual manages to emphasize human rights and the military’s role in promoting human rights principles without categorically connecting those efforts to rule of law.

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<sup>49</sup> FM 3-07 (2008), *supra* note 43, at G-1.

<sup>50</sup> *Id.* at ch. 3.

<sup>51</sup> *Id.* at ¶ 3-46.

<sup>52</sup> *See id.* This section of the manual further explains, “The list of essential tasks may include an initial response in which military forces monitor vulnerable groups, provide information and referrals to groups whose rights may be violated, and act preemptively to deter human rights abuses.”

Furthermore, the current field manual's reversion to the "common English usage" of "rule of law" suggests army doctrine no longer recognizes a substantive component to rule of law. As noted above, most dictionary definitions do not recognize human rights as an element of rule of law.<sup>53</sup> Had FM 3-07 intended to retain human rights as a substantive component, first, it would not have abandoned the rule of law definition adopted in 2008, and second, it would not have prescribed a common usage understanding of the term. Oddly, though, FM 3-07 continues to use the same description—formerly expressed as a definition—to explain rule of law. As with the 2008 field manual, however, most subsequent references to human rights in FM 3-07 seem to disconnect human rights from rule of law or, at least, to characterize the promotion of human rights as an element of some other effort, such as criminal justice reform. For example, the field manual proclaims that criminal justice system reform may necessitate "[e]valuating host-nation law, legal traditions, and administrative procedures in light of international legal obligations and human rights standards . . . ."<sup>54</sup> Similarly, FM 3-07 suggests commanders should consider the protection of civilians and human rights as a key criminal justice reform objective.<sup>55</sup> On the other hand, FM 3-07 does characterize the protection of human rights as an aspect of rule of law reform.<sup>56</sup> The field manual states, "The rule of law dictates government conduct according to publicly recognized regulations while protecting the rights of all members of society[.]" and contends that rule of law exists when the "state protects human rights and fundamental freedoms."<sup>57</sup> In this context, however, the field manual could be understood merely to be reinforcing the idea of equality before the law and the importance of those rights and freedoms

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<sup>53</sup> See also Waldron, *supra* note 19 (noting that when "ordinary people" call for rule of law, "they often have in mind the absence of corruption, the independence of the judiciary, and a presumption in favor of liberty").

<sup>54</sup> FM 3-07, *supra* note 17, at ¶ 1-99. FM 3-07 similarly states that criminal justice system reform may involve "[e]valuating the training given to host-nation judges, prosecutors, defense counsel, legal advisors, court administrators, and police and corrections officials in light of international legal obligations and human rights standards." *Id.*

<sup>55</sup> *Id.* at ¶ 3-110.

<sup>56</sup> *Id.* at ¶ 3-100.

<sup>57</sup> *Id.*

already associated with formal or procedural dimensions of rule of law.

## VI. Improving conceptual and mission clarity

Can rule of law exist without compliance with international human rights principles? Arguably, it could, though a “thin” definition of rule of law that excludes the incorporation of substantive ideals may seem unsatisfying—or even horrifying.<sup>58</sup> Raz, for example, famously argued that a “non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of rule of law better than any of the legal systems of the more enlightened Western democracies.”<sup>59</sup> Raz further observed that while such a legal system would be “immeasurably worse” than those of Western democracies, it would at least “excel in one respect: in its conformity to the rule of law.”<sup>60</sup> This formalist approach has been firmly criticized by advocates of a “thick” definition of rule of law that incorporates substantive ideals, such as human rights.<sup>61</sup> Tom Bingham, for example, has argued that a state which “savagely represses or persecutes sections of its people cannot . . . be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of

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<sup>58</sup> *Order in the Jungle*, THE ECONOMIST (Mar. 15, 2008), <https://www.economist.com/briefing/2008/03/13/order-in-the-jungle> (“Thin definitions are more formal. . . . Laws must provide stability. They do not necessarily have to be moral or promote human rights.”).

<sup>59</sup> RAZ, *supra* note 21, at 211.

<sup>60</sup> *Id.*

<sup>61</sup> See, e.g., *Order in the Jungle*, *supra* note 58 (noting that proponents of “thick” definitions of rule of law consider elements of political morality to be part of rule of law); BINGHAM, *supra* note 22, at 67 (“While . . . one can recognize the logical force of Professor Raz’s contention, I would roundly reject it in favour of a ‘thick’ definition, embracing the protection of human rights within its scope.”); Fox-Decent, *supra* note 22, at 353 (arguing that “while some separation of form and substance is desirable,” the arguments in favor of Raz’s “no-rights thesis” “do not provide a compelling reason to suppose that the rule of law is indifferent to human rights, including rights such as freedom from slavery).

female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.”<sup>62</sup>

In the context of military stability operations, however, the distinction between “thin” and “thick” definitions of rule of law, or formalist and substantive approaches to rule of law development, need not determine whether military forces undertake to restore, establish, maintain, or enhance human rights protections or fundamental freedoms in the host nation. These objectives unquestionably should be pursued, whether in the context of rule of law or separately as part of the greater stabilization effort. Conceptually, however, separating the formal and procedural aspects of rule of law from the promotion of substantive law would alleviate some of the confusion concerning the objectives of rule of law operations and provide a clearer outline for military forces engaged in host nation rule of law development.

The *Rule of Law Handbook* published by the U.S. Army’s Center for Law and Military Operations observes, “It is difficult to completely separate the form of a legal system from its content.”<sup>63</sup> While this may be true, military rule of law operations can and should separate activities designed to develop structural aspects of a host nation’s legal system from those intended to inform the content of the host nation’s substantive laws. Such a division would help clarify what formal and procedural objectives military forces are expected to achieve without further complicating the rule of law mission, here conceived of in a formalist sense. Army doctrine would more narrowly confine “rule of law” activities to those directed toward formal and procedural requirements rather than substantive values. Accordingly, rule of law operations would address structural issues associated with a host nation’s legal system: Have the laws been publicly promulgated, and do they apply generally—to both individuals and the state—to permit, prohibit, or require certain types of conduct? Do the laws apply prospectively, rather than retroactively, to specify how individuals should or should not behave in the future? Are the laws reasonably clear in meaning and specific in what they permit, prohibit, or require? Do the laws express realistic expectations for compliance? Does the legal system guarantee all individuals due process and equal protection before the law?

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<sup>62</sup> BINGHAM, *supra* note 22, at 67.

<sup>63</sup> RULE OF LAW HANDBOOK, *supra* note 17, at 7.

Separating human rights from the tasks and activities associated with a formalist perspective of rule of law would not, of course, signify an abandonment of human rights or the rejection of other substantive values. Concern for human rights pervades all aspects military stability operations, and FM 3-07 repeatedly directs military forces to support human rights initiatives.<sup>64</sup> Moreover, emphasizing the development of substantive law as a separate and distinct facet of stability operations could actually elevate the attention devoted to human rights by ensuring host nation laws are sufficiently scrutinized for compliance with international human rights standards. Currently, passing references made to “international human rights principles,” “international human rights standards,” and other “basic human rights” in FM 3-07 fail to elucidate what is required to meet those thresholds.<sup>65</sup> The *Rule of Law Handbook* states:

There is disagreement . . . on exactly what rights the law must protect to be considered a society governed by RoL [rule of law]. While some experts define the most important obligation as one of equal treatment regardless of gender or economic, racial, or religious status, many disagree on exactly what forms of equality

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<sup>64</sup> See, e.g., FM 3-07, *supra* note 17, at ¶ 1-77 (identifying the incorporation of principles of good governance and respect for human rights as one of six principles guiding security sector reform); *id.* at ¶ 1-83 (citing human rights as a foundation of security sector reform); *id.* at ¶ 1-99 (describing the evaluation of host nation law, legal traditions, and administrative procedures in light of international human rights standards as an aspect of criminal justice system reform); *id.* at ¶ 3-100 (identifying a state’s ability to protect human rights and fundamental freedoms as an indicator of the existence of rule of law); *id.* at ¶ 3-110 (characterizing the protection of civilians and human rights as a key criminal justice system reform action); *id.* at ¶ 3-140 (explaining that Army advisors engaged in building partner capacity should emphasize respect of human rights among other issues); see also RULE OF LAW HANDBOOK, *supra* note 17, at 8 (“Human rights considerations are central to [Rule of Law] development in the military context.”).

<sup>65</sup> See, e.g., FM 3-07, *supra* note 17, at ¶¶ 1-12 (“international human rights principles”), ¶ 1-13 (“international human rights principles”), 1-15 (“international human rights standards”), 1-62 (“basic human rights”), 1-83 (“principles of international human rights”), 1-99 (“international legal obligations and human rights standards”), 3-101 (“international human rights principles”).



are necessary to RoL. In many societies, unequal treatment is a cultural fact supported by popular consent. Others define the necessary rights substantively—for instance, the right to security in one’s person or the right to free speech—but doing so is unlikely to avoid disputes over which rights are essential to establishing RoL.<sup>66</sup>

Consequently, the *Rule of Law Handbook* advises that “[i]t is important . . . to research the human rights treaty obligations of the host nation along with any reservations made by it and the likely [U.S. Government] views of any such obligations or reservations . . . .”<sup>67</sup>

If indeed human rights are to be a priority in stability operations, the effort dedicated to promoting human rights values and ensuring host nation compliance with human rights obligations should be given the attention it deserves. Linking the promotion of human rights to rule of law development diminishes not only the conceptual clarity of “rule of law” but also the mission clarity needed to accomplish the important objectives of military stability operations. It encourages a piecemeal approach to human rights when a more deliberate and purposeful approach may be most needed. Separating human rights as a substantive dimension from rule of law could ensure structural development of the legal system and substantive law development occur concurrently, but also at a pace appropriate to local circumstances. In other words, it would help define independent, but related, lines of effort aimed at enhancing structural aspects of a host nation’s legal system and the substantive content of host nation domestic laws, with particular regard to human rights.

## VII. Conclusion

U.S. armed forces are expected to conduct stability operations with a proficiency equivalent to combat operations, yet Army doctrine fails to define a key term concerning an end state condition of Army stability operations: the establishment of “rule of law.” The *Rule of Law*

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<sup>66</sup> RULE OF LAW HANDBOOK, *supra* note 17, at 7–8 (internal citations omitted).

<sup>67</sup> *Id.* at 8. FM 3-07 also highlights the importance of “[e]valuating host-nation law, legal traditions, and administrative procedures in light of international legal obligations and human rights standards” with respect to criminal justice system reform. FM 3-07, *supra* note 17, at ¶ 1-99.

*Handbook* submits that legal systems can be described along both formalist and substantive lines and that distinguishing between approaches “is a matter of emphasis and priority rather than a choice between approaches.”<sup>68</sup> While this suggests one course of action, an alternative approach would separate formal and procedural rule of law efforts from substantive law development.

Military stabilization activities should ensure host nation laws meet legality requirements that enable individuals to be guided by law, however that law may be defined. Additionally, military stabilization activities should ensure the content of host nation laws complies with international human rights principles. Both these endeavors need not be subsumed under the umbrella of “rule of law” to drive military action. Separating the formal and procedural aspects of rule of law from substantive concerns over human rights would not only lend greater analytic clarity to the concept of rule of law but would also more clearly delineate the objectives military forces should pursue in the course of stability operations.

## **About the Author**

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<sup>68</sup> RULE OF LAW HANDBOOK, *supra* note 17, at 10.

# Rule of Law Development and the Need for a Whole of Government Team

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From May 2013–October 2014, as a mobilized Army Reserve General Officer, I had the honor of leading teams of military and civilian personnel to help develop parts of the criminal justice sector in Afghanistan, specifically the criminal investigative, prosecution, and detention sectors. Brigadier General John Hussey<sup>2</sup> and I wrote an article for Joint Force Quarterly discussing our experiences in order to help shape a discussion of the military’s role in rule of law development.<sup>3</sup> The premise of that article was that the military played a critical role in rule of law development, and it must begin the rule of law development/restoration process during the early stages of a conflict, when the environment is still kinetic and less permissive for travel by non-military personnel. This article serves as a sequel to suggest a standing team/whole of government approach is needed pre-conflict to coordinate efforts, establish relationships, and enable the deployment of a joint, interagency task force early in the conflict to conduct rule-of-law operations in the earliest phase of combat operations as possible.

First, it is appropriate to attempt to define the rule of law. The United Nations defines the rule of law as:

[The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to

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<sup>1</sup> The views expressed in this article are the views of the author and do not reflect the views of the U.S. Department of Justice (Department) or the Department of Defense (DOD).

<sup>2</sup> At the time we wrote the Joint Force Quarterly article, John Hussey was an Army Reserve Colonel, and I was an Army Reserve Brigadier General serving as commander and deputy commander of Combined Joint Interagency Task Force 435 in Afghanistan.

<sup>3</sup> Patrick J. Reinert & John F. Hussey, *The Military’s Role in Rule of Law Development*, JOINT FORCE Q. 120 (2015).

laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>4</sup>

This definition discusses governance of the entire nation, which requires rule of law development of all sectors to build a culture of following the law as a matter of habit.

In order to develop the rule of law, all aspects of society must be developed, but first focusing on intelligence gathering and criminal justice processes will enable national stability quicker, as safety is immediately above human's most basic physiological needs (food/shelter, etc.).<sup>5</sup> This focus will directly help the war fighter, law enforcement officials, the citizens of the country, and the fledgling nation-state while developing the mechanisms necessary to regulate the ungoverned spaces of a nation coming out of conflict. The processes prioritized for early development include intelligence gathering, criminal investigations, apprehensions/arrests, prosecutions, detentions, court system operations, probation/parole pre-release rehabilitation, and counter-corruption.

## **I. Rule of law planning process**

In order to build the rule of law in all sectors of a government, a broad team is needed, so each sector of the U.S. government can coach, teach, and mentor a partner sector of the nation being developed, and coordinate with the non-governmental entities and donor nations from the international community. This also requires close coordination of the effort by the whole of government before and

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<sup>4</sup> U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>5</sup> See Kendra Cherry, *The Five Levels of Maslow's Hierarchy of Needs*, VERYWELLMIND (updated July 21, 2019).

during execution of rule of law development operations so the effort can begin in the earliest phase of combat operations.

The planning process must also be flexible and adaptable to different cultures to help combat any ethnocentric bias one may have to a particular rule of law system, for example, adversarial/confrontational criminal justice system versus an inquisitorial system. As noted in John Hussey's 2013 article on rule of law development, existing interim criminal codes have been in development for years. Hussey notes:

In the latter part of the 1990s and in early 2000, the subject of the rule of law was widely debated. The UN issued the Report of the Panel on UN Operations, also known as the Brahimi Report. Within a year of the report's release, the U.S. Institute of Peace and the Irish Centre for Human Rights launched the Model Codes Project. The project included over 300 international experts who developed a set of codes for post-conflict reconstruction based on extensive research and best practice principles—the Model Criminal Code, the Model Code of Criminal Procedure, the Model Detention Act, and the Model Police Powers Act. Although the international community has not implemented the model codes, they offer a valuable alternative and starting point for criminal justice reform in post-conflict.<sup>6</sup>

Helping to tie the system of justice to the cultural norms of the nation strengthens the rule of law and binds the people to the nation-state. Rule of law policy development is greatly aided by the interim model codes developed by the international community to synchronize efforts of any international coalition working to rebuild the nation. But rule of law development cannot be viewed as a solitary process that occurs at the end of a conflict, it must be viewed as part of the continuum of any given conflict, which includes the use of military force.

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<sup>6</sup> John Hussey & Larry Dotson, *Seizing the Initiative by Establishing the Rule of Law During Combat Operations*, MIL. REV.: THE PROF. J. OF THE U.S. ARMY 30, 33–34 (2013) (citing COLETTE RAUSCH & VIVIENNE O'CONNOR, MODEL CODES FOR POST-CONFLICT CRIMINAL JUSTICE, VOLUME I: MODEL CRIMINAL CODE (Hans-Joerg Albrecht et al., eds., 2007)).

Fitting the rule of law development efforts into the scheme of a military campaign, requires a discussion of military operations. Current joint military doctrine describes “phasing” of operations in order to coordinate all activities needed to accomplish a mission to ensure appropriate emphasis is placed on necessary activities at the right time.<sup>7</sup> Joint Publication 5 defines a phase:

A phase can be characterized by the focus that is placed on it. Phases are distinct in time, space, and/or purpose from one another, but must be planned in support of each other and should represent a natural progression and subdivision of the campaign or operation. Each phase should have a set of starting conditions that define the start of the phase and ending conditions that define the end of the phase. The ending conditions of one phase are the starting conditions for the next phase.<sup>8</sup>

Before 2017, joint doctrine discussed six phases of combat operations: Phase 0 (shaping the environment by building coalitions and dissuading potential adversaries); Phase I (deterring specific adversary action); Phase II (seizing the initiative through appropriate use of force); Phase III (dominating to control the environment); Phase IV (stabilizing the environment, “when there is no fully functional, legitimate civil governing authority present”); and Phase V (enabling civil authority to support legitimate civil governance).<sup>9</sup> Typically, rule of law development is thought to occur primarily in Phases IV and V, but I suggest it needs to be planned and implemented much earlier, using a coordinated whole of government approach. For purposes of clarity, I will use the construct of six phases to discuss the concept of creating a standing interagency team to develop rule of law development policy and execute it in a much earlier phase of the campaign.

Every part of our government must play a part in developing the rule of law in a nation coming out of conflict, or to help a nation to keep from sliding into conflict. Rule of law development is not the sole

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<sup>7</sup> JOINT CHIEFS OF STAFF, JOINT PUBLICATION 5-0, JOINT PLANNING (June 16, 2017).

<sup>8</sup> *Id.*

<sup>9</sup> JOINT CHIEFS OF STAFF, JOINT PUBLICATION 5-0, JOINT OPERATION PLANNING (Aug. 11, 2011).

province of any single agency or part of government. In Phase 0, a time of ordinary, peace-time U.S. governmental operations, the Department of State (DOS) has primacy for international relations, but other agencies, like the intelligence agencies, Department, DOD, Department of Homeland Security (DHS), and others have direct international engagements as well. For instance, an embassy is staffed with a defense attaché from DOD, Justice attaché office from the Department, and a host of other agencies.<sup>10</sup> Many government agencies, like DOD, have frequent, direct military-to-military contact with foreign militaries through the Defense Security Cooperation Office and the Defense Institute of International Legal Studies.<sup>11</sup>

During Phase 0, agencies have the opportunity to build a holistic plan for rule of law development in concert with partners to be able to effectively rebuild a nation so it can govern itself. This plan, if ever needed, would be the rule of law development blue print to organize the activities of the whole of government. During phases of conflict that may be more kinetic, agencies that are designed for the kinetic environment will necessarily take a more leading role in executing the rule of law development plan.

Waiting until later in the conflict to plan for rule of law development is a path fraught with peril. In Afghanistan, the Rule of Law Field Force under Combined Joint Interagency Task Force 435 (CJIATF 435) worked in concert with the embassy to execute rule of law development missions, but this command began in 2011, a decade after the conflict began.<sup>12</sup> If a cooperative venture to rebuild the rule of law in Afghanistan began much earlier in the conflict, Afghanistan would have been more resilient and perhaps been better able to ensure its own stability and territorial integrity as coalition force levels were reduced.

In a rule of law development/assistance process, all agencies need to engage in a coordinated effort that leverages the strengths of each

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<sup>10</sup> Diplomacy at Work: A U.S. Embassy, *Archive*, U.S. Dep't of State (Jan. 20, 2001–Jan. 20, 2009), <https://2001-2009.state.gov/r/pa/ei/c6177.htm> (last visited July 29, 2019).

<sup>11</sup> DEFENSE SECURITY COOPERATION AGENCY, <https://www.dsca.mil/> (last visited July 24, 2019); *Defense Institute of International Legal Studies (DIILS)*, DEFENSE SECURITY COOPERATION AGENCY, <https://www.dsca.mil/programs/defense-institute-international-legal-studies-diils> (last visited July 24, 2019).

<sup>12</sup> Reinert & Hussey, *supra* note 3, at 123.

agency. In Phase 0, we, as a nation, must plan, prepare, and train to conduct coordinated rule of law development missions that include: planning to build appropriate infrastructure for detention centers and courts; building a cadre of police, detention personnel, intelligence personnel, prosecutors, defense counsel, and judges; and developing the processes needed to make following the laws of the nation a habit of the people.

In a conflict-ridden country, restoration of a criminal justice system may be the area requiring the most urgent effort to reestablish a functioning nation-state. There, the Department is best suited to serve as subject-matter experts to drive the interagency process, to create an integrated plan, and to be the executive agent for implementing a coordinated strategy. Coupling the expertise of the Department, the DOS, and the military planners comprised of Judge Advocates and planners from the School of Advanced Military Studies (SAMS),<sup>13</sup> will lead to a scalable, executable, comprehensive plan for rule of law development that can be executed throughout the continuum of conflict. The rule of law processes requiring priority for development are discussed more fully below.

## II. Intelligence gathering and criminal investigations

If history is a predictor of the future, when a nation comes out of conflict, there is a high probability that an insurgency and a rise in organized criminal activity will follow combat operations.<sup>14</sup> Intelligence gathering, either for use by the war fighter or to combat organized crime, is critical to successful counter-insurgency operations and the establishment of a stable nation. In Afghanistan, CJIATF 435 had a Theater Intelligence Group, which blended military intelligence assets with civilian intelligence and law enforcement entities to gather actionable intelligence for the warfighter, while also building the Afghan National Directorate of Security's ability to conduct information gathering to support criminal investigations and

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<sup>13</sup> *School of Advanced Military Studies (SAMS)*, U.S. ARMY COMBINED ARMS CTR., <https://usacac.army.mil/organizations/cace/cgsc/sams> (last visited July 23, 2019).

<sup>14</sup> Scott Stewart, *Insurgency and the Protracted War*, STRATFOR (June 28, 2012), <https://worldview.stratfor.com/article/insurgency-and-protracted-war>.



prosecutions.<sup>15</sup> The Theater Intelligence Group was very adept at conducting strategic debriefings of detainees to better understand the insurgency while also training the Afghans to interview the detainee about his own activities that may have violated Afghan criminal law. This organization would have been much more effective if it had been conceptualized and formed in Phase 0 or Phase I, utilizing a model like the various fusion centers or the Drug Enforcement Administration (DEA) Special Operation Division.<sup>16</sup>

Many of the skills and methods used in intelligence gathering are similar skills used in criminal investigations of complex organizations, like the drug trafficking and Transnational Criminal Organizations targeted by the Organized Crime Drug Enforcement Task Force (OCDETF) investigative teams across the country. Of course, there would need to be careful controls to ensure classified information is not spilled into systems with a lower classification. But those processes exist and were used extensively in Afghanistan when CJIATF 435 had to develop criminal prosecution files for Afghan authorities to prosecute detainees in Afghan criminal court. The processes helped the Afghans conduct criminal interviews and declassify select information to make it releasable to the Afghans to use in criminal court.<sup>17</sup> The ability to train information gathering skills is critical to the development of a robust criminal justice system and a military engaging in a counter-insurgency.

During the course of combat operations in Afghanistan, after the fall of the Taliban and the establishment of the Afghan military, the military effort progressed from coalition forces conducting unilateral operations, to coalition forces in the lead with Afghan support, to shared combat operations fighting shoulder to shoulder, to, finally, Afghan forces in the lead with coalition support.<sup>18</sup> With this

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<sup>15</sup> Reinert & Hussey, *supra* note 3, at 124.

<sup>16</sup> See *Transnational Organized Crime*, OFF. OF THE DIRECTOR OF NAT'L INTELLIGENCE, <https://www.dni.gov/index.php/who-we-are/organizations/ise/ise-archive/ise-additional-resources/2146-transnational-organized-crime> (last visited July 23, 2019).

<sup>17</sup> Reinert & Hussey, *supra* note 3, at 124.

<sup>18</sup> David Simons, *Training Afghans 'Shohna ba Shohna,' 'Shoulder to Shoulder'*, ARMY NEWS SERV. (Jan. 24, 2011), [https://www.army.mil/article/50718/training\\_afghans\\_shohna\\_ba\\_shohna\\_shoulder\\_to\\_shoulder](https://www.army.mil/article/50718/training_afghans_shohna_ba_shohna_shoulder_to_shoulder); Sean Kimmons, *Soldiers See Afghan Security Forces Taking Lead with New Capabilities*, ARMY NEWS SERV. (Jan. 30, 2019),

transition, the primacy of Afghan criminal law regarding insurgent related crimes became more apparent, as Afghanistan would not exercise administrative detention authority over insurgent detainees under the Law of War, but rather exercised detention authority under Afghan criminal law. Having a robust multi-agency team with all procedures established pre-conflict will make this complex transition from intelligence used to target an organization with kinetic means, to law enforcement operations using the host nation's criminal process to disrupt and dismantle the insurgent organization.

### III. Detention, probation, parole, and pre-release rehabilitation

Detention operations is an area that needs to be carefully planned and coordinated to transition from law of war detention, using international law and "Prisoner of War" status, to one that may be based on detention under criminal law of the host nation.<sup>19</sup> An interagency team to develop policy to handle detentions, probation, parole, and pre-release rehabilitation can gather best practices and provide uniform guidance to both military and civilian agencies conducting detention operations or prison operations.

The CJIATF 435 experience in detention operations and training the Afghans to conduct pre-trial detention of individuals captured on the battlefield while participating in insurgent-related activities is discussed in our earlier article.<sup>20</sup> Detention operations for the Afghan military was a military mission, but training the Afghans in prison operations fell to the DOS and Bureau of International Narcotics and Law Enforcement Affairs (INL).<sup>21</sup> For instance, the military at the Pol-e-Charki detention facility in Kabul, specifically CJIATF 435, provided construction expertise and training to military personnel to conduct detention of insurgents convicted in Afghan court, but INL

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[https://www.army.mil/article/216780/soldiers\\_see\\_afghan\\_security\\_forces\\_taking\\_lead\\_with\\_new\\_capabilities](https://www.army.mil/article/216780/soldiers_see_afghan_security_forces_taking_lead_with_new_capabilities).

<sup>19</sup> Reinert & Hussey, *supra* note 3, at 125.

<sup>20</sup> *Id.* at 124.

<sup>21</sup> Corrections Programs in Afghanistan, Fact Sheet, *Bureau of International Narcotics and Law Enforcement Affairs, Archived Content*, U.S. Dep't of State, <https://2009-2017.state.gov/j/inl/rls/fs/189319.htm>; Reinert & Hussey, *supra* note 3, at 125.

provided training and construction oversight to the civilian side of the same facility.<sup>22</sup>

The skills needed to detain an insurgent, prisoner of war, pre-trial detainee, or post-trial prisoner to the standard that meets international humanitarian requirements, are virtually indistinguishable. The difference in agency responsibility was more a “color of money” issue rather than finding the right agency to provide the correct training without creating gaps or duplicative programs.<sup>23</sup>

The Department, serving as an executive agent for rule of law in concert with the military planners, especially those skilled in military corrections, could bring all assets and funding sources to help coordinate policy and infrastructure funding for detention operations, with the military taking the lead on its traditional “prisoner of war” operations. The military could ensure semi-permanent or permanent facilities built for any detention purpose would be constructed in the appropriate location and be sustainable by the host nation post-conflict—taking into consideration the local utility system and avoiding the pitfalls of diesel power generation at operating bases or facilities that may later be transferred to the host nation.<sup>24</sup>

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<sup>22</sup> Gregory Frazho, *CJIATF 435 Meets with Afghan National Army, CSTC-A Partners*, DEFENSE VISUAL INFORMATION DISTRIBUTION SERVICE, (June 16, 2012); SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION (SIGAR), POL-I-CHARKHI PRISON: AFTER 5 YEARS AND \$18.5 MILLION, RENOVATION PROJECT REMAINS INCOMPLETE (Oct. 2014).

