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## Leahy—Sharpening the Blade

Nandor F.R. Kiss

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# LEAHY—SHARPENING THE BLADE

Nandor F.R. Kiss\*

## ABSTRACT

*Over the course of the last 20 years, the Leahy Law has become one of the cornerstones of foreign and human rights policy. Yet, despite its largely unchallenged importance, field practitioners and other stakeholders have identified a number of substantive and practical deficiencies that greatly diminish the law's ability to achieve the desired effect, and worse, may pose a risk to the United States' interests. In reflecting on these deficiencies, and armed with decades of data and anecdotal evidence, this Article proposes adjustments focused on better aligning the law's intent and effect. These recommendations range from semantic edits to substantive policy changes which may affect the way that Leahy operates in substantial ways. We should not fear revisiting the original intentions now that we have seen how the law operates. Like all things, the Leahy Law must be continually improved or it risks becoming an empty remnant of its former self. America needs to be a world leader in the area of human rights, but it requires functional tools in order to do so. Congress needs to sharpen the blade and it's the author's hope that, by implementing the changes presented in this Article, it can do just that.*

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## I. INTRODUCTION

In the hills of the Morazán region of el Salvador, near the Honduran border sits the village of El Mozote. It is one of those small corners of the world that typically eludes the attention of the global community, and likely would have, had it not been for one chilling ordeal in the early 1980s. At the time, the Morazán region was home to a number of guerilla groups that had been consistently evading the Salvadoran government during the country's civil war.<sup>1</sup> Eventually, one battalion of the Salvadoran armed forces found their way to the village of El Mozote and over the course of three days tortured, raped, and killed over 800 Civilians.<sup>2</sup>

On the morning of December 10, 1981, the Atlacatl Battalion of the Salvadoran Army rounded up the civilian inhabitants of the village in an attempt to obtain information on the whereabouts of certain guerrilla leaders.<sup>3</sup> During the day, the victims were forcibly removed from their homes, gathered in the village's central plaza and made to lay in the dirt as Soldiers kicked and beat them and stole their jewelry and other valuables.<sup>4</sup> By nightfall, the citizens of the village were told to return to their homes and not leave or they would face immediate execution.<sup>5</sup> The following morning, the people were again pulled from their homes and divided into groups of men, boys, girls, women, and children.<sup>6</sup> The male inhabitants were led to the church to be either immediately executed by decapitation or point-blank shots to the head; or, to be tortured for information.<sup>7</sup> At the same time, the girls and women were marched up a hillside where they were raped, and then summarily murdered.<sup>8</sup> The children, recently orphaned, were moved to an empty home where they too were systematically

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<sup>1</sup> See LEIGH BINFORD, THE EL MOZOTE MASSACRE 13–15 (1996) (explaining how the People's Revolutionary Army (ERP) organized its base in the Morzan region).

<sup>2</sup> See *id.* at 18–22.

<sup>3</sup> *Id.* at 18–19.

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

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

<sup>6</sup> *Id.* at 20.

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

<sup>8</sup> *Id.* at 21.

executed; one after the other.<sup>9</sup> The remaining structures were vandalized, the homes burned, and the animals killed and burned with the bodies of their former owners.<sup>10</sup>

The story of what would later be known as the El Mozote massacre is a glimpse into the darkest side of humanity and while it is a truly terrifying story, it is far from the sole example of this type of barbarity being administered to innocent Civilians in remote reaches of the globe. However, the reason why the El Mozote massacre reached its heights of infamy was that the Atlacatl Battalion was trained and equipped by the U.S.<sup>11</sup>

During the Cold War, the U.S.’ foreign policy began to focus on developing partner nation’s capacity in order to allies in the fight against the existential communist threat.<sup>12</sup> One of earliest efforts to do so was the School of the Americas (“SOA”), founded in 1946.<sup>13</sup> The purpose of the SOA was to train military forces in Central and Southern American countries to develop them into strong allies against communist forces.<sup>14</sup> Early on, the SOA was viewed as wise foreign policy and likely would have continued to had it not been for the stories that started trickling in about U.S. trained Soldiers committing human rights violations.<sup>15</sup> One of the most egregious incidents being the story at the beginning of this Article.<sup>16</sup>

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<sup>9</sup> *Id.* at 21-22.

<sup>10</sup> *Id.* at 20-21.

<sup>11</sup> See MARK DANNER, *THE MASSACRE AT EL MOZOTE* 3-10 (1994); see also JAMES HODGE & LINDA COOPER, *DISTURBING THE PEACE: THE STORY OF FATHER ROY BOURGEOIS AND THE MOVEMENT TO CLOSE THE SCHOOL OF THE AMERICAS* 91 (2004) (describing the events that led to the creation of SOA Watch); JACK NELSON-PALLMEYER, *SCHOOL OF ASSASSINS: GUNS, GREED, AND GLOBALIZATION* 1-13, 21-32 (2001) (describing how the United States trained and equipped the Atlacatl Battalion and the School of Americas).

<sup>12</sup> See NELSON-PALLMEYER, *supra* note 11, at 14-15 (2001) (discussing the policy to combat communism during the Cold War).

<sup>13</sup> U.S. GEN. ACCOUNTING OFFICE, GAO 96-178, *SCHOOL OF THE AMERICAS: U.S. MILITARY TRAINING FOR LATIN AMERICAN COUNTRIES* 1 (1996) [hereinafter GAO 96-178]; HODGE & COOPER, *supra* note 11, at 91.

<sup>14</sup> GAO 96-178, *supra* note 13, at 5-8; HODGE & COOPER, *supra* note 11, at 91.

<sup>15</sup> See HODGE & COOPER, *supra* note 11, at 91.

<sup>16</sup> Ian Urbina, *O.A.S. to Reopen Inquiry into Massacre in El Salvador in 1981*, N.Y. TIMES (Mar. 8, 2005),

Upon the realization that these atrocities were occurring, and that the Soldiers committing them had been trained by the U.S., increased scrutiny was applied to which nations and which units were allowed to receive U.S. funding and support.<sup>17</sup> The call to action was answered by Senator Patrick Leahy of Vermont, through the passage of what eventually became known as the eponymous “Leahy Laws,”<sup>18</sup> which have now become the cornerstone of U.S. human rights policy.

The Leahy Law, also known as Leahy Amendment, was an attempt to prevent U.S. funding or security assistance making its way into the hands of known human rights violators<sup>19</sup>. It had, and continues to have, a noble intent and should continue to be one of the primary weapons brandished against human rights abuse in the world. However, over the past three and a half decades a number of substantive and practical deficiencies emerged that greatly diminish the law’s ability to achieve the originally desired effect. These deficiencies have also created a potential negative impact to U.S. forces and interests as the U.S. has turned increasingly to allied forces to perform tasks that were once the exclusive province of the U.S. armed forces.

In order to correct these deficiencies, a number of small, yet important, changes are necessary. This Article will identify some of the well-documented problems in the law’s ability to achieve its purpose and propose a number of adjustments to the law that may better align its intent and effect. These recommendations range from semantic edits to substantive policy changes which may affect the way that Leahy operates in substantial ways. Importantly, these adjustments are intended to work in isolation from one another; their

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<https://www.nytimes.com/2005/03/08/world/americas/oas-to-reopen-inquiry-into-massacre-in-el-salvador-in-1981.html>.

<sup>17</sup> See, e.g., *About - School of the Americas Watch*, SCH. OF THE AMERICAS WATCH, <https://www.soaw.org/about/> (last visited May 20, 2019) (outlining the actions of SOA Watch, a non-profit group focused on monitoring human rights abuses committed by graduates of the SOA).

<sup>18</sup> *Human Rights*, U.S. SENATOR PATRICK LEAHY OF VT., <https://www.leahy.senate.gov/issues/human-rights>.

<sup>19</sup> Daniel R. Mahanty, *The “Leahy Law” Prohibiting US Assistance to Human Rights Abusers: Pulling Back the Curtain*, JUST SEC. (June 27, 2017), <https://www.justsecurity.org/42578/leahy-law-prohibiting-assistance-human-rights-abusers-pulling-curtain/>.

effectiveness should not depend on how many are ultimately implemented. Each amendment would, independently, improve the law's ability to achieve its end.

This Article will proceed with a short background section, discussing the how the Leahy Law functions, the history of how it came to be, its precursors, major amendments, and expansion. Parts III through VI will then focus on individual weaknesses in the law that have been identified, and the existing conflicts that exist between the intent and effect. These Sections will also propose recommended adjustments or policy changes that are likely to correct, or at least mitigate, the problems in Leahy's functionality. This Article will then make some conclusory remarks.

The Leahy Law is incredibly important to U.S. foreign policy, especially in the area of human rights. Due in large part to its importance, it must be continually improved and refined. Armed with over thirty years of data and anecdotal evidence, this Article aims to serve as a whetstone to sharpen the blade and ensure that America's cornerstone weapon against human rights abuse remains as capable as it was originally intended to be.

## II. BACKGROUND

### A. *How Leahy Works*

#### 1. The Law

The Leahy Law is a segment of law that has been injected in the authorizations for both the Department of State and the Department of Defense.<sup>20</sup> Named after Vermont Senator Patrick Leahy, the law is intended to prevent U.S. Foreign Assistance to units of foreign security forces if there is "credible information" that the unit, or any of its individual members, has committed a gross violation of human rights.<sup>21</sup> Once it has been discovered that a unit has violated the Leahy law, it cannot receive any U.S. funding until it has taken

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<sup>20</sup> *Leahy Law Fact Sheet*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, <https://www.state.gov/key-topics-bureau-of-democracy-human-rights-and-labor/human-rights/leahy-law-fact-sheet/> (last updated Jan. 22, 2019).

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



adequate measures to “remediate” the violation.<sup>22</sup>

While the Leahy law is typically referred to as if it were a single statute, it is actually a pair of similar, though not identical, provisions located in different authorizations.<sup>23</sup>

The Defense version of the law, located in the Howard P. “Buck” McKeon National Defense Authorization Act, reads as follows:

Of the amounts made available to the Department of Defense, none may be used for any training, equipment, or other assistance for a *unit* of a *foreign security force* if the Secretary of Defense has *credible information* that the unit has committed a *gross violation of human rights* . . . This prohibition shall not apply if the Secretary of Defense, after consultation with the Secretary of State, determines that the government of such country has taken all necessary corrective steps, or if the equipment or other assistance is necessary to assist in disaster relief operations or other humanitarian or national security emergencies . . . The Secretary of Defense, after consultation with the Secretary of State, may waive the prohibition . . . if the Secretary determines that the waiver is required by extraordinary circumstances.<sup>24</sup>

The State Department version, located in Section 620M of the Foreign Assistance Act of 1961 (“FAA”), is as follows:

No assistance shall be furnished under this chapter or the Arms Export Control Act [22 U.S.C. 2751 et seq.] to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights. The prohibition . . . shall not apply if the Secretary determines and reports to the Committee on Foreign Relations of the Senate, the Committee on Foreign Affairs of the House of Representatives, and the Committees on Appropriations that the government of such country is taking effective steps to bring the responsible members of the security forces unit to justice . . . In the event that funds are withheld from any unit pursuant to this section, the Secretary of State shall promptly inform the foreign government of the basis for such action and shall, to the maximum extent practicable, assist the foreign government in taking effective measures to bring the responsible members of the security

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

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

<sup>24</sup> 10 U.S.C. § 362 (2016) (“[P]rohibition on use of funds for assistance to units of foreign security forces that have committed a gross violation of human rights”) (emphasis added).

forces to justice.<sup>25</sup>

It is important to note that while the laws appear to be the same on the first read, there are a number of key differences between the two versions. The three primary variances are the difference in remediation standards: “taking effective steps to bring the responsible members to justice” as opposed to the Defense standard “all necessary corrective steps have been taken.” The second is the Secretary of Defense’s ability to waive the law’s prohibitions in “extraordinary circumstances.” The third is the “duty to inform” provision requiring the Secretary of State to promptly inform a foreign government of the basis for withholding funding or support and the duty to assist the foreign government to take effective steps towards remediation.<sup>26</sup> These differences, and their impacts, will be discussed in greater length in Part V of this Article.

*a. Security Forces*

The Department of State is silent on the specific definition of “security forces,” but the Department of Defense defines it as both the “duly constituted military, paramilitary, police, and constabulary forces of a state,”<sup>27</sup> as well as, “forces including but not limited to: military forces; police forces; border police, coast guard, and customs officials; paramilitary forces; forces peculiar to specific nations, state, tribes, or ethnic groups; prison correctional and penal services; infrastructure protection forces; and governmental ministries or departments responsible for the above forces.”<sup>28</sup>

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<sup>25</sup> 22 U.S.C § 2378d (1961) (“[L]imitation on assistance to security forces”) (emphasis added).

<sup>26</sup> NINA M. SERAFINO, ET AL., CONG. RESEARCH SERV. R43361, “LEAHY LAW” HUMAN RIGHTS PROVISIONS AND SECURITY ASSISTANCE: ISSUE OVERVIEW 1, 5 (2014).

<sup>27</sup> U.S. DEP’T OF DEF., JOINT PUBLICATION, 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, i, 213 (2016).

