Brandeis University Law Journal

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Dear Reader,

After a yearlong revival process, we at the *Brandeis Law Journal* are proud to present our first issue in nearly 5 years. In this new world of virtual classes, the *Brandeis Law Journal* was uniquely positioned to continue work towards our publication. These seven rigorously-edited articles showed unique creativity, dedication, and insight from our incredible writers. They offer perspectives and analyses of legal issues which are important to our students. The issue is written and edited by undergraduates. They cover topics ranging from prisoners' voting rights to the right to privacy in the 21st century including a discussion of a potential right to internet access.

In addition to our print publication, the *Brandeis University Law Journal* is also presenting our publication through an online format: Issuu. The e-publication is linked through our new website at https://brandeislawjournal.wordpress.com. Our online presence is especially important going forward as the world is becoming increasingly digitally connected.

I would like to thank our incredible leadership team, writers, and editors. Without all of their work, this revived publication would not have been possible. Their dedication, passion, and creativity are evident throughout this issue and provide the foundation for publication. I would like to give great appreciation to Emma Fiesinger and the Allocations Board on Student Union for providing us the funding necessary to print this edition.

I would like to extend a special thanks to Cat Gibson and Lucy Pugh-Sellers, my former fellow Co-Editors-in-Chief. Congratulations on your graduations and we wish you all the best in your post-graduate careers. They inspired our current revival and conducted the crucial outreach to start the publication process. We owe our success and ability to publish this issue and build our club to them.

Through their inspiration, we have gathered a new team of editors and administrators to maintain our club and continue to build on our success. I hope to create partnerships with other law journals and to create a mentorship program within the Brandeis community in the coming year and beyond to continue to build on the wonderful club. We look forward to our continued work supported by two phenomenal advisors, Professors Kabrhel and Breen. We really appreciate all of their insight, advice, and support.

This revived publication is dedicated to the memory of Judah Marans '11, our inspirational founder who created an incredible foundation on which the Brandeis Law Journal is able to thrive even during the current pandemic environment. His creation of Journal enables and empowers us to do our work and learning today. We are honored to continue this legacy and maintain this incredible and vibrant forum for legal discussion and debate. We extend our deepest sympathies to his family and friends throughout the Brandeis community. May his memory be a blessing.

Sincerely,

Sophia Reiss

Editor-in-Chief

Dedicated to Judah Marans'11

We are incredibly grateful to the Brandeis Law Journal's founder, Judah, for creating this forum for discussion and learning in and around the legal field. Judah's contribution to the Brandeis community will forever be remembered and greatly appreciated.

The Notorious RBG: May Her Memory Be For A Blessing
March 15, 1933- September 18, 2020

Cat Gibson[1]

The first time I most likely heard Ruth Bader Ginsburg's name was probably in the wake of the *Obergefell v. Hodges* decision. Decided in the summer of 2015, *Obergefell v. Hodges*[2] recognized the right for same-sex couples to marry, and amongst the pictures of happy couples kissing, getting married, carrying rainbow flags, and celebrating the hard-won recognition of a human right, I was most struck by the images of an elderly Jewish woman I saw in my social media and news feeds amongst the celebrations of love. Often adorned with a crown, and sometimes captioned with the title "The Notorious RBG," it was clear that somehow, this woman had done something to influence all those celebrations. My high-school self couldn't help but wonder how this woman had been elevated to the level of popular culture icon, clearly beloved by young and old alike?

I can't remember the google searches I'm sure I made as I tried to unravel the mystery of who this woman was and how she'd amassed such a devoted fanbase, but I can remember feeling an instant connection. On the surface, we had nothing in common: she was a northern, Jewish, Supreme Court justice while I was a southern, catholic, high school student who was thinking about a career in writing. I was determined NOT to go into law, because that's what my father did, and I didn't want to just follow in his footsteps. But I somehow related to this woman's spirit even if I couldn't relate to her background. She was only the second female United States Supreme Court justice, and the first Jewish woman to be appointed. I read about how she had fought for the rights of women and those societies commonly rejected and thought that maybe law wasn't completely off the table as I tried to prepare myself for a career which would allow me to make a difference. I was in awe of her achievements and all that she'd managed to accomplish in the legal landscape.

It wasn't until I was buying my sister's Christmas present about three years later that I really began to appreciate her for not just the effect she had on the law, but more fully for who she was as a person and the strength of her spirit. My sister and I had shared a love for the justice and would send each other clips of her working out on television shows or text each other quotes

[1] Undergraduate at Brandeis University, Class of 2021.
[2] Obergefell v. Hodges, 576 U.S. 644, accessed January 24, 2021.

that had been attributed to her. My sister was a social worker who at the time was working with young kids, so when I saw a picture book about Ruth Bader Ginsburg[3], I knew it would be the perfect gift for her. After unwrapping the gift, my sister excitedly began to read it aloud. It's through this child's book that I learned about how her mother had died the day before she's graduated from high school, how she'd gone to Cornell and then to Harvard, gotten married and had a baby all before completing Law School, and how she took notes for her husband, who'd been diagnosed with cancer. My admiration for her grew immensely not only knowing the struggles she faced as a woman in a male-dominated field, but that she'd managed to emerge stronger from so many personal tragedies.

I have been fortunate in that I set my eyes on the legal field at a time when there were three women serving on the highest court in the United States at once, and Justice Ruth Bader Ginsburg served not just to inspire me to pursue a career in the law, but many other women. Even for those who are not seeking a career in law, her determination and brilliance serve as a reminder that a determined woman can do whatever she sets her mind to. Furthermore, her example serves as a testament to human's capability for strength amongst adversity, regardless of the gender one identifies as. She will not be forgotten by the many young people she inspired to follow their selected career path regardless of the challenges or by the people whose rights she managed to protect and recognize. She will be remembered for her strong dissents and her championing of gender equality. In her own words, Ruth Bader Ginsburg expressed that "I would like to be remembered as someone who used whatever talent she had to do her work to the very best of her ability."[4] I think it's safe to say that she achieved her goal.

[3] Debbie Levy, *I Dissent: Ruth Bader Ginsburg Makes Her Mark* (Simon and Schuster, 2016).
[4] "In Honor of Her Honor | Cambridge College," accessed February 8, 2021, https://www.cambridgecollege.edu/honor-her-honor.

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TABLE OF CONTENTS

Mission Statement

The *Brandeis University Law Journal* aims to provide Brandeis University with the opportunity to contribute to discussions of law and law-related topics with the publication of undergraduate scholarship. We hope to aid in the furtherance of Brandeis University's motto of "truth even unto its innermost parts" through publishing rigorously researched articles and engaging in respectful, thoughtful, and insightful debates. This journal is both a publication and a constant work in progress as we are grounded in an undergraduate academic environment and constantly trying to learn, grow and improve. Our journal provides a platform for intellectual growth and debate where academic scholarship can flourish. We focus on academic excellence encouraging expressions of scholarship and encouragement of educational purposes.

SUBMISSIONS

Our journal requires all submissions of articles and abstracts to be:

1) Original and concerning the Brandeis community
2) Related to law and/or using legal reasoning.

Please include a title, author, and author's biographical information (relation to Brandeis, etc).

We accept all submissions for publication at any time. We highly encourage undergraduate scholarship. We will work with undergraduates interested in learning about legal writing, research, and scholarship to develop these skills.

All those interested in involvement through writing, editing, or administrative roles are welcome.

Please send any questions, submissions, or inquires to brandeisulawjournal@gmail.com and visit our website at https://brandeislawjournal.wordpress.com

The Fourth Amendment Judicial Understanding: Third Parties

Sophia Reiss[5]

ABSTRACT: *This article explores the Fourth Amendment's privacy protections specifically focused on the "third party exception" and the integrity of that exception to the Fourth Amendment and its definitions of privacy. Additionally, this article examines the European Union's relatively new data privacy law as an alternative way to account for third parties while remaining faithful to the Fourth Amendment's privacy ideals.*

The Fourth Amendment grants rights to privacy and protection from unnecessary government intrusion. Justice Louis Brandeis' dissent in *Olmstead v. United States* deepened the understanding of what the Fourth Amendment protects, specifically what privacy means. This includes detailing what is allowed as a search and seizure under the specified definition of privacy. This understanding of the Fourth Amendment and its purpose serves as background to the "reasonable expectation of privacy" test that protects situations where there is a reasonable expectation of privacy. *Maryland v. Smith* contributed the "third party exception" to the judicial understanding of the Fourth Amendment. The "third party exception" is when the government is allowed to access information revealed to a third party without obtaining a warrant. This exception lessens the privacy protections against government intervention, and should therefore be abolished as it does not fit with Justice Brandeis' explanation of the Fourth Amendment given technology's new role in our lives. Nowadays, it is hard to live a modern life without giving information to third parties as third parties have become so intertwined in our lives especially in the case of technology for example a smartphone is akin to a tracking device.[6] Despite technology and a lack of privacy pervading, "Americans say they care deeply about protecting their data" according to the Pew Research Center.[7] Unlike the United States government, the European Union has worked to take account of this disparity. The European Union wrote a data privacy law in 2016 in recognition of this new relationship with technology and the reasonable expectation of privacy that individuals expect in their interactions with technology.

The Fourth Amendment's meaning has evolved since its creation with *Olmstead v. United States (1928)* becoming a crucial precedent. Justice Brandeis thought that the wire-tapping of Olmstead violated the Fourth Amendment because the government violated Olmstead's privacy. Justice Brandeis wrote that the founders wrote the Fourth Amendment "to protect Americans in their beliefs, their thoughts, their emotions, and their sensations" and against "unjustifiable

[5] Undergraduate at Brandeis University Class of 2023.

[6] Manoush Zomorodi, "Do You Know How Much Private Information You Give Away Every Day?," *TIME*, March 29, 2017, https://time.com/4673602/terms-service-privacy-security/.

[7] Zomorodi, "Do You Know How Much Private Information You Give Away Every Day?"

intrusion by the government upon the privacy of the individual."[8] As Brandeis elaborates that "the privacy of the individual" includes "their beliefs, their thoughts, their emotions, and their sensations."[9] Brandeis explained that privacy considerations would have to evolve over time and that given the potential of possible new innovations the founders allow for the Fourth Amendment protections to expand.

The "third party exception" contradicts the reasonable expectation of privacy test because it does not fit with Brandeis' rationale for the Fourth Amendment. In *Maryland v. Smith*, the Supreme Court included the "third party exception" into the legal framework of the Fourth Amendment. The majority opinion explained that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."[10] Returning to Brandeis' explanation, individuals are protected "in their beliefs, their thoughts, their emotions, and their sensations."[11] Even when expressing these protections to a third party, there is an expectation of privacy. For instance, when people have secrets they are often shared with a third party, but still treated as private information. The individual with the secret may "voluntarily" divulge the information to a friend, but this thought can still be regarded as private. This contradiction invalidates the "third party exception" to the legal understanding of the Fourth Amendment's privacy protections.

In *United States v. Jones* (2012), the U.S. Supreme Court decided the ways in which information may be obtained by the government without a warrant. The court stated that gathering copious amounts of a wide range of information without a warrant might violate the Fourth Amendment's right to privacy. In *Jones*, the court mentioned that "[i]t may be that achieving the same result [as traditional surveillance] through electronic means, (..) is an unconstitutional invasion of privacy," but Justice Scalia writing for the court chose to limit his discussion of electronic surveillance, focusing instead on the physical violation of the "search" provision of the Fourth Amendment.[12] In contrast to *Maryland v. Smith*, *Jones* outlines the core of the Fourth Amendment protections, which are grounded in intrusion on privacy of ideas often thought of as private property. Additionally, *United States v. Jones* portrayed how tracking methods can retain copious amounts of information of an individual's whereabouts violates the Fourth Amendment. *Jones* decided whether information obtained by installing a GPS on someone's car can be used as evidence against them. As Justice Sotomayor wrote in her *Jones*

[8] "Olmstead v. United States, 277 U.S. 438 (1928)," Justia Law, accessed November 23, 2019, https://supreme.justia.com/cases/federal/us/277/438/.
[9] "Olmstead v. United States, 277 U.S. 438 (1928)."
[10] "Smith v. Maryland, 442 U.S. 735 (1979)," Justia Law, accessed November 23, 2019, https://supreme.justia.com/cases/federal/us/442/735/.
[11] "Olmstead v. United States, 277 U.S. 438 (1928)."
[12] "UNITED STATES v. JONES," LII / Legal Information Institute, accessed November 23, 2019, https://www.law.cornell.edu/supremecourt/text/10-1259.

concurrence, “GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”[13] This statement demonstrates that tracking someone’s whereabouts gathers information that is beyond what would be obtained by other methods not involving a warrant. The “third party exception” counters this statement because when “a wealth of detail” similar to this is given to the third party the “third party exception” would decide that this information is no longer private.[14]

Technology has proven to be pervasive in society blurring the boundaries of privacy which should lead to a reexamination of the “third party exception.” Similarly to the GPS tracking in *Jones*, browser histories gather a plethora of information regarding personal matters which individuals would have a reasonable expectation of privacy. The “third party expectation” would not protect the privacy of browsing histories, private accounts, and websites. In the case of browser histories, internet providers, third parties, have access to the information of what one searched and everything one did online. Browsing histories are similar to the “papers and effects" that are protected by the Fourth Amendment and individuals would have a reasonable expectation of privacy in this information.[15] According to a Harvard Law Review article, “[v]iewing collection[s] of data" should be viewed as a Fourth Amendment search as people reasonably expect this data, and other online data, to be private.[16] This may fall within Justice Brandeis’ explanation that the Fourth Amendment “protect[s] Americans in their beliefs, their thoughts, their emotions, and their sensations.”[17] Browsing histories contain information often over long periods of time and with a range of kinds of information: business and personal.