<sup>23</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE, AFGHANISTAN DEVELOPMENT: AGENCIES COULD BENEFIT FROM A SHARED AND MORE COMPREHENSIVE DATABASE ON U.S. EFFORTS, GAO-13-34 (2012).

<sup>24</sup> Military bases in Afghanistan and Iraq built by coalition forces, were many times entirely dependent upon diesel power generation and were not linked to the local power grid. The diesel fuel needed to generate power needs to be delivered, which in turn consumes more fossil fuels. Chris Garvin & Jim Codling, *Making Grid Connection Happen*, TME: THE MIL. ENGINEER, <http://themilitaryengineer.com/index.php/item/111-making-grid-connection-happen>. For every gallon of fuel burned in a generator to produce electricity, it takes seven gallons of fuel to get it there. This operational planning challenge, is made more concerning when one considers a single 1000 kW generator with 100% load which could support approximately 500 people burns 71.1 gallons of fuel per hour (1,706.4 gallons per day). JOHN VAVRIN, U.S. ARMY CORPS OF ENGINEERS, POWER AND ENERGY CONSIDERATIONS AT FORWARD OPERATING BASES (FOBS) (2010) (summarizing an October 1, 2009, study by the U.S. Marine Corps Energy Assessment Team).

The Department's expertise is critical to help a host nation establish systems of parole and pre-release programming for detainees and prisoners. "Parole" during time of war is "[a] pledge by a prisoner of war or a defeated soldier not to bear arms."<sup>25</sup> While conducting detention operations, CJIATF 435 released a variety of individuals back to their communities in Afghanistan, usually in the custody of a village elder.<sup>26</sup> It is unknown how many of these individuals returned to again take up arms against the coalition. The reintegration process will also be an issue if or when the Taliban ultimately makes peace with the Afghan government and becomes a political party, with its members leaving the battlefield and rejoining Afghan society.<sup>27</sup>

During 2015, the state and federal governments in the United States released 641,100 individuals who completed their prison sentences in state or federal prison.<sup>28</sup> Individuals released from federal sentences are aided by both pre-release programming in their last place of incarceration and a dedicated federal probation officer to

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<sup>25</sup> Parole, *Glossary of Civil War Terms*, AM. BATTLEFIELD TRUST, <https://www.battlefields.org/glossary-civil-war-terms#P> (last visited July 23, 2019).

<sup>26</sup> George Cloutier, *Two Former Detainees Released During Paktika Shura*, U.S. CENTRAL COMMAND (Dec. 6, 2010), <https://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/884195/two-former-detainees-released-during-paktika-shura/>; Emma Graham-Harrison, *Afghanistan Orders Release of 72 Bagram Jail Prisoners*, THE GUARDIAN (Jan. 9, 2014), <https://www.theguardian.com/world/2014/jan/09/afghanistan-orders-release-bagram-jail-prisoners>; Megan McCloskey, *Reliance on Afghan Elders Tests Troops*, STARS AND STRIPES (Jan. 10, 2011), <https://www.stripes.com/news/reliance-on-afghan-elders-tests-troops-1.131239>.

<sup>27</sup> Kathy Gannon, *U.S. Watchdog: Afghans May Not Be Ready for 'Day After' Peace*, MILITARY TIMES (May 1, 2010), [https://www.militarytimes.com/news/pentagon-congress/2019/05/01/us-watchdog-afghans-may-not-be-ready-for-day-after-peace/?utm\\_source=Sailthru&utm\\_medium=email&utm\\_campaign=EBB%2005.01.19&utm\\_term=Editorial%20-%20Military%20-%20Early%20Bird%20Brief](https://www.militarytimes.com/news/pentagon-congress/2019/05/01/us-watchdog-afghans-may-not-be-ready-for-day-after-peace/?utm_source=Sailthru&utm_medium=email&utm_campaign=EBB%2005.01.19&utm_term=Editorial%20-%20Military%20-%20Early%20Bird%20Brief).

<sup>28</sup> *NRRC Facts & Trends*, THE NAT'L REENTRY RESOURCE CTR., <https://csgjusticecenter.org/nrrc/facts-and-trends/> (last visited July 23, 2019).

assist in being successful on supervised release.<sup>29</sup> The Bureau of Prisons (BOP), in concert with the expertise of the federal probation officers and military corrections and detentions personnel, like the Army Corrections Command, can create basic reintegration policy and procedures that can be tailored to any circumstance of detention and release. The reintegration policy and procedures will also serve as a set of guiding principles in conducting training for the local detention and prison facilities, when those facilities become operational. The Department is well-positioned to be the executive agent to develop detention, probation, parole and pre-release rehabilitation programming that can be executed to develop the rule of law in a nation coming out of conflict.

## IV. Criminal prosecutions

In Afghanistan, the Rule of Law Field Force and CJATF 435 had military practitioners, lawyers from coalition partners, contractors and employees of INL, and Department personnel to coach, teach, and mentor the Afghans working in the counter-terrorism realm.<sup>30</sup> The military worked directly with the Afghan Supreme Court to establish the National Security Justice Center in Parwan and establish nationwide jurisdiction for insurgent-related crimes.<sup>31</sup> In

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<sup>29</sup> U.S. DEP'T OF JUSTICE: FED. BUREAU OF PRISONS, P5325.07 RELEASE PREPARATION PROGRAM (Dec. 31, 2007); *Probation and Pretrial Officers and Officers Assistants*, U.S. COURTS, <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-officers-and-officer> (last visited July 23, 2019); *Army Clemency and Parole Board*, U.S. ARMY: ARMY REVIEW BOARDS AGENCY, <https://arba.army.pentagon.mil/clemency-parole-faq.html> (last visited July 23, 2019).

<sup>30</sup> Reinert & Hussey, *supra* note 3, at 123; Patrick J. Reinert, *NATIO Rule of Law Field Support Mission / Rule of Law Field Force—Afghanistan After Action Report* (Judge Advocate Gen.'s Legal Ctr. and School and Army Ctr. for Military History, Mar. 11, 2014); Patrick J. Reinert, *A History of NATO Rule of Law Field Support Mission and Rule of Law Field Force—Afghanistan* (Judge Advocate Gen.'s Legal Ctr. and School and Army Ctr. for Military History, Mar. 13, 2014).

<sup>31</sup> Kyle W. Bayless, *The Rule of Law Effort in Afghanistan: A Success Story in the Making* (Oct. 6, 2016) (unpublished masters thesis, Nat'l Def. Univ. Joint Forces Staff Coll. Joint Advanced Warfighting School); Paul Tait, *Giant Prison for Afghan Militants Aims to Avoid Pitfalls of the Past*, REUTERS (Apr. 15, 2016), <https://www.reuters.com/article/us-afghanistan-security->

counter-narcotics, DOD, U.S. Agency for International Development (USAID), the DEA, and the Department played pivotal roles in the development of processes and the creation of the National Counter-Narcotics Court.<sup>32</sup> In counter-corruption, the military and civilian officials all encouraged the creation of a Major Crimes Task Force (with significant support from the Federal Bureau of Investigation (FBI)) and an Anti-Corruption Justice Center to help the Afghans investigate and root out corruption.<sup>33</sup> These efforts have gotten off to a slow start, but show promise.<sup>34</sup> A holistic approach led by an executive agent for rule of law development may have been able to establish these mechanisms earlier in the conflict resolution and rebuilding process.

Many of the rule of law practitioners were meeting with some of the same partners, but for different purposes and perhaps with a different approach. For instance, I regularly met with the Afghan Deputy Attorney General for Internal and External Security Crimes to discuss the detention and prosecution of insurgents and other security threats. Other government agencies and military organizations met with him and others in the Ministry of Justice to discuss counter-narcotics, anti-corruption, and using the Afghan legal system to prosecute law of war violations committed by Afghan forces against detainees. The Ministry of Justice and the Afghan Supreme Court

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prison/giant-prison-for-afghan-militants-aims-to-avoid-pitfalls-of-past-idUSKCN0XC1Z4.

<sup>32</sup> SIGAR, COUNTERNARCOTICS: LESSONS FROM THE U.S. EXPERIENCE IN AFGHANISTAN (June 2018); SIGAR, COUNTERNARCOTICS (Oct. 30, 2018).

<sup>33</sup> Randy Fabi & Mirwais Harooni, *Afghan's New Anti-Graft Court Hears First Cases in Kabul*, REUTERS (Nov. 12, 2016), <https://www.reuters.com/article/us-afghanistan-corruption/afghans-new-anti-graft-court-hears-first-cases-in-kabul-idUSKBN13709F>; *Anti-Corruption Judicial Center (ACJC)*, WHO IS WHO IN AFGHANISTAN?, [http://www.afghanbios.info/index.php?option=com\\_afghanbios&id=3573&task=view&total=3673&start=381&Itemid=2](http://www.afghanbios.info/index.php?option=com_afghanbios&id=3573&task=view&total=3673&start=381&Itemid=2) (last visited July 23, 2019); Stephen A. Cyrus, *The Major Crimes Task Force-Afghanistan: A Case Study and Examination of Implications for Future FBI Capacity Building Programs*, HOMELAND SECURITY AFF. (Dec. 2014).

<sup>34</sup> SIGAR, AFGHANISTAN'S ANTI-CORRUPTION EFFORTS: THE AFGHAN GOVERNMENT HAS BEGUN TO IMPLEMENT AN ANTI-CORRUPTION STRATEGY, BUT SIGNIFICANT PROBLEMS MUST BE ADDRESSED (May 2018); Chad Brooks & Craig Trebilcock, *Fighting for Legitimacy in Afghanistan: The Creation of the Anti-Corruption Justice Center*, 7 PRISM: NAT'L DEF. U. (2017).

were critical to establishing courts with national jurisdiction like the Central Narcotics Court with the Department and the National Security Justice Center for insurgency-related prosecutions with the DOD. In short, it was a complicated legal landscape for all involved.

Using an interagency approach pre-conflict, the United States can develop a unified approach that can be implemented by each agency or department in the areas in which they operate. For instance, DOD, as the uniformed war fighting agency, would lead in areas of detention of prisoners of war, but would need to closely coordinate with agencies assisting in criminal detention and incarceration in order to ensure facilities, policies, and procedures are synchronized. Similarly, DOD should take the lead in managing the tribunals needed to detain prisoners of war and must coordinate closely with the Department and other agencies working generally in the criminal courts to process “prisoners of war” as insurgents under local criminal law. The Department, with the support of the other agencies, would lead on rehabilitative programming, release, prison operations, prosecution, and investigations. Early coordination is the key to success.

## **V. Court system operations**

The criminal justice system of any nation coming out of conflict needs a holistic approach to ensure the system meets the needs of the nation under international law. Although all aspects of the court system need to be developed to establish rule of law, the criminal justice system may require priority in order to help enable early stability. Efforts to create a criminal justice system, or help one recover and reform after protracted conflict, should not attempt to create a system that is culturally foreign to the host nation. When the justice system is degraded or incapable of dispensing impartial justice, outside personnel may be needed to jumpstart the newly constituted justice system.

As noted by John Hussey in his 2013 article:

In Kosovo, the Albanian judiciary failed to apply the law equally between the ethnic Albanians and Serbs. Due to obvious discrimination, the Special Representative of the UN Secretary-General attempted to improve the judicial system by permitting internationals to serve on the judiciary. After the conflict in Kosovo, the UN Mission in Kosovo established an independent judiciary by appointing international judges and prosecutors. It

was the first time this had been done, and it resulted from discrimination within the courts and a lack of trained judges and prosecutors. The after action conclusion of the program was that the international participation in establishing the judiciary should have been immediate rather than incremental and crisis-driven.<sup>35</sup>

If the new system is too far removed from the nation's historically-grounded system, it will be harder to implement and may inadvertently create a culture that the law can be ignored with no consequence. The justice system must meet the capabilities of the country and mature with the nation.

For instance, the Afghan legal system was modeled after the Italian model of justice. In this model, the original trial is in the district; the appeal, which could overturn both acquittals and convictions as a finder of fact, is in the province; and the Supreme Court, which also has fact finding ability, is a central court in Kabul.<sup>36</sup> The Interim Criminal Procedure Code from 2004 and Afghan Criminal Procedure Code, passed in 2014, state that in order to appeal a case, correspondence must be received by the appellate court in the province within 20 days of the conviction or acquittal.<sup>37</sup> The appellate court, which is also a court of original jurisdiction, can take new evidence and must have the defendant present for trial.<sup>38</sup> This system works well in a nation with ease of travel, electronic filing, and other modern conveniences, but in parts of Afghanistan, like Badakhshan Province in far Northwest Afghanistan, travel from the 28 districts in the province to the appellate court in Fayzabad may be impossible for months on end due to weather and the virtually impassable terrain of the Hindu Kush mountain range.<sup>39</sup> The timelines in the code simply

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<sup>35</sup> Hussey & Dotson, *supra* note 6, 33–34 (citing SETH G. JONES ET AL., ESTABLISHING LAW AND ORDER AFTER CONFLICT 42–43 (The Rand Corp. 2005)).

<sup>36</sup> Bayless, *supra* note 31.

<sup>37</sup> CRIM. PROC. CODE OF THE ISLAMIC REPUBLIC OF AFG. art. 253 (2014); INTERIM CRIM. CODE FOR COURTS art. 63 (2004).

<sup>38</sup> INTERIM CRIM. CODE FOR COURTS art. 63 (2004).

<sup>39</sup> Badakhshan Province “has a total area of 44,059 square kilometres (17,011 sq mi), most of which is occupied by the Hindu Kush [*Hindu Kush*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Hindu\\_Kush](https://en.wikipedia.org/wiki/Hindu_Kush) (last visited July 24, 2019),] and Pamir [*Pamir Mountains*, WIKIPEDIA,



can't be followed in lock-step with the more urban provinces like Kabul.

In a unified court system functioning in a diverse, largely rural, and underdeveloped nation coming out of conflict, the rules may not be able to be uniform. This dichotomy of a written rule that only works in the urban centers, that is virtually impossible to follow in the rural areas, foments division in the nation and undermines the rule of law.

Before any conflict begins, the interagency process needs to leverage all the expertise available for court operations, including members of the judiciary. It is much easier for a senior judge of a foreign nation to take guidance and suggestions from another judge. Under the Department's administrative umbrella, the judges would be able to provide expertise to the courts and probation/parole operations. The Administrative Office of U.S. Courts could provide key assistance to a newly established court system.

## VI. Conclusion

It is in Phase 0 that the interagency needs to work to develop policy, staff exportable teams, and train the members to work as a team in order to deploy them into conflict zones. During the continuum of conflict, different agencies will lead the implementation efforts at different times and in different sectors. If diplomacy fails, and national command authority chooses force, then DOD takes the initial lead, until the area is stabilized and the lead shifts back to the DOS. Although the team composition and lead may change over the phases of the conflict, the policy and end state of producing a nation that embraces the rule of law must remain firmly fixed. A planning team with the Department, DOS, the military (Judge Advocates, Civil Affairs, Military Police, members of the special operations community and planners from School of Advanced Military Studies), and other stakeholders, can effectively develop a plan for rule of law development that is scalable and attainable. Now is the time to plan, prepare, and train. Failing to plan is planning to fail.

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[https://en.wikipedia.org/wiki/Pamir\\_Mountains](https://en.wikipedia.org/wiki/Pamir_Mountains) (last visited July 24, 2019),  
mountain ranges." Badakhshan Province, WIKIPEDIA,  
[https://en.wikipedia.org/wiki/Badakhshan\\_Province](https://en.wikipedia.org/wiki/Badakhshan_Province) (last visited July 24,  
2019).

## About the Author

**Major General (Retired) Patrick J. Reinert** is a career Assistant United States Attorney in the Northern District of Iowa, who is currently serving as a Senior Litigation Counsel. He retired from the Army Reserve after serving over 35 years in the Army National Guard, on active duty, and in the Army Reserve retiring as an Army Reserve Major General. Major General (Retired) Patrick Reinert holds a B.S. in Political Science from Iowa State University, a J.D. (with distinction) from the University of Iowa, and a Masters of Strategic Studies from The U.S. Army War College. As a General Officer, Major General (Retired) Reinert served as Chief Judge (Individual Mobilization Augmentee) of the Army Court of Criminal Appeals, Commander of the U.S. Army Reserve Legal Command, Commander of the Rule of Law Field Force-Afghanistan, Commander of the NATO Rule of Law Field Support Mission-Afghanistan, Deputy Commander of Combined Joint Interagency Task Force 435 (Afghanistan), Commander of Combined Joint Interagency Task Force 435 (Afghanistan), Special Assistant to the Chief of Army Reserve, and Commander of the 88th Readiness Division.

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# Legitimacy and Rule of Law: A Military Practitioner's Point of View

*Lieutenant Colonel Nathan J. Bankson<sup>1</sup>  
Chief, Strategic Engagements  
National Security Law Division  
Office of the Judge Advocate General*

The United States does not seek conflict, but we know that having the capability to win wars is the best way to deter them.<sup>2</sup>

In the practical art of war, the best thing of all is to take the enemy's country whole and intact; to shatter and destroy it is not so good.

...

Hence to fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting.<sup>3</sup>

The development and maintenance of a disciplined and ready force capable of fighting and winning our nation's wars is the mission of the Department of Defense (DOD). Preventing, mitigating, or resolving conflicts short of war, however, remains the mark of supreme excellence. The United States, by establishing and maintaining a position of strength, serves as a noble deterrent for those who would attempt to violate our sovereignty and destroy our way of life. This deterrent effect has largely prevented major conflict for decades, but obviously peace has not broken out across the globe. This is not the time for complacency, but rather a time to redouble our efforts through promotion and support of the rule of law.

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<sup>1</sup> The views expressed in this paper are those of the author and do not reflect the official policy or position of the U.S. Army, the DOD, or the U.S. government.

<sup>2</sup> Patrick M. Shanahan, Acting Sec'y of Def., Remarks at the IISS Shangri-La Dialogue 2019 (June 1, 2019).

<sup>3</sup> SUN TZU, ART OF WAR 8 (Lionel Giles transl., Allandale Online Publishing 2000).

Legitimacy, in large part hinges on commitment to the rule of law. As anyone can read in their news source of choice, conflicts tend to take place where institutions are failing or have failed. The populations of those states have lost trust in their governments; basic services are inadequate and there is general unrest. This is fertile ground for disruptive and destructive forces to take root. Maligned forces further destabilize the security of those states—jeopardizing relative peace by potentially (or actually) drawing in superpowers and limiting peaceful options for conflict resolution. The military attempts to prevent or mitigate this breakdown of institutions by reinforcing legitimacy both in its own actions and the actions of the host nation.

Operating in a supporting role—that is, at the request of a host nation and the U.S. State Department—the military has multiple programs aimed at building partner capacity and strengthening foreign militaries. Within the military construct, the Army Judge Advocate General’s (JAG) Corps likewise supports prevention, mitigation, and early resolution of conflict through the promotion of legitimate military institutions and advocacy of the rule of law. Where legal advisors on the battlefield are generally thought of as advising clients regarding the legality of the use of particular weapon systems on particular targets, in the case of promoting rule of law, law is the means of achieving effects against a competitor or adversary.

This article highlights legitimacy as a warfighting principle and explores ways Army lawyers promote rule of law around the globe to secure our national security interests.

Legitimacy is the “quality or state of being legitimate.”<sup>4</sup> Legitimate, on the other hand, is defined as “accordant with law or with established legal forms and requirements [or] conforming to recognized principles or accepted rules and standards.”<sup>5</sup> The U.S. Joint Warfighting Doctrine (Joint Doctrine) identifies legitimacy as one of the 12 warfighting principles stating:

Legitimacy, which can be a decisive factor in operations, is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences. These audiences will include our national leadership and domestic

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<sup>4</sup> *Legitimacy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/legitimacy> (last visited Sept. 3, 2019).

<sup>5</sup> *Id.*

population, governments, and civilian populations in the [operating environment], and nations and organizations around the world.<sup>6</sup>

Part of the Joint Doctrine further focuses on

the legitimacy bestowed upon a local government through the perception of the populace that it governs. Humanitarian and civil military operations help develop a sense of legitimacy for the supported government. Because the populace perceives the government has genuine authority to govern and uses proper agencies for valid purposes, they consider that government as legitimate, especially when coupled with successful efforts to build the capability and capacity of the supported government to complete such operations on its own.<sup>7</sup>

In line with the Joint Doctrine, judge advocates work to establish legitimacy through promotion of the rule of law. This work often occurs in areas where there is no active conflict. The work many times takes place in what some call “gray zone” environments.<sup>8</sup> Judge advocates, after nearly two decades of conflict in failed or failing states, also have great insight into the importance of establishing legitimacy amidst ongoing combat operations.<sup>9</sup>

Rule of law is the centerpiece to legitimacy. In a time of conflict, for example, the military must be responsive to the security concerns of the state and protect the population and vital infrastructure. A force

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<sup>6</sup> CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT OPERATIONS, JOINT PUBLICATION 3-0 app. A-4 (2017).

<sup>7</sup> *Id.*

<sup>8</sup> Gray zone may generally be described as an environment of intense competition falling short of U.N. Charter Article 2(4) prohibitions on the threat or actual use of force. *See, e.g.*, Christopher Paul, *Confessions of a Hybrid Warfare Skeptic*, SMALL WARS J., <https://smallwarsjournal.com/jrnl/art/confessions-of-a-hybrid-warfare-skeptic>; Mike Schmitt, *Grey Zones in the International Law of Cyber Space*, 42 YALE J. INT’L L. 1 (2017).

<sup>9</sup> *See, e.g.*, Susan Escallier, *Understanding Misunderstanding: Lessons Learned from the Negotiation and Implementation of the Security Agreement Between the United States and Iraq*, 67 DOJ J. FED. L. & PRAC., no. 4, 2019, at 287.

that violates human rights, disregards the law, or otherwise engages in corrupt practices will not earn the trust and respect of the population and, therefore, will lose its legitimacy—this applies to all forces. Similarly, when dealing with a failed or failing state, establishing sustainable and responsive institutions will help the population survive and reinforce the legitimacy of the government institutions. Judge advocates have a critical role in helping develop that rule of law, whether it is through training forces on the law of armed conflict or human rights law, or working with a local military official to develop policy.

## I. The role of a judge advocate

With Army JAG Corps personnel deployed to numerous countries outside of the United States, the U.S. Army consistently promotes rule of law missions, helping host nation militaries establish and maintain legitimacy. From understanding how to turn intelligence into evidence for warrant-based targeting, to ensuring detention facilities and courts are operating under a standard reflective of human rights requirements, or assisting a host nation root out an enemy to then begin rebuilding a functioning state, the Army JAG Corps effectively operationalizes the practice of law in the rule of law discipline.

### A. Security Assistance<sup>10</sup>

Rule of law pre- and post-conflict falls largely under the Security Assistance umbrella performed at the request of the host-nation and in support of the U.S. State Department under the authority of Title 22 of the United States Code.<sup>11</sup> This is distinct (at least in name) from DOD Security Cooperation Activities authorized under Title 10 of the U.S. Code discussed below.<sup>12</sup>

The judge advocate's role under Title 22 authority takes the form of host-nation training in subjects such as human rights law, the law of armed conflict, and peace support operations. One of the best mechanisms to help educate foreign militaries on the law comes from

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<sup>10</sup> For purposes of this article, the Foreign Assistance Act (FAA) of 1961 is the relevant authority for Security Assistance. 22 U.S.C. § 2151, *et seq.*

<sup>11</sup> *Id.*

<sup>12</sup> *See, e.g.*, 10 U.S.C § 311 (Exchange of defense personnel between United States and friendly foreign countries: authority); 10 U.S.C. § 333 (Foreign security forces; authority to build capacity).

the Defense Institute for International Legal Studies (DIILS) based in Newport, Rhode Island.<sup>13</sup> As an element of the Defense Security Cooperation Agency (DSCA), ambassadors and geographic combatant commanders (for example, Central Command, European Command, and Southern Command) call upon DIILS to address an identified gap in capability for a particular nation.<sup>14</sup> DIILS then sends training teams to engage or brings diverse groups of nations to Rhode Island for more intensive training.<sup>15</sup>

Recently, an ambassador from an emerging nation requested assistance from the senior uniformed legal advisors for the Army, Marine Corps, and Army National Guard to advise foreign legal advisors on how to better ensure military commanders adhered to human rights law and the law of armed conflict (LOAC). The request sought a specific outcome—preserve positive diplomatic relations with the country by educating its armed forces on preventing and/or mitigating human rights violations. Along with providing the African nation’s legal advisors with techniques to advise commanders and adhere to the rule of law, preventing incidents of human rights violations directly impacts the nature of support the United States can provide to foreign partners in light of Leahy Laws dealing with human rights.<sup>16</sup>

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<sup>13</sup> *Defense Institute of International Legal Studies*, CNIC, [https://www.cnic.navy.mil/regions/cnrma/installations/ns\\_newport/about/tenant\\_commands/defense\\_institute\\_of\\_international\\_legal\\_studies.html](https://www.cnic.navy.mil/regions/cnrma/installations/ns_newport/about/tenant_commands/defense_institute_of_international_legal_studies.html) (last visited Sep. 18, 2019).

<sup>14</sup> DSCA’s mission is to advance U.S. national security and foreign policy interests by building the capacity of foreign security forces to respond to shared challenges. DSCA leads the broader U.S. security cooperation enterprise in its efforts to train, educate, advise, and equip foreign partners. *Mission, Vision, and Values*, DEF. SECURITY COOPERATION AGENCY, <https://www.dsca.mil/about-us/mission-vision-values> (last visited Aug. 29, 2019).

<sup>15</sup> *See id.*

<sup>16</sup> *See, e.g.*, 22 U.S.C. § 2151n(a). The statute states:

No assistance may be provided under subchapter 1 of this chapter to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of

Similarly, delegations from partner nations are welcome to visit the Pentagon to learn about how to improve the legal services they provide to their clients. Even without pending crises, these delegations simply want to modernize and improve their systems. These efforts promoting rule of law are taking place during times of peace with an eye to preventing conflict and building the legitimacy of partner nations.

The National Guard's State Partnership Program is another vehicle whereby a state in the United States partners with a particular nation (for example, Illinois partners with Poland) offering training opportunities and exchanges.<sup>17</sup> Judge advocates assigned to a state National Guard regularly engage with their foreign partners and have been involved in creating training manuals, teaching advocacy courses, and maintaining dialogue in locations such as South America and Africa.

The International Institute of Humanitarian Law, located in Sanremo, Italy, is a yet another forum where an international faculty (with one U.S. Army Judge Advocate) engages with hundreds of senior leaders from around the globe teaching a variety of courses from refugee law to targeting.<sup>18</sup> This venue provides access to nearly every country and serves as an inviting venue to share ideas and promote both international human rights law and the LOAC.

