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## FOREWORD

Dr. Alisa Smith, J.D., Ph.D.

Department Chair, Department of Legal Studies

It is my distinct honor to welcome readers to the second edition of the University of Central Florida (UCF), Department of Legal Studies undergraduate law journal. The editorial board are top-notch undergraduate students, who were nominated by UCF, Department of Legal Studies faculty and selected by faculty advisor, Professor James Beckman, to participate. Student editors and authors enjoyed a unique and hands-on learning experience, typically reserved for law students. The writing of articles and editing of the undergraduate law journal provides students a deep understanding of the publication process.

Consistent with last year's inaugural issue, the articles in this volume are truly superb in the quality of their research and writing, their timeliness, and relevancy to current issues. For example, the lead article explores whether the forcing of government employees to work without pay during the 2018-2019 government shutdown violates the "involuntary servitude" clause of the Thirteenth Amendment. Other articles analyze contemporary, federal court litigation on affirmative action in higher education, the viability of impeaching a sitting President of the United States, the legality of United States covert operations and interventions under public international law, and the need to revise United States laws in anticipation of increased activities in outer space during the next century. The remaining articles cover eclectic and diverse topics from the Music Modernization Act and copyrighted musical creations in the digital age to the role that emotions play in jury selection.

Read each article, and you will have to remind yourselves that the authors and editorial board are undergraduate students. You will find that these bright students produced a journal that contributes to the intellectual debate on many contemporary, interdisciplinary issues.

## INTRODUCTION

James A. Beckman, Faculty Advisor

Professor, Department of Legal Studies

This journal was composed entirely by a group of truly talented undergraduate students at the University of Central Florida (UCF). The level of erudition displayed by undergraduate students in the following pages of this journal is simply outstanding.

The inaugural issue of this journal was published in Spring 2018. Upon the publication of the inaugural issue, work started in earnest on this year's journal. As with the previous year, the first step in the creation of the second annual law journal was the selection of the right group of students to serve on the Editorial Board and to craft and mold the content. In order to ensure that the best students were selected, each student on the editorial board had to be nominated by a faculty member of the Legal Studies Department. Of those nominated, I then invited those nominated students who had a clearly evidenced ability and experience in solid legal writing, research and editing to be in the Legal Studies "Law Journal" class and serve on the editorial board. These students are listed in full on the very first page of this journal.

During the first month of work, time was spent on discussing "best practices" of an editorial board, covering the well-established procedures of student run law school level "law reviews" and "law journals," exercises in the proper usage of the *Chicago Manual of Style* and the *Harvard Blue Book for Legal Citations*, and other such preparatory activities. Students were also required to research and write an article of their own—although there was no guarantee that their authored article would be published.

As a result of a call for papers that went out to multiple academic departments, thirty articles were ultimately submitted by students for consideration. Each of the thirty articles were sent directly to me as the Faculty Advisor. In order to conduct a blind peer-review of all of these articles, I removed all identifiable author information for each submission and converted each file into a randomized PDF file labeled and given the title of a submission number ranging from one to thirty (*e.g.*, Submission #1, Submission #11, Submission #22, *et cetera*). To guide the editorial board in their critique and blind peer-review of the various submissions, an "Article Review Sheet" was utilized to aid in a proper review. This "Article Review Sheet" can be found at the end of this Introduction. As one may ascertain from perusing the review sheet, articles were evaluated on a bevy of different criteria, ranging from the writing style and proper use of citations and scholarly attribution, to the timeliness and currency of the topic being addressed in the article. Every editorial board member was tasked with reading each of the submissions. After individual reviews of the articles were conducted, the entire editorial board met and discussed the merits and deficiencies of each submission. Once the final articles were selected for publication, each article was assigned a team of three reviewers/editors, who would each review and edit the articles in detail.

The amount of work that the editorial board put into the production of this journal has been nothing short of stellar. The quality of the articles and the quality of the editing by the editorial board was as good, if not better, than that found at the law school level. The articles are all thoroughly researched, solidly written and deal with relevant and current issues. In perusing the following pages of this journal, I am confident that the reader will find the articles to be highly engaging, fascinating and educational.

**PLA 4932: 0M02 SPECIAL TOPICS:  
LEGAL STUDIES UNDERGRADUATE LAW JOURNAL**

Department of Legal Studies  
College of Community Innovation and Education, University of Central Florida

**Article Review Sheet for the UCF Legal Studies Undergraduate Law Journal<sup>1</sup>**

**Timeliness, Currency and Overall Analysis**

1. Does the article deal with a topic of current relevancy? Is it timely?	1	2	3	4	5
2. Does the article offer new information or new perspectives for the readers?	1	2	3	4	5
3. Is the article coherent for the intended audience(s)?	1	2	3	4	5
4. Are the qualitative or quantitative analyses appropriate?	1	2	3	4	5
5. Does the article offer a viable solution, an alternative approach, or a transition position to the problem the research defines?	1	2	3	4	5
6. Does the evidence and reasons support the conclusions and implications made by the author(s)?	1	2	3	4	5

**Facts, Issues and Conclusions in Article**

7. Does article include clear legal issues and most significant facts?	1	2	3	4	5
8. Does article have clear conclusion and/or answers?	1	2	3	4	5
9. Does article use and apply legal principles/rules?	1	2	3	4	5
10. Does article include all material facts?	1	2	3	4	5
11. Does article exclude extraneous facts?	1	2	3	4	5
12. Does article include unfavorable and favorable facts?	1	2	3	4	5

<sup>1</sup> This review sheet was designed utilizing multiple resources dedicated to effective writing and designing top-notch research papers. See, for example, The University of Southern California: Research Guide: Organizing Your Social Science Research Paper: Theoretical Framework, <http://libguides.usc.edu/writingguide/theoreticalframework>. See also, Louis J. Sirico, Jr. and Nancy Schultz, *PERSUASIVE LEGAL WRITING*, 4<sup>th</sup> edition, Wolters Kluwer: 2015.

13. Is Article organized in a logical fashion? 1 2 3 4 5

**Discussion Issues**

14. Is Article organized around issues and sub-issues? 1 2 3 4 5

15. Devotes appropriate amount and depth of analysis consistent with the importance of the authority 1 2 3 4 5

16. Does Article utilize appropriate authorities? Does the article weigh or apply the authorities appropriately? 1 2 3 4 5

17. Explains why and how the legal rules applies to the topic of the article? 1 2 3 4 5

**Writing Style, Organization and Proper Grammatical Usage**

18. Article uses complete paragraphs and paragraphs are organized to communicate logical progression of ideas 1 2 3 4 5

19. Article uses thesis sentences to create logical progression 1 2 3 4 5

20. Article uses appropriate word choice and grammar 1 2 3 4 5

21. Article contains few excess words 1 2 3 4 5

22. Article uses complete sentences with subject and verb agreement 1 2 3 4 5

23. Article uses accurate punctuation and proper quotation marks 1 2 3 4 5

24. Article includes no contractions or slang 1 2 3 4 5

25. Article writes out numerals and abbreviates as appropriate 1 2 3 4 5

26. Article uses correct possessives and capitalizations 1 2 3 4 5

**Proper Citation**

27. Provides citation for every utilized quotation 1 2 3 4 5

28. All citations are substantively accurate 1 2 3 4 5

29. Names of authorities are accurate 1 2 3 4 5

30. Volumes and sources accurate 1 2 3 4 5

31. Year and court accurate 1 2 3 4 5

32. Page numbers of cases or articles correct 1 2 3 4 5

33. Pin point cites are utilized and are accurate 1 2 3 4 5

34. Typeface, spacing, italicizing, underlying, et cetera, are accurate 1 2 3 4 5





# SHUTDOWNS AND SERVITUDES: WHY REQUIRING GOVERNMENT EMPLOYEES TO WORK WITHOUT PAY DOES NOT VIOLATE THE THIRTEENTH AMENDMENT

Michael D. McWaters

At 12:01 AM on December 22, 2018, after Congress and the President failed to agree on a budget, the United States government entered into a partial government shutdown.<sup>1</sup> Of the 2.1 million federal employees in the nation, approximately 800,000 were directly impacted by the shutdown;<sup>2</sup> about 420,000 workers were identified as “essential” and required to work without pay for the duration of the shutdown, while the remaining 380,000 were deemed “nonessential” and ordered not to report to work.<sup>3</sup> In the ensuing weeks, numerous federal lawsuits were filed by the affected federal workers who were either furloughed or required to continue working without pay. While most of these complaints alleged violations of the Fair Labor Standards Act,<sup>4</sup> one uniquely bold suit claimed that requiring these excepted federal employees to work without compensation amounted to a violation of the Thirteenth Amendment’s prohibition of involuntary servitude.<sup>5</sup>

This Article explores whether the Thirteenth Amendment claim has merit and attempts to predict how the United States District Court should ultimately evaluate such a claim given current applicable case law and precedent. The Article begins with an explanation of the historical application of the Thirteenth Amendment and how its interpretation has evolved since the nineteenth century. Next, the Article analyzes what standards and mechanisms contemporary courts use to evaluate Thirteenth Amendment claims. Despite the panoply of possible standards that the district court could apply in this case, this Article asserts that the alleged violation of the Thirteenth Amendment should not be recognized under any standard.

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<sup>1</sup> Erica Werner et al., *Major parts of the federal government begin shutting down for an indefinite closure*, WASH. POST (Dec. 22, 2018), [https://www.washingtonpost.com/politics/trump-leans-on-mcconnell-to-pass-spending-bill-with-border-funding-in-senate/2018/12/21/31bb453a-0517-11e9-b5df-5d3874f1ac36\\_story.html?utm\\_term=.f87709865ce1](https://www.washingtonpost.com/politics/trump-leans-on-mcconnell-to-pass-spending-bill-with-border-funding-in-senate/2018/12/21/31bb453a-0517-11e9-b5df-5d3874f1ac36_story.html?utm_term=.f87709865ce1).

<sup>2</sup> Deanna Paul, *‘Nothing short of inhumane’: Union sues Trump administration over shutdown*, WASH. POST (Jan. 1, 2019), [https://www.washingtonpost.com/politics/2019/01/02/federal-work-force-shouldnt-be-used-pawn-union-sues-trump-administration-over-shutdown/?utm\\_term=.ac65c226e061](https://www.washingtonpost.com/politics/2019/01/02/federal-work-force-shouldnt-be-used-pawn-union-sues-trump-administration-over-shutdown/?utm_term=.ac65c226e061).

<sup>3</sup> Kevin Breuninger, *Here’s who the partial government shutdown affects*, CNBC (Dec. 21, 2018), <https://www.cnbc.com/2018/12/21/what-happens-if-government-shuts-down.html>.

<sup>4</sup> See, e.g., *Tarovsky v. United States*, No. 1:19-cv-00004 (Fed. Cl. filed Jan. 2, 2019); *Nat’l Treasury Employees Union v. United States*, No. 1:19-cv-00050-RJL (D. Colo. filed Jan. 9, 2019).

<sup>5</sup> *Hardy v. Donald J. Trump*, No. 1:19-cv-00051 (D. Colo. filed Jan. 9, 2019).

Although, at the time of this writing, the aforementioned government shutdown has concluded, the ensuing analysis is nonetheless relevant for future claims that consider the reach of the Thirteenth Amendment in public employment. Moreover, with the frequency of government shutdowns in recent history,<sup>6</sup> it is likely that similar Thirteenth Amendment claims will accompany subsequent future shutdowns. Even outside the context of a shutdown, defining the extent of the government’s power to compel its employees – or its citizens in general – to labor without compensation is an independently valuable inquiry. With this in mind, the topics addressed in this Article will remain relevant to inform those future discussions.

## I. HISTORY OF THE THIRTEENTH AMENDMENT AND ITS APPLICATION

### A. *The Foundation for the Thirteenth Amendment and Its First Section*

Ratified in December 1865, the Thirteenth Amendment brought to fruition the commitment of President Abraham Lincoln and other Republicans to abolish slavery in the entire United States.<sup>7</sup> The foundation for the Thirteenth Amendment and the legal abolition of slavery emanates from President Lincoln’s Emancipation Proclamation. The Emancipation Proclamation, a wartime executive order issued in 1862, mandated that “all persons held as slaves within any state or designated part of a state, the people whereof shall there be in rebellion...shall be then, thenceforth and forever free.”<sup>8</sup> While the Proclamation claimed to provide for the permanent liberation of slaves within the Confederate states, it did not prevent the re-institutionalization of slavery following the Civil War. Moreover, the Proclamation did not affect the status of slaves within the United States and could not invalidate the Supreme Court’s constitutional approval of slavery as set forth in *Dred Scott v. Sandford*.<sup>9</sup> The incomplete and temporary effects of the Emancipation Proclamation all but necessitated a more expansive and legally binding prohibition of slavery through a constitutional amendment.

Thus, the very first section of the resulting Thirteen Amendment holds that “neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”<sup>10</sup> Radical Republicans in Congress sought a more expansive wording of the amendment,<sup>11</sup> but the Senate Judiciary Committee ultimately borrowed language from the

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<sup>6</sup> Gretchen Frazee & Lisa Desjardins, *How the government shutdown compared to every other since 1976*, PBS (Dec. 26, 2018), <https://www.pbs.org/newshour/politics/every-government-shutdown-from-1976-to-now> (identifying twenty-one government shutdowns since the adoption of the current budget process in 1976).

<sup>7</sup> For a more detailed historical analysis, see Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 Temp. L. Rev. 539, 540-543 (2002).

<sup>8</sup> JOHN HOPE FRANKLIN, *THE EMANCIPATION PROCLAMATION* 96-98 (1963).

<sup>9</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>10</sup> U.S. CONST. amend. XIII, § 1.

<sup>11</sup> CONG. GLOBE, 38th Cong., 1st Sess. 521 (1864). Radical Republican Sen. Charles Sumner initially proposed an amendment which stated, “Everywhere within the limits of the United States, and of each State or Territory thereof, all persons are equal before the law, so that no person can hold another as a slave.”

1787 Northwest Ordinance to form the basis of their proposal.<sup>12</sup> Notably, the inclusion of the term “involuntary servitude” expands the application of the doctrine to forbid not only slavery but forced employment conditions that resemble slavery.

Indeed, congressional records reflect that proponents of the Thirteenth Amendment expected it to do more than merely outlaw slavery. In debating the Civil Rights Act of 1866, Representative M. Russell Thayer criticized those who narrowly interpreted the amendment as only ensuring “freedom from sale or barter.” Instead, Thayer argued that the amendment should provide a basis to invalidate laws in former Confederate states which denied African Americans the right to sue, purchase property, and enter into contracts.<sup>13</sup> Senator James Harlan similarly endorsed the amendment as a means to end the “incidents of slavery,” which he identified as barriers to familial relationships, property ownership, legal rights, and education.<sup>14</sup>

Despite these sentiments, the Supreme Court restrained the progressive potential of the Thirteenth Amendment soon after its passage. In the *Slaughter-House Cases*, the Court considered a challenge to a state-sanctioned monopoly which regulated where slaughterhouses could exist in New Orleans.<sup>15</sup> The plaintiffs asserted that this mandate to “labor... in one place” invoked a servitude in violation of the Thirteenth Amendment.<sup>16</sup> Writing for the majority, Justice Samuel F. Miller underscored that “the pervading spirit” of the amendment was prohibition of forced labor and derided the plaintiff’s argument as “a microscopic search” to define its historic purpose as disallowing all servitudes which are connected to property.<sup>17</sup> While the Court recognized that the Thirteenth Amendment must apply to cases not directly connected to historic slavery,<sup>18</sup> its emphasis on the amendment’s traditional purpose undoubtedly constrained its practical reach.

While the *Slaughter-House Cases*’ best-known precedent, its distinction between the privileges and immunities of state and United States citizenship, has been the subject of ongoing legal controversy,<sup>19</sup> numerous lower courts have continued to narrowly interpret the

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<sup>12</sup> Act of July 13, 1787, art. VI, reenacted by Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51. The Northwest Ordinance read in relevant part that “[t]here shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted.” The language is derived from a draft of the Ordinance of 1784 attributed to Thomas Jefferson. See George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1372 (2008) (citing HENRY S. RANDALL, *THE LIFE OF THOMAS JEFFERSON* 397-98 (New York, Derby & Jackson 1858)).

<sup>13</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1151-52 (1866).

<sup>14</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864).

<sup>15</sup> *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 36-37 (1873).

<sup>16</sup> *Id.* at 90-91.

<sup>17</sup> *Id.* at 69.

<sup>18</sup> *Id.* at 72.

<sup>19</sup> *Id.* at 78-79. “Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge. . . .” Simply put, the Court drew a distinction between the rights of citizens of the United States as protected by the Privileges or Immunities Clause of the Fourteenth Amendment and the rights of citizens of the several States as covered by the

reach of the Thirteenth Amendment's first section with little deviation from how it was defined by the Court in 1872. Potentially, the judicial preference to mitigate the scope this section comes from the Supreme Court's holding in the *Civil Rights Cases* that the amendment applies to private individuals as well as government actors.<sup>20</sup> In asserting that the Thirteenth Amendment "is undoubtedly self-executing,"<sup>21</sup> the Court implicitly permitted federal tort action against any private conduct that results in involuntary servitude. In an effort to reduce litigation and dismiss frivolous claims, courts have employed various mechanisms to limit the availability of constitutional torts under the first section of the Thirteenth Amendment.

### *B. The Second Section*

By contrast, the second section of the Thirteenth Amendment has been interpreted with an increasingly broadened scope. It states only that "Congress shall have power to enforce this article by appropriate legislation."<sup>22</sup> This clause has the potential to serve as an expansive grant of authority to justify congressional action to remedy discrimination, but the Supreme Court narrowed the applicability of the doctrine shortly after its ratification. In the *Civil Rights Cases*, the Court held that the Thirteenth Amendment did not grant Congress the authority to pass the Civil Rights Act of 1875, which permitted civil redress for anyone denied equal access to "accommodations, advantages, facilities... and other places of public amusement."<sup>23</sup> Per the Court, the second section of the amendment gives Congress the power to regulate only "the inseparable incidents of the institution" and did not extend to segregation in private facilities.<sup>24</sup> Phrased another way, the Court agreed that Section 2 did indeed authorize Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States," but refused to expand this authority to permit legislating against private discrimination relating to inns, hotels, restaurants, railroads, or other such facilities. In a significant departure from the goals of the amendment's framers, the majority declared that the Thirteenth Amendment "simply abolished slavery" and did not extend to private "individual invasion of individual rights."<sup>25</sup>

The Thirteenth Amendment remained relegated to this impotent status until the Civil Rights Era some eighty-five years later, when the Court reversed its position in *Jones v. Alfred H*

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Privileges and Immunities Clause of Article Four of the Constitution. The Plaintiff's argument in *Slaughter-House* alleged a violation of economic liberties; because the Court did not recognize this as a right of United States citizenship, it concluded that there was no violation of the Fourteenth Amendment. Justice Field's dissent argued for a broader interpretation of the Fourteenth Amendment and the individual rights it guaranteed. This rationale has surfaced in many subsequent opinions, including, most recently, in Justice Thomas' concurrence in *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>20</sup> The *Civil Rights Cases*, 109 U.S. 3, 23 (1883) (holding that the Thirteenth Amendment and legislation passed to enforce it "may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not").

<sup>21</sup> *Id.* at 20.

<sup>22</sup> U.S. CONST. amend. XIII, § 2.

<sup>23</sup> *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

<sup>24</sup> *Id.* at 22.

<sup>25</sup> *Id.* at 11, 23.

*Mayer Co.*<sup>26</sup> The case concerned an African-American man who was barred from purchasing a home because of his race and sued the realty company under 42 U.S.C. § 1982.<sup>27</sup> In upholding the statute, the Court found that the Thirteenth Amendment's second section could permit Congress to legislate against private discrimination. The Court in the *Civil Rights Cases* acted as the arbiter to determine the incidents of slavery, but in *Jones* it fully abdicated this power to the legislature in acknowledging "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."<sup>28</sup>

With this concession, the Court has empowered Congress to define for itself the extent of actionable causes under the Thirteenth Amendment, not only to ensure the continued prohibition of the institution of slavery, but also to legislate to prevent any ancillary "badges or incidents of slavery." And much like the Commerce Clause, Congress' means enacted pursuant to the amendment are evaluated under a rational basis standard of review.<sup>29</sup> This interpretation undeniably grants Congress significant deference to legislate against the incidents of slavery, but the increased power afforded to the second section comes at the expense of the first. For individual claimants seeking to establish Thirteenth Amendment violations under the self-executing first section, *Jones* now requires congressional authorization to recognize incidents of slavery.<sup>30</sup> The reliance on congressional intent as the barometer to measure to reach of the Thirteenth Amendment has undercut the first section's function as a source of individual freedoms.<sup>31</sup>

## II. CONTEMPORARY APPLICATION OF THE THIRTEENTH AMENDMENT

### A. *The Kozminski Test*

Most recently, the Court provided guidance informing Thirteenth Amendment application in the 1988 case of *United States v. Kozminski*.<sup>32</sup> *Kozminski* involved a Michigan family that coerced a pair of mentally disabled laborers to work on their dairy farm, and the Court was tasked with determining whether the Thirteenth Amendment prohibited servitude achieved through psychological coercion. The victims, Robert Fulmer and Louis Molitoris, were

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<sup>26</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

<sup>27</sup> *Id.* at 412.

<sup>28</sup> *Id.* at 440. The Court's reference to the badges and incidents of slavery in *Jones* draws from language used during congressional debates over the Thirteenth Amendment. The phrase was likewise relied upon by Justices seeking a more expansive view of the amendment in both *Slaughter-House* and in *Blyew v. United States*, 80 U.S. 581 (1871).

<sup>29</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-13, at 332 (2d ed. 1988) (asserting that "Congress possesses a power to protect individual rights under the Thirteenth Amendment which is as open-ended as its power to regulate interstate commerce.").

<sup>30</sup> *Alma Soc'y Inc. v. Mellon*, 601 F.2d 1225, 1237 (2d Cir. 1979) (rejecting a Thirteenth Amendment challenge to a New York law requiring adoption records to be sealed because "The Court has never held that the Amendment itself, unaided by legislation as it is here, reaches the "badges and incidents" of slavery...").

<sup>31</sup> For a more detailed discussion of this phenomenon and proposed remedies, see Lauren Kares, *Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 Cornell L. Rev. 372 (1995).

<sup>32</sup> *United States v. Kozminski*, 487 U.S. 931 (1988).

both in their sixties but had IQs below seventy and exhibited the mental capacity of children between eight and ten years old.<sup>33</sup> The Kozminski family initially paid the men fifteen dollars per day to work on their farm, but later they withheld their pay entirely. The men were required to work seven days a week for approximately seventeen hours a day, and they were denied adequate food, housing, and medicine.<sup>34</sup> The defendants told the men not to leave the farm or to contact their families and threatened them with institutionalization if they tried to escape.<sup>35</sup>

The Kozminskis were tried and convicted in federal district court for holding the men in involuntary servitude, but the Court of Appeals for the Sixth Circuit reversed the decision because it found the district court's inclusion of psychological coercion in involuntary servitude too broad.<sup>36</sup> Writing for a unanimous court, Justice O'Connor sided with the court of appeals in finding that the Thirteenth Amendment did not extend to psychological threats and instead was purely limited to servitude "enforced by the use or threatened use of physical or legal coercion."<sup>37</sup> The Court emphasized in the opinion that, in a criminal context, there must be clear and predictable standard for what actions constitute criminal liability. Per the Court, because extending the amendment to psychological coercion would make the criminal nature of an action dependent on the victim's state of mind, it would be too imprecise when applied to criminal cases.<sup>38</sup> Nevertheless, the Court found "sufficient evidence of physical or legal coercion to permit a conviction" and denied acquittal, instead remanding the case for further proceedings.<sup>39</sup>

Despite the unanimous holding, the justices disagreed about the relevant considerations in evaluating the claim. Justice Brennan argued in his concurring opinion that the amendment could include psychological elements in prohibiting any action "that actually succeeds in reducing the victim to a condition of servitude."<sup>40</sup> In a separate concurrence, Justice Stevens likewise rejected the distinction between mental and physical coercion and advocated for a "totality of the circumstances" methodology that would allow the judiciary to consider the circumstances of the victim on a case by case basis.<sup>41</sup> Emphasizing the rule of lenity,<sup>42</sup> the

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<sup>33</sup> *Id.* at 934-35.

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

<sup>35</sup> *Id.* at 935-36.

<sup>36</sup> *Id.* at 937-39. The district court instructed the jury that involuntary servitude included any means of compulsion such that "the alleged victims believe they had no reasonable means of escape and no choice except to remain in the service of the employer." On appeal, the Court of Appeals for the Sixth Circuit rejected this definition of involuntary servitude because it could include any form psychological coercion.

<sup>37</sup> *Id.* at 944.

<sup>38</sup> *Id.* at 952-53.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 962.

<sup>41</sup> *Id.* at 970.

<sup>42</sup> The rule of lenity provides that when ambiguity in the language of a statute exists regarding degrees of punishment, ambiguities should be resolved in favor of the defendant. *See, Lenity Rule*, BLACK'S LAW DICTIONARY (6th ed. 1990).

majority rejected these arguments on the grounds that they would “fail to provide fair notice to ordinary people” about what conduct is criminal.<sup>43</sup>

Paradoxically, the majority in *Kozminski* acknowledged that the “victim’s vulnerabilities” are relevant factors in determining whether physical or legal threats could have actually compelled the subject to serve.<sup>44</sup> The majority opinion draws a distinction in hypothesizing that “threatening an incompetent with institutionalization or an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude,” despite the same not being true for “an adult citizen of normal intelligence.”<sup>45</sup> In incorporating the victim’s mental state into the analysis, the majority confuses its own “physical and legal” rule and indicates that psychological elements could, in certain circumstances, be relevant factors to determine coercion.

Notwithstanding the unique criminal context that resulted in the narrow Thirteenth Amendment interpretation, lower courts have frequently applied the *Kozminski* analysis to civil cases. Because the Thirteenth Amendment is equally applicable to private action, courts have a distinct interest in applying the more stringent criminal rule to reduce civil litigation regarding the amendment. Even before *Kozminski*, courts had regularly applied to civil cases the restrictive criminal analysis that was pioneered in *U.S. v. Shackney*.<sup>46</sup> Under this standard, the necessary inquiry to sustain a Thirteenth Amendment challenge is that the victim must have “no option to work elsewhere.”<sup>47</sup> This boundedness is not satisfied by fear of social consequences or a loss in wages, and only exists when the worker is truly deprived the option of leaving employment by threat of physical or legal repercussions.<sup>48</sup>

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<sup>43</sup> *Kozminski*, 487 U.S. 931 at 949-50.