<sup>28</sup> U.S. ARMED FORCES, JOINT PUBLICATION 3-22 FOREIGN INTERNAL DEFENSE, i, VI, 31 (2010), [https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3\\_22.pdf?ver=2018-10-10-112450-103](https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_22.pdf?ver=2018-10-10-112450-103).

b. *Gross Violations of Human Rights*

Another important consideration is the determination of what, specifically, constitutes a “gross violation of human rights” (“GVHR”). These determinations are to be informed by existing norms in international law. The Department of State version of the act states that “the term ‘gross violations of internationally recognized human rights’ includes torture or cruel, inhumane, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person.”<sup>29</sup> According to the State Department, the definition also includes extrajudicial killings as well as any politically motivated rape.<sup>30</sup>

c. *Units*

The Leahy law specifies that in the event an allegation is substantiated, it is only the specific “unit” rather than the entirety of the armed forces that is subject to Leahy sanctions. According to Congress, the term “unit” is intended to be “construed as the smallest operational group in the field that has been implicated in the reported violation.”<sup>31</sup> In practice, this means that if there is information that someone within a unit has committed a gross violation of human rights, the entire unit is barred *unless* it can be established that the incident was the responsibility of a smaller, subordinate unit. As a result, the more detailed the information about the alleged incident, the smaller the effect of Leahy sanctions.

2. Remediation

The Leahy law features a few exceptions, the most important of which is for remediation. Under this exception, the Departments of State or Defense may continue to provide security assistance after

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<sup>29</sup> Foreign Assistance Act of 1961 § 502B(d)(1) Pub. L. No. 87-195 (codified as amended at 22 U.S.C. 2340(d)(I)).

<sup>30</sup> SERAFINO, ET AL., *supra* note 26, at 2.

<sup>31</sup> SENATE REPORTS 58 (2003), <https://www.govinfo.gov/content/pkg/CHRG-108shrg92146/html/CHRG-108shrg92146.htm>.

determining that sufficient remedial steps have been taken to address the human rights violation.<sup>32</sup> In order to use this exception, the Department of Defense version requires the Secretary of Defense, after consultation with the Secretary of State, determine that the government of such country has taken *all necessary corrective steps*.<sup>33</sup> The Department of State version merely requires that the Secretary of State determine that the government of the violating country is taking *effective steps* to bring the responsible members of the security forces unit to justice.<sup>34</sup> Congress has not expressly defined either of these standards, nor has there been any express rationale provided justifying the need for two separate standards.

In 2015, the Departments of State and Defense adopted a joint policy on remediation which established a three-step process to declare a unit remediated.<sup>35</sup> The policy lays out three primary components of the remediation process: (1) investigation; (2) as appropriate, judicial or administrative adjudication; and (3) as appropriate, sentencing or comparable administrative actions.<sup>36</sup> Once a senior U.S. official in a country or embassy is satisfied that these steps have been taken, the information will be forwarded to a review panel at the Secretarial level to decide whether the unit has been remediated.<sup>37</sup> Once remediation has been declared, the unit may once

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<sup>32</sup> Memorandum from Secretary of Defense Chuck Hagel, “Additional Guidance on Implementation of Section 8057(b), DoD Appropriations Act, 2014 (Division C of Public Law 113-76) (“the DoD Leahy law”) and New or Fundamentally Different Units” 9 (Feb. 10, 2015) [hereinafter Secretary of Defense Memorandum].

<sup>33</sup> 10 U.S.C. § 362 (emphasis added).

<sup>34</sup> 22 U.S.C. § 2378d (2014) (emphasis added).

<sup>35</sup> U.S. DEP’T OF DEF., DODIG-2018-018, IMPLEMENTATION OF THE DOD LEAHY LAW REGARDING ALLEGATIONS OF CHILD SEXUAL ABUSE BY MEMBERS OF THE AFGHAN NATIONAL DEFENSE AND SECURITY FORCES 10–11 (Nov. 16, 2017), <https://media.defense.gov/2017/Nov/17/2001845582/-1/-1/1/DODIG-2018-018.PDF> [hereinafter DODIG-2018-018]. This memo also states that, as a matter of policy, the remediation standards will be treated the same. *Id.* This is explained in further detail in Part V, *infra*.

<sup>36</sup> *Id.* at 10.

<sup>37</sup> *Id.* at 10–11. The process is slightly more complex than explained here. The review panel, called the Remediation Review Panel (RRP) is made up of several DoD and DoS stakeholders who decide whether the standard has been met. *Id.* at 10–11. If they are unable to agree, the issue is elevated to a Senior Remediation Review Panel (SRRP), then to the Assistant Secretary level, and

again begin receiving U.S. security assistance.<sup>38</sup>

### 3. Additional DoD Exceptions

In addition to the remediation exception which appears in both the State and Defense version of the Leahy law, there are two additional exceptions within the DoD version of the law and other exceptions that exist outside the statutes themselves. The first express DoD exception, added in 2014 as part of the Consolidated Appropriations Act,<sup>39</sup> is for equipment or other assistance necessary to assist in disaster relief operations or other humanitarian or national security emergencies.<sup>40</sup> The other exception is a waiver that allows the Secretary of Defense, after consulting with the Secretary of State, to waive the prohibitions against funding training, assistance, or other equipment if the Secretary of Defense determines that such a waiver is required by “extraordinary circumstances.”<sup>41</sup> Although this may seem like an easy way to avoid the Leahy law’s prohibitions, it has never been used.<sup>42</sup> This is partially due to the fact that Congress has never defined “extraordinary circumstances” for the purposes of this law.<sup>43</sup>

Other than the exceptions written into the Leahy laws themselves, some other statutes and appropriations contain built-in exceptions to Leahy.<sup>44</sup> The most well-known example of this is the Afghan Security Forces Fund (“ASFF”).<sup>45</sup> The relevant provision

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ultimately to the Secretaries themselves. For those interested, the specifics of this process are explained in the joint policy memorandum. *See id*

<sup>38</sup> Secretary of Defense Memorandum, *supra* note 32, at 9.

<sup>39</sup> Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 621, 128 Stat. 5, 228.

<sup>40</sup> 10 U.S.C. § 362 (2016).

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

<sup>42</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO 13-866, HUMAN RIGHTS: ADDITIONAL GUIDANCE, MONITORING, AND TRAINING COULD IMPROVE IMPLEMENTATION OF THE LEAHY LAWS 7 (2013) hereinafter GAO 13-866].

<sup>43</sup> DODIG-2018-018, *supra* note 35, at 9 n.30.

<sup>44</sup> *See, e.g.*, § 8057, 128 Stat. 5.

<sup>45</sup> *See, e.g.*, James LaPorta, Report: *Pentagon skirted U.S. law on human rights abuses in Afghanistan*, UPI (Jan. 23, 2018, 4:59 PM), <https://www.upi.com/Defense-News/2018/01/23/Report-Pentagon-skirted-US-law-on-human-rights-abuses-in-Afghanistan/9321516732458/>; OFFICE OF THE SEC’Y OF DEF., JUSTIFICATION FOR FY 2020 OVERSEAS CONTINGENCY

within the ASFF is known as the “notwithstanding” authority. It reads:

That such funds shall be available to the Secretary of Defense, notwithstanding any other provision of law, for the purpose of allowing the Commander, Combined Security Transition Command—Afghanistan, or the Secretary’s designee, to provide assistance, with the concurrence of the Secretary of State, to the security forces of Afghanistan, including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction, and funding.<sup>46</sup>

Upon first read, it doesn’t appear to mean much but it provides the commander of Combined Security Transition Command—Afghanistan (“CSTC-A”)<sup>47</sup> with the authority to waive the provisions of any other provision of law, including Leahy, if she determines it necessary. Despite the seemingly broad application, there are no records available showing that this provision has received more than “limited exercise.”<sup>48</sup>

#### 4. Sanctions

The end result of a substantiated allegation that a unit or individual committed a gross violation of human rights is that the security forces unit will no longer be eligible for U.S. assistance, training, or equipment. In practice, this ineligibility is referred to as

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OPERATIONS AFGHANISTAN SECURITY FORCES FUND (2019); SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION, SIGAR 17-47-IP CHILD SEXUAL ASSAULT IN AFGHANISTAN: IMPLEMENTATION OF LEAHY LAWS AND REPORTS OF ASSAULT BY AFGHAN SECURITY FORCES (Jan. 18, 2018), <https://www.sigar.mil/pdf/inspections/SIGAR%2017-47-IP.pdf> [hereinafter SIGAR 17-47-IP].

<sup>46</sup> § 8057, 128 Stat. 5 (emphasis added).

<sup>47</sup> From their website, “CSTC-A trains, advises, and assists within Afghan security institutions to develop resource management capability, Inspector General and rule of law capability, and provides resources in accordance with the Afghan National Defense Security Forces requirements while ensuring fiscal oversight and accountability of funds and materiel delivered. CSTC-A is focused on helping Afghanistan develop a sustainable, effective and affordable ANDSF in support of the Afghan Government.” *Resolute Support Afghanistan*, N. ATLANTIC TREATY ORG., <http://www.rs.nato.int/rs-commands/combined-security-transition-command-afghanistan.aspx>.

<sup>48</sup> DODIG-2018-018, *supra* note 35, at 14.

being “Leahy-barred” or receiving “Leahy-sanctions.” These sanctions remain in place unless an exception is used or the unit is able to remediate itself.<sup>49</sup>

### 5. Leahy Vetting

The final piece of the Leahy Law involves a process which has come to be known as “Leahy Vetting.” After a unit has been Leahy barred, it is entered into a Department of State database known as “International Vetting and Security Tracking” or INVEST.<sup>50</sup> Then, whenever an organization is planning to request support or training for a foreign unit, they will submit a list of the individuals set to receive training to be “vetted.”<sup>51</sup> The vetting process involves a background check, records search, and certification before any unit or individual is allowed to receive U.S. support.<sup>52</sup> If the unit or individuals are cleared, they may receive training, if not, they will be turned away and the training or other assistance will be prohibited, ending the Leahy process.

### B. *The History of Leahy*

#### 1. Precursors to Leahy

The legislative history that ended in the passing of the modern Leahy amendments began in the 1970s. Congress wanted to apply increased pressure to respect human rights on countries that were receiving U.S. security assistance.<sup>53</sup> At first, these laws were small attachments to legislation that addressed specific countries and emplaced specific conditions on the receipt of support.<sup>54</sup> These developed into a more expansive version of the requirement known as “Section 502B” which was a reference to Section 502B of the

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<sup>49</sup> Secretary of Defense Memorandum, *supra* note 32, at 9.

<sup>50</sup> SERAFINO ET AL., *supra* note 24, at 10.

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

<sup>52</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-793, SOUTHEAST ASIA: BETTER HUMAN RIGHTS REVIEWS AND STRATEGIC PLANNING NEEDED FOR U.S. ASSISTANCE TO FOREIGN SECURITY FORCES 8 (2005), <https://www.gao.gov/assets/250/247336.pdf>.

<sup>53</sup> SERAFINO, ET AL., *supra* note 26, at 11–12.

<sup>54</sup> *Id.* at 14.

FAA. Section 502B prohibited any funding from being provided to a country found to be engaging in a “consistent pattern of gross violations of internationally recognized human rights.”<sup>55</sup> However, this proto-Leahy suffered from its breadth; according to the Congressional Research Service, the Department of State never invoked Section 502B to refuse funding because it was “overly broad.”<sup>56</sup>

The next generation of Leahy was a series of counter-narcotic statutes that aimed to encourage human rights compliance in nations that were receiving U.S. support in combating the drug trade.<sup>57</sup> These laws prevented FY 1998 funds from being provided to foreign security forces when there was credible evidence of gross violations of human rights.<sup>58</sup>

## 2. Early Leahy Law

The set of laws that we now know as the Leahy Amendments can trace their roots back to the counter-narcotics statutes of the late '90s. In 1998, Congress decided to expand the application of the counter-narcotics version of Leahy to all assistance provided to foreign nations through Department of State appropriations each year.<sup>59</sup> Finally, this practice was permanently codified in the FAA,<sup>60</sup> applying to all assistance authorized by the FAA and Arms Export and Control Act (AECA) unless exempted through a notwithstanding provision.<sup>61</sup>

Congress also decided to apply the Leahy provision to the Department of Defense appropriations as well.<sup>62</sup> This originally prohibited DOD funds to train units of a foreign military or other security forces if there was credible information that a member of a

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<sup>55</sup> 22 U.S.C. § 2304(a)(2) (2014).

<sup>56</sup> SERAFINO, ET AL., *supra* note 12, at 3.

<sup>57</sup> Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-138.

<sup>58</sup> Act of Nov. 6, 2000, Pub. L. No. 429, 114 Stat. 1900.

<sup>59</sup> Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, 585, 111 Stat. 2386 (1997).

<sup>60</sup> 22 U.S.C. 2378d. (1996).

<sup>61</sup> *See infra* Section II.A.3.

<sup>62</sup> Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, § 8115, 112 Stat. 2279, 2327 (1998).



unit had committed a gross violation of human rights.<sup>63</sup> This original version differed from the FAA in that it only applied to training, not to other forms of assistance as was prohibited in the Department of State version of the law.<sup>64</sup> From that point on, both Department of Defense and State appropriations were permanently subject to Leahy vetting.