Similar to browsing histories, private social media accounts contain a copious amount of information which might be understood by individuals to be private. On various social media platforms, individuals may create private accounts where they have control over what people can see, and who can access their account. The information may be posts, messages, or other potentially personal information which should similarly fall within the “papers and effects” protected by the Fourth Amendment. Additionally, private accounts would be reasonably understood to carry with a reasonable expectation of privacy given their namesake as “private” accounts. Since the social media platforms have access to information in all accounts, the individuals would have given away this information to a third party losing all rights to its privacy

[13] “UNITED STATES v. JONES.”
[14] “UNITED STATES v. JONES.”
[15] U.S. const. amend. 4
[16] “DIGITAL DUPLICATIONS AND THE FOURTH AMENDMENT,” *Harvard Law Review* 129, no. 4 (2016): 1046–67.
[17] “Olmstead v. United States, 277 U.S. 438 (1928).”

under the "third party exception" idea. This reality conflicts with their reasonable expectation of its privacy.

The "third party exception" should be abolished because technology grants third parties access to information which individuals still believe is private. Legal professions have noticed that technology's changing role in society will affect privacy protections. As Justice Alito stated in his *Jones* concurrence, "hypothetical reasonable person has a well-developed and stable set of privacy expectations" and "[b]ut technology can change those expectations."[18] The European Union acknowledged this new relationship between technology and privacy with its data privacy law.

The European Union privacy law regulates what third parties can do with the information given to them, which has created a culture where European individuals expect a high level of privacy regarding information and their technology. To make individuals aware of technology companies' interactions with their data and to provide individuals with greater control of their data, privacy law "would force Internet companies like Amazon.com and Facebook to obtain explicit consent from consumers about use of their personal data, delete that data forever at the consumer's request and face fines for failing to comply."[19] These companies' form of obtaining consent is generally through terms and conditions. While some may argue that terms and conditions are valid forms of obtaining consent, terms and conditions tend to be written to encourage compliance and they often are hard to read, long, and complicated. Many do not read through the terms and conditions and as "researchers estimate [it] would take 76 hours a year to read all the user agreements we meant" while "clicking 'No' often means not using a tool that you may actually need to navigate, communicate or work."[20] The European Union data privacy law takes into account this understanding of how we interact with these user agreements. Part of the privacy law's implementation includes requiring user agreements to be short, clear, and understandable. Through "obtaining explicit consent from consumers" this law insures the individuals' awareness that they are giving their information to a third party.[21] Given the ability of the consumers to "delete that data forever" with a request, they have additional control potentially expanding the boundaries of privacy protections within law especially with regard to data that third parties had access to.[22] The European data privacy law is more faithful to the Fourth Amendment's protection of privacy in the face of new technology.

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[18] "UNITED STATES v. JONES."
[19] Somini Sengupta, "Europe Weighs a Tough Law on Online Privacy and User Data," *The New York Times*, January 23, 2012, sec. Technology, https://www.nytimes.com/2012/01/24/technology/europe-weighs-a-tough-law-on-online-privacy-and-user-data.html.
[20] Zomorodi, "Do You Know How Much Private Information You Give Away Every Day?"
[21] Sengupta, "Europe Weighs a Tough Law on Online Privacy and User Data."
[22] Sengupta, "Europe Weighs a Tough Law on Online Privacy and User Data."

Additionally, the expectation of privacy could change with greater awareness derived from companies' presentation of privacy agreements. Satariano states that "[a] central element of Europe's new regulations is that companies must clearly explain how data is collected and used."[23] This element could appear in a variety of ways, but would potentially produce a greater awareness of technologies' role in our lives and refine individual's expectations of what information is private.[24] The "third party exception" would most likely be resolved by these new regulations which could possibly appear in the United States. The potential of privacy legislation is shown through the European Union serves as an example for the United States as the author states "Europe's experience is being closely watched by policymakers in the United States, who are considering a new federal privacy law."[25] While legislation would change the manner in which the "third party exception" is discussed, the possibility of it in the future shows an acknowledgment of technological changes and crucial interactions with our privacy.

Due to the changed relationship between third parties and private information, the "third party exception" should be abolished. The "third party exception" introduced in *Maryland v. Smith* starkly contrasts with the understanding of the Fourth Amendment established in Brandeis' memorable *Olmstead* dissent. This dissent has framed discussions of the Fourth Amendment within the court's judicial opinions. In *Jones*, the justices debated the extent to which technological surveillance could be used under the Fourth Amendment. Providing further backing to abolish the "third party exception" is the European Union's new data privacy law which gives a crucial current acknowledgment of the changing nature of privacy. The "third party exception" would allow for information considered private within a reasonable expectation of privacy to be searched like browser histories and private accounts. Americans would benefit from a greater sense of privacy and security backed by real control over their information. It also could increase public trust in government and a real understanding of the benefits of governmental intervention.

[23] Adam Satariano, "Google Is Fined $57 Million Under Europe's Data Privacy Law," *The New York Times*, January 21, 2019, sec. Technology, https://www.nytimes.com/2019/01/21/technology/google-europe-gdpr-fine.html.
[24] Satariano, "Google Is Fined $57 Million Under Europe's Data Privacy Law."
[25] Satariano, "Google Is Fined $57 Million Under Europe's Data Privacy Law."

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Lights, Camera, Action! How Hollywood Avoided Eternal Federal Censorship

Renée Nakkab[26]

ABSTRACT: *This article captures the legal history of censorship in film. In an effort to prevent an American governmental body from regulating the movie industry, Hollywood created their own agencies to police film production companies. While this moral and ethical policing may be considered censorship, this article will explain why the industry's approach made perfect sense. Although production companies had to abide by a code, it was only for America's three most modest decades in the 1900s. If the government created legislation about film content requirements, it would be an incredibly difficult process to modernize the requirements with the times. This article will explain how the movie industry's censorship evolved from the production code to the rating system, ultimately proving that America is better off for Hollywood's creation of malleable content expectations.*

Introduction

Censorship is the antithesis of liberty and freedom. The First Amendment of the United States Constitution protects Americans' right to freedom of speech.[27] As an iconic aspect of American culture, freedom of speech aims to increase democractic ideals by allowing everyone to speak without fear of retribution from the government. In an environment where open discussion is encouraged, individuals feel safer, and thus more inclined to voice their opinions. The first amendment helps America evolve into a country in which more voices than those at the top of the social and financial ladder are heard.

The platform in which voices travel has a large effect on perception and impact of what is being discussed. Film is a powerful vehicle of thought and has the capacity to captivate audiences within the first minute of rolling. Because film has the potential to mesmerize people, the messages and motifs portrayed onscreen were glaring concerns to those in power immediately after the birth of the motion picture in the early 20th century.

This article will address the genius of the American film industry's avoidance of federal censorship through the development of a self-regulating agency. This system was highly censorial and adapted to modernizing legal views of free speech to keep film relevant to the American public. Nevertheless, the adaptation of the state censorship board's regulations to the Motion Picture Association (MPA) rating system was the best method of removing this censorship from the film industry.

Historical Context

[26] Undergraduate at Brandeis University Class of 2022.
[27] U.S. Constitution, amend. 1.

In the early 1900s, there were a plethora of different legal codes and standards for the development of film. State, city and town authorities maintained their own moral and ethical guidelines for which films were allowed to be featured in their region.[28] This obvious inconsistency created confusion and frustration among the film production industry. If there is no standard to abide by, how will producers know whether or not their film would be allowed to be shown throughout the United States?

In 1907, theater operators sued Chicago for their institutional censorship of film. Chicago police chiefs would watch and review the movie before the general public, making the ultimate decision as to whether or not the movie was morally acceptable for release. In this case, theater owners believed the ordinance improperly delegated discretionary and judicial powers, deprived film owners of property without due process, and made the judgement void due to the lack of standards that led the chief to his decision.[29] The court sided with Chicago's censorship system, and held that "an average person of healthy and wholesome mind knows well enough what the words 'immoral' and 'obscene' mean and can intelligently apply the test to any picture presented."[30] The court, not accounting for the possibility of human error or a difference in understanding, ushered in a wave of state censorship of the film industry. In 1911, the Pennsylvania State Board of Censors was created. In 1913, the Ohio Censorship Law passed, creating another board of film censors, and Kansas and Maryland followed a couple years later with the development of their own film censorship boards.[31] Within the next ten years, New York, Virginia, Atlanta, Memphis, and other states and cities developed censorship bodies to regulate the moral righteousness of the film industry.[32]

The lack of uniformity and clear guidelines diminished profits in the movie industry. Film producers make money by selling their film to cinemas, so if a large number of theaters are banned from buying a film because it fails to meet their region's censorship expectations, then a film will not make a significant profit. Although film makers did not necessarily want to adhere to the strict moral standards being imposed on them, they were forced to for the sake of market access. Hence, the film industry realized that they needed to create their own set of guidelines to protect their business. The National Association for the Motion Picture Industry created the first loose set of expectations for the industry's producers; film was not allowed to arouse "bawdy emotions"or pander to a "salacious curiosity." Sex appeal, white slavery and improper attitudes were widely condemned, yet "artistic expression" was still encouraged.[33] With

[28]Laura Wittern-Keller, *Governmental Censorship, the Production Code and the Ratings System*, in Hollywood and the Law 130, (Paul McDonald et al. eds., 2015), 130.
[29] *Block v. City of Chicago*, 87 N.E. 1011, 1013, 1015 (Ill. 1909).
[30] Ibid., 1015.
[31] Wittern-Keller, 131.
[32] Ibid., 132.
[33] Donald Young, Motion Pictures: A Study in Social Legislation 13 (1922).

industry-controlled restrictions, film production companies were able to self-regulate Hollywood instead of the state governments and prevent it from ever becoming a federal government issue. If film content control ventured into the hands of the government, the industry risked the creation of legislation that would have the potential to last centuries, while this code ended after a few decades.

Hay's Code

Will H. Hays was the first president of the Motion Picture Producers and Distributors of America Incorporated (MPPDA), now known as the Motion Picture Association of America Incorporated (MPAA). This organization was established to counter the increased censorship efforts by states and other agencies.[34] The MPPDA reviewed scripts in hopes of guiding against possible immorality charges brought on by state censorship boards. Hays manifested a list of "don'ts" and "be carefuls" to give movie creators a clear set of guidelines to follow.

Figure 1: The "Don'ts and Be Carefuls"[35]

Subjects not to appear in pictures produced by member firms of the MPPDA:	Subjects to be treated with special care to eliminate vulgarity and emphasize good taste by the MPPDA:
Pointed profanity, including the words "God," "Lord," "Jesus," "Christ," (unless used with proper religious reverence), and all other profanities	Use of the flag
Illegal traffic of drugs	International relations
Nudity, licentious or suggestive; and any lecherous notice of nudity by characters	Theft, robbery, safe-cracking, and dynamiting of trains, mines, buildings (due to the effect which a too-detailed description may have upon the moron)
White slavery; miscegenation	Brutality, possible gruesomeness
Any inference of sexual perversion	The technique of committing murder
Scenes of actual childbirth, in fact or in silhouette	Actual hangings or electrocutions as legal punishment for a crime
Sex hygiene and venereal diseases	Sympathy for criminals

[34] Michael Conant, *Antitrust in the Motion Picture Industry*. New York: Arno Press, 1978, 240.
[35] For the full list of the "Don'ts and the Be-Carefuls" please refer to MPPDA's Digital Archive https://mppda.flinders.edu.au/records/341.