Finally, through the International Military Education and Training (IMET) program,<sup>19</sup> The Judge Advocate General's Legal Center and School in Charlottesville, Virginia, brings highly qualified and promising foreign students to the Army's fully accredited LLM-conferring law school for short courses on discreet subjects, as

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persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty, and the security of person, unless such assistance will directly benefit the needy people in such country.

*Id.*; see also 22 U.S.C. § 2378d(a) ("No assistance shall be furnished under this chapter or the Arms Export Control Act to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.").

<sup>17</sup> *State Partnership Program*, NAT'L GUARD,

<https://www.nationalguard.mil/Leadership/Joint-Staff/J-5/International-Affairs-Division/State-Partnership-Program/> (last visited Sept. 18, 2019).

<sup>18</sup> *Courses*, IIHL, <http://iihl.org/> (last visited Sept. 18, 2019).

<sup>19</sup> 22 U.S.C. § 2347, *et seq.*



well as basic and advanced schooling covering a broad spectrum of legal disciplines. Through rigorous training, these talented foreign legal advisors help shape the course of their respective militaries and nations.

As explained through this sampling of programs, judge advocates work to inform and empower foreign militaries on ways to support their respective states. Each of these programs develops more intelligent and thoughtful leaders—leaders who take the lessons learned home for consideration and implementation.

## **B. Security Cooperation**

As noted above, Security Cooperation is a term used to define a DOD-controlled program under Title 10 of the U.S. Code. Security Cooperation can take place during active hostilities where state-sponsored programs may not enjoy similar access.

Security Cooperation programs generally fall under a “Build Partner Capacity” construct.<sup>20</sup> The specific Security Cooperation priorities nest within the National Security Strategy,<sup>21</sup> National Defense Strategy,<sup>22</sup> and specific theater campaign strategies for the combatant commanders.

Two examples illustrate the complexities of promoting rule of law during active hostilities and reinforce the importance of robust security assistance prior to unrest. Example one involves identifying viable Syrian opposition. Example two involves ensuring humane treatment of detainees.

## **C. Vetted Syrian opposition**

U.S. forces engaged the Islamic State of Iraq and Syria (ISIS) forces in Syria under the collective self-defense justification found in Article 51 of the U.N. Charter.<sup>23</sup> Congress, however, placed strict

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<sup>20</sup> See Kathleen J. McInnis & Nathan J. Lucas, Cong. Research Serv., R44313, What is “Building Partner Capacity?” Issues for Congress (2015).

<sup>21</sup> THE WHITE HOUSE, UNITED STATES NATIONAL SECURITY STRATEGY 3 (2017).

<sup>22</sup> U.S. DEP’T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (2018).

<sup>23</sup> U.N. Charter art. 51. Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain

requirements on which forces the United States could partner with in order to combat ISIS. Section 1209 of the National Defense Authorization Act for Fiscal Year 2015 prohibited funding certain Syrian forces without first obtaining “a commitment from such elements, groups, and individuals to promoting the respect for human rights and the rule of law.”<sup>24</sup> Distinct from Leahy Laws mentioned above, the section 1209 vetting falls upon the DOD rather than the State Department.<sup>25</sup>

Section 1209 clearly illustrates the importance of adherence to the rule of law and the promotion of human rights even if to the detriment of a tactical objective.<sup>26</sup> In operationalizing the law, judge advocates first had to assist their commanders in developing procedures to objectively assess adherence to the requirement. After close coordination with State Department officials on Leahy vetting procedures, judge advocates created a similar process. They next worked tirelessly with the rest of the commander’s staff reviewing intelligence about potential counter-ISIS forces and advising commanders on whether or not particular forces complied with the legal requirements. These judge advocates, and their successors,

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international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

<sup>24</sup> Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1209(e)(1)(B), 128 Stat. 3541, (2014).

<sup>25</sup> *Id.* at § 1209(e)(1)(A)–(B) (“(1) The term ‘appropriately vetted’ means, with respect to elements of the Syrian opposition and other Syrian groups and individuals, at a minimum—(A) assessments of such elements, groups, and individuals for associations with terrorist groups, Shia militias aligned with or supporting the Government of Syria, and groups associated with the Government of Iran. Such groups include, but are not limited to, the Islamic State of Iraq and the Levant (ISIL), Jabhat al Nusrah, Ahrar al Sham, other al-Qaeda related groups, and Hezbollah; and (B) a commitment from such elements, groups, and individuals to promoting the respect for human rights and the rule of law.”).

<sup>26</sup> *Id.*

would also help commanders revalidate human rights and rule of law compliance—removing some formerly vetted forces from the vetted roster (and payroll) when appropriate.

As noted in the Joint Doctrine, legitimacy is based on “actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences.”<sup>27</sup> With clear law regarding how and who U.S. forces can operate with, adherence to the law provided necessary assurance domestically that U.S. forces were not “winning at all costs” or sacrificing morals or the rule of law to defeat the enemy. Abroad, coalition partners knew the United States would not intentionally further exacerbate a highly volatile situation by partnering with a “less bad” terrorist group. Judge advocates, along with their commanders and staff, provided admirable oversight and analysis to the vetting process to mitigate criticism, but, more importantly, to provide integrity to the system.

#### **D. Detainees<sup>28</sup>**

The importance of and adherence to the rule of law is paramount when dealing with the deprivation of liberty. Judge advocates are instrumental to this fundamental protection on the battlefield. Closely coordinating with non-governmental organizations (NGOs) like the International Committee of the Red Cross (ICRC), judge advocates regularly assess facilities around the globe. Recently, this has included locations in Syria not under the control of the United States.<sup>29</sup> The same judge advocates who are assisting with issues such as ensuring proxy forces comply with human rights and support the rule of law are also inspecting facilities which must operate humanely.<sup>30</sup> In short, the judge advocates serve a critical role in the training, development, and implementation of systems designed to support rule of law—on and off of the battlefield.<sup>31</sup>

Apart from helping NGOs assess the physical and spiritual well-being of detainees and their facilities, judge advocates diligently administered justice, working to hold detainees accountable when

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<sup>27</sup> JOINT OPERATIONS, *supra* note 6, at A-4.

<sup>28</sup> See generally OFFICE OF GEN. COUNSEL, U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ch. VIII (June 2015, updated Dec. 2016) [hereinafter DOD LAW OF WAR MANUAL].

<sup>29</sup> See generally *id.*

<sup>30</sup> See generally *id.*

<sup>31</sup> See generally *id.*

appropriate. Because many of the detainees in recent conflicts have been considered criminals, they were subject to trial by the host-nation under the applicable criminal code.<sup>32</sup> Understanding the local government ultimately has to prosecute some of the detainees, judge advocates provided vital assistance training host-nation forces how to mark, collect, and preserve evidence on a military objective for subsequent use at trial, assist local prosecutors and investigators convert “intelligence” into “evidence,” and help local officials develop sustainable systems to operate completely independently.

## II. Looking inward

Promotion of the rule of law requires introspection as well. As one current reflection point, the U.S. Military Justice system is facing intense scrutiny in light of unacceptable levels of sexual violence in the ranks.<sup>33</sup> If we fail our service members, and if our system does not hold the right personnel accountable under the law, the system, and consequently the military, will lose its legitimacy. If the military loses credibility domestically, international support will follow—impacting national security interests.

As the preamble of the *Manual for Courts-Martial* states, “[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen the national security of the United States.”<sup>34</sup> Failure to adhere to this preamble—our commitment to the rule of law—directly impacts our ability to project legitimacy to our partners, to our peers, and to our adversaries. If we lose our legitimacy, we may also lose our

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<sup>32</sup> This article will not address conflict classification or the rights afforded to detainees under the applicable Geneva Conventions, Additional Protocols, or DOD policies.

<sup>33</sup> See Frances Stead Sellers & Dan Lamothe, *Sexual Assaults in the Military Spiked Last Year, Pentagon Says, Amid Renewed Debate Over How to Handle Cases*, WASH. POST (May 2, 2019), [https://www.washingtonpost.com/world/national-security/sexual-assaults-in-the-military-spiked-nearly-38percent-last-year-pentagon-says/2019/05/02/831826d8-5a11-11e9-842d-7d3ed7eb3957\\_story.html?noredirect=on&utm\\_term=.3d785cbd01f5](https://www.washingtonpost.com/world/national-security/sexual-assaults-in-the-military-spiked-nearly-38percent-last-year-pentagon-says/2019/05/02/831826d8-5a11-11e9-842d-7d3ed7eb3957_story.html?noredirect=on&utm_term=.3d785cbd01f5).

<sup>34</sup> DEP’T OF DEF., MANUAL FOR COURTS-MARTIAL UNITED STATES pt. I ¶ 3 (2019).

ability to deter and we may be drawn into battles and out of Sun Tzu's vision of "supreme excellence."<sup>35</sup>

### III. Conclusion

As legal practitioners in the Army JAG Corps, one key function is assisting our clients to establish legal maneuver space and enhance the lawful options available for commanders to deter, mitigate, or win in conflict. Establishing the legitimacy of military forces through promotion of the rule of law serves as a fundamental element to that end state. Whether it is providing guidance to a partner on reinforcing judicial institutions to better serve the needs of the population or helping a host-nation military secure its elections sites in order to establish a system of governance from whole cloth, the mentally and physically tough judge advocates in the Army JAG Corps are ready now and are constantly evolving to predict and address ways to address future threats to our national security. Army judge advocates serving this nation around the world right now perform a critical role in planning, advising, and often executing meaningful rule of law missions. These efforts promote our national security interests by building more resilient, capable partners.

#### About the Author

**Lieutenant Colonel Nathan J. Bankson** currently serves in the Pentagon as the Chief of Strategic Engagements for the U.S. Army Judge Advocate General's National Security Law Division. From July 2017–July 2018, he served as the Teaching Fellow at the IIHL in Sanremo, Italy, where he lectured and trained foreign legal advisors on the Law of Armed Conflict, Human Rights Law, and Command Responsibility. His operational experience includes a deployment to Kuwait as the senior legal advisor for Special Operations in Syria and Iraq; a deployment to Baghdad, Iraq to manage military justice for all U.S. Forces and civilians accompanying the force; and a deployment to Kirkuk, Iraq to advise a Brigade Combat Team engaged in combat operations. LTC Bankson has also served as a civil litigation attorney, an appellate defense counsel, and prosecutor during his time with the U.S. Army. LTC Bankson has one publication, *A Justice Manager's*

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<sup>35</sup> TZU, *supra* note 3.

*Guide to Navigating High Profile Cases*, THE ARMY LAWYER,  
July 2012.

# National Security Data Access and Global Legitimacy

*Dylan Cors*

*International Director*

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## I. Introduction

Foreign governments are increasingly scrutinizing lawful access to data by the U.S. government for national security purposes. As U.S.-based service providers have expanded cross-border data communications and storage services globally, they have come to hold the personal data of many foreign persons residing outside the United States. That data may be of foreign-intelligence value in identifying and responding to international terrorism, state-sponsored cyber intrusions, and other threats. U.S. statutes authorize government acquisition of foreign intelligence information for national security investigations, subject to detailed constraints. Federal prosecutors and investigating agents honor the rule of law and appropriate privacy protections every day by adhering to those constraints under U.S. law, including the Fourth Amendment and applicable statutes, policies, and procedures. But foreign governments have raised concerns about how easily their citizens' data moves across national borders to be stored by U.S. providers and then subject to U.S. law and potentially to government surveillance. As a result, adherence by U.S. prosecutors and investigators to the rule of law and privacy standards, when this foreign data is accessed, is being measured under both U.S. and foreign standards.

Foreign governments are concerned about their citizens' data being held by U.S. providers not only because the data is potentially subject to U.S. government surveillance, but also because the data is subject to U.S. laws which may block a foreign government's access to data about its own citizens, thus frustrating investigations about local crimes. These concerns may ultimately reduce U.S. investigators' access to that data. For example, some countries have addressed these concerns by enacting data localization laws requiring that certain categories of data, for example electronic communications data pertaining to domestic communicants, be stored within that country's

borders and potentially inaccessible to U.S. investigators. The Department of Justice (Department) is responding to this trend through a number of initiatives. For example, under authority in the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), which was enacted in March 2018, attorneys from the Criminal Division and National Security Division, in coordination with the State Department, are negotiating executive agreements with other countries that meet certain criteria, such as respect for privacy and the rule of law, so that providers subject to restrictions under the law of one country can comply with qualifying, lawful orders for electronic data issued by the other country.<sup>1</sup> Further information about the CLOUD Act and the executive agreements it authorizes may be found on justice.gov.<sup>2</sup> Separately, National Security Division attorneys regularly provide information to foreign audiences on privacy protections and other safeguards in U.S. law, relating to national security access to data. This includes working with the Civil Division's Office of Foreign Litigation and hired foreign counsel in support of the appearance by the United States in an *amicus* capacity in several European court cases to ensure that those courts have accurate information about relevant U.S. law and practice. As discussed below, these cases challenge the validity under European Union (EU) law of transfers of EU citizens' personal data to the United States.

This article provides an overview of U.S. law and practice governing national security access to personal data and related privacy safeguards, including from the perspective of foreign audiences. Foreign criticisms of the United States are evaluated, including by comparison to the actual law and practice of foreign governments, in particular in the EU.

## II. Foreign scrutiny of U.S. national security access to data

Like all countries, the United States gathers data for foreign intelligence purposes to identify and respond to threats to security and to inform government policymakers. This surveillance presents

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<sup>1</sup> See Clarifying Lawful Overseas Use of Data Act, Div. V, Pub. L. No. 115-141, 132 Stat. 348 (codified in scattered sections of Title 18).

<sup>2</sup> U.S. DEP'T OF JUSTICE, PROMOTING PUBLIC SAFETY, PRIVACY, AND THE RULE OF LAW AROUND THE WORLD: THE PURPOSE AND IMPACT OF THE CLOUD ACT 4 (2019).



risks to privacy interests, a tension that must be addressed in any country respecting individual rights and the rule of law. For over 40 years, privacy safeguards relating to electronic surveillance and other methods to acquire data in the United States for foreign intelligence purposes have been implemented under the regime of court approvals and supervision required by the Foreign Intelligence Surveillance Act (FISA).<sup>3</sup> More broadly, U.S. foreign intelligence activities are governed by Executive Order 12333, issued in 1982, which calls for intelligence agency procedures protecting privacy interests.<sup>4</sup> Additionally, in 2014, President Obama issued Presidential Policy Directive 28 (PPD-28), which establishes binding requirements for U.S. intelligence agencies to afford fundamental privacy safeguards for all people, regardless of nationality or location.<sup>5</sup>

PPD-28 was issued in response to foreign governments' increasing scrutiny over the scope of privacy safeguards relating to U.S. intelligence laws. Many electronic communications service providers of global reach are based in the United States, and foreign governments have raised concerns that their citizens' data transferred to and held by U.S.-based providers may be accessed by the U.S. government for foreign intelligence purposes. These concerns have a direct impact on whether data can be transferred into the United States. Under the law of the EU, for example, personal data may not be transferred outside of the EU unless sufficient privacy safeguards are in place in the destination country.<sup>6</sup> These restrictions are imposed under the EU's General Data Protection Regulation (GDPR) which came into effect in May 2018, superseding similar transfer restrictions under the EU's Data Protection Directive of 1995.<sup>7</sup>

EU officials raised many of these concerns about U.S. intelligence activities in the wake of the Snowden disclosures in 2013. This led to the Court of Justice of the EU striking down in 2015 the U.S.–EU

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<sup>3</sup> See generally Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1801, *et seq.*).

<sup>4</sup> See United States Intelligence Activities, Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

<sup>5</sup> Directive on Signals Intelligence Activities, 2014 DAILY COMP. PRES DOC. 4 (Jan. 17, 2014).

<sup>6</sup> See Regulation (EU) 2016/679 of the European Parliament and of the Council, 2016 O.J. (L 119), ch. V.

<sup>7</sup> *Id.*

“Safe Harbor” framework of 2000, an arrangement through which U.S. companies could self-certify to maintaining certain privacy protections and policies in order to provide safeguards sufficient under EU law for transfers of personal data from the EU to the United States.<sup>8</sup> The court ruled Safe Harbor invalid because the European Commission’s findings on the adequacy of the privacy safeguards instituted under Safe Harbor had failed to address potential U.S. government access to the transferred data.<sup>9</sup> In 2016, the United States and the EU replaced Safe Harbor with the “Privacy Shield” framework. While designed similarly to Safe Harbor, in its findings on the adequacy of the Privacy Shield, the European Commission undertook a detailed review of U.S. privacy safeguards relating to government access to data. The validity under EU law of the Commission’s findings for Privacy Shield is now also being challenged before EU courts.<sup>10</sup>

In these challenges before the EU courts, written pleadings are not made public. EU officials, however, regularly and publicly criticize U.S. intelligence laws and practices, specifically the U.S. legal bases to compel access to data transferred from the EU to U.S. companies. In July 2018, for example, the EU Parliament called for the European Commission to suspend Privacy Shield due, in part, to its concern that data collection under FISA section 702 allows “indiscriminate” access to EU citizens’ personal data and constitutes “bulk collection.”<sup>11</sup>

These developments have required the United States to explain more clearly and publicly the constraints and privacy safeguards the U.S. government implements relating to data acquisition for foreign intelligence purposes. Many of these privacy safeguards have long been established in U.S. law and practice. In recent years, the United States has also instituted several legislative reforms and policy initiatives relating to its foreign intelligence laws and practices, including new constraints on surveillance programs, expansion of transparency measures, and the establishment of a new redress mechanism specifically for EU citizens. On the whole, as discussed below, U.S. privacy safeguards for foreign intelligence surveillance

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<sup>8</sup> Case C-362/14, *Schrems v. Data Prot. Comm’r*, 2015 E.C.R. 650.

<sup>9</sup> *Id.* at ¶¶ 90, 98.

<sup>10</sup> Case T-738/16, *La Quadrature du Net and Others v. Commission*, 2016 E.C.R. 1250.

<sup>11</sup> Resolution on the Adequacy of the Protection Afforded by the EU-US Privacy Shield, Eur. Parl. Doc. PV 21 ¶¶ 22, 35 (2018).

compare favorably with other rights-respecting democracies around the world, including those in the EU.

### **III. Privacy safeguards for U.S. national security data access domestically**

Under U.S. law, acquisition of data for intelligence purposes is limited by statutes that specify when and how the government can require a company to disclose data. The FISA statute and the National Security Letter (NSL) statutes are the only legal means by which the U.S. government may compel a company to produce data for foreign intelligence purposes.<sup>12</sup> FISA, as discussed in detail below, authorizes more intrusive measures to acquire data, such as electronic surveillance of the content of communications and physical searches. The NSL statutes, in contrast, involve less intrusive measures, authorizing the FBI and other agencies to compel the production of third-party financial and communications records. For example, NSLs can be used to obtain targeted telephone subscriber information and billing records, but not the content of communications or the location information for mobile telephones.<sup>13</sup>

#### **A. Judicial approvals and supervision for all FISA data access**

All forms of FISA surveillance are subject to detailed restrictions set out in the statute and require approvals from and supervision by the Foreign Intelligence Surveillance Court (FISC). The FISC is comprised of 11 regularly serving federal judges designated by the Chief Justice of the United States to serve for seven-year terms.<sup>14</sup> The FISC reviews the government's surveillance applications and supervises the government's use of surveillance authority to ensure compliance with the statute and the court's orders. Privacy interests are further safeguarded by the appointment of *amici curiae* in cases presenting novel or significant issues. An *amicus* may access classified materials and make "legal arguments that advance the protection of individual privacy and civil liberties."<sup>15</sup> Some opinions and orders of

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<sup>12</sup> 12 U.S.C. § 3414; 15 U.S.C. §§ 1681u, 1681v; 18 U.S.C. § 2709; 50 U.S.C. § 3162.

<sup>13</sup> 18 U.S.C. §§ 2709 (a), (b).

<sup>14</sup> 50 U.S.C. § 1803(d).

<sup>15</sup> 50 U.S.C. § 1803(i).

the FISC, as well as arguments made by *amici* before the FISC, have been declassified and publicly released.

The FISC's approval and supervision of U.S. government foreign intelligence surveillance compares favorably with safeguards in place in the Member States of the EU. Only about half of the 28 Member States require any form of advance independent judicial approval for intelligence collection of personal data, whether at home or abroad. A 2015 report by the EU Fundamental Rights Agency (EU FRA) concluded that "just over half [of Member States] charge the judiciary (judges or prosecutors) with the [surveillance] approval process, while others charge ministers, prime ministers, and expert bodies."<sup>16</sup>

## **B. Bulk data demands for foreign intelligence purposes are prohibited**

As noted above, one criticism by EU officials is that U.S. government acquisition of data under FISA constitutes "bulk collection." It is true that a FISA surveillance program that was disclosed by Edward Snowden, and later confirmed by the U.S. government, involved the collection in bulk from U.S. telephone companies of metadata pertaining to both domestic and international telephone calls.<sup>17</sup> That program, however, was terminated in 2015 after changes were made to the section of FISA under which it had been authorized by the FISC. As a result of those and other amendments in the USA FREEDOM Act of 2015, all types of data acquisition under both FISA and the NSL statutes now prohibit bulk collection.<sup>18</sup> The relevant statutory provisions explicitly require that

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<sup>16</sup> EUROPEAN UNION FUNDAMENTAL RIGHTS AGENCY [EU FRA], SURVEILLANCE BY INTELLIGENCE SERVICES: FUNDAMENTAL RIGHTS SAFEGUARDS AND REMEDIES IN THE EU—MAPPING MEMBER STATES LEGAL FRAMEWORKS 51–52 (2015) [hereinafter EU FRA Intel. Report Vol. I].

<sup>17</sup> Further information on this program and an evaluation of its lawfulness and value may be found in a 2014 report by the independent Privacy and Civil Liberties Oversight Board (PCLOB). PRIVACY CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT (Jan. 13, 2014) [hereinafter PCLOB TELEPHONE RECORDS REPORT].

<sup>18</sup> Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 (USA FREEDOM Act), Pub. L. No. 114–23, 129 Stat. 268.

foreign intelligence demands for data be targeted. This requirement is discussed below for each type of data acquisition authorized by FISA and for the NSL statutes.<sup>19</sup>

## 1. Electronic surveillance under Title I of FISA

Title I of FISA authorizes targeted electronic surveillance to acquire the contents of communications with the approval of the FISC.<sup>20</sup> To obtain a court order authorizing electronic surveillance, the government must target its requests by including in its application “the identity, if known, or a description of the specific target of the electronic surveillance.”<sup>21</sup> The government must demonstrate probable cause that the target is “a foreign power or an agent of a foreign power,”<sup>22</sup> which FISA defines by reference to exclusive categories of persons and entities, including foreign governments, international terrorist groups or proliferation networks, and their agents.<sup>23</sup> A FISC order authorizing electronic surveillance must specify “the nature and location of each of the facilities or places at which the electronic surveillance will be directed, if known.”<sup>24</sup>

## 2. Physical searches under Title III of FISA

Title III authorizes certain physical searches with FISC approval. To obtain a court order authorizing a physical search, the government must target its request by including in its application “the identity, if known, or a description of the target of the search, and a description of the premises or property to be searched and of the information, material, or property to be seized, reproduced, or altered.”<sup>25</sup> As with

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<sup>19</sup> The below discussion addresses only targeting requirements, not other restrictions and safeguards in FISA. For example, FISA restricts the duration of FISC orders authorizing surveillance. 50 U.S.C. §§ 1805(d)(1) (Title I), 1824(d)(1) (Title III), 1842(e) (Title IV), 1861(c)(2) (Title V), and 1881a(a) (Title VII).

<sup>20</sup> See 50 U.S.C. § 1802(a).

<sup>21</sup> 50 U.S.C. § 1804(a)(2).

<sup>22</sup> 50 U.S.C. § 1805(a)(2).

<sup>23</sup> 50 U.S.C. § 1801(a), (b).

<sup>24</sup> 50 U.S.C. § 1805(c)(1)(B). That facilities or places may be unknown does not, however, allow for unrestricted surveillance. If the facilities or places are unknown, the court order must direct the government to notify the court within 10 days after surveillance begins of the facts and circumstances justifying the government’s belief that the facility or place is being used by the target (50 U.S.C. § 1805(c)(3)).

<sup>25</sup> 50 U.S.C. § 1823(a)(2).

electronic surveillance under Title I, the government must demonstrate probable cause that the target is “a foreign power or an agent of a foreign power,” under the same definitions discussed above.<sup>26</sup> A court order authorizing a physical search must also specify “the identity, if known, or a description of the target of the physical search”; “the nature and location of each of the premises or property to be searched”; “the type of information, material, or property to be seized, altered, or reproduced”; and a statement of the manner in which the physical search is to be conducted.<sup>27</sup>

### **3. Communication transactional data and subscriber information under Title IV of FISA**

Title IV of FISA requires the government to obtain FISC approval to use specified techniques to collect communication transactional data and subscriber information, such as the name, address, payment information, or phone numbers or email addresses, of specific communicants.<sup>28</sup> Title IV does not authorize collection of the content of communications. The USA FREEDOM Act explicitly prohibits using Title IV to engage in bulk collection.<sup>29</sup>

Under the amendments in that Act, the government must target a request under Title IV by submitting an application to the court based on a “specific selection term,” which is defined as a term that specifically identifies a person, account, address, or personal device, or any other specific identifier.<sup>30</sup> A court order must specify “the identity, if known, of the person who is the subject of the investigation”; “the identity, if known, of the person” to whom the telephone line or other facility is leased; and the attributes of the communication to which the

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<sup>26</sup> 50 U.S.C. § 1824(a)(2).

<sup>27</sup> 50 U.S.C. § 1824(c)(1).

<sup>28</sup> 50 U.S.C. § 1842(d)(2)(C). Title IV refers to “pen registers” and “trap-and-trace devices” which are used to obtain communication transactional data. A pen register is a device that records all numbers dialed from a particular telephone line; a trap-and-trace device shows incoming numbers dialed to connect to a particular telephone line. These devices also operate in analogous manners for email communications, for example, by recording email addresses of communicants, but not the contents of communications. *See* 18 U.S.C. § 3127(3), (4).

<sup>29</sup> USA FREEDOM Act, Pub. L. No. 114–23, § 501, 129 Stat. 268 (2015).

<sup>30</sup> 50 U.S.C. §§ 1842(c)(3), 1841(4).

order applies, such as the telephone number and the location of the telephone line or other facility.<sup>31</sup>

#### **4. Collection of business records under Title V of FISA**

Title V of FISA authorizes the FBI to acquire, for intelligence purposes and with FISC approval, business records and other tangible things.<sup>32</sup> Title V authorizes compelled production of the same types of third-party records that the government could obtain through court orders directing the production of such records in other contexts, such as a law enforcement investigation.<sup>33</sup> As with Title IV, the USA FREEDOM Act prohibits bulk collection using Title V. To obtain an order authorizing requests for business records under Title V, the FBI must target its requests by submitting an application to the court based on a “specific selection term,” which is defined as a term that specifically identifies a person, account, address, or personal device, or any other specific identifier.<sup>34</sup>

#### **5. Collection of foreign communications under Title VII of FISA.**

Section 702 of FISA, contained in Title VII, authorizes the acquisition, with FISC approval, of electronic communications of non-U.S. persons located outside of the United States to obtain foreign intelligence information.<sup>35</sup> Section 702 authorizes collection targeting specific persons pursuant to a certification signed by the Attorney General and the Director of National Intelligence (DNI) and approved by the FISC.<sup>36</sup> Each certification must be accompanied by targeting procedures and minimization procedures that must be approved by the court and are binding on the government.<sup>37</sup> After the court

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<sup>31</sup> 50 U.S.C. § 1842(d)(2).