### 3. Leahy Amendment and Expansion

Over the past 20 years, there have been a number of changes to the Leahy Law's provisions which range in effect. Early changes to the DoD version removed language about "members" of units to clarify that the law was intended to be applied to the entirety of a tainted unit.<sup>65</sup> In 2013, the words "or police" were added.<sup>66</sup>

In 2011, Congress took steps to better align the DoD and DoS versions of the law by clarifying that the requirement applied when there was "a gross violation" as opposed to "gross violations."<sup>67</sup> Secondly, the standard to resume aid in the FAA version was adjusted to "effective steps" instead of "effective measures" to better match the DoD "all necessary steps" standard.<sup>68</sup> Lastly, the standard of proof was changed from "credible evidence" to "credible information."<sup>69</sup>

One of the largest changes to the Defense version took place in 2014 when Congress removed one of the major differences with the State version and increased application to "any training, equipment, or other assistance" for the members of the foreign

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<sup>63</sup> *Id.* § 8130.

<sup>64</sup> *Compare id.*, 112 Stat. 2279, at 2235 ("any training program") with "none of the funds made available by this act" § 563, 114 Stat. 1900, at 1900A-8.

<sup>65</sup> Department of Defense Appropriations Act of 2000, Pub. L. No. 106-79, § 8014, 113 Stat. 1212 (1999).

<sup>66</sup> Consolidated and Further Continuing Appropriations Act, 2013, 127 Stat. 198, 199 (Division C).

<sup>67</sup> Department of State, Foreign Operations, and Related Programs Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 787, 1181-82 (2011).

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

<sup>69</sup> This change was made to clarify that the information used to substantiate a Leahy violation would not necessarily be admissible evidence in a court of law. This will be discussed further in Section III of this Article.

unit.<sup>70</sup> This greatly increased the application of the Leahy Law within the DoD and resulted in additional guidance being distributed throughout the Armed Forces detailing which authorities were affected.<sup>71</sup> The 2014 amendment also created new exceptions for disaster or humanitarian assistance.<sup>72</sup>

### C. *Summation*

Armed with an understanding of the law as it currently functions, and the history and intent behind its development, this Article will now turn to an analysis of the law and some of its deficiencies and propose changes that can be made to better align the law's effect with its intent.

## III. ISSUE 1: CREDIBLY INFORMED—CLARIFYING THE STANDARD OF PROOF IN LEAHY CASES

As a Leahy practitioner working in a U.S. embassy or military headquarters, you are tasked with deciding whether a recent allegation of a gross violation of human rights is sufficient to Leahy-bar the security force unit that supposedly committed it. The at-issue unit is critically important to both U.S. and the host-nation's defense strategy and relies heavily on U.S. security assistance, funding, and support. The allegation, made by a well-respected non-governmental organization ("NGO"), consists of the vague statements of a handful of undisclosed sources. You now have to decide; does this meet the Leahy standard? Should the U.S. cease all support? The implications of this decision are huge, but as you look at your existing guidance and Standard Operating Procedures (SOPs), you find yourself in an incredibly difficult position; how do you make the call?

Currently, the standard of proof necessary to substantiate a Leahy violation is "credible information" that a gross violation of human rights occurred. However, this wasn't always the case. The current standard was created in 2011. Before that, Leahy laws used

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<sup>70</sup> § 8057, 128 Stat. 5, at 118–19.

<sup>71</sup> See Memorandum from Secretary of Defense Chuck Hagel, "Implementation of Section 8057(b), DoD Appropriations Act, 2014 (Division C of Public Law 113-76) ("the DoD Leahy law")" Tab B, 5 (Aug. 14, 2014).

<sup>72</sup> Consolidated Appropriations Act of 2014, *supra* note 39.

the standard created in the early counter-narcotic days which required “credible *evidence*” instead. The change from “evidence” to “information” was made to address confusion in the practitioner community. Practitioners were reading the term “evidence” and assuming that it invoked the types of evidentiary protections afforded in a court proceeding. This was never the intent of Leahy’s drafters. In a 1999 conference report for the Omnibus Consolidated Emergency Supplemental, the conferees clarified that “by ‘credible evidence’ [we] do not intend that the evidence must be admissible in a court of law.”<sup>73</sup> The term “evidence” was never intended to be used in the same sense as the Federal Rules of Evidence, but that intent was lost on many practitioners.

Practitioners continued to assume evidentiary considerations existed in the law. Perhaps due to the appearance of evidence law in Leahy determinations, Congress acted to cure the confusion. In 2012 the term “evidence” was removed and replaced with the modern standard: “credible information.” The rationale for this change was explicitly stated in the conference report for the Consolidated Appropriations Act of 2012: “[The Act] substituted ‘credible information’ for ‘credible evidence’ in order to clarify that the information need not be admissible in a court of law to be credible and to conform to similar wording in a comparable provision<sup>74</sup> in the Defense Appropriations Act.”<sup>75</sup>

#### A. *What is the Standard?*

With the 2012 amendment, the problem of deciphering “evidence” was solved. It is likely that those drafting the amendment believed there would no longer be any problem in deciphering the standard of proof in Leahy cases. “Credible information,” the new standard, would make it easier for practitioners to make more uniform, predictable determinations. Yet despite Congress’s good intentions,

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<sup>73</sup> Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998); H.R. REP. NO. 105-825, at 1168 (1999).

<sup>74</sup> Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, 112 Stat. 2279 (1998). The Department of Defense version has had the “credible information” standard since its inception in 1999.

<sup>75</sup> Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786 (2012); H.R. REP. NO. 112-331, at 1355 (2012).

there remained a glaring issue, no one has any idea what “credible information” actually means.

In a 2017 RAND Corporation study, a number of interviews were conducted with DoD and DoS Leahy practitioners to acquire a more precise picture of how Leahy functions in the field.<sup>76</sup> One of the concerns documented in the report was that many of the interviewees were unsure how to determine the meaning of “credible information.”<sup>77</sup> There is no official Department of Defense definition for the term in law or in any supplemental guidance that has been released.<sup>78</sup> The DoS has recently released guidance which includes a definition of the term,<sup>79</sup> but practitioners continually express confusion and the DoD has expressly stated that it will not use the same definition provided by DoS.<sup>80</sup> The RAND study found that out of 16 DoS Leahy vetting Standard Operating Procedures (“SOPs”) they collected, only one included a definition.<sup>81</sup> One interviewee requested clarification from the Department of State headquarters, and was told it was up to the post to decide the meaning.<sup>82</sup> Interviewees reported significant differences between their interpretation of the standard, and the interpretation used at the DoS headquarters.<sup>83</sup>

The Department of Defense Inspector General (“DODIG”), found the same thing; there is no formal standard. In a November 2017 report,<sup>84</sup> DODIG interviewed one official, who stated, “the credibility of information is determined on a case-by-case basis and

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<sup>76</sup> See generally MICHAEL J. MCNERNEY, ET AL., IMPROVING IMPLEMENTATION OF THE DEPARTMENT OF DEFENSE LEAHY LAW (2017) [hereinafter RAND] (discussing the vetting processes and methodology for Leahy practitioners).

<sup>77</sup> *Id.* at 39.

<sup>78</sup> DODIG-2018-018, *supra* note 35, at 53.

<sup>79</sup> *Id.* at 54. The DoS interprets “credible information” to mean “information that is sufficiently believable that a reasonable person would rely on such information in their decision-making process. The application of the standard does not require a fact finder actually to conclude that a security force has committed a GVHR. The term ‘credible information’ . . . is a low evidentiary standard.” *Id.* at 53–54 (quoting the DOS “2017 Leahy Vetting Guide; A Guide to Implementation and Best Practices”).

<sup>80</sup> *Id.*

<sup>81</sup> RAND, *supra* note 76, at 39.

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

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

<sup>84</sup> DODIG-2018-018, *supra* note 35, at 55.

the knowledge of doing so is gained through doing the job and having experience.” Another official called the standard “very subjective.” According to the DODIG report, the Office of the Under Secretary of Defense for Policy (“OUSDP”), the office responsible for managing the DoD’s Leahy portfolio, was “unable to articulate the methodology used...to determine whether the information was credible. They simply stated that [representatives] always reach a consensus and that it was a judgement call decided on a case-by-case basis.”<sup>85</sup> DODIG concluded that “there is no record of the reasoning behind any credible information determinations, and there is no specific guidance or criteria for making these decisions... As a result, there is a risk of inconsistency, and the OUSDP’s process could be deficient in identifying credible information to comply with DoD Leahy Law.”<sup>86</sup>

In addition to issues defining the standard, there is also great concern with the reliability of the information that is actually used.<sup>87</sup> The reliability of source information was an issue that came up multiple times in the RAND study.<sup>88</sup> One DoS official noted that the evidentiary threshold for credible information was relatively low but that information from questionable sources was weighed and valued differently at different stages of the vetting process.<sup>89</sup> One interviewee described a “hierarchy of information sources” wherein he weighed “official reporting as ‘reliable,’ other media as ‘mixed,’ and social media as ‘very fuzzy’.”<sup>90</sup> The RAND study concluded the discussion on the topic by stating: “[s]takeholders perceived final determinations on information credibility to be opaque and inconsistent. This was frustrating not only for DoD officials implementing assistance programs but also for partners themselves. As one [Combatant Command] official noted: “Failure to apply appropriate rigor to adjudication prior to the suspension of assistance may negatively impact bilateral relationships and partner nation willingness to

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

<sup>86</sup> *Id.* at 56.

<sup>87</sup> RAND, *supra* note 76, at 40.

<sup>88</sup> See generally RAND *supra* note 77.

<sup>89</sup> *Id.* at 40.

<sup>90</sup> “Very fuzzy” is an academically nebulous standard that caused the author much grief during his tenure in law school.

<sup>91</sup> RAND, *supra* note 76, at 39–40.

investigate and address legitimate allegations.”<sup>92</sup>

Clearly, the standard used in Leahy cases, “credible information,” is vague, often misunderstood, and subject to disparate treatment. This is an obvious impediment to practitioner confidence and uniform application of a standard across the Federal Government, but the problem extends even further.

*B. Effects of Poor Interpretation*

As detailed above, there are abundant difficulties in assessing what information should be relied upon in making credibility determinations, and how to properly weigh them. Without clarity, there is a high probability that determinations can be overly narrow or overly broad and ultimately affect units that have done nothing wrong. The study conducted by the RAND Corporation uncovered a number of cautionary tales that clearly illustrate this concern.<sup>93</sup> In one situation, a well-known human rights advocacy organization made allegations that a partner nation security force had committed gross violations of human rights.<sup>94</sup> The local Leahy-vetting officials at the embassy were able to work extensively with the partner nation and other NGOs in the area to provide enough background information to refute the allegations; but without extensive efforts by the embassy staff, that unit could have been barred from U.S. assistance based on false information.<sup>95</sup> It is easy to see how this can be a problem for U.S. bilateral relations; just one false report from an NGO and the U.S. completely shuts down security assistance. Guilty until proven innocent.

It can also be difficult to explain the Leahy process to partner nations. “Too often, partners see Leahy merely as a bureaucratic impediment and have little understanding of their role in creating a smooth process.”<sup>96</sup> This is exasperated by the relatively amorphous nature of the “credible information” standard. To many partner nations, this can simply look like a convoluted way of disguising capricious intent on the part of the United States. A disgruntled partner

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<sup>92</sup> *Id.* at 40.

<sup>93</sup> *Id.* at 40, 58–61.

<sup>94</sup> *Id.* at 40–41.

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

<sup>96</sup> *Id.* at 60.

nation may believe: “The U.S. doesn’t want to support us so they came up with this nonsense to justify their actions.”

*C. Difficulties of Interpretation*

The previous section detailed an example of false information being relied upon in Leahy vetting. This is a problem that has been documented in multiple countries and with multiple partner nations.<sup>97</sup> It is not, however, the only example of over-breath in application. There have also been allegations that some of the “derogatory information” relied upon in Leahy-vetting credibility determinations had nothing to do with human rights abuses. The RAND Corporation study found incidents of units being Leahy-barred due to an individual having a driving under the influence charge.<sup>98</sup> These are all indicative of a larger issue, the “credible information” standard is hard to apply to real cases.

One example of this difficulty was experienced by the author during a recent deployment to Afghanistan. In April of 2017, The United Nations Assistance Mission in Afghanistan (“UNAMA”) released a report on the treatment of conflict-related detainees.<sup>99</sup> The report consists of interviews conducted with 469 conflict-related detainees in 62 detention facilities in 29 provinces across Afghanistan.<sup>100</sup> It concluded that 39 percent of detainees gave “credible and reliable accounts of having experienced torture or other forms of inhuman or degrading treatment whilst in the custody of [the Afghan National Defense and Security Forces (ANDSF)].”<sup>101</sup> Clearly, this is unacceptable, and if true, it constitutes the precise type of human rights abuses that Leahy aims to address. This would have been a perfect time to invoke Leahy if not for a single serious problem, the report didn’t provide any information about the actual incidents. In

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<sup>97</sup> *Id.* at 40–41.

<sup>98</sup> *Id.* at 41.

<sup>99</sup> See generally U.N., Office of the United Nations High Comm’r for Human Rights (OHCHR), Treatment of Conflict-Related Detainees: Implementation of Afghanistan’s National Plan on the Elimination of Torture (2017), [https://unama.unmissions.org/sites/default/files/treatment\\_of\\_conflict-related\\_detainees\\_24\\_april\\_2017.pdf](https://unama.unmissions.org/sites/default/files/treatment_of_conflict-related_detainees_24_april_2017.pdf) [hereinafter UNAMA] (discussing the human rights situation in Afghanistan with respects to conflict-related detainees).

<sup>100</sup> *Id.* at 6.