<sup>44</sup> *Id.* at 948, 952. The majority opinion argues, then, that the same physical or legal coercion might be more or less effective depending on the mental state of the victim. This finding certainly diminishes the importance of psychological coercion that was incorporated into the appellate court’s holding, but it does not remove the victim’s mental state from the analysis. Instead, the majority contends that the test they adopt better conforms to the rule of lenity because it focuses on “the defendant’s intent in using such means” to exploit the victim’s unique circumstances.

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

<sup>46</sup> *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964). The case considered an American chicken farmer who paid for a Mexican family’s travel to the United States to work on his farm. The defendant, Shackney, threatened the laborers with deportation if they refused to work or left the farm. Shackney was convicted of holding the laborers in involuntary servitude, but the circuit court reversed the conviction, holding that “[t]here must be ‘law or force’ that ‘compel[led] performance or a continuance of the service.’”

<sup>47</sup> See *Apperson v. Ampad*, 641 F. Supp 747, 751 (N.D. Ill. 1986) For a discussion of the holding in *Apperson*, see *infra* note 75.

<sup>48</sup> *United States v. Mussry*, 726 F.2d at 1453; (“We recognize that economic necessity may force persons to accept jobs that they would prefer not to perform or to work for wages they would prefer not to work for. Such persons may feel coerced into laboring at those jobs. That coercion, however, results from societal conditions and not from the employer’s conduct.” (quoting *Clyatt v. United States*, 197 U.S. 207, 215-2016 (1905))).



## B. *The Balancing Test*

Along with relying upon *Kozminski* to limit civil suits, federal courts have also utilized a balancing test to weigh the nature of the servitude against its proposed benefit. While the Supreme Court has never openly admitted to performing balancing to evaluate Thirteenth Amendment claims, several circuit courts have utilized balancing when considering certain servitudes. As such, there is no one consistent “balancing test,” but rather, a variety of balancing methodologies employed by various courts. Most often, these procedures pay special attention to the identity of the worker and the nature of the servitude. Particularly in contexts where the service is evidently involuntary but provides other individual or societal benefits, such as in mental institutions or schools, courts tend to apply the balancing to limit constitutional recourse.

In one of the earliest instances of this balancing, *Jobson v. Henne*, the Second Circuit considered a suit brought by an institutionalized New York mental patient against his school.<sup>49</sup> The plaintiff asserted that by requiring them to perform chores, the school kept him, and other patients, in involuntary servitude. The court in *Jobson* focused on “the nature of the tasks that are required of the inmate” in finding that the therapeutic benefit to the patient outweighs the burden of the labor requirement.<sup>50</sup> The U.S. District Court for the Western District of New York employed similar rationale in *King v. Carey*, holding that the “therapeutic and cost saving purposes” of a program should be weighed against aspects which are “excessive” or unrelated to those benefits.<sup>51</sup>

Courts have likewise afforded considerable deference to mandatory school programs because they advance educational, rather than therapeutic benefits. In *Steirer v. Bethlehem Area School District*, the U.S. District Court for the Eastern District of Pennsylvania recognized that “there are certain servitudes which because of their historical circumstance are excepted from the prohibitions of the Thirteenth Amendment.”<sup>52</sup> The court in *Steirer* sided with the defendant in finding that the public benefit and educational purpose of the mandatory community service program outweighed the burden of labor. The U.S. District Court for Southern District of New York rejected a challenge to a similar community service program in *Immediato v. Rye Neck School District* where it stressed the obvious educational benefit outweighed the “incidental burden of the labor requirement.”<sup>53</sup>

Outside the unique contexts of education and mental institutions, courts have tended to consider how the servitude constrains the victim’s personal freedom and mobility similar to that which was suffered by slaves. When performing this analysis, these lower courts emphasize the Supreme Court’s opinion in limiting the purpose of the Thirteenth Amendment

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<sup>49</sup> *Jobson v. Henne*, 355 F.2d 129 (2d Cir. 1966).

<sup>50</sup> *Id.* at 132.

<sup>51</sup> *King v. Carey*, 405 F. Supp. 41 (W.D.N.Y. 1975).

<sup>52</sup> *Steirer v. Bethlehem Area School Dist.*, 789 F. Supp. 1337 (E.D. Pa. 1992).

<sup>53</sup> *Immediato v. Rye Neck School Dist.*, 873 F. Supp. 846 (S.D.N.Y. 1995).

to “those forms of compulsory labor akin to African slavery.”<sup>54</sup> For example, the Third Circuit in *U.S. v Bertoli* considered a district court order which compelled a law firm to provide continuing services to a former litigant who chose to represent himself.<sup>55</sup> The court there emphasized that the servitude required was too dissimilar to the actual incidents of slavery to be credible.<sup>56</sup> Similarly, in *Jane L v. Bangerter*, the court rejected a Thirteenth Amendment challenge to a restrictive abortion law because equating caring for a child to the labor demands of legitimate slavery was non-credible.<sup>57</sup> In each of these cases, the courts identified the existence of a servitude but nonetheless concluded that the service was too divergent from the historical realities of slavery to invoke a Thirteenth Amendment violation.

### C. Categorical Exceptions

Prior to its relatively recent decision in *Kozminski*, the U.S. Supreme Court dismissed numerous Thirteenth Amendment challenges on the grounds that the servitude in question was not intended to be displaced or modified by the constitutional provision. In actuality, the Court in these scenarios is performing a sort of “covert balancing” in recognizing that the public benefit from these mandatory servitudes would outweigh the individual burden. In disposing of these claims, the Court considers the type of servitude and how socially accepted they were at the time of ratification.<sup>58</sup>

This type of blanket exclusion has been granted in a wide variety of circumstances that plainly do entail involuntary servitude, including military draft,<sup>59</sup> conscription to work on public roads,<sup>60</sup> and sailors’ contracts to work on vessels.<sup>61</sup> In each of these decisions, the Court did not question that the labor was involuntary, but instead concluded that the Thirteenth Amendment did not apply because it could not have been intended to displace these programs. Moreover, the courts have concluded that the public benefit in allowing these programs to continue is more substantial than the individual burden of any one participant. And, like in the balancing test, the courts have distinguished the nature of these servitudes from historical slavery; because they do not include a private economic benefit as a consequence of the servitude, the labor considered is less likely to be prohibited by the Thirteenth Amendment.

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<sup>54</sup> *Butler v. Perry*, 240 U.S. 328, 332 (1916).

<sup>55</sup> *United States v. Bertoli*, 994 F.2d 1002 (3d Cir. 1993); *See also Sharp v. Kansas*, 783 P.2d 343 (1989), cert. denied, 498 U.S. 822 (1990) (requiring attorneys to represent indigent criminal defendants).

<sup>56</sup> *Bertoli*, 994 F.2d 1002, 1022.

<sup>57</sup> *Jane L. v. Bangerter*, 794 F. Supp. 1537 (D. Utah 1992).

<sup>58</sup> Ironically, this exemption ignores the fact that slavery and racial discrimination were well-accepted in American society in the mid-nineteenth century.

<sup>59</sup> *Selective Draft Law Cases*, 245 U.S. 366 (1918) (holding that the implementation of a military draft does not violate any Thirteenth Amendment protections).

<sup>60</sup> *Butler*, 240 U.S. 328 (1916) (holding that work on public road crews is “a part of the duty owed by able-bodied men to the public” and does not constitute involuntary servitude).

<sup>61</sup> *Robertson v. Baldwin*, 165 U.S. 275 (1897) (holding that contracts requiring sailors to work on a vessel for the duration of the agreement do not violate the Thirteenth Amendment because “the provision against involuntary servitude was never intended to apply to such contracts.”).

Absent a historical analogy, courts have extended traditional exceptions to also cover contemporary servitudes. This was the case in *United States v. Tivian Laboratories*, in which a company alleged that the burden of providing the government with data pursuant to the Air and Water Pollution Prevention Control Acts violated the Thirteenth Amendment.<sup>62</sup> The First Circuit rejected this claim in finding that the Thirteenth Amendment “has no application to a call for service made by one’s government according to law to meet a public need.”<sup>63</sup> The Supreme Court of Arkansas relied upon similar logic in rejecting a Thirteenth Amendment claim in *Williams v. Arkansas*.<sup>64</sup> The case concerned two men who violated a state statute by refusing to aid a police officer in the apprehension of a suspect. The court emphasized the “responsibilities of a citizen in this republic” included participation in law enforcement and so the statute did not provide for involuntary servitude.<sup>65</sup>

### III. HOW THE CURRENT CLAIM SHOULD BE ADJUDICATED

In evaluating the current claim against the United States Government, this Article considers every possible standard that might afford relief to the plaintiffs. The complaint asserts that the plaintiffs are “required to work without pay as a condition of their employment,” and that they would be “subject to discipline” for noncompliance.<sup>66</sup> The plaintiffs emphasize that they only continue working because refusal of these order would result in them being “stripped of their property interest in continuing federal employment.” The complaint concludes that the government’s requirement that the plaintiffs “perform involuntary, unpaid service under threat of deprivation of Plaintiffs’ property interests” violates the Thirteenth Amendment.<sup>67</sup>

Under *Kozminski*, the plaintiffs must demonstrate that they face a choice between forced labor or physical or legal sanction.<sup>68</sup> Critically, the employees here are threatened with “removal from federal service” which implicitly concedes that the servitude is not compulsory.<sup>69</sup> The plaintiff’s own aversion to leaving their job because of financial or social pressures does not satisfy this burden. The “deprivation of [p]laintiffs’ property interests” is not a threat for legal action by the United States, but rather the workers’ unwillingness to leave their current jobs and search for different employment.<sup>70</sup> Inasmuch as the employees’

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<sup>62</sup> *United States v. Tivian Labs*, 589 F.2d 49 (1st Cir. 1978).

<sup>63</sup> *Id.* at 58 (quoting *Heflin v. Sanford*, 142 F.2d 798, 799 (5th Cir. 1944)).

<sup>64</sup> *Williams v. State*, 490 S.W.2d 117 (Ark. 1973).

<sup>65</sup> *Id.* at 122.

<sup>66</sup> *Hardy v. Trump*, *supra* note 5, at 8.

<sup>67</sup> *Id.* at 8-9.

<sup>68</sup> *Kozminski*, 487 U.S. 931, at 944.

<sup>69</sup> *Hardy v. Trump*, *supra* note 5, at 8.

<sup>70</sup> *Id.* at 9.

punishment for refusing to work is termination from employment, a Thirteenth Amendment challenge cannot be sustained.<sup>71</sup>

The plaintiff's complaint fundamentally misinterprets the Thirteenth Amendment in placing the greatest emphasis not on the compulsion used, but on the compensation received to encourage the servitude. The government workers are performing the same tasks they were required to prior to the shutdown, and the service is none the more compelled now that their wages are withheld. As the second circuit recognized in *Heflin v. Sanford*, "it is not uncompensated service, but involuntary servitude which is prohibited by the Thirteenth Amendment."<sup>72</sup> The Court's precedent has never focused on the denial of salary to determine coercion, and such a finding could only be relevant to the extent that work without pay resembles the conditions of historical slavery. Despite this, denial of wages is far from the touchstone of the Thirteenth Amendment. The Court's decision in *Kozminski* turned on the use of physical and legal coercion to compel the laborers to remain in their jobs against their will,<sup>73</sup> and inadequate compensation has never been the deciding factor to demonstrate a Thirteenth Amendment violation.

In this case, plaintiffs contend that the requirement to work without pay under threat of termination jeopardizes their "property interests" in continuing federal employment. Ostensibly, these property interests refer to the plaintiffs' interest in receiving their government wages to purchase necessary goods and services. The fatal flaw in this argument is that the plaintiffs remain free to pursue these same interests through a different employer. The United States has not threatened to directly deprive plaintiffs of their property if they refuse to work, but instead it is the plaintiffs' own perception that ending their relationship with the government as an employer would imperil their property interests. The plaintiffs' Thirteenth Amendment argument ignores the fact that they are free to work elsewhere, and similar claims have been uniformly rejected by the courts.<sup>74</sup>

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<sup>71</sup> See *Beltran v. Cohen*, 303 F. Supp. 889 (N.D. Cal. 1969) ("The essence of slavery or involuntary servitude is that the worker must labor against his will for the benefit of another." (quoting *Wicks v. Southern Pacific Co.*, 231 F.2d 130 (9th Cir. 1956))).

<sup>72</sup> *Heflin*, 142 F.2d 798, 799 (1944).

<sup>73</sup> *Id.* at 952. ("[T]he term "involuntary servitude" necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.").

<sup>74</sup> The circuit courts have come to similar conclusions in *Audet v. Board of Regents*, 606 F. Supp. 423, 433 (D.R.I. 1985) (concluding that a teacher's transfer to a different department, against his wishes, did not constitute involuntary servitude because "[plaintiff's] right to change employers has not been affected. As long as he is free to leave, his servitude cannot be involuntary"); *Apperson v Ampad*, 641 F. Supp. 747, 751 (N.D. Ill. 1986) (finding an employment contract which prohibited a former employee from working in the paper goods industry did not violate the Thirteenth Amendment because "the plaintiff in this case retains the right to pursue employment in other industries besides paper goods"); *Sellers v. Philips Barber Shop*, 46 N.J. 340, 349 (1966) (holding that a court order compelling a barber to provide services to patrons of all races did not amount to involuntary servitude because "the order does not compel him to continue in the practice of barbering.").

Even if the Thirteenth Amendment is extended to reach psychological coercion, as the Court declined to do in *Kozminski*, the plaintiffs' claim remains untenable. When the lower court in *Kozminski* considered psychological coercion, it emphasized that the unique mental state of the defendants made them feel like they were forced to labor in involuntary servitude even if a person of ordinary intelligence would not have been similarly deceived.<sup>75</sup> Even prior to *Kozminski*, in *U.S. v. Mussry*, the Ninth Circuit found involuntary servitude did include psychological elements, but again paid special attention to the situation of the victims.<sup>76</sup> The persons subject to servitude traveled to the United States from Indonesia and spoke no English, so it was plausible that a reasonable person from their perspective would feel no choice but to labor against their will.<sup>77</sup> It is more likely that psychological pressure would be a relevant consideration in a civil matter, such as this, because the interest in lenity within criminal law is not present. Even so, there is nothing in the plaintiff's complaint to suggest that they are uniquely situated so as to be especially vulnerable to psychological compulsion.

Under the balancing test, the servitude challenged here is among the least likely to be forbidden by the Thirteenth Amendment. While there clearly is no educational or therapeutic benefit served, the public need in performing government services during a shutdown is substantial. Additionally, the type of servitude required is not especially brutal and is not at all analogous to the historic conditions of slavery. More importantly, the plaintiffs have not suffered any loss whatsoever of personal freedom or mobility. Their condition may tangentially resemble slavery only in that they are denied their compensation, but they are in no way compelled to continue their labor commitment and the court of appeals rejected even more restrictive conditions in *Bertoli*.<sup>78</sup> Even if denial of pay were sufficient to establish involuntary servitude, the plaintiffs here have not truly been forced to work without compensation; both Congress and the Office of Personnel Management have affirmed that the excepted government employees will receive compensation at the conclusion of the shutdown and so their position is even more dissimilar to that of slaves.<sup>79</sup>

Equally problematic to plaintiffs' complaint are the numerous exceptions to the Thirteenth Amendment made in the interest of serving public needs. Historically, these exceptions have most often been granted to servitudes that exist for the overall benefit of the

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<sup>75</sup> While the Court in *Kozminski* attached less weight to this factor, the majority still recognized that the victim's vulnerabilities could contribute to a Thirteenth Amendment violation. *See supra* note 45.

<sup>76</sup> *Mussry*, 726 F.2d 1448 (9th Cir. 1984).

<sup>77</sup> *Id.* at 17 (stating that "A holding of involuntary servitude occurs when an individual coerces another into his service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labor.").

<sup>78</sup> *Bertoli*, 994 F.2d 1002 (3d Cir. 1993).

<sup>79</sup> Memorandum from Margaret M. Weichert, Acting Director, U.S. Office of Pers. Mgmt., for Heads of Executive Departments and Agencies on Pay Benefits Information for Employees Affected by the Lapse in Appropriations (January 11, 2011), *available* at <https://chcoc.gov/content/fact-sheet-pay-and-benefits-information-employees-affected-lapse-appropriations>; *See also* Government Employee Fair Treatment Act of 2019, S. 24, 116th Cong. (2019).

public and provide some sort of public good.<sup>80</sup> In this case, the public's interest in efficient operation of government entities, like the Departments of Transportation and Justice,<sup>81</sup> could potentially warrant the same type of blanket exclusion. This was the case in *Crews v. Lundquist*, which challenged a statute requiring public administrators to provide estate services for deceased veterans without pay.<sup>82</sup> The Illinois Supreme Court held that the Thirteenth Amendment was inapplicable to "services which the individual is... required to give to the State."<sup>83</sup> The court concluded that because the services of the public administrator are part of the function of the state government, "it follows that to impose upon that officer certain duties without compensation" does not violate the Thirteenth Amendment."<sup>84</sup>

As discussed in section one, Congress' position on the shutdown is likewise relevant to the district court's analysis of this claim. After *Jones*, Congressional authorization of a category of servitude or discrimination is necessary to allege it as incidental to slavery.<sup>85</sup> In this instance, where plaintiffs' situation of being denied pay is a direct result of the action (or inaction) of Congress, recognizing their condition as an incident of slavery would contradict the Court's holding in *Jones*. Far beyond the judiciary recognizing a badge of slavery where Congress has not, the continued government shutdown reflects the fact that Congress has chosen to allow this lapse in appropriations and the associated requirement that excepted employees work without pay; finding of favor of the plaintiffs here would represent a drastic departure from the Supreme Court's prior precedent regarding deference to the legislature in the realm of Thirteenth Amendment enforcement.<sup>86</sup>

#### IV. CONCLUSION

Since its initial adoption in 1865, the self-executing first section of the Thirteenth Amendment has been continually restrained by the judiciary. While Congress' power to legislate against the incidents of slavery has grown substantially since the Court's holding in *Jones*, the judiciary has simultaneously narrowed the scope of possible scenarios that constitute involuntary servitude. To establish a Thirteenth Amendment claim, the victims must generally demonstrate physical or legal coercion to compel a servitude that subjects the laborers to

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<sup>80</sup> *Kozminski*, 487 U.S. 931 at 943-944 (constraining the scope of Thirteenth Amendment violations in holding that "[T]he Court has recognized that the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties.").

<sup>81</sup> *Hardy v. Trump*, *supra* note 5, at 4-6.

<sup>82</sup> *Crews v. Lundquist*, 197 N.E. 768 (Ill. 1935).

<sup>83</sup> *Id.* at 201.

<sup>84</sup> *Id.*

<sup>85</sup> See *Palmer v. Thompson*, 403 U.S. 217 (1971) (rejecting a Thirteenth Amendment challenge to a city's choice to close public pools instead of desegregating them because "Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities.")

<sup>86</sup> This does not imply, however, that Congressional authorization is a necessary condition to satisfy any Thirteenth Amendment violation. While Congress retains the power to determine the incidents of slavery (as the Court delegated to it in *Jones*), the Thirteenth Amendment is sufficient to disallow forced servitude even absent supporting legislation.

conditions similar to those endured by slaves. Moreover, the servitude must be for private benefit and not to fulfill a public need. The claim considered in this Article simply fails to satisfy the numerous burdens presented under the Thirteenth Amendment.

Compelling federal government employees to work without pay would seem to be at the heart of what this provision is intended to prohibit, but the courts' precedent regarding the Thirteenth Amendment offers no relief to these excepted workers. Under each of the possible standards that could be applied by the district court, the plaintiffs' argument lacks the critical elements to substantiate a legitimate violation of the Thirteenth Amendment. The federal employees seeking legal relief are not truly compelled to work, their position does not closely resemble the historic conditions of slavery, and their labor serves a crucial government need for the benefit of the American public. And while rejecting the federal workers' claim might seem to contradict the Thirteenth Amendment's purpose, it instead reflects the commonsensical observation that service can never be involuntary when the workers are permitted to quit.

# THE FIGHT TO INDICT: CAN A SITTING PRESIDENT BE INDICTED?

John Michael Tuley

## 1. *The Mueller Investigation*

In November of 2016, Donald J. Trump was elected as the forty-fifth president of the United States. This surprised many political pundits who placed his Democratic opponent, Hillary Clinton, wife of former President Bill Clinton, as the overwhelming favorite to win the 2016 election. However, Clinton was not without her own faults. Throughout the election, there were numerous concerns over her use of a private email server during her time as Secretary of State. Concern arose that classified documents could have fallen into the hands of foreign state agents due to the lack of government security on a private server. Indeed, on March 16, 2016, Clinton's emails were released on the site "Wikileaks," which has become an infamous source for numerous hackings and leaking of private documents.<sup>1</sup> All of this culminated in the 2016 election, where Donald Trump won the presidency by a margin of 304 to 227 electoral votes, despite losing the popular vote by almost three million votes.<sup>2</sup>

Shortly after President Trump took office, rumors began swirling throughout the media that the Trump campaign and transition team had colluded with the Russian government to spread false, damaging, or misleading information during the 2016 campaign. This was brought about in a formal dossier written by former head of the Russia Desk for British Intelligence Agency, MI6, Christopher Steele. Steele was contracted by the company Fusion GPS to investigate any irregularities in the Trump campaign.<sup>3</sup> The FBI, then under the direction of James Comey, began looking into any possible ties between the Trump campaign team and the Russian government. As the investigation was heating up, Trump began to publicly criticize Comey, questioning his intentions in the investigation via press conferences and numerous social media posts. In May of 2017, Trump made the controversial decision to fire Comey after he allegedly urged Comey to drop the FBI investigation into potential Russian collusion.<sup>4</sup> Shortly after the Comey firing, Deputy Attorney General Rod Rosenstein appointed former FBI Director Robert Mueller to lead the investigation into the Russian collusion in 2016. Mueller eventually shifted his focus to

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<sup>1</sup> Julian Assange et. al., *Hillary Clinton Email Archive*, Wikileaks, (Mar. 16, 2016), available at <https://wikileaks.org/clinton-emails/>.

<sup>2</sup> *2016 Presidential Election*, 270 to Win (Nov. 8, 2016), [https://www.270towin.com/2016\\_Election/](https://www.270towin.com/2016_Election/).

<sup>3</sup> Christopher Steele, *The Steele Dossier I*, The Moscow Project, (Dec. 13, 2016), available at <https://themoscowproject.org/dossier/>.

<sup>4</sup> Julia Manchester, *Timeline: Mueller's Russia Probe*, The Hill (Oct. 28, 2017), <https://thehill.com/homenews/administration/357639-timeline-muellers-russia-probe>.



investigating the President himself for potential obstruction of justice.<sup>5</sup> A little over two months after Mueller's appointment, the home of former Trump campaign chairman, Paul Manafort, was raided by the FBI. Charges were eventually brought against Manafort and close ally Rick Gates like conspiracy against the United States in October of 2017.<sup>6</sup>

Since these initial indictments, the Mueller investigation has yielded twelve indictments, including Manafort, Gates, Trump's private attorney Michael Cohen, and National Security Advisor to President Trump, Michael Flynn. With the investigation nearing its end, there is massive speculation whether Mueller's investigation will ultimately name President Trump as having committed federal crimes, including obstruction of justice.<sup>7</sup> The Mueller probe uncovered evidence that President Trump ordered his private attorney to make payments of "hush money" to adult film actress Stephanie Clifford (more commonly referred to as Stormy Daniels), and that secret meetings were held between Trump campaign members and high-ranking officials of the Russian government. President Trump was reported to have been the "Individual 1" that was referred to numerous times during Cohen's indictment.<sup>8</sup> These beliefs were confirmed in Cohen's own sworn testimony to Congress on February 27, 2019, where Cohen stated, "last Fall I plead guilty to felonies for the benefit of, at the direction of, and in coordination with Individual 1. For the record: Individual 1 is President Donald J. Trump."<sup>9</sup> Also, there has been developments in the original investigation into potential obstruction of justice. Since an independent counsel's report of this magnitude has never been seen, there are many unanswered questions as to what will happen when Independent Counsel Mueller's report is completed. During the confirmation of new Attorney General William Barr, Barr stated that it was "vital" that Mueller be allowed to complete his investigation but was hesitant to commit to how Mueller's report will be delivered to Congress, as well as, how much will be given to the general public.<sup>10</sup>

The first time that a formal independent counsel investigation appeared was during the 1970's when President Richard Nixon was facing the final days of the Watergate investigation. Since that time, there has been much debate and speculation as to whether a sitting president can be indicted, a question which may be answered in the coming months.

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<sup>5</sup> Alex Whiting, *Mueller's Investigation of Obstruction of Justice: The Next Steps*, Just Security (Jun. 7, 2017), <https://www.justsecurity.org/41934/muellers-investigation-obstruction-justice-steps/>.

<sup>6</sup> Indictment, *United States v. Manafort and Gates*, No. 1:17-cr-00201 (Dist. Ct. D.C. Wash. D.C.).

<sup>7</sup> Barry H. Berke et. al., *Presidential Obstruction of Justice: The Case of Donald J. Trump*, (2<sup>nd</sup> ed. 2018).

<sup>8</sup> Indictment, *United States v. Cohen*, No. 18 Crim. 850. (Dist. Ct. N.Y. Southern Dist., N.Y.).

<sup>9</sup> Michael D. Cohen, *Testimony of Michael D. Cohen to the Committee on Oversight and Reform* (Feb. 27, 2019), <https://www.politico.com/f/?id=00000169-2d31-dc75-affd-bfb99a790001>.

<sup>10</sup> Even Perez & Laura Jarrett *Exclusive: William Barr gears up to take the reins on Mueller probe and pick a top deputy*, (Feb. 13, 2019), <https://www.cnn.com/2019/02/13/politics/william-barr-decisions-mueller-deputy/index.html>.