<sup>32</sup> 50 U.S.C. § 1861.

<sup>33</sup> See 50 U.S.C. § 1861(c)(2)(D).

<sup>34</sup> 50 U.S.C. § 1861(b)(2), (k)(4).

<sup>35</sup> 50 U.S.C. § 1881a.

<sup>36</sup> 50 U.S.C. § 1881a(a), (g). The certifications must be approved at least annually, and any amendments or modifications must also be approved by the court. 50 U.S.C. § 1881a(i)(1)(C).

<sup>37</sup> The targeting procedures define how the government determines which persons' communications may be acquired. The minimization procedures restrict how the government acquires, retains, and disseminates the acquired

approves a certification, the government may issue “directives” to electronic communications service providers in the United States to provide communications of non-U.S. persons reasonably believed to be located outside the United States and containing the type of foreign intelligence information covered by the certification.<sup>38</sup> The government may then issue requests to the provider for communications data within the scope of the directive, consistent with court-approved targeting procedures. The National Security Agency (NSA) receives the data acquired under section 702, and the Central Intelligence Agency (CIA), the National Counterterrorism Center (NCTC) and the FBI receive portions of the data.<sup>39</sup>

Under section 702, the government’s requests for data from a provider must target specific persons and cannot be generalized.<sup>40</sup> Court-approved targeting procedures require the government to use individual “selectors,” which identify a particular communications facility, such as an email address or telephone number that the target of the acquisition uses.<sup>41</sup> Selectors cannot consist of general “key words” such as “bomb” or “attack,” or even the names of individuals, because such terms would not identify specific communications facilities.<sup>42</sup> The Privacy and Civil Liberties Oversight Board (PCLOB), an independent federal oversight agency, conducted a thorough review of the section 702 program and concluded that the government’s collection of data under the program “consists entirely of targeting individual persons and acquiring communications associated with those persons, from whom the Government has reason to expect it will

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information. The FISC can only approve the targeting and minimization procedures if the court determines they are consistent with the FISA statute and the Fourth Amendment. 50 U.S.C. § 1881a(d).

<sup>38</sup> 50 U.S.C. § 1881a(h).

<sup>39</sup> PRIVACY CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 7–8 n.11 (July 2, 2014) [hereinafter PCLOB § 702 REPORT].

<sup>40</sup> See *id.* at 24.

<sup>41</sup> *Id.* at 32–33; see also *In Re DNI/AG Certification*, Docket Number 702(i)-08-01 8 (FISA Ct. Sept. 4, 2008) (describing the FISA Section 702 NSA Targeting Procedures as “tasking for acquisition a telephone number or electronic communication account (generally referred to as ‘selectors’) believed to be used by a targeted person.”).

<sup>42</sup> PCLOB § 702 REPORT, *supra* note 39, at 33.



obtain certain types of foreign intelligence. The program does not operate by collecting communications in bulk.”<sup>43</sup>

As with Titles IV and V of FISA, the USA FREEDOM Act expressly bans bulk collection using the NSL statutes, requiring the government to base NSL requests on a “specific selection term”—a term that specifically identifies a person, account, or telephone number.<sup>44</sup>

In contrast to these U.S. requirements under the FISA and NSL statutes that foreign intelligence demands for data from U.S. companies be targeted, a number of EU Member States authorize their intelligence agencies to collect personal data in their territories that is not so targeted. The EU FRA reported in 2017 that among the five Member States that regulate untargeted intelligence collection, three allow for untargeted surveillance domestically.<sup>45</sup> Moreover, the EU FRA’s study of those five Member States was “in no way exhaustive,” as other Member States that allow untargeted surveillance might “not regulate it in detail.”<sup>46</sup> A separate 2017 academic study found that “the only country that has conclusively terminated a bulk collection program in recent years [was] the United States”; “[m]eanwhile, the UK, France, Germany and other countries have ratified or expanded collection programs.”<sup>47</sup>

### **C. Restrictions on use, storage, and sharing of data collected**

Information obtained from U.S. companies pursuant to lawful government demands for foreign intelligence purposes is subject to detailed use restrictions. Electronic surveillance and other types of data collection under FISA can only be conducted pursuant to “minimization procedures” adopted by the Attorney General and

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<sup>43</sup> *Id.* at 103.

<sup>44</sup> *See* 12 U.S.C. § 3414(a)(2); 15 U.S.C. §§ 1681u(c), 1681v(a); 18 U.S.C. § 2709(b); 50 U.S.C. §§ 1861, 3162(a)(2).

<sup>45</sup> EU FRA, SURVEILLANCE BY INTELLIGENCE SERVICES: FUNDAMENTAL RIGHTS SAFEGUARDS AND REMEDIES IN THE EU—VOLUME II: FIELD PERSPECTIVES AND LEGAL UPDATE 42–43 (2017) [hereinafter EU FRA INTELLIGENCE REPORT VOL. II].

<sup>46</sup> *Id.* at 42.

<sup>47</sup> BULK COLLECTION: SYSTEMATIC GOVERNMENT ACCESS TO PRIVATE-SECTOR DATA xxviii (Fred H. Cate & James X. Dempsey eds., 2017).

approved by the FISC.<sup>48</sup> Minimization procedures establish detailed and binding restrictions on each intelligence agency's acquisition, retention, and dissemination of personal information.<sup>49</sup> Redacted versions of the minimization procedures approved by the FISC and used by intelligence agencies under FISA section 702 have been publicly released.<sup>50</sup>

Each of the NSL statutes also sets forth specific restrictions on the dissemination of information acquired.<sup>51</sup> Procedures approved by the Attorney General further govern the FBI's collection, use, retention, and dissemination of information obtained from NSLs.<sup>52</sup>

EU officials focus their criticism on FISA section 702 because it authorizes the acquisition of the communications data exclusively of non-U.S. persons located outside the United States to acquire foreign

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<sup>48</sup> 50 U.S.C. § 1805(a) (court order approving electronic surveillance under FISA Title I requires minimization procedures); *see also* 50 U.S.C. § 1824(a) (same for physical searches under Title III); 50 U.S.C. § 1861(c) (same for acquisition of third party business records under Title V); 50 U.S.C. § 1881a(i)(3) (court approval of government certification under Section 702 requires minimization procedures). FISA Title IV, authorizing acquisition of non-content communication transactional data and subscriber information, requires separate privacy procedures approved by the Attorney General. 50 U.S.C. § 1842(h).

<sup>49</sup> *See, e.g.*, 50 U.S.C. § 1801(h) (defining "minimization procedures" for electronic surveillance).

<sup>50</sup> NAT'L SEC. AGENCY, MINIMIZATION PROCEDURES USED BY THE NSA IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED (2017) [hereinafter NSA SECTION 702 MINIMIZATION PROCEDURES]; FED. BUREAU OF INVESTIGATION, MINIMIZATION PROCEDURES USED BY THE FBI IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED (2016) [hereinafter FBI SECTION 702 MINIMIZATION PROCEDURES]; CENT. INTELLIGENCE AGENCY, MINIMIZATION PROCEDURES USED BY THE CIA IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED (2016) [hereinafter CIA SECTION 702 MINIMIZATION PROCEDURES].

<sup>51</sup> 12 U.S.C. § 3414(a)(1)(5)(B); 15 U.S.C. §§ 1681u(g); 18 U.S.C. § 2709(e); 50 U.S.C. § 3162(f).

<sup>52</sup> FBI, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE § 18.6.6.3 (2013). A 2016 update to these procedures is undergoing declassification review and has not yet been released.

intelligence information. Yet the restrictions on the use of personal data acquired under FISA section 702 exemplify the care with which the United States treats personal data collected for intelligence purposes. The section 702 minimization procedures impose strict access controls with respect to the acquired data, regardless of the nationality of the individual to whom the data pertains, and require that all personnel who are granted access to raw data acquired under section 702 receive in-depth training on the minimization procedures.<sup>53</sup> The procedures also permit analysts and investigators to query data obtained under section 702 only to identify foreign intelligence information or, in the case of the FBI, also to obtain evidence of a crime.<sup>54</sup> Agencies must delete data acquired as a result of errors in the application of the section 702 targeting or minimization procedures.<sup>55</sup>

Additionally, while the FISA section 702 minimization procedures restrict the retention and dissemination of personal data by reference only to the data of U.S. persons, PPD-28 and its implementing procedures extend comparable retention and dissemination protections to EU individuals and other foreign nationals.<sup>56</sup> Specifically, section 4 of PPD-28 requires each intelligence agency to adopt procedures to safeguard the personal information of all persons, regardless of nationality, by retaining or disseminating the information only if the retention or dissemination of “comparable information concerning U.S. persons would be permitted.”<sup>57</sup>

U.S. intelligence agencies’ procedures implementing PPD-28 are publicly available.<sup>58</sup> The PPD-28 procedures impose a number of

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<sup>53</sup> FBI SECTION 702 MINIMIZATION PROCEDURES at § III.B; CIA SECTION 702 MINIMIZATION PROCEDURES at § 2.

<sup>54</sup> NSA SECTION 702 MINIMIZATION PROCEDURES at § 3(b)(5); CIA SECTION 702 MINIMIZATION PROCEDURES at § 4; FBI SECTION 702 MINIMIZATION PROCEDURES at § III.D.

<sup>55</sup> NSA SECTION 702 MINIMIZATION PROCEDURES at §§ 3(b)(4)(b), 3(e); CIA SECTION 702 MINIMIZATION PROCEDURES at § 8; FBI SECTION 702 MINIMIZATION PROCEDURES at § II.A.2.

<sup>56</sup> Directive on Signals Intelligence Activities, 2014 DAILY COMP. PRES DOC. 6–7 (Jan. 17, 2014).

<sup>57</sup> *Id.* at 4.

<sup>58</sup> *See, e.g.*, NAT’L SEC. AGENCY (NSA), PPD-28 SECTION 4 PROCEDURES (2015) [hereinafter NSA PPD-28 SECTION 4 PROCEDURES]; CENT. INTELL. AGEN. (CIA), SIGNALS INTELLIGENCE ACTIVITIES [hereinafter CIA PPD-28

safeguards for signals intelligence activities globally, which includes collection pursuant to FISA section 702. The procedures confirm that strict access controls apply to the data of all persons, regardless of nationality, and require training for all personnel who are granted access.<sup>59</sup> The procedures impose retention limits, including a requirement to age-off data after five years (subject to shorter limits that apply under other procedures), unless longer retention is justified for a foreign intelligence or other reason comparable to those applicable to U.S. persons or the DNI makes a specific finding that continued retention is in the national security interests of the U.S.<sup>60</sup> The procedures restrict the dissemination of information—for example, NSA’s procedures state that information specifically identifying or tending to identify one or more non-U.S. persons may be disseminated only if the personal information is publicly available, is related to an authorized foreign intelligence requirement, is related to a crime that has been, is being, or is about to be committed, or indicates a possible threat to the safety of any person or organization.<sup>61</sup> Information cannot be disseminated based on the mere fact that a party to a communication is not a U.S. person.<sup>62</sup> These procedures are subject to oversight, including thorough periodic auditing by the Inspectors General of intelligence agencies.<sup>63</sup>

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SECTION 4 PROCEDURES]; FED. BUREAU INVESTIGATION (FBI), PRESIDENTIAL POLICY DIRECTIVE 28 POLICIES AND PROCEDURES (2015) [hereinafter FBI PPD-28 SECTION 4 PROCEDURES].

<sup>59</sup> NSA PPD-28 SECTION 4 PROCEDURES at § 6.1(c); CIA PPD-28 SECTION 4 PROCEDURES at 5; FBI PPD-28 SECTION 4 PROCEDURES at § III.A.5.

<sup>60</sup> NSA PPD-28 SECTION 4 PROCEDURES at § 6.1(a); CIA PPD-28 SECTION 4 PROCEDURES at 4; FBI PPD-28 SECTION 4 PROCEDURES, at § III.A.1.b.

<sup>61</sup> NSA PPD-28 SECTION 4 PROCEDURES at § 7.2. Similar restrictions apply under CIA and FBI procedures. *See* CIA PPD-28 SECTION 4 PROCEDURES, at 5–6; FBI PPD-28 SECTION 4 PROCEDURES at § III.A.1.a.

<sup>62</sup> *E.g.*, NSA PPD-28 SECTION 4 PROCEDURES at § 7.2 (noting when “disseminating the personal information because it relates to a foreign intelligence requirement, it may not disseminate it solely because of the person’s foreign status. Thus, for example, personal information about the routine activities of a non-U.S. person would not be disseminated without some indication that the personal information is related to an authorized foreign intelligence requirement”); *see also* CIA PPD-28 SECTION 4 PROCEDURES at 5; FBI PPD-28 SECTION 4 PROCEDURES at § III.A.1.a.

<sup>63</sup> Directive on Signals Intelligence Activities, 2014 DAILY COMP. PRES DOC. § 4(a)(iv) (Jan. 17, 2014).

## D. Remedies

Individuals may obtain redress in U.S. courts for violations of the above intelligence authorities in a number of ways. For example, several statutes authorize individuals of any nationality to seek redress in civil lawsuits for violations of FISA. A FISA target whose communications, records, or other information were used or disclosed unlawfully may invoke remedies in FISA to sue the individual who committed the violation and recover compensatory damages, punitive damages, and attorney's fees.<sup>64</sup> The Electronic Communications Privacy Act (ECPA) provides a separate cause of action to recover compensatory damages and attorney's fees against the U.S. government for willful violations of various FISA provisions.<sup>65</sup> Additionally, individuals may challenge allegedly unlawful government access to personal data through civil actions under the Administrative Procedure Act (APA), which allows persons "suffering legal wrong because of" certain government conduct to seek a court order enjoining that conduct.<sup>66</sup>

Based on lawsuits brought under these statutes, U.S. courts in some cases have found the government's data collection under FISA unlawful. The Second Circuit, for example, ruled in a 2015 civil lawsuit that the government's bulk collection of telephony metadata, a program the government has since terminated, was not authorized by the terms of Title V of FISA.<sup>67</sup> In a currently pending case, a plaintiff

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<sup>64</sup> 50 U.S.C. § 1810.

<sup>65</sup> 18 U.S.C. § 2712.

<sup>66</sup> 5 U.S.C. § 702.

<sup>67</sup> *ACLU v. Clapper*, 785 F.3d 787, 812–13 (2d Cir. 2015). Other courts hearing challenges to the same intelligence program have reached different results. *See Klayman v. Obama*, 957 F. Supp. 2d 1, 19–25 (D.D.C. 2013) (finding that plaintiffs could not bring suit under the APA alleging violations of the FISA statute, but could bring suit alleging violations of the Fourth Amendment), *vacated and remanded*, 800 F.3d 559 (D.C. Cir. 2015); *In re Application of the FBI*, No. BR 13-109, 2013 WL 5741573, at \*3–\*9 (FISC Aug. 29, 2013) (holding that the program was consistent with the FISA statute). The bulk telephony collection program challenged in these cases was terminated by the USA FREEDOM Act in 2015. USA FREEDOM Act, Pub. L. No. 114–23, § 501, 129 Stat. 268 (2015).

is seeking redress under the APA based on a challenge to the lawfulness of surveillance under section 702.<sup>68</sup>

FISA surveillance may also be challenged when the government uses information obtained under FISA in a criminal or other proceeding against a person, of any nationality. This safeguard has led to several court decisions upholding the legality of FISA surveillance. FISA requires the government to notify any person, regardless of nationality, who was targeted for surveillance under section 702 or whose communications were subject to collection, if the government seeks to use the FISA evidence against them in a legal proceeding.<sup>69</sup> The person can then seek to exclude the evidence on the grounds that the collection was unlawful—for example, because the collection violated the FISA statute or a particular FISC order.<sup>70</sup> If the reviewing court determines the collection was unlawful, it must exclude the evidence.<sup>71</sup> The government has given this notice of intent to use FISA evidence in numerous criminal cases, including to non-U.S. persons subject to collection under section 702 and defendants of any nationality have been able to challenge the lawfulness of section 702 collection in court.<sup>72</sup> The different types of surveillance authorized by FISA have been challenged numerous times in court through this mechanism since FISA was enacted in 1978.<sup>73</sup> Since section 702 was enacted in 2008, collection under section

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<sup>68</sup> *Wikimedia Found. v. National Sec. Agency*, 857 F.3d 193 (4th Cir. 2017) (reversing the district court’s holding that Wikimedia had failed to establish standing, as a facial matter, to challenge “Upstream” collection under FISA section 702, and remanding to the district court to determine the government’s factual challenge to Wikimedia’s standing).

<sup>69</sup> 50 U.S.C. §§ 1806(c), 1881e(a). Notification must be given to any “aggrieved person,” defined as the target of the electronic surveillance or a person whose communications were subject to collection. *See* 50 U.S.C. §§ 1801(k), 1821(2).

<sup>70</sup> *See* 50 U.S.C. §§ 1806(e), 1881e(a).

<sup>71</sup> 50 U.S.C. §§ 1806(g), 1881e(a).

<sup>72</sup> For example, in *United States v. Mohammad*, No. 3:15-cr-358 (N.D. Ohio Mar. 07, 2018), ECF No. 325, notice of Section 702 collection was provided to several defendants, including a citizen of India, and in Opinion and Order, *United States v. Al-Jayab*, No. 16 CR 181, at 5–6 (N.D. Ill. June 28, 2018), ECF No. 115, notice of section 702 collection was provided to an Iraqi citizen defendant.

<sup>73</sup> *See, e.g., United States v. Duka*, 671 F.3d 329, 341 (3d Cir. 2011) (“[T]he courts of appeals that have reviewed FISA, both before and since the Patriot Act amendments, all would conclude that FISA’s standards and procedures

702 has also been repeatedly challenged through this mechanism and upheld as lawful by a federal appellate court and several federal trial courts.<sup>74</sup>

Collection of personal data in the United States pursuant to intelligence statutes may be challenged not only by individuals, but also by the companies receiving government demands for personal data. Electronic communications service providers receiving section 702 directives may challenge the legality of directives issued.<sup>75</sup> For example, after a company refused to comply with directives it received under section 702, the government petitioned the FISC to order compliance, leading to a 2014 judgment confirming that the directive met the requirements of section 702 and was otherwise lawful.<sup>76</sup> Recipients of requests for business records issued under Title V of FISA may likewise challenge them in the FISC, which may set aside orders that do not meet the statutory requirements or are otherwise unlawful.<sup>77</sup> Companies such as Microsoft have also challenged NSLs.<sup>78</sup>

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for authorizing foreign intelligence surveillance orders are reasonable under the Fourth Amendment.” (citing *United States v. Abu-Jihaad*, 630 F.3d 102, 128–29 (2d Cir. 2010); *United States v. Ning Wen*, 477 F.3d 896, 898–99 (7th Cir. 2007); *United States v. Damrah*, 412 F.3d 618, 625 (6th Cir. 2005); *United States v. Johnson*, 952 F.2d 565, 573 (1st Cir. 1991); *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States v. Cavanagh*, 807 F.2d 787, 790–91 (9th Cir. 1987); *United States v. Duggan*, 743 F.2d 59, 72–74 (2d Cir. 1984)); *see also In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002).

<sup>74</sup> *United States v. Mohamud*, 843 F.3d 420 (9th Cir. 2016); *United States v. Hasbajrami*, No. 11-cr-623, 2016 WL 1029500, at \*13 (E.D.N.Y. Mar. 8, 2016) (targeting under FISA Section 702 “*was as particular as it gets*” because “*the FISC approved the targeting of specific non-U.S. persons outside the United States for specific counter-terrorism purposes*”) (emphasis added); *United States v. Muhtorov*, 187 F. Supp. 3d 1240 (D. Colo. 2015); Opinion and Order at 38–64, *United States v. Al-Jayab*, No. 16 CR 181; *United States v. Mohammad*, 339 F. Supp. 3d 724, 753 (N.D. Ohio 2018).

<sup>75</sup> 50 U.S.C. § 1881a(i)(4).

<sup>76</sup> Memorandum Opinion at 37, *In re* [REDACTED], No. [REDACTED] (FISA Ct. 2014).

<sup>77</sup> 50 U.S.C. § 1861(f)(2).

<sup>78</sup> *See* Order, *In re* National Security Letter, No. C13-1048RAJ, 2014 WL 11034005, at \*1 (W.D. Wash. May 21, 2014).

These judicial remedies in U.S. law for intelligence violations are comparable to or greater than those in EU Member States. The EU FRA reports that among Member States “[t]he different remedial avenues are often fragmented and [compartmentalized], and the powers of remedial bodies curtailed when . . . national security is involved.”<sup>79</sup>

## E. Oversight

Due to the inherently secret nature of national security operations, targets of intelligence surveillance are typically not alerted to the surveillance and may be unable to establish standing to invoke judicial remedies. Accordingly, both the U.S. and European legal regimes provide other safeguards before, during, and after governments collect information.<sup>80</sup> In a 2018 judgment upholding Sweden’s signals intelligence program, the European Court of Human Rights noted that Sweden’s intelligence law requires notification of targets only if doing so is permitted by security requirements and in practice, due to those security requirements, targets are in fact never notified.<sup>81</sup> The court proceeded to confirm that, where secrecy precludes notifying targets and thereby limits their recourse to civil litigation, an aggregate of non-judicial safeguards and remedies is sufficient to protect privacy interests, especially safeguards such as prior judicial approval of surveillance followed by multiple layers of independent supervision.<sup>82</sup> Likewise in the United States, privacy interests relating to FISA surveillance are protected through prior judicial approval by the FISC, followed by multiple layers of

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<sup>79</sup> EU FRA INTEL. REPORT VOL. I, *supra* note 16, at 59.

<sup>80</sup> See European Commission Staff Working Document, Report from the Commission to the European Parliament and the Council, COM (2017) 611 final (Oct. 18, 2017) (“[I]t must be [recognized] that all legal systems—including that of the EU and its Member States—contain procedural rules that restrict access to the courts on admissibility grounds and these limitations will be more difficult to overcome in the area of national security.”).

<sup>81</sup> *Centrum För Rättvisa v. the Kingdom of Sweden*, No. 35252/08 Eur. Ct. H.R. § 163 (2018) (“The Government confirmed that a notification had never been given by the FRA for reasons of secrecy . . .”).

<sup>82</sup> *Id.* at §§ 177–78; see also *Klass and Others v. Germany*, 28 Eur. Ct. H.R. §§ 59, 67–68 (1978); *Weber and Saravia v. Germany*, No. 54934/00 Eur. Ct. H.R. § 136 (2006).



supervision conducted by the FISC itself, by independent entities within the executive branch, by intelligence agency privacy officers, and by Congress.

The FISC enforces compliance with its orders and accompanying procedures, including by demanding that the government take remedial action where necessary. The government must report to the FISC incidents of non-compliance with the FISA statute, court orders, or court-approved procedures.<sup>83</sup> The court can require the government to explain the nature of any non-compliance and of corrective actions taken, or risk the court ordering the government to terminate the collection activity. The court has made clear that its review of section 702 targeting and minimization procedures is not confined to the procedures as written, but also includes how the procedures are implemented by the government.<sup>84</sup>

If the FISC is not satisfied with the government's explanation of non-compliance incidents and how they have been remedied, it can terminate the authority for the government to engage in data acquisition, including through binding remedial decisions. For example, in 2011, reporting of non-compliance with targeting and minimization procedures led the court to decline to renew the section 702 program until the government agreed to modifications.<sup>85</sup> As another example, in 2017, following non-compliance incidents, the court reauthorized the section 702 program only after the government made significant changes to address the court's concerns, including the termination of "abouts" collection, which refers to acquisition of a communication because it contains a reference in its text to a section 702-tasked selector, such as an email address, not because the communication is to or from the section 702-tasked selector.<sup>86</sup>

Independent entities in the executive branch also oversee the activities of intelligence agencies. These include Inspectors General in each agency, who conduct independent audits to ensure that the agency's operations and programs are lawful, ethical, and efficient.<sup>87</sup>

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<sup>83</sup> See FISA Ct. R. P. 13(b).

<sup>84</sup> *E.g.*, Memorandum Opinion and Order at 7, *In re* [REDACTED], No. [REDACTED] (FISA Ct. Nov. 6, 2015).

<sup>85</sup> See PCLOB § 702 REPORT, *supra* note 39, at 30–31.

<sup>86</sup> See Memorandum Opinion and Order at 11–25, *In re* [REDACTED], No. [REDACTED] (FISA Ct. Apr. 26, 2017).

<sup>87</sup> Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified at 5 U.S.C. app. 3).

The independence of Inspectors General is codified in statute—agency heads are prohibited from interfering with an Inspector General’s investigations,<sup>88</sup> and Inspectors General may only be removed by the President with notice and explanation to Congress.<sup>89</sup> Inspectors General have full access to agency records and may issue subpoenas to obtain other information.<sup>90</sup> They report publicly to Congress on the results of investigations, refer cases of suspected criminal violations for prosecution, and make recommendations to the agency heads and Congress.<sup>91</sup> Each Inspector General audits its agency’s privacy program annually to address, for example, how effectively the agency protects individuals’ privacy, whether resources for privacy programs are sufficient, and the effectiveness of workforce privacy training.<sup>92</sup> For example, two reports by the NSA’s Inspector General address the agency’s data collection under FISA section 702 and of bulk telephony metadata under FISA Title V (before termination of that program by the USA FREEDOM Act). The reports discuss unintentional compliance failures by the NSA and the controls put in place to prevent such compliance failures in the future.<sup>93</sup>

The PCLOB is an additional independent oversight body within the Executive Branch. The PCLOB is composed of five members appointed by the President and confirmed by the Senate for six-year terms, who supervise a full-time staff.<sup>94</sup> The PCLOB reviews the implementation of intelligence laws and other counterterrorism policies and practices to ensure the protection of privacy and civil liberties, and it has full

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<sup>88</sup> 5 U.S.C. app. 3 § 3.

<sup>89</sup> *Id.*

<sup>90</sup> 5 U.S.C. app. 3 § 6.

<sup>91</sup> *See* 5 U.S.C. app. 3 §§ 4–6.

<sup>92</sup> Federal Information Security Modernization Act of 2014, Pub. L. No. 113-283, 128 Stat. 3073 (codified at 44 U.S.C. § 3555); *see* Office of Mgmt. & Budget (OMB), Exec. Office of the President, Memorandum from Shaun Donovan, Director, to Heads of Executive Departments and Agencies on Fiscal Year 2016–2017 Guidance on Federal Information Security and Privacy Management Requirements 3–6 (2016).