Willful offense to any nation, race or creed	Attitude to public characters and institutions; sedition
Children's sex organs	Apparent cruelty to children and animals; branding of people or animals
Ridicule of the clergy	The sale of women or a woman selling her virtue
	Rape or attempted rape
	Man and woman in bed together
	The institution of marriage
	The use of drugs
	Surgical operations
	Excessive or lustful kissing, particularly when one character or the other is a "heavy"
	Scenes involving law enforcement or law-enforcing officers

Although the creation of this list was meant to eliminate the encroaching censorial threat of state agencies, it failed to stop the state powers because the movie industry largely ignored the MPPDA's guidelines. In 1929, producers submitted only 21 percent of scripts for review by the MPPDA.[36] By ignoring the moral standards for film, movie companies became the target for censorship beyond state power. President Hoover debated antitrust action against the industry, civic organizations fought for federal control, and censorship legislation was introduced in both Congress and state legislatures.[37] It was not until the start of the Catholic National Legion of Decency's campaign against immoral films that a formalized code was accepted by the industry. Father Daniel A. Lord, a Catholic priest and St. Louis University professor, along with Hays, developed the Motion Picture Production Code in 1930.[38] This final version of the Motion Picture Production Code became better known as *Hay's Code*.

Breen Administration

[36] Leonard J. Jeff & Jerold L. Simmons, T*he Dame in the Kimono: Hollywood, Censorship, and the Production Code* 8 (Univ. Press of Ky. 2d ed. 2001).
[37] Ibid., 8-9.
[38] Ibid., 9-10.

The MPPDA dedicated a branch of their services, the Production Code Administration (PCA), to the upkeep of the moral and ethical standards of Hay's Code. Joseph I. Breen, a staunch Catholic, was placed as the head of this administration. Under the Breen administration, the Code followed three primary principles:

> "No picture shall be produced which will lower standards of those who see it. Hence the sympathy of the audience shall never be thrown to the side of crime, wrongdoing, evil or sin. Correct standards of life, subject only to the requirements of drama and entertainment, shall be presented. Law, natural or human, shall not be ridiculed, nor shall sympathy be created for its violation."[39]

The larger principles were divided into twelve broader subject headings of prohibition: crimes against the law, sex, vulgarity, obscenity, profanity, costume, dances, religion, locations (bedrooms), national feelings, titles, and repellent subjects.[40] Increased limits on film content consequently decreased film producers' freedom to produce free-speech film material. While film producers could ignore the standards, as they did in years prior, those who did would be forgotten by the industry. The incentive to comply with the movie standards exponentially grew because the banking industry put value in the moral policing of the PCA. If a film's script, advertising, wardrobe, or acting did not have Breen's seal of approval, the producer's were unable to receive loans from banks.[41] Without money, films could not be produced. From 1934-1948, 95 percent of all American-made films —and a large number of foreign films—were made with the clearance of the PCA.[42]

Twentieth Century Fox, RKO Pictures, Paramount Pictures, Warner Brothers, and Metro-Goldwyn-Mayer were known as the "Big Five" production and distribution firms in the 1950s. The PCA and the Big Five had an agreement to only show films that received PCA approval within their theaters. The Big Five owned and operated 70 percent of first-run theaters in the nation's major cities.[43] For a film to make money, it had to be seen. If films did not have PCA approval there was limited opportunity for profit due to the theaters' agreement to only purchase PCA approved films.

There are two clear impacts of the tightly held restriction on the movie industry. First, the Code minimized the artistic liberties of film creators. Creativity is the exploration of thought and the willingness to be different and make something new. Regimented rules limit creativity, but if the rules were not followed producers would not have been able to create their art. Second, the

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[39] Motion Picture Producers and Distributors of America, Inc., Record #2254, MPPDA Digital Archive 1, 1 (1931) https://mppda.flinders.edu.au/records/2254
[40] Ibid.
[41] Gregory D. Black, "Hollywood Censored: The Production Code Administration and the Hollywood Film Industry, 1930-1940." *Film History* 3, no. 3 (1989), 173.
[42] Conant, 41.
[43] Ibid.

PCA became the governing body of the movie industry. Through their close connections with the Big Five, the PCA attempted to establish a moral America through film. Although the PCA liked to consider themselves "regulators," they were undeniably censorship enforcers.

Nevertheless, the creation of the PCA was imperative for the longevity of American film. When an organization creates regulations, it has the ability to evolve and adapt with the changing needs of the time. In surveying the general public, the organization's leaders can easily alter their thinking to continue to be well regarded by society. Since the PCA is merely a service of the MPPDA, it can be changed or even destroyed without much commotion. If the PCA did not exist, the federal government would have passed legislation to censor film. This would have been catastrophic for the development of the industry. The law is notoriously set in stone and does not modernize well, so changing censorship laws from the 1930s would have taken decades of litigation and debate. Additionally, the change would involve far more entities, press, and possible disagreement. If censorship of film existed on the federal level, it could easily divide the country; just as any other bipartisan issue fought on the federal level has done before. When America becomes divided over an issue, it rarely resolves quickly. Admittedly, the PCA censored the artistic freedom of movie producers for decades. However, without this self-regulating body within the film industry, the movies we have come to love today might not have been produced. The lack of federal involvement allowed for the industry to advance with the changing progressive thought of society.

However, it was not until the late 1950s that obscenity laws were called into question.[44] With wobbling conceptions of what is considered obscene, it was only a matter of time before film's moral standards were readjusted. It was in 1965 when *Freedman v. Maryland* held that government-operated rating boards were to be terminated after a majority decision that a government rating board could only approve films and no longer ban them.[45] Due to this, the MPAA revised their role as an enforcer of a strict moral code to that of mere advisor. After *Freedman v. Maryland*, the only power states had to regulate film production was regarding the dissemination of objectionable material to children.[46] Unwilling to relinquish power to state authorities, the MPAA created the Code and Rating Administration (CARA) who generated the current rating system.

MPAA Rating System

The MPAA rating system maintains a multitude of categories aimed to advise the viewer of the level of explicit material within the film. The original ratings categories consisted of G

[44] *Roth v. United States*, 354 U.S. 476, 479 (1957).
[45] *Freedman v Maryland*, 380 U.S. 51 (1965).
[46] *Interstate Circuit, Inc. v. Dall.*, 390 U.S. 676, 680 (1968) (defining "young persons" as those under the age of sixteen).

(general audiences), M (mature audiences), R (restricted, no one under the age of sixteen admitted without parent or guardian), and X (not suitable for anyone under sixteen due to sex, violence, or language).[47] Eventually, the M rating split into PG (parental guidance suggested) and PG-13 (parents strongly cautioned); and the previous age minimums shifted from sixteen to seventeen.[48] The X rating is the only non trademarked category. It is available for independent filmmakers to self-designate, over time, it became synonymous with pornographic material. In light of this, the MPAA created the NC-17 rating (no one seventeen and under admitted) in 1996 to signal that although not illicitly pornigrafic, the film contains explicit material.[49] Notice that this system does prohibit the creation of film through monetary restraints. Rather it encourages audiences to watch the film believed to be most appropriate for them. Nevertheless, viewer discretion is what dictates what films an individual can see. The greatest difference between the Code and the Rating system is just that: one would not be able to see a film that did not abide by the Code, because it would not exist.

Conclusion

Although it took decades for the power of choice to be restored to film audiences, the MPAA rating system successfully eliminated the lasting remnants of self-regulated censorship of the film industry. In avoiding possible abuses of federal censorship, the MPPDA developed a tightly managed moral code in hopes of preserving Hollywood's independence. By restricting the liberties of the film-makers then, the filmmakers now can enjoy the freedom and creativity those in the past may not have known came with the job.

[47] Wittern-Keller, 144.
[48] Ibid.
[49] Ibid.

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Updating Our Rights With The Internet: Arguing the Necessity of a Fundamental Right to Internet Access

Joshua Rotenberg[50]

ABSTRACT: *Fundamental rights are essential to the functions of our democracy. A right is declared fundamental when the government must pass a strict scrutiny test in order to infringe upon it. This article is in support of a fundamental right to internet access given how essential the internet has become in the last decade, particularly post-pandemic. Under this right, the United States government would need to go to great lengths to remove internet access from a citizen.*

Malleability has been entrenched in American jurisprudence since its founding. With the advent of the digital age, once again American law must adapt to changing circumstances and ratify a fundamental right to steady internet access, or the "right to connect." Promoting the right to connect to a fundamental right ensures that, should the government desire to remove internet connectivity from a citizen, it would need to pass a strict scrutiny test. This test secures a right from infringement, requiring that the government would need to go to great lengths to revoke a right under strict scrutiny. Strict scrutiny is the groundwork protecting other fundamental rights such as the right to privacy, the right to marriage, or the right to procreation. The current rule of law in the United States relating to the internet is primarily centered around censorship rather than pure access to the internet; there has yet to be a landmark case wherein the government removed one's internet access in its entirety. While such a case has yet to occur in America, it is imperative that our government consider both the necessities of a fundamental right to connect, and the consequences of an unprotected right to connect in the post-pandemic world.

To determine one's digital rights, it is essential to establish the relationship between the online and real world as used today. In the modern era, people live entire lives on the internet. Social media allows for communication comparable to face to face conversation, digital file storing services allow people to keep online possessions as they would physical copies, and applications that are used regularly to allow citizens to apply for jobs and work exclusively online. Today, it is difficult to find an aspect of life that cannot be digitized. This is doubly true when considering the pandemic. Given the outbreak of COVID-19 society has been readjusted to function solely on a digital platform; businesses, families, friendships, and even the government itself now function wholly over the internet.[51] For the first time in history, the Supreme Court broadcasted oral arguments online, while all parties were isolated at home during the pandemic.[52] There are no signs of this trend toward digitalization slowing in the coming years. The threat of

[50] Undergraduate at Brandeis University, Class of 2023.
[51] Koeze, Ella, and Nathaniel Popper. "The Virus Changed the Way We Internet." *The New York Times*, The New York Times, 7 Apr. 2020, www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html.
[52] Honig, Elie. "The Sky Didn't Fall When the Supreme Court Went Live." *CNN*, Cable News Network, 4 May 2020, www.cnn.com/2020/05/04/opinions/supreme-court-went-live-opinion-honig-cross-exam/index.html.

the coronavirus will persist for the foreseeable future, and thus digital life will continue indefinitely. Following the threat of the pandemic certain aspects of digital life will linger, due to the simple fact that the internet removes the barrier of physical distance. Many companies are now finding more convenient ways to conduct business using the internet, pressured to do so by the pandemic. The modern circumstance renders the internet no longer a convenience, but a necessity; it has evolved to become a separate world in which humanity lives just as it would physically.

With a new digital world should come newly digitized applications of fundamental rights, which are bound to be threatened should the government revoke internet access. Furthermore, there is a plausible mortality connected to lack of internet access. Today those with limited access to the internet are forced to work outside of their homes, possibly exposing themselves to the virus, jeopardizing themselves and those close to them. People who have the privilege of living with internet connectivity work from the safety of self-isolation, with minimal change to their daily pre-pandemic routine other than location and time spent using their computer. Should the government remove connection to the internet, some citizens would be compelled to work in an unsafe environment, possibly threatening one's fundamental right to life. Of course, with time the dangers of the coronavirus will subside, but even after a new normal is established, removing access to the internet still prevents people from speaking their mind, associating with those they wish to associate with, or applying for the jobs they wish to work in. The calculation is simple: life has been digitized. Thus, the rights and protections of American citizens must be updated to the digital medium as well. The only way to properly guarantee this outcome is to ensure that the government must go to great lengths to take away the sole path to the digital world citizens have, which is internet connectivity.

Just as previous fundamental rights were established through interpretation of precedent, the same can be done with the right to connect. When concluding the existence of the right to privacy from the landmark case *Griswold v. Connecticut*, Justice Douglas explained that the right was within the "penumbra" of previous rights established within the Bill of Rights. By explaining the right as a penumbra, he highlights that the right to privacy is a product of inference. Douglas explained that this fundamental right can be inferred from the First Amendment, wherein privacy is "protected from governmental intrusion," as well as the Third Amendment, which prevents physical governmental intrusion through the prohibition of quartering of soldiers.[53] In his conclusions Justice Douglas clarified for the court the common applications of the law as used by its citizens, and then redefined fundamental rights to fit those common applications. The same must be done today for the internet. The common applications of fundamental rights have been digitized just as applications of the First Amendment changed,

[53] *Griswold v. Connecticut*, 484.

resulting in Justice Douglas recognizing these penumbras of established fundamental rights. One can clearly see that the online applications of fundamental rights manifest digital rights. Such online rights are easily identifiable when considering what rights are forcibly infringed upon should the government confiscate one's internet access.