## 2. *The Nixon Investigation*

Resulting from the Watergate scandal, Archibald Cox served as the first special prosecutor for the Watergate investigation. Cox was tasked with being the first to wrestle with the idea that his investigation could lead to criminal charges against Nixon. Cox testified to Congress shortly after his termination by President Nixon just six months into his tenure as independent counsel, that in order to avoid future scandals at the presidential level, "[t]he pressures, the tensions of divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential."<sup>11</sup> Section 595(c) of the federal statutes state that the role of the independent counsel is to "advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel's responsibilities under this chapter, that may constitute grounds for an impeachment."<sup>12</sup>

A narrow interpretation of this statute could mean that an independent counsel would have the right to directly investigate a sitting president, even independent of an investigation into another government agent, but that the end result of that investigation would be only a report to Congress, not an indictment for the president on criminal charges. Cox adopted this view and was "reluctant even to name the President an unindicted coconspirator, for fear that this designation would violate the spirit if not the letter of the Constitution."<sup>13</sup> Cox was fired six months into his tenure as independent counsel by President Nixon amidst this issue and was replaced by Leon Jaworski. Jaworski wrote a memorandum concurring with the opinion of his predecessor, Cox, adding in a memorandum that even if the independent counsel himself were to bring forward an indictment, "the Supreme Court, if presented with the question, would not uphold an indictment of the President for the crimes of which he would be accused."<sup>14</sup> Jaworski added to the statutory concerns by discussing the Constitution itself. Article 1 Section 3 of the Constitution states that:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.<sup>15</sup>

From this, Jaworski believed that it could be seen that any "civil officer" must be impeached before they can be indicted. In an article discussing the creation of the Independent Counsel statute, Julie O'Sullivan stated that "While Article I, section 3, clause 7 authorizes prosecutions

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<sup>11</sup> Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 Mich. L. Rev. 604 (1998).

<sup>12</sup> 28 U.S.C. § 595(C) 1978.

<sup>13</sup> Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 Stan. L. Rev. 315 (1999).

<sup>14</sup> *Id.* at 316.

<sup>15</sup> U.S. Const. art. I, § 3.

for "part[ies] convicted" upon impeachment and thus seems to anticipate pre-indictment impeachment, it does not necessarily require it."<sup>16</sup> Back in 1804 however, Vice President Aaron Burr was indicted for the murder of Alexander Hamilton despite not being impeached first. Since then, numerous public officials have been indicted on federal charges before they were impeached from the public office they held, most notably federal judges.

The question then became what the difference is between the President and any other public servant. This difference lies in the public interest of having a sitting president indicted. The President serves arguably the most important role in the country as he is responsible for serving as the face of the nation in all settings foreign and domestic. People look to the president for strength and wisdom during difficult times. The President is the chief dignitary that faces other nations on the world stage. They are responsible for keeping foreign relations positive and ensuring that the United States maintains its image of strength and prosperity to the entire world. The duty that the President serves both foreign and domestic is so great, that being embroiled in an indictment while serving this role would be too great a risk to the public image to occur.

Furthermore, the idea that a president could balance all of the responsibilities and time commitments that come from being the leader of the free world, while dealing with the time commitments that come from a criminal trial is something that the Nixon independent counsels were not willing to consider plausible.<sup>17</sup> For those reasons, both of them made the decision that they would not seek an indictment for President Nixon stemming from the Watergate investigation until after they had presented their findings to Congress and a proper impeachment had commenced. There was never a definitive answer given as to whether an indictment could occur because on August 9, 1974, Nixon chose to resign from office rather than face the public scrutiny of an impeachment. He was indicted after his resignation on charges including obstruction of justice and contempt of Congress. However, despite the anti-Nixon sentiment, Gerald Ford decided that it was in the best interest of the country that Nixon face no further punishment and on September 8, 1974 granted Nixon a "a full pardon for all offenses against the United States in order to put the tragic and disruptive scandal behind all concerned."<sup>18</sup> The country was finally at rest, but for the Department of Justice this meant that the issue of whether the sitting President could be indicted was no longer pressing and wouldn't be an issue again until the late 1990's when the nation was embroiled in another presidential controversy.

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<sup>16</sup> Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 Geo. L.J. 2262 (1998).

<sup>17</sup> Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 Stan. L. Rev. 320 (1999).

<sup>18</sup> History.com Editors, *President Ford Pardons Former President Nixon*, History (Aug. 21, 2018), <https://www.history.com/this-day-in-history/president-ford-pardons-former-president-nixon>.

### 3. *The Clinton Controversy*

In the 1990's President Bill Clinton became embroiled in a controversy where he was accused of having a sexual relationship with White House employee, Monica Lewinsky. During a grand jury trial brought about by a previous civil action, President Clinton denied any sexual relations with Ms. Lewinsky. As a result, Clinton was called in front of Congress for a proceeding where he faced potential impeachment due in large part to the falsehoods, he told during the grand jury trial. Clinton protested against participating in the process, stating that he should be exempt under executive privilege. However, Nixon had argued a similar principle during the Watergate investigation and was forced to participate based on the ruling of *United States v. Nixon*.<sup>19</sup> The Senate chose to move forward with impeachment, making him the first President since Andrew Johnson to be impeached.

Once again, the issue had been raised with the Department of Justice of whether the sitting president was liable to indictment prior to the end of the impeachment proceedings. In President Clinton's case, the question was whether he could be indicted for perjury, essentially claiming that he had lied to the grand jury and was attempting to perpetuate that same lie in front of Congress. This could have, in the eyes of those who were looking to bring forth the charges, forced him into criminal liability. However, the Department of Justice was once again hesitant to bring forth these charges, especially with the impeachment already underway. A stark difference occurred in the Clinton process from that of the Nixon process twenty years earlier. Independent Counsel Kenneth Starr, in the eyes of many legal scholars, created a host of issues in the public discourse with the independent counsel. When Starr was named independent counsel, he refused to give up his position at a private law firm which prompted many to question whether he could give an opinion on the subject without considering his private gain.<sup>20</sup> Supreme Court Justice Antonin Scalia, criticized not only Starr but the notion of the independent counsel as a whole, stating that the entire notion of an independent counsel "seems to me to be not conducive to fairness."<sup>21</sup> Scalia insinuated that the independent counsel functioned almost as a fourth branch of government, allowing it to overstep the separation of powers doctrine.<sup>22</sup> Starr also made one more decision that differed from his predecessors, Cox and Jaworsky, by choosing to publish his report of the investigation of President Clinton in its entirety to the public. The Starr Report contained detailed accounts into the alleged sexual misconduct against President Clinton and contained private emails and other correspondence that detailed "salacious material relating to the President's misconduct."<sup>23</sup>

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<sup>19</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>20</sup> David Halperin, *Ethics Breakthrough or Ethics Breakdown? Kenneth Starr's Dual Roles as Private Practitioner and Public Prosecutor*, 15 *Geo. J. Legal Ethics* 231 (2002).

<sup>21</sup> *Morrison v. Olsen*, 487 U.S. 654 (1988). Scalia, J. Dissenting.

<sup>22</sup> Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 *Iowa L. Rev.* 399 (2001).

<sup>23</sup> Michael J. Gerhardt, *Privacy, Cyberspace, and Democracy: A Case Study*, 32 *Conn. L. Rev.* 907 (2000).

The issue of the Clinton impeachment became highly politicized as the public's interest focused in on the party of the President rather than the actions he had allegedly committed. For a large part of the population that was not focused on the political gamesmanship that was taking place surrounding the impeachment, , wishing instead that the impeachment would end, and politics would go back to business as usual. Moreover, the published Starr Report recommended no charges for indictment, instead it focused on the impeachment itself rather than federal criminal charges.

#### 4. *The Mueller Investigation and It's Ramifications*

There is no telling what kind of consequences resulting from the Mueller investigation will bring once it is released in its entirety to the public. There is a very real possibility that it ends with more indictments, none of which would be the president. However, it is just as likely that, based on the findings that have already been released from the Mueller report, President Trump could be implicated, and Robert Mueller could make an unprecedented decision to directly use a report to recommend charges against a sitting president. In his dissent in the *Morrison* case, Antonin Scalia hypothesized in depth as to the ease of which an independent counsel could expand their statutory power using the courts. Scalia stated:

But that has often been (and nothing prevents it from being) very broad -- and should the independent counsel or his or her staff come up with something beyond that scope, nothing prevents him or her from asking the judges to expand his or her authority or, if that does not work, referring it to the Attorney General, whereupon the whole process would recommence and, if there was "reasonable basis to believe" that further investigation was warranted, that new offense would be referred to the Special Division, which would in all likelihood assign it to the same independent counsel.<sup>24</sup>

Therefore, if Mueller wished to expand the power of the independent counsel to name the President in a federal indictment, he need only ask to expand his statutory powers. In May of 2018, the Mueller team contacted President Trump's personal attorney and former New York City mayor, Rudy Giuliani, to propose an interview between President Trump and Mueller. During that conversation, Giuliani asked whether or not the investigation would be seeking an indictment for the President at the end of the investigation. When the Mueller team stated they were unsure, Giuliani told them that must follow the DOJ guidelines. However, Giuliani erred in that statement as it is a gross misstatement of the law to state that the Mueller team must follow the DOJ guidelines set out over fifty years ago. Giuliani later went on to say that the Mueller team reached back out to him and stated that they would adhere to the DOJ guidelines, however, this is far from a guarantee.<sup>25</sup>

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<sup>24</sup> *Morrison v. Olsen*, 487 U.S. 654 (1988). Scalia, J. Dissenting.

<sup>25</sup> Michael S. Schmidt, et. al., *Mueller Won't Indict Trump if He Finds Wrongdoing*, New York Times (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/politics/mueller-trump-indictment.html>.

The closest that an independent counsel's investigation has ever gone towards seeking an indictment of the sitting President upon conclusion is in the case of Nixon. Both former President Nixon and current President Trump's situations are similar as they both were under investigation based on potential obstruction of justice. Unlike the Nixon situation, this issue is more analogous to the Clinton investigation in that it has become hyper political. Individuals on both sides of the aisle were quick to condemn the actions of President Nixon when it was believed he had used his office to cover up vital information related to Watergate. However, many people view the Clinton impeachment merely as a way to attack a president and not something that should be dealt with in Congress or by the Supreme Court. A highly politicized scandal coupled with a position that has historically been unable to bring forth a formal indictment has led the recommendations of the independent counsel to be seen as largely "simply nominal."<sup>26</sup> The question of whether Trump "colluded" with Russia is one of the more highly politicized issues in modern politics and law. President Trump himself has perpetuated the notion that this investigation is "rigged" against him, stating in December that:

Robert Mueller and Leakin' Lyin' James Comey are Best Friends, just one of many Mueller Conflicts of Interest. And by the way, wasn't the woman in charge of prosecuting Jerome Corsi (who I do not know) in charge of "legal" at the corrupt Clinton Foundation? A total Witch Hunt...<sup>27</sup>

He also stated prior to that, in November:

The inner workings of the Mueller investigation are a total mess. They have found no collusion and have gone absolutely nuts. They are screaming and shouting at people, horribly threatening them to come up with the answers they want. They are a disgrace to our Nation.<sup>28</sup>

Weighing all relevant factors, it cannot be definitively stated that President Trump or any president is immune to indictment. The notion that it cannot relies on a DOJ interpretation of a statute which is not legally binding in any sense. The original memorandum states, "[t]he indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions,"<sup>29</sup> However, Kenneth Starr reportedly did his own investigation into the amenability of the president and concluded the opposite of the memorandum, and intended to file charges

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<sup>26</sup> Matthew Hansen, *All the President's Lawyers—Problems and Possible Solutions in Prosecuting Presidential Criminal Conduct*, 61 Ariz. L. Rev. 234 (2019).

<sup>27</sup> Donald Trump (@realDonaldTrump), Twitter (Dec. 7, 2018, 6:18 AM), <https://twitter.com/realDonaldTrump/status/1071001119697108992>.

<sup>28</sup> Donald Trump (@realDonaldTrump), Twitter (Nov. 14, 2018, 7:14 AM), <https://twitter.com/realDonaldTrump/status/1063042585802039296>.

<sup>29</sup> Robert G. Dixon Jr., *Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office*, (1973).

against President Clinton if any had arisen.<sup>30</sup> There are many nuances and intricacies that must be thought out and explored in order to make a rational, non-partisan decision on this issue. The idea that the independent counsel cannot even recommend charges against the President should be determined as unequivocally false. In many cases, there is no difference from the charges a president can be impeached on and potential federal or state criminal charges that arise out of those impeachable offenses. In fact, the Constitution states that “The President... shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>31</sup> It is within the scope of an appointed member working on behalf of the DOJ to complete a thorough investigation, and to extend that investigation to potential legal consequences for those actions.

Limiting the Mueller investigation reports to only potential articles of impeachment would effectively handcuff the Mueller investigation and any other special investigation towards the President. Specifically, with the Mueller investigation there is a complicated situation that could arise should the Supreme Court decide that the DOJ was correct in their assertion that the President cannot be indicted. There remains a possibility that even if the Mueller report leads to an impeachment that it would not ultimately lead to a removal from office. If that is the case, it could be roughly six more years before an indictment could be brought forward. In this, and potentially other situations, there remains the possibility that under the current statute, if an impeachment does not happen, that the statute of limitations could lapse before that president is out of office. Legal scholar Ken Gormley, who focuses on the independent counsel’s statute, postulates that “[t]his would be accomplished by allowing the independent counsel to place all relevant evidence under seal so that it may be preserved and used properly if and when a criminal prosecution is instituted, after the President leaves office.”<sup>32</sup> Gormley also suggests that “Congress should further provide that the statute of limitations is tolled as to any criminal charges that might be filed against a sitting President, until he or she leaves office.”<sup>33</sup>

Another question that emerges from this ambiguity, is whether a special investigation can yield federal and/or state charges. The potential dangers of allowing the states to have the ability of bringing charges that could lead to the imprisonment of the sitting President could lead to serious conflict between the federal government and the state governments. This would fly directly in the face of one of the Supreme Court’s earliest rulings in *McCullough v. Maryland*.<sup>34</sup> While *McCullough* dealt with taxing a federal bank, the Court was clear in their interpretation that the states cannot infringe on the federal government. This is commonly referred to as the “separation of powers.” Allowing the states to prosecute a sitting president

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<sup>30</sup> Jan Wolfe, *Can a Sitting U.S. President Face Criminal Charges?*, Reuters, (Feb. 26, 2019), <https://www.reuters.com/article/us-usa-trump-russia-indictment-explainer/can-a-sitting-us-president-face-criminal-charges-idUSKCN1QF1D3>.

<sup>31</sup> U.S. Const. art. II, § 2.

<sup>32</sup> Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 Stan. L. Rev. 353 (1999).

<sup>33</sup> *Id.* at 353.

<sup>34</sup> *McCullough v. Maryland*, 17 U.S. 316 (1819).

would contradict the ruling of the Separation of Powers under the Constitution. As Keith King stated in the *Southwestern Law Review*, “[p]rosecuting the President for a state crime would be a removal from office, a power conferred by the Constitution to Congress.”<sup>35</sup> King also went on to state that “[t]he preclusion of state indictment for a sitting President reflects the notion that all citizens of the nation have the right to a functioning government, which supersedes the right of a few to have a speedy prosecution.”<sup>36</sup> Therefore, there should be no circumstance where a sitting president can be indicted by a state. This is an important consideration due to the recent Cohen congressional testimony.

According to former New Jersey Governor, Chris Christie, Trump could be facing charges from the Southern District of New York.<sup>37</sup> These charges however, would have to be brought after Trump’s presidency. With Mueller’s report being given to Attorney General William Barr, Mueller chose to follow the protocols as they were directed to him. As it came out by the end of the weekend, Barr summarized the report to Congress stating that the independent counsel himself would not be choosing to bring charges but would instead leave it up to the Attorney General to make use of the evidence provided and bring charges as seen fit. Attorney General Barr decided not to bring charges from the report, stating that “Deputy Attorney General Rod Rosenstein and I have concluded that the evidence provided during the special counsel’s investigation is not sufficient to conclude that the President committed an obstruction-of-justice offense.”<sup>38</sup> It is also worth noting that Mueller did not state that Trump was exonerated, but rather that the evidence could neither bring an indictment nor outright exonerate the President.<sup>39</sup> Barr later went on to say, perhaps most notably, that “our determination was made without regard to, and is not based off of, the constitutional considerations that surround the indictment and criminal prosecution of a sitting president.”<sup>40</sup>

The question still remains whether the President could face federal charges. The answer to this relies heavily on the social implications that were discussed during the Watergate scandal. Indicting the President while they are serving their term would bring overwhelming harm to the general population. Justice Stevens said that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances.”<sup>41</sup> However, this was in regard to making President Clinton sit for a civil lawsuit, and the Court chose not to extend that ruling to criminal prosecution while in office. If the President were to be arrested and sentenced to prison while serving out the remainder of their term, it would stop any ability for the executive to accomplish their constitutional duties.

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<sup>35</sup> Keith King, *Indicting the President: Can a Sitting President be Criminally Indicted?*, 30 Sw. U. L. Rev. 417 (2001).

<sup>36</sup> *Id.* at 417

<sup>37</sup> *Cuomo Prime Time* (CNN Television broadcast Feb. 28, 2019).

<sup>38</sup> Special Counsel’s Report, William Barr (2019).

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Id.* at 2.

<sup>41</sup> *Clinton v. Jones*, 520 U.S. 681 (1997).



Gorman discusses this in his discussions of the independent counsel's statute. Gorman cites Supreme Court Justice Brett Kavanaugh, who was giving a speech during a symposium at Georgetown Law:

The President is not simply another individual. He is unique. He is the embodiment of the federal government and the head of a political party. If he is to be removed, the entire government likely would suffer, [and] the military or economic consequences to the nation could be severe...Those repercussions, if they are to occur, should not result from the judgment of a single prosecutor - whether it be the Attorney General or special counsel - and a single jury.<sup>42</sup>

Kavanaugh had a lot of experience with the independent counsel's process as he served as a staff attorney under Kenneth Starr in the Whitewater independent counsel's office.

Quite frankly, no one should want the president to be indicted prior to an impeachment. There is no reason why an ex-president cannot face criminal action. However, doing so while that person is serving in the highest office in the free world would create considerable disruption. The country could, and even has in the case of Aaron Burr and Spiro Agnew, survive the indictment of even a vice president, as their roles are significantly reduced from even that of the president. An investigative council should have the ability and the duty to inform Congress of the legal ramifications of an action while it is brought forward on impeachment, any legal proceedings on those charges should have to wait until after the impeachment has seen its course and removal has occurred.

Gorman suggests that this answer would be best answered with a revised independent counsel statute.<sup>43</sup> The statute adopted in 1973 was revised in 1999 following the Starr report. In order to alleviate the issues that have arisen from the statute Congress should revise the current statute as soon as possible. In the statute, Congress should clearly indicate that the public interest requires that the independent counsel make publicly available their report for impeachment and allow the House of Representatives to make an independent conclusion. The independent counsel should not call for an impeachment themselves as this directly contradicts the constitutional mandate which grants the House the authority to call for an impeachment and requires that no criminal charges be initiated while the president is in office.<sup>44</sup> However, they should incorporate Gorman's ideas that the President's time in office should not be counted against the statute of limitations and that the independent counsel should be permitted to confidentially prepare materials for potential indictments until the President's term ends, whether it be by impeachment or by term limit.

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<sup>42</sup> Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 Stan. L. Rev. 324 (1999).

<sup>43</sup> *Id.* at 314.

<sup>44</sup> U.S. Const. Art. I §2 Cl. 5. "The House of Representatives ... shall have the sole Power of Impeachment. U.S. Const. Art. I §6 Cl. 6. "The Senate shall have the sole Power to try all Impeachments."

# FORTY YEARS OF PRECEDENT: REAFFIRMING AFFIRMATIVE ACTION

Danielle N. Hoyer

## I. Introduction

Starting in 1961,<sup>1</sup> affirmative action has been utilized effectively to provide educational opportunities to minority groups that have faced previous discriminations and to increase the representation of these minority groups within federal contracting, employment and higher education. Despite the fact that affirmative action has been banned by eight states<sup>2</sup> at the time of this writing, university affirmative action policies continue to be utilized within many public and private universities nationwide.<sup>3</sup> Data collected from 2015 indicates that affirmative action policies are currently implemented within over one hundred four-year public universities.<sup>4</sup> In order to protect these universities' interest in promoting and sustaining student diversity, the Supreme Court has ruled to protect these race-conscious affirmative action policies for over forty years in several notable landmark rulings going back to 1978.

The Students for Fair Admissions have their sights set on ending affirmative action and have not been discouraged by their previous failed attempt to overturn race-conscious admissions in *Fisher v. University of Texas at Austin* (2013) & (2016).<sup>5</sup> With over 20,000 students and parents comprising the organization, their mission statement aims to overturn decades of precedent. In pertinent part, the mission statement specifies the following goal: "A student's race and ethnicity should not be factors that either harm or help that student to gain admission to a competitive university."<sup>6</sup>

With each subsequent Supreme Court decision over the course of the last four decades, the Court has placed many constitutional restrictions on the practice of affirmative action. In 2003, the Court previously predicted that affirmative action in higher education would not remain necessary as institutions become progressively more diverse and representative of the United States population and went as far as to place an arguable loose termination date on the practice by 2028. The Students for Fair Admissions is attempting to push affirmative action to a premature expiration. However, no matter the number of unique cases or plaintiffs used to

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<sup>1</sup> Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).

<sup>2</sup> The eight states that have prohibited the use race-conscious affirmative action as a matter of state law in the area of higher education are as follows: California; Michigan; Florida; Washington; Nebraska; Arizona; New Hampshire and Oklahoma. Deanna M. Ferrante, *Students Divided on Affirmative Action Case*, CENTRAL FLORIDA FUTURE (January 6, 2016, 7:01 pm), <http://www.centralflorida.com/story/news/2016/01/06/students-divided-affirmative-action-case/78376878>.

<sup>3</sup> Grant H. Blume & Mark C. Long, *Changes in Levels of Affirmative Action in College Admissions in Response to Statewide Bans and Judicial Rulings*. Educational Evaluation and Policy Analysis, Vol 36, No 2, 228 (2014).

<sup>4</sup> State data on colleges considering race in admissions, [https://ballotpedia.org/State\\_data\\_on\\_colleges\\_considering\\_race\\_in\\_admissions](https://ballotpedia.org/State_data_on_colleges_considering_race_in_admissions) (last visited Feb. 6, 2019).

<sup>5</sup> *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013). *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016).

<sup>6</sup> *About*, Students for Fair Admissions, <https://studentsforfairadmissions.org/about/> (last visited Feb. 6, 2019).

weaken the practice, a future ruling to void educational institutions of affirmative action would require a departure from established law and, therefore, is uncertain at best.

## II. The History of Educational Affirmative Action

After John F. Kennedy's Executive Order 10925, requiring government employers "to take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin," the United States Congress promulgated the Civil Rights Act of 1964 which extended this previous Executive mandate involving federal contractors to educational opportunities.<sup>7</sup> Title VI of the Civil Rights Act of 1964 requires "public funds, to which all taxpayers of all races [colors, and national origins] contribute, not to be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination."<sup>8</sup> Thus, Title VI precludes racial discrimination at any institution that receives any federal funding. An institution that violates Title VI risks the forfeiture of future federal funding and also the imposition of other judicial remedies/sanctions.

This legislation also extended the ability to practice take affirmative action as a means of rectifying previous acts of discrimination which may have occurred, as well as giving university and colleges a green light to utilize affirmative action to eradicate current discriminatory behavior and/or gross imbalances to the diversity of an institution's student body. Due to the passage of the Civil Rights Act, numerous private universities benefitting from federal grants have also been tasked with adhering to the standards of non-discrimination contained in Title VI. Though, as previously noted,<sup>9</sup> eight states have chosen to ban the practice entirely, affirmative action has become an instrument of numerous universities and continues to be an effective means for the production of diversity. Despite this, and because the Fourteenth Amendment's Equal Protection Clause mandate is universal,<sup>10</sup> numerous litigants have challenged affirmative action as in essence being a form of reverse discrimination based upon race and therefore a violation of state's obligation to ensure the "equal protection" of the laws. Over the course of forty years of judicial challenges, affirmative action has remained steady, but not strong; with each ruling, the Court has further restricted and constrained the limits of the practice. To better understand the forthcoming litigations, the Supreme Court's previous guidance on the subject must be taken into consideration.

### A. *Regents of the University of California v. Bakke* (1978)

In the case of *Regents of the University of California v. Bakke*, Allan Bakke was twice denied admission to the University of California Medical School at Davis. The school in question reserved sixteen seats of one hundred within its incoming class for students of racial minorities.

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

<sup>8</sup> Civil Rights Act, 42 USCS § 2000d (1964).

<sup>9</sup> See *supra*, note 2.

<sup>10</sup> U.S. Const. amend. XIV, § 1. See also *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

The racial minority candidates received an insulated application review that only compared their portfolios to that of other minorities and Bakke contested this selection process.<sup>11</sup>

Under Fourteenth Amendment Supreme Court jurisprudence, all race-based classifications are subject to a strict scrutiny analysis by the Court. Thus, under this standard, the party wishing to implement a policy that discriminates on race must possess a recognized compelling governmental interest and the means of the asserted policy must be necessary to achieve the proposed interest and narrowly tailored in application.<sup>12</sup> All Equal Protection challenges pertaining to race, ethnicity, or origin must be able withstand a test of strict scrutiny.<sup>13</sup>

The Court considered the motivation behind UC Davis for implementing their affirmative action policy and determined that the attainment of a diverse student body is “a constitutionally permissible goal for an institution of higher education.”<sup>14</sup> Ultimately, the use of insulating application reviews and adhering to a quota system in order to ensure the admission of a particular group because of race or ethnic origin was deemed a “preferential purpose [that] must be rejected...as facially invalid.”<sup>15</sup> The policy of UC Davis was held to be unconstitutional.<sup>16</sup>

#### B. *Gratz v. Bollinger & Grutter v. Bollinger* (2003)

Since *Bakke* is a plurality opinion,<sup>17</sup> it was uncertain how expansively or broadly the ruling should be relied upon by universities moving forward. However, the Court was given an opportunity to readdress and set unquestionably binding precedent with their decision in *Gratz v. Bollinger & Grutter v. Bollinger*, targeting the University of Michigan’s undergraduate program and law school admissions practices, respectively.

In *Gratz*, the University of Michigan’s undergraduate admissions policy was deemed unconstitutional because the racial considerations at issue amounted to race being the deciding factor.<sup>18</sup> While the Court maintained that inclusion of racial considerations in an effort to increase diversity satisfied a compelling interest, the means were concluded problematic. The policy utilized a point system to assess candidates.<sup>19</sup> Candidates that were of an underrepresented minority received an extra twenty points over their peers.<sup>20</sup> Additionally,

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<sup>11</sup> *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 265-266 (1978).