<sup>93</sup> NAT’L SEC. AGENCY, OFFICE OF THE INSPECTOR GEN., REPORT ST-14-0002 (2016). Semi-annual reports on the work and investigations undertaken by the Inspector General of the Intelligence Community may be found at <https://www.nsa.gov/Portals/70/documents/news-features/declassified-documents/3IGReports-Sealed.pdf>.

<sup>94</sup> *See* 42 U.S.C. §§ 2000ee-1(h), (j).

access to U.S. government information, including classified information.<sup>95</sup> The PCLOB extensively reviewed the implementation of FISA section 702 and the government's bulk collection of telephony metadata under FISA section 215. The PCLOB's report on section 215's telephony metadata program concluded that it was not consistent with the statute, raised serious privacy concerns, and did not provide any uniquely significant intelligence value.<sup>96</sup> Congress drew significantly from this report in enacting the USA FREEDOM Act, which terminated the program and expressly prohibits bulk collection in the United States under FISA and NSLs. By contrast, the PCLOB concluded that FISA section 702 serves valuable public safety functions and has been implemented consistent with the law.<sup>97</sup>

Numerous other oversight mechanisms, relating to FISA intelligence gathering, exist within the Executive Branch. All applications to the FISC to conduct electronic surveillance or physical searches must be personally approved by the Attorney General, the Deputy Attorney General, or the Assistant Attorney General for National Security, as well as by other relevant senior national security officials.<sup>98</sup> Department attorneys and representatives of the Office of the Director of National Intelligence (ODNI) conduct oversight of intelligence agencies' compliance with FISA and ensure that FISA applications are accurate.<sup>99</sup> The Department submits semi-annual reports to the FISC regarding compliance incidents.<sup>100</sup> For FISA section 702, oversight is conducted by a joint team of FISA compliance experts at the Department and ODNI. The joint team reviews each targeting decision made by NSA, each compliance incident identified and reported by agency personnel, and

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<sup>95</sup> See 42 U.S.C. §§ 2000ee-1(d), (g).

<sup>96</sup> See generally PCLOB TELEPHONE RECORDS REPORT, *supra* note 17, at § IV.

<sup>97</sup> See generally PCLOB § 702 REPORT, *supra* note 39.

<sup>98</sup> 50 U.S.C. §§ 1801(g), 1804(a), 1823(a); *cf.* EU FRA INTELLIGENCE REPORT VOL. II, *supra* note 45, at 61 (highlighting “the executive’s crucial role in authorising/approving surveillance measures in most Member States”).

<sup>99</sup> PCLOB § 702 REPORT, *supra* note 39, at 8.

<sup>100</sup> *Id.* at 66.

disseminations of section 702 information.<sup>101</sup> Some of these reports have been declassified and are publicly available.<sup>102</sup>

Additionally, within the executive branch, ODNI, NSA, CIA, FBI, and other intelligence agencies each have a senior official responsible for ensuring that the agency effectively carries out applicable privacy requirements and appropriately considers privacy and civil liberties in its policies and programs.<sup>103</sup> These officials, sometimes called civil liberties and privacy officers (CLPOs), report directly to the head of the agency.<sup>104</sup> They conduct privacy reviews of proposed and existing agency programs, advise the heads of their agencies on integrating privacy protection into new policies and initiatives, and ensure that the agency has adequate procedures to investigate and respond to privacy violations.<sup>105</sup> They have access to all information needed to

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<sup>101</sup> *Id.* at 70–79 (also discussing external oversight requirements, including mandatory reporting to the FISC; oversight by the court; and reporting to Congress of incidents of noncompliance with section 702 targeting or minimization procedures).

<sup>102</sup> *See, e.g.*, OFF. DIR. OF NAT'L INTELL., untitled report on Section 702 (2015) (a 2015 report relating to the section 702 program). Semi-annual Compliance Assessments under section 702 of FISA are jointly submitted by the Attorney General and the DNI. As of January 2017, 15 joint assessments have been submitted. The 13th–15th Joint Assessments are posted, together with a corresponding Fact Sheet explaining joint assessments, at <https://icontherecord.tumblr.com/post/155810963663/release-of-joint-assessments-of-section-702>.

<sup>103</sup> 42 U.S.C. §§ 2000ee-1, 2000ee-2 (requiring ODNI, the DOD (which houses the NSA), and the CIA, among others, to have senior privacy officers); Off. Mgmt. & Budget (OMG), Exec. Office of the President, Memorandum from Shaun Donovan, Director, to Heads of Executive Departments and Agencies on Role and Designation of Senior Agency Officials for Privacy (2016) (implementing Presidential directive on senior privacy officers); DIRECTOR OF NATIONAL INTELLIGENCE, OFF. DIRECTOR NAT'L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE 107: CIVIL LIBERTIES AND PRIVACY (Aug. 31, 2012) [hereinafter ICD 107] (requiring each intelligence agency to designate a senior privacy officer).

<sup>104</sup> 42 U.S.C. § 2000ee-1(c) (“Each privacy officer or civil liberties officer[s] shall . . . report directly to the head of the department, agency, or element concerned . . . .”); Memorandum on Role and Designation of Senior Agency Officials for Privacy, *supra* note 103, at 2.

<sup>105</sup> 42 U.S.C. §§ 2000ee-1(a)(2), (a)(4); Memorandum on Role and Designation of Senior Agency Officials for Privacy, *supra* note 103, at 3.

perform their responsibilities.<sup>106</sup> Department and agency CLPOs with national security responsibilities submit semi-annual reports to Congress and the PCLOB on the number and types of privacy reviews, privacy violations, and other privacy matters at the agency.<sup>107</sup> A DNI directive assigns the ODNI CLPO the responsibility to “[d]evelop and administer IC Standards to ensure that the protection of civil liberties and privacy is appropriately incorporated in the policies and procedures of IC elements.”<sup>108</sup> The ODNI CLPO, for example, has issued guidance for intelligence agencies to report to the ODNI CLPO and General Counsel violations of the protections under PPD-28 for non-U.S. persons’ personal information.<sup>109</sup>

Privacy protections relating to intelligence collection are also subject to independent oversight by the Congress. The House of Representatives and the Senate each created intelligence committees in the 1970s to guard against abuses. Committees have access to classified information, and the President is required to keep the committees “fully and currently informed of the intelligence activities” of the government.<sup>110</sup> They hold hearings, in public or in private, and

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<sup>106</sup> 42 U.S.C. § 2000ee-1(d) (requiring, *inter alia*, heads of their respective agencies to provide them with sufficient information, material and resources required to carry out their functions); Memorandum on Role and Designation of Senior Agency Officials for Privacy, *supra* note 103, at 2.

<sup>107</sup> 42 U.S.C. § 2000ee-1(f). These reports are publicly available. *See Office of Civil Liberties, Privacy, and Transparency—Reports*, OFF. DIRECTOR NAT’L INTELLIGENCE, <https://www.dni.gov/index.php/who-we-are/organizations/clpt/clpt-related-menus/clpt-related-content/civil-liberties-privacy-office-reports> (last visited Oct. 7, 2019).

<sup>108</sup> ICD 107, *supra* note 103, at 2.

<sup>109</sup> CIVIL LIBERTIES PROTECTION OFFICER, OFF. DIRECTOR OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY STANDARD 107-02: REPORTING SIGNIFICANT COMPLIANCE ISSUES INVOLVING PERSONAL INFORMATION UNDER PPD-28 TO THE DNI (Feb. 10, 2016). More information about the CLPOs at ODNI, NSA, and CIA can be found at their respective websites. *See Office of Civil Liberties, Privacy, and Transparency—Who We Are*, OFF. DIRECTOR OF NAT’L INTELLIGENCE, <https://www.dni.gov/clpt> (last visited Oct. 7, 2019); *Civil Liberties and Privacy*, NAT’L SECURITY AGENCY: CENT. SECURITY SERV., <https://www.nsa.gov/about/civil-liberties/> (last visited Oct. 7, 2019); *Privacy and Civil Liberties at CIA*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/about-cia/privacy-and-civil-liberties/> (last visited Oct. 7, 2019).

<sup>110</sup> 50 U.S.C. § 3091(a).

may issue subpoenas for testimony or documents from CLPOs, agency heads, or other officials. The committees receive frequent briefings from intelligence and oversight officials and reports from the intelligence agencies as required by law.<sup>111</sup> The Attorney General and the DNI are required by law to make regular reports to the intelligence and judiciary committees of the House and the Senate regarding the use of FISA (including section 702) and to report on compliance incidents.<sup>112</sup> Some laws, including FISA section 702, are subject to “sunset” provisions under which they expire on a fixed date, unless reauthorized by the Congress.

## F. Privacy Shield Ombudsperson

As an additional redress mechanism, reinforcing the role of the intelligence oversight functions described above, in 2016 as part of the Privacy Shield framework, the U.S. government established a new Ombudsperson mechanism at the U.S. Department of State.<sup>113</sup> This mechanism allows EU individuals to confirm that any U.S. signals intelligence activity they suspect may affect their personal data complied with U.S. laws and procedures or that any non-compliance has been remedied. This mechanism is unprecedented. The United States designated a senior official—appointed by the President and confirmed by the Senate—to serve as an Ombudsperson. The Ombudsperson will, after receiving any completed request from an EU individual forwarded by a designated EU entity, respond by confirming that the request has been properly investigated and that U.S. laws and policies have been complied with or that any non-compliance has been remedied. Access to such a broad review of

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<sup>111</sup> See, e.g., U.S. SENATE SELECT COMMITTEE ON INTELLIGENCE, <https://www.intelligence.senate.gov/> (last visited Oct. 7, 2019) (listing open and closed hearings before the Senate intelligence committee by date and topic, along with transcripts and videos); *Reports & Publications*, OFF. DIRECTOR NAT’L INTELLIGENCE, <https://www.dni.gov/index.php/newsroom/reports-publications> (last visited Oct. 7, 2019) (listing various reports ODNI has issued, some of which are mandated by legislation or requested by Congressional committees).

<sup>112</sup> See 50 U.S.C. §§ 1808, 1826, 1846, 1862, 1871, 1873, 1881f.

<sup>113</sup> Memorandum on E.U.–U.S. Privacy Shield Ombudsperson Mechanism Regarding Signals Intelligence.

intelligence activities is provided in some—but not all—EU Member States.<sup>114</sup>

The United States has published unclassified procedures for the Ombudsperson mechanism.<sup>115</sup> Those procedures provide that the Ombudsperson will report any attempts of improper influence—from inside or outside the State Department—directly to the Secretary, who will take appropriate action to ensure the Ombudsperson can carry out his or her function free from improper influence. The procedures also identify the roles and responsibilities of the U.S. officials with whom the Ombudsperson will work to review requests from EU individuals. They describe the process for handling a request revealing an instance of non-compliance, including the Ombudsperson’s ability to call on independent U.S. oversight entities such as Inspectors General and the PCLOB. Through this process, EU individuals can invoke the robust U.S. compliance oversight structure to confirm any improper acquisition or handling of their personal data by relevant U.S. intelligence agencies is remedied.

## G. Transparency

U.S. intelligence agencies have implemented a commitment to openness unsurpassed by any intelligence service in the world. In 2015, the ODNI issued “Principles of Intelligence Transparency” that guide U.S. intelligence agencies on making information about intelligence activities and oversight publicly available in a manner that enhances public understanding while continuing to protect information that, if disclosed, would harm national security.<sup>116</sup> ODNI also created an internet site called “IC on the Record” that provides public access to information related to intelligence activities, including thousands of pages of documents on FISC proceedings and other

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<sup>114</sup> EU FRA INTELLIGENCE REPORT VOL. II, *supra* note 45, at pt. III (discussing various remedies offered by non-judicial bodies in EU Member States).

<sup>115</sup> Privacy Shield Ombudsperson Mechanism Unclassified Implementation Procedure (Oct. 2017), available at <https://www.state.gov/wp-content/uploads/2018/12/Ombudsperson-Mechanism-Implementation-Procedures-UNCLASSIFIED.pdf>.

<sup>116</sup> *Principles of Intelligence Transparency for the Intelligence Community*, OFF. DIRECTOR NAT’L INTELLIGENCE, <https://www.dni.gov/index.php/how-we-work/transparency> (last visited Oct. 7, 2019).

intelligence-related matters.<sup>117</sup> This transparency facilitates public scrutiny of U.S. intelligence activities.

The U.S. government is open about its use of surveillance authorities, oversight of the intelligence agencies, and compliance incidents. The government discloses annually the number of FISA orders sought and approved and provides estimates of the number of U.S. persons and non-U.S. persons targeted by surveillance.<sup>118</sup> Judicial oversight is made transparent through numerous publicly released filings and other documents.<sup>119</sup> Companies that have received requests for data under FISA or NSLs are authorized in FISA to publish certain aggregate data concerning the requests they receive.<sup>120</sup>

These public reports on oversight confirm U.S. intelligence agencies' commitment to proper protection of individuals' privacy. For example, the required Department-ODNI reports to Congress on the section 702 program have consistently concluded that the number of compliance incidents has been small, with no indication of any intentional attempt to violate or circumvent any legal requirements.<sup>121</sup> Based on its oversight of the government's use of section 702 authority, and the government's own oversight mechanisms, the FISC concluded in 2014 that:

[i]t is apparent to the Court that the implementing agencies, as well as [ODNI] and [Department/]NSD, devote substantial resources to their compliance and oversight responsibilities under Section 702. As a general rule, instances of non-compliance are identified

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<sup>117</sup> *IC on the Record*, OFF. DIRECTOR NAT'L INTELLIGENCE, <https://icontherecord.tumblr.com/> (last visited Oct. 7, 2019).

<sup>118</sup> 50 U.S.C. § 1873. ODNI releases these figures and other information, in annual Statistical Transparency Reports. See Press Release, Off. of the Director of Nat'l Intelligence, ODI Releases Annual Transparency Report (May 2, 2017).

<sup>119</sup> 50 U.S.C. § 1872. Public filings of the FISC, including declassified opinions, are available at the U.S. Foreign Intelligence Surveillance Court's website at [www.fisc.uscourts.gov](http://www.fisc.uscourts.gov).

<sup>120</sup> 50 U.S.C. § 1874.

<sup>121</sup> Semiannual Compliance Assessments under FISA section 702 are jointly submitted by the Department and ODNI. The 13th–15th Joint Assessments are posted here, together with a corresponding Fact Sheet explaining joint assessments, at <https://icontherecord.tumblr.com/post/155810963663/release-of-joint-assessments-of-section-702>.



promptly and appropriate remedial actions are taken, to include purging information that was improperly obtained or otherwise subject to destruction requirements under applicable procedures.<sup>122</sup>

## IV. Privacy safeguards for U.S. national security data access globally

As noted above, through PPD-28 issued in 2014, the United States established binding requirements for U.S. signals intelligence activities that afford fundamental privacy safeguards for all people, regardless of nationality or location. These requirements apply not only to FISA section 702, but to all signals intelligence activity conducted globally by U.S. intelligence agencies. The procedures adopted by the FBI, NSA, and CIA to implement PPD-28 were discussed above. In addition, each of the other 14 U.S. intelligence agencies and components have also adopted procedures implementing PPD-28, which are all publicly available.<sup>123</sup> We are aware of no other country whose intelligence agencies have adopted and publicized procedures affording privacy safeguards applicable to signals intelligence targeting any person, regardless of nationality or location, as the United States has done under PPD-28.

In addition to the restrictions on retention and dissemination of all persons' information collected through signals intelligence activity as discussed in the previous section, PPD-28 sets out a number of general principles governing the conduct of U.S. signals intelligence activities. It requires that privacy and civil liberties be "integral considerations in the planning of U.S. signals intelligence activities."<sup>124</sup> Signals intelligence may only be collected where there is a foreign intelligence or counterintelligence purpose.<sup>125</sup> Signals intelligence may not be collected for the purpose of "suppressing or burdening criticism or dissent, or for disadvantaging persons based on

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<sup>122</sup> Memorandum Opinion and Order, *In re* [REDCATED], No. [REDCATED], at 28 (FISA Ct. 2014).

<sup>123</sup> A list of the various intelligence agencies' PPD-28 procedures is available at [https://www.dni.gov/files/CLPT/documents/Chart-of-PPD-28-Procedures\\_May-2017.pdf](https://www.dni.gov/files/CLPT/documents/Chart-of-PPD-28-Procedures_May-2017.pdf).

<sup>124</sup> Directive on Signals Intelligence Activities, 2014 DAILY COMP. PRES DOC. 2 (Jan. 17, 2014).

<sup>125</sup> *Id.*

their ethnicity, race, gender, sexual orientation, or religion.”<sup>126</sup> Signals intelligence activities “shall be as tailored as feasible,” after taking into account “the availability of other information, including from diplomatic and public sources.”<sup>127</sup>

While thus prioritizing targeted signals intelligence, PPD-28 also recognizes there may be situations where identifying new or emerging threats may not be practicable through targeted collection, so that collection of signals intelligence in bulk may be required. PPD-28, also recognizes the need to protect privacy and civil liberties interests in this context and imposes limits on the use of signals intelligence collected in bulk. Specifically, the United States will only use signals intelligence collected in bulk for the purpose of detecting and countering: (1) espionage and other threats from foreign powers; (2) terrorism; (3) threats from weapons of mass destruction; (4) cybersecurity threats; (5) threats to U.S. or allied forces; and (6) transnational criminal threats.<sup>128</sup>

These principles and restrictions are further elaborated in the intelligence agencies’ implementing procedures. For example, NSA’s PPD-28 procedures recognize the privacy concerns raised by the potential acquisition of foreign national’s personal data and require the use of “selectors,” such as an email account or other identifier of a specific target, wherever practicable. They note that signals intelligence activities “may result in the acquisition of communications that contain personal information of non-U.S. persons.”<sup>129</sup> The procedures then require that:

[w]henever practicable, collection will occur through the use of one or more SELECTION TERMS in order to focus the collection on specific foreign intelligence targets (*e.g.*, a specific, known international terrorist or terrorist group) or specific foreign intelligence topics (*e.g.*, the proliferation of weapons of mass destruction by a foreign power or its agents).<sup>130</sup>

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

<sup>127</sup> *Id.* at 3

<sup>128</sup> *Id.*

<sup>129</sup> NAT’L SEC. AGENCY (NSA), PPD-28 SECTION 4 PROCEDURES § 4.1 (2015).

<sup>130</sup> *Id.* at § 4.2

The procedures also recognize the NSA Inspector General may perform oversight of NSA activities to ensure compliance with these requirements.<sup>131</sup>

## V. Conclusion

As U.S.-based service providers expand cross-border data communications and storage services globally, and as a result increasingly hold the data of foreign customers, foreign governments will continue to scrutinize U.S. laws and practices relating to potential government access to data for national security purposes. This article demonstrates that U.S. privacy safeguards governing national security access to personal data are robust and multi-layered and can stand up to that scrutiny, including in comparison to the law and practice of foreign governments. Explaining to foreign audiences these U.S. privacy safeguards will build foreign understanding and confidence in the U.S. system of privacy safeguards and promote confidence in the free movement of data, thereby helping to ensure that U.S. prosecutors and investigators can obtain access to the data relevant to their investigations.

### About the Author

**Dylan Cors** serves as International Director in the Office of Law and Policy Office of the National Security Division. The Office of Law and Policy advises on issues arising from the National Security Division's prosecuting, intelligence and other sections, and also develops and implements Department policies with regard to intelligence, counterterrorism, and other national security matters. He joined the Department in 2010.

*Mr. Cors recognizes with gratitude the many contributions from Department and inter-agency colleagues reflected in this article.*

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<sup>131</sup> *Id.* at § 8.1.

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# Understanding Misunderstanding: Lessons Learned from the Negotiation and Implementation of the Security Agreement Between the United States and Iraq<sup>1</sup>

*Brigadier General Susan Escallier*  
*Commander*  
*U.S. Army Legal Services Agency*  
*Chief Judge*  
*Army Court of Criminal Appeals*

As the conventional struggle with the Islamic State of Iraq and Syria (ISIS) ends and as the government of Iraq continues the difficult work to secure its peace, it is worthwhile to reflect on prior efforts to support Iraq in establishing and maintaining the rule of law. Specifically, the 2008–2011 efforts to establish a viable relationship between the United States and Iraq. The U.S.–Iraq experience in 2008–2011 provides valuable lessons worthy of memorialization and analysis. The efforts during that time endeavored to ensure the Iraqi people viewed their government institutions as legitimate; supported their government (and the government supported its citizens); and ultimately channeled that support and legitimacy into sustainable government institutions that would be the bulwark of a stable and secure Iraq. The friction created when implementing the formalities of the business of government at the lowest levels, while still engaged in combat operations, helped shape the establishment of the rule of law as the touchstone.<sup>2</sup>

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<sup>1</sup> Adapted from a piece written as part of a graduation requirement for the Industrial College of the Armed Forces, National Defense University. The views expressed in this paper are those of the author and do not reflect the official policy or position of the National Defense University, the Department of Defense, or the U.S. government.

<sup>2</sup> Earlier efforts from the Vietnam conflict are all but forgotten but would have been instructive for lawyers and diplomats in Iraq. *See, e.g.*, GEORGE S. PRUGH, *LAW AT WAR: VIETNAM, 1964–1973* iii (Dep't of the Army 1975)

This article draws on personal experience implementing and refining the agreement between the United States and Iraq in committees and subcommittees. And it serves as a guide for those who may find themselves working through a similar agreement in the future.

## I. Introduction

From mid-2003 until the end of 2008, a United Nations (U.N.) Security Council Resolution authorized U.S. presence in Iraq. At the end of 2008, the United States and Iraq opted not to seek an extension to the resolution.<sup>3</sup> As a result, between 2008 and 2011, the United States and Iraq negotiated, concluded, and partially implemented a unique bilateral international agreement.<sup>4</sup>

The agreement, which was known in the United States as the *Security Agreement*,<sup>5</sup> gave the United States authority to conduct combat missions in Iraq for three years. It also provided authority for U.S. forces to detain Iraqi citizens.<sup>6</sup> Its provisions covered everything from the mundane to lethal—from intimate to international—and its ambitions challenged the Iraqi government’s bureaucratic ability to implement its details. It was nonetheless a hard-bargained agreement

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(“While cognizant that history never repeats itself exactly and that no army ever profited from trying to meet a new challenge in terms of the old one, the Army nevertheless stands to benefit immensely from a study of its experience, its shortcomings no less than its achievements.”).

<sup>3</sup> S.C. Res. 1790 (Dec. 18, 2007).

<sup>4</sup> Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, Iraq–U.S., Nov. 17, 2008 (effective Jan. 1, 2009) [hereinafter *Security Agreement*].

<sup>5</sup> As a harbinger of the misunderstanding, the phrase “Security Agreement” was not found in the document and certainly not in the title. The Iraqis referred to the actual title—Withdrawal Agreement.

<sup>6</sup> *Security Agreement*, *supra* note 4, at art. 22.

accomplished at arm's length, where each party fought for its own best outcome.<sup>7</sup>

The *Security Agreement* was in effect from January 1, 2009, until December 31, 2011.<sup>8</sup> It was structured as a two-phase process: (1) initial negotiation and agreement; and (2) a committee-based implementation phase.<sup>9</sup> During its three-year existence, the committees enjoyed uneven progress, leaving many aspects of the *Security Agreement* unfulfilled. Because the United States and Iraq could not agree upon terms for a follow-on agreement, all conventional U.S. forces withdrew on December 31, 2011, as dictated by the *Security Agreement*.<sup>10</sup>

This article will briefly survey the legal status of U.S. forces before the *Security Agreement*. It will also examine the negotiating process in depth and the effect that the United States and Iraq domestic politics had on each of the parties. It will also explore two provisions of the *Security Agreement*, which illustrate how important rule of law is to a nation's sovereignty and how the most mundane or seemingly inconsequential issues can unravel or complicate international relations.<sup>11</sup> Finally, this article will provide insight into hard lessons

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<sup>7</sup> After the implementation began, it was not clear that the agreement met a separate legal standard, namely, that a "meeting of the minds" occurred. The author served as the primary legal advisor for the *Security Agreement* Secretariat for U.S. forces and attended almost all joint subcommittee meetings as well as the joint U.S.–Iraq working group meetings.

<sup>8</sup> *Security Agreement*, *supra* note 4, at art. 24.

<sup>9</sup> The Status of Forces Agreements (SOFAs) in the North Atlantic Treaty Organization (NATO) (and Japan) are also administrative by committee. This was a proven protocol.

<sup>10</sup> *Security Agreement*, *supra* note 4, at art. 24; Mark Landler, *U.S. Troops to Leave Iraq by Year's End, Obama Says*, N.Y. TIMES (Oct. 21, 2011), <https://www.nytimes.com/2011/10/22/world/middleeast/president-obama-announces-end-of-war-in-iraq.html?>

<sup>11</sup> Although high-profile aspects of the agreement such as detainees or combat operations received publicity, the provisions dealing with the "business" of military operations in a host-nation country (that is, logistics, personnel, facilities) were both harder to implement and more complex. Current national security planners should focus on those aspects of interoperability particularly as the United States develops more robust partnerships in Eastern Europe and in the Pacific.

learned, in an effort to help improve negotiation and implementation of future international agreements.

A few overarching themes affected the negotiation and implementation of the *Security Agreement*. They can be generally characterized as domestic political pressure, the dynamic nature of combat, and Iraq's sensitivity to sovereignty.

## II. Legal status of U.S. forces in Iraq

The United States invaded Iraq in March 2003 and quickly ousted the Ba'athist dictatorship of Saddam Hussein.<sup>12</sup> In the wake of this collapse, coalition forces had obligations under international law to administer and govern the country as occupiers.<sup>13</sup> This legal paradigm provided both authority and an obligation to military forces that replaced an extant government. As an occupying force, they had authority to conduct basic governance, and they did not have the ability to opt out of this role. By successfully invading and overthrowing the government, coalition forces became the government. Formalizing this status, the U.N. Security Council passed a resolution recognizing the Coalition Provisional Authority (CPA).<sup>14</sup> Subsequent U.N. Security Council Resolutions (UNSCRs) also provided for combat and detention authorization for coalition forces.<sup>15</sup> The combat and detention authorities from the UNSCRs continued throughout the various phases of interim governance by the CPA.

The progress of military and governance operations followed an awkward path of ongoing violent military struggle, as well as iterative steps to reestablish a fully functioning, independent, and sovereign Iraqi government. From the outset of the invasion, most of the legal structure and governance was hastily enacted and lacked sufficient

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<sup>12</sup> Neil MacFarquhar, *Saddam Hussein, Defiant Dictator Who Ruled Iraq With Violence and Fear, Dies*, N.Y. TIMES (Dec. 30, 2006), <https://www.nytimes.com/2006/12/30/world/middleeast/30saddam.html>.

<sup>13</sup> *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, INT'L COMM. OF THE RED CROSS (Aug. 12, 1949), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument> (last visited Aug. 27, 2019).

<sup>14</sup> S.C. Res. 1483 (May 22, 2003).