In the event of a state sanctioned internet blackout, First Amendment rights are likely to be the first to be torn from US citizens. Previously, if a person wished to voice his opinion, they would do so through either the press or public speaking. While both practices are used today, the internet has become an astronomically more wide-reaching and efficient resource to spread one's opinion. This links the use of the internet to the fundamental right to freedom of speech. Freedom of association, a right tied to the First Amendment, further binds internet usage to the First Amendment. Social media applications are home to groups of like-minded people, who join these groups for the purpose of discussing certain hobbies or passions. While physical meetings of like-minded people are of unquestionable prevalence, contemporary organizations that do not rely on the internet to function are rare. Additionally, censorship cases have been the focus of internet jurisdiction for the past few decades. The 1997 case, *Reno v. American Civil Liberties Union*, determined that a law censoring indecent content on the internet violated the First Amendment, as the Act was determined to be a content-based restriction of speech, as caused by the complexities of the word "indecent." A similar outcome is to be expected should the state remove internet access. All international examples of government instigated internet blackouts revolved around conflicts between citizens, which cause the government to block communication to prevent violence stemming from the disagreement. Given the international precedent, it can be inferred that should an internet blackout occur in the United States, it would derive from similar issues concerning the content of speech and the consequential disagreement between people and government. The mass censorship that would follow would be a one-sided, unmerited violation of fundamental rights. The only way to circumvent such injustice would be with the strict scrutiny test. If the government wishes to remove first amendment rights via an internet blackout, they must provide a compelling state interest. Simply preventing disagreement between government and people would not pass this test, thus preventing infringement upon American fundamental rights.

Naturally, there is a difference between internet regulation and internet control. A person can conduct nearly all functions of life online. These activities are subject to regulation. For example, in the 2003 case *United States v. American Library Association*, congress wished to pass the Children's Internet Protection Act, which would require public libraries to install internet filters on all public computers within the library. This form of state action was deemed constitutional, as it was the only way of serving a compelling state interest of protecting children, while imposing "a comparatively small burden" on internet users. Here, First Amendment rights

are excused when applying to specific websites that can be harmful to children. However, baring one's *access* to the internet prevents them from not only exercising fundamental rights, but from living online entirely. Freedom to connect does not prohibit government internet regulation, simply government intrusion upon internet access. Should state action create laws such as that of *American Library Association*, they can do so with ease under a fundamental freedom to connect, which would only protect *access* to this digital world on the grounds that digital life demands as many fundamental rights as the real world. In the physical world, the government creates law to regulate activities, but would never restrict the *ability* to exercise fundamental rights in the physical world without due process. There is a natural fundamental right to life. These same rights should be protected digitally as well.

Similarly, potential state action against access to the internet negates the established fundamental right to property. During an internet blackout, private conversations or files will be kept from citizens just as if the government physically sealed the entrance to one's home or removed all private papers or possessions. The physical act of seizing property is an extreme violation of one's rights, bound to cause an immediate and visceral reaction in opposition. There is no reason why the same standards should not be applied online. The modern zeitgeist is trending towards the existence of a digital life; a stable connection in each home is required to flourish in that life. A threat to it would be a threat to contemporary American life in a manner no government can reasonably enforce under the bounds of the constitution of the United States. Protection of this digital life can only be achieved through recognizing the parallels and equalities between digital and physical life, and understanding that these parallels correspond to digital penumbras supported by the constitution, emphasizing the need for the fundamental right to access the world we now live in.

Of course, this is not to say that every citizen is required to maintain a stable connection to the internet; that would be an unreasonable request. There are many people who choose not to exercise some of their constitutional rights. The Second Amendment,which secures the right to bear arms, for example, is controversial. Many exercise it, while just as many people do not. However, it is the citizens' prerogative to choose which path to take. Similarly, there is a large population who choose not to live a digital life. However, this dispute is one of rights, and government restraint in removing those rights. It should be the right of the American citizen to choose how they live digitally, and if they desire, they should be able to exercise their fundamental rights digitally, free of the fear that the government will remove connection to the online world, and in doing so, disregard their fundamental rights.

Despite the obvious fact that the internet has changed with modern society, many will contest that it is unnecessary that we establish the fundamental right to connect. This is a natural conclusion, as there has not yet been a case where the government has forcibly removed internet

access in the United States, thus there is no pressing need for an update in the law. However, while such a case has yet to occur in America, governments have forced internet blackouts several times beyond the US border. These international examples highlight the ramifications and violations of basic rights a government shutdown of internet access enables, while also exemplifying the need for and the uses of a fundamental right to connect to prevent such an outcome. For example, nations such as Egypt, Iran, or India have shut down their internet during times of war or political turmoil simply because anti-government or anti-war protests were organized online via social media. Egyptian and Tunisian governments forced internet blackouts during the mayhem of the Arab Spring in 2011, and, most recently, in Iran during the 2019 fuel protests. The Iranian internet blackout obstructed families living outside the state from communicating with those still in Iran while preventing protests from organizing over social media[54]. In this act both physical and digital versions of freedom of speech were seized from Iranian citizens. There were economic and personal consequences as the entire nation was plunged into an archaic state of detachment from the world. Reporting about the protests was limited, thus information about violence during those protests was kept from the world and was isolated to the locations wherein such violence was committed. The internet blackout in Iran and the chaos that followed emphasized how great of an influence the internet is today, and how an internet blackout bluntly removed many fundamental rights a citizen has. In the Kashmir region of India, the government imposed an internet blackout following a series of violent protests. These restrictions were applied "to prevent the propagation of terror activities and the circulation of inflammatory material"[55]. In the months that the blackout took place, the expected chaos ensued as citizens were stripped of their livelihoods, and connections to their families and friends. As a result, however, India remedied their policies by establishing the right to connect as a fundamental right within the Indian Constitution (Dutta)[56]. They saw what a government enabled internet blackout could do to the modern population, and promptly amended their constitution to adapt to modern circumstance, accepting the fact that rights can be revoked both physically and digitally, with equal consequence. It is essential that America reach the same result. A more conservative court, such as the one we have now, will argue that it is not the place of the court to litigate, but to simply apply the rights of the constitution verbatim to whatever

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[54] Hjelmgaard, Kim. "'Tool of Repression': Iran and Regimes from Ethiopia to Venezuela Limit Internet, Go Dark Online." *USA Today*, Gannett Satellite Information Network, 23 Nov. 2019, www.usatoday.com/story/news/world/2019/11/23/irans-internet-blackout/4268948002/.

[55] Schultz, Kai, and Sameer Yasir. "India Restores Some Internet Access in Kashmir After Long Shutdown." *The New York Times*, The New York Times, 26 Jan. 2020, www.nytimes.com/2020/01/26/world/asia/kashmir-internet-shutdown-india.html.

[56] Dutta, Prabhash K. "Internet Access a Fundamental Right, Supreme Court Makes It Official: Article 19 Explained." *India Today*, 10 Jan. 2020, www.indiatoday.in/news-analysis/story/internet-access-fundamental-right-supreme-court-makes-official-article-19-explained-1635662-2020-01-10.

issue arises in the court. This is a perfectly valid argument, as there has yet to be a case of first impression concerning the right to connect. Conservative judges may not recognize digital penumbras as Justice Douglas would. However, this paper is an argument for change, albeit through the judicial or legislative branch. Should the court determine that it is not their place to ratify the freedom to connect as a fundamental right without a case, legislation can allow for such an amendment to occur. In these circumstances, the method is less important than the result. So long as the freedom to connect is protected under strict scrutiny, America may confidently move forward into its future.

The American policy towards an internet blackout is, as of now, unknown. However, regulations exist specifying how government control of internet connectivity functions in the United States. The Communications Act of 1934 allows the president to shut down "any facility or station for wire communication" as per 47 US Code, Section 606, which clarifies war powers of the president. However, war is a chaotic time, and policies forged in the pursuit of winning a war are not always the just policy (consider, for example, the Espionage Act). This is why it is essential that freedom to connect be established *before* troubling times develop in the United States. It is the only way to ensure the prevention of injustice. As previously established, the one common aspect of all government internet blackouts was disagreement between state and public. Either through protest or war, there was an aspect of public behavior that the government deemed dangerous, and to avoid the supposed "danger" of disagreement, they established restrictions that violated fundamental rights. America has been in such a position before, concerning the now unused bad tendency test of the First Amendment. The "bad tendency" test allowed censorship towards inflammatory material, or parts of speech that contained a "bad tendency." This method of identifying which form of speech to prohibit in the United States is identical to India's reasoning behind their internet blackout, in both situations "inflammatory material" was cited. The bad tendency test was removed through a series of cases which redefined how the First Amendment is used, beginning with *Schenck v. United States,* and ending with *Abrams v. United States*.

In *Schenck v. United States*, the Supreme Court ruled that the pamphlets Charles Schenck and Elizabeth Baer distributed contained a bad tendency for opposing the first World War and violated the Espionage Act. This case, decided by Oliver Wendell Holmes, established the unjust bad tendency test as the precedent until Holmes reversed his opinion following changes in societal norms. When a similar set of circumstances reappeared in 1918, after the war, Justice Holmes reprimanded the bad tendency test in his historic *Abrams* dissent, where he reevaluated the state of the nation, and determined that the law must change. He recognized that "[e]very year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect

knowledge…that experiment is part of our system"[57]. The story of the bad tendency test, the fundamental right to privacy, and other changes in fundamental rights follow a similar path. Holmes recognized the injustice perpetuated by the bad tendency test as well as the changing attitudes towards the First Amendment; he extrapolated from these notions that a change in the law was required. Today, similar injustices concerning First Amendment rights, as well as all other digital rights, will be committed unless the government acts preemptively by safeguarding digital rights before they can be trampled upon. Just as the bad tendency test changed over time, and the fundamental right to freedom of speech was redefined, the time has come to reach a similar conclusion concerning the internet. There is an existing precedent of considering the internet as a tool to be used at one's own leisure. However, given the pandemic and the evolution of digital activities, the internet is no longer the device it once was. It has grown to touch all aspects of modern life and must be treated as such by the law. A change to our nation's fundamental rights is required, just as Holmes recognized with the bad tendency test.

This debate leads to a clear conclusion. Modern citizens carry two lives: one physically and one digitally. To remove the gateway to one's digital life—a stable connection to the internet-- is to violate the fundamental rights that coincide with the use of the internet. Such rights include the right to freedom of speech, the right to property, and the right to freedom of association as established by the First Amendment of the Constitution. While there has yet to be a case concerning the American government revoking such digital rights, it is imperative that we preventively follow trends established by nations who have recognized this danger, such as India. The circumstances under which a government forces an internet blackout have been consistently controversial. Legislating a fundamental right to freedom to connect is the only true way to ensure that the long-standing fundamental rights our nation has protected for centuries can be adapted into the modern setting justly and easily. Continuing to ignore this need until a case of first impression arises will subject our nation to the near certainty of injustice, as caused by the very nature of such cases. The internet has delivered a new world to modern times, and our nation must prepare to protect its citizen's rights as they navigate the complexities of digital life in the same way we have been since our creation. As Darwinian evolution teaches, when faced with a new pressure, one must adapt to survive, or fall behind and perish. In order to ensure America continues to be the just nation it prides itself on being, it must adapt its fundamental rights to the digital age. Establishing the freedom to connect as a fundamental right by amending our constitution is the only true way to ensure our nation's next stage of evolution.

[57] *Abrams v. United States*, 250.

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Does Innocence Matter in Criminal Appeals?

Cat Gibson[58]

ABSTRACT: *This article examines the importance of innocence in criminal appeals through the lens of Benjamine Spencer's murder case history and its development through the appeals process. Spencer's case shows how innocent people can easily be convicted with false evidence and a flawed criminal justice system. Criminal appeals should provide a true path to resolve faulty convictions and fixed flawed aspects of the criminal justice process.*

Benjamine Spencer was tried for the murder of Jeffery Young in October of 1987 despite claims of innocence. He was convicted and sentenced to 35 years in prison. He maintained his innocence and filed for a new trial, which he was then granted. In his second trial, he was convicted of aggravated robbery, and was now sentenced to life in prison. Spencer continued to assert his innocence and appealed his case. In 1989, this conviction was upheld.[59] In 2008, Judge Rick Magnis, after spending eight months reviewing information presented in an evidentiary hearing, declared that Spencer should be granted a new trial "on the grounds of actual innocence."[60] However, in 2011, the Texas Court of Criminal Appeals ruled that the new evidence did not unquestionably establish the applicant's innocence, and since the threshold for proving actual innocence was not met, habeas relief was denied.[61] If Spencer was serving the original sentence he'd been granted in 1987 for murder, he would be released in 2022. However, after his second trial and conviction for aggravated robbery, he is still expected to serve life in prison, and has been denied parole at every opportunity.[62]

According to Colin Miller, a professor and Associate Dean at the South Carolina School of Law, there have historically only been two routes of obtaining post-conviction relief: presenting newly discovered evidence of innocence and/or evidence of a constitutional violation. Every state has enacted a statute establishing post-conviction relief based on DNA testing, though not every state allows defendants to bring "freestanding claims of actual innocence."[63] Texas is actually one of those states that allows actual innocence claims outside of those with DNA evidence, and yet, Spencer remains imprisoned. This is due to the fact that, when seeking post-conviction relief based on a freestanding claim of actual innocence, the standard for a new trial is incredibly high and almost unattainable.