<sup>12</sup> *Id.* at 357.

<sup>13</sup> *Id.* at 290.

<sup>14</sup> *Id.* at 311-312.

<sup>15</sup> *Id.* at 307.

<sup>16</sup> *Id.* at 379. A majority of justices could not agree in *Bakke* about the role of race in admissions decisions, but Justice Powell’s concurrence was later accepted by the Court as binding. In his concurring opinion, Justice Powell directed the Court to the brief submitted by Harvard University detailing their affirmative action program which did not set a minimum number requirement for minority students, but, instead, considered the diversity of each candidate and how said candidate would fit into the incoming class. The Harvard policy was praised for setting sound example and the use of racial considerations as a single factor within a holistic review was adopted by many other universities. *Id.* app. at 321-324.

<sup>17</sup> A plurality opinion is the controlling opinion in cases for which there is no majority opinion. While a majority of justices agreed on the decision, they differed in reasoning behind the decision.

<sup>18</sup> *Gratz v. Bollinger*, 539 U.S. 244, 280 (2003).

<sup>19</sup> *Id.* at 255.

<sup>20</sup> *Id.* at 246.

every student's portfolio did not receive an individualized review and, therefore, it could not be considered narrowly tailored. The policy was considered the "functional equivalent of a quota" system as previously disallowed in *Bakke*.<sup>21</sup>

The Court in *Grutter* thought differently of the University of Michigan Law School's affirmative action policy. Because the Court upheld that "diversity is a compelling state interest that can justify the use of race in university admissions," the analysis focused primarily on the extent to which the admissions review was narrowly tailored.<sup>22</sup> It was determined that under the Law School's admissions assessment that all applicants were given an individualized, holistic review and race was not the deciding factor.<sup>23</sup> Therefore, the review was held as constitutional.<sup>24</sup>

However, in the *Gratz* and *Grutter* decisions, the Court also discussed race-neutral means for the purpose of narrowly tailoring a policy, the states using percentage plans in lieu of affirmative action, and the future of affirmative action in general. The Court denied the total exhaustion of all race-neutral means to be a valid reason to question the narrow tailoring of a policy, but the Court did promote that universities, especially those in states that prohibit affirmative action, should "draw on the most promising aspects of...race-neutral alternatives as they develop."<sup>25</sup> The Court stated that states prohibiting the practice of affirmative action could satisfy this request by the implementation of percentage plans.<sup>26</sup> The reason the University of Michigan Law School did not have to adhere to a race-neutral alternative is because they contended that the quality of their institution would suffer.<sup>27</sup> Moreover, the Court concluded their majority opinion by stating that they "expect that 25 years from now, the use of racial preferences will no longer be necessary to further the [approved] interest" of student body diversity.<sup>28</sup> This sunset clause has been taken as a prophecy for litigants attempting to dismantle affirmative action. The majority opinion in *Grutter* was utilized to threaten affirmative action as early as 2013, but poses a greater threat for affirmative action suits that will come closer to the recommended 2028 deadline.

### C. *Fisher v. The University of Texas at Austin* (2013) & (2016)

In *Fisher v. University of Texas* (2013), the Court affirmed precedent it first discussed in *Bakke* (in Justice Lewis Powell's plurality opinion in the case) and reaffirmed in *Grutter v. Bollinger* in 2003, stating that the consideration of "racial minority status as a positive or favorable factor in a university's admissions process, with the goal of achieving the educational benefits of a more diverse student body" is permissible.<sup>29</sup> Though seemingly a victory for affirmative action, the Court again created tighter parameters around the use of affirmative

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<sup>21</sup> *Id.* at 258.

<sup>22</sup> *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

<sup>23</sup> *Id.* at 337.

<sup>24</sup> *Id.* at 343-344.

<sup>25</sup> *Id.* at 309, 342.

<sup>26</sup> *Id.* Dissent at 369. Percentage plans are admissions policies that grant automatic acceptance to a fixed percentage of top students graduating from their high school class.

<sup>27</sup> *Id.* at 309.

<sup>28</sup> *Id.* at 343.

<sup>29</sup> *Fisher I*, *supra* note 5 at 2418.

action. Furthermore, the Court concluded that an institution would need to show that “no workable race-neutral alternatives would produce the educational benefits of diversity” before such race or gender conscious considerations are permissible.<sup>30</sup>

Instead of ruling on the University of Texas at Austin policy itself, the Court directed its attention to the Court of Appeals review of the University of Texas’s affirmative action policy at issue in the case. Because the Supreme Court was not convinced that the Fifth Circuit Court of Appeals did not apply strict scrutiny in reviewing the record of the case, the Court remanded the case for review once more according the Court’s guidance on the strict scrutiny standard.<sup>31</sup>

The *Fisher* case resurfaced after the Court of Appeals concluded its subsequent review after remand and held that UT Austin’s admissions policy could withstand a test of strict scrutiny. The Supreme Court affirmed this decision in 2016.<sup>32</sup> The university’s admission plan involved automatically accepting any Texas student that graduated within the top ten-percent of their high school class; this accounted for approximately seventy-five percent of their yearly enrollment.<sup>33</sup> The remainder of students that were accepted without the Top Ten Percent Plan received a race-conscious holistic review and was considered “a hallmark of narrow tailoring” due to its limited use.<sup>34</sup> The Court focused on the alternative options available to the university and accepted the arguments of UT Austin stating that there were no other workable means for the university to achieve diversity.<sup>35</sup>

To this day, diversity remains a compelling interest, but over the years of ruling up to *Fisher*, the Court has restrained the means in which a university may use to obtain educational diversity. What started as restrictions against insulating application reviews and reserving class seats in *Bakke* became the following: disallowing race to be the deciding factor; that the practice of should arguable be phased out by 2028; and that race-consciousness methods are only permissible after the exhaustion of all other race-neutral means. Yet, affirmative action survived to face its most recent challenge to date.

### III. The Establishment of The Students for Fair Admissions

The Students for Fair Admissions was established from the Project for Fair Representation shortly after the *Fisher* proceedings to contest the policies of other higher education institutions. At the forefront of the Students for Fair Admissions is Edward Blum, the director of the Project for Fair Representation, and a litigant focusing on activism fighting against legislation that distinguishes between individuals on the basis of race.<sup>36</sup> Blum has been

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<sup>30</sup> *Id.* at 2423-2424.

<sup>31</sup> *Id.* at 2424-2426.

<sup>32</sup> *Fisher II*, *supra* note 5 at 2220.

<sup>33</sup> *Id.* at 2203.

<sup>34</sup> *Id.* at 2215.

<sup>35</sup> *Id.* at 2216.

<sup>36</sup> See Morgan Smith, *One Man Standing Against Race-Based Laws*, The New York Times, 2012, <https://www.nytimes.com/2012/02/24/us/edward-blum-and-the-project-on-fair-representation-head-to-the-supreme-court-to-fight-race-based-laws.html> (last visited Feb. 7, 2019). See also Anemona Hartocollis, *He Took On the Voting Rights Act and Won. Now He’s Taking on Harvard.*, The New York Times, 2017, <https://www.nytimes.com/2017/11/19/us/affirmative-action-lawsuits.html> (last visited Feb. 7, 2019).

involved in numerous Supreme Court cases such as *Bush v. Vera* (1996), *Shelby County v. Holder* (2013), and the aforementioned *Fisher* cases.<sup>37</sup>

Over the years, Blum's work has shifted from removing racial considerations from redistricting and voter laws to preventing race-consciousness in admissions action decisions. Blum's actions supporting litigation that challenges racial classification, including the establishment of the Project on Fair Representation, revolve around the erasure of "racial... preference[s]," but have consequently threatened the erasure of minority representation.<sup>38</sup> Blum, considered the founder of the organization, has taken measures to recruit plaintiffs who would have standing to challenge affirmative action practices by select universities. On the front page of the Students for Fair Admissions website reads an advert to all those rejected from universities: "Were You Denied Admission to College? It may be because you're the wrong race...Tell us about your grades, test scores, and activities."<sup>39</sup> The Students for Fair Admissions has been targeting high achieving students that faced college rejection in a search for plaintiffs. Previously failing in demonstrating a white woman (Abigail Fisher) was denied on the basis of race in the case of *Fisher*, the search has been expanded.<sup>40</sup> In new attempts to overturn affirmative action, Blum now also "need[s] Asian plaintiffs."<sup>41</sup> Also, for the first time, the litigation is challenging affirmative action practices as being unconstitutional. In previous cases, the litigation all pertained to public/state universities.

#### IV. Challenging the Future of Affirmative Action: Harvard and UNC

The present lawsuits threatening affirmative action are being pursued and financed by the Students for Fair Admissions. The organization examines the diversity-driven affirmative action policies of universities and challenges them if they believe they are in violation of the strict legal requirements decided in *Fisher*. It is the Students for Fair Admissions' belief that "Harvard, UNC and most competitive universities are not in compliance with the Supreme Court's instructions."<sup>42</sup>

In-depth details of an institution's affirmative action policy are typically not public knowledge, but the Students for Fair Admissions obtained this information through different means. During the *Fisher* appeals, over seventy amicus briefs were submitted in support of UT Austin, including briefs from Harvard and the University of North Carolina at Chapel Hill. The Students for Fair Admissions are now suing with information regarding university affirmative

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<sup>37</sup> *Bush v. Vera*, 517 U.S. 952 (1996) *Shelby County v. Holder*, 570 U.S. 529 (2013) These cases respectively impacted redistricting and altered the Voting Rights Act of 1965 to the detriment of voters of minority status.

<sup>38</sup> Project on Fair Representation, <https://www.projectonfairrepresentation.org/> (last visited Feb. 7, 2019). *See also*, The Effects of *Shelby County v. Holder*, <https://www.brennancenter.org/analysis/effects-shelby-county-v-holder> (last visited Feb. 7, 2019).

<sup>39</sup> Students for Fair Admissions, <https://studentsforfairadmissions.org/> (last visited Feb. 7, 2019).

<sup>40</sup> *Fisher I*, *supra* note 5 at 2411.

<sup>41</sup> Oiyen Poon, *Edward Blum: "I needed Asian plaintiffs,"* YouTube (Jul. 30, 2018), <https://www.youtube.com/watch?v=DiBvo-05JRg>.

<sup>42</sup> *Legal Issues*, Students for Fair Admissions, <https://studentsforfairadmissions.org/legal-issues> (last visited Feb. 7, 2019).

action policies that they have obtained from the amicus briefs submitted by said universities on behalf of UT Austin.<sup>43</sup>

As of the date this article was written, the trial of *Students for Fair Admissions v. the University of North Carolina at Chapel Hill* is scheduled to commence April 2019 and *Students for Fair Admissions v. Harvard* is scheduled for a second round of arguments before the Massachusetts District Court in February 2019.<sup>44</sup> Regardless of the trial court outcome of either of these cases, it is highly likely the cases will be appealed, with the ultimate goal of another Supreme Court review in the coming next several years.

#### A. Asian Americans and White Americans in Higher Education

Affirmative action has helped increase the representation of minority students within higher education for decades. Asian Americans are certainly a minority group that has faced and continue to face social discrimination in America, but, for the purposes of higher education, Asian Americans have not been a typically challenged group. Asian and white Americans tend to be the biggest achievers within higher education. As of the most recent United States consensus, Asian Americans represent 5.8 percent of the population while African Americans represent 13.4 percent, Hispanic Americans represent 18.1 percent, and white Americans represent 76.6 percent.<sup>45</sup> On average within most four-year institutions, be it public or private, Asian American students represent between 5.26-6.86 percent of the student population while white students represent 65.6-67.1 percent.<sup>46</sup> The Lumina Foundation's 2017 National Summary reflects that degree attainment of Asian and Pacific Islanders within the United States is the highest of any demographic at 61.2 percent.<sup>47</sup> Additionally, 45.7 percent of white Americans have also achieved an associate degree or higher, while African American and Hispanic degree attainment falls behind at 29.3 percent and 21.3 percent, respectively.<sup>48</sup>

Asian American and white students are also highly represented within the top universities in the United States. The universities currently being sued by the Students for Fair Admissions, Harvard and UNC-Chapel Hill, are currently ranked within the top thirty schools in the nation.<sup>49</sup> Both institutions, as per their most recently published incoming-class profile, have Asian Americans as the second most represented demographic. Harvard's class of 2022 includes

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<sup>43</sup> *Fisher v. University of Texas at Austin*, SCOTUSblog, <https://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin-2/> (last visited Feb. 7, 2019).

<sup>44</sup> *Lawsuit Updates*, Students for Fair Admissions, <https://studentsforfairadmissions.org/lawsuit-updates/> (last visited Feb. 7, 2019). Delano R. Franklin & Samuel W Zwickel, *Harvard Admissions Trial Will Stretch Into 2019 with New Hearing, Filings*, The Harvard Crimson, 2018, <https://www.thecrimson.com/article/2018/11/15/admissions-trial-new-hearing/> (last visited Feb. 7, 2019).

<sup>45</sup> *Quick Facts – United States*, United States Census Bureau, <https://www.census.gov/quickfacts/fact/table/US/PST045217> (last visited Feb. 7, 2019).

<sup>46</sup> Rachel S. Franklin, *Benchmarking Student Diversity at Public Universities in the United States: Account for State Population Composition*. Ann Reg Sci., Vol. 49, No. 2, 363, (2012).

<sup>47</sup> *A Stronger Nation: Learning beyond high school builds American talent National Summary 2017*. Lumina Foundation, 4 (2018) <https://www.luminafoundation.org/resources/a-stronger-nation-report> (last visited Feb. 7, 2019).

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

<sup>49</sup> *National University Rankings*, U.S. News & World Report, <https://www.usnews.com/best-colleges/rankings/national-universities> (last visited Feb. 7, 2019).



18.1 percent Asian and 3.8 percent South Asian enrollment compared to 46 percent white enrollment, 14.3 percent multiracial enrollment, 10.7 percent African American enrollment, and 6.5 percent Hispanic American enrollment.<sup>50</sup> UNC-Chapel Hill has a comparable enrollment breakdown with 18 percent Asian American enrollment compared to 66 percent white enrollment, 11 percent African American enrollment, and 9 percent Hispanic American enrollment.<sup>51</sup>

Since admissions and matriculation rates have been favorable to Asian American and white students, the statistics raise questions regarding the Students for Fair Admissions' claims. Why would Asian American plaintiffs be an equal or more viable option than a white plaintiff? If Abigail Fisher's claim to the Supreme Court did not prove successful, why would claims by Asian-American litigants? While obviously speculative, it is reasonable to assume that the goal of the recent legal challenges is almost undoubtedly not to increase representation of Asian American students in higher education. It is reasonable to conclude that the goal in mind is to continue with the trend of whittling away at the use of affirmative action by universities through more and more restrictive Supreme Court precedent with each passing year. The ultimate strategy of the litigation is to constrain the practice of affirmative action until it can be proven as impossible to carry out or to prove that affirmative action is as unnecessary in 2019, instead of the previously suggested year of 2028.

#### B. The Harvard Complaint

Unlike previous affirmative action cases wherein the litigation was commenced by one litigant, the Students for Fair Admissions chose not one, but multiple Asian American plaintiffs, one who was recently denied from the university and an unspecified number of high school students intending to apply, in its complaint against Harvard.<sup>52</sup> The complaint cites four main infractions the plaintiffs believe Harvard to be committing against Title VI, as follows: (1) using a "holistic" admissions review to justify creating higher burdens for Asian American applicants; (2) racial balancing; (3) utilizing race as a defining application feature; and (4) ignoring race-neutral alternatives in the attempt to achieve diversity.<sup>53</sup> The Students for Fair Admissions contend that strict scrutiny is not enough to prevent discrimination that exists behind "the veil of 'holistic' admissions."<sup>54</sup>

The Students for Fair Admissions cite numerous sources to support their complaint that Asian American students are tasked with achieving higher test scores than their peers in order to gain admission into elite institutions such as Harvard. A study conducted by Espenshade-Radford concluded that Asian Americans need to achieve an SAT score 140 points higher than white students in order to be considered for admission into top universities.<sup>55</sup> The Harvard

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<sup>50</sup> *Demographics*, The Harvard Crimson, <https://features.thecrimson.com/2018/freshman-survey/makeup-narrative/> (last visited Feb. 7, 2019).

<sup>51</sup> *Apply - Class Profile*, The University of North Carolina at Chapel Hill, <https://admissions.unc.edu/apply/class-profile-2/> (last visited Feb. 7, 2019).

<sup>52</sup> Complaint at 14-28, *Students for Fair Admissions, Inc. v. Harvard Corp.*, 2014 WL 6241935 (D. Mass.) (No. 1:14-cv-14176-DJC).

<sup>53</sup> *Id.* at 5-8.

<sup>54</sup> *Id.* at 9.

<sup>55</sup> *Id.* at 206-208.

Crimson collected self-disclosed SAT test scores from 80 percent of the class of 2017 and concluded that the average SAT score was 2237.<sup>56</sup> Per result of this survey, the average SAT score for Asian American students was determined to be 2299.<sup>57</sup> Meanwhile, test scores for other racial groups remain at or below the SAT score average.<sup>58</sup> Asian Americans made up roughly 55 percent of all students submitting SAT scores of 2300 or higher to Harvard.<sup>59</sup> Therefore, the Students for Fair Admission are asking that Asian American students receive greater representation for these academic credentials. The Students for Fair Admissions cites the California Institute of Technology's class racial makeup as one that directly derives from academic credentials of students.<sup>60</sup> Caltech's Asian American population noted for the fall class of 2013 was 42.5 percent, and, therefore, is reflective of the top SAT scores in the nation.<sup>61</sup>

Due to the enrollment of Asian Americans at Harvard not being solely representative of top academic achievers, the Students for Fair Admissions consider Harvard to be partaking in racial balancing, as is explicitly prohibited by *Grutter*.<sup>62</sup> The complaint includes a table reflecting the racial demographics of students admitted into Harvard between the years 2006 and 2014, and in each year, the representation of Asian American students has been between 17 and 21 percent.<sup>63</sup> This seems to be an accurate reflection of the 27 percent Asian American applicants Harvard has per annum, but Asian Americans make up 46 percent of the applicant pool with academic credentials in the range from which Harvard usually admits its students.<sup>64</sup> Hence, the Students for Fair Admissions insist that this is not a fair application process for Asian American applicants because they believe Harvard engages in racial balancing to prevent Asian Americans from becoming a larger part of the student body.

Establishing a fact pattern that proves discrimination helps the Students for Fair Admissions display that race is used unconstitutionally (per *Grutter*) as a defining feature of an application instead of a mere "plus-factor" in a university's pursuit for diversity.<sup>65</sup> Furthermore, through the Court's stringent guidance on strict scrutiny in *Fisher*, Harvard must also prove that race-neutral means of achieving diversity do not suffice before turning to race-conscious methods.<sup>66</sup> Harvard previously stated, in their amicus brief for *Fisher*, that race-neutral means "cannot substitute for individualized, holistic review that takes account of race and ethnicity."<sup>67</sup> Seizing on that concession, the Students for Fair Admissions challenge whether or not Harvard has done their due diligence in attempting to employ any viable race-neutral measures. The Students for Fair Admissions insist that Harvard discourages minorities from applying to

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<sup>56</sup> *Id.* at 210-211.

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

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

<sup>59</sup> *Id.* at 220.

<sup>60</sup> *Id.* at 240-242.

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

<sup>62</sup> *Id.* at 288-304. *Grutter, supra* 22 at 330 (quoting *Bakke, supra* 11 at 307; *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

<sup>63</sup> *Id.* at 291.

<sup>64</sup> *Id.* at 298.

<sup>65</sup> *Grutter, supra* 22 at 334 (quoting *Bakke, supra* 11 at 315).

<sup>66</sup> *Fisher I, supra* 5 at 2424.

<sup>67</sup> Complaint at 146, *supra* note 52.

Harvard by favoring legacy students and not providing enough financial aid to students.<sup>68</sup> By far the boldest suggestion posed by the Students for Fair Admissions, the complaint asks Harvard to drop race-based considerations in favor of socioeconomic considerations in order to achieve diversity.<sup>69</sup> This focus on socioeconomic factors is modeled after the University of Colorado's admissions formula that gives preference to students dependent upon numerous socioeconomic factors, such as single-parent status, parents' education level, family income, family dependents, various high-school and hometown statistics, and native language.<sup>70</sup> This system increased minority enrollment at the University of Colorado from 56 percent to 65 percent.<sup>71</sup> Currently, only 20 percent of Harvard students report family incomes of less than \$65,000 a year.<sup>72</sup> The Students for Fair Admissions suggest that this plan will not only eliminate the need for race-based considerations, but also increase socioeconomic diversity within the institution.

Finally, the Students for Fair Admissions use Harvard as an example to attempt to send a message to the Supreme Court that delegitimizes the practice of affirmative action. Citing the studies previously mentioned, the Students for Fair Admissions claim that Harvard exemplifies the idea that "if given the chance" to use racial preferences, universities will abuse this power just to increase the number of represented minority students.<sup>73</sup> Stating that there is "no practical way to ensure that colleges and universities will use race...in any way that would meet the narrow tailoring requirement," the plaintiffs in *Students for Fair Admissions v. Harvard* asks the trial court to consider the arduous requirements of strict scrutiny and therefore determine that no application of affirmative action within higher education can exist as constitutional under the facts of the case as represented above.<sup>74</sup>

### C. University of North Carolina at Chapel Hill

The Students for Fair Admissions filed their complaint against the University of North Carolina at Chapel Hill on the same day they submitted their Harvard complaint. Using the same verbiage as that mentioned above, the plaintiff contends that an arguable high-achieving, white plaintiff was wrongfully denied admission because race was utilized as a defining application feature and because the university ignores race-neutral alternatives while pursuing diversity, thereby disfavoring the plaintiff's application for admissions over others.<sup>75</sup>

Consistent with the litigation in the Harvard case, the Students for Fair Admissions claim that race is a defining feature of UNC's application process and white and Asian American students are thereby negatively impacted by this application process, and, thus, it is unconstitutional per *Grutter*.<sup>76</sup> Table B of the complaint details the number of admitted

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<sup>68</sup> Complaint at 342, 355, 364-366, *supra* note 52.

<sup>69</sup> *Id.* at 306.

<sup>70</sup> *Id.* at 308-309.

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

<sup>72</sup> *Id.* at 320.

<sup>73</sup> *Id.* at 499.

<sup>74</sup> *Id.* at 500.

<sup>75</sup> Complaint at 14, *Students for Fair Admissions, Inc. v. University of North Carolina, et al*, 2014 (M.D.N.C.) (No. 1:14-cv-00954-LCB-JLW-DJC).

<sup>76</sup> *Id.* at 4-5. *Grutter*, *supra* 22 at 336-337 (quoting *Bakke*, *supra* 11 at 319 n. 52).

students, average GPA, and average SAT score for seven different racial categories individuals mark on their application.<sup>77</sup> Asian American and white applicants have an average GPA of 4.57 and average SAT score of 1375; meanwhile, the combined statistic for African American, Hispanic, and American Indian applicants is a 4.40 GPA and a 1269 SAT.<sup>78</sup> The Students for Fair Admissions refers to this as an “academic achievement gap” that arguably proves UNC’s racial bias.<sup>79</sup> UNC in essence relies on non-academic achievement criteria and holistic life experience factors to support their admission of minority applicants with less competitive GPAs and test scores.<sup>80</sup> However, the Students for Fair Admissions counter this with data collected from 100,000 University of California, Los Angeles applicants that display no correlation between an individual’s race and their personal achievement.<sup>81</sup> Additionally, the Students for Fair Admissions argue that academic factors determine approximately eighty percent of admissions decisions at prestigious universities and, therefore, race cannot be merely a plus factor in the application process of UNC Chapel Hill.<sup>82</sup>

In furthering that UNC ignores race neutral means to achieve diversity, just as Harvard does, the Students for Fair Admissions once again uses the University of Colorado’s admissions formula that focuses on socioeconomic status as opposed to race.<sup>83</sup> However, in addition to this, the Students for Fair Admissions urges the consideration of percentage plans before the implementation of racial considerations.<sup>84</sup> The Students for Fair Admissions relies upon a study conducted by UNC, submitted as an amicus brief in the case of *Fisher*, to prove that a percentage plan would allow for diversity to be retained without the use of race-consciousness.<sup>85</sup> The study, filed in support of UT Austin, proved that the adoption of UT Austin’s top-ten-percent plan would increase underrepresented minority enrollment from 15 percent to 16 percent.<sup>86</sup> However, UNC did disclose within the brief that the implementation of such a policy within its institution would also decrease the average SAT score of the incoming class by fifty-six points, decrease the first-year GPAs by a tenth of a point, and students enrolled outside of the top ten percent of their high school classes would decrease from 31 percent to 10 percent.<sup>87</sup> While accepting these findings as fact, the Students for Fair Admissions argue that the fifty-six point SAT decrease is well within the test’s margin of error, the 0.10 GPA decrease is not reflective of the students’ ability to achieve, and that the university does not have a “compelling government interest in preferring applicants who do not finish in the top ten percent of their class.”<sup>88</sup> Overall, the Students for Fair Admissions point out that if a decrease in SAT score or GPA was overlooked to achieve diversity in admissions, the same should apply to a

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<sup>77</sup> Complaint at 55, *supra* note 75.

<sup>78</sup> *See Id.*

<sup>79</sup> *Id.* at 56.

<sup>80</sup> *Id.* at 58-59.

<sup>81</sup> *Id.* at 60-61.

<sup>82</sup> *Id.* at 63.

<sup>83</sup> *Id.* at 68-69.

<sup>84</sup> *Id.* at 74-75.

<sup>85</sup> *Id.* at 77-80.

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

<sup>87</sup> *Id.* at 84.