<sup>15</sup> S.C. Res. 1511, ¶ 13 (Oct. 16, 2003); S.C. Res. 1546, ¶ 10 (June 8, 2004).



government capacity to operate effectively.<sup>16</sup> Because of the dire security situation, the Iraqi Prime Minister continued to request assistance from the multi-national forces through the U.N. Security Council.<sup>17</sup> The U.N. resolutions provided blanket authorization for coalition forces to use “all necessary measures” to combat insurgent forces.<sup>18</sup> In 2007, after years of U.N.-based authority, the United States and Iraq told the U.N. that they only needed one last extension of the resolution.<sup>19</sup> The President and Prime Minister then signed a *Declaration of Principles* that was the starting point for the negotiation of the *Security Agreement*.<sup>20</sup>

### III. Negotiation of the *Security Agreement*

With the *Declaration of Principles* as a backdrop, the two sides began negotiating a watershed bilateral agreement. At its core, the agreement needed to provide lawful authority for U.S. troops to be present in Iraq and the authority to continue conducting combat missions. As early as February 2008, senior administration officials described two separate agreements to address traditional Status of Forces (SOFA)<sup>21</sup> issues and security cooperation and assistance with

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<sup>16</sup> JONATHAN MORROW, UNITED STATES INST. FOR PEACE, IRAQ’S CONSTITUTIONAL PROCESS II: AN OPPORTUNITY LOST (2005) (“The Constitution Drafting Committee began its work late and was terminated early.”).

<sup>17</sup> KENNETH KATZMAN, CONG. RESEARCH SERV., RL31339, IRAQ: POST-SADDAM GOVERNANCE AND SECURITY 37–38 (2009); CATHERINE DALE, CONG. RESEARCH SERV., RL34387, OPERATION IRAQI FREEDOM: STRATEGIES, APPROACHES, RESULTS, AND ISSUES FOR CONGRESS 45–46 (2009).

<sup>18</sup> DALE, *supra* note 17, at 45–46; *see supra* notes 11–12.

<sup>19</sup> S.C. Res. 1546; S.C. Res. 1790 (Dec. 18, 2007). UNSCR 1790 was the last resolution to authorize Multi-National Forces to use “all necessary measures” to address the insurgency. While those words are not used, the UNSCR adopts the language from UNSCR 1546. The letters from the Iraqi Prime Minister and the U.S. Secretary of State are appended to the UNSCR.

<sup>20</sup> *U.S.–Iraq Declaration of Principles for Friendship and Cooperation*, ARCHIVE, U.S. DEPT OF STATE (Nov. 26, 2007), <https://2001-2009.state.gov/p/nea/rls/95640.htm> [hereinafter *Declaration of Principles*].

<sup>21</sup> SOFA is a term of art and not a specific type of legal arrangement in contrast to a treaty. As a legal matter, it is an executive agreement. *See, e.g.*, R. CHUCK MASON, CONG. RESEARCH SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 6 (2012) (“A SOFA may be based on the authority found in previous treaties,

Iraq.<sup>22</sup> The twin agreements, which became known in the United States as the *Security Agreement* and the *Strategic Framework Agreement*, were negotiated simultaneously.<sup>23</sup> The *Security Agreement* concerned topics such as combat and detention authorities, as well as those matters typically contained in SOFAs.<sup>24</sup> The *Strategic Framework Agreement* focused on activities affiliated with the U.S. Embassy such as economic, cultural, and education initiatives.<sup>25</sup> The parties also set July 31, 2008, as their initial target for completing this agreement.<sup>26</sup>

The United States framed the *Security Agreement* as an international agreement similar to a SOFA, which enabled the Executive Branch to approve, without congressional approval.<sup>27</sup> In contrast, the Iraq constitution required more formal approval of international agreements; namely, the council of representatives, not

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congressional action, or sole executive agreements comprising the security arrangement.”).

<sup>22</sup> Thom Shanker & Steven Lee Myers, *U.S. Asking for Wide Rights in Fighting War*, N.Y. TIMES (Jan. 25, 2008), <https://www.nytimes.com/2008/01/25/world/middleeast/25military.html?mtrref=undefined&assetType=REGIWALL&mtrref=www.nytimes.com&gwh=5D45871946889F43BC4F6C1386B84D8&gwt=pay&assetType=REGIWALL> (presciently predicting that the United States’ position will face a “buzz saw of opposition from Iraq”); see also Peter Spiegel, *Gates discusses Iraq Pact*, L.A. TIMES (Feb. 7, 2008), <https://www.latimes.com/archives/la-xpm-2008-feb-07-fg-gates7-story.html>.

<sup>23</sup> The *Strategic Framework Agreement* is enduring and largely concerns diplomatic and political partnerships. Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq, Iraq-U.S., Nov. 17, 2008 (entered into force Jan. 1, 2009) [hereinafter *Strategic Framework Agreement*].

<sup>24</sup> *Security Agreement*, *supra* note 4.

<sup>25</sup> *Strategic Framework Agreement*, *supra* note 23.

<sup>26</sup> *Declaration of Principles*, *supra* note 20.

<sup>27</sup> Speigel, *supra* note 22; see also *Fact Sheet: U.S-Iraq Declaration of Principles for Friendship and Cooperation*, OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE (Nov. 26, 2007), <https://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071126-1.html> (last visited Aug. 23, 2019). But see Bruce Ackerman & Oona A. Hathaway, *Bush’s Final Illusion*, SLATE (Oct. 21, 2008), <https://slate.com/news-and-politics/2008/10/the-bush-al-maliki-agreement-bypasses-congress.html> (arguing the executive branch was not legally permitted to enter into an agreement).

merely the prime minister, would have to approve.<sup>28</sup> The *Security Agreement* eventually contained many provisions designed to satisfy the Iraqi legislators and their respective constituents.<sup>29</sup> Unlike reconstruction in post-World War II Japan and homogeneous Germany, the political, religious, and ethnic schisms in Iraq played a large role in the discussions between parties. Similar to the reconstruction of Japan and Germany, SOFA negotiations in Iraq occurred post-conflict.

The controversy and political wrangling over this agreement began immediately after unveiling the *Declaration of Principles*, hitting terminal velocity once the negotiation began. For example, the U.S. Secretaries of State and Defense co-wrote an op-ed piece in the middle of February 2008, advocating the need for the agreement and soliciting the support of the public and politicians for the agreement.<sup>30</sup> Congress, however, had mixed opinions.<sup>31</sup> One factor remained constant: U.S. leaders in both the executive and legislative branches underestimated the negotiating position of the Iraqis and their legitimate desire to have true sovereign control of their country. Amidst this difficult political landscape, the United States and Iraq embarked upon negotiations. Initially taking place in diplomatic

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<sup>28</sup> Article 61, *Dustūr Jumhūrīyat al-Irāq* [The Constitution of the Republic of Iraq] of 2005; *see also* Renewing the United Nations Mandate for Iraq: Plans and Prospects: Hearing Before the Subcomm. on Int'l Orgs., Human Rights, and Oversight of the Comm. on Foreign Affairs House of Reps., 110th Cong. 9–10 (2008).

<sup>29</sup> Article 61, *Dustūr Jumhūrīyat al-Irāq* [The Constitution of the Republic of Iraq] of 2005; *see also* Rania Abouzeid, *Brinksmanship Delays Iraq Security Vote*, *TIME* (Nov. 26, 2008), <http://content.time.com/time/world/article/0,8599,1862402,00.html>; GEORGE W. BUSH, *DECISION POINTS* 389–92 (2010).

<sup>30</sup> Condoleezza Rice & Robert Gates, *What We Need Next in Iraq*, *WASH. POST*, Archive, U.S. DEPT OF STATE (Feb. 13, 2008), <https://2001-2009.state.gov/secretary/rm/2008/02/100713.htm> (last visited Aug. 26, 2019).

<sup>31</sup> *See* Ackerman & Hathaway, *supra* note 27.

circles and outside of the public glare, as one would expect for delicate political negotiation, the debate quickly went public.<sup>32</sup>

By summer 2008, details of the draft proposal began leaking into the popular press.<sup>33</sup> The Arab and Islamic world was abuzz about the text, and regional media did in-depth analysis and commentary.<sup>34</sup> The leaked draft also sparked Congress's renewed interest in the text itself, as well as its role in the negotiation and approval process.<sup>35</sup> The Bush administration hoped to finalize the agreement in the summer, but it was abundantly clear that the parties would not be able to meet that goal. Moreover, it was not clear there would be an agreement.

The United States encountered significant resistance from Iraq early in the negotiations. The contentious issues concerned firm withdrawal dates, requirements of Iraqi approval for combat missions,

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<sup>32</sup> Transcript, *U.S., Iraq Ponder Long Term Treaty*, NAT'L PUBLIC RADIO (Jan. 24, 2008),

<https://www.npr.org/templates/story/story.php?storyId=18368586>. At that time, the negotiations were completely private.

<sup>33</sup> See Bob Dreyfuss, *Iraqi Officials Oppose US-Iraq Treaty*, THE NATION BLOG (June 5, 2008), <https://www.thenation.com/article/iraqi-officials-oppose-us-iraq-treaty/>; Patrick Cockburn, *Revealed: Secret Plan to Keep Iraq Under U.S. Control*, INDEPENDENT (June 5, 2008),

<https://www.independent.co.uk/news/world/middle-east/revealed-secret-plan-to-keep-iraq-under-us-control-840512.html>. Neither of these sources could be considered unbiased, but these types of stories gained tremendous traction in the regional press and diluted versions of the same scenarios were repeated in U.S.-based media.

<sup>34</sup> Leila Fadel, *U.S. Seeking 58 Bases in Iraq, Shiite Lawmakers Say*, MCCLATCHY NEWSPAPERS (June 9, 2008),

<https://www.mcclatchydc.com/news/nation-world/world/article24486298.html>. Al Jazeera English ran a series of specials called *Inside Story: Iraq* an in-depth analysis and coverage of the *Security Agreement* negotiation. These aired in June, July, and November 2008. Guests on the show included Iraqi spokesman, Ali Dabbagh, as well as U.S. Ambassador Ryan Crocker. See, e.g., Al Jazeera English, *Inside Iraq-Iraq-U.S. Security Pact-11 Jul 08-Part 1*, YOUTUBE (July 12, 2008), <https://www.youtube.com/watch?v=zMk-I4zTGwc>.

<sup>35</sup> Associated Press, *Bush Admin. May Not Get Iraq Security Deal Before End of Term*, FOX NEWS (June 9, 2008), <https://www.foxnews.com/story/bush-admin-may-not-get-iraq-security-deal-before-end-of-term>. See generally R. CHUCK MASON, CONG. RESEARCH SERV., RL40011, U.S.-IRAQ WITHDRAWAL/STATUS OF FORCES AGREEMENT: ISSUES FOR CONGRESSIONAL OVERSIGHT (2009).

Iraqi legal authority for detention, and criminal jurisdiction over U.S. forces and U.S. contractors.<sup>36</sup> After months of unsuccessful negotiation, Prime Minister Maliki publicly stated the sides had reached an impasse.<sup>37</sup>

## IV. Domestic politics

Overshadowing the entire process, domestic politics in both countries impacted the ability to produce an effective agreement. In Iraq, the opponents of the agreement were the most vocal—and formed the majority—and the supporters' voices were either silent or muted.<sup>38</sup> Some thought the Maliki government lacked the sovereign and executive ability to negotiate such an agreement.<sup>39</sup> Other critics believed that the agreement itself, with an assumed authorization for foreign troops to operate on Iraqi soil, would abrogate Iraqi

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<sup>36</sup> Michael Georgy, *Iraq Says it Wants to Restrict Movement of U.S. Troops*, REUTERS (June 6, 2008), <https://www.reuters.com/article/idUSL06935676> (restriction on movement); Tim Arango & Michael S. Schmidt, *Despite Difficult Talks, U.S. and Iraq Had Expected Some American Troops to Stay*, N.Y. TIMES (Oct. 22, 2011), <https://www.nytimes.com/2011/10/22/world/middleeast/united-states-and-iraq-had-not-expected-troops-would-have-to-leave.html?mtrref=undefined&assetType=REGIWALL&mtrref=www.nytimes.com&gwh=077BCF55EE8A3AF6F81A35B77EC6E9B5&gwt=pay&assetType=REGIWALL> (discussing immunity for U.S. armed force members in Iraq); Massimo Calabresi, *Will Contractors Lose Iraq Immunity?*, TIME (Feb. 13, 2008), <http://content.time.com/time/nation/article/0,8599,1712938,00.html> (discussing contractor immunity).

<sup>37</sup> Mike Tharp, *Maliki Says Talks over U.S. Troop Presence at an Impasse*, MCCLATCHY NEWSPAPERS (June 13, 2008), <https://www.mcclatchydc.com/news/nation-world/world/article24486724.html>; Alissa Rubin, *Talks With U.S. on Security Pact are at an Impasse, the Iraqi Prime Minister Says*, N.Y. TIMES (June 14, 2008), <https://www.nytimes.com/2008/06/14/world/middleeast/14iraq.html?mtrref=undefined&assetType=REGIWALL&mtrref=www.nytimes.com&gwh=C8A1E7517BAB480C33F42E18D3E1D09F&gwt=pay&assetType=REGIWALL>.

<sup>38</sup> Tharp, *supra* note 37.

<sup>39</sup> See Jenny Paul, *U.S.–Iraq Security Pact May Be in Violation, Congress is told*, THE BOSTON GLOBE (Nov. 20, 2008), [http://archive.boston.com/news/world/middleeast/articles/2008/11/20/us\\_iraq\\_security\\_pact\\_may\\_be\\_in\\_violation\\_congress\\_is\\_told/](http://archive.boston.com/news/world/middleeast/articles/2008/11/20/us_iraq_security_pact_may_be_in_violation_congress_is_told/); see also Khair El-Din Haseeb, *The Occupation of Iraq: An Exit Proposal*, 2 CONTEMP. ARAB AFF. 1–25 (2009).

sovereignty.<sup>40</sup> Iraq also had a complicated relationship with Iran, and Iran was highly critical of the *Security Agreement*.<sup>41</sup> The Grand Ayatollah Sistani factored prominently into the negotiations.<sup>42</sup> Further complicating the political situation, Iraqi law required the council of representatives to approve all international agreements (not just treaties). What's more, initially it was unclear whether a simple or super majority was necessary to enact the agreement.<sup>43</sup> Eventually Iraqi legislators interpreted the law to require a two-thirds majority vote, thus the domestic pressure for Maliki was even greater.<sup>44</sup>

Among ordinary Iraqi citizens there was widespread resentment and anger about U.S.-caused casualties, U.S. detention policies; de-Ba'athification, initial disbandment of the military, as well as the hundreds of thousands of refugees and displaced persons. Almost every Iraqi had been adversely affected by the U.S. invasion at some stage of the conflict.<sup>45</sup> Given these angry citizens were also

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<sup>40</sup> Haseeb, *supra* note 39; *see also Approval of U.S.–Iraq Agreement “Disgrace” for Shi’i Government*, translated and published by BBC Monitoring Middle East, June 4, 2008; Nazila Fathi, *U.S.-Iraqi Agreement is Getting Mixed Reviews in Iran*, N.Y. TIMES (Nov. 19, 2008), <https://www.nytimes.com/2008/11/19/world/middleeast/19tehran.html??mtrref=undefined&gwh=F024F355390CB5992EDFE0FDD6FF9543&gwt=pay&assetType=REGIWALL>.

<sup>41</sup> INST. FOR THE STUDY OF WAR, TIMELINE OF THE STATUS OF FORCES AGREEMENT (SOFA) NEGOTIATIONS AND IRANIAN INTERFERENCE (2008).

<sup>42</sup> The referendum that the Council of Representatives included in their endorsement of the *Security Agreement* allegedly satisfied Sistani's desire for majority support. *See, e.g.,* Campbell Robertson & Stephen Ferrell, *Pact, Approved in Iraq, Sets Time for U.S. Pullout*, N.Y. TIMES (Nov. 17, 2008), <https://www.nytimes.com/2008/11/17/world/middleeast/17iraq.html??mtrref=undefined&assetType=REGIWALL&mtrref=www.nytimes.com&gwh=58564A86D02C75A7A13BEF809AB77741&gwt=pay&assetType=REGIWALL> (“Some Iraqi Shiite politicians said a significant factor in the cabinet decision was the approval of the pact by Grand Ayatollah Ali al-Sistani, the most influential Shiite cleric in Iraq, who from the outset had laid down three conditions: full Iraqi sovereignty, transparency and majority support for the pact.”).

<sup>43</sup> Paul, *supra* note 39.

<sup>44</sup> *See* The Constitution of the Republic of Iraq, *supra* note 28.

<sup>45</sup> *See generally* RIVERBEND, *Baghdad Burning* (The Feminist Press 2005); GILBERT BURNHAM ET AL., THE HUMAN COST OF THE WAR IN IRAQ: A MORTALITY STUDY, 2002–2006 (2006) (discussing recent statistics for deaths, poverty, orphans, and displaced persons).

constituents, and since Iraq was a democracy, representatives could not ignore their concerns. Therefore, the presence of U.S. troops, although temporarily necessary for security, was almost universally regarded as an affront to Iraqi dignity, self-governance, and self-respect. The presence of foreign troops was an infringement of Iraqi sovereignty. Even if the Iraqis were not ready to administer their country in an exemplary modern fashion, they were hungry for the simple dignity of full sovereignty. The negotiation and implementation of the *Security Agreement* was a vehicle for them to fulfill that need.<sup>46</sup> They were ready for rule of law on their own terms.

As Prime Minister Maliki was declaring an impasse, congressional interest in the *Security Agreement* piqued in the United States. As the July 31, 2008 deadline approached, presidential contenders used the *Security Agreement* as a focal point to highlight their foreign policy objectives.<sup>47</sup>

Given the unpopularity of the conflict in Iraq, the domestic pressure in the United States was threefold.<sup>48</sup> Publically, there was pressure to shift assets to the fight in Afghanistan;<sup>49</sup> pressure to have the agreement considered as a treaty; and even a learned opinion that the Iraqi government did not have the sovereign capacity to enter into

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<sup>46</sup> Tim Cocks and Muhanad Mohammed, *Iraq Regains Control of Cities as U.S. Pulls Back*, REUTERS (June 30, 2009), <https://www.reuters.com/article/us-iraq-usa-troops-sb/iraq-regains-control-of-cities-as-u-s-pulls-back-idUSTRE55T10I20090630> (Prime Minister Maliki lamented Iraq's lack of sovereignty saying, "Our incomplete sovereignty and the presence of foreign troops is the most serious legacy we have inherited (from Saddam).").

<sup>47</sup> Brian Knowlton, *Commander Faces More Doubt in Congressional Hearing*, INT'L HERALD TRIBUNE, GLOBAL POLICY FORUM (Apr. 9, 2008), <https://www.globalpolicy.org/component/content/article/239-withdrawal/37869-commander-faces-more-doubt-in-congressional-hearing.html> ("At times, Senators Hillary Rodham Clinton and Barack Obama, the Democratic presidential candidates, and Senator John McCain, the presumptive Republican nominee, seemed to be talking about two different wars.").

<sup>48</sup> BUSH, *supra* note 29, at 355. In President Bush's memoirs, he describes a September 2006 conversation with Republican Senator Mitch McConnell where Senator McConnell petitioned the President to bring troops home from Iraq in order to boost Republican political standing with the American public.

<sup>49</sup> *See generally* The Situation in Iraq and Afghanistan: Hearing on S. 110-716 Before Comm. on Armed Services, 110th Cong. (2008).

such an agreement.<sup>50</sup> Congressional pressure to actively control the prosecution of the Iraq War did not abate during the negotiation of the *Security Agreement*.<sup>51</sup> Politically, there was concern that President Bush was attempting to bind the next president into a long-term commitment in Iraq.<sup>52</sup> Diplomatically, there was direct interaction between Iraq and U.S. lawmakers.<sup>53</sup> Both bodies were keen to have a

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<sup>50</sup> Paul, *supra* note 39. (reporting that a U.S. law professor testified that Iraq did not have the capacity to enter an agreement).

<sup>51</sup> In 2006, Congress commissioned the Iraq Study Group to examine the war strategy and to make recommendations. This commission exerted tremendous influence and despite President Bush's opposition to its genesis, he eventually adopted some of its proposals and invoked it at the signing of the *Security Agreement*. See *Iraq Study Group*, U.S. INSTIT. OF PEACE (Mar. 17, 2009), <https://www.usip.org/publications/2009/03/iraq-study-group>; see also Jordan Tama, *The Contemporary Presidency: The Power and Limitations of Commissions: The Iraq Study Group, Bush, Obama, and Congress*, 41 PRES. STUD. Q. 135 (2011). Congress has imposed various benchmarks and report requirements throughout the conflict. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-1221T, H.R. COMMITTEE ON ARMED SERVICES, SECURING STABILIZING AND REBUILDING IRAQ (2007) (statement of David M. Walker, Comptroller General of the United States noting GAO was legislatively mandated to complete this independent report which concluded that Iraq had not met most of the 18 benchmarks established in earlier legislation); see also DEPT OF DEFENSE, MEASURING STABILITY AND SECURITY IN IRAQ (2009). For a detailed treatment of congressional action vis-à-vis Iraq, see MATTHEW C. WEED, CONG. RESEARCH SERV., RL34568, U.S.—IRAQ STRATEGIC FRAMEWORK AND STATUS OF FORCES AGREEMENT: CONGRESSIONAL RESPONSE (2008).

<sup>52</sup> Leila Fadel & Warren P. Strobel, *U.S. Security Talk with Iraq in Trouble in Baghdad and D.C.*, MCCLATCHY NEWSPAPERS (June 10, 2008), <https://www.mcclatchydc.com/news/nation-world/world/article24486352.html> (“On Capitol Hill, top Democrats and Republicans complain that Bush is rushing the negotiations to try to tie his successor's hands.”).

<sup>53</sup> Dozens of Iraqi legislators signed a letter highlighting concerns and Iraqi demands for the next phase of the military involvement in Iraq. *Remarks on the Agreements Between the Iraqi Republic and the United States of America*, POLITICO (May 29, 2008), [http://www.politico.com/static/PPM43\\_080604\\_iraqparliamentltr6408.html](http://www.politico.com/static/PPM43_080604_iraqparliamentltr6408.html).



significant voice in the next phase of U.S.–Iraq relations. The Iraqis were also aware of our domestic political timelines.<sup>54</sup>

## V. U.S. concessions

After a period of inaction, the two parties began negotiating again in late summer 2008. Ultimately, after much back and forth, the United States conceded several contentious points—at one point viewed as “red-line” issues. Concessions included: troops withdrawal dates from cities; a final withdrawal from Iraq; and acknowledgement that the government of Iraq must approve operations.<sup>55</sup> By August 2008, the negotiators prematurely announced they had agreed upon a draft.<sup>56</sup> Negotiation continued with spikes of activity and publicity in August and in October. The United States repeatedly stated it believed the final offer was on the table, only to encounter entrenched Iraqi resistance.<sup>57</sup> Ultimately, the final version presented

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<sup>54</sup> Alissa J. Rubin, *Iraq Hints at Delay in U.S. Security Deal*, N.Y. TIMES (July 3, 2008),

<https://www.nytimes.com/2008/07/03/world/middleeast/03iraq.html>.

<sup>55</sup> Dan Froomkin, *It's Timetable Time*, WASH. POST (Nov. 17, 2008),

[http://busharchive.froomkin.com/BL2008111701579\\_pf.htm](http://busharchive.froomkin.com/BL2008111701579_pf.htm); see also Jim Garamone, *Gates Works With Congress on Iraq Status of Forces Agreement*, AM. FORCES PRESS SERV., DVIDSHUB.NET (Oct. 16, 2008),

<https://www.dvidshub.net/news/25106/gates-works-with-congress-iraq-status-forces-agreement> (quoting Pentagon spokesman Geoff Morrell, “Any withdrawal dates that are in this—and there are dates in this document—are entirely conditions-based. These are not ad hoc, willy-nilly, arbitrary timelines. These are goals that . . . we have agreed to that will only be followed if the conditions on the ground provide for it.” The final document included two firm withdrawal deadlines.).

<sup>56</sup> Helene Cooper & Stephen Ferrell, *Rice Meets with Maliki to Discuss Security Agreement*, N.Y. TIMES (Aug. 21, 2008), <https://www.nytimes.com/2008/08/21/world/africa/21iht-iraq.4.15523713.html?mtrref=undefined&gwh=D121DA16EDC2A1C666F360B24C4EED90&gwt=pay&assetType=REGIWA LL>.

<sup>57</sup> *Iraq to Submit Changes to U.S. Security Agreement*, CNN (Oct. 28, 2008), <http://edition.cnn.com/2008/WORLD/meast/10/28/iraq.us.forces/index.html>.

to the council of representatives reflected a near total capitulation of what were previously viewed as red-line issues for the United States.

## VI. Cross-border raid

Negotiations hit yet another bump in October 2008 when the United States conducted a cross-border raid into an Al Qaeda camp in Syria.<sup>58</sup> Press reports of the raid indicated an Iraqi national was among the dead.<sup>59</sup> The raid was criticized in Iraq and sparked even greater resentment and controversy about the *Security Agreement*.<sup>60</sup> Although initial drafts of the *Security Agreement* did not address use of Iraqi territory for combat operations against other nations, the version approved by the Iraqi cabinet and parliament the following month did. There was a specific prohibition against using Iraqi land or airspace for attacks against neighbors.<sup>61</sup> In the long term, that provision might have been the most significant strategic concession the United States made to Iraq.<sup>62</sup>

It might be tempting to criticize the decision to conduct the raid because of its political backlash, but one must also consider the tactical alternatives. This situation illustrates how difficult it is to

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<sup>58</sup> Eric Schmitt & Tom Shanker, *Officials Say U.S. Killed an Iraqi in Raid in Syria*, N.Y. TIMES (Oct. 28, 2008), <https://www.nytimes.com/2008/10/28/world/middleeast/28syria.html?mtrref=undefined&gwh=8BF899CFD62EBF0AF675461584CA242A&gwt=pay&assetType=REGIWALL>; Jonathan S. Landay & Nancy A. Youssef, *CIA Led Mystery Syria Raid that Killed Terrorist Leader*, MCCLATCHY NEWSPAPERS (Oct. 27, 2008), <https://www.mcclatchydc.com/news/nation-world/world/article24507010.html>.

<sup>59</sup> Landay & Youssef, *supra* note 58.

<sup>60</sup> *Id.*

<sup>61</sup> *IRAQ: Latest Draft of the U.S.–Iraq Security Agreement*, L.A. TIMES: BABYLON AND BEYOND (Oct. 21, 2008), <https://latimesblogs.latimes.com/babylonbeyond/2008/10/post-1.html> (The blog contains a leaked draft of the *Security Agreement*, which does not contain any prohibition addressing use of Iraqi land or airspace for attacks on neighboring countries. The final version has a sweeping prohibition.).

<sup>62</sup> See Leila Fadel, *Maliki Tells Bush He Now Backs New U.S. Troop Deal*, MCCLATCHY NEWSPAPERS (Nov. 14, 2008), <https://www.ledger-enquirer.com/living/article29025763.html>; see also Nazila Fathi, *U.S.–Iraqi Agreement Getting Mixed Reviews in Iran*, N.Y. TIMES (Nov. 19, 2008), <https://www.nytimes.com/2008/11/19/world/middleeast/19tehran.html?mtrref=undefined&assetType=REGIWALL&mtrref=www.nytimes.com&gwh=E42EC6BB488198498291FE51021CFE60&gwt=pay&assetType=REGIWALL>.

publicly negotiate such an agreement amidst ongoing combat operations. On one hand, to prioritize tactical mission accomplishment over the establishment of rule of law facially appeared to conflict with the strategic objective of a sovereign Iraq. On the other hand, rule of law could not thrive without some level of stability; therefore, operations had to continue. Striking the balance was necessary, though not always possible. Iraqi casualties would become an issue during the implementation phase as well.