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[59] "Ex Parte Spencer, 337 S.W.3d 869 – CourtListener.Com," CourtListener, accessed April 17, 2021, https://www.courtlistener.com/opinion/2279756/ex-parte-spencer/.
[60] Story by Barbara Bradley Hagerty, "Can You Prove Your Innocence Without DNA?," *The Atlantic*, accessed April 17, 2021, https://www.theatlantic.com/magazine/archive/2018/01/no-way-out/546575/.
[61] "Ex Parte Spencer, 337 S.W.3d 869 – CourtListener.Com."
[62] Colin Miller, "Why States Must Consider Innocence Claims After Guilty Pleas," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 6, 2018), https://doi.org/10.2139/ssrn.3226915.
[63] Miller, "Why States Must Consider Innocence Claims After Guilty Pleas."

According to court documents, Jeffrey Young was found by police unconscious and bleeding in the street on March 22, 1987. He died after being transported to the hospital, and it was later determined that his death occurred as a result of severe skull fractures. There was no physical evidence linking Spencer to the crime and the police were unable to link him to any of the items stolen from Young, but several neighbors then testified that they had either seen Spencer getting out of Young's car or standing by the car, and one witness even testified that he saw Young getting pushed out of the car before it pulled into an alley and he was allegedly able to see Spencer exiting the car before jumping over a fence to go through a neighbor's backyard.[64]

In the second trial, a woman named Gladys Oliver whose house overlooked the alley where the car pulled into was the star witness for the prosecution. She claimed to have seen Spencer get out of Young's car and saw Spencer's car parked in the street before it disappeared. She said the street was well lit and she could identify Spencer as one of the men getting out of the car.[65] According to former prosecutor Andy Beach: "[t]here's no question that Gladys Oliver's testimony convicted Ben Spencer."[66] He continues: "[i]n the 25 years I tried criminal cases, she was one of the top three or four eyewitnesses of all time. Just her physical presence and her ability to clearly answer questions, and to stand up to cross-examination, it carried the day for us, there's no question."[67] When the evidentiary hearing was opened by Judge Magnis in 2007, Oliver held firm, though other witnesses backtracked. Spencer's team called a "forensic visual scientist," who testified that no witness would be able to identify a face from over twenty-five feet away under conditions similar to as they were on the night of March 22, 1987. The closest eyewitness was ninety-two feet away. Even the state's expert agreed that at best, the witness would have been able to see a silhouette, not an identifiable face and whether the witness seemed sure or unsure of the fact.[68]

In Texas, the standard used when looking at appeals based on DNA evidence is often cited as whether "**any** rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt," as is displayed in *Skinner v. State.*[69] The new evidence brought forth by Spencer's team was enough to convince Judge Magnis: "[w]hen you have two [experts] that

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[64]Johnathan Silver, "Inmate Declared Innocent Is Still in Texas Prison," The Texas Tribune, March 17, 2016, https://www.texastribune.org/2016/03/17/inmate-convicted-murder-pursues-parole-exoneration/.; "Why A Man Declared Innocent Can't Get Out Of Prison," NPR.org, accessed April 18, 2021, https://www.npr.org/2017/12/06/568314351/why-a-man-declared-innocent-can-t-get-out-of-prison.: "Ex Parte Spencer, 337 S.W.3d 869 – CourtListener.Com."

[65] "Ex Parte Spencer, 337 S.W.3d 869 – CourtListener.Com."

[66] "Why A Man Declared Innocent Can't Get Out Of Prison."

[67] "Why A Man Declared Innocent Can't Get Out Of Prison."

[68] "Why A Man Declared Innocent Can't Get Out Of Prison."; Hal Arkowitz Lilienfeld Scott O., "Why Science Tells Us Not to Rely on Eyewitness Accounts," Scientific American, accessed April 18, 2021, https://doi.org/10.1038/scientificamericanmind0110-68.

[69] "Skinner v. State."

say none of these three witnesses could have seen what they said they saw," Magnis said, "I felt that was very, very compelling."[70] It was even enough to convince the foreman of the second jury, the one which sentenced him to life in prison: "[w]e worked with what we had, but we were very wrong."[71] So why was Spencer's request for habeas relief denied? Surely both a criminal court judge and the foreman of the jury who convicted Spencer to life in prison would fall under the standard of "any reasonable trier or fact." However, when evaluating freestanding actual innocence claims, the State doesn't use the same test it used in *Skinner v. State*. Instead, the appellate judge cites a threshold established in *Ex Parte Franklin* and cites a that "[e]ven if we determined that the evidence here was new, it does not **unquestionably** establish Applicant's innocence."[72]

It's easy to make a claim of actual innocence, but incredibly difficult for that claim to be recognized in court. The fact that it is broad and largely unspecified means that anyone who is looking to be released could hypothetically raise a claim of actual innocence and, in a system already straining under the number of cases it has to hear, arguing that each case of actual innocence should be given large deference would injure the integrity of the legal system. However, reading about cases like Spencer's demands that some room be made for appeals that may not comfortably fit under the usual grounds for appeal, but are nonetheless important and need to be heard. The fact that standard is so incredibly high means that, for people like Spencer, it's unlikely that he will ever be able to find relief save for some miracle. The integrity of the legal process should be protected, but not at the expense of keeping an innocent man imprisoned. Such action not only ruins the life of the person improperly convicted of the crime due to procedural reverence, but allows the actual perpetrator to remain free, turning out a result that cannot claim to hold justice for any of those involved.

Benjamin Spencer was 22 when he was arrested, recently married and expecting a child.[73] The Texas Department of Criminal Justice lists his age now as 55.[74] Spencer has spent over half his life behind bars in a maximum security prison with no release date in sight despite a trial judge determining his sentence should be overturned due to actual innocence over twelve years ago. Our post-conviction system is meant to give relief to those who did not receive justice in their initial trial, but has little room for granting relief based on actual innocence, resulting in innocent people spending time behind bars while guilty perpetrators are not held accountable for their crimes. Obviously, someone who is convicted of a crime can't simply be released due to a

[70] "Why A Man Declared Innocent Can't Get Out Of Prison."
[71] "Why A Man Declared Innocent Can't Get Out Of Prison."
[72] "Ex Parte Franklin, 72 S.W.3d 671 – CourtListener.Com.";"Ex Parte Spencer, 337 S.W.3d 869 – CourtListener.Com."
[73] "Why A Man Declared Innocent Can't Get Out Of Prison."
[74] "Texas Department of Criminal Justice Offender Search," accessed October 23, 2020, https://offender.tdcj.texas.gov/OffenderSearch/start.action.

claim of innocence, but surely we have to have a better system for being able to evaluate claims of actual innocence following conviction so that the momentum of the system doesn't overtake the importance of obtaining justice not just for those who have been convicted, but also for those who may be the victims of a crime which doesn't see the guilty party or party be held accountable. Striking the proper balance between protecting the legal system and its results and reevaluating those results based on evidence is incredibly difficult, but also incredibly necessary. For a case to be reexamined due to new evidence, our system has to allow for reexamination of evidence that has been cast in a new light in order to maximize the chance of producing a just outcome for all those who are involved.

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Voting While in Mass Incarceration

Rebecka Sokoloff[75]

ABSTRACT: *This article explores a recent report of scholars and voting-rights activists urging Congress to make voting mandatory. In this article, I examine the rights of felons, specifically their rights to vote while in mass incarceration. Since prisoners are not allowed to vote in most states, I argue why they should gain suffrage. From this article, I hope to provide and enlighten the reader on possible alternative solutions to prisoner voting.*

Introduction

In a recent report, many scholars and voting-rights activists urge Congress to make voting mandatory for all U.S. citizens.[76] Participating in voting is incredibly important because it ensures your voice is heard, which is one of the primary foundational elements of democracy. By forcing Americans to vote, scholars and voting-rights activists are encouraging and influencing individuals to educate themselves and others about the important issues and policies of each presidential candidate. This is crucial in our democracy because it allows us to be involved in the national decision-making process and having knowledge in what our nation is achieving. If every individual were to cast a vote, the outcome would be huge; there would be reduced partisanship, more knowledge about current issues, and more youth advocates and activist groups.[77] Scholars and voting-rights activists argue that if people do not vote or have an acceptable excuse for not voting, they should be penalized. This stemmed from the 2012 and 2016 Presidential Election reports that revealed an average of 61.6% of eligible citizens participating in the registration and voting process.[78] Since many individuals have not voted in recent years, scholars and voting-rights activists argue that if people do not vote or have an acceptable excuse for not voting, they should be penalized. By making voting a civic responsibility, America would be a more democratic and advanced society.[79] Voting is an important right in America, and it should be upheld for all citizens, no matter if one has been convicted of a felony or incarcerated.

Currently, in the United States, felons are ineligible to vote. In some circumstances, felons lose their right to vote while they are in incarceration but receive restoration upon their release. Unfortunately, states continue to indefinitely remove voting rights from felons.[80] Several important questions have been raised regarding voting rights in relation to prisoners, such as, how do prisoner voting rights factor into this new plan? Why are prisoners not allowed to vote? Should they be allowed? Are there alternative ways to ensure that prisoners can vote? It is unjustifiable and unconstitutional to deny prisoners the right to vote, and it is incredibly

[75] Undergraduate at Brandeis University, Class of 2022.
[76] Dambisa Moyo. "Make Voting Mandatory in The U.S.." *The New York Times* (2019).
[77] Moyo, 2019.
[78] "Voting in America: A Look at the 2016 Presidential Election." *The United States Census Bureau* (2017).
[79] Moyo, (2019).
[80] "Felon Voting Rights." *National Conference of State Legislatures* (2019).

important that America changes its established laws to accommodate prisoner voting because we cannot take away an American's inherent right to participate in democracy.

Background

The history of felony disenfranchisement dates back to the English colonists. When British colonists came to North America, they brought with them the common law practice of "civil death."[81] These were a set of criminal penalties that punished those who rejected common law. If one violated the moral code, the penalty was the revocation of their right to vote. It was not until after the American Revolution that the states began expanding the annulment of voting rights to all felony offenses.[82]

During the post-Reconstruction period, also known as the Jim Crow Laws era, many of the southern states tailored disenfranchisement laws to target and ban black males from voting. For example, Kentucky and Virginia created laws that prevented convicted felons from voting at any point in their life after conviction. The laws for disenfranchisement broadened throughout the states, causing more individuals to lose their right to vote.[83]

This disenfranchisement continued in the United States until 1965 when the Voting Rights Act was introduced nationwide, in order to protect voting rights. This landmark legislation prohibited every state and government from discrimination of racial or cultural minorities through voting rights.[84]

The Voting Rights Act was the start to providing equality in voting rights for all Americans. However, the 1974 court case *Richardson v. Ramirez* challenged this progress. Ramirez and several felons brought a class action suit against California's Secretary of State because they were denied their right to vote. They challenged the laws that permanently disenfranchised any individual that was convicted of a crime and argued that the state did not have justification or evidence to deny them the right to vote. On appeal, the Supreme Court ruled in favor of California. It was stated that it was constitutionally acceptable to deny the felons the right to vote because a state could lawfully consider the qualifications of a voter based on their criminal record. Yet, the Constitution confirms that states cannot deny the individual the right to vote based on their racial presentation. Since it was viewed as historically acceptable to disenfranchise prisoners, Ramirez and the other felons did not regain their right to vote.[85]

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[81] Jean Chung. "Policy Brief: Felony Disenfranchisement." *The Sentencing Project* (2019).
[82] Chung, 2019.
[83] Chung, 2019.
[84] "History of Federal Voting Rights Laws." *The United States Department of Justice* (2020).
[85] Richardson v. Ramirez, 418 U.S. 24 (1974).

As seen above, the barring of felons from voting stems from the hostility and the perception society has about individuals who commit crimes. When an individual is incarcerated, they are forever tainted with a negative image based on their crimes, regardless of serving their time and amending their sins. Some might argue that the government and authorities need to control and govern felons' voting rights because they have and (possibly) will continue to violate the rules and regulations put in place by the state and federal government. Additionally, many individuals may ask why prisoners should be allowed to vote when they neglected to adhere to the law? While some crimes may not be as bad as others (i.e., the possession of marijuana compared to first degree murder), anyone who goes against set rules is deemed inexcusable in the eyes of the law. Prisoners who disrupt the peace and commit crimes need to have the intrusion in order to get the help they need to live a crime-free life, and to ensure the safety of the public. If they were left to do this on their own, they may fall into bad habits or cause more destruction.