<sup>88</sup> *Id.* at 104. *See Id.* at 88.

policy that would eliminate the use of race-consciousness whilst still reaping the benefits of diversity.<sup>89</sup>

Consistent again with the complaint against Harvard, the Students for Fair Admissions state that UNC's plan fails under a strict scrutiny analysis by the court.<sup>90</sup> As such, the Students for Fair Admissions are asking the trial court to declare that "any use of race or ethnicity in the educational setting violates the Fourteenth Amendment" and the placement of a permanent injunction on UNC preventing its use of race or ethnicity in admissions decisions.<sup>91</sup>

#### D. Where Does Affirmative Action Go From Here?

In addition to Harvard and UNC-Chapel Hill, the University of Wisconsin-Madison faces legal threats from the Students for Fair Admissions as well; however, to date, no complaint has been filed.<sup>92</sup> Legal experts are predicting that one, if not both, of these lawsuits will end up in front of the Supreme Court, in which there will be yet again another opportunity to attack and potentially overturn affirmative action.<sup>93</sup>

While the Students for Fair Admissions' complaints present evidence from numerous studies detailing the alleged ineffectiveness of affirmative action, there are numerous studies the opposition can cite proving that affirmative action is more necessary now than ever to preserve diversity within education. A study published in *The New York Times* in 2017 shows that while the representation of African American and Hispanic students has inched to higher numbers, there is a growing gap between enrolled and unenrolled college-aged minority students.<sup>94</sup> African Americans make up approximately fifteen percent of the population that are of college-age but only approximately six percent are enrolled.<sup>95</sup> Hispanics make up approximately twenty-two percent of the college-age population, yet only thirteen percent of these individuals are enrolled in a higher education institution.<sup>96</sup> These gaps have increased since the year 1980 by three and six percent, respectively.<sup>97</sup> Stringent court rulings have already taken their toll on the practice; the abandonment of affirmative action would be detrimental to higher education. While America is becoming increasingly more diverse, it is important that universities reflect that diversity.

Unlike the growing importance of racial diversity in many college admissions plans, the need for socioeconomic diversity as a consideration appears to be decreasing. While this might

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<sup>89</sup> *Id.* at 173.

<sup>90</sup> *Id.* at 221.

<sup>91</sup> *Id.* at 64 (b).

<sup>92</sup> The University of Wisconsin-Madison – Not Fair, <http://uwnotfair.org/> (last visited Feb. 7, 2019).

<sup>93</sup> Eric Hoover, *That Other Affirmative-Action Case: The Battle Over UNC's Admissions Policies Heats Up*, *The Chronicle of Higher Education*, 2019, [https://www.chronicle.com/article/That-Other-Affirmative-Action/245519?cid=wcontentlist\\_hp\\_latest](https://www.chronicle.com/article/That-Other-Affirmative-Action/245519?cid=wcontentlist_hp_latest) (last visited Feb. 7, 2019).

*See also Grutter*, *supra* 18 at 343.

<sup>94</sup> Jeremy Ashkenas, Haeyoun Park, & Adam Pearce, *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, *The New York Times*, 2017, <https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html> (last visited Feb. 7, 2019).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

not be the case for every institution, college enrollment for individuals with lower family incomes has surpassed college enrollment for individuals of middle-class status according to an analysis by Forbes.<sup>98</sup> The statistic of students from families making below thirty thousand dollars per year enrolling in four-year institutions is currently thirty-nine percent.<sup>99</sup> Unsurprisingly, students from families making above \$100,000 per year enrolling in four-year institutions is the highest of any income class at sixty-one percent, but students from middling income classes, upper and lower middle-class, enroll at a more analogous forty-five percent and thirty-three percent respectively.<sup>100</sup> Therefore, there is no need to elevate the application of students in the lowest income bracket because they are currently enrolled in higher numbers than their middle class peers. Diversity of socioeconomic status could only ever operate as a proxy for racial diversity on a case by case basis. Socioeconomic status should not be used in lieu of racial diversity because, ultimately, it is not as pressing of an enrollment concern as increasing higher education opportunities for those of traditionally disadvantaged minority status.

Furthermore, although an institution could opt to implement a percentage plan in place of or alongside of a race-conscious admissions plan, an institution should not be required to do so. UNC is justified in its argument to not implement such a policy, because, as stated within *Grutter*, the narrow tailoring of strict scrutiny “does not require the exhaustion of every conceivable race-neutral alternative or mandate that a university choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”<sup>101</sup> In the case of *Grutter*, the Court was satisfied by the University of Michigan Law School’s mere consideration of race-neutral means before implementing their race-conscious policy.<sup>102</sup> UNC has done their due diligence in exemplifying why such a policy would not meet their institutional needs, and therefore, the Court should be satisfied by their reasoning to not implement such a policy.<sup>103</sup>

The same legal logic potentially applies to the Harvard complaint. The Students for Fair Admissions found more faults within the Harvard admissions plan, and Harvard is using its abundant resources to prove that race-neutral means equate to less diversity. Professor David Card of the University of California at Berkeley has already analyzed Harvard’s admissions database and filed a full report attesting to the non-discriminatory nature of Harvard’s application review in June of 2018.<sup>104</sup> Moreover, Harvard has studied dozens of race-neutral alternatives, such as increasing financial aid, top student programs, eliminating Early Action,

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<sup>98</sup> Preston Cooper, *College Enrollment Surges Among Low-Income Students*, Forbes, 2018, <https://www.forbes.com/sites/prestoncooper2/2018/02/26/college-enrollment-surges-among-low-income-students/#46b95359293b> (last visited Feb. 7, 2019).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Grutter*, *supra* note 22 at 339.

<sup>102</sup> *Id.* at 340.

<sup>103</sup> Moreover, the Court has to respect academic precedent set prior to the establishment of affirmative action. In *Sweezy v. New Hampshire* (1957), the Court upheld an institution’s right to academic freedom, which includes the right to choose “who may be admitted to study.” Universities have a right to diversity, from which race cannot be excluded. *Sweezy v. New Hampshire*, 354 U.S. 234, 354 (1957).

<sup>104</sup> *Fact Check: SFFA*, Harvard Admissions Lawsuit, <https://admissionscase.harvard.edu/fact-check-sffa> (last visited Feb. 7, 2019).

affording greater weight to socioeconomic status, *et cetera*, and has determined that none of these practices work at increasing institutional diversity while maintaining all institutional imperatives.<sup>105</sup>

Neither lawsuit is a one-sided fight. Both Harvard and UNC-Chapel Hill have case law on their side. It may be easier for the Students for Fair Admissions to expose problematic practices within the admissions processes of individual universities, but the practice as a whole has a long way to go before it could be rendered ineffective. As stated by the amicus brief filed in favor of Harvard by the American Civil Liberties Union, even if the Students for Fair Admissions prevails, the remedy they seek is not warranted.<sup>106</sup> A violation on Harvard's part, whether it be racial balancing, quota systems, or not sufficiently considering race neutral alternatives, would not mean the practice of affirmative action should be ruled unconstitutional; it would mean Harvard must correct or reassess their practices. There is no case law stating that racial considerations may not be used. Therefore, it does not accurately follow that one or two violations of Equal Protection would mean the required abolition of racial considerations by all universities with the court's jurisdiction. From a legal standpoint, in the short term, the Students for Fair Admissions should not prevail in the dismantlement of affirmative action by lower court rulings adverse to the practice of affirmative action.

## V. Conclusion

Affirmative action is an integral part of higher education. There is as much an institutional right to implement affirmative action as there is a state right to ban the practice of affirmative action. To think that one more challenge could nullify the entire practice of affirmative action is to discount its foundation as weak. The Court has allotted academic freedoms to institutions for years preceding the establishment of affirmative action.<sup>107</sup> The practice of affirmative action has only strengthened a university's right to pursue and protect diversity in its student population.

The Students for Fair Admissions are pursuing every possible avenue that will allow them to weaken the practice. As previously stated, it is reasonable to assume that the goal is to reach the Supreme Court. Harvard and UNC-Chapel Hill are both prestigious and well-equipped to take on their challenges. The Students for Fair Admissions' complaints do not bring any original takes on affirmative action that would rightfully abolish it as a whole. The complaints challenge the specifics of individual policies; even if the Students for Fair Admissions prevail, they should only succeed in requiring these universities to reconfigure their admissions policies. One unconstitutional policy does not discount them all. These lawsuits should not be enough to overturn forty years of precedent, much like the *Fisher* litigation did not invalidate the practice by the Court's decisions in 2013 and 2016.

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<sup>105</sup> *Key Points – Report of the Committee to Study Race-Neutral Alternatives*, Harvard Admissions Lawsuit, <https://admissionscase.harvard.edu/key-points> (last visited Feb. 7, 2019).

<sup>106</sup> Brief for Harvard as Amicus Curiae Supporting Defendants v. Students for Fair Admissions, Inc., p. 5-6, 2014 WL 6241935 (D. Mass.) (No. 1:14-cv-14176-ADB).

<sup>107</sup> *Sweezy*, *supra* note at 103.

Although it could be construed differently, the “sunset clause” written in to *Grutter* reads as a suggestion, not a prophecy. There is no mandated end to affirmative action. Any enforcement of this deadline by the Court would be based upon its interpretation of *Grutter*. The closing words of *Grutter* suggest that, ideally, affirmative action will no longer be necessary when diversity and equality are substantially achieved. Stating that affirmative action will require definite removal by 2028 blurs the lines between legislative and judicial action and was likely not Justice O’Conner’s intention. Affirmative action requires constant reevaluation; hard deadlines cannot be assigned justly.

Moreover, disregarding the effectiveness of affirmative action is an even harder task in the current day than it may become a few more years down the line as diversity and equality are better established. Traditionally, Asian American and white students do not appear to be academically disadvantaged in the admissions process based upon race alone. Meanwhile, African American and Hispanic students still find themselves statistically underrepresented at colleges and universities nationwide. Until the statuses of these individuals are elevated within the classrooms as well as within the working world, affirmative action will still retain its merits, because that is what it was created to do. Affirmative action is an effort to promote the rights and progress of disadvantaged persons. As long as there are disadvantaged people, affirmative action remains necessary.





# WORKING OUT THE FDA POLICIES: REGULATORY ISSUES WITH THE SALE OF SUPPLEMENTS ON THE U.S. MARKET

Milosz P. Alberski

## I. INTRODUCTION

The fitness industry has expanded enormously since its beginnings in the 1960s and 1970s. After the iconic Arnold Schwarzenegger won his sixth consecutive Mr. Olympia title in 1975, hundreds of young men strove to look like him by “pumping iron”<sup>1</sup> in gyms around the world. Today, weight lifting, bodybuilding, or simply going to the gym is no longer exclusive to young men seeking to resemble competitive body builders. In the last twenty years, gym memberships have exploded in popularity and have attracted customers of all ages and backgrounds. Between 2008 and 2017, the number of health club members rose by 33.6% from 45.6 million to 60.9 million, which translates to an increase of 15.3 million people in less than a decade.<sup>2</sup> Similarly, the number of health clubs in the U.S. rose from 30,500 to 38,447 between 2012 and 2017.<sup>3</sup>

With this recent expansion in healthy living and exercise culture has come an opportunity to exploit participants who are hoping to improve their workouts and physique. The promise of achieving fitness goals faster or staying healthier and stronger became a selling point of protein powders, workout formulas, vitamins, and other dietary supplementss. The dietary supplements industry has a great interest in selling their products to the growing number of gym goers and exercise enthusiasts. There is a constantly growing niche of consumers who are often desperate to lose weight faster, gain more muscle mass, or improve their health. According to Grand View Research, the global dietary supplement industry market was valued at \$133 billion in 2016 and is projected to reach over \$270 billion by 2024.<sup>4</sup> However, U.S. laws and regulations governing consumable products have failed to adjust to the challenges that accompany the burgeoning supplement industry. In the United States, dietary supplements, unlike drugs, do not have to be approved by the Food and Drug Administration, a federal agency, which is a part of the US Department of Agriculture overseeing food, drugs and

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<sup>1</sup> The phrase “pumping iron” refers to the bodybuilding industry jargon describing weightlifting, popularized by the documentary *Pumping Iron* (1977) featuring Arnold Schwarzenegger’s preparation for the Mr. Olympia competition.

<sup>2</sup> Melissa Rodriguez, *Latest Data Shows U.S. Health Club Industry Serves 70.2 Million* IHRSA Success By Association (2018), <https://www.ihrsa.org/about/media-center/press-releases/latest-data-shows-u-s-health-club-industry-serves-70-2-million/> (last visited Feb 22, 2019).

<sup>3</sup> Media Center, IHRSA IHRSA, Media Center (2018), <https://www.ihrsa.org/about/media-center/> (last visited Feb. 22, 2019).

<sup>4</sup> Dietary Supplements Market Size Worth \$278.02 Billion By 2024, Personalized Medicine Market Analysis By Product And Segment Forecasts To 2022 (2018), <https://www.grandviewresearch.com/press-release/global-dietary-supplements-market> (last visited Feb 22, 2019).

supplements on the American market.<sup>5</sup> Before it can be sold, a medicinal drug needs to be approved by the FDA for its safety and effectiveness; however, dietary supplements are not required to be previewed and approved before being marketed to consumers.<sup>6</sup> Supplement manufacturers must follow certain requirements concerning the production and labeling of their products, but it is not until the supplement enters the market that it is checked for its safety and legitimacy.<sup>7</sup> The FDA can issue warning letters to the companies selling products that do not meet the federal regulations and require them to pull the products off the market. In 2018, the FDA issued 425 warning letters regarding matters ranging from adulterated food to unapproved medicinal drugs.<sup>8</sup> However, if the company continues to sell the supplement to the public or disagrees with the FDA directive to pull the product off the market, the federal government can prosecute the case for not following the law or sue in a civil court to resolve a factual dispute. This is when the courts and the legal system ultimately decide what what supplements are permitted for consumer usage.can or cannot end up in our local supplement store.

As the courts grapple with the legal issues presented by the growing supplement industry, there is still a question as to how laws and regulations should be modified to ensure the products in the supplement market are safe for consumersThe question remains how can the laws and regulations ensure the safety of consumers and products on the rapidly growing supplement market, as well as what is and what should be the exact role of the American legal system in regulating the supplement industry.

## II. HISTORY OF LAWS AND CASES REGULATING THE FOOD INDUSTRY

The case of *Nix v. Hedden* (1893)<sup>9</sup> shows one of the earliest involvements of the United States Supreme Court in the regulation interpretation of laws regarding food. In this case, the Supreme Court decided whether tomatoes were fruits or vegetables for the purposes of tax law.<sup>10</sup> The Tariff Act of 1883 imposed a ten percent ad valorem tax on imported vegetables but not on imported fruits.<sup>11</sup> The plaintiff in the case sued to recover the duties paid on tomatoes in the port of New York. In the opinion, the Court said:

Botanically speaking, tomatoes are the fruit of a vine, just as are cucumbers, squashes, beans, and peas. But in the common language of the people, whether sellers or consumers of provisions, all these are vegetables which are grown in kitchen gardens,

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<sup>5</sup> National Institutes of Health: Office of Dietary Supplements, *Dietary Supplements: Background Information* (2011), <https://ods.od.nih.gov/factsheets/DietarySupplements-HealthProfessional/> (last visited Feb. 22, 2019).

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

<sup>7</sup> *Id.*

<sup>8</sup> U.S. Food & Drug Administration, 2018 Warning Letters (2019), <https://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2018/default.htm> (last visited Feb. 23, 2019).

<sup>9</sup> *Nix v. Hedden*, 149 U.S. 305 (1893).

<sup>10</sup> *Id.*

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

and which, whether eaten cooked or raw, are, like potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery, and lettuce, usually served at dinner in, with, or after the soup, fish, or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert.<sup>12</sup>

Although the issue considered here appears trivial, this case provides an early instance of the courts taking an active role in shaping law regarding the American food and drug industry. While botanical experts classified the tomato as a fruit, the Court interpreted the law affecting food in accordance to their idea of fairness, rather than ruling based on scientific evidence.

In fact, throughout early American history, courtrooms were the only place where disputes regarding food and drugs could be resolved. Although there were laws regulating food products imported to the U.S., there was no federal laws that protected the American people from consumption of unsafe food and drugs manufactured and sold domestically until 1906.<sup>13</sup> The Pure Food and Drug Act was the very first piece of legislation enacted in the United States preventing the sale of misbranded, poisonous, and adulterated food, drugs, medicines, and liquors.<sup>14</sup> The act did not require products to be preapproved for sale, but it did establish labeling standards and prohibited manufacturers from using illegal substances or ingredients different than those listed on the label.<sup>15</sup> For the first time, manufacturers were required to list ingredients on the label deemed to be additive and dangerous, such as alcohol, morphine, or cocaine.<sup>16</sup> While the act set specific standards for the manufacture and sale of drugs, food was not as strictly regulated. The law prohibited the addition of “any ingredients that would substitute for the food, conceal damage, pose a health hazard, or constitute a filthy or decomposed substance.”<sup>17</sup> This lack of specificity in the language of the law led to various lawsuits. In *United States v. Lexington Mill & Elevator Co.*<sup>18</sup>, the U.S. government sought to seize 625 sacks of flour that had been treated with nitrogen peroxide and bleached, claiming it was “adulterated” by adding the poisonous ingredients and illegal to sell under the Pure Food and Drug Act.<sup>19</sup> The Lexington Mill and Elevator Company admitted to using the process affecting the flour but disagreed over the meaning of the word “adulterated”.<sup>20</sup> The problem presented to the Supreme Court in the *Lexington* case was the meaning of the word “may” in the part of

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<sup>12</sup> *Id.* at 307.

<sup>13</sup> U.S. Food & Drug Administration, *Laws Enforced by the FDA* (2018), <https://www.fda.gov/RegulatoryInformation/LawsEnforcedbyFDA/default.htm> (last visited Feb. 23, 2019).

<sup>14</sup> U.S. Food & Drug Administration, *Milestones in U.S. Food and Drug Law History* (2018), <https://www.fda.gov/AboutFDA/History/FOrgsHistory/EvolvingPowers/ucm2007256.htm> (last visited Feb. 23, 2019).

<sup>15</sup> U.S. Food & Drug Administration, *Part I: The 1906 Food and Drugs Act and Its Enforcement* (2018), <https://www.fda.gov/AboutFDA/History/FOrgsHistory/EvolvingPowers/ucm054819.htm> (last visited Feb. 23, 2019).

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

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

<sup>18</sup> *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399 (1914).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 405.

the statute that deemed food to be adulterated, “...if it contain[ed] any added poisonous or other added deleterious ingredient which *may* render such article injurious to health.”<sup>21</sup> Subsequently, the Court concluded:

The word ‘may’ is used in its ordinary and usual signification, and if an article of food may not, by the addition of a small amount of poisonous substance, by any possibility injure the health of any consumer, it may not be condemned under this subdivision of the act.<sup>22</sup>

While the primary issue in this case concerned whether the treated flour could be considered “adulterated” under the Pure Food and Drug Act, the Court’s interpretation of one word in the statute ultimately determined that the mere presence of poisonous ingredients in a food product, such as flour, does not mean that the product is poisonous. The Court’s conclusion seems edto be illogical. More importantly, it meant that because under this interpretation of the Pure Food and Drug Act, consumers could be exposed to potentially harmful products.

In 1938, Congress passed the Federal Food, Drug, and Cosmetic Act, one of the most important pieces of legislation regulating food and drugs in the United States which, with several amendments added, is still valid today.<sup>23</sup> In contrast to the Pure Food and Drug Act of 1906, it took a proactive approach to product safety issues. For instance, it required new drugs to be demonstrated as safe before entering the market and set safe tolerances for substances that might be otherwise poisonous, which could potentially prevent court disputes such as the *Lexington Mill* case.<sup>24</sup> The act set new standards for food, including the requirement that a producer of a food additive must demonstrate that the additive will not cause harm if used in the intended foods. While the majority of Pure Food and Drug Act violations were resolved in civil courts, the act further supported consumer protections by reducing the burden to prove a criminal offense in drug misbranding cases.<sup>25</sup>

### III. MODERN LAWS AND REGULATIONS OF THE SUPPLEMENT INDUSTRY

Because bodybuilding and fitness did not gain their popularity until the second half of the twentieth century, products like dietary supplements and anabolic steroids were not strictly regulated until the 1990s. In 1990, Congress passed the Anabolic Steroid Act, which was the first law in America that considered anabolic steroids and other hormonal substances that promoted muscle growth as controlled substances.<sup>26</sup> It also established penalties for physical trainers and advisers who would recommend and persuade individuals to possess or use such enhancers. Four years later, Congress passed the Dietary Supplement Health and Education Act

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<sup>21</sup> *Id.* at 407.

<sup>22</sup> *Id.* at 399.

<sup>23</sup> U.S. Food & Drug Administration, *Part II: 1938, Food, Drug, Cosmetic Act* (2018), <https://www.fda.gov/AboutFDA/History/FOrgsHistory/EvolvingPowers/ucm054826.htm> (last visited Feb. 22, 2019).

<sup>24</sup> FDA’s Evolving Regulatory Powers – Milestones, *supra* note 17.

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

<sup>26</sup> Anabolic Steroids Act of 1990, amendment to the Federal Food, Drugs and Cosmetic Act 21 U.S.C. §§ 802-971 (1990).

of 1994 (DSHEA).<sup>27</sup> It was an amendment to the Food, Drug and Cosmetic act, which for the first time provided a regulatory framework for dietary supplements. As of April 2019, it is still a valid law that outlines FDA regulations that guide the supplement manufacturing, labeling, and sales.

There are several issues regarding the DSHEA guidelines that are yet to be addressed by the federal government.<sup>28</sup> One of the major problems is the retroactive approach to new products and ingredients. While food regulations have been in effect in the United States since the beginning of the twentieth century, there is still no requirement that supplements be reviewed by any government agency to verify their safety and effectiveness before they are available to consumers.<sup>29</sup> Another issue is the unclear language of the law, which does not specifically define what substances can be legally manufactured and sold. For instance, one definition of a dietary supplement is “an herb or other botanical”<sup>30</sup> and section 413. (a) of the DSHEA allows for any new ingredient to be introduced as long as it has been present in food supply and has not been chemically altered.<sup>31</sup> The vagueness resulting from such general statements results in disputes regarding the interpretation of the law. For example, does this definition mean that anything found in botanicals and edible plants can be used for supplement purposes?

This issue was brought before the U.S. District Court for the Northern District of Georgia in case of *U.S. v. Quantities of Finished & In-Process Foods* in 2017.<sup>32</sup> The district court granted summary judgement in favor of the government, arguing that the defendant Hi-Tech Pharmaceuticals, Inc. was selling supplements containing 1,3-dimethylamylamine, known as DMAA, which according to the FDA is an amphetamine derivative and does not qualify as a dietary ingredient.<sup>33</sup> In response, the supplement company argued that DMAA is found in geraniums and therefore counts as a dietary ingredient under the “botanical” definition of the DSHEA.<sup>34</sup> The decision was appealed to the United States Court of Appeals for the Eleventh Circuit and the oral arguments were heard in August 2018.<sup>35</sup> During the arguments, the appellate panel noted that the issue is of an evidentiary matter and that the Hi-Tech Pharmaceuticals should have been allowed to present evidence in form of scientific research to back up their claim.<sup>36</sup> No decision of the circuit court of appeals has been issued as of February 2019 and there has not been any public confirmation that the case was dismissed or settled as

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<sup>27</sup> Dietary Supplement Health and Education Act, 21 U.S.C. §§ 1-26 (1994).

<sup>28</sup> State governments can enact their own laws regarding dietary supplements. Several states have done so, which may cause a conflict between the federal and state agencies and courts.

<sup>29</sup> National Institutes of Health: Office of Dietary Supplements, *Dietary Supplements: What You Need to Know*, 2011), [https://ods.od.nih.gov/HealthInformation/DS\\_WhatYouNeedToKnow.aspx](https://ods.od.nih.gov/HealthInformation/DS_WhatYouNeedToKnow.aspx) (last visited Feb. 22, 2019).

<sup>30</sup> Dietary Supplement Health and Education Act, *supra* at 30.

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

<sup>32</sup> *U.S. v. Quantities of Finished & In-Process Foods*, No. 1:13-CV-3675-WBH, 2017 U.S. Dist. LEXIS 214527, (2017 WL 4456903) (N.D. GA April 3, 2017)

<sup>33</sup> *Id.* at 10.

<sup>34</sup> *Id.* at 5.

<sup>35</sup> Steve Myers, *Takeaways: Sports nutrition performance*, Natural Products INSIDER (2018), <https://www.naturalproductsinsider.com/sports-nutrition/takeaways-sports-nutrition-performance> (last visited Feb. 22, 2019).

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

of this date as well. The case not only shows how the federal government and the courts can determine what ingredients can be included in the workout formulas sold in the U.S., but also how the lack of strict and specific laws regarding dietary supplements burdens the judiciary with complex scientific issues.

#### A. ANNOUNCED CHANGES TO THE FDA REGULATIONS

On February 11<sup>th</sup>, 2019, the Food and Drug Administration Commissioner Scott Gottlieb, M.D. released a statement on the agency's efforts to regulate the supplement industry in order to ensure that only safe products are available to the customers on the U.S. market.<sup>37</sup> Gottlieb's announcement is of a great significance to the laws and regulations of the FDA because it describes the biggest changes since the enactment of the DSHEA. The incoming changes seem to be a response to the booming supplement industry. The FDA commissioner notes this boom in his statement:

What was once a \$4 billion industry comprised of about 4,000 unique products, is now an industry worth more than \$40 billion, with more than 50,000 – and possibly as many as 80,000 or even more – different products available to consumers.<sup>38</sup>

On the day of the announcement, the FDA took steps to ensure consumer safety by sending out seventeen warning letters to the companies that inappropriately advertised their supplements products with potential results that were never confirmed by science.<sup>39</sup> In his statement, Gottlieb set out three priorities for the incoming changes. First, to ensure safety of the dietary supplements by protecting consumers from harmful products.<sup>40</sup> Second, to maintain product integrity by ensuring the products contain only the ingredients listed on the label and that the manufacture process of those products meets quality standards.<sup>41</sup> And third, what seems to be an intended result of the first two priorities, to promote informed decision-making by the consumers and health professionals before purchasing or recommending certain product.<sup>42</sup>

The FDA commissioner also announced several steps already implemented or to be implemented in the near future affecting the supplements industry. Those actions include the development of a rapid-response tool to alert the public about dangerous products or ingredients available on the market.<sup>43</sup> Before a new ingredient can be sold to consumers, it now must be submitted to the FDA's new dietary ingredient notification. Gottlieb is also planning on updating the regulatory framework that would ensure safe products but also promote

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<sup>37</sup> U.S. Food & Drug Administration, *Statement from FDA Commissioner Scott Gottlieb, M.D., on the agency's new efforts to strengthen regulation of dietary supplements by modernizing and reforming FDA's oversight* (2019), <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm631065.htm> (last visited Feb. 23, 2019).