## VII. Final agreement and signing ceremony

Finally, in late November, the two sides submitted text to the Iraqi cabinet and parliament. The United States and Iraq reached a compromise just in time to have a legal agreement in place when the last UNSCR expired. The agreement was replete with deadlines, requirements to comply with Iraqi law, requirements to gain Iraqi approval for combat and detention operations, and a large number of other U.S. concessions to Iraqi negotiation demands.<sup>63</sup> When the Council of Representatives approved the *Security Agreement*, they also

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<sup>63</sup> Fadel Leila & Nancy Youssef, *Why the US Blinked on Its Troops Agreement with Iraq*, MCCLATCHY NEWSPAPERS (Nov. 18, 2008), <https://www.mcclatchydc.com/news/nation-world/world/article24511291.html> (“Pentagon officials, however, said the White House made unprecedented concessions. In addition to allowing Iraq to search cargo and mail under some conditions, the deal bars U.S. forces from launching attacks on other countries from Iraqi soil and permits Iraq to prosecute U.S. military contractors, and in some cases perhaps also American troops, under Iraqi law.”).

inserted a provision into the approval legislation calling for a popular referendum on the *Security Agreement* in summer 2009.<sup>64</sup>



## Articles of the Security Agreement

Article 1 Scope and Purpose  
Article 2 Definitions  
Article 3 Laws  
Article 4 Missions  
Article 5 Property Ownership  
Article 6 Use of Agreed Facilities  
and Areas  
Article 7 Defense Equipment  
Article 8 Environment  
Article 9 Movement of Vehicles,  
Vessels and Aircraft  
Article 10 Contracts  
Article 11 Services and Communication  
Article 12 Jurisdiction  
Article 13 Weapons and Apparel  
Article 14 Entry and Exit  
Article 15 Import and Export

Article 16 Taxes  
Article 17 Licenses and Permits  
Article 18 Official and Military  
Vehicles  
Article 19 Support Activities  
Services  
Article 20 Currency  
Article 21 Claims  
Article 22 Detention  
Article 23 Implementation  
Article 24 Withdrawal of US Forces  
Article 25 Termination of Chapter VII  
Article 26 Iraqi Assets  
Article 27 Deterrence of Security  
Threats  
Article 28 Green Zone  
Article 29 Implementing Mechanisms  
Article 30 Effective Dates

### Articles of the Security Agreement

## VIII. Implementation<sup>65</sup>

The UNSCR expired on December 31, 2008, and U.S. forces adjusted to the strictures of the *Security Agreement*.<sup>66</sup> The Iraqis held a public

<sup>64</sup> Steven Lee Myers, *A Loosely Drawn American Victory*, N.Y. TIMES (Nov. 28, 2008),

<https://www.nytimes.com/2008/11/29/washington/29policy.html?mtrref=undefined&gwh=748FF05A1CD3141B75E2A5E611474226&gwt=pay&assetType=REGIWALL>.

<sup>65</sup> The author served as the legal advisor to the *Security Agreement* Secretariat within Multi-National Forces-Iraq (MNF-I) from March 2009 until March 2010. The duties and responsibilities of the legal advisor included attendance at committee and joint subcommittee meetings; review of proposed agreed minutes and opinions about the nature, scope, applicability; and meaning of the *Security Agreement*. Unless otherwise noted below, the incidents and circumstances were personally witnessed by the author.

ceremony accepting responsibility for the Green Zone, and the mindset and attitude of the Iraqis shifted.<sup>67</sup> The business of implementation began with the oversight committees and specialized joint subcommittees holding initial meetings. Although no one expected instant progress on implementation, there were numerous unexpected challenges with interpretation and implementation. Iraqis wanted to exercise their authority under the agreement, but the United States favored reliance on the status quo until the parties devised a sustainable process for implementation. The once routine and largely unfettered movement of cargo by military aircraft serves as one example of the *Security Agreement's* impact on military operations.

On December 31, 2008, when a U.S. Air Force cargo plane approached the U.S. military side of the Baghdad airport, it just landed. It may have been subject to dozens of U.S. statutes and military rules and regulations, but it was not subject to Iraqi law. Iraq had no authority over it because military forces had authorities, rights, and privileges under the UNSCRs, as well as vestiges of CPA regulations.<sup>68</sup> When that same plane landed the next day, on January 1, 2009, it was simultaneously subject to numerous articles of the

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<sup>66</sup> See *supra* note 19 and accompanying text.

<sup>67</sup> See Campbell Robertson & Stephen Farrell, *Heart of U.S. Occupation Reverts to Iraqi Control*, N.Y. TIMES (Jan. 1, 2009), <https://www.nytimes.com/2009/01/02/world/middleeast/02greenzone.html?mtrref=undefined&gwh=06A9ABEF12B916F12370E8D3B4A982FE&gwt=pay&assetType=REGIWALL>.

<sup>68</sup> Trevor A. Rush, *Don't Call It a SOFA! An Overview of the U.S.-Iraq Security Agreement*, 2009 ARMY LAW. 34, 60 (2009); Mike Ryan & Jason Coats, *The U.S.-Iraq Security Agreement and the Changing Nature of U.S. Military Operations in Iraq*, 89 MIL. REV. 48 (2009) (noting one section is titled "From Blank Check to Strict Guidelines").

*Security Agreement*. This chart highlights<sup>69</sup> the complex legal situation that began on January 1.<sup>70</sup>

## Security Agreement Scenario

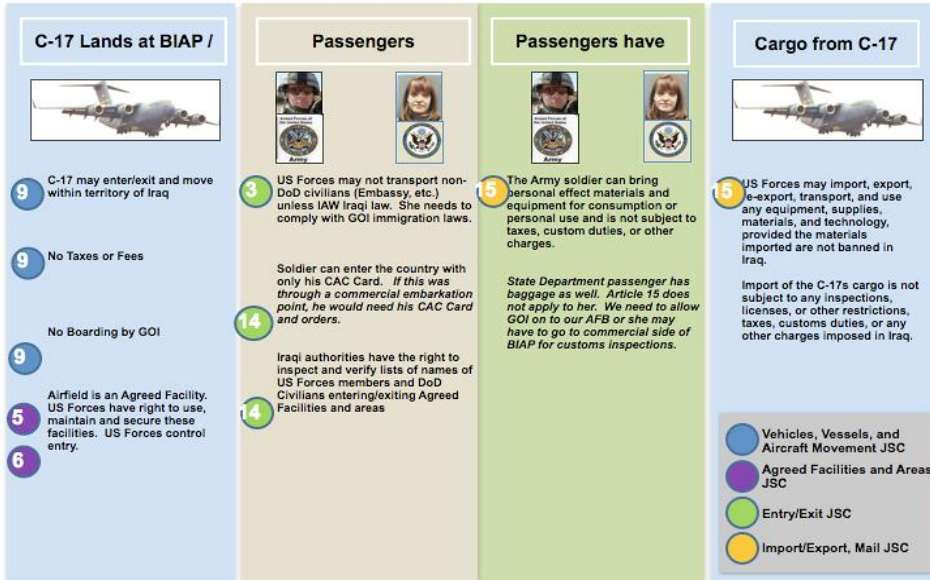


Chart Highlighting the *Security Agreement* Scenario

While aircraft and their crews were navigating this complex environment, the parties struggled to establish systems to administer the *Security Agreement*. The United States also underestimated the amount of time it would take to make substantive process on the implementation issues. In addition to all of the normal challenges

<sup>69</sup> The numbers in the bubbles indicate the relevant *Security Agreement* articles for each action, with the color of the bubble indicating the joint subcommittee that would be responsible for implementation of that particular article. Note that this chart depicts an *easy Security Agreement* scenario because most aspects involve specific privileges that U.S. forces continue to have even after the effective date of the *Security Agreement*. If some of the passengers were outside of the ambit of the *Security Agreement* (for example, USO entertainers on a good will mission) then their immigration and luggage would all be subject, in theory, to Iraqi immigration and customs laws.

<sup>70</sup> One of the action officers at Multi-National Force Iraq developed this graphic to explain the overlay and interplay of the *Security Agreement* and the responsibilities of the Joint Subcommittees that would implement it.

such as scheduling conflicts, or delays for translations of drafts from English to Arabic, there were delays due to extraordinary events such as terrorist threats or actual attacks on ministry buildings or government representatives.<sup>71</sup>

Additionally, the Iraqi mindset and desire to wield sovereign authority continued to manifest itself in public confrontations. As soon as the agreement took effect there were Iraqi accusations of “Security Agreement violations” leveled at U.S. forces. Although one might expect members of the public to make such claims, especially radical forces, these accusations also came from political leaders, Iraq Security Force (ISF) commanders, and government spokesmen—the people the United States negotiated the agreement with and the partners fighting alongside U.S. forces.

The challenges in implementation were varied and complicated. They ranged from the committee structure and membership to the overall Iraqi mindset, from the desire to reopen negotiations over contentious portions to the inability to resolve issues in a timely fashion. Additionally, unique challenges arose from implementation in a dynamic combat environment, as well as challenges with the levels of corruption and immaturity in the Iraqi ministries. Finally, due to the uneven progress of implementation at the national level, local leaders (Iraqi and U.S.) engaged in informal and ad hoc implementation. These phenomena will be illustrated and analyzed in turn. The following subsections highlight unexpected or unanticipated challenges in establishing sustainable national governance while also defending a state militarily.

## **A. Withdrawal of combat troops**

When the United States began negotiating the *Security Agreement*, it did not intend to have any fixed deadlines in the agreement; it favored conditions-based standards or “time horizons.” Despite the United States’ opposition to deadlines, the Iraqis insisted upon, and the United States ultimately approved, two fixed deadlines.<sup>72</sup> The first

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<sup>71</sup> See, e.g., *30 Children Among 160 Killed in Iraq Bombings, Interior Ministry Says*, CNN (Oct. 26, 2009), <http://edition.cnn.com/2009/WORLD/meast/10/26/iraq.violence/index.html> (The Ministry of Justice was the location for the only Jurisdiction Joint Subcommittee. In October, it was attacked by a suicide truck bomber and was unusable after. Our main Iraqi representative on the Claims Joint Subcommittee was injured in the attack).

<sup>72</sup> Fromkin, *supra* note 55.

was a withdrawal of “combat forces” from “cities, villages and localities” on June 30, 2009, and then a complete withdrawal of all U.S. forces in December 2011.<sup>73</sup> Despite the seemingly firm language of the article, when the *Security Agreement* went into effect in January 2009, there was actually an assumption and expectation by the United States that the government of Iraq would ask the United States to remain in a few key cities to ensure continued security.<sup>74</sup>

This situation highlighted the complexity of having legislatively-dictated deadlines during combat operations. The Iraqis felt the agreement needed to have firm, fixed deadlines in order to get it passed in the legislature. But it was difficult, if not impossible to project the security situation months in advance. Again, the government of Iraq was a sovereign nation, permitting the United States to remain and help it maintain peace. To support the rule of law and help the Iraqis establish legitimacy, however, the United States’ opinion was the Iraqis required more support. Ultimately, that opinion did not carry the day in Iraq—it was not that simple.

In April 2009, the U.S. military weighed options to leave some combat forces in a few select cities. By June, the Iraqi government changed its mind and insisted on complete withdrawal. The catalyst for this dramatic shift was a combat operation. Just as a raid into Syria complicated the negotiations, tactical combat action complicated implementation. In April, the press had reported the Iraqis might want a residual U.S. force in certain cities after the withdrawal deadline.<sup>75</sup> Immediately after those reports, there was a well-publicized combat raid in Southern Iraq where U.S. Special Forces shot two civilians in an attempt to detain a terrorist suspect.<sup>76</sup> One of the dead civilians was an Iraqi mother of nine children. Press reports quoted Prime Minister Maliki saying this action was a *Security Agreement* violation, and it was widely reported to be a “test”

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<sup>73</sup> *Security Agreement*, *supra* note 4, art. 24.

<sup>74</sup> Rod Nordland, *Exceptions to Iraq Deadline Are Proposed*, VETERANS TODAY (Apr. 27, 2009), <https://www.veteranstodayarchives.com/2009/04/27/exceptions-to-iraq-deadline-are-proposed/>.

<sup>75</sup> U.S. ‘Saddened’ by Deadly Iraq Raid, BBC NEWS (Apr. 28, 2009),

[http://news.bbc.co.uk/2/hi/middle\\_east/8022156.stm](http://news.bbc.co.uk/2/hi/middle_east/8022156.stm).

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



of the new relationship.<sup>77</sup> Whether this was the deciding factor is unknown, but between mid-April and June 30, 2009, the posture of the Iraqi government dramatically shifted to an expectation that all U.S. combat forces would, in fact, leave all cities by June 30.<sup>78</sup>

Once the Iraqis shifted position with regard to combat troops in cities, they wholeheartedly embraced the narrative that they forced the United States out of the cities—declaring the withdrawal deadline a federal holiday called Sovereignty Day.<sup>79</sup> This resonated with the public in dramatic fashion, and even the government was swept up in the momentum. Suddenly, the United States needed permission for every activity. When General Odierno and Iraqi officials held a joint press conference in Baghdad to discuss the withdrawal, the Iraqi spokesman apologized for the delayed start of the conference stating “the American general needed permission to enter the building.”<sup>80</sup> At this point, the Iraqis were boldly and proudly exercising their sovereignty.

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<sup>77</sup> *Id.*; Steven Lee Myers, *After a U.S. Raid: 2 Iraqis Dead, Protests and Regrets*, N.Y. TIMES (Apr. 26, 2009), <https://www.nytimes.com/2009/04/27/world/middleeast/27iraq.html?mtrref=undefined&gwh=84A8C1A53CF53A2657B978EC3257772F&gwt=pay&assetType=REGIWALL>; *Iraqi Leader: U.S. Raid that Killed 2 Breached Accord*, CNN (Apr. 26, 2009), <http://edition.cnn.com/2009/WORLD/meast/04/26/iraq.troops.raid/>.

<sup>78</sup> Interview by Bernard Gwertzman with Jane Arraf, Correspondent, *Reappraising U.S. Withdrawal from Iraqi Cities*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/interview/reappraising-us-withdrawal-iraqi-cities> (last visited Aug. 26, 2019).

<sup>79</sup> Damien McElroy, *Iraq Celebrates National Sovereignty Day but Needs a Master Plan of its Own*, TELEGRAPH (June 30, 2009), <https://www.telegraph.co.uk/news/worldnews/middleeast/iraq/5701423/Iraq-celebrates-National-Sovereignty-Day-but-needs-a-master-plan-of-its-own.html>.

<sup>80</sup> Jane Arraf, *Why Was Top U.S. General Late for His Own Press Conference?*, CHRISTIAN SCIENCE MONITOR (June 15, 2009), <https://www.csmonitor.com/World/Middle-East/2009/0615/p06s04-wome.html>; Tim Cocks & Muhanad Mohammed, *Iraq Regains Control of Cities as U.S. Pulls Back*, REUTERS (June 30, 2009), <https://www.reuters.com/article/us-iraq-usa-troops-sb/iraq-regains-control-of-cities-as-u-s-pulls-back-idUSTRE55T10I20090630>.

## B. Agreed facilities and troop positioning

Aside from the withdrawal issue, several other challenges developed with regard to the location of U.S. troops. At the time the *Security Agreement* went into effect, U.S. forces were arrayed throughout Iraq on a wide variety of bases from mega-bases, such as Victory Base Complex, to small joint security stations. To provide a reference for the parties, U.S. forces developed a list of bases or “agreed facilities” where U.S. forces were located.<sup>81</sup> The agreed facility status or designation was significant because it conferred a wide array of legal rights under the *Security Agreement*, which were essential for ordinary operations. Designation as an agreed facility included rights to use the property,<sup>82</sup> to place defense and communication equipment on it,<sup>83</sup> to erect communication structures,<sup>84</sup> to secure the property,<sup>85</sup>

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<sup>81</sup> *Security Agreement*, *supra* note 4, art. 6.

1. With full respect for the sovereignty of Iraq, and as part of exchanging views between the Parties pursuant to this Agreement, Iraq grants access and use of agreed facilities and areas to the United States Forces, United States contractors, United States contractor employees, and other individuals or entities as agreed upon by the Parties.
2. In accordance with this Agreement, Iraq authorizes the United States Forces to exercise within the agreed facilities and areas all rights and powers that may be necessary to establish, use, maintain, and secure such agreed facilities and areas. The Parties shall coordinate and cooperate regarding exercising these rights and powers in the agreed facilities and areas of joint use.
3. The United States Forces shall assume control of entry to agreed facilities and areas that have been provided for its exclusive use. The Parties shall coordinate the control of entry into agreed facilities and areas for joint use and in accordance with mechanisms set forth by the JMOCC. The Parties shall coordinate guard duties in areas adjacent to agreed facilities and areas through the JMOCC.

<sup>82</sup> *Id.* at art. 6, ¶ 2.

<sup>83</sup> *Id.* at art. 7.

<sup>84</sup> *Id.* at art. 11, ¶ 3.

<sup>85</sup> *Id.* at art. 6, ¶ 2.

to resupply the property,<sup>86</sup> and to enjoy exclusive criminal jurisdiction on the property.<sup>87</sup>

While the U.S. military was coordinating lists of agreed facilities, it was simultaneously closing bases and drawing down force levels. These enormous logistical tasks began before the implementation of the *Security Agreement* and while forces were still engaged in an active counterinsurgency fight. Based on military necessity, the United States either left a residual force on a base that had been formally turned over, or they discovered they needed to station troops in a completely new location.

## 1. Residual forces and new locations

Because the operating environment in Iraq was far from static, and certainly not uniform across the entire country, some U.S. commanders at the tactical level created agreements with local Iraqi Security Forces Commanders to maintain residual forces on bases which were turned over. These were colloquially called “tenancies.” The tenancies were based on mission requirements but held an ambiguous legal status. It was unclear whether they would qualify as an “agreed facility” and whether the United States could rely upon the essential legal rights that accompanied that status. Commanders, their Iraqi partners, and the legal advisors did the best they could to comply with the rule of law while also accomplishing their combat and security mission. As a case of first impression, all parties were dealing with a challenging reality and something far from a standard commercial lease agreement.

## 2. Rent seeking and threats of eviction

Victory Base Complex was a sprawling constellation of U.S. bases and forward operating bases (FOBs) that included Al-Faw palace, as well as the U.S. military portion of the Baghdad International Airport.<sup>88</sup> Although U.S. forces submitted Victory Base Complex and all of its subcomponent camps to the Iraqis on the two lists of agreed facilities, they did not provide an exact map of the camp boundaries

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at art. 12, ¶ 5.

<sup>88</sup> Jim Loney, *U.S. Hands Main War Base, Saddam Palaces Back to Iraq*, REUTERS (Dec. 2, 2011), <https://www.reuters.com/article/us-iraq-withdrawal-base/u-s-hands-main-war-base-saddam-palaces-back-to-iraq-idUSTRE7B10Z620111202>.

when the lists were due. As a result, some U.S. contractors who maintained facilities commonly understood to be on the Victory Base Complex would routinely get visits from the minister of transportation’s representatives demanding exorbitant rent under threat of eviction or even deportation. Under the *Security Agreement*, the contractors had a right to be present on agreed facilities, and they were exempt from rent. Their location on the periphery of the base made them a target for corrupt officials testing the “grey area” created by unclear communications between parties.

This is exactly the sort of issue that should have been addressed in a committee. The Agreed Facility Committee only solved one problem, however, and that was to establish an Iraqi “receivership” for the returned real property. This accomplishment allowed the United States to avoid entanglement in Iraqi property issues. Some bases were a mix of government and private property, and even the government property had been controlled by multiple ministries. So, the receivership was a significant accomplishment. Unfortunately, there was no appetite for the committee to solve any additional issues.

## **C. Other implementation challenges**

### **1. License plates**

The *Security Agreement* required Iraqi license plates for Department of Defense (DOD) non-tactical vehicles (NTV).<sup>89</sup> The United States hoped the implementation of the license plate paragraph would be one of the easiest tasks to accomplish—the ostensible “low-hanging fruit.” It was anything but that. The negotiators agreed that U.S. forces would get these license plates using the same process the Iraqi Army used.<sup>90</sup> In other words, an incredibly laborious and slow process. The Iraqi major general from the traffic police proposed an eight-step process where paperwork would boomerang around various offices to get stamps and other approvals. This was the process employed by the Iraqi Army, and the United States was bound by the text to adopt a similar procedure.

This is not as trivial as it might seem. Rule of law starts locally and with the smallest of government transactions. The Iraqi public could plainly see the Americans driving around the country and could quickly validate the U.S. commitment to Iraq’s sovereignty by the

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<sup>89</sup> *Security Agreement*, *supra* note 4, art. 18.

<sup>90</sup> *Id.*

presence, or lack of, license plates.<sup>91</sup> One of the Iraqi complaints about private security companies and other contractors was that Iraqis had no way to identify the vehicle if a problem arose. So they expected to see license plates on non-tactical vehicles after the *Security Agreement* went into effect. As painful and inefficient as it was, the United States agreed to the process. For Iraq to succeed, the United States had to adhere to the rules.

## **2. The *Security Agreement* and commercial partners**

The United States did not anticipate the “growing pains” realized by contractors and suppliers in the transition to the *Security Agreement*. Numerous commercial partners encountered bureaucratic problems after the *Security Agreement* went into effect. For example, the Iraq Civil Aviation Authority (ICAA) imposed landing fees, arbitrary “taxes,” and made unexplained flight cancellations. This is important because many of the companies impacted provided key logistical support for U.S. forces. Where commercial partners previously enjoyed unfettered access and minimal regulation in Iraq, the *Security Agreement* drastically affected the way the United States received commercial services. The United States should have anticipated potential procedural changes.

## **3. Implementation at the tactical level: myths, misunderstandings, and public statements**

When developing a strategic document intended to wind down one sovereign nation’s presence in another sovereign nation’s territory, it is people—local clergy, media, council members, citizens, soldiers—at the tactical level who will ultimately judge legitimacy and the effectiveness of the agreement. In Iraq in 2009, for a variety of reasons, the *Security Agreement* was either misunderstood or only partially understood at the tactical level. Leaders emphasized Iraqi sovereignty and the primacy of joint operations, but did not devote much time to publicly emphasizing the rights associated with cargo or basing. Or they amplified the importance of the *Security Agreement* to enhance the status of their partner force, but inadvertently undermined the important legal rights negotiated in Baghdad.

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<sup>91</sup> Although U.S. forces used a variety of military-specific vehicles, they did have many “non-tactical” (commercial) vehicles specifically in the Green Zone.

The situation was comparable to U.S. citizens' misunderstandings of the protections and rights articulated in the Constitution. To a large extent, the Iraqi and U.S. soldiers and citizens learned about the substance of the *Security Agreement* through media references, popular understanding, or word of mouth—not by carefully reading the document.

Further exacerbating the misunderstandings, the *Security Agreement* became the public media touchstone, and so it seemed as though every pronouncement or utterance from a senior U.S. military official began with “[i]n accordance with the Security Agreement,” even if the activity was not discussed or contemplated within the *Security Agreement*.<sup>92</sup> There were unintended consequences of attributing everything to phantom *Security Agreement* authority or obligation. If adjacent commanders or towns adopted different but permissible approaches, the inconsistent application invited a conclusion that the contrary procedure was a “security agreement violation.” As discussed above, the Iraqis were prone to make these allegations and the inconsistent practices encouraged the mistaken belief that the United States was not in compliance with its provisions.

In addition to misunderstandings about the *Security Agreement* contents, there was the awkward interplay of partnership relationships with Iraqi military counterparts. The distance between the rights in the agreement and the practices on the ground was quite substantial in some regards. As an illustration, the *Security Agreement* contained an unequivocal right of movement for U.S. vehicles.<sup>93</sup> It did articulate that the Joint Military Operations Coordination Cell could prescribe appropriate rules and procedures for the movement but, unlike the combat authority in Article 4, it did not require agreement of or coordination with the government of Iraq. In practice though, many units did coordinate with and seek approval from Iraqi security forces for convoy movements, especially those

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<sup>92</sup> As an example, the President’s decision to change from combat to stability operations in August 2010 was falsely attributed to *Security Agreement* obligations.

<sup>93</sup> *Security Agreement*, *supra* note 4, art. 9, ¶ 1 (“With full respect for the relevant rules of land and maritime safety and movement, vessels and vehicles operated . . . exclusively [for the use of] United States Forces may enter, exit, and move within the territory of Iraq for the purposes of implementing this Agreement.”).

traversing urban areas. This effort by U.S. forces and commanders to accommodate their Iraqi partners was logical, sensible, and welcome by the Iraqis.<sup>94</sup> It did, however, set a precedent and expectation for GOI permission or concurrence for each vehicle movement and, at times, it could be arbitrarily or hastily withdrawn.<sup>95</sup>

This practice also raised the potential for confrontation between U.S. and ISF commanders if a U.S. commander chose to exercise his rights of movement in Article 9. In some areas, U.S. commanders put large placards on their vehicles that announced that the provincial council approved the vehicle movement. This was a seismic shift in mindset from the days where U.S. forces drove where and how they pleased. Thus, even though U.S. forces had movement rights guaranteed in the *Security Agreement*, it made more sense at the tactical level to coordinate and allow Iraqis more de facto authority than they had de jure.

#### **4. Cargo rights and cargo inspection**

Cargo inspection rights and exemptions were a contentious subject when negotiating the agreement, and it continued to be just as difficult in implementation. The Iraqis wanted to have the right to open and inspect containers U.S. forces brought into the country. The United States insisted on complete exemption from inspection (consistent with other SOFAs), fees, and any other Iraqi exercise of authority over cargo. Although the final negotiation resulted in a U.S. exemption from inspection, implementation proved challenging. Orderly and predictable logistics are a key strategic need, and thus the implementation committee had important work to do to flesh out the details of the dense articles that addressed the flow of cargo.<sup>96</sup> The Iraqis asserted themselves through their implementation proposals as well as their actions at points of entry. For example, when the *Security Agreement* went into effect there were numerous incidents of impeded and stalled cargo movement. Most were addressed informally by U.S. officials contacting high ranking Iraqi officials outside of the

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<sup>94</sup> See DALE, *supra* note 17 (This practice was a logical extension of the U.S. mantra to do operations “by, with and through” ISF partners.).

<sup>95</sup> *Text of Colonel Reese’s Memo*, N.Y. TIMES (July 30, 2009), [https://www.nytimes.com/2009/07/31/world/middleeast/31advtext.html?page\\_wanted=all&mtrref=undefined&gwh=EB8092E2CB9E953B034753C5B517525D&gwt=pay&assetType=REGIWALL](https://www.nytimes.com/2009/07/31/world/middleeast/31advtext.html?page_wanted=all&mtrref=undefined&gwh=EB8092E2CB9E953B034753C5B517525D&gwt=pay&assetType=REGIWALL).