Importance of Prisoner Voting

While these are true remarks, how can we justify taking away someone's right to talk for themselves? Even if an individual committed a crime, they are a self-governing individual protected under the fundamental rights of the Constitution. They have the ability to speak and act for themselves, without the forced governance of authority. People voice their opinion in politics through voting. If the government or authorities were to implement harsher restrictions onto the individual, it may depreciate them more. The individual may be more isolated from society and not given the resources they need in order to improve. The isolation from society would enable the incarcerated to continue to feel useless and unwanted. This would not only affect their mental and physical health, but also not allow them to be educated, express themselves, or reintegrate back into society properly. Implementing these restrictions could be detrimental and cause more separation and judgement within society.

Our national political conversation and change depends on the voting. In the past 20 years, neglect and the misuse of authoritative power has plagued prisoners throughout the nation. In addition to being locked away, the prisons are failing health inspections and lack proper immersion programs for the prisoners. If prisoners had the ability to vote, they would vote for representatives that cared about the prison system and would fight to ensure that health inspections are taken care of. Furthermore, the representatives could enact programs that allow prisoners to access proper education and therapeutic resources.[86] By giving them the right to vote, prisoners can represent themselves and the larger portion of the population. Moreover, they

[86] "Prison Abuse: A Curated Collection of Links." *The Marshall Project* (2020).

can voice their concerns about maltreatment and the ways to help improve life in and after prison.

As a result of prisoners being prohibited from voting, a caste system has formed. America has had a dark past where it was believed that people were not and should not be equals. This can be seen in the "three-fifths clause" of the U.S. Constitution. This clause stated that African Americans were only three-fifths of a full citizen of the United States. Enslaved African Americans were not allowed to vote, allowing white individuals and the government to talk, act, and decide for them.[87] Like slavery, mass incarceration is a designed system to racialize, discriminate, and create stigma between individuals in prison and individuals in the 'free world.' Prisoners are legally the property of the government. The government has the right to speak on their behalf and to go above their heads to use the law, even if that makes them inferior and dehumanized.[88] A caste system in the United States is the artificial grouping and labeling of individuals.[89] Prisoners could be considered in a caste system because they are systematically grouped to be labeled as bad individuals. Caste systems go against everything this country is supposed to stand for, and limit individuals' ability to partake in their fundamental rights.

Furthermore, prisoners perform mandatory labor for private companies. Mass incarceration may refer to this as a rehabilitation approach to get prisoners back into normal life, but there are ulterior motives other than rehabilitation. Often there is a profit extraction for this labor where prisoners are paid little to nothing for their labor.[90]

Most importantly, the inhumane conditions of the prisons cause medical and mental health problems. By not facilitating the prisoners with proper sanitation and cleanliness, it is in contradiction to the idea that prisons are a rehabilitation center. Many of the prisoners are left in the same dirty, moldy prison cells with little cleaning. In addition, they wear the same clothing every day. The lack of sanitary conditions can contribute to the spread of infections, diseases, and viruses. Mentally, prisoners are not given proper support or resources to find comfort in their surroundings or with themselves. This can make prisoners act out violently towards each other or the guards. Going a step further, this could lead to suicide or self-harm. Surely, prisoners who committed horrible acts deserve to feel guilty, but why should the government and prison system allow for cruel and unusual conditions? Voting would enable the prisoners to elect representatives that cared enough to implement policies and conditions that would improve their

[87] Malik Simba. "The Three-Fifths Clause of the United States Constitution (1787)." *Black Past* (2014).
[88] Gina M. Florio. "5 Ways America's Prison System Mimics Slavery." *Bustle* (2016).
[89] Isabel Wilkerson. "America's Enduring Caste System." *The New York Times Magazine* (2021).
[90] Florio, 2016.

living conditions. Prisoners should be given the tools, such as voting, to improve themselves and right their wrongs right. This cannot be done when they are treated like animals.[91]

Alternative Solutions

Since 2019, a few states have found alternative solutions to prisoner voting. However, not all of the alternative solutions have an easy and positive outcome. For instance, the Harris County Jail in Houston, Texas has partnered with outside organizations – such as the Texas Organizing Project and the Houston Justice – to help jumpstart voting initiatives within the prisons. One of the alternative solutions to prisoner voting was to place a polling location within the jail. This way, both the prisoners and the surrounding community have the opportunity to vote. Though, this solution was not plausible. First, the incarcerated felons lacked the proper and necessary identification to cast a ballot. The jail lacked internet access or resources to obtain the proper identification of the prisoners. Second, any polling place must be open to the general public because any individual is entitled to use one. This meant that community members would have to enter the jail in order to vote. There was controversy with this solution because jails limit the number of individuals who enter the building, meaning that the community members would not have access to the polling station.[92]

Besides the Harris County Jail, there have been many attempts in finding resolutions to prisoner voting and the voting process throughout the country. In several states, such as the District of Columbia, Maine, and Vermont, felons never lose their right to vote, even while they are incarcerated. In the past years, legislatures within the states of Virginia, Maine, and Vermont have rejected laws that excluded convicted individuals from voting because they felt as though it was wrong to retrieve an individual's American rights. In these states, prisoners can vote by absentee ballot. Since there are many people of color within the prisons, these states allow the minority to participate in their right to vote. However, while these states allow prisoners to vote, there is a lack of resources and discussions on the voting process and political options.[93] I suggest several alternative solutions that would allow prisoners to vote and to be educated about the voting process and political options.

First, all prisoners should have a mandatory seminar every four years about the different presidential candidates and their policies in order to inform the prisoners about the voting choice. Thus, criminals can be well educated and learn about new policies. This is especially important for criminals who are serving short prison sentences or individuals who have children of their own. The seminars could be taught by outside officials or educators in a protected and safe

[91] Amy Miller. "Overcrowding in Nebraska's Prisons Is Causing a Medical and Mental Health Care Crisis." *ACLU of Nebraska* (2017).
[92] Nicole D. Porter. "Voting in Jails." *The Sentencing Project* (2020).
[93] Nicole Lewis. "In Just Two States, All Prisoners Can Vote. Here's Why Few Do." *The Marshall Project* (2019).

classroom (to ensure that all officials or educators feel comfortable). This solution would work because it allows convicted felons not only the opportunity to be informed, but also to understand the candidates and their policies. Before voting, the felons are exposed to the outside world and would be given a second wave of hope. During the voting process, there should be several polls placed within the prison that enable incarcerated individuals to vote. The security guards could monitor the number of prisoners entering and exiting the polling area. The polls would ensure security and protection of the vote, while also allowing prisoners to participate in the inherit American right to democracy. If the polling stations were to malfunction, the prisons should have absentee ballots ready for the detainees. When they are released, the inmates would be able to experience a society, no matter if it had changed the outcome based on their vote. Even if the votes show that the other party wins, incarcerated individuals will still have the opportunity to be seen as individuals and re-integrate back into society.

A second option could be that prisoners who will be released during the next presidency period should vote. Since the prisoner would no longer be incarcerated, their presidency choice would matter. They have the right to vote for someone that they believe will represent and govern them. While this could create a separation between the prisoners (who can vote and who cannot vote), it may also provide a sense of encouragement, hope, and 'revolutionary' spirit. A plausible concern with this alternative is that the inmates that would not be released by the next presidency would feel as though there was special treatment. This may ensue distrust amongst the guards and prisoners, and more violence between inmates. Nevertheless, it would allow the prisoner to vote and make change within the nation.

These two options are of many possibilities to help restore the knowledge and humanization of the mass incarceration system and society.

Conclusion

It is deeply problematic to deny the right to vote for an entire class of American citizens. The democratic society and system depend on all of the individuals within the nation. Fortunately, many states are reconsidering their disenfranchisement policies, but this does not excuse the effects that it has caused in the past. Prisoners are individuals who have a voice and a right to be heard. If people of the nation do not vote, they are letting the nation's leaders speak for them, and important issues will be disregarded. Prisoners are used as correctional facilities. To deny a product of that facility the right to vote and the right to be a proper citizen is to say that the prison system in the United States is untrustworthy and deeply flawed. The United States has two options: continue down the path of a flawed system or do what the nation is designed to do; change.

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Features Section: Opinions

OPTIONS FOR THE BIDEN ADMINISTRATION TO PREVENT IRAN FROM DEVELOPING A NUCLEAR WEAPON

Kevin A. Mani[94]

Abstract: *Today, Iran's nuclear program poses a threat to the United States' (U.S.) security interests in the Middle East. In 2015, under the Obama administration, the U.S. joined the Joint Comprehensive Plan of Action (JCPOA), commonly referred to as the Iran nuclear deal. The JCPOA was a multinational agreement meant to prevent Iran from developing a nuclear weapon in return for the removal of sanctions on Iran. However, in 2018, the Trump administration withdrew from the agreement and re-imposed sanctions. Despite the U.S.' decision to withdraw from the agreement, Iran continued to abide by it until the Trump administration imposed new sanctions against their country. The Biden administration has only two options to address this situation: The U.S. could either rejoin the JCPOA or increase economic sanctions. While increasing sanctions could pressure Iran to negotiate, they would risk the rise of anti-American sentiment and enhance the power of hardliners in the government. On the other hand, if the U.S. rejoins the JCPOA, there is the risk that Iran will continue with its missile program and its dominance in the region.*

Introduction

A Joseph R. Biden presidency renews hope of the United States (U.S.) rejoining the Joint Comprehensive Plan of Action (JCPOA), commonly referred to as the Iran nuclear deal. The JCPOA was a preliminary framework agreement reached on July 14, 2015, between Iran, the European Union (E.U.), and the five permanent members of the United Nations Security Council (UNSC) — the United States, Great Britain, France, Russia, and China — plus Germany, commonly referred to as the P5+1.[95] The agreement was a transaction in which Iran promised to stop developing nuclear weapons for 15 years in return for the removal of economic sanctions.[96] However, on May 8, 2018, under the Trump administration, the U.S. withdrew from the agreement and reimposed sanctions on Iran despite strong disapproval from the other signatories.[97] Trump backed his decision to leave, claiming that it was "defective at its core."[98] Trump claimed that the limits of the agreement were "very weak," "allow[ing] Iran to continue

[94] Undergraduate at Brandeis University, Class of 2024.
[95] Kali Robinson "What Is the Iran Nuclear Deal?" *Council on Foreign Relations*, 2021, https://www.cfr.org/backgrounder/what-iran-nuclear-deal.
[96] Kali, "What Is the Iran Nuclear Deal?"
[97] "The P4+1 and Iran Nuclear Deal Alert, May 16, 2018," Arms Control Association, 2018, https://www.armscontrol.org/blog/2018-05-16/p41-iran-nuclear-deal-alert-may-16-2018.
[98] "The P4+1 and Iran Nuclear Deal Alert, May 16, 2018."

enriching uranium and — over time — reach the brink of a nuclear breakout."[99] In November 2018, the Trump administration re-imposed economic sanctions on Iran.[100] In April 2019, the U.S. threatened to impose sanctions on any country that continued to buy oil from Iran.[101] Two months later, the Trump administration imposed sanctions on the Iranian Supreme Leader Ali Khamenei.[102] The U.S.' decision to not only withdraw from the agreement but also to increase sanctions on Iran discouraged the country from continuing to abide by the limits set by the agreement. On July 1, 2019, Iran violated the terms of the agreement when it surpassed the limit on its low-enriched uranium stockpile.[103] A week later, Iran breached the 3.67% limit on nuclear enrichment.[104] The potential for political and economic destabilization poses a great risk to the U.S. and its allies in the Middle East — Israel and Saudi Arabia. Therefore, the Biden administration must decide what strategy to pursue to protect U.S. security interests in the region. The Biden administration can pursue two strategies to address this situation: attempt to rejoin the original agreement or increase economic sanctions. The most effective strategy that will fulfill U.S. regional security interests is to rejoin the original agreement.

Background

Iran launched its civilian nuclear program in the 1950s under the Shah, Mohammad Reza Pahlavi.[105] In 1968, Iran signed the Non-Proliferation of Nuclear Weapons Treaty (NPT), ratifying the treaty two years later.[106] The NPT had three objectives: to prevent the spread of nuclear weapons, to promote the peaceful use of nuclear technology, and to strive for global

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[99] Donald J. Trump, "Remarks by President Trump on the Joint Comprehensive Plan of Action," Trump White House Archives, 2018, https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action/.

[100] "The P4+1 and Iran Nuclear Deal Alert, May 16, 2018."

[101] Edward Wong and Clifford Krauss, "U.S. Moves to Stop All Nations From Buying Iranian Oil, but China Is Defiant," *The New York Times*, 2019, https://www.nytimes.com/2019/04/22/world/middleeast/us-iran-oil-sanctions-.html.

[102] Daphne Psaledakis and Humeyra Pamuk, "U.S. imposes sweeping sanctions on Iran, targets Khamenei-linked foundation," *Reuters*, 2020, https://www.reuters.com/article/usa-iran-sanctions-int/u-s-imposes-sweeping-sanctions-on-iran-targets-khamenei-linked-foundation-idUSKBN27Y262.