<sup>101</sup> *Id.* at 7.

reading the report, there are broad references to a number of torture-related incidents taking place by organizations in certain areas,<sup>102</sup> but the particulars of specific cases were never released.

This creates a frustrating Leahy-vetting issue: Did these reports constitute “credible information” of gross violations of human rights committed by the units in these areas? Potentially. There was enough information to identify the area and organization that was responsible, but there was no information about the specific incidents of torture. In trusting the highly-respected United Nations agency, the U.S. could make a credibility determination on the word of the UNAMA report alone, but there would still be an overbreadth problem. If only one police station, military unit, or other organization was at fault, it would be unnecessarily damaging to the Afghan National Security and U.S.-Afghan relations to Leahy-bar entire swaths of units based on the report. And there remained the issue of whether these incidents, if examined individually by U.S. personnel, would meet the Leahy standard. It is no wonder then, that the DoD and DoS came to opposite conclusions in this case. The DoS chose to believe UNAMA and find the allegations credible while the DoD stated that “in order to consider that information credible, it would need a corroborating source or additional evidence from UNAMA, beyond the statement in its report.”<sup>103</sup>

This issue is compounded when incidents receive national attention. In July 2017, an article was released in *The Washington Post* entitled, “Afghan soldiers are using boys as sex slaves, and the U.S. is looking the other way.”<sup>104</sup> The article details the author’s experience with an unnamed Afghan police commander showing off his prized *Bacha Bazi* boy. *Bacha Bazi* is a terrible practice that exists in some parts of Afghanistan involving wealthy men “acquiring”

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<sup>102</sup> *Id.* at 37. For example, the report details that of the 22 reports of torture at the hands of the Afghan Local Police, seven victims reported being beaten on arrest by ALP in Nangarhar province, five by ALP in Baghlan, two by ALP in Kunduz, and one each by ALP in Badakhshan, Balkh, Faryab, Kunar, Laghman, Paktika, Paktiya, Sar-e-Pul and Takhar.

<sup>103</sup> DODIG-2018-018, *supra* note 35, at 55.

<sup>104</sup> Anuj Chopra, *Afghan Soldiers are Using Boys as Sex Slaves, and the U.S. is Looking the Other Way*, WASH. POST (July 18, 2017), [https://www.washingtonpost.com/news/global-opinions/wp/2017/07/18/afghan-soldiers-are-using-boys-as-sex-slaves-and-the-u-s-is-looking-the-other-way/?utm\\_term=.b92c8179e507](https://www.washingtonpost.com/news/global-opinions/wp/2017/07/18/afghan-soldiers-are-using-boys-as-sex-slaves-and-the-u-s-is-looking-the-other-way/?utm_term=.b92c8179e507).



dancing slave boys and forcing them to dance for their guests, and occasionally perform sexual favors.<sup>105</sup> The practice has been condemned by the United Nations<sup>106</sup> and is also clearly the type of behavior that should invoke Leahy. *The Washington Post* article criticizes the U.S. for not doing enough to stop the practice and even invokes the Leahy Law by name: “turning a blind eye to crimes such as *Bacha Bazi* amounts to a serious contravention of America’s Leahy amendment, which bans U.S. assistance or training to foreign military units that fail to honor basic human rights.”<sup>107</sup> The article, which garnered hundreds of comments and thousands of shares on social media, presented difficulties for Leahy practitioners: despite the overwhelming pressure to respond to the incident detailed in the article, how do you address it without more specific information? And, if you don’t invoke Leahy, what ground can you stand on when responding to the public outcry?

Without a clearly defined standard of proof, or review, it is difficult to provide a clear answer about the “correct” actions in any of these cases. The U.S. risks damaging relationships and tainting innocent units if it applies the standard too broadly, and risks failing the “front page test” in the *Washington Post* for not applying the standard strictly enough. Further, in either instance, there is not a lot of legal ground to stand on in justifying the position. The practitioners cannot point to the “credible information” standard for explanation because the standard is poorly understood and too inconsistently applied. The solution, then, is to change the standard to something that can more easily be understood and applied by practitioners, and better explain decisions to the press, partner nations, and the American public. Which brings us to the first suggested change presented by this Article: change “credible information” to “probable cause.”

#### D. Probable Cause

*“Of the amounts made available to the Department of Defense, none may be used for any training, equipment, or*

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<sup>105</sup> *Id.*

<sup>106</sup> *See, e.g.*, U.N. Secretary General, Report of the Secretary-General on Conflict-Related Sexual Violence, U.N. Doc. S/2019/280 (Apr. 15, 2017), <https://undocs.org/en/S/2019/280>.

<sup>107</sup> Chopra, *supra* note 105.

*other assistance for a unit of a foreign security force if the Secretary of Defense has probable cause to believe that the unit has committed a gross violation of human rights.”*

The solution proposed by this Article is to change the standard of proof in Leahy to mirror an established legal standard from elsewhere in American jurisprudence. There are two primary benefits to this approach. First, you provide the practitioner community, partner nations, and the American public, with a familiar requirement that has been analyzed and scrutinized in countless cases over the course of the last 200 years. Second, you provide practitioners with the entirety of American jurisprudence to assist them when difficult cases emerge.

The justification provided above could support the use of any established legal standard from “reasonable suspicion” through “beyond a reasonable doubt.” The decision about which standard to choose is subject to debate, and ultimately comes down to a policy decision to be made by Congress. However, given what we know about the original intent of Leahy, this Article believes that “probable cause” would be best. Upon first glance, it appears to be the closest in effect to “credible information,” and it is a standard that should be very familiar to legal experts and laymen alike. For the sake of ease and demonstration, the following analysis will assume probable cause is selected as the new standard and then better explain why, although others may be viable, it is the proper choice.

#### 1. In Favor of an Established Standard

As stated above, there are two primary reasons to support a change from “credible information” to a more established standard of proof in Leahy cases. The first is the familiarity of the standard, and the second is the ease of application. Turning back to the study conducted by the RAND Corporation, practitioners repeatedly expressed their concerns with the actual degree of scrutiny being applied, the degree of credibility and hierarchy to assign information sources, and the amount of information necessary to substantiate an allegation.<sup>108</sup> These issues all disappear when the law is changed

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<sup>108</sup> See generally RAND, *supra* note 76 (explaining how the United States can better identify and punish human rights violators).

from “credible information” to “probable cause.” Probable cause has been defined in a number of different ways, but for the sake of this Article, we will use the definition set forth by the Supreme Court (with a few adjustments to better suit our subject matter): “where the facts and circumstances within the [deciding official’s] knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a person of reasonable caution that a [gross violation of human rights] has been committed.”<sup>109</sup>

Familiarity, the first benefit, is something that can be realized immediately and simply by the implementation of the change. Knowing that there is established standard will likely increase a practitioner’s faith that the Leahy standard is being enforced uniformly. This in turn will allow them to focus on a fair application, rather than feeling tempted to warp the standard to fit what they believe to be a proper outcome as determined by political or public demand.

This standard would also sound better when explained to the American public or partner nations. Without a well-established standard of proof, it may appear to some that there is no standard at all. “Credible information” as officially defined by Leahy vetting SOPs can very easily be confused with “credible information” in the common sense: information that someone, somewhere, found credible, for some reason. In contrast, announcing that “there was insufficient information to establish probable cause that a unit engaged in violations of human rights” carries with it a weight that the public has ascribed to the well-known standard of probable cause.<sup>110</sup>

Far more importantly than appearances and familiarity, it will actually work better. This brings us to the second reason to support a change to an established legal standard: ease of application. Over the course of American history, there have been hundreds of court cases that have interpreted the probable cause standard as it applies to different situations. Practitioners, armed with this expansive jurisprudence, will be far better equipped to

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<sup>109</sup> *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

<sup>110</sup> This is independent of whether they understand the actual standard.

make credibility determinations. In order to demonstrate how this could work, we will first need to indulge a brief history lesson.

In the preeminent cases of *United States v. Spinelli*<sup>111</sup> and *Aguilar v. Texas*,<sup>112</sup> the U.S. Supreme Court was tasked with determining whether there was probable cause when warrants were heavily based on the statements of confidential informants.<sup>113</sup> In *Aguilar* they held that there was no probable cause to search when the only information supporting a warrant was an affidavit of police officers who swore that they had “received reliable information from a credible person and do believe” that narcotics were present.<sup>114</sup> The court held that there was insufficient information to allow the magistrate who issued the warrant to determine the credibility of the informants statements and that “the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and some of the underlying circumstances from which the affiant concluded that the informant, whose identity was not disclosed, was credible or his information reliable.”<sup>115</sup> The Court in *Spinelli* further clarified that the magistrate must be informed of the “underlying circumstances from which the informant had concluded” that a crime was committed.<sup>116</sup> The result of these cases came to be known as the Aguilar-Spinelli test, that probable cause cannot be established on the basis of a confidential informant without facts showing that (1) the informant is reliable and credible and (2) establishing some of the underlying circumstances relied upon by the person providing the information.<sup>117</sup>

The two-prong test was later overruled in favor of a totality-of-the circumstances approach in *Illinois v. Gates*,<sup>118</sup> but the “veracity” and “basis of knowledge” factors are still considered to

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<sup>111</sup> *Spinelli v. United States*, 393 U.S. 410, 410 (1969).

<sup>112</sup> 378 U.S. 108 (1964).

<sup>113</sup> *Id.* at 109.

<sup>114</sup> *Id.* at 115.

<sup>115</sup> *Id.* at 114.

<sup>116</sup> *Spinelli*, *supra* note 111, at 417.

<sup>117</sup> See *Illinois v. Gates*, 462 U.S. 213, 214 (1983) (explaining the standard as a “two-prong test” before overruling it in favor of a totality of the circumstances test).

<sup>118</sup> *Id.* at 213.

be relevant considerations in the determination of probable cause,<sup>119</sup> and some states still use the test for probable cause determinations under their own constitutions.<sup>120</sup>

Now, given the quick guidance from these cases and our new definition, one can make a determination in the Leahy context. Focus on the UNAMA report from earlier that contained allegations that members of the Afghan Local Police had been torturing detainees. Under the totality of the circumstances, are the facts and circumstances, as known to the deciding official, sufficient in themselves to warrant a belief by a person of reasonable caution that a gross violation of human rights has been committed?<sup>121</sup>

On first thought, one may believe that there is obviously enough to meet the standard. After all, UNAMA, an agent of the United Nations, said that it happened. However, upon further reflection a practitioner may ask: where did they get their information? In this case, the source of the information was from undisclosed combat-related detainees,<sup>122</sup> which could just as easily be called confidential criminal informants. The Leahy practitioner should not be attempting to determine UNAMA's credibility any more than a court would focus on the credibility of a police affiant. Instead, the practitioner should focus on the credibility of the informants UNAMA interviewed. So, what is known about them?

If one were to apply what he's learned of *Aguilar* and *Spinelli*, he may ask: what can be said about the veracity of the source? In this case, nothing. There is no information available about the individual answering UNAMA's questions, their reliability, or their credibility. UNAMA says they are credible, but that is no different than the police officers in *Aguilar* and their warrant based on "reliable information from a credible person."<sup>123</sup>

What about the second prong, the basis of knowledge for the information? The practitioner knows that the detainees are experiencing what they perceive to be torture, but nothing of the

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<sup>119</sup> *Id.*

<sup>120</sup> See generally *Commonwealth v. Banville*, 457 Mass. 530 (2010); *People v. Bigelow*, 66 N.Y.2d 417, 424–26 (1985).

<sup>121</sup> This is the standard definition in *Brinegar v. United States*, 338 U.S. 160 (1949), adjusted to fit the context of this example.

<sup>122</sup> See generally UNAMA, *supra* note 99.

<sup>123</sup> *Aguilar*, 378 U.S. at 109.

underlying circumstances, what has been done to them, who is doing it, or in what fashion it was done. This is almost identical to the situation in *Aguilar*, wherein the magistrate had no information about the basis for the informant’s knowledge. As such, a Leahy practitioner can come to the conclusion that these incidents do not establish probable cause.

In doing so, he can demonstrate his reasoning based on established case law, and provide others a basis for challenging his decision with further legal analysis. The rationale for his determination can be held out to the public, to Congress, and to the partner nation, and demonstrate consistency in application of the law.

## 2. In Favor of Probable Cause

Neither of the two reasons to move away from “credible information” would be affected if the standard of proof applied was “clear and convincing evidence,” “reasonable suspicion,” or any other established standard of proof. The analysis and the case law would change, the definitions would change, but the rationale would remain. You’d still provide practitioners, the public, and partner-nations with a more easily understandable, and more familiar standard, and you’d still arm decision makers with a well-developed jurisprudence to inform their decisions. Yet despite the fact that other standards may work, it is the opinion of this Article that probable cause works best, and most closely resembles the intent of Leahy’s existing “credible information” standard.

One thing that has been made clear is that the original intent for the Leahy standard of proof was that the information it was based on did not have to be admissible in court;<sup>124</sup> that it did not need to be admissible “evidence.” Probable cause meets this criterion. Information does not need to meet the requirements of admissibility in a court in order to be used in a probable cause determination. As discussed above, information from confidential informants, which would be barred from admission in court due to the Sixth Amendment right to confrontation,<sup>125</sup> is permissible when

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<sup>124</sup> See generally H.R. REP. NO. 112-331 (2011) (Conf. Rep.).