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

<sup>39</sup> *Id.*

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

<sup>41</sup> *Id.*

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

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

innovation.<sup>44</sup> The FDA commissioner also announced the creation of the Botanical Safety Consortium, a partnership designed to gather scientists and researchers to evaluate the botanical ingredients and mixtures in dietary supplements.<sup>45</sup>

## B. HOW THE FDA LAWS CAN BE IMPROVED

One of the upcoming changes announced by the FDA Commissioner may finally tackle the issue of misleading labeling by ensuring that products contain only the ingredients listed on the label. According to the Food, Drug and Cosmetic Act (FDCA),<sup>46</sup> manufacturers are required to list only the amount of total macro and micronutrients, but they do not have to disclose the sources and specific compounds that make up that source.<sup>47</sup> This regulatory loophole is the reason why a lot of many consumers buy products of lower quality without even realizing it unintentionally buy lower quality supplement products. That relates to one of the major problems in the supplement industry, termed “protein spiking,” a practice/process described more fully below. Current lab tests used to determine the amount of protein in a given product involve rely on measuring the nitrogen content because protein is made up of amino acids, which contain nitrogen.<sup>48</sup> “Protein spiking” or “nitrogen spiking” refers to the process of manipulating the protein content without changing the actual amount of protein listed on the label.<sup>49</sup> The reason why this practice occurs is because the more beneficial sources of protein for athletes, such as whey or casein, are also more expensive.<sup>50</sup> Therefore, a supplement manufacturer may add cheaper amino acids such as taurine, glycine, or branched-chain amino acids (BCAAs) to reduce the cost of production without changing the amount of nitrogen in the product.<sup>51</sup> However, these cheaper amino acids do not make up complete protein chains; supplements subjected to protein spiking contain the proper nitrogen amount, but the true protein content is not accurately reflected on the label.<sup>52</sup> If a protein supplement is sold as casein and lists twenty grams of protein per serving, but the manufacturer adds five grams of glycine per serving, the consumer only gets fifteen grams of the actual casein protein without realizing it. This unfair business practice was at issue in a lawsuit involving MusclePharm Corp., one of the biggest supplement companies on the U.S. market.

In *Durnford v. MusclePharm Corp.*,<sup>53</sup> the plaintiff, a consumer from California, claimed that MusclePharm made false and misleading statements about the protein content in one of its

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

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

<sup>46</sup> Food, Drug and Cosmetic Act 21 U.S.C. § 301 (1938) (Amend. 1994)

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

<sup>48</sup> Jim Stoppani, *Protein Spiking: The Supplement Industry's Dirty Little Secret*, JIM STOPPANI (2018), <https://www.jimstoppiani.com/supplements/protein-spiking> (last visited Feb. 22, 2019).

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

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

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

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

<sup>53</sup> *Durnford v. MusclePharm Corp.*, 907 F.3d 595, (9th Cir. 2018).



products.<sup>54</sup> The plaintiff conducted an independent testing which showed that the product contained around nineteen grams of protein instead of the forty grams of protein per serving as advertised on the product label.<sup>55</sup> This case made its way to the U.S. Circuit Court of Appeals for the Ninth Circuit where the appellate court reversed the district court's decision to dismiss the case.<sup>56</sup> The district court sided with MusclePharm, citing the Food, Drug and Cosmetic Act, which requires the disclosure of the protein amount and not the specific content.<sup>57</sup> Thus, the district court concluded that the statements could not be misleading if they were made in accordance with federal regulations.<sup>58</sup> The lawsuit was brought under the California Unfair Competition Law, which imposed stricter standards than the FDA's regulations. However, the district court concluded that the FDCA preempts the state-law requirements, and therefore, California consumer law could not create liability for an FDA compliant measurement.<sup>59</sup> The justices judges of the Circuit Court had to decide whether the FDCA, which does not outlaw the nitrogen spiking process and requires to state only the total amount of protein and not the particular sources of protein on the label, preempts state law that requires the label to state the "correct amount of protein per serving", which "is equal to actual amount of protein."<sup>60</sup>

The appellate panel held that the FDCA preempted the California law as to the nitrogen spiking process, but it did not preempt the law against false statements as to the sources and amount of protein.<sup>61</sup> The case was ultimately remanded for further proceedings, but it indicates the legal system's struggle to reach a just conclusion in the case. The district court's dismissal on the basis of preemption of federal law completely ignored the implications of such a holding, which would allow for further unfair practices despite the state law attempting to protect the consumers. The appellate court tried to differentiate between the federal regulation allowing nitrogen spiking and California law requiring the labeling of the correct and actual protein amounts. But should these courts decide this issue in the first place? Such legal disputes call for a reasonable federal law, which should be drafted in close cooperation with the industry experts, scientists, and researchers, to ensure transparency and protect consumers from unfair business practices.

The creation of the Botanical Safety Consortium announced by the FDA Commissioner could prevent lawsuits such as *U.S. v. Quantities of Finished & In-Process Foods*, where the courts had to decide whether an ingredient was in fact plant-derived or whether it was an illegal food additive.<sup>62</sup> If the consortium included scientists and industry experts who could research, test, and determine whether an ingredient should be sold as a dietary supplement, it

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

<sup>55</sup> *Id.* at 598.

<sup>56</sup> *Id.* at 605.

<sup>57</sup> *Id.* at 597.

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

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

<sup>60</sup> *Id.* at 601.

<sup>61</sup> *Id.* at 605.

<sup>62</sup> *Quantities of Finished & In-Process Foods*, *supra* note 35.

could help in the creation of proactive laws that would eliminate unsafe products before they enter the market.

#### *IV. CONCLUSION*

The fact that the last federal law regulating the multibillion-dollar dietary supplement market in the United States was enacted over two decades ago highlights the importance of an update. The flaws and vagueness of the FDCA and DSHEA affect the safety and wellbeing of consumers who are being exposed to unfair business practices. Without governmental requirements to accurately report ingredients and their respective quantities, supplement manufacturers are free to manufacture products of dubious quality and sell them without disclosing detailed information about their contents. In order to ensure informed decision-making by consumers and health professionals, supplement companies should be obligated to list every ingredient and its specific amount on the product's label. FDA regulations allowing new supplements and ingredients to enter the market without a prior approval pose a serious health risk and may cause harm to users unaware of the potential negative effects. New laws should require products and ingredients to be pre-approved by a body of scientists and industry professionals who could ensure the safety of a potential dietary supplement. Changes to the outdated supplement regulations could avoid deferring to judges and justices to resolve cases that require scientific knowledge and expertise. Allowing health professionals to determine what supplements should be sold to the public instead of relying on courts to reach a proper outcome, would benefit the consumers by ensuring safer products and would aid the legal system by having clearer laws preventing broad interpretation.



# THE MUSIC MODERNIZATION ACT: AN ANALYSIS OF NECESSARY IMPROVEMENTS TO PROTECT COPYRIGHTED MATERIAL FROM DIGITAL MUSIC DISTRIBUTORS

Monique Corea

Copyright in the United States is a concept that many people have become familiar with today, because it provides them with the ability to protect their own work, profit from their work, and avoid infringing on others' rights. Whether it be from the need to protect their own work or learning the concept in a course, people, regardless of background, have heard of copyright one way or another. The first copyright laws were enacted shortly after the United States Constitution through the Copyright Act of 1790,<sup>1</sup> which was established in response to the needs of creators of the time. Since then, it has become engrained in American society and business because of its relevance to music content creators. Initially, copyright laws were enacted to cover different forms of work such as books, maps, and other printed media, as creators wanted to ensure the protection of their works.<sup>2</sup> Now, due to advancements in technology, the law has expanded to cover many other forms of work including sound recordings, television programs, internet broadcasts, and online publications.<sup>3</sup> Today, one of the most prevalent areas that copyright law is found is in the music industry. Within this industry, technological developments, such as streaming, have created new ways to receive and present music. As these new technologies have developed new forms of delivery, amendments to past laws and new legislation have been created in order to keep the law concurrent with the progression of society.<sup>4</sup>

Due to a lack of adaptation of the law to new digital technologies, such as music streaming services, groups such as Spotify,<sup>5</sup> Apple, and BMI have continuously grappled with copyright actions. Congress has considered new legislation in order to update copyright law so that musical works could be better protected when handling business with digital music providers. Stakeholders of the music industry have gone to great lengths to remedy copyright issues that music streaming services have brought into the limelight. These groups involved in the music industry, including singers, songwriters, and lawmakers, have negotiated an act called the Music Modernization Act (MMA), which was recently approved by both the House of

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<sup>1</sup> The Copyright Act of 1790, 17 U.S.C § 101 (1790).

<sup>2</sup> *Copyright Timelines: A History of Copyright in the United States*, Association of Research Libraries, <https://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.XHApas2ZNsN> (last visited Feb. 19, 2018).

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

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

<sup>5</sup> See Megan R. Dickey, *infra* p. 7 and note 32.

Representatives and the Senate.<sup>6</sup> The need for the act arose due to groups involved in the music industry wanting more clarity with regard to copyright pertaining to digital providers and streamers. The MMA was signed into law by President Trump on October 11, 2018.<sup>7</sup> The act is the culmination of this effort, and it addresses the modernization of copyright law with regards to digital music providers and streamers.<sup>8</sup> Although the Music Modernization Act is a big step forward for law in relation to digital music distributors and streamers, there are still areas of concern within the three titles of the act that need to be improved upon in order to better protect music copyright owners' intellectual property and work in conjunction with the Copyright Act.

### **The Music Modernization Act Explained**

The MMA combines three bills that were introduced to Congress. These bills were initially denied, but they were revised into three new titles: (1) Music Licensing Modernization, (2) Classics Protection and Access Act, and (3) the AMP Act.<sup>9</sup> The act is intended to improve compensation and licensing of artists' musical work, allow artists who recorded before 1972 to be paid royalties when their work is played on digital radio, and to provide a consistent legal process for studio professionals to receive royalties.<sup>10</sup> The three titles in the act create new guidelines and ways to achieve these three goals.

#### *Title 1: Music Licensing Modernization*

The first title, Music Licensing Modernization, establishes three components. First, it creates a "Blanket License," which allows music providers to permit their clients to conduct "permanent downloads, limited downloads, and interactive streams" of musical works.<sup>11</sup> This allows streaming services like Spotify to provide their customers with the ability to stream music; however, these licenses are limited in that they are only provided to companies on a song-by-song basis<sup>12</sup> so that the transaction of royalties can be monitored. The first title also establishes a mechanical licensing collective (MLC) that will be charged with distributing the "Blanket Licenses," and maintaining a public database that will identify musical works and their respective owners.<sup>13</sup> The MLC will work as a part of the US Copyright Office and will also be tasked with ensuring payment of royalties for musical works. This collective will be funded by

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<sup>6</sup> Music Modernization Act, S. 2823, 115th Cong. (2018) (enacted).

<sup>7</sup> Ed Christman, *President Trump Signs Music Modernization Act into Law with Kid Rock, Sam Moore as Witnesses*, Billboard (Oct. 11, 2018), <https://www.billboard.com/articles/business/8479476/president-trump-signs-music-modernization-act-law-bill-signing>.

<sup>8</sup> Music Modernization Act, S. 2823, 115th Cong. (2018) (enacted).

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

<sup>10</sup> *Summary of H.R.1551, the Music Modernization Act (MMA)*, Copyright Alliance, [https://copyrightalliance.org/wp-content/uploads/2018/10/CA-MMA-2018-senate-summary\\_CLEAN.pdf](https://copyrightalliance.org/wp-content/uploads/2018/10/CA-MMA-2018-senate-summary_CLEAN.pdf) (last visited Feb. 19, 2018).

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

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

<sup>13</sup> Music Modernization Act, S. 2823, 115th Cong. § 102 (2018) (enacted).

digital music providers, such as Spotify and Apple, who pay and support the “Blanket Licenses” via a tax system that is placed on those who make use of them.<sup>14</sup>

The Music Licensing Modernization title also changes how performance rights organizations (PRO’s) may collect performance royalties on behalf of their employers in court proceedings.<sup>15</sup> This will affect some of the biggest named PROs in the United States, including ASCAP, BMI, and SESAC. Before the act was put forth, these companies were each assigned to a single court judge who presided over every case brought by that specific PRO.<sup>16</sup> Under the MMA, the PROs will be randomly assigned a district judge in the Southern District of New York, which contains the copyright rate courts for PROs, on a rotating basis in order to ensure that the judge will view each case and the correlating facts as a new case.<sup>17</sup>

Lastly, this title ends the Notice of Intent (NOI) process that occurs through the Copyright Office.<sup>18</sup> This was a system which allowed music distributors and streaming services to send a NOI if the owner of a musical work could not be determined.<sup>19</sup> This system became a problem as streaming services began to utilize NOIs, even when the owner was known, in order to avoid paying licensing fees.<sup>20</sup> Through this title alone, many changes have been made that affect streaming services, and the MMA offers many other benefits to content creators.

### *Title II: Classics Protection*

The second title of the MMA is “Classics Protection.” This title allows sound recordings created before February 15, 1972 to be protected by federal copyright law.<sup>21</sup> Now, creators of music recorded before that date can receive royalties, including music played through streaming services. The reason music creators did not have access to these royalties previously was because copyright law did not cover sound recordings until that same year. During this time period, music creators pushed for protection of their work,<sup>22</sup> resulting in the Copyright Act of 1976, which did not protect sound recordings created before 1972.<sup>23</sup> In the MMA, they will

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

<sup>15</sup> *Overview of the Music Modernization Act.* Congressman Ted Lieu Press, <https://lieu.house.gov/sites/lieu.house.gov/files/Overview%20of%20the%20Music%20Modernization%20Act.pdf> (last visited Feb. 19, 2018).

<sup>16</sup> Music Modernization Act, S. 2823, 115th Cong. § 104 (2018) (enacted).

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

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

<sup>19</sup> See *Section 115 NOIs Filed with the Copyright Office* U.S. Copyright Office, accessed February 19, 2018. <https://www.copyright.gov/licensing/115/noi-submissions.php>.

<sup>20</sup> Steven Nelson, *Big Copyright Changes Come for Music Streaming Services*, Washington Examiner (May 8, 2018), <https://www.washingtonexaminer.com/news/white-house/streaming-services-near-big-copyright-changes-with-few-objectors-1>.

<sup>21</sup> Music Modernization Act, S. 2823, 115th Cong. § 201 (2018) (enacted).

<sup>22</sup> Copyright Act, 17 U.S.C. § 302 (2018).

<sup>23</sup> *Id.* at §303.

now receive the same protection as sound recordings that were originally covered by the Copyright Act. These protections include rights to claim mechanical and distribution rights, remedies for infringement, payment of royalties via Sound Exchange, an entity tasked with collecting and distributing performance royalties for copyright owners,<sup>24</sup> and state and common law protection.

### *Title III: Allocation of Music Producers Act*

The last title in the MMA is the “Allocation of Music Producers Act” (AMP), and it mainly concerns Sound Exchange, which, as stated above, collects and distributes performance royalties for copyright owners.<sup>25</sup> Performance royalties are earned when a musical work is publicly performed;<sup>26</sup> this includes songs that are performed live or recorded digitally.<sup>27</sup> The title provides that royalties for musical works will be distributed to any contracted music producer who was involved in the creation of sound recordings that are featured through digital media.<sup>28</sup> The title also states music producers must have the artist they worked with send a letter of direction before they may receive royalties.<sup>29</sup> The letter indicates that a portion of the royalties from digital music providers must go to the producer. The title also accounts for works prior to November 1, 1995 if a letter of direction does not exist. When this happens, producers will still be able to collect two percent of royalties for past works.<sup>30</sup> This change is beneficial because those involved in the production and creation of the music will now receive royalties from digitized recordings that have been long demanded, even if a letter of direction from past collaborations is not available.

## **Areas of Concern and Necessary Improvements of MMA**

### *Title I: Music Licensing Modernization Does Not Protect Every Past Copyright Infringements*

The Music Modernization Act (MMA) offers many benefits as well as a foundation to more regulations pertaining to copyright with digital music providers; however, there are still several issues with the act that need to be addressed and improved upon to benefit creators, artists, and copyright holders. The first issue with the act concerns the “Blanket License” and the Mechanical Licensing Collective (MLC) that are to be established through the act.<sup>31</sup> Through

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<sup>24</sup> *Summary of H.R.1551, the Music Modernization Act (MMA)*, Copyright Alliance, [https://copyrightalliance.org/wp-content/uploads/2018/10/CA-MMA-2018-senate-summary\\_CLEAN.pdf](https://copyrightalliance.org/wp-content/uploads/2018/10/CA-MMA-2018-senate-summary_CLEAN.pdf) (last visited Feb. 19, 2018).

<sup>26</sup> *What is the Difference Between Performing Right Royalties, Mechanical Royalties, and Sync Royalties?*, BMI Online, [https://www.bmi.com/faq/entry/what\\_is\\_the\\_difference\\_between\\_performing\\_right\\_royalties\\_mechanical\\_r](https://www.bmi.com/faq/entry/what_is_the_difference_between_performing_right_royalties_mechanical_r). (last visited Feb. 19, 2018).

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

<sup>28</sup> Music Modernization Act, S. 2823, 115th Cong. §302 (2018) (enacted).

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

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

<sup>31</sup> *See supra* note 13, at 3.

Title I, digital music distributors are able to avoid potential claims that may arise from past, unpaid mechanical royalties that are paid to copyright owners when a copy of their work is made.<sup>32</sup> Distributors will be able to do this as long as they support the MLC through funding and receive a “Blanket License” in return for that support. The MMA precludes lawsuits from being filed for past unpaid royalties after January 1, 2018 if distributors have a “Blanket License” and fund the MLC.<sup>33</sup>

When news of this portion of the act emerged, a large number of copyright owners who were never paid royalties by streaming service companies that played their music expressed their frustration with the act by filing suit.<sup>34</sup> The Wixen Music Publishing Group (Wixen) was the first to file suit and to bring this issue into the attention of the public.<sup>35</sup> Wixen is well known and represents many artists, including Tom Petty, Stevie Nicks, and Missy Elliot,<sup>36</sup> which explains why they gained the attention that they did. Wixen filed suit against Spotify for \$1.6 billion shortly before the January 1<sup>st</sup> deadline imposed by the act.<sup>37</sup> If they had not filed before the deadline, the case would have been dismissed, and Spotify would not be liable for copyright infringement. This situation brings about the question of whether the decision to not allow lawsuits against companies that support the MLC places stakeholders on equal ground.

Although the MMA ensures that royalties will be paid and managed through the MCL after January 1, 2018, the act still disallows collection of the large number of unpaid royalties that many copyright owners have not filed for.<sup>38</sup> The process of accessing data to find unpaid royalties is a lengthy one, and copyright owners and company representatives do not always come forward immediately. The MMA now allows royalties to be received in an easier fashion, and it solidifies the rights of copyright owners. However, copyright owners cannot enforce their right to receive royalties unless it is a transaction that occurs after January 1, 2018 and is overseen by the MLC.<sup>39</sup> This new process contradicts the Copyright Act because it prevents copyright owners from being able to bring suit against companies that have violated copyright law in the past.<sup>40</sup> To avoid noncompliance with the Copyright Act, this title must allow copyright

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<sup>32</sup> *What is the Difference Between Performing Right Royalties, Mechanical Royalties, and Sync Royalties?*, BMI Online, [https://www.bmi.com/faq/entry/what\\_is\\_the\\_difference\\_between\\_performing\\_right\\_royalties\\_mechanical\\_r](https://www.bmi.com/faq/entry/what_is_the_difference_between_performing_right_royalties_mechanical_r). (last visited Feb. 19, 2018).

<sup>33</sup> Music Modernization Act, S. 2823, 115th Cong. §102(d) (2018) (enacted)

<sup>34</sup> Megan R. Dickey, *Spotify Faces \$1.6 Billion Lawsuit from Music Publisher Alleging Copyright Infringement*, Tech Crunch (2018), <https://techcrunch.com/2018/01/02/spotify-faces-1-6-billion-lawsuit-from-music-publisher-wixen/>.

<sup>35</sup> Megan R. Dickey, *Spotify Faces \$1.6 Billion Lawsuit from Music Publisher Alleging Copyright Infringement*, Tech Crunch (2018), <https://techcrunch.com/2018/01/02/spotify-faces-1-6-billion-lawsuit-from-music-publisher-wixen/>.

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

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

<sup>38</sup> See BMI Online *supra* note 32, at 7.

<sup>39</sup> Music Modernization Act, S. 2823, 115th Cong. §302 (2018) (enacted).

<sup>40</sup> See Copyright Act, 17 U.S.C. § 302 (2018).



owners to file suit against *all* unpaid royalties, including suits for infractions that occurred in the before January 1, 2018. Congress must then apply the new legislation to transactions that occurred after the MMA was enacted.

The reason that this new system is problematic is because “Blanket Licenses” and the MLC can easily be abused by digital music providers, just as NOIs (Notice of Intents) had been.<sup>41</sup> By supporting the MLC, music streaming companies avoid payments demands by owners of older copyrighted music; they also have the potential to have a large share of power with regards to providing future payments.<sup>42</sup> Since streaming companies fund the MLC and provide their data, they have large amount of power in the collective’s actions. This can be seen through the board that was appointed to manage the collective<sup>43</sup> and control how the bill will be implemented. The board contains ten music publishers and four song writers. The music providers on the board will decide which writers may join the board.<sup>44</sup> The collective holds a lot of potential for abuse by these digital music providers due to their position in the process. If copyright owners cannot bring suit to these digital music providers, how will they be able to enforce their rights to collect royalties for the work they produced when the providers in charge of the system determines the actions taken?<sup>45</sup> There is a strong public need for this act to be remediated, so that the digital music providers do not hold such a large portion of power within the industry. One way this can be achieved is by having a larger variety of stakeholders within the music industry on the board and allowing stakeholders to elect the representatives that they want within the board.

### *Title II: Classics Protection Offers Too Much Protection*

The Classics Act, Title II, allows pre-1972 musical works to enjoy the same federal copyright protection and status as current works.<sup>46</sup> Copyright owners in this class may now receive royalties for the copying of their works onto digital platforms and television. Although Title II provides protection for copyrighted material that has been long overdue for some, some of the provisions do not align with other copyright legislation. Under the MMA, pre-1975 works receive a copyright extension of 95 years, for works created on or before 1972.<sup>47</sup> According to the Copyright Act,<sup>48</sup> the standard number of years a copyright endures for an anonymous work, pseudonymous work, or work made for hire is 95 years or a term of 120 years from the year of

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<sup>41</sup> See Steven Nelson, *supra* p.4 and note 20.

<sup>43</sup> Daniel Sancez, *3 Major Problems with the Music Modernization Act*, Digital Music News (February 27, 2018), <https://www.digitalmusicnews.com/2018/02/27/music-modernization-act-major-problems/>

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

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

<sup>46</sup> *See supra* note 21, at 4.

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

<sup>48</sup> *See* Copyright Act, 17 U.S.C. § 302 (2018).

its creation, whichever expires first.<sup>49</sup> Although the number of years is the same in the MMA, the federal copyright begins in 1972, rather than the year the work was created.<sup>50</sup> This results in copyrights for classic material lasting until the year 2067, an amount of time that is well beyond the specified numbers of years provided by the Copyright Act.<sup>51</sup> This practice allows the extension of copyrights that have already expired, and grants owners of classic copyrights a large sum of time to collect extra royalties. This policy contradicts the Copyright Act, which only grants copyright owners either 95 or 120 years to protection their work.<sup>52</sup> This even applies to copyright owners that have long since passed away, so their copyrights would go to whomever they might have appointed them to in the past which still grants these new owners with an overabundance of years with these protected works.<sup>53</sup>

This extension of time prevents a large number of works from entering into the public domain and creates a need to supply royalties for newly appointed copyrights.<sup>54</sup> This act also requires digital music distributors to pay royalties for older copyrighted works.<sup>55</sup> Additionally, current copyright owners will now need to assess whether they need to pay royalties for works that were previously available in the public domain. This, in turn, requires classic copyright owners with music works found in digital environments to pay for samples or parts of works that were incorporated into their own. In order to remedy this, lawmakers should reconsider the amount of extra time that they are giving these pre-1972 musical works and opt for a shorter term or time period, which will be decided on a case-by-case basis, to comply with the Copyright Act.

### *Title III: Allocation of Music Producers Act Might Not Occur Without a Letter of Intent*

The final issue with the MMA deals with the Allocation of Music Producers Act (AMP Act), Title III. Through this title, people involved in the production process of a musical work may now receive royalties from digital music providers for the distribution of their work;<sup>56</sup> however, in order to gain those royalties, music producers must first have the artist of the work send in a letter of intent that allows them to can receive the royalties.<sup>57</sup> Although the MMA takes into consideration that producers may not be able to obtain letters of intent from past work, the letter of intent will be required in order to receive royalties from the moment the MMA is enacted.<sup>58</sup> Once the bill passes, the receipt of royalties for music producers, or people involved in the production of the work, will be entirely dependent on the company that

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<sup>49</sup> *How Long Does Copyright Protection Last?*, U.S. Copyright Office, <https://www.copyright.gov/help/faq/faq-duration.html>. (last visited Feb. 19,2018).

<sup>50</sup> See Music Modernization Act, S. 2823, 115th Cong. § 201 (2018) (enacted).

<sup>51</sup> See *supra* note 47, at 9.

<sup>52</sup> See Copyright Act, 17 U.S.C. § 302 (2018).

<sup>53</sup> See Music Modernization Act, S. 2823, 115th Cong. § 201 (2018) (enacted).

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

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

<sup>56</sup> See Music Modernization Act, S. 2823, 115th Cong. §302 (2018) (enacted).

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

<sup>58</sup> See Music Modernization Act, S. 2823, 115th Cong. §302 (2018) (enacted).

manages the artist. With the enactment of Title III, the process of royalty distribution will likely be abused, just as the NOIs had been, because the royalties the producers receive will be deducted from the royalties of the artists themselves.

To avoid further abuse, music producers should be allowed to send notice of the people they worked with on a particular piece of music; the notice should then be validated by either the artist or the MLC. With this practice, the MLC could account for both sides of the transaction. By doing this, the artist's letter of intent would not be the primary source of evidence in a lawsuit that arises as a result of music producers not being paid. In this way, both sides would be accounted for, and there would be multiple letters of intent that can be weighed on during trial.