[103] Rafael Mariano Grossi, "Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015)," International Atomic Energy Agency, 2019, https://www.iaea.org/sites/default/files/19/07/govinf2019-8.pdf.

[104] Rafael Mariano Grossi, "Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015)," International Atomic Energy Agency, 2019, https://www.iaea.org/sites/default/files/19/07/govinf2019-9.pdf.

[105] Joseph Cirincione, Jon B. Wolfsthal, and Miriam Rajkumar, *Deadly Arsenals: Nuclear, Biological, and Chemical Threats*, Carnegie Endowment for International Peace, Washington, D.C.: 2014.

[106] "The Iran Primer: Iran and the NPT," United States Institute of Peace, 2020, https://iranprimer.usip.org/blog/2020/jan/22/iran-and-npt#:~:text=1968.develop%20or%20acquire%20nuclear%20weapons.

nuclear disarmament. Following the 1979 Iran Revolution, Iran's nuclear program came to a stillstand as many nuclear scientists had fled the country in the wake of the revolution and Ayatollah Ruhollah Khomeini opposed the use of nuclear technology.[107] In 1984, the U.S. added Iran to its list of state sponsors of terrorism and gradually imposed economic sanctions and arms embargos on the country.[108] Later that year, Khomeini restarted Iran's nuclear program to defend the Islamic Republic from external threats, such as Iraq.[109] Over time, sanctions were used to address concerns that Iran was using its civilian nuclear program as a cover for nuclear weapons development.[110]

Almost two decades later, in 2002, the National Council of Resistance of Iran (NCRI), the political wing of the People's Mujahedin of Iran, a militant opposition organization banned by the Iranian government, revealed the existence of Iran's nuclear program.[111] Alireza Jafarzadeh, a representative of the NCRI, disclosed that Iran had built two new nuclear facilities in Natanz and Arak.[112] The following year, Iran negotiated with the EU-3 — France, Germany, and the United Kingdom — in an attempt to avoid referral to the UNSC.[113] During this time, Iran notified the IAEA that it would suspend nuclear enrichment for the duration of the talks, commonly referred to as the Paris Agreement.[114] However, diplomatic progress fell apart in 2005 after Iran rejected the EU-3's long-term framework agreement and decided to resume enriching uranium.[115]

In June 2006, the P5+1 proposed an agreement that would advance Iran's civilian nuclear technology if it suspended nuclear enrichment and resumed the implementation of additional protocols requiring Iran to declare its nuclear activities and grant the IAEA access to its nuclear facilities.[116] Although Iran rejected the proposal, it admitted that it contained "elements which

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[107] Gary Samore, *Iran's Strategic Weapons Programmes: A Net Assessment*, London, UK: Routledge, 2005, 9-16.
[108] "Chapter 3: State Sponsors of Terrorism Overview," U.S. Department of State, 2004, https://2009-2017.state.gov/documents/organization/225050.pdf.
[109] Micah Zenko, "Iran's Nuclear Program: History and Eight Questions," *Council on Foreign Relations*, 2012, https://www.cfr.org/blog/irans-nuclear-program-history-and-eight-questions#:~:text=According%20to%20an%20IAEA%20internal,Islamic%20Revolution%20from%20external%20threats.
[110] "Chapter 3: State Sponsors of Terrorism Overview."
[111] Samore, *Iran's Strategic Weapons Programmes: A Net Assessment*, 16.
[112] Samore, *Iran's Strategic Weapons Programmes: A Net Assessment*, 16.
[113] "SECURITY COUNCIL IMPOSES SANCTIONS ON IRAN FOR FAILURE TO HALT URANIUM ENRICHMENT, UNANIMOUSLY ADOPTING RESOLUTION 1737 (2006)," United Nations Security Council, 2006, https://www.un.org/press/en/2006/sc8928.doc.htm.
[114] "Communication dated 26 November 2004 received from the Permanent Representatives of France, Germany, the Islamic Republic of Iran and the United Kingdom concerning the agreement signed in Paris on 15 November 2004," International Atomic Energy Agency, 2004, https://www.iaea.org/sites/default/files/publications/documents/infcircs/2004/infcirc637.pdf.
[115] Kelsey Davenport, "Timeline of Nuclear Diplomacy With Iran," Arms Control Association, 2021. https://www.armscontrol.org/factsheets/Timeline-of-Nuclear-Diplomacy-With-Iran.
[116] "Iran: Nuclear," Nuclear Threat Initiative, 2020, https://www.nti.org/learn/countries/iran/nuclear/.

may be useful for a constructive approach."[117] In response, the UNSC adopted Resolution 1737, which gradually imposed economic sanctions on Iran in an attempt to force the country to the negotiation table.[118]

In June 2008, the UNSC proposed a new, more comprehensive framework agreement.[119] Unlike the first proposal, the UNSC's new proposal included a promise not to impose any additional sanctions on Iran.[120] A year later, under the Obama administration, the U.S. initiated a "fuel swap" agreement whereby Iran would trade a majority of its 3.5% enriched uranium in return for fuel for the Tehran Research Reactor.[121] Although Iran agreed, the country increased its stockpile of 3.5% enriched uranium, violating the agreement.[122] In response, the UNSC adopted Resolution 1929, expanding sanctions on Iran.[123]

Six years later, on April 2, 2015, a general framework agreement was agreed upon, and a date was set to finalize the deal.[124] However, before the agreement could be completed, the U.S. Congress passed the "Iran Nuclear Agreement Review Act of 2015," a bill that gave Congress the right to review any nuclear agreement negotiated with Iran.[125] Congress had 60 days to pass a resolution in support of or in opposition to the agreement.[126] If Congress could not come to a decision, the choice would be — and ultimately was — left to the President.[127] On July 14, Iran, the EU, and the P5+1 met in Vienna, Austria, to finalize the agreement.[128] However, in October,

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[117] Davenport, "Timeline of Nuclear Diplomacy With Iran."
[118] Rafael Mariano Grossi, "Cooperation between the Islamic Republic of Iran and the Agency in the light of United Nations Security Council Resolution 1737 (2006)," International Atomic Energy Agency, 2007, https://www.iaea.org/sites/default/files/gov2007-07.pdf.
[119] "Updated P5+1 Package," U.S. Department of State, 2008, https://2001-2009.state.gov/t/isn/rls/fs/106217.htm.
[120] "Updated P5+1 Package."
[121] Daniel Poneman and Sahar Nowrouzzadeh, "The Deal That Got Away: The 2009 Nuclear Fuel Swap with Iran," Harvard Kennedy School: Belfer Center for Science and International Affairs, 2021, https://www.belfercenter.org/publication/deal-got-away-2009-nuclear-fuel-swap-iran.
[122] Poneman and Nowrouzzadeh, "The Deal That Got Away: The 2009 Nuclear Fuel Swap with Iran."
[123] Colum Lynch and Glenn Kessler, "U.N. Imposes another round of sanctions on Iran," *Washington Post*, 2010, https://www.washingtonpost.com/wp-dyn/content/article/2010/06/09/AR2010060902876.html.
[124] "Parameters for a Joint Comprehensive Plan of Action Regarding the Islamic Republic of Iran's Nuclear Program," Obama White House Archives, 2015, https://obamawhitehouse.archives.gov/the-press-office/2015/04/02/parameters-joint-comprehensive-plan-action-regarding-islamic-republic-ir.
[125] "Summary of the Iran Nuclear Agreement Review Act, as Amended by Committee," National Iranian American Council, 2015, https://www.niacouncil.org/resources/summary-of-the-iran-nuclear-agreement-review-act-as-amended-by-committee/?locale=en.
[126] "Summary of the Iran Nuclear Agreement Review Act, as Amended by Committee."
[127] Jennifer Steinhauer, "Democrats Hand Victory to Obama on Iran Nuclear Deal," *The New York Times*, 2015, https://www.nytimes.com/2015/09/11/us/politics/iran-nuclear-deal-senate.html.
[128] Michael R. Gordon and David E. Sanger, "Deal Reached on Iran Nuclear Program; Limits on Fuel Would Lessen With Time," *The New York Times*, 2015, https://www.nytimes.com/2015/07/15/world/middleeast/iran-nuclear-deal-is-reached-after-long-negotiations.html.

the U.S. raised concerns to the UNSC for Iran's medium-range ballistic missile tests, a possible violation of Resolution 1929.[129]

In December 2016, U.S. Secretary of State John Kerry reissued sanctions waivers to demonstrate the U.S.' commitment to JCPOA.[130] In January 2017, Iran tested medium-range ballistic missiles in violation of Resolution 2231.[131] Two months later, the U.S. introduced new sanctions on Iran targeting its ballistic missile program and its support of terrorism.[132]

The Trump administration announced the U.S.' withdrawal from the JCPOA in May 2018.[133] Trump referred to the deal as "defective at its core" and accused Iran of exporting ballistic missiles to fuel proxy wars with Israel and Saudi Arabia.[134] Many international organizations, countries, and U.S. scholars have criticized the Trump administration's decision to withdraw, while many U.S. conservatives, Israel, and Saudi Arabia supported the move.[135] Former President Barack H. Obama called Trump's decision "a serious mistake."[136] He claimed that "without the JCPOA, the United States could eventually be left with a losing choice between a nuclear-armed Iran or another war in the Middle East."[137]

Once again, in July 2019, Iran breached the agreement when it surpassed the limit on its low-enriched uranium stockpile.[138]

Analysis

Iran's nuclear program remains one of the United States' most pressing foreign policy issues. If Iran successfully develops a nuclear weapon, the safety of Israel, Saudi Arabia, and other countries in the Middle East will be in jeopardy. Such a feat would further destabilize the region and threaten U.S. regional security interests. Therefore, it is within the Biden

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[129] Louis Charbonneau, "U.S. confirms Iran tested nuclear-capable ballistic missile," *Reuters*, 2015, https://www.reuters.com/article/us-iran-missiles-usa/u-s-confirms-iran-tested-nuclear-capable-ballistic-missile-idUSKCN0SA20Z20151016.
[130] John Kerry, "Statement by Secretary Kerry on Renewing Waivers Related to Extension of the Iran Sanctions Act," U.S. Department of State, 2016, https://2009-2017.state.gov/secretary/remarks/2016/12/265652.htm.
[131] "Iran's Compliance with UNSCR 2231: Alleged Violations Must Be Addressed," Iran Watch, 2017, https://www.iranwatch.org/our-publications/articles-reports/irans-compliance-unscr-2231-alleged-violations-must-be-addressed.
[132] Donald J. Trump, "Read the Full Transcript of Trump's Speech on the Iran Nuclear Deal," *The New York Times*, 2018, https://www.nytimes.com/2018/05/08/us/politics/trump-speech-iran-deal.html?partner=rss&emc=rss.
[133] Mark Landler, "Trump Abandons Iran Nuclear Deal He Long Scorned," *The New York Times*, 2018, https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html.
[134] Landler, "Trump Abandons Iran Nuclear Deal He Long Scorned."
[135] Landler, "Trump Abandons Iran Nuclear Deal He Long Scorned."
[136] Barack H. Obama, "REMARKS: Quitting the Iran Nuclear Deal: 'A Serious Mistake,'" Arms Control Association, 2018, https://www.armscontrol.org/act/2018-06/features/remarks-quitting-iran-nuclear-deal-%E2%80%98-serious-mistake%E2%80%99.
[137] Obama, "REMARKS: Quitting the Iran Nuclear Deal: 'A Serious Mistake.'"
[138] Grossi, "Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015)."

administration's best interest to prevent such an outcome from occurring by taking proactive steps to ensure that Iran does not develop a nuclear weapon.

Rejoining the Joint Comprehensive Plan of Action

Prior to withdrawing from the JCPOA, the Trump administration imposed various sanctions on Iran without compromising the United States' commitments to the Iran nuclear deal.[139] After withdrawing from the JCPOA, the Trump administration introduced additional sanctions that violated U.S. commitments to the deal.[140] The Biden administration's ability to re-enter the JCPOA is contingent upon addressing four different groups of sanctions: those imposed after May 2018 that violate the U.S.' JCPOA commitments, sanctions imposed between January 2016 and May 2018 that are in line with the U.S.' commitments, and non-nuclear sanctions imposed by the Trump administration in 2019 that prevent efficient re-entry.