<sup>125</sup> U.S. CONST. amend. VI.

determining probable cause.<sup>126</sup> The same is true with hearsay evidence, which can be used as the basis probable cause when obtaining a warrant.<sup>127</sup> The Federal Rules of Criminal Procedure expressly state that at preliminary hearings, in which magistrates determine probable cause, the defendant is not allowed to “object to evidence on the ground that it was unlawfully acquired.”<sup>128</sup> Privileged evidence is also often relied upon in Probable Cause hearings as evidenced by a number of cases where probable cause was determined by the statements of a spouse, seemingly in violation of spousal privileges.<sup>129</sup> The law in this area is best summed up by Justice Black in addressing whether the of rules of evidence should apply in Grand Jury proceedings: “It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change.”<sup>130</sup> Probable cause meets Leahy’s intent and quashes the fear that the U.S. would continue to fund human rights abusers due to the tyranny of such “technical rules.” As such, it is the ideal choice.<sup>131</sup>

#### *E. Summation*

The current standard of proof in Leahy vetting is confusing, poorly applied, and subject to an inappropriate degree of subjective

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<sup>126</sup> *Aguilar*, 378 U.S. at 113; *see* *Peterson v. California*, 604 F.3d 1166, 1169 (9th Cir. 2010) (holding that Confrontation Clause does not apply to preliminary hearings).

<sup>127</sup> *See* *Jones v. United States*, 362 U.S. 257, 271 (1960) (overruled on other grounds) (“We conclude, therefore, that hearsay may be the basis for a warrant.”); *Costello v. United States*, 350 U.S. 359, 363 (1956) (holding that Grand Jury proceedings do not require competent evidence to satisfy the Fifth Amendment).

<sup>128</sup> FED. R. CIV. P. 5.1.

<sup>129</sup> *See, e.g.*, *United States v. Beaver*, 99 (1929); *People v. Bladdek*, 259 Ill. 69 (1913).

<sup>130</sup> *Costello v. United States*, 350 U.S. 359, 364 (1956).

<sup>131</sup> As stated earlier, this is ultimately a policy decision. The higher the standard, the fewer cases will result in Leahy sanctions. Congress needs to decide whether the intent is to incentivize compliance or make absolutely certain U.S. money stays out of the hands of offenders. In order to make a fully informed decision, stakeholders should analyze the effects of different legal standards and the resulting degree of impact.

interpretation. This causes great difficulties for the practitioner community, and risks U.S. relations with partner nations. In order to improve application of the Leahy laws, and to further its intent, the standard should be changed from “credible information” to “probable cause.” Changing to an existing and recognized legal standard provides Leahy practitioners with the benefit of American jurisprudence, and the guidance that it offers, and it lends more legitimacy to the Leahy-vetting process. Once the decision to switch to an established standard is made, probable cause is the best choice. It meets the intent of Leahy’s drafters and as such, would likely strike the desirable balance between reliability of information and protection against over-application of Leahy sanctions.

#### IV. ISSUE 2: CLASSIFIED INFORMATION AND THE DUAL PURPOSES OF LEAHY

During a classified briefing, you learn that U.S. assets have observed members of a well-known partner security force unit engaging in clear violations of human rights. Torture, extra-judicial killings, rape, and other offenses are being clearly displayed on a screen in front of you. You know immediately that Leahy needs to be invoked, any standard of proof would be satisfied. After submitting the necessary reports, and moving through the required processes, the commander of the at-issue partner nation security forces unit requests support and assistance. What do you tell him? What can you tell him? All the details of the incident are classified. You explain to the commander that the U.S. is immediately terminating all support for his unit but you cannot tell him why. You cannot tell him anything about the incident, or what the unit can do to correct the issues. He is Leahy-barred, and despite his desire to cooperate and bring the wrong-doers to justice, he is prohibited from learning a single detail of the violations that occurred. The unit is now combat ineffective, it is unable to support itself without U.S. security assistance funds, relations with the unit, commander, and the partner nation have taken a colossal blow, and arguably worst of all, the perpetrators cannot be prosecuted, remaining free to commit additional violations in the future.

The problem detailed above stems from an internal contradiction in what we will later define to as the “dual purposes” of the Leahy law: (1) preventing U.S. taxpayer dollars from going to human rights abusers; and (2) incentivizing partner nations to respect



human rights and hold violators accountable.<sup>132</sup> Both are highly admirable and, in most cases, they can both be satisfied through the law's invocation. However, there can be cases in which the dual purposes fall into conflict with one another. In these cases, such as the scenario at the beginning of this section, the U.S. government can only accomplish one of the two. This is frequently the case when the basis of the credibility determination is classified. In these cases, there can be no incentivizing effect as partner nations are prohibited from knowing why their support is being withheld. Which brings us to the second proposed change to the law, in those situations where the dual purposes conflict, decision makers need the flexibility to decide which purpose is most important.

A. *The Dual Purposes of Leahy*

During his 2015 remarks to the U.S. Institute of Peace, Senator Patrick Leahy, the namesake of the Leahy law, discussed the purpose for which the law was created. "The Leahy Law is narrowly focused, and it has two distinct but complementary purposes: to shield our country from complicity in gross violations of human rights; and to encourage and assist foreign governments in bringing to justice members of their security forces when those crimes occur."<sup>133</sup> These "distinct but complimentary purposes"<sup>134</sup> are what this Article refers to as the dual purposes of Leahy.

The first of these dual purposes, which this Article will refer to as "purity," is to shield the U.S. from complicity in gross violations of human rights. According to Senator Leahy, "[w]hen our partners commit abuses we become complicit—or we are perceived to be complicit—in the predatory and abusive acts that erode the legitimacy of those forces."<sup>135</sup> The U.S. must distance itself from these acts and ensure that taxpayer dollars are not being spent in a fashion that is so antithetical to American values. In effect, ensuring that the U.S.

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<sup>132</sup> Linwood Ham, *Human Rights Violations: U.S. Foreign Aid for Accountability and Prevention with U.S. Senator Patrick Leahy's Remarks*, U.S. INST. OF PEACE (Mar. 29, 2015), <https://www.usip.org/publications/2015/03/human-rights-violations-us-foreign-aid-accountability-and-prevention>.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

remains *pure* and untainted by complicity in human rights violations.

The second of the dual purposes, which will be referred to as “incentive,” is to encourage and assist foreign governments in holding violators accountable and developing systems to prevent abuses from occurring in the first place. This incentive has both punitive, and aspirational ends. It is punitive because security forces that commit human rights violations need to be held accountable, and responsible individuals need to be prosecuted. In Senator Leahy’s words, we mustn’t treat violators as “if they are above the law, but by showing that they have to answer to the law.”<sup>136</sup> However, the other end is aspirational, “the law is punitive . . . But the Law’s larger purpose is to build professional, disciplined, transparent and accountable security forces who are sustainable and effective partners for the .”<sup>137</sup> We don’t just want to punish these individuals, units, and nations because they deserve to be punished, we want to incentivize them to become better, and to hold themselves to a higher standard.<sup>138</sup> According to Tom Malinowski, assistant secretary of state for democracy, human rights and labor, this incentive is “the whole point of the Leahy Law”;<sup>139</sup> to make the world a better place.

#### *B. Dueling, Dual Purposes*

These “distinct but complementary”<sup>140</sup> purposes are both commendable, and generally, they can both be accomplished through the use of the Leahy law. Practitioners can ensure that U.S. funds do not end up in the hands of human rights abusers, and simultaneously use Leahy-sanctions as an incentive to force partner nations to take human rights issues more seriously; this would hold individual abusers accountable. The problem is that not all cases are so simple; and, at no time is this truer than when classified information is involved.

When the information that forms the basis for a Leahy violation is classified, practitioners cannot share the information with

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<sup>136</sup> *Id.* (emphasis in original).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (quoting Tom Malinowski, former Assistant secretary of state for Democracy, Human Rights and Labor).

<sup>139</sup> Sarah Egozi, *Aid is Key to Reform Forces on Rights, Leahy Says*, U.S. INST. OF PEACE (Feb. 12, 2016), <https://www.usip.org/publications/2016/02/aid-key-reform-local-forces-rights-leahy-says>.

<sup>140</sup> Ham, *supra* note 132.

units, commanders, or partner nations. This doesn't matter for Leahy's "purity" purpose. The first of Leahy's dual purposes is indifferent to the offending nation's degree of understanding, knowledge, or ability to address gross violations of human rights. The only concern is that keeps its hands clean, and that taxpayer dollars stay out of the pockets of human rights violators. As such, there is no problem fulfilling these purposes by Leahy-barring a unit without explaining why.

The second of the dual purposes is not nearly so apathetic; incentives don't work in secrecy. Without the ability to share information with the partner nation or security force, there is no way to incentivize them to change. There is no way "to build professional, disciplined, transparent, and accountable security forces who are sustainable and effective partners for the United States"<sup>141</sup> when units are immediately cut off with little hope of ever being eligible for future support. "Meanwhile, security Forces are in a 'catch-22': they have no training to improve tactics and ensure human rights compliance, because they have unresolved human rights allegations due to poor tactics."<sup>142</sup> Even if there is willingness to take the desired steps, without knowledge of the underlying incident, there is little that unit or nation can do. This is no-doubt frustrating and can lead to serious consequences in achieving the U.S.' policy objectives and strengthening bilateral relations with partner nations. As one practitioner noted, "[d]enial of training, particularly without a comprehensive explanation, is politically sensitive."<sup>143</sup> Politically sensitive, indeed.

In their study, the RAND Corporation spoke with a U.S. official with first-hand knowledge of this type of incident. The interviewee explained that "tensions arose with the partner nation after a 'golden boy' within the military was tied to derogatory information and suspended from training. The embassy was unable to provide details, further upsetting high-ranking military officials."<sup>144</sup> This isn't an isolated, or even rare event. This Article's author witnessed similar

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<sup>141</sup> Ham, *supra* note 132 (emphasis in original).

<sup>142</sup> Michael J. O'Connor, *Bangladesh Rapid Action Battalion: Satisfying the Requirements of the Leahy Amendment with a Rule of Law Approach*, 215 MIL. L. REV. 182, 228 (2013).

<sup>143</sup> MCNERNEY, ET AL., *supra* note 76, at 46.

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

instances during his time in Afghanistan. It is hard enough to explain to a partner nation that you are withholding well-needed assistance when you can explain the exact rationale, situations and policies at play. Without that explanation, it can set relations back immensely, and make partner nations feel abandoned.

*C. The New Rules of the Duel*

In situations where the “incentive” purpose is frustrated by an inability to share information of a violation of human rights, the current result is that “purity” will always win. If a unit cannot ever remediate due to an inability to identify the problem, it will be permanently banned from receiving U.S. assistance. In some cases, this is the proper result. There are clearly situations where the violations are widespread, egregious and obvious enough, that the U.S. must wipe its hands of any involvement, without explanation. Yet, no matter how strongly one feels about keeping the U.S. pure, in some cases the ability to preserve the relationship, and the combat effectiveness of the unit outweighs the consequences. Sometimes, purity without incentive is not enough. In these cases, when the “incentive” purpose is frustrated by an inability to share classified information, Leahy practitioners need a mechanism to decide whether to continue support despite the substantiated violation.

This Article recommends the addition of the following new provision in both versions of the Leahy law:

(X) UN-DISCLOSABLE BASIS –

- (1) In the event that *all* the information used by the Secretary of (State/Defense) to establish probable cause to believe that a security force unit has committed a gross violation of human rights is *un-disclosable* to the security force unit or parent nation,
- (2) The Secretary of (State/Defense), or his designee<sup>145</sup>, may decide to continue to provide training, equipment, or other assistance,
- (3) Provided that there is no way to change the un-disclosable status of the relied upon information or evidence.
- (4) In making this determination, the Secretary of (State/Defense), or his designee, should consider the following factors:

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<sup>145</sup> The degree to which this may be delegated is subject to a policy determination.

(A) The unit's remediation capability, including the sophistication of the unit's military justice system, or other similar punitive, investigative system;

(B) The unit or parent nation's familiarization with the "Leahy Law;"

(C) The egregiousness of the incident;

(D) The degree of command involvement or condoning of the incident;

(E) The sophistication of the security force's organizational structure; and

(F) The National Interest of the United States in maintaining the unit's eligibility for security assistance.

(5) No later than 15 days after any such decision, the Secretary of (State/Defense) shall submit to the appropriate committees of Congress a report . . .<sup>146</sup>

(6) For the purposes of this section "un-disclosable" means that the security force or partner nation cannot be provided access to the information or evidence used to substantiate a violation because:

(A) The classified nature of the information or evidence;

(B) The classified nature of the means used to collect the information or evidence; or

(C) Another existing written policy.

This new provision will provide the necessary operational flexibility to allow the continued support of key units when doing so is in the best interests of the U.S. It will also provide an additional tool to use in the maintenance of bilateral relationships between the U.S. and a partner nation. This proposed provision is narrowly tailored enough to avoid abuse while still providing a fair degree of flexibility. The remainder of this section will move through the proposed provision and explain the rationale for each subdivision.

1. In the event that *all* the information . . . is *un-disclosable* . . .

The first paragraph of the provision clarifies that it can only be invoked when *all* of the information relied upon is un-

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<sup>146</sup> The desired substance of these reports is subject to Congressional decision.

disclosable. This is important because it prevents the use of the provision when there is enough disclosable information to explain the reason why a unit is being Leahy-barred. In situations where there is both classified and unclassified information that both points to a violation of human rights, the U.S. is able to explain why security assistance is being withheld and therefore there is no conflict between the dual purposes of Leahy.