## **Conclusion**

The Music Modernization Act has many areas of concern that need improvement, including the handling of past unpaid royalties, the timespan that pre-1972 royalties are allotted for copyrights, and the oversight of letters of intent.<sup>59</sup> However, this act provides the many stakeholders of the music industry with legislation that finally updates copyright law and adapts it to modern business and technology. Although there are areas to be improved upon, the MMA provides the foundation for the creation of future copyright legislation regarding the modernization of copyright law in the music industry.<sup>60</sup> Since this is the first legislation, hopefully of many, that was geared toward improving the rights of copyright holders, it is possible that new legislation in the area will not be favorable for some stakeholders. The Music Modernization Act was also the first piece of legislation that all the stakeholders in the industry agreed upon in many years, so it is inevitable that there will be benefits and drawbacks for each party involved. In the future legislation regarding modern music practices and digital music providers, some of the areas of concern pointed out beforehand will need to be addressed in order for copyright owners to feel more secure about their work. Technology will continue to advance, thus the way we distribute material will change as well. In order to keep up with the changing technology and music distribution atmosphere, the MMA and other laws need to provide a foundation for future legislation in order to ensure that copyright owners will be protected equally.

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<sup>59</sup> See Music Modernization Act, S. 2823, 115th Cong. (2018) (enacted).

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

## MIND READER: HOW EMOTIONS TAINT JURY SELECTION

Annalisa Gobin

After O.J. Simpson was controversially acquitted in 1995, and people sought answers to how such a thing could happen despite strong evidence of guilt, they often turned their focus towards the trial jury. Specifically, the public directed their attention towards jury selection and a method that included the hiring of special consultants to provide insight into the process<sup>1</sup>. When consultants eventually revealed their focus on human psychology and demographic data when selecting jurors, the disclosure was poorly received by many who feared that the procedure was used to amplify the presence of empathy in the courtroom. Focusing heavily on the background of jury members not only encourages the admission of emotional responses into legal procedure, but also entertains them as equal in weight to evidence. Despite the backlash, lawyers continue to rely on jury strategists, as we saw recently when Bill Cosby's attorneys hired their own team of renowned jury consultants.<sup>2</sup>

Voir dire, French for "to speak the truth," is the legal term for the pre-trial examination of a prospective juror by counsel or a judge. During voir dire, perspective jurors are questioned about their life and views in an attempt to prevent prejudiced individuals from serving on a jury and consequently infringing on a defendant's right to a fair trial.<sup>3</sup> When conducted by attorneys, this process provides an important opportunity to select jurors they believe will return a verdict favorable to their side. During this preliminary stage, an individual's projected temperament is valuable to attorneys, and is evaluated through a technique that resembles an emotional probe. When jurors answer questionnaires, how a question is answered and by whom is often as important as the answer itself. The model juror both delivers the right

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<sup>1</sup> Audrey Cleary, *Scientific Jury Selection: History, Practice, and Controversy*, CONCEPT (2006).

<sup>2</sup> Jon Hurdle, *Bill Cosby Jury Is Set After a Dispute Over the Racial Makeup*, N.Y. TIMES (April 4, 2018), <https://www.nytimes.com/2018/04/04/arts/television/bill-cosby-jury-selection.html>

<sup>3</sup> Michael D Mulvaney & John A Little, *The Importance of Voir Dire: Essential Techniques for Choosing Finders of Fact*, 39 AMERICAN JOURNAL OF TRIAL ADVOCACY 39, 313–338 (2015).

response and belongs to a credible demographic group. Lawyers use this information to predict the emotional reactions that will be recreated by jurors when evaluating evidence during trial.<sup>4</sup>

With multiple studies done in attempt to steer attorneys towards selecting ideal participants, it is necessary for legal professionals to challenge *what* those ideals are and *how* they are developed. How much judgement about a juror's intuition is made based on assumptions of their emotional demeanor?

The emotional power of a jury is a well-seasoned topic of study, with extensive case law that restricts the presence of language or material that might involve purely emotional response over the course of a trial. The legal system has endorsed the idea that when emotions are prejudicial, there should be rules put in place to minimize their prejudicial effects. Yet, there is little enforcement of those sentiments proactively monitoring the creation of a jury, itself.

Emotional reactions are considered nondiscriminatory and within the permissible lines of peremptory challenges—the right of attorneys to reject a potential juror without reason.<sup>5</sup> Even the Batson claim,<sup>6</sup> which provides that peremptory challenges cannot be used to strike a juror based solely on race or gender, fails to capture that discriminatory factors are usually unimportant to attorneys. Lawyers more often strike jurors due to the emotional allegiances associated with certain demographic groups rather than out of pure racism. While a juror cannot be dismissed based on race and gender, an attorney can instead attempt to reject them based on predictions of their emotional responses, demonstrating the inconspicuous nature of emotions prior to trial. Further, when emotional focus is allowed during voir dire, it remains unentertained as an influential factor during the next stages of trial, where emotional appeal is prohibited by instructions and constitutional laws to be a deciding factor by a jury.

Using studies of bias, behavior, and discrimination within jury selection as framework, inferences can be made as to how and why emotions persist within jury selection, the problems they can impose, and the protective measures that can be taken against them.

## **THE RISE OF SYSTEMATIC JURY SELECTION**

To highlight one of the many doors by which emotions may enter voir dire, jury consultants—like those of the Simpson and Cosby trials—have devised a science to design

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<sup>4</sup> Erin Michelle Danielsen, *Predicting jurors' decisions: The Effects of Repeated Expression and Forewarning in Civil Voir Dire* 2713, FIU ELECTRONIC THESES AND DISSERTATIONS (2006), <https://digitalcommons.fiu.edu/etd/2713>

<sup>5</sup> Joshua Revesz, *Ideological Imbalance and the Peremptory Challenge*, 125 YALE L.J. 2535–2549 (2016). (citing the definition of a peremptory challenge)

<sup>6</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

juries that return favorable verdicts. Scientific or Systematic Jury Selection (SJS)<sup>7</sup> originated during the Vietnam War Era and remains targeted by the scientific community as a practice more artistic than factual.<sup>8</sup> But while the motives of the procedure and its status as a recognized science are still controversial, a close examination of its methods provides insight into the hidden pathways of emotional assumption relied upon by jury selectors.

Jury consultants who practice SJS usually focus on certain strategic markers: demographic classification, behavioral responses, and psychological attributes.<sup>9</sup> On the surface, these categories create a very satisfying array of options. Research used by consultants suggest that each distinct demographic group or behavioral cohort represents a unique set of emotional values. However, dividing jury candidates into categories is hardly an organizational technique. Reflective of their grouping, jury consultants use SJS to do a task very common of human nature; mere stereotyping.

Methods like SJS are by no means arcane in their estimates and often reflect our everyday intuitions. The segregation of demographics into categories is designed to pull emotional outcomes. Associating emotions with certain groups is virtually the status quo. For example, a federal prosecutor in a district court once struck a potential juror, perceived to be Indian and “probably Hindu in religion”, because “Hindus tend ... to have feelings a good bit different from us” and the prosecutor preferred an “American juror.”<sup>10</sup> The allowance of this is telling in that it suggests that while striking a juror based solely on race is an unacceptable violation of peremptory challenges, it can be justified when removing them due to biases perceived to accompany that race or ethnicity.

The same case is made when people declare that women are more emotional and will attempt to show more mercy to defendants than men would under most circumstances. Arguments that younger people are more liberal and against harsh sentencing such as the death penalty follow the same logic. The risk of employing methods like SJS is apparent; they send a message to attorneys that prejudicial strikes are beneficial.

## **THE DANGERS OF EMOTIONS IN VOIR DIRE**

Regardless of opinions on prejudice and the accuracy of stereotypes, the problems emotions pose within jury selection are consistent. Emotions distract from evidentiary

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<sup>7</sup> CAROLINE B CROCKER & MARGARET BULL KOVERA, *Systematic Jury Selection*, in THE HANDBOOK OF TRIAL CONSULTING 13-31 (2014).

<sup>8</sup> Visher, C. A., *Juror decision making: The importance of evidence*. LAW AND HUMAN BEHAVIOR, 11, 1-17. (1987).

<sup>9</sup> Lieberman, Joel D. & Sales, Bruce D, *Scientific Jury Selection*. AMERICAN PSYCHOLOGICAL ASSOCIATION (1996).

<sup>10</sup> United States v. Clemmons, 892 F.2d 1153, 1160 (3d Cir. 1990).

presentations, redefine the purpose of a jury, and impede on the constitutional rights of citizens, preventing an impartial legal process.

Jury stacking<sup>11</sup> refers to the result of SJS: a jury filled with members presumed to be biased in favor of one party (either the defense or prosecution). Usually, this refers to the creation of a like-race or same-sex jury. Numerous studies suggest that someone of the defendant's race is more likely to resonate with them and return verdicts favorable to them.<sup>12</sup> In the O.J. Simpson trial, a predominantly female, African-American jury was assessed by consultants to be beneficial. Using race and gender data, the expert consultants crafted a population that was designed to be antagonistic towards the victim and prosecutor of contrasting race, and empathic towards the defendant of their own race.<sup>13</sup>

While the evidence supports these insights, permitting jury stacking is a mere reversal of the Batson claim. If striking a person due to race or gender is prohibited, welcoming a juror for the same reasons should be prevented as well.

The same risks exist within both angles as demonstrated by a study that evaluated another take on the Batson claim.<sup>14</sup> After finding that the side with the most influence on jury selection was usually the most successful, researchers made the following conclusion:

The ultimate levels of implicit bias a racial minority defendant may face up against in court might depend on which side, the defense or the prosecution, happens to have the better judgment in selecting their jury members.<sup>15</sup>

The dangers of entertaining these emotions do not stop at the redirection of focus from the evidence onto the jury. There is indication that increased reliance on emotions and further development of methods like SJS, have begun to impede on Constitutional rights. The Sixth Amendment of the constitution guarantees that, "In 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."<sup>16</sup> Jury instructions—such as those in capital penalty phases, which warn jurors that they “must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling,” urge jurors to abandon any

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<sup>11</sup> D. Shapley, *Jury Selection: Social Scientists Gamble in an Already Loaded Game*, 185 SCIENCE 1033, 1071 (1974).

<sup>12</sup> Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1019 (2012) (basing findings on an empirical study of all felony trials in two Florida counties during five-and-a-half and ten-year periods)

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

<sup>14</sup> Mike Morrison, Amanda Devaul-Fetters & Bertram Gawronski, *Stacking the Jury*, 42 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 1129–1141 (2016).

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

<sup>16</sup> U.S. Const. amend. VI

emotional loyalties that they had disclosed in voir dire, and to deliver a verdict they believe to be their impartial best.<sup>17</sup> When jurors are selected through a procedure littered with emotional analysis, however, is it then reasonable to expect an impartial verdict from those selected using a partial process? In other words, can a juror who has been selected based on predictions of his or her emotional responses subsequently be placed in a courtroom and enter judgments devoid of those emotions?

Despite the warnings outlined in jury instructions for deliberation, it may be unrealistic to expect a juror to interpret these instructions with more discretion after an emotionally charged voir dire. In addition, a psychology study done on juror mentality reported that:

It is unlikely that a jury subconsciously exposed to bias and illogic favoring one side will be moved back toward fairness and logic by subconscious exposure to bias and illogic favoring the other side.<sup>18</sup>

We can safely assume that reliance on methods like SJS would hardly be celebrated by those who, like Aristotle, share the view that the law be “free of passion.”<sup>19</sup> By allowing the selection biases of SJS to prevail, courts encourage the development and use of emotionally drawn methods; methods that contradict the principles of impartiality that the law holds so dear. The perils of advocating the use of emotional vessels like scientific jury selection follows the footwork of other emotional threats within the legal system. Jurors are urged not to make judgments based on mere sentiment to prevent projecting their prejudices onto a defendant, but the act of pulling them to the surface during selection serves as a loophole for these biases to enter surreptitiously.

Thus, the legal system could benefit as a whole from a restrictive voir dire process that forces parties to focus on presentations of evidence rather than attempting to use emotions to manipulate the process. In doing so, a randomized jury can be created, reflecting a more accurate opinion of the people.

## **POTENTIAL REFORMS**

Reform of jury selection is therefore pertinent in upholding the standard of legal procedure and in hindering attempts to hijack the process through emotional appeals and jury stacking. These reforms should not only monitor the strategies used by consultants in methods like SJS, but also those utilized by lawyers in traditional selection to create a more uniform and restrictive process focused on the absolute relevance of information acquired during voir dire.

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<sup>17</sup> *California v. Brown*, 479 U.S. 538 (1987)

<sup>18</sup> F. LEE BAILEY & HENRY B. ROTHBLATT, *FUNDAMENTALS OF CRIMINAL ADVOCACY* (1974).

<sup>19</sup> Liesbeth Huppel-Cluysenaer & Nuno M.M.S Coelho, *The Debate About Emotion in Law and Politics*, In *ARISTOTLE ON EMOTIONS IN LAW AND POLITICS* (2018).



Several solutions have been proposed by critics as outlined below:<sup>20</sup>

1. *Lower the number of peremptories* as Supreme Court precedent already warns against bias when selecting jurors. This would also prevent lawyers from using peremptories to flesh out a jury without justifying each selection.
2. *Halt attorney conduction of voir dire* and instead allow only judges to perform the selection.
3. *Prohibit the use of jury consulting* through legislative action. This would injunct the use of methods employed by these consultants and send a message that implementation of similar strategies will no longer be tolerated during selection.
4. *Limiting the information* that can be sought from potential jurors is an efficient process that will prevent lawyers from seeking information that entertains assumptions.
5. *Force disclosure* of consultant use by making surveys of prospective jurors legally available to the opposing party. Making this information discoverable will allow both parties to benefit from the information and provide more transparency on the types of inferences made.

Implementing these types of reform have been, for the most part, neglected. While further studies will need to be conducted to demonstrate the effectiveness of each option, it is a crucial area for investigation. Alleviating the number of concerns present during jury selection restores confidence that the system is cleansing itself against those emotional biases. At the very least, increasing the awareness of the potency of emotional data within voir dire is a cause of growing necessity.

While reform has yet to manifest, continuing to throw support behind jury analysis and scientific selection provided basis for allowing more emotionally charged material and assessments into the legal field. Clothed as a science, emotionally charged jury selection poses a threat to clear-cut legal procedures and impartial trials. Presently, while the trend of these methods is high, demand for legislative regulation must be brought; sooner rather than later.

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<sup>20</sup> RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM. 163-165 (2016).

# THE LEGALITY OF COVERT OPERATIONS AND INTERVENTIONISM IN INTERNATIONAL LAW

John Vatian

## I: Introduction

International law is a unique area of law that encompasses many aspects and actors, vying for power on the global stage of world affairs. It is a vast subject that includes humanitarian, maritime, and aviation/air space law. Within each of these realms, scholarly debates on policy—and legality—occur. The area of international law that carries much debate, and is central to this article, is the use of covert operations and intervention between state actors and the corresponding legality of these actors. This article will describe how covert action is conducted, and then analyze the variety of definitions pertaining to intervention and the legality of covert operations under United Nations law. Lastly, an analysis of the ongoing events in Venezuela will be presented, and a claim will be asserted regarding potential covert operations presently happening. Throughout this article, the Central Intelligence Agency (CIA) will be referenced, as they are the primary institution through which the United States conducts—and, albeit imperfectly—achieves its foreign policy objectives.

## II: The Covert Action Domain

Covert action is a unique and dynamic foreign policy tool that is not available to many states.<sup>1</sup> Historically, covert action has been “reserved to the superpowers and exercised against Third World nations.”<sup>2</sup> Global superpowers hold numerous advantages over weaker, inferior states. Even if a country is discovered engaging in covert action, there will be minimal retaliation from the subjected country. Economically, the same thing applies, as superpowers are able to exploit the Third World nations’ dependency on trade. In a more general sense, covert action is conducted as a means of preventing full-fledged, open warfare.<sup>3</sup> This falls under the category of intervention, which will be discussed later in the article. In modern international law, open military aggression has generally been condemned and is viewed in a negative light within the global community.<sup>4</sup> Politically, and logically, this makes sense as it welcomes unfavorable consequences to the would-be aggressor. As a result, a negative public image can significantly outweigh any military gains made. Consequently, governments will be less likely to opt for military aggression as a means of intervention.<sup>5</sup> Additionally, wars are costly, both in

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<sup>1</sup> See Ahmed M. Rifaat, *International Aggression: A Study of the Legal Concept: Its Development and Definition in International Law* (1979)

<sup>2</sup> Berkeley La Raza Journal, *Legality of Covert Action under Contemporary International Law*, 1 La Raza L.J. 139 (2015)

<sup>3</sup> See Richard Little, *Intervention: External Involvement in Civil Wars* 4 (1975).

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

<sup>5</sup> Berkeley La Raza Journal, *Supra*, note 1, at 140

financial terms as well as in human life.<sup>6</sup> This is a very important component that decision makers often factor in when strategizing political interests. It should be noted that sending troops abroad often times does not yield national security successes either. According to the Berkeley Raza Journal, “Although they commanded substantial military strength, neither Britain, France, nor Portugal were able to hold on to their colonial empires.”<sup>7</sup> This further highlights the potential ineffectiveness of military endeavors abroad, especially from a historical lens. More recently, however, is the case of Vietnam, where, “Despite an enormous effort, the U.S. failed to defeat the Vietnamese Communists.”<sup>8</sup> In essence, this makes the case that overt military aggression is not the preferred means in international relations, and, as noted above, can have lasting consequences for nations. Because covert operations do not require many resources—and do not drain the economy—it is viewed as an alternative to open warfare. Therefore, covert action has become the primary means of larger, more powerful states when conducting policy to achieve their foreign policy objectives. Examples of this in the U.S. include, relations with Cuba in the 1960’s, intervention in the Middle East from the 1970’s through the 2000’s, and perhaps most notably in recent times, the operation to kill Taliban Leader Osama Bin Laden in 2011. Under international law, it is vital to examine how covert action is defined and how it can be classified.

### III: Covert Action Defined

Scholars have attempted to define covert action numerous times in the past. In this article, it will broadly be defined as “a spectrum of coordinated coercive measures, short of direct military assault, secretly exercised by one state in order to influence the sovereign affairs of another.”<sup>9</sup> The influencing of sovereign affairs is a vital component of the definition and will be more distinctly noted when discussing the United Nations Charter and Resolutions. Within this definition there are three subparts: tactics used, secrecy, and end goals sought.<sup>10</sup>

#### (A) Tactics

Richard Bissell, the Chief of the CIA’s clandestine services from 1958 to 1962, highlights eight distinct and identifiable actions that cement a clear understanding of covert actions:

(1) political advice and counsel; (2) subsidies to an individual; (3) financial support and ‘technical assistance’ to political parties; (4) support of private organizations, including labor unions, business firms, cooperatives, etc.; (5) covert propaganda; (6) private training of individuals and exchange of persons; (7) economic operations; and (8) paramilitary or political action operations designed to overthrow or to support a

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

<sup>7</sup> *Id.*

<sup>8</sup> Taylor, *Force in the Relations Between Great Powers and the Third World*, in *The Use of Force in International Relations*, 150 (F.S. Northedge ed. 1974).

<sup>9</sup> Berkeley La Raza Journal, *supra*, note 1, at 141

<sup>10</sup> *Id.*

regime.<sup>11</sup>

As described by Bissel, covert action is distinct and has widely recognized attributes. Upon examining this list, it is clear that armed forces' operation/aggression is not the part of it. This makes for an important omission especially in light of the definition above. There is also a noteworthy characteristic regarding covert action. It is the fact that the intervening state, from an outside perspective, does not appear to be directly involved in the subjugated country's affairs.<sup>12</sup> This constructed image—one where the intervening state appears uninvolved—can aid in the offending country's means to achieving their state interests, and plays into the next segment of covert actions definition.

#### (B) Secrecy

Although secrecy is synonymous with the term “covert,” they certainly do not apply the same way and there is a unique distinction to be made. Not every covert action is conducted in secret.<sup>13</sup> While this may appear counterintuitive, it reaffirms the nature of covert actions. “Second, covert action may be kept secret from some, but deliberately made known to others.”<sup>14</sup> For example, a countries' covert actions may require assistance from other groups, such as mercenaries or rebels. Therefore, secrecy is important, yet it can undermine the operation in certain situations. However, the defining characteristic may lie in the fact that the acting nation can leverage plausible deniability if a covert action goes wrong. The secrecy aspect, then, is to “prevent responsibility or blame from being placed at its real source.”<sup>15</sup> Furthermore, secrecy plays a vital role on the domestic front. The aggressor country will prevent its own citizenry from being knowledgeable on the context and extent of covert action being taken. If the public knew, they could immediately oppose such an action, resulting in protests and public upheaval. As a result, “secrecy provides the actor government freedom to engage in covert action quickly, without having to justify the action to its citizenry.”<sup>16</sup>

#### (C) Ends sought

The ends sought signify the ultimate purpose and objective for the actions taken. Foreign policy is, in essence, countries attempting to influence one another to further their own state interests; as a result, the line between regular diplomacy and covert action can become blurred. The significant aspect to look for is *purpose*; and whether there was there clear intent to invade the sovereignty of the subject nation. In the case that it is, intent is necessary to look at as well. On the other hand, “acts which appear as merely normal diplomatic bargaining may, when viewed in the context of other activities of the actor state, appear more clearly as one part of a larger plan of covert action.”<sup>17</sup> However, it is important to note that covert action is

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<sup>11</sup> Victor Marchetti & John Marks, *The CIA and the Cult of Intelligence* 39 (1974).

<sup>12</sup> Berkeley La Raza Journal, *supra*, note 1, at 142

<sup>13</sup> *Covert Action in Chile*, at 49-50

<sup>14</sup> Marchetti & Marks, *supra*, note 12, at 144

<sup>15</sup> Berkeley La Raza Journal, *supra*, note 1, at 142

<sup>16</sup> *Id.* at 143.

<sup>17</sup> *Id.* at 144.

just one small aspect of global politics and diplomacy, and, as a result, the entire range of interaction between states must be analyzed before coming to a conclusion.

#### IV: Intervention Defined under International Law

Scholars Ann and A.J. Thomas defined intervention as: “any interference by a state in the affairs of another state which is meant or intended to compel certain action or inaction by which the intervening state imposes or seeks to impose its will.”<sup>18</sup> This serves as an effective definition and will properly lay the groundwork from which intervention can be analyzed. At its core, intervention violates the concept of state sovereignty—“the idea that states are in complete and exclusive control of all the people and property within their territory.”<sup>19</sup> All nations should, in theory, have the right to govern themselves as they see fit and no nation could rightfully interfere in the government of another nation.<sup>20</sup> Interestingly enough, nonintervention has been recognized and “widely accepted by the majority of jurists as the correct rule of international law and the correct behavior of nations in their international relations.”<sup>21</sup> The point of contention is in the scope of the definition of intervention. For instance, a broader definition of intervention, which would include economic and/or political coercion, does not involve the use of force and poses difficulty in distinguishing regular diplomacy and intervention. Looking again to state sovereignty, “if the economic and political pressure is such that it violates the concept of independent state sovereignty, it constitutes intervention.”<sup>22</sup> Over time it has become accepted that, without the use of force, it can still be recognized as a form of intervention. Much like many other areas of law, there are exceptions to the general rule. According to the Berkeley La Raza Law Journal, the general rule prohibiting intervention has been consolidated into six exceptions. These consist of: self-defense or self-preservation; upholding the balance of power; humanitarian prevention; intervention by treaty; intervention to protect foreign nationals and property; and collective intervention by an organization of states.<sup>23</sup> Another scholar, T.J. Lawrence, succinctly summarizes the key issue by claiming that:

The mere fear that something done by a neighbor state today may possibly be dangerous to us in the future if that state should happen to become hostile, is no just ground of intervention.<sup>24</sup>

This reaffirms the second exception in the Berkeley La Raza Law Journal: upholding the balance of power. While there are varying legal jurists, each holding their own opinions on intervention, the main consensus is in the eye of the beholder. Based on the more expansive definition of intervention, which does not require the use of force, covert action would definitively fall under intervention, because by definition it seeks to meddle in the sovereignty

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<sup>18</sup> Ann Thomas & A.J. Thomas, Jr., *The Concept of Aggression in International Law* 71 (1972)

<sup>19</sup> *Globalization 101*, Southern University of New York Levin Institute (2019).

<sup>20</sup> Thomas & Thomas Jr., 71 (1972).

<sup>21</sup> *Id.* at 75.

<sup>22</sup> Berkeley La Raza Journal, *supra*, note 1, at 149

<sup>23</sup> *Id.* at 150.

<sup>24</sup> T.J. Lawrence, *The Principles of International Law* 125

of another nation. If covert action does fall under intervention, then it would suggest that, under no circumstances, can the exception rules apply. This follows logically because if covert action was justifiable then there would be no need for it to be clandestine.<sup>25</sup>

#### V: The Legality of Covert Operations Pertinent to the United Nations

Following the end of World War II, the United Nations became the primary institution which sought to resolve international disputes and promote peace and stability. It also became the primary source of the rules of international behavior. Article 1 of the United Nations Charter lays the framework and objectives of the organization. The goals are “to maintain international peace and security”; suppressing “threats to the peace”, “acts of aggression” and “other breaches of peace.”; but most notably, “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people.”<sup>26</sup> Here noted is the concept of self-determination, but it expands to encompass sovereignty. Article 2, section 1 states “the Organization is based on the principle of the sovereign equality of all its Members.”<sup>27</sup> This is an important legal concept to the UN. Here, the UN recognized the importance of sovereignty to a nation and regards it highly within the international community. Even more important is the concept discussed under Article 2, section 4 which declares:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations.<sup>28</sup>

This is where self-determination, sovereignty, and the threat or use of force is encompassed under the United Nations Charter. Most importantly, each section within these Articles builds upon one another, creating a coherent, clearly defined body of international law and standards, which member nations are expected to abide by.

Now, although Article 2, section 4 is clearly defined and outlined, the debate surrounding interpretation and implementation remains unclear and somewhat ambiguous. Some scholars have argued that “the threat or use of force” can refer to both armed and non-armed force.<sup>29</sup> Under this claim, Article 2, section 4 would then prohibit economic and political sanctions and, most importantly, incorporate subversion under covert action. Therefore, taking any covert action, including something as simple as an economic sanction, would be in violation of the UN Charter and in violation of international law. The other argument is that “the threat or use of force” strictly implies military aggression and the use of armed forces. Under this interpretation, political pressures and economic sanctions do not apply and, as a result, are

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<sup>25</sup> Berkeley La Raza Journal, *supra*, note 1, at 154

<sup>26</sup> U.N. Charter, art. 1.