<sup>96</sup> *Security Agreement*, *supra* note 4, arts. 9 & 15.

implementation process. U.S. forces wanted something more tangible and reliable than personal intervention and attempted to accomplish this through implementation of Article 15—in other words, by following the rule of law.

Similar to other status of forces agreements, Article 15 of the *Security Agreement* stated U.S. forces were only obliged to “certify” the contents of cargo containers in order to comply with the *Security Agreement*.<sup>97</sup> The United States proposed using a standard levy exemption waiver as the certifying document since it was already in use and would suffice to certify that the contents were for use of U.S. forces and not commercial entities. They entered the meetings thinking this could be an easy point of agreement, but were shocked when the Iraqis countered with a proposal that U.S. forces should individually mark every imported item with some sort of indelible stamp indicating the cargo item was for U.S. forces. The Iraqi logic was that they would then be able to ascertain if items for sale in markets had been brought in via U.S. cargo shipments. They were convinced that their markets were awash in black market goods. The two sides met many times and exchanged many letters before eventually returning back to the idea of using a levy exemption waiver.

During this time the negotiators also discovered a translation inaccuracy. The *Security Agreement* was equally authentic in English and Arabic. Thus it was of paramount importance to accurately translate the document. The parties had conducted at least three committee meetings before realizing the Arabic version of the *Security Agreement* said the United States would provide “documents” to identify cargo whereas the English version said the United States would provide “certification” the cargo was official cargo.<sup>98</sup> The two

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<sup>97</sup> *Security Agreement*, *supra* note 4, art. 15, ¶ 1 (“United States Forces authorities shall provide to relevant Iraqi authorities an appropriate certification that such items are being imported by the United States Forces or United States contractors for use by the United States Forces exclusively for the purposes of this Agreement.”).

<sup>98</sup> This disconnect occurred in a similar fashion in the immigration committee as well. *See, e.g., Security Agreement*, *supra* note 4, art. 14, ¶ 2 (The *Security Agreement* simply states that the United States will provide “lists of names” of personnel who entered Iraq pursuant to the *Security Agreement*).



sides envisioned very different procedures, and the translation inaccuracy was at least partly to blame for the difference.

## **D. Recommendations for future negotiation**

Successful military planners are notorious for careful examination of every aspect of a campaign and for clear-eyed assessments of assumptions, constraints, and environmental and political concerns before execution of a mission. They will examine everything from the weather, to the depth of a harbor, and the weight tolerance of bridges along a potential axis of advance. Future international legal agreements deserve the same careful assessments across the entire legal and political enterprise before beginning a negotiation.

In hindsight, it seems the U.S. negotiators assumed the Iraqi government apparatus had sufficient bureaucratic infrastructure to make the agreement work. Moreover, the United States may have assumed the successful SOFAs in NATO, Japan, and Korea would work equally well in Iraq. Finally, the glaring inconsistency with the other SOFAs, namely that they were negotiated post-conflict and in homogenous societies, was never fully appreciated.

While it is easy to be hypercritical knowing the agreement did not endure, it was also a tremendously challenging environment of tradeoffs between political accommodation and tactical flexibility. The domestic political pressure in Iraq and the United States was real. Al Qaeda was weakened from its most lethal capability in 2006–2007, but were still committing mass slaughter of Iraqi civilians and executing devastating attacks against coalition forces. This was not an academic exercise nor did the negotiations take place in a sanitized laboratory—external pressures threatened to derail the process from start to finish.

Understanding the reality, and in reflection, future negotiators within the State Department and the DOD, must approach these agreements with more deliberate, robust analysis, and war-game the way ahead similar to any other military operation. Future negotiations should involve as many stakeholders as possible from the lowest to the highest levels of government and other relevant leaders—the success of any agreement will depend on how the population accepts the final terms. To build that legitimacy requires transparent and frequent dialogue with the end users.

## IX. Conclusion

The *Security Agreement* was indeed a watershed document, but the two-phase negotiation and implementation architecture was not effective. The Iraqis may have been tough and effective negotiators, but the implementation was just as difficult, slow, and, at times, contentious. If Iraq had continued to allow U.S. forces to maintain peace, then there would have been greater opportunity for meaningful implementation. But the three-year lifespan was too short for wholesale implementation of such a comprehensive agreement.

The ambitious, and possibly unrealistic, goal of implementing a SOFA-like agreement, while fighting a lethal insurgency in a politically immature country, proved too much. The implementation also suffered from a lack of Iraqi government capability, as well as entrenched political rivalry and competition. It was too deliberate and slow to be responsive to dynamic combat developments. Similarly, the switch from absolute U.N. authority to a bilateral agreement, without institutionalizing the status quo or some variant thereof to govern the period before effective implementation, put too much stress on the fledgling government. The U.S. forces did not have systems in place to ensure consistent and even practices throughout the country. Most of all though, the United States underestimated the Iraqi desire to express their sovereignty and regain a feeling of national dignity after years of conflict and hardship.

Ultimately, however, the sovereign Iraq controlled its own destiny once the UNSCRs expired. To sincerely reinforce commitment to rule of law, and to breathe legitimacy into the government of Iraq, the United States had no choice but to relinquish bargaining power. One cannot predict how events would have played out with new threats, but in the future, negotiating parties can learn from the mistakes of the past and apply additional rigor to the international agreement process for the benefit of all parties concerned.

### About the Author

**Brigadier General Susan Escallier** is a career Army officer in the Judge Advocate General's Corps. She currently serves as the Commanding General of the U.S. Army Legal Services Agency and Chief Judge of the U.S. Army Court of Criminal Appeals. Her prior assignment was in the Pentagon as the Assistant Judge Advocate General for Military Law and Operations for the U.S. Army. Throughout her career she has provided legal advice in dynamic and

far-reaching military operations including the 2003 invasion of Iraq, the establishment of the Coalition Provisional Authority in Iraq, and, in 2009, as the legal advisor for the *Security Agreement* Secretariat in Iraq. She worked extensively in Europe, Korea, and in Japan on numerous international training exercises. The domestic highlights of her career include service as a trial judge presiding over courts-martial at numerous Army installations. In a later assignment, she was a Division Chief in the U.S. Army's Legislative Liaison Office, where she focused on legislation and areas of congressional interest.

Before her selection for Brigadier General, she served as the senior attorney for the Joint Force Command, United Assistance in Liberia during the DOD deployment to contain the spread of Ebola, and a year later she served as the senior attorney in Iraq during Operation Inherent Resolve. Her military service includes additional legal leadership assignments with the 82d Airborne Division, the 1st Infantry Division, and the 101st Airborne Division (Air Assault).

Brigadier General Escallier holds a Bachelor of Arts from the University of California, Berkeley, a Juris Doctor from Ohio State University, a Masters in Law from the U.S. Army Judge Advocate General's School and a Master of Science in Resource Strategy from the Industrial College of the Armed Forces.

*Brigadier General Escallier would like to thank Lieutenant Colonel Nathan Bankson for his assistance in preparing this article for publication.*

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# Francis Fukuyama and the Rule of Law: A Book Review of *Political Order and Political Decay* by Francis Fukuyama

*Tate Chambers*  
*Assistant United States Attorney*  
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In the prior companion book, *The Origins of Political Order: From Prehuman Times to the French Revolution*, Francis Fukuyama outlined the evolution of the world's political institutions from pre-history to the French Revolution. In this, the second book in the set, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (hereinafter *Political Order*), he covers the same topic from the French Revolution to the present. In a straightforward and crisp manner, Fukuyama's work presents thought provoking questions. Based on his selection of historical facts, he reaches conclusions that will make the reader pause. But this is not an easy read. The text, while direct, is dense. Fukuyama marshals thousands of historical facts and reaches his conclusions from those facts. Unless the reader has a strong background in political history, it is hard to determine the validity of those conclusions, some of which are negative about the state of democracy in the United States today. Again, it is difficult for the average reader to know if those conclusions are valid or the product of his slant on what makes a healthy liberal democracy.<sup>1</sup> Because

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<sup>1</sup> As Zach Dorfman wrote in his review of *Political Order* in the *Los Angeles Review of Books*:

There is simply no way to do full justice in a review to a book as dense and as rich as *Political Order and Political Decay*, let alone to both volumes considered as a complete work. The books span millennia, but they also often delve deep into granular details about specific political arrangements the world over.

Zach Dorfman, *Long Burn the Fire: On Political Order and Political Decay*, L.A. REV. OF BOOKS (Sept. 21, 2014), <https://lareviewofbooks.org/article/long-burn-fire-political-order-political-decay/>.

*Political Order* covers so much ground, it is also difficult to cover all of Fukuyama's treatment of political history in a book review. Here, we limit our review to Fukuyama's treatment of the rule of law and how the rule of law functions in the United States today.

Fukuyama's overarching thesis is that a liberal democracy is the best form of government, and a healthy liberal democracy is built on three legs—a strong, effective state, the rule of law, and political accountability. According to Fukuyama,

Modern political systems are built on a tripod consisting of a modern state, rule of law, and democratic accountability. States are about accumulating and using power, while law and accountability seek to constrain and channel power. If the tripod becomes unbalanced in either direction, it falls over into either dictatorship or weak—or at an extreme, failed—government.<sup>2</sup>

In order to have a strong democracy, the three legs not only need to be balanced, but they also need to develop in the correct order. Out of balance or out of order and the state will fail. In *The Evolution of Political Order*, Alina Mungiu-Pippidi characterizes Fukuyama's three-legged stool:

These may perhaps be better understood as three equilibria that a society strives to reach: The first entails the central control of violence by the state. The second requires the establishment of an objective law by which rulers are effectively bound and that they cannot change arbitrarily to suit their purposes. The third, democratic accountability, is . . . the development of modern universal citizenship through which all groups, not just elites, gain a voice in decision making and control.<sup>3</sup>

A convenient shorthand for the reader may be that here in the United States, the “state” is expressed in the Executive Branch,

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<sup>2</sup> FRANCIS FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY 550 (Farrar, Straus and Giroux 2014).

<sup>3</sup> Alina Mungiu-Pippidi, *The Evolution of Political Order*, 26 J. DEMOCRACY 169, 170 (2015).

“democratic accountability” in the Legislative Branch, and the “rule of law” in the Judicial Branch.

The timing of the development of each leg is important. Gerard De Groot characterized Fukuyama’s view of the importance of timing in his review of *Political Order* in *The Washington Post*:

Timing is also crucial. The United States, Fukuyama argues, “democratized before it had a modern state.” This resulted in a power vacuum at the top, which allowed patronage and corruption to thrive. The problem persists to this day but in entirely legal form. In no other country do paid lobbyists, out of touch with public sympathy, exert so much influence over government.<sup>4</sup>

Fukuyama uses the phrase “getting to Denmark” to characterize the development of a successful democracy. In his review of *Political Order*, Nick Fraser explained this term: “In Fukuyama’s view, ‘Denmark’ is a metaphor of moderate tempers, a good legal system, credible parliamentary democracy, and a dose of healthful end-of-history tedium. Denmark, defined both as a real place or a metaphor, is the closest we can get to collective perfection.”<sup>5</sup> A perfectly balanced and timed three-legged stool will result a healthy liberal democracy. It will get to Denmark.

Fukuyama defines the rule-of-law leg of the stool as:

[A] set of rules of behavior, reflecting a broad consensus within the society, that is binding on even the most powerful political actors in the society, whether kings, presidents, or prime ministers. If rulers can change the law to suit themselves, the rule of law does not exist, even if those laws are applied uniformly to the rest of society. To be effective, a rule of law usually has to be

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<sup>4</sup> Gerard De Groot, *Book Review: ‘Political Order and Political Decay,’ by Francis Fukuyama*, WASH. POST (Oct. 24, 2014), [https://www.washingtonpost.com/opinions/book-review-political-order-and-political-decay-by-francis-fukuyama/2014/10/24/57414b58-4e35-11e4-aa5e-7153e466a02d\\_story.html?noredirect=on](https://www.washingtonpost.com/opinions/book-review-political-order-and-political-decay-by-francis-fukuyama/2014/10/24/57414b58-4e35-11e4-aa5e-7153e466a02d_story.html?noredirect=on).

<sup>5</sup> Nick Fraser, *Political Order and Political Decay Review—Volume Two of Francis Fukuyama’s Magisterial Political History*, THE GUARDIAN (Sept. 28, 2014), <https://www.theguardian.com/books/2014/sep/28/francis-fukuyama-political-order-political-decay-review-magisterial-overview>.

embodied in a separate judicial institution that can act autonomously from the executive.<sup>6</sup>

He finds the origin of the rule of law in religious bodies:

The rule of law, understood as rules that are binding even on the most politically powerful actors in a given society, has its origins in religion. It is only religious authority that was capable of creating rules that warriors needed to respect. Religious institutions in many cultures were essentially legal bodies responsible for interpreting a set of sacred texts and giving them moral sanction over the rest of society.<sup>7</sup>

Fukuyama continues, “The rule of law was most deeply institutionalized in Western Europe, due to the role of the Roman Catholic church. Only in the Western tradition did the church emerge as a centralized, hierarchical, and resource-rich political actor whose behavior could dramatically affect the political fortunes of kings and emperors.”<sup>8</sup> Fukuyama points out that in Western countries, the rule of law leg of the three-legged stool developed first—before the modern state or accountability. Thus, unlike China, where the rule of law never developed, the governments were not centralized absolute states but, instead, grew into form constrained by the rule of law. The result of this difference is that democracy failed to develop in China. He explains this contrast:

China represents the one world civilization that never developed a true rule of law. . . . [T]here was never a transcendental religion, and there was never a pretense that law had a divine origin. Law was seen as a rational human instrument by which the state exercised its authority and maintained public order. This meant that . . . China had rule by law rather than rule of law.<sup>9</sup>

Fukuyama continued the comparison,

The law [in China] did not limit or bind the sovereign himself, who was the ultimate source of law. While the

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<sup>6</sup> FUKUYAMA, *supra* note 2, at 24.

<sup>7</sup> *Id.* at 11.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 357.



law could be administered impartially, this was not due to any inherent rights possessed by citizens. Rights were rather the gift of a benevolent ruler. Impartiality was simply a condition for good public order.<sup>10</sup>

According to Fukuyama, rule by law does not support democracy. Rule of law does.

Fukuyama posits that two legs of the stool—the rule of law and democratic accountability—pull in the opposite direction on the third leg: the state. They constrain the state’s power and ensure that it is used only in a controlled and consensual manner. What results is “[t]he miracle of modern politics[,] . . . we can have political orders that are simultaneously strong and capable and yet constrained to act only within the parameters established by law and democratic choice.”<sup>11</sup>

Although they act as balancing stones against each other, the state and the rule of law can also work together to produce immense benefits to the state. Fukuyama explains that the presence of a strong rule of law created enormous economic growth in the European states and the early United States. For example:

The United States inherited from Britain a strong rule of law in the form of the Common Law, an institution that was in place throughout the colonies well before the advent of democracy. The rule of law, with its strong protection of private property rights, laid the basis for rapid economic development in the [early United States].<sup>12</sup>

Although Fukuyama is optimistic about the development of “getting to Denmark” when the three legs balance and are timed correctly, he spends a good part of *Political Order* looking at what can go wrong when the legs are out of balance. And he uses the modern-day United States as an example of the decline of a liberal democracy caused by such imbalance.

In Fukuyama’s opinion, the rule of law as expressed through the courts has become too strong in the United States.

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<sup>10</sup> *Id.* at 357–58.

<sup>11</sup> *Id.* at 25.

<sup>12</sup> *Id.* at 203.

The rule of law constitutes a basic protection of individuals against tyrannical government. But in the second half of the twentieth century, law lost its focus as a constraint on government and became instead an instrument for widening the scope of government. . . . For fear of empowering “big government,” the United States has ended up with a government that is equally large but actually less accountable because it is in the hands of the courts.<sup>13</sup>

He claims that the United States has become a state of courts:

The story of the courts is one of the steadily increasing judicialization of functions that in other developed democracies are handled by administrative bureaucracies, leading to an explosion of costly litigation, slowness of decision making, and highly inconsistent enforcement of the laws. The courts, instead of being constraints on government, have become alternative instruments for the expansion of government.<sup>14</sup>

He points to the Supreme Court decision in *Brown v. Board of Education* as the turning point in this imbalance. He believes that opinion was the start of “[u]se of the courts to enforce new social rules” and “was the model followed by many subsequent social movements in the late twentieth century, from environmental protection to women’s rights to consumer safety to gay marriage.”<sup>15</sup> He believes that most Americans “are seldom aware of how peculiar their approach to social change is.”<sup>16</sup> He contends that “[t]here is no other liberal democracy that proceeds in this fashion.”<sup>17</sup> While Britain, France, and Germany also made similar changes in the legal status of minorities, women, and LGBTQI people in the same period as the United States, those changes occurred through their legislatures not their courts.<sup>18</sup> Although in the United States, Congress played a role in these

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<sup>13</sup> *Id.* at 486.

<sup>14</sup> *Id.* at 470.

<sup>15</sup> *Id.* at 471.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 472.

<sup>18</sup> *See id.*

changes, that role consisted of turning over many of its responsibilities to the courts. Fukuyama asserts “what [Congress] did . . . was turn over to the courts responsibility for monitoring and enforcement of the law. Congress deliberately encouraged litigation by expanding standing . . . to wider circles of parties, many of whom were only distantly affected by a particular rule.”<sup>19</sup> Fukuyama alleges that “[b]y keeping enforcement out of the bureaucracy, it also makes the system far less accountable.”<sup>20</sup> He declares, “[i]n the United States, policy is made piecemeal in a highly specialized and therefore nontransparent process by judges who are often unelected and serve with lifetime tenure.”<sup>21</sup> Fukuyama believes that giving the courts this authority has “entailed large costs in terms of the quality of public policy.”<sup>22</sup>

As to who is to blame, Fukuyama maintains that “American progressives and liberals are complicit in creating this system . . . and [they] were happy to inject unelected judges into social policy making when legislators proved insufficiently supportive.”<sup>23</sup> The progressives, Fukuyama asserts, encumbered American government with contradictory and unfunded, mandates only reduced public confidence in the state’s capacity to serve its citizens fairly and efficiently.<sup>24</sup>

But conservatives do not fare any better. He claims that while “litigation and the right to sue has been jealously guarded by many on the progressive left”<sup>25</sup> on the other end of the political spectrum “[c]onservatives often fail to see that it is the very distrust of government that leads the American system into a far less efficient court-based approach to regulation than that of democracies with stronger executive branches.”<sup>26</sup> Michael Ignatieff in his review of *Political Order* in *The Atlantic* writes that Fukuyama’s view is that “[c]ontemporary American conservatism has no solution to paralysis;

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<sup>19</sup> *Id.* at 473.

<sup>20</sup> *Id.* at 474.

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

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 475.

<sup>24</sup> *See id.*

<sup>25</sup> *Id.* at 474.

<sup>26</sup> *Id.* at 475.

‘starving the beast’ ignores the necessity of capable government regulation for any efficient capitalist economy.”<sup>27</sup>

Fukuyama also blames the decay of the state on the diminution of the state by the vastly increased use of federal contractors instead of federal government employees. He devotes the better part of five pages to his claim, arguing that the use of contractors is leading to non-representational government. He states:

This situation creates huge problems of accountability, and makes it impossible to know where government ends and civil society and the private sector begin. The interest of the non-government “agent” can diverge from the elected “principal” who hires them much more readily than a direct employee. The practice erodes the hierarchical authority of the state . . . and also potentially corrupts the nongovernmental actors. Moreover, this legion of contractors and service providers themselves constitute organized interests that have a stake in the survival of governmental programs.<sup>28</sup>

Fukuyama concludes that “[n]etworked and outsourced government is thus a reality, one deeply problematic in many ways.”<sup>29</sup>

Although it is pessimistic—and it at times appears that Fukuyama’s bias colors his conclusions—Fukuyama’s treatment of the United States today is one of the most interesting and most concerning parts of *Political Order*. In her review of *Political Order*, Sheri Berman notes that:

[Fukuyama] warns that even the United States has no permanent immunity from institutional decline. Over the past few decades, American political development has gone in reverse, Fukuyama says, as its state has become weaker, less efficient and more corrupt. One cause is growing economic inequality and concentration of wealth, which has allowed elites to purchase immense

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<sup>27</sup> Michael Ignatieff, *Doubling Down on Democracy*, THE ATLANTIC (Oct. 2014), <https://www.theatlantic.com/magazine/archive/2014/10/doubling-down-on-democracy/379340/>.

<sup>28</sup> FUKUYAMA, *supra* note 2, at 553–54.

<sup>29</sup> *Id.* at 556.

political power and manipulate the system to further their own interests. Another cause is the permeability of American political institutions to interest groups, allowing an array of factions that “are collectively unrepresentative of the public as a whole” to exercise disproportionate influence on government.<sup>30</sup>

Fukuyama asserts:

American society has changed. It has become more polarized and class-ridden; Americans are sorting themselves out residentially in ways that make it easier for politicians to appeal to ideologically pure positions on the left and right. At the same time, there has been a huge increase in the number and sophistication of interest groups, which have been liberated from constraints on their right to spend money on political campaigns by a series of Supreme Court decisions.<sup>31</sup>

He also believes that because of the highly complex system of checks and balances built into the institutional design of the U.S. system, the United States has become a “vetocracy” where minorities are able to veto actions detrimental to themselves.<sup>32</sup> Which, according to Fukuyama, produces gridlock. He further states:

Today it means that Congress is unable to pass budgets, reform the tax code, or do comprehensive immigration reform; in the future it will make entitlement reform extremely difficult. . . . Even if Congress were willing to renew the country’s badly decayed infrastructure, it would take years of court battles to get even the most modest projects completed. The system muddles through, but it leads to huge waste, delay, and dissatisfaction with the quality of government.<sup>33</sup>

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<sup>30</sup> Sheri Berman, *Global Warning*, N.Y. TIMES (Sept. 11, 2014), <https://www.nytimes.com/2014/09/14/books/review/francis-fukuyamas-political-order-and-political-decay.html>.

<sup>31</sup> FUKUYAMA, *supra* note 2, at 552.

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

<sup>33</sup> *Id.* at 553.

Fukuyama clearly believes that the rule of law has been captured by special interests through the use of the court system. As Zach Dorfman writes, Fukuyama claims that “[t]he American tradition of common law means judges in effect serve as legislators, making policy in a highly fragmented manner. . . . [T]his leads, [in part,] . . . to a ‘system of redundant and nonhierarchical authority.’”<sup>34</sup> Michael Barone writes in the *National Review*, “bureaucracies, as Fukuyama notes, decay through intellectual rigidity and regulatory capture. The interests they supposedly regulate use the instruments of democratic accountability and rule of law to get their way over the years.”<sup>35</sup>

In his review in *The Atlantic*, Michael Ignatieff summarized Fukuyama’s view of today’s United States:

The fundamental problem, [Fukuyama] argues, lies in the Madisonian machinery of American constitutional law. The Founders’ separation of powers can generate positive outcomes only when political opponents trust one another sufficiently to approve one another’s nominees, support one another’s bills, and practice the grubby but essential arts of political compromise. When the spirit of trust breaks down, the result is not democracy but *vetocracy* . . . . Too many political players—courts, congressional committees, special interests . . . , independent commissions, regulatory authorities—have acquired the power to veto measures; too few have the power to get things done. The dire consequences of the systemic paralysis have become obvious: a democracy that cannot unite to pay down its deficits, rebuild its infrastructure, fund its rising long-term obligations to the aged, or rebuild its tax code to be simple, progressive, and fair.<sup>36</sup>

At the end of *Political Order*, Fukuyama states, “[n]o one living in an established liberal democracy should therefore be complacent about the inevitability of its survival. There is no automatic historical mechanism that makes progress inevitable, or that prevents decay

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<sup>34</sup> Dorfman, *supra* note 1.

<sup>35</sup> Michael Barone, *Is Political Decay Inevitable?*, NAT’L REV. (Oct. 21, 2014), <https://www.nationalreview.com/2014/10/political-decay-inevitable-michael-barone/>.

<sup>36</sup> Ignatieff, *supra* note 27.

and backsliding. Democracies exist and survive only because people want and are willing to fight for them . . . .”<sup>37</sup>

Are things really as grim as Fukuyama portrays them? Have they improved since he wrote *Political Order*? As one reviewer points out, Fukuyama wrote *Political Order* toward the end of the last administration.<sup>38</sup> It would be interesting to know if Fukuyama believes the policies and changes over the last two years has reversed the imbalance in the three branches and the United States’ slide to decay. Even if reality is not as grim as Fukuyama paints it, if the survival of this democracy is uncertain (regardless of the origins of that uncertainty), what are we, the readers, doing to shore it up—or, in Fukuyama’s words—to fight for it?

If the reader has a strong background in political organizational history, she can read Fukuyama’s arguments and conclusions, especially those about the United States, with a critical eye. If she does not have that background, she is left to wonder if there are solid counter-arguments or contrary positions to those Fukuyama takes.<sup>39</sup> If you have such a background in political history and enjoy seeing disparate facts pulled together to form what appears to be logical conclusions, read *Political Order* from end to end. If you do not have that background, treat it as a well-written and extremely comprehensive historical tour. Spend time with what interests you, and move on when something becomes too dense or simply too difficult to accept—or when you sense Fukuyama’s biases are coloring his conclusions. Either approach makes Fukuyama’s book worth reading.

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<sup>37</sup> FUKUYAMA, *supra* note 2, at 548.

<sup>38</sup> Barone, *supra* note 35.

<sup>39</sup> For example, in his review of *Political Order* in the *Washington Monthly*, John J. Dilulio Jr. critiques several of the conclusions Fukuyama reaches concerning the current United States. John J. Dilulio Jr., *The Rise and Fall of the U.S. Government*, WASH. MONTHLY (Jan./Feb. 2015), <https://washingtonmonthly.com/magazine/janfeb-2015/the-rise-and-fall-of-the-u-s-government/>. The conclusions Dilulio Jr. reaches appear, on the surface, to be as reasonable as those reached by Fukuyama. *See id.* Also, Alina Mungiu-Pippidi looks at many of the same facts considered by Fukuyama and reaches conclusions much different than Fukuyama. *See* Mungui-Pippidi, *supra* note 3.

## **About the Author**

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# Note from the Editor-in-Chief

As Editor-in-Chief, I'm excited to write a few words about this issue. Unlike past issues of the DOJ Journal of Federal Law and Practice, this unique issue is not devoted to a discrete area of law but rather deals with contemporary thinking on the rule of law itself. This is a timely and important topic. The authors in this issue come from a wide variety of backgrounds, and their articles reflect the rich diversity of ideas on this subject. Their opinions, however, are their own and do not necessarily reflect the opinions of the Department of Justice. We hope that you enjoy the spirited discussion within these pages.

Special thanks to OLE Training Coordinator, Bonnie Greenberg, who acted as this issue's point-of-contact and recruited authors. Thanks also go out to former Director of the Executive Office for United States Attorneys, Jim Crowell, and our former colleague here in the Office of Legal Education, Tate Chambers, who were instrumental in the initial formulation of this issue. And, as always, thanks to our editorial mainstays—Sarah Nielsen, Gurbani Saini, and Phil Schneider—without whom timely delivery of the DOJ Journal would not be possible.

Chris Fisanick  
Columbia, South Carolina  
November 2019