The use of the term “un-disclosable” instead of the more specific “classified” allows for greater flexibility in circumstances where the information relied upon is not classified, but disclosure is unwarranted or prohibited for some other diplomatic, strategic, or policy reason. Including these additional grounds within the definition of the term “un-disclosable” ensures the provision isn’t too narrowly focused.

2. Provided that there is no way to change the un-disclosable status . . .

Paragraph three is intended to prevent the use of the provision when there is a possibility to change the classification level, or reassess the policy reason for withholding information from a partner nation. In the event that a Leahy practitioner can get the information declassified, there is no longer justification to use this provision.

3. . . . should consider the following *factors* . . .

The explicit listing of factors provides Leahy practitioners with better guidance than using something broader, such as “National Interest,” to determine whether use of the provision is necessary. Each factor is selected with Leahy’s dual purposes in mind. The first two factors are focused on the incentive purpose, the next two on the purity purpose, and the final two focus on equity and the U.S.’ interest in the outcome of the decision.

The first two factors look at the incentive purpose and whether it is truly frustrated. The first factor considers the sophistication of the unit’s ability to address the issue on its own. If a security force has a highly sophisticated military justice system or an active criminal investigative agency, it is likely they will be able to discover, investigate, and adjudicate the incident on their own.

The more likely it is the security force will take remediating measures without U.S. assistance, the less justified the use of this provision. Essentially, units that are self-motivated do not need incentives from the U.S. The second factor focuses on the security force's familiarity with the Leahy Law. The better a security force is familiarized, the easier it will be for them to realize the types of things they need to do to address the underlying incident without U.S. assistance.

The third and fourth factors focus on the violations themselves. These two factors are intended to represent the *purity* purpose of Leahy, the more egregious the violation, and the more direct the chain of command involvement, the more important it is to keep the U.S. away and untainted. If an entire nation's armed forces are riddled with human rights abusers at the highest levels of command, there is little to be gained by continuing a relationship with a single offending unit. In these cases, a more holistic, national strategy is likely necessary. In comparison, a single individual's actions should not be the basis for loss of support to the entire unit, especially if the unit would be likely to address the incident if they knew it occurred. Furthermore, the more egregious an incident, the more likely the security force will uncover it on their own, or receive information from another source.

The fifth and sixth factors are focused on the U.S.' interest. The fifth factor considers the sophistication of the organizational structure. As discussed at the beginning of this Article,<sup>147</sup> when an individual commits a violation of human rights, he and his unit become Leahy-barred. The more sophisticated the organization's structure, the better the U.S. is able to minimize the impact of a single violation. If it can be isolated to a single company, or platoon sized element,<sup>148</sup> it will allow continued security assistance to the vast majority of non-offending units. If, however, there are poor distinctions between units, a Leahy violation will likely taint a far larger group of individuals which may have a more dramatic impact

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<sup>147</sup> See *supra* Section II.

<sup>148</sup> See *generally*, Michael Moran, Modern Military Force Structure, COUNCIL ON FOREIGN RELATIONS (OCT. 26, 2006), <https://www.cfr.org/background/modern-military-force-structures>. In most militaries, this sized unit ranges from 20–100 people. *Company*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/company-military-unit>.

on bilateral relations and U.S. interests. The final factor asks the decision maker to broadly assess the U.S. national interest. If there is nothing to lose, bilateral relations will not be affected, and there is no military effectiveness threatened, there is little reason to use this provision.

*D. Summation*

The Leahy law's dual purposes are typically able to exist together in peace. However, sometimes they fall into conflict. Rather than allowing the law to always choose to serve the *purity* purpose by default, decision makers on the ground should be empowered to assess the situation and decide whether it is more important to keep the U.S. away from a tainted unit, or to continue developing and working with the unit to make them a stronger future partner and promote a stronger relationship with partner nations. In making this decision, precautions should be taken to prevent abuse but also provide enough flexibility to ensure that Leahy is being used as effectively as possible to promote the U.S. National Interest and the international development of human rights policy.

V. ISSUE 3: STATELY LANGUAGE—DIFFERENCES BETWEEN THE  
DOS AND DOD VERSIONS OF LEAHY

In the preceding sections of this Article, there have been multiple references to the differences that exist between the DoD and DoS version of the law. The primary differences<sup>149</sup> are: (1) The remediation standard; (2) The DoS duty to notify and assist; and (3) DoD's "extraordinary circumstances," disaster relief, humanitarian aid, and national security exceptions.<sup>150</sup> Clearly, there must be an important reason to differentiate between the standards applied to the Secretaries of State and Defense, otherwise, why further complicate

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<sup>149</sup> There are other obvious differences between the two versions such as substituting the names of agencies, the names of the appropriations, the specific grammatical structure used, but the three identified are the only sections that could conceivably have material impacts on interpretation.

<sup>150</sup> SERAFINO, ET AL., *supra* note 26, at 5.



and already complicated law with additional layers of ambiguity? It is true that there are important differences between the Departments of State and Defense, both in structure and in mission, but these differences don't account for all the discrepancies between the two versions of the law. Additionally, as the mission of the two departments overlaps, as has large become the case in Afghanistan and other modern conflicts, any justification in keeping the standards different is increasingly weakened. As such, there is no longer a reason to maintain many of the differences in the laws which is why this Article's third recommendation is to remove the unnecessary differences.

#### A. Remediation Standard

As explained earlier, remediation is the process by which a previously Leahy-barred unit is able to regain access to U.S. funding and support. The standard for remediation is different depending on the version of the Leahy law. The Department of Defense version requires that a security force remain barred "unless *all necessary corrective steps* have been taken."<sup>151</sup> The Department of State version applies when the Secretary of State "determines and reports" to Congress "that the government of such country is taking *effective steps* to bring the responsible members of the security forces unit to justice."<sup>152</sup> Neither version expressly defines what "all necessary steps" nor "effective steps" would entail. To date, Congress has not provided any information explaining a rationale for keeping them separate.

The intent has always been that the two be treated as a single standard. In a letter sent from Senator Leahy to then Secretary of Defense William Cohen in 1999, the Senator admitted that the DoS and DoD Standards were intended to be the same.<sup>153</sup> In practice, the Department of Defense and Department of State have agreed. The two Departments treat the standards as if they were the identical.<sup>154</sup> In a

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<sup>151</sup> 10 U.S.C. § 362 (emphasis added).

<sup>152</sup> 22 U.S.C § 2378(d) (emphasis added).

<sup>153</sup> SERAFINO, ET AL., *supra* note 26, at 17 (quoting a letter from Senator Patrick Leahy to Secretary of Defense William Cohen, January 14, 1999, provided to CRS by the Senator's staff).

<sup>154</sup> Secretary of Defense Memorandum, *supra* note 32, at 3.

2015 memorandum issued by Secretary of Defense, Chuck Hagel, Secretaries of the Military Departments were told that the term ‘appropriate remediation measures’ would be used when describing the measures necessary for a security forces unit to be remediated. Military Departments were explicitly told that the new term should be read to mean ‘all necessary corrective steps’ for purposes of the DoD Leahy law, and ‘effective steps’ for purposes of the DOS Leahy law.”<sup>155</sup> In effect, the memo erased the difference between the two versions of the law as a matter of practice.

There are also good policy reasons to unify the language. In a law as complex as Leahy, and as potentially burdensome, there are always going to be risks that individuals or organizations try to avoid its effects. Allowing separate language gives lip-service to the argument that the standards were intended to mean different things and as neither standard has ever been expressly defined, an alternative interpretation could be defended. One example of this occurred in the early days of the law. Despite Senator Leahy’s clarification letter sent to Secretary Cohen in 1999, the Secretary disagreed. He felt that the law could be interpreted in a different way. Cohen wanted to interpret the law to allow a unit to fulfill remediation requirements by simply removing an identified violator or violators from a unit, or by ensuring that that unit received law of war or human rights training.<sup>156</sup> Secretary Cohen eventually backed down and, to date, there has never been an incident of the Department of Defense using an alternative interpretation of the standard to remediate a Leahy-barred unit;<sup>157</sup> however, the opportunity still remains, bolstered by some theories of statutory construction.<sup>158</sup> Should the Secretary of State or Defense disagree with his or her counterpart’s actions, they have a superfluous ground to make an argument.

The primary counterargument to all the differences discussed in this section, is that there are real differences between the missions

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

<sup>156</sup> GAO 13-866, *supra* note 42, at 6.

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

<sup>158</sup> *Rodriguez v. United States*, 480 U.S. 522, 525 (1987). “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Id.* at 525 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

of the Department of Defense and that of the Department of State that warrant discrepancies in standards. Namely, the Department of State's aim is diplomacy while the Department of Defense's is defense. Traditionally, this has been the case. With that in mind, it would make sense that the Department of State, interested in maintaining diplomatic ties, teaching foreign nations to improve, and being actively involved in security assistance, would only require a few steps in the right direction to resume support. The Department of Defense, especially in wartime, has a different role. It doesn't have the time to track progress, or encourage continued support. Once a unit is fully remediated, that is when "all necessary steps" have been taken, the DoD will resume support, until then it has other things to occupy its time and resources. If this were still the case, regardless of Senator Leahy's original intent, there would be a solid justification in maintaining the differences. However, over the course of the last few years, that mission distinction is increasingly no longer the case.<sup>159</sup> The mission of the Department of State and the Department of Defense has a great degree of overlap in recent conflicts.<sup>160</sup> As an example, look no further than the Afghan Security Forces Fund which is a direct authorization from Congress for the DoD to engage in comprehensive security assistance to the ANSF.<sup>161</sup> There is also the change in the NATO mission from ISAF's combat operations to Resolute Support's Train, Advise, Assist (TAA) role. Perhaps due to the instability of the region, or the poor security situation, the DoD has taken a much larger role in security assistance. And if that is to remain in the future, it is better to remove the distinctions in Leahy to reflect the modern state of affairs.

For these reasons, and unless the Departments of Defense and State move toward their traditional separate missions, there is little justification in maintaining the differences in the remediation language. The intent has always been that the two versions be treated the same, they are already treated the same as a matter of policy, and if allowing differences creates an opportunity to undermine the

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<sup>159</sup> See generally GORDON ADAMS & SHOON MURRAY, MISSION CREEP (Gordon Adams & Shoon Murray, eds., 2014).

<sup>160</sup> The overlap in mission set between the two Departments and the effects on the Leahy law could easily form the basis for additional research but it is far beyond the scope of this Article.

<sup>161</sup> Consolidated Appropriations Act of 2014, *supra* note 39.

purpose of the law, that opportunity should be eliminated.

*B. Duty to Notify and Assist*

The next major difference is that the DoS version of the law includes the following duty to notify offending nations:

In the event that funds are withheld from any unit pursuant to this section, the Secretary of State shall promptly inform the foreign government of the basis for such action and shall, to the maximum extent practicable, assist the foreign government in taking effective measures to bring the responsible members of the security forces to justice.<sup>162</sup>

The Defense version of the law has no equivalent.<sup>163</sup> There is no stated reason why the State version has this provision and the Defense version does not. Additionally, it has never been well established how the DoS duty to notify should work in practice.<sup>164</sup> The duty to assist is equally vague and there is no information on the types of assistance that could be offered or the circumstances under which the assistance may be provided.<sup>165</sup> This is unlikely to change. In 2013, following a GAO report that called attention to the lack of guidance on the implementation of the duty to inform, the Department of State replied, “embassies are in the best position to determine the level and form of notification that will address the requirement.”<sup>166</sup> At the time of publication, there is still no publicly available guidance.

The duty to notify and assist makes sense, especially given its consistency with one of the dual purposes of the law.<sup>167</sup> It incentivizes nations to hold violators accountable and develop systems to prevent abuses from occurring.<sup>168</sup> As such, it does makes sense to keep the

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<sup>162</sup> 22 U.S.C.S. § 2378d(c).

<sup>163</sup> There is authority for the DoD to provide limited human rights training to security forces that would otherwise be prohibited, but no further assistance is authorized. Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292.

<sup>164</sup> GAO 13-866, *supra* note 42, at 11.

<sup>165</sup> *Id.* at 17.

<sup>166</sup> It did, however, state that “further guidance . . . would be worthwhile.” *Id.* at 25.

<sup>167</sup> As discussed in depth in the previous section.

<sup>168</sup> *See supra* Section IV.

duty, and to add it to the DoD version. There is little reason why the funds withheld from one appropriation should trigger the duty while the withholding of other funds would not. Further guidance on implementation is necessary, and it would likely be easier should the Leahy laws be changed to implement the suggestions this Article makes in cases where classified or sensitive material is the basis of credibility determinations.<sup>169</sup> Regardless, if Congress decides the duties to inform and assist are worthwhile, they should appear in both versions.<sup>170</sup>

### C. *Exceptions*

The final distinction is the additional exceptions in the DoD version. In addition to remediation, DoD funds may still be provided to offending units if the Secretary of Defense, after consultation with the Secretary of State, determines that it is required by “extraordinary circumstances” or when the assistance is necessary to assist in “disaster relief operations or other humanitarian or national security emergencies.”<sup>171</sup> This Article will spend more time analyzing the necessity and effectiveness of specific Leahy exceptions in Section VI; however, to the extent that the “extraordinary circumstances” and “disaster relief” exceptions are retained, it makes little sense to limit them to one federal department and not the other.