<sup>27</sup> U.N. Charter, art. 2, para. 1.

<sup>28</sup> U.N. Charter, art. 2, para. 4. *Emphasis Added.*

<sup>29</sup> Rifaat, *supra* note 1, at 234.

legal and admissible under the UN Charter. The first General Assembly of the United Nation specifically prohibiting covert action was Resolution 2131 (XX).<sup>30</sup> It succinctly stated that:

No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.<sup>31</sup>

It went further when it declared:

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no State shall organize, assist, foment, Finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.<sup>32</sup>

These two paragraphs comprehensibly define the boundaries within which states must act. Here, they incorporate the two vital aspects of the aforementioned definitions: to not participate in economic or political pressure to coerce and intervene, directly or indirectly, in the affairs of another state.

As the United Nations General Assembly continued to meet through the years, they soon expanded upon their previous Resolutions, elaborating further against interventionism in the affairs of states. It wasn't until 1975, however, that the nations of the U.N. consistently opposed covert actions, under Resolution 31/91. This resolution reaffirmed the right of each and every state to determine its affairs free from foreign pressure and interference.<sup>33</sup> It declares "any form of interference, covert or overt, direct or indirect, including recruiting or sending mercenaries, by one State or group of States and any act of military, political, economic or other form of intervention in the internal or external affairs of other States, regardless of the character of their mutual relations or their social and economic systems"<sup>34</sup> is denounced.

The last resolution regarding intervention was in 1981, Resolution 36/103 titled "Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States" was adopted by the General Assembly.<sup>35</sup> This declaration definitively sought—and succeeded—in prohibiting the use of covert actions against other states. It states:

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<sup>30</sup> Berkeley La Raza Journal, *supra*, note 1, at 155

<sup>31</sup> G.A. Res. 21313, 20 U.N. GAOR Supp. (No.14) at 11, U.N. Doc. A/6014 (1965)

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

<sup>33</sup> Berkeley La Raza Journal, *supra*, note 1, at 158

<sup>34</sup> G.A. Res. 31/91, 31 U.N. GAOR Supp. (No.39) at 42, U.N. Doc. A/31/39 (1977).

<sup>35</sup> G.A. Res. 36/103, 36 U.N. GAOR Supp. (No. 51) at 78, U.N. Doc. A/36/51 (1981).

The duty of a State to refrain from armed intervention, subversion, military occupation or any other form of intervention and interference, overt or covert, directed at another State or group of States, or any act of military, political or economic interference in the internal affairs of another State, including acts of reprisal involving the use of force.<sup>36</sup>

Therefore, from all the previous Charter's mentioned above, it is clear that clandestine, covert and intervention (of any kind) is expressly prohibited under United Nations law. These actions are more particularly noted when they are dealing with, and pertaining to, the sovereignty of a nation and their internal affairs.

## VI: A Comment on the Events in Venezuela

The recent political events unfolding in Venezuela can shed light to the plausibility of covert action and, potentially, intervention by the United States.<sup>37</sup> On Wednesday, January 23<sup>rd</sup>, 2019 Juan Guaidó, leader of the opposition party to current President Nicolas Maduro, declared himself acting president of Venezuela.<sup>38</sup> "He joined the National Assembly in 2011, serving as an alternate until he was elected in 2016 as representative for the state of Vargas -- the position that he currently holds."<sup>39</sup> According to CNN, he was relatively unknown until he was chosen to lead Venezuela's legislative body.<sup>40</sup> Western Media outlets and more than 50 countries around the world have recognized Juan Guaidó as the interim President of Venezuela.<sup>41</sup> However, a survey was conducted in which 81% of Venezuelans' did not know who Juan Guaidó was prior to being elected as interim President.<sup>42</sup> This does not happen out of mere chance, but rather with the support of powerful forces behind it—possibly the United States. This claim is only further bolstered when, on January 22<sup>nd</sup>, one day before a scheduled mass protest against Maduro, Vice President Mike Pence sent a direct and thorough message to the protesters: "Nicolas Maduro is a dictator with no legitimate claim to power,"; "He has never won the presidency in a free and fair election, and has maintained his grip of power by imprisoning anyone who dares to oppose him."<sup>43</sup> This coincidence is uncanny and warrants further analysis. Less than a week after Guaidó assumed his newfound role, "the Trump administration sent a message to the Maduro government, sanctioning the state-owned oil

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<sup>36</sup> *Id.* sec II, para. (c).

<sup>37</sup> Due to the lack of information because of the secrecy of covert action, there is no definitive proof as to any U.S. intervention in Venezuela. This section will serve as a hypothetical to apply what we do know and will assume to apply the law above.

<sup>38</sup> Nicole Chavez and Rafeal Romo, *Who is Venezuela's Juan Guaido*, CNN, <https://www.cnn.com/2019/01/23/americas/juan-guaido-venezuela/index.html>.

<sup>39</sup> *Id.*

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

<sup>41</sup> Sam Meredith, *Here's how a massive nationwide protest against Maduro could shape Venezuela's future*, CNBC, <https://www.cnbc.com/2019/02/12/how-a-nationwide-protest-against-maduro-could-shape-venezuelas-future.html>.

<sup>42</sup> ¡Oposición sin liderazgo! 81% de los venezolanos no sabe quién es Juan Guaidó (+ Encuesta), <https://www.conelmazodando.com.ve/oposicion-sin-liderazgo-81-de-los-venezolanos-no-sabe-quien-es-juan-guaido-encuesta>.

<sup>43</sup> Jeff Mason, 'Hola, I'm Mike Pence': U.S. VP delivers message of support to Venezuelans, Reuters, <https://www.reuters.com/article/us-usa-venezuela-idUSKCN1PG1W9>.



company PDVSA with the proviso that the sanction will be lifted once Caracas transfers control of the company to the opposition.”<sup>44</sup> What these hard-hitting sanctions have done is essentially cut off Venezuela’s economic life-line: oil. Based on these events alone, a violation of U.N. Charter is abundantly clear. This violation is noted under United Nations law, and previously demonstrated when it says, “The duty of a State to refrain from...any act of military, political or economic interference in the internal affairs of another State...”<sup>45</sup>

On January 26<sup>th</sup>, 2019, the United Nations held an emergency Security Council meeting where numerous countries expressed their view on the situation.<sup>46</sup> The U.N., however, has yet to take an official stance on the matter in Venezuela.<sup>47</sup> Venezuela’s Foreign Minister expressed grave distaste with the United States actions, stating, “No Power [...] can dictate to my country its destiny or its future.”<sup>48</sup> So far, the United States unilateral sanctions have cost Venezuela \$23 billion, causing severe economic turmoil.<sup>49</sup> Bolivia’s UN delegate spoke of solidarity with the Maduro government claiming, “If we are going to talk honestly about the humanitarian situation in Venezuela, let’s talk about who is responsible for the sanctions.”<sup>50</sup> These sanctions are just the latest form of international financial coercion against Venezuela. In fact, prior to this, the world’s largest banks had already begun boycotting Venezuelan transactions, which forced the shutdown of accounts their government used for bond payments.

This forced Venezuela to undertake complicated transactions through Russia and China in particular, but once the formal sanctions came down, these were impossible too. Venezuela cannot trade its currency for dollars which means it cannot pay its dollar denominated debts, which means they default and their credit, their money, is worthless.<sup>51</sup>

Moreover, there are underlying American interests in Venezuela, again relating to oil. The Wall Street Journal reported back in 2017 that Goldman Sachs bought about \$2.8 billion in Venezuelan bonds that had been held by the oil-rich country’s central bank.<sup>52</sup> They purchased that for 31 cents on the dollar, which comes to be approximately \$865 million in bonds.<sup>53</sup> Jan

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<sup>44</sup> Robert Bridge, ‘President’ Juan Guaido, a Neocon Tool for Unlocking Venezuela’s Vast Resources, Strategic Culture, <https://www.strategic-culture.org/news/2019/02/13/president-guaido-neocon-tool-unlocking-venezuela-vast-resources.html>.

<sup>45</sup> Berkeley La Raza Journal, *supra*, note 1, at 160

<sup>46</sup> Press Release, Security Council, ‘With Venezuela Buckling under Severe Shortages, Security Council Emergency Session Calls for Political Solution to End Crisis, as Divisions Emerge over Path Forward,’ U.N. Press Release SC/13680 (Jan. 26, 2019).

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

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

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

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

<sup>51</sup> Andrew Dobbs, *Almost Everything Americans Hear About Venezuela Is A Lie*, American Herald Tribune, <https://ahtribune.com/world/americas/venezuela/2871-everything-americans-hear-lie.html>.

<sup>52</sup> Kejal Vyas and Anatoly Kurmanaev, *Goldman Sachs Bought Venezuela’s State Oil Company’s Bonds Last Week*, The Wall Street Journal, <https://www.wsj.com/articles/goldman-sachs-bought-venezuelan-oil-co-bonds-last-week-1496020176>.

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

Dehn, head of research at the Ashmore Group told Forbes in an interview that “Those bonds double in value if Maduro goes.”<sup>54</sup> This is an indication of both political and economic coercion by the United States to encourage a regime change in Venezuela, and consequently, would be an unmistakable violation of international law.

## VII: Conclusion

Ultimately, the status of covert action in international law is a fascinating one that remains challenged on a daily basis. In the international community and through the U.N., member states have come together to voice opinions on vital matters of the day. Post WWII, the U.N. has been the primary means of resolving disputes between countries and “to maintain international peace and security.”<sup>55</sup>

With regard to Venezuela, Richard Bissell’s list of eight distinct tactics provide a necessary framework to understanding the context of events currently unfolding. His eighth tactic, “...political action operations designed to overthrow or support a regime” provides much needed insight to the present day situation.<sup>56</sup> The United States has supported Juan Guaidó, a previously unknown figure in the opposition party, and has thrown their immense support behind him, rallying its allies across the globe to recognize him as interim President as well. Upon analyzing the issues at hand, the answer becomes clearer: The United States is likely violating the independent sovereignty of Venezuela. Marred by conflicting interests and strong economic incentives, the United States has resorted to political and economic coercion as a form of intervention. As mentioned previously, the critical factor of covert action is that a state can maintain plausible deniability in their actions, protected under a guise of secrecy. While the United States’ actions pertaining to Venezuela have been rather transparent and seamless, they still reserve the right to deny meddling in the country’s affairs due to lack of military action.

Upon analyzing the totality of the present situation it is vital to note the seriousness of these violations. If covert actions and the use of force, both subtly and overtly, are to be stopped, they must be acknowledged and exposed. Whenever they occur, these actions must be openly and transparently discussed, criticized, and legally sanctioned under international law and United Nations resolutions. There are many mediums in the international law realm that can prevent humanitarian and economic crises like this one; The U.N., the International Court of Justice and any regional NGO’s can provide proper forums and the means to address these issues. Applying these potential remedies to the context of Venezuela would be a valuable asset to the international community in fostering discourse and dialogue. Lastly, the events that follow are worthy of paying close attention to, especially with a lens geared toward the United States’ intervention.

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<sup>54</sup> Kenneth Rapoza, *Market Ponders The End Of Venezuela's Failed Socialist Project*, Forbes, <https://www.forbes.com/sites/kenrapoza/2019/01/23/market-ponders-the-end-of-venezuelas-failed-socialist-project/#6908de88e166>.

<sup>55</sup> U.N. Charter, art. 1. *Supra*, see note 25.

<sup>56</sup> Marchetti and Marks, *supra* note 11.



# SPACE FOR IMPROVEMENT: A REVIEW OF THE LEGAL COMPLICATIONS ARISING FROM A MARTIAN COLONY

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## I. INTRODUCTION

Previously, the concept of mankind living on another planet was a futuristic notion that seemed inconceivable. However, recent works of fiction, such as *The Martian*,<sup>1</sup> have illustrated that this futuristic concept is closer than once believed. Historically, innovations are faster moving than we perceive. For example, there was only a fifty-eight-year gap between the Wright Brothers' first flight (1903)<sup>2</sup> and the first manned space flight (1961).<sup>3</sup> Elon Musk, CEO and lead designer at SpaceX, has proposed a one-million-person Martian colony within the next one hundred years.<sup>4</sup> Although his proposal seems outlandish, historical fast-moving innovations prove unconventional ideas are obtainable. Aside from scientific impediments arising from the creation of a one-million-person colony on Mars, we are also faced with the legal complications that emerge from such an endeavor.

Most importantly, does current legislation permit the creation of a Martian colony? If so, how is the legal system on the colony determined? Finally, if an American citizen is moving to SpaceX's Martian colony, do they maintain their American rights? There are a vast amount of legal questions that must be answered before the human race becomes a multi-planet species. To address some of these questions, this article will analyze the laws currently governing outer space and explain what limits they impose onto a Martian colony. Keeping these limits in mind, the article will further discuss some of the fundamental American rights and how they are affected on Martian colony.

## II. DEFINITIONS

To better understand the discussions presented in this article, this section includes definitions of key terms. These key terms include "colony" and "customary international law."

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<sup>1</sup> *The Martian* (20th Century Fox 2015).

<sup>2</sup> Herbert A. Johnson, *THE WRIGHT PATENT WARS AND EARLY AMERICAN AVIATION*, 69 J. Air L. & Com. 21, 23 (Winter, 2004).

<sup>3</sup> Frans G. von der Dunk, *Beyond What? Beyond Earth Orbit?...!: The Applicability of the Registration Convention to Private Commercial Manned Sub-Orbital Spaceflight*, 43 Cal. W. Int'l L.J. 269, 303 (Spring, 2013).

<sup>4</sup> Sarah Knapton, *Elon Musk: We'll create a city on Mars with a million inhabitants*, *The Telegraph*, (June 21, 2017). <https://www.telegraph.co.uk/science/2017/06/21/elon-musk-create-city-mars-million-inhabitants/>.

In this article, the term colony refers to an extraterrestrial city not limited to scientific research or exploration. The proposed population of Musk's colony (one million people) may seem infeasible to some readers; thus, for the remainder of the article, the term colony represents a city of at least ten thousand colonists. The legal analysis is the same for both scenarios, but a Martian city of ten thousand people might seem more plausible within the next one hundred years.

The two leading sources of international law are treaties and customary international law. Customary international law is law that "results from a general and consistent practice of states followed by them from a sense of legal obligation."<sup>5</sup> Both treaties and customary international law are recognized in Article thirty-eight of the Statute of the International Court of Justice.<sup>6</sup>

### III. OUTER SPACE TREATY

Outer space is considered to be the final frontier, which is daunting due to the unknown: the unknown galaxies, unknown lifeforms, and unknown legal system. To lessen the threat of the unknown, governments around the world created a legal framework to govern activities in outer space. This legal framework is called the "Outer Space Treaty."<sup>7</sup> This treaty severely limits the possibility of a United States-established colony, but in the near future, it might not have the same effect for a private colony. A colony created by the United States is restricted because "[o]uter space, including the Moon and other celestial bodies, is not subject to national appropriation by claims of sovereignty."<sup>8</sup> In effect, the United States and any other nation subject to this treaty may not claim any part of outer space for their nation. This treaty further claims that outer space is the property of "all peoples."<sup>9</sup> While this claim is beneficial in theory, it hinders nations' use of outer space.

In practice, the Outer Space Treaty creates a situation that is similar to that of a sports team receiving a trophy. The team members (i.e., nations subject to the treaty) all have an equal privilege to the trophy (i.e., outer space), but all they can do is observe (i.e., explore) the trophy. The individual team members cannot take ownership of the trophy or alter it in any way; thus, none of the members can use it. If one member uses the trophy, then they infringe on another's right to use the trophy. Similarly, Earth's nations cannot use outer space because one nation's use violates another nation's use. The United States cannot establish a colony

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<sup>5</sup> Louis Henkin, *International Law: Cases and Materials* 51 (West Publishing Co. 3<sup>rd</sup> ed. 1993).

<sup>6</sup> Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031.

<sup>7</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, opened for signature Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter *Outer Space Treaty*]. As of 2018, 107 countries have ratified this treaty.

<sup>8</sup> *Id.* at Art. II.

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

under the Outer Space Treaty, but there is possibly another way to colonize Mars. Pershing best explains this possibility in *Interpreting the Outer Space Treaty's Non-Appropriation Principle*:<sup>10</sup>

Despite an original broad interpretation of the non-appropriation principle during the Treaty's drafting, customary international law has since carved out an exception to this principle for extracted space resources. A second shift could be similarly underway. Driven by economic incentives, States may reinterpret the non-appropriation principle to allow for private appropriation of space property.<sup>11</sup>

If the interpretation of the non-appropriation principle allows for private entities to appropriate space, private entities would still have to abide by the laws of the Outer Space Treaty. Essentially, SpaceX could build a Martian colony and would be subject to the remaining provisions of the Outer Space Treaty. For example, SpaceX would have to comply with Article VI of the treaty: a “non-governmental entit[y] ... shall require authorization and continuing supervision by the appropriate State Party to the Treaty.”<sup>12</sup> In sum, because SpaceX is an American company, the United States acts as the authorizer and supervisor to its activities in space.

Despite the possibility described above, the current customary international laws and treaties do not allow for private appropriation of space. If SpaceX wants to establish a colony under current customary international law, then the United States must either amend or withdraw from the Outer Space Treaty; both are realistic options.<sup>13</sup> President Trump has instructed the military to establish the Space Force branch<sup>14</sup> and directed NASA to prepare for missions to the moon and Mars.<sup>15</sup> With the escalation of space aspirations, comes a desire to be liberated from the limitations of the Outer Space Treaty. This leads to two possibilities: either customary international law changes the interpretation of the Outer Space Treaty to allow individuals to appropriate space, or the United States amends or withdraws from the Outer Space Treaty. The remainder of this article assumes the national appropriation principle has been changed to allow for private appropriation, by either customary international law or by amendments to the Outer Space Treaty.

Thus, under the assumed interpretation, a private entity is able to start a colony on Mars, and the United States has jurisdiction over the colony if the entity is registered under the United

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<sup>10</sup> Abigail D. Pershing, *Interpreting the Outer Space Treaty's Non-Appropriation Principle: Customary International Law from 1967 to Today*, 44 Yale J. Int'l L. 149, (Winter, 2019).

<sup>11</sup> *Id.* at 178

<sup>12</sup> UN, *supra* note 7, at Art. VI.

<sup>13</sup> UN, *supra* note 7, at Art. XV, XVI.

<sup>14</sup> Mike Wall, *Trump Signs Directive to Create a Military Space Force*, SPACE.com, (Feb. 20, 2019). <https://www.space.com/president-trump-space-force-directive.html>

<sup>15</sup> Jen Rae Wang, *New Space Policy Directive Calls for Human Expansion Across Solar System*, NASA, (Nov. 30, 2018). <https://www.nasa.gov/press-release/new-space-policy-directive-calls-for-human-expansion-across-solar-system>

States' membership to the Outer Space Treaty.<sup>16</sup> To understand why the United States maintains jurisdiction over a private entity from the United States, one must look at Article VIII of the Outer Space Treaty:

A State Party to the Treaty on whose registry an object launched into outer space is carried *shall retain jurisdiction* and control over such object, and over any personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth.<sup>17</sup>

Therefore, if every object SpaceX launches is registered through the United States, then SpaceX's Martian colony would be under the jurisdiction of the United States.

#### IV. RIGHTS ON A MARTIAN COLONY

If SpaceX launched the first transport shuttle today, would the United States citizens on board be able to bring their constitutional rights with them? This section seeks to answer this question as well as whether fundamental American rights differ between Mars and Earth. Lastly, the final part of this section is not intended to encompass all possible legal complications arising from an American citizen's rights. Rather, it aims to use the Second and Third Amendments to illustrate how American rights can cause legal turmoil on a Martian colony.

As discussed earlier, the United States has jurisdiction over a private entity's colony because of the Outer Space Treaty. Because of this jurisdiction, the rights of the colonists are derived from the federal government. On Earth, one has the right of "freedom of speech,"<sup>18</sup> but whether that right is protected depends on the situation surrounding the speech. If a person yells, "Fire!" in a crowded theater, then their speech is not protected.<sup>19</sup> This person retains his right to freedom of speech, but his speech at that time, in that place, and in that manner is not protected. Likewise, on Mars, a citizen's rights' applicability depends on the situation. Overall, we can assume the American citizen has the same rights, whether they reside on Mars or on Earth; the only difference is the application of the rights due to situational differences.

The first highlighted right that causes legal issues is the right to "keep and bear arms."<sup>20</sup> In 2008, The Supreme Court affirmed this right as an "individual right,"<sup>21</sup> meaning an individual does not have to be part of a militia to maintain this right. Thus, a colonist also retains this individual right. However, it is important to note the Supreme Court also commented that this

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<sup>16</sup> UN, *supra* note 7, at art. VIII.

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

<sup>18</sup> U.S. Const. amend. I.

<sup>19</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>20</sup> U.S. Const. amend. II.

<sup>21</sup> *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008).

right is “not unlimited.”<sup>22</sup> Similar to other rights, the right to bear arms can be restricted in certain circumstances. On Earth, this right is restricted in many different ways, such as requiring a background check to purchase a firearm or disallowing a private individual to own a weapon that is too dangerous, such as a grenade launcher. It has long been accepted that certain arms are too dangerous and can be prohibited under the Second Amendment.<sup>23</sup> It follows that arms which are too dangerous, such as a grenade launcher, are illegal on Mars for the same reasons they are illegal on Earth. The Court also mentions “forbidding the carry of firearms in *sensitive places*”<sup>24</sup> (such as a school) is constitutional. The question then is if a Martian colony would be considered a sensitive place. The travel between the colony and Earth is surely a sensitive place because firing a firearm could breach the walls of the shuttle and kill everyone. But is the Martian colony as sensitive as a space shuttle or a school? Firing a firearm could pierce the walls and open the structure to the outside, creating a potential danger to all colonists. If it is determined that the colony is not a sensitive place, then the United States government could not prohibit firearms on the colony.

The other hurdle for the Second Amendment is the Outer Space Treaty. This treaty mandates the moon and other celestial bodies should be used “exclusively for peaceful purposes.”<sup>25</sup> Initially, it seems bearing arms on Mars counteracts using it for peaceful purposes. The difficulty is that we have not yet had any arms on a celestial body, so there is not a precedent for guidance on if arms can coexist with the phrase peaceful purposes. Also, the Antarctic Treaty,<sup>26</sup> which has the same peaceful purposes requirement, does not provide more insight into the interpretation of this phrase. The interpretation of peaceful purposes that has the most support interprets it as meaning non-aggressive.<sup>27</sup> If this is the case, firearms could be permitted on Mars, as long as they are not used in an aggressive manner. Acts of defense are not considered to be aggressive acts. Therefore, keeping and bearing arms for the purpose of self-defense against others or the government would not be considered to be aggressive and would thus be considered peaceful.

One concern for the United States’ justice system on Mars is the ability to have United States judicial officers on the private colony. This colony needs police officers, judges, and prosecutors for the same reason an American city needs police officers, judges, and prosecutors: to enforce legislation. The private colony could invite or accept United States judicial officers to their colony, but the confusion emerges when the private entity does not permit the United States government access. The Third Amendment provides insight into this conundrum. It reads, “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner,

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<sup>22</sup> Id. at 595.

<sup>23</sup> Id. At 627.

<sup>24</sup> Id. at 626.

<sup>25</sup> UN, supra note 7, at Art. IV.

<sup>26</sup> The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

<sup>27</sup> Major Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 A.F. L. Rev. 1, 79 (2000).



nor in time of war, but in a manner to be prescribed by law.”<sup>28</sup> The plain reading of the text seems as if the term soldier would only apply to military members, but the term could cover more occupations if it is interpreted broadly; however, it is difficult to determine the definition because the Supreme Court has not yet defined it. The United States Court of Appeals for the Second Circuit, on the other hand, considered “National Guardsmen are ‘Soldiers.’”<sup>29</sup> In the same case, they “did ... broadly interpret the term ‘owner’ ... thus, the [term] ‘soldier’ ... should also be broadly interpreted.”<sup>30</sup> With a broad interpretation, the Third Amendment could very well cover United States judicial officers and other government officials. If the broad interpretation is accepted, then the private space colony is enabled to exclude the United States government from enforcing their laws on the colony. Conversely, if the Supreme Court defines the term soldier to only apply to military personnel, then the private colony might be unable to forbid the United States government from putting personnel on the colony using the Third Amendment.

## V. CONCLUSION

The movement of mankind from Earth to the rest of the universe has been a vision for many years. This vision entails a vast amount of legal complications, which provoked the creation of the Outer Space Treaty. Because the treaty is idealistic and seeks to prohibit the use of space for selfish or harmful purposes, the Outer Space Treaty is overly restrictive. The limitations of the current treaty hinder nations and their citizens from utilizing outer space.

In SpaceX’s colony, the Outer Space Treaty dictates that the United States legal system would have jurisdiction. As a result, the rights of colonists would travel from the Earth to Mars with them. Although these rights on Mars may be applied differently than those on Earth because of situational differences, they are fundamentally the same. With the change of circumstances, there are certain individual rights that would cause difficulties, particularly those found in the Second and Third Amendments.

Ultimately, the current laws governing space activities are inadequate. The Outer Space Treaty is visionary by trying to bring mankind together, but it is unrealistic with modern aspirations. It is likely that customary international law will dictate that private entities can appropriate outer space, but it would be more advantageous if the United States proposed an amendment to the Outer Space Treaty. In doing so, the United States could solve other problems for which the treaty does not provide solutions. Proposing an amendment (even if it is not accepted) would spark the conversation of revitalizing international space law. The Outer Space Treaty came into fruition before the first manned moon landing; likewise, a revitalized body of space law should

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<sup>28</sup> U.S. Const. amend. III.

<sup>29</sup> CHRISTOPHER J. SCHMIDT, *COULD A CIA OR FBI AGENT BE QUARTERED IN YOUR HOUSE DURING A WAR ON TERRORISM, IRAQ OR NORTH KOREA?*, 48 St. Louis L.J. 587, 655.

<sup>30</sup> *Id.* at 591.

be established before mankind takes another “giant leap.”<sup>31</sup> The world is ready to be a multi-planet species, and the laws governing outer space should be clear and unambiguous.

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<sup>31</sup> Neil Armstrong, Address from the Surface of the Moon (July. 20 1969).