This is especially the case for issues involving disaster relief humanitarian and national security emergencies. While there was little discussion in the Congressional record justifying the addition of these exceptions in 2014,<sup>172</sup> there is no reason to more stringently limit the Department of State’s ability to engage in humanitarian assistance or disaster relief, even when taking the traditional difference of mission sets into account. As such, this exception should be added to

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

<sup>170</sup> *Id.* (showing that to the extent that the Department of State and Defense resume their traditional roles, it makes sense for the DoS to take a mentorship role, and the DoD to cut ties until sufficient progress has been made).

<sup>171</sup> 10 U.S.C. § 362.

<sup>172</sup> S. REP. NO. 113-76, at 183 (2014) (containing the only written discussion is that “[I]n addition to a waiver for extraordinary circumstances, the provision would authorize the Secretary of Defense to provide training, equipment, or other assistance for disaster relief, humanitarian assistance, or national security emergencies, as well as to conduct human rights training.”).

the DoS version of Leahy in the FAA.

The other exception, for “extraordinary circumstances,” is also exclusively available to the Department of Defense. This is justifiable as “extraordinary circumstances” that threaten U.S. national security may manifest in an endless variety of ways.<sup>173</sup> In order to provide the DoD with necessary operational flexibility in times of war, on while engaging threats, it is important to never tie the Departments hands completely when it could otherwise be avoided. On the contrary, DoS security assistance is typically divorced from these “extraordinary circumstances” due to its more diplomatic nature. That being said, to the extent that we are willing to recognize that these “extraordinary circumstances” exist, and as the approval rests solely at the Secretarial level, it makes sense to provide an equivalent provision to the Department of State.

#### *D. Summation*

As the law currently exists, there are three primary distinctions between the Department of State and Department of Defense versions of the law. These distinctions may have served a deliberate purpose at one time but they now cause increased confusion in an already complex system. The remediation standard was never intended to be different for the two versions, as a matter of policy it is now treated the same, and to the extent Congress wants to avoid frivolous legal arguments about the meaning of the distinction, it should be removed. The duty to inform and assist directly supports one of Leahy’s dual purposes and there is, therefore, little justification for keeping it out of the Department of Defense version of the law. Lastly, the exceptions for humanitarian assistance, national security, and disaster relief should be included in the Department of State version of the law. To the extent that Congress thinks we should make exceptions in these circumstances it shouldn’t matter where the humanitarian aid comes from. The exception for “extraordinary circumstances” is withheld to such a high level and used so infrequently, it too could have a Department of State equivalent with little risk.

If the Departments of Defense and State maintain distinct missions, and the differences between those missions justify

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<sup>173</sup> Again, the exact meaning of “extraordinary circumstances” has never been clearly defined in the Leahy context.

differences in their respective version of the Leahy law, it makes sense to maintain distinct standards. However, as the mission between the agencies begins to overlap, and as the two more frequently work together when addressing Leahy issues, there is no sense in maintaining the distinction. Even when ignoring the “mission creep,” many of the differences between the two versions of the law have no justification. The Leahy law is complex enough, needless statutory distinctions do nothing but complicate it even more and should, therefore, be eliminated.

VI. ISSUE 4: HELPING OUR HELPERS—PROVIDING SECURITY ASSISTANCE TO FOREIGN FORCES PURSUING U.S. INTERESTS

You are sitting in a conference room listening to a brief about an increasingly desperate situation. A group of U.S. personnel in Afghanistan are about to come under attack by an insurgent force and due to the inequity in numbers, there is no chance they’ll be able to survive. There aren’t any U.S. forces in the area that will be able to make it in time but there is a local Afghan National Army unit only a few kilometers away. Unfortunately, the Afghan unit lacks necessary arms and equipment to be of any benefit. You know that you can drop the necessary armaments via air support and ensure that they arrive in time. Unfortunately, that particular unit is Leahy-barred and you are prohibited from equipping them. In a situation like this, it seems obvious that there needs to be an exception to the rule. When foreign security forces are working on behalf of U.S. forces or interests, Leahy sanctions may end up hurting the U.S. more than the offending unit. There needs to be a mechanism for providing support in these situations without allowing for a complete degradation of the Leahy Law’s purpose. This is increasingly important given how many functions have been handed over to foreign forces that were traditionally performed by the U.S.

In December of 2014, following more than a decade of international military operations, the International Security Assistance Force (“ISAF”) ended combat operations and control of the NATO mission in Afghanistan and transitioned to Resolute Support (“RS”).<sup>174</sup> RS and ISAF were both charged with training

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<sup>174</sup> SULTAN BARAKAT & BROOKE SMITH-WINDSOR, POST-ISAF AFGHANISTAN: THE EARLY MONTHS 2 (2015).

Afghan National Security Forces (ANSF), but unlike RS, ISAF was also actively engaged in combat operations with the Taliban Insurgency, a mission that has now been turned over to the ANSF.<sup>175</sup> Since the transition from ISAF to RS, the security situation in the country has not done particularly well.<sup>176</sup> In fact, some analysts have gone as far as stating that the security situation in the country is the “worst since 2001,” when ISAF and U.S. forces first entered the country.<sup>177</sup> As just one example of this, in May 2017, a truck bomb detonated near the German Embassy in downtown Kabul killing 92 people and injuring another 450.<sup>178</sup> Since the transition, and subsequent reduction in U.S. and NATO forces, the Taliban have made alarming gains. As of 2017, only 60% of the country remains under government control, the rest is either controlled by the Taliban, ISIS affiliates, or is under dispute.<sup>179</sup>

In total, U.S. Forces have been reduced from over 100,000 Service members in 2011 to approximately 13,000 in 2017.<sup>180</sup> This means that many of the combat and security-related tasks that were once directly performed by U.S. and Coalition forces have now been passed on to the ANSF whose units are now responsible for keeping

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<sup>175</sup> S.C. Res. 1386, ¶ 9 (Dec. 20, 2001).

<sup>176</sup> SECURITY COUNCIL REPORT, DECEMBER 2017 MONTHLY FORECAST 24 (2017), [https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/2017\\_12\\_forecast.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/2017_12_forecast.pdf).

<sup>177</sup> David Wroe, *Experts Back Afghanistan Troop Boost but Some Ask ‘Where’s the Strategy?’*, THE SYDNEY MORNING HERALD (May 29, 2017, 5:34 PM), <https://www.smh.com.au/politics/federal/experts-back-afghanistan-troop-boost-but-some-ask-where-s-the-strategy-20170529-gwfooa.html>; *Some Afghan Ministers Have Embezzled Millions – Anti-Graft Chief*, REUTERS, Oct. 22, 2011, 9:02 AM, <https://in.reuters.com/article/idINIndia-60064820111022>; Aimal Faizi, Opinion, *How Ghani’s Appeasement Towards Pakistan Has Worsened the Situation Inside Afghanistan*, AFG. TIMES (June 10, 2017, 7:22 AM), <http://indianexpress.com/article/opinion/how-ghanis-appeasement-towards-pakistan-has-worsened-the-situation-inside-afghanistan-4694215/>.

<sup>178</sup> Eltaf Najafizada, *Suicide Truck Bomb in Afghan Capital Leaves at Least 93 Dead*, BLOOMBERG POL. (May 31, 2017, 3:50 PM), <https://www.bloomberg.com/news/articles/2017-05-31/kabul-hit-by-worst-attack-since-march-near-foreign-embassies>.

<sup>179</sup> *Why States Fail and How to Rebuild Them*, ECONOMIST, (January 7, 2017), <https://www.economist.com/news/international/21713835-fixing-fragile-nations-lessons-afghanistan-and-south-sudan-why-states-fail-and-how>.

<sup>180</sup> *Id.*



U.S. Forces safe, and for a variety of counter-terrorism efforts that have a huge impact on U.S. national security interests.<sup>181</sup>

This is likely a very different situation than the original Leahy drafters had in mind. In Afghanistan today, security assistance and support is not being used solely to benefit Afghanistan, Afghan forces, and Afghan citizens, it is also being used to benefit the U.S. and its citizens that live and serve within and outside Afghanistan's borders. This can place practitioners in a difficult situation where they must choose between upholding the law and putting Americans at risk. The solution to this conflict is this Article's final recommendation; eliminate the "extraordinary circumstances" exception in favor of a new mechanism which can grant flexibility to military commanders when the true beneficiaries of security assistance to a foreign military unit are U.S interests.

#### A. *Leahy's Operational Criticism*

In December 2013, while giving a speech on human rights and American interests, the National Security Advisor, Susan E. Rice, addressed a difficult balance that must be struck in American foreign policy.<sup>182</sup> After stating that the advancement of democracy and respect for human rights is central in U.S. foreign policy, she continued with the following:

Yet, obviously, advancing human rights is not and has never been our only interest. Every U.S. president has a sworn duty to protect the lives and the fortunes of the American people against immediate threats. That is President Obama's first responsibility, and mine. We must defend the United States, our citizens and our allies with every tool at our disposal, including, when necessary, with military force. We must do all we can to counter weapons of mass destruction, aggression, terrorism, and catastrophic threats to the global economy, upon which our way of life

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<sup>181</sup> U.S. DEP'T OF DEF., PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN JANUARY 2009, at 8 (2009), [https://dod.defense.gov/Portals/1/Documents/pubs/OCTOBER\\_1230\\_FINAL.pdf](https://dod.defense.gov/Portals/1/Documents/pubs/OCTOBER_1230_FINAL.pdf).

<sup>182</sup> Susan E. Rice, Nat'l Sec. Advisor, Remarks at the Human Rights First Annual Summit, Human Rights: Advancing American Interests and Values (Dec. 4, 2013) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2013/12/04/remarks-national-security-advisor-susan-e-rice-human-rights-advancing-am>) (emphasis added).

depends. Anything less would be a dereliction of duty. As we seek to secure these core interests, we sometimes face painful dilemmas when the immediate need to defend our national security clashes with our fundamental commitment to democracy and human rights. Let's be honest: at times, as a result, we do business with governments that do not respect the rights we hold most dear. We make tough choices. When rights are violated, we continue to advocate for their protection. But we cannot, and I will not pretend that some short-term tradeoffs do not exist . . . *American foreign policy must sometimes strike a difficult balance—not between our values and our interests, because these almost invariably converge with time, but more often between our short and long-term imperatives.*"<sup>183</sup>

While not specifically mentioning the Leahy Laws by name, Rice's comments address one of the Leahy Law's most common criticisms. In 2013, on the eve of the U.S. drawdown in Afghanistan, military leaders, diplomats, and Senator Leahy gathered to debate the Leahy Law's role in the country.<sup>184</sup> At the time, as discussed earlier in this section, the Pentagon was working to train and equip local security services to combat militants so that American troops didn't have to.<sup>185</sup> Admiral William H. McRaven, a Navy SEAL who at the time was the commander of U.S. Special Operations Command, testified that while he supported the spirit of the law, its enforcement had complicated the nation's ability to "train and equip foreign security forces, many of which are now front-line units fighting Al Qaeda and its affiliates."<sup>186</sup> He added that while U.S. officials were dedicated to teaching foreign forces the importance of human rights, the law "has restricted us in a number of countries across the globe in our ability to train units that we think need to be trained."<sup>187</sup>

Even when an allegation has not yet been confirmed, there are problems for military commanders. The vetting process can be incredibly slow, taking weeks or months to verify whether a

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<sup>183</sup> *Id.*

<sup>184</sup> Eric Schmitt, *Military Says Law Barring U.S. Aid to Rights Violators Hurts Training Mission*, N.Y. TIMES (June 20, 2013), <https://www.nytimes.com/2013/06/21/us/politics/military-says-law-barring-us-aid-to-rights-violators-hurts-training-mission.html>.

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

<sup>186</sup> *Id.*

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

violation occurred, and months more to remediate. General John Kelly, then the Commander of U.S. Southern Command, once stated that he had to “wait until the State Department sorts these things out before I can send people in.”<sup>188</sup>

These concerns are likely the reason that exceptions, exemptions, and various notwithstanding authorities exist; in some extraordinary circumstances, we need to assist foreign forces in order to help ourselves. That being said, the existing exceptions do not provide much help. Congress has never stated the actual standard to be applied for the “extraordinary circumstances” exception,<sup>189</sup> and the use of notwithstanding authorities, located in the ASFF and other similar appropriations, is typically met with criticism.<sup>190</sup> On the other hand, there needs to be meaningful limitations on these exceptions or else the entire point of the Leahy law may be frustrated. The proposed solution must provide a meaningful restraint on abuse while simultaneously addressing the operational concerns of U.S. military leaders. Luckily, that mechanism already exists thanks, in part, to a Congressman from Arkansas named Bill Alexander.

*B. Who’s Benefiting Whom? The “Big ‘T’ / Little ‘t’” Method.*

As a general rule, the Department of State has the responsibly, exclusive authority, and appropriated funding to conduct foreign assistance on behalf of the U.S. Government. This includes all assistance to foreign military or governments, development of infrastructure projects, and humanitarian assistance.<sup>191</sup> The Department of Defense may only provide security assistance using its funds when there is a specific

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

<sup>189</sup> DODIG-2018-018, *supra* note 35 n.30.

<sup>190</sup> *See* SIGAR 17-47-IP, *supra* note 45.

<sup>191</sup> The Foreign Assistance Act of 1961 created the authority for the executive branch to conduct foreign assistance on behalf of the United States. *See* Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2151 (2012)); *see also* EXEC. ORDER NO. 10973, pt. 5 (1961) (delegating authority to conduct foreign assistance created by Congress in the Foreign Assistance Act to the Department of State).

Congressional authorization,<sup>192</sup> or when the funding, while being provided to train a foreign force, is *actually* intended to benefit U.S. military forces; a category of training known as “Little ‘t’ training.” The distinction between Big ‘T’ Training and Little ‘t’ training is commonly used by military fiscal attorneys to determine whether using DoD funds for foreign security assistance is proper. The distinction traces its roots back to a U.S. Comptroller General opinion, known as the “Honorable Bill Alexander” decision.<sup>193</sup>

#### 1. The *Ahuas Tara* Exercise

In 1983, The Department of Defense commenced *Ahuas Tara*, a joint-combined military exercise in Honduras.<sup>194</sup> Over the course of the six-month exercise, 12,000 American Troops participated in maneuvers alongside the Honduran military.<sup>195</sup> The Department of Defense also built a 3,500 foot airstrip, constructed nearly 300 wood huts, deployed radar systems, provided medical assistance to 50,000 Honduran Civilians and veterinary assistance to 40,000 animals, built a school, and provided training to hundreds of Honduran military personnel.<sup>196</sup> A Congressional delegation, led by Congressman William “Bill” Alexander, requested that the Comptroller General of the conduct an investigation to determine whether it was appropriate for the Department of Defense to conduct this exercise using its standard operations funds. After a lengthy discussion, the Comptroller General concluded that many of the activities carried out by the Department of the Defense were unlawfully funded and should have been paid through security assistance funds, within the purview of the Department of State.<sup>197</sup> Nonetheless, it was concluded that minor amounts of interoperability and safety instruction did not constitute “training” as that term is used in the context of security assistance, and could

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<sup>192</sup> For example, the ASFF. See *Afghanistan Security Forces Fund (ASFF)*, DEF. SEC. COOPERATION AGENCY, <https://www.dsca.mil/programs/afghanistan-security-forces-fund-asff>.

<sup>193</sup> The Honorable Bill Alexander, House of Representatives, B-213137, 63 Comp. Gen. 422 (1984).

<sup>194</sup> *Id.* at 447.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

therefore be financed with standard DoD Funds.”<sup>198</sup>

This caveat became known as “Little ‘t’ training,” training or instruction for foreign forces which had the *primary purpose* of promoting interoperability, safety, and/or familiarization with U.S. military forces. The overall benefit is primarily directed at U.S. forces, who learn how to fight with and alongside allied militaries, use allied military equipment, and work in settings they would likely find themselves should they ever fight on multinational battlefields. Because the primary beneficiaries in those situations are U.S. forces, the Comptroller General opined that DoD funds are appropriate. The alternative became known as “Big ‘T’ Training.” This type of training consisted of security assistance undertaken to improve a foreign military force’s operational readiness; the traditional form of security assistance that must be funded by the Department of State.<sup>199</sup>

## 2. Application to Leahy

This same approach can be used in the Leahy context. Assuming that a foreign unit is Leahy-barred, military leaders are currently prohibited from providing any assistance regardless of their intent in doing so. When the intent is to train, develop, and mentor units for the benefit of foreign nations, it makes sense to prohibit security assistance, that’s exactly what the Leahy law is designed to do. The problem arises when foreign forces are receiving U.S. assistance and equipment to aid in the pursuit of U.S. objectives, or to protect and support U.S. forces. These are the situations that give rise to the complaints and criticisms made by Ms. Rice, Admiral McRaven, and General Kelly. Just as we would never bar a U.S. unit or individual from receiving support, we should not bar foreign forces when they are acting as U.S. surrogates.

The solution is to establish a Leahy equivalent to the Big ‘T’ Little ‘t’ distinction. Dividing “assistance” into Big ‘A’ Assistance and little “a” assistance grants military commanders the ability to use funds that would otherwise be prohibited when the beneficiary of the security assistance is primarily the U.S. Big “A” assistance,

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<sup>198</sup> *Id.*

<sup>199</sup> CONT. & FISCAL DEP’T, THE JUDGE ADVOC. GEN.’S LEGAL CENTER & SCHOOL., U.S. ARMY FISCAL LAW DESKBOOK 10-10 (2019).

like Big “T” Training, would be defined as “foreign security assistance primarily undertaken to improve a foreign military force’s operational readiness.”<sup>200</sup> This is traditional security assistance that the Leahy law was intended to prohibit when there is a confirmed gross violation of human rights. This will be distinguished from “Little ‘a’ assistance” which would be limited to assistance that primarily benefits the U.S.

### 3. Factors of Consideration

In order to assist in this determination under the Big ‘T’/ little ‘t’ training paradigm, a number of factors have been established to assist practitioners.<sup>201</sup> Similarly, the Big ‘A’ little ‘a’ distinction could rely on the following: (1) relationship between the U.S. and the foreign force; (2) the location the assistance will take place; (3) the amount of benefit received by the foreign force; and (4) the past performance of the foreign force. These could either be written directly into the statute, or established elsewhere in administrative policy. The following paragraphs in this section will summarize each of these factors and how they would be used to determine the primary beneficiary of the proposed assistance.

The first factor is the relationship between the U.S. and the foreign security force that will be receiving the security assistance. This factor is intended to demonstrate the degree to which the foreign force is acting as a U.S. surrogate. On one end of the spectrum are forces that integrated into a U.S. chain of command. In some situations, foreign forces work directly alongside U.S. armed forces, following U.S. orders, and executing joint missions. On the other end of the spectrum are forces that are wholly independent, that are not subject to U.S. oversight or guidance, and function largely as if they were independent contractors. The closer the relationship, and the more the U.S. relied on the unit in the pursuit of U.S. objectives, the better justification for categorizing the support as “Little ‘a’ assistance. This factor should also consider relative advancement of the foreign security force. The regular

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

<sup>201</sup> These include: cumulative financial costs, training duration; size of foreign military training force; expected foreign military, training proficiency outcome, training location, and primary training beneficiary. *Id.*

armed forces of a sovereign state should be held to a higher standard than a local militia that does not have the benefit of regular human rights training or a developed understanding of the Rule of Law.

The next factor considers the location the assistance will take place, the closer to active hostilities, and the more likely U.S. forces will be at risk, the more likely the U.S. is the primary beneficiary. Practitioners could consider whether there is a designated International Armed Conflict (IAC), a Non-international Armed Conflict (NIAC), or whether the hostile forces were undeclared. This factor would also take into account any available information on the current security situation. The more dependent U.S. forces are on foreign security and protection, the more likely they should qualify as little 'a' assistance.

Third would be the degree to which the foreign security force benefits from the assistance. This would be measured by the cumulative cost of the assistance, the duration, and the breadth of the benefit. Providing foreign security forces with large, expensive equipment or new construction will likely have a benefit well after the immediate benefit to the U.S. has ended and therefore increases the overall benefit received by the foreign security force. Furthermore, the analysis should consider whether the beneficiary would be another sovereign nation as a whole or a regional or local force or militia. For assistance that would benefit an allied nation as a whole rather than a specific Leahy-barred unit, there is a stronger argument in allowing the support as less of the benefit will be received by the barred unit.

The final factor is the past performance of the unit. This would encompass the severity of the human rights violation, whether it was an isolated incident, and whether the unit has taken any steps to address it. If a unit has been taking steps to remediate, or hold the responsible individuals accountable, but has not yet satisfied the Leahy's remediation standard, it strengthens the justification in providing assistance.

By using these factors, decision makers will be better able to determine whether proposed assistance will primarily benefit the U.S., or, the foreign Leahy-barred unit. This analysis will allow for continued security assistance support to forces that the U.S. depends on for the protection and security of U.S. forces and interests. Foreign forces directly responsible for providing security or aid in a

role that would typically be fulfilled by the U.S., serving in an area with active contingencies, that would only receive minimal long-term assistance, will be eligible for necessary little ‘a’ assistance. Conversely, repeat offenders within allied armed forces, working independently of U.S. forces in an area free of hostilities and likely to receive extensive, costly support would remain barred as recipients of Big ‘A’ Assistance.

#### 4. Mitigating the Risks

The greatest risk in changing the mechanism from “extraordinary circumstances” to the method detailed above, is that it there is a chance the exception could swallow the rule. There is an argument that everything that the DoD does is intended to benefit national security, otherwise, it would not be the DoD’s role at all. In order to mitigate that risk, the exception would have to be reserved for the strategic, rather than tactical level.<sup>202</sup> To do this, all that is necessary is to require a high-level approval authority for the exception. Like “extraordinary circumstances,” it could be reserved to the Secretary of Defense, or, delegated as far as the Combatant Commanders.<sup>203</sup> This will ensure that the exception is not relied upon unless there is a legitimate need to do so. There should also be a Congressional notification requirement, like the current statute already has.<sup>204</sup> It is also important to note that this exception would only allow the DoD to continue funding a foreign unit in support of its mission. Nothing would prevent the full investigation, prosecution, and punishment of responsible parties.

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<sup>202</sup> Strategic, Operational, and Tactical are the three levels of war. The strategic level focuses on the outcome of a war as a whole. Tactical, on the other hand, focuses instead on individual maneuvers and battles on the smallest scale. U.S. Armed Forces, Joint Publication 1, Doctrine for the Armed Forces of the United States, at I-8 (2013), [https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp1\\_ch1.pdf](https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp1_ch1.pdf).

<sup>203</sup> Commanders of Combatant Commands (COCOMs), geographic multi-service commands that report directly to the Secretary of Defense and the President of the United States. *Id.* at II-25.

<sup>204</sup> 22 U.S.C. § 2378d.



*C. Summation*

As National Security Advisor Rice said in 2013, the U.S. sometimes faces painful dilemmas requiring choices between the need to defend our national security interests and our ongoing, fundamental commitment to democracy and human rights.<sup>205</sup> These potential conflicts were likely the reason why an “extraordinary circumstances” exception was included in the DoD’s version of the law from the start. However, despite the existence of this exception, senior military leaders have still attested to difficulties navigating the tension between these values. In order to arm our military leaders with the tools needed to keep our interests and Servicemembers safe, while being true to the principles that form the basis for the Leahy laws, we need to provide sufficient operational flexibility to allow them to decide how to handle difficult situations. By changing from a vaguely defined exception to a methodology based in existing law, military commanders, and those advising them, will be better able to simultaneously protect American principals, and the Soldiers that defend them.

## VII. CONCLUSION

Each of the recommendations listed in this Article could be further expanded upon and form the basis for further research. The intent of this Article is to demonstrate that there is a divide between the original intent of the Leahy Law and the way the law operates in effect. Armed with decades of lessons learned and data gathered from Leahy practitioners, Congress should update the law to ensure that the intent and effect are better aligned.<sup>206</sup> By setting the

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<sup>205</sup> Rice, *supra* note 182.

<sup>206</sup> While the thesis of this paper is that statutory amendments in Congress is the best mechanism to make these changes, much can be done as a matter of policy. Lacking a statutory definition, the Departments of State and Defense can order practitioners to interpret “credible evidence” to mean “probable cause;” they can interpret extraordinary circumstances to invoke the reasoning in the “Honorable Bill Alexander” decision from GAO, and they can consider the dual purposes when making credibility, remediation, and notwithstanding decisions. This may also galvanize Congress to correct deficiencies in the new interpretations which may lead to the Congressional, statutory solution that is ultimately preferred. This Article is also silent on the role of Congressional politics or partisan polarity and how that would affect implementation of the

standard of proof in Leahy cases as “credible information,” Congress intended to specify the types of evidence to be considered; however, without clear guidance on what that standard means, and how to handle difficult cases, practitioners cannot hope to properly assess violations. Without the discretion to choose between Leahy’s dual purposes, practitioners and commanders lose the operational flexibility necessary to select the optimal objectives when a conflict arises. While differences between the Department of State and Defense may have once justified distinctions in their versions of the law, that justification has been weakened as the mission of the two has become increasingly overlapped, and as decisions are more often being made by inter-agency committees. Finally, while the original drafters always recognized the need for flexibility in Leahy’s application in order to prevent disproportionate harm to the U.S. national security in certain “extraordinary circumstances,” the mechanisms chosen lack the practical effectiveness or guidance that is necessary to be used properly or deliberately.

This by no means excuses the problems that have been occurring in the law’s implementation. The processing times are too long, the tracking system, INVEST, is too convoluted, and the role of the Department of Defense is too marginalized. These should all be reexamined, and upgrades to the statute should be matched with upgrades the policies, programs, and processes that are currently in place. Many of the sources cited in this Article contain a myriad of great suggestions that would increase Leahy’s functionality. However, these administrative changes will ultimately be futile if some of the fundamental problems identified in this Article are not solved. We need to improve the heart of the law and not just its application.

There is no doubt that the Leahy law is a critical part of the United States’ foreign policy and that its aim warrants continued effort to achieve. However, we should not fear revisiting the original intentions now that we have seen how it operates in the real world. It must be continually improved or risk becoming an empty remnant of its former self, or worse, become the operational burden that its critics espouse. America needs to be a world leader in the

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proposed amendments as it would be outside the scope of this Article and likely warrant extensive scholarship on its own.

area of human rights but it requires functional tools in order to do so and when it comes to Leahy, Congress needs to sharpen the blade. It is the author's hope that, by implementing the statutory changes presented in this Article, it can do just that.

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