By rejoining the JCPOA, the Biden administration would have to address the current sanctions that contradict JCPOA commitments. This category of sanctions would be relatively easy to address because the administration would only need to revert to compliance with the deal. Notably, these are the same sanctions that the Obama administration lifted in 2016 to ensure U.S. compliance with the agreement.[141] The sanctions cover Iran's petrochemical development, oil sales, and acquisition of hard currency.[142] The second point of consideration in reentry would be the sanctions prior to withdrawal. As noted above, the Trump administration had imposed various sanctions on Iran that were in line with U.S. commitments under the JCPOA. The sanctions covered terrorist networks, Iran's prison system, the Islamic Revolutionary Guard Corps, and Iran's networks for ballistic missile procurement.[143] In the negotiations phase, Iran might advocate for a total reset to when the deal first went into effect. However, sanctions hereby outlined under the second category were made in compliance with JCPOA regulations, and it is unlikely that the Biden administration will lift them. Iran would need to agree to decrease its nuclear enrichment levels to the negotiated levels and to correct JCPOA restriction violations such as the development of new centrifuges and resuming heavy water production.[144]

[139] Brian O'Toole, "Rejoining the Iran nuclear deal: Not so easy," *Atlantic Council*, 2021, https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/rejoining-the-iran-nuclear-deal-not-so-easy/.
[140] "The P4+1 and Iran Nuclear Deal Alert, May 16, 2018."
[141] O'Toole, "Rejoining the Iran nuclear deal: Not so easy."
[142] O'Toole, "Rejoining the Iran nuclear deal: Not so easy."
[143] O'Toole, "Rejoining the Iran nuclear deal: Not so easy."
[144] Kali, "What Is the Iran Nuclear Deal?"

Increasing Economic Sanctions

The Biden administration has the option to increase sanctions on Iran. Powerful nations and multilateral alliances use economic sanctions to force adversaries to change specific behaviors. The U.S. government has used sanctions on Iran to degrade Iran's military and nuclear powers, influence its decision making, and "promote positive political change in the nature of the Iranian regime."[145] As a coercive instrument of influence, the U.S. and its multilateral partners have used sanctions to discourage Iranian defiance of international community demands. Although sanctions are primarily economic, the overall price of sanctions is the coercive element that necessitates political changes.[146] For example, sanctions proved effective in bringing Iran to the negotiation table, which resulted in the JCPOA. These sanctions created unfavorable economic conditions for the people of Iran and may have slowed the progress of the nuclear program due to economic hardship.

Nonetheless, economic struggles caused by sanctions do not always create positive political changes. In addition, sanctions could accelerate Iran's nuclear program.[147] Sanctions might also increase the population's support for the regime's economic defiance and consequently undermine the efficacy of economic sanctions.[148] This can include building stronger political and economic relationships with U.S. adversaries such as China and Russia. Overall, economic pressure does not always guarantee effective control of the incumbent regime.

In various ways, Iran is not the ideal candidate for the use of economic sanctions by the U.S. In general, the outcomes of economic sanctions are uncertain when it comes to attempting to influence behavior.[149] Sanctions may fail to match their coercive objectives, particularly when imposed on authoritarian adversaries.[150] Although the U.S. has used coercive economic sanctions on Iran for decades, the results have been far from ideal.[151] Since the Reagan administration, the U.S. has imposed various sanctions to restrict monetary aid, arms trade, and economic activities between the U.S. and Iran, among other penalties.[152] During the Bush administration, the U.S. restricted Iran's access to the international financial system with the objective of blocking or

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[145] Robert Reardon, "Containing Iran: Strategies for Addressing the Iranian Nuclear Challenge," RAND Corporation, 2012. https://www.rand.org/pubs/monographs/MG1180.html.
[146] Shirley A. Kan, "China and Proliferation of Weapons of Mass Destruction and Missiles: Policy Issues," Congressional Research Service, 2015, https://fas.org/sgp/crs/nuke/RL31555.pdf.
[147] Seyed Hossein Mousavian and Mohammad Mehdi Mousavian, "Building on the Iran Nuclear Deal for International Peace and Security," *Journal for Peace and Nuclear Disarmament*, 2018, https://www.tandfonline.com/doi/full/10.1080/25751654.2017.1420373.
[148] Mousavian, "Building on the Iran Nuclear Deal for International Peace and Security."
[149] Adam Tarock, "The Iran nuclear deal: winning a little, losing a lot," *Third World Quarterly*, 2016, https://www.tandfonline.com/doi/abs/10.1080/01436597.2016.1166049.
[150] Tarock, "The Iran nuclear deal: winning a little, losing a lot."
[151] Chintamani Mahapatra, "US–Iran Nuclear Deal: Cohorts and Challenger," *Contemporary Review of the Middle East*, 2016, https://journals.sagepub.com/doi/10.1177/2347798916632323.
[152] Mahapatra, "US–Iran Nuclear Deal: Cohorts and Challenger."

discouraging banks from operating in Iran.[153] This policy continued in the Obama administration and successfully limited Iran's access to the international financial system.[154] The Trump administration introduced sanctions on Iran's manufacturing, textiles, mining, and construction sectors, as well as imposing additional sanctions on specific companies, individuals, and authorities in a failed attempt to bring Iran back to the negotiation table to negotiate a new agreement.[155]

If the Biden administration chooses to tighten U.S. sanctions on Iran, the key challenge will be to prevent a domestic backlash in Iran. Adverse coercive measures such as sanctions on Iranian oil could have negative implications for the Iranian population at large. Although an oil sanction could inflict economic pain on Iran, it could also rally the masses in support of the incumbent regime and strengthen the hardline position to block negotiations with the U.S. This risk is characteristically high, considering that hardliners support both the country's uranium enrichment and missile program.[156] To put it succinctly, it is unlikely that sanctions can be used as an effective way to limit the missile program of Iran, which has been used by hardliners as a tool to secure their dominance in the region.

Conclusion

Although the Biden administration has a variety of intervention options at its disposal, rejoining the JCPOA deal would be the most effective strategy. One option is to continue imposing further economic sanctions on Iran. A drawback of this strategy is an increase in anti-American sentiment and drawing attention away from the oppressive behavior of the Iranian government. The Biden administration should secure re-entry into the JCPOA by renegotiating current sanctions that violate the United States' commitment to the agreement.

Rejoining the JCPOA will not be easy. However, compared to economic sanctions, returning the JCPOA appears to be the most beneficial. Despite the U.S.' withdrawal during the Trump administration, Iran initially continued to abide by the deal. The current U.S. administration can use quiet diplomacy to ensure Iran's commitment to a new bargain agenda that covers various issues after U.S. withdrawal. First, the Biden administration should ensure that all issues regarding compliance to the JCPOA be resolved before beginning re-entry talks.

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[153] Mahapatra, "US–Iran Nuclear Deal: Cohorts and Challenger."
[154] Robert, "Containing Iran: Strategies for Addressing the Iranian Nuclear Challenge."
[155] O'Toole, "Rejoining the Iran nuclear deal: Not so easy."
[156] Ariane M. Tabatabai and Annie Tracy Samuel, "What the Iran-Iraq War Tells Us about the Future of the Iran Nuclear Deal," *International Security*, 2017, https://www.mitpressjournals.org/doi/full/10.1162/ISEC_a_00286; Ali Fathollah-Nejad and Amin Naeni, "What explains the decline of Iran's moderates? It's not Trump," *Brookings*, 2020, https://www.brookings.edu/blog/order-from-chaos/2020/06/15/what-explains-the-decline-of-irans-moderates-its-not-trump/.

The U.S. would need to remove any sanctions not aligned with the JCPOA and reassure Iran that the U.S. will not leave the agreement. Iran would need to agree to decrease its nuclear enrichment levels to the negotiated levels and to correct JCPOA restriction violations such as the development of new centrifuges and resuming heavy water production.[157] Second, the Biden administration should ensure that there is an agreement from Tehran to engage in discussions regarding its missile program. In summary, the Biden administration should return to the Joint Comprehensive Plan of Action.

[157] Kali, "What Is the Iran Nuclear Deal?"

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Reining in the Imperial Presidency: The Case for a Weak Executive

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ABSTRACT: *Over the years, the Executive branch, in particular the presidency, has become extremely powerful. In fact, it has far more power than the Constitution allows. What can be done to limit executive power as the Constitution intended? The powers and functions of the presidency, mainly found in Article II of the Constitution, are actually very limited, but public perception and legal theories have given the institution immense power. In particular, former President Trump and his administration have dangerously increased the power of the executive branch. This piece discusses the theories and actions that have led us to this point, and proposes necessary changes to curb executive power in accordance with the Constitution and founding principles.*

In 1973, in *The Imperial Presidency*, Arthur Schlesinger described an out-of-control, monarchical institution. He argued that the presidency then (Nixon had just begun his second term) had far more power than the Constitution allows. In my view, that is still the case. Former president Trump believed he was above the law, and had a monarchist attorney general to aid him. Both men were fully content to run roughshod over two co-equal branches of government, and that means it is clear that the presidency has spun out of control and that it is time to rein it in. A constitutional amendment or amendments to minimize executive power would be too difficult to enact given the process. Therefore, changes to the law and to legal policy are the only way to limit executive power. Here, I will outline the Constitutional functions of the president, the origins of today's broad view of executive power, and the changes that the next administration and Congress need to make.

Article II of the Constitution defines the powers of the presidency. Article II, Section I states that "the power of the executive branch shall be vested in a president of the United States."[159] The word "vested" is the basis for the monarchical "Theory of the Unitary Executive", which holds that the president is the absolute head of the executive branch and holds broad power over its many administrative agencies. Proponents of this theory also argue that the president can intervene on all agency decision-making, including matters in which they have a personal stake, and that he can fire any agency official for any reason. I disagree. While it is true that Executive Branch officials serve at the pleasure of the president, that does not mean they can issue illegal orders or fire them in order to cover up illegal actions, and courts have ruled on presidential immunity in investigations. The Constitution also gives the president the power to appoint members of his cabinet, ambassadors, and judges with the advice and consent of the Senate. Third, the president is the commander in chief of the armed forces, and has the power to pardon. His most important responsibilities are to keep the nation safe, to protect the

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[159] US Const., art. 2 sec. 1. cl.1

Constitution, and to "take care that the laws be faithfully executed."[160] Some argue that this makes the president the chief law enforcement officer of the United States. This argument fails because implementation and enforcement are two different things. Implementation, or execution, of the law, means that the president is ensuring that the laws take effect. Enforcement means ensuring that people obey the laws once they take effect as well as punishing those who break them. There is no reason to think the president is the chief law enforcement officer.

Not only has executive power itself expanded; so has the belief in a strong, monarchical presidency. This is true in most circles of public life, not only conservative America. The American public looks to the president to lead the nation in times of crisis, and to use the power of his office to better the lives of the citizenry and to protect the national interest:

> We want our president to stimulate our national economy while protecting our local ones—and we roundly condemn him when either shows signs of weakness. We call on the president to simultaneously liberate the creative imaginations of private industry and regulate corruption within. We call on the president, as the main steward of the nation's welfare, to resuscitate our housing and car industries while reducing the national debt. We bank on the president, as commander in chief, to wage our wars abroad while remaining attentive to all emergent foreign policy challenges beyond today's battlefields. We look to the president, as the nation's figurehead, to be among the first on the scene at disasters, to offer solace to the grieving, to assign meaning to lives lost and ruined. All this we expect presidents can do. All this we insist they must do.[161]

Although the Constitution strongly limits what the president can actually do, the public believes that the president to be all powerful and expects the president to use that power. Howell notes that "most Americans see their entire government in the presidency."[162] This means that Americans are more likely to support a president who seeks to exercise power and perhaps to disregard the Constitution, especially if that president belongs to their own political party. An authoritarian figure may be attractive for that reason. As the public might see it, a weak executive will plunge the country into ruin. After the Great Depression, strong government programs in the New Deal as well as government cooperation with industry led the country out of this collapse. In the 1960s, Lyndon Johnson implemented the Great Society, a master at projecting presidential power. But even American conservatism, supposedly devoted to the principle of limited government, has championed executive power. Conservatives in fact devised

[160] US Const., art. 2, sec. 3 cl.5
[161] William Howell, "Thinking About the Presidency: The Primacy of Power", Princeton, 2015, p.1.
[162] Howell, "Primacy" p.5.

the aforementioned "Theory of the Unitary Executive". While one might expect originalists, as conservatives often claim to be, to believe in a weaker executive, Steven Skowronek notes that

> [t]he overall effect [of this new view of executive power] is to authorize the President to capitalize on all that the historical development of national power has created while leaving to others the Constitution's most rudimentary and combative instruments: term limits and quadrennial elections, congressional control of the purse and Senate review of appointments, judicial intervention and the threat of impeachment.[163]

Conservatives are not against enumerated checks and balances such as impeachment and the advice and consent clause, but they are against unenumerated checks such as general congressional oversight absent impeachment and Congress's being able to regulate various executive agencies. Similarly, they are against criminal investigations of and lawsuits against a president from outside the legislative branch. Writing for the Minnesota Law Review, then-judge Brett Kavanaugh wrote: "Congress might consider a law exempting a President—while in office—from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel."[164] In line with the conservative stance against other unenumerated checks and balances, the only Constitutional mechanism they accept for punishing the president is impeachment. Therefore, they would argue, a strong executive subject only to these guidelines is Constitutional. Skowronek also notes that conservative proponents of executive power "have reinvigorated traditional conservative arguments for resting power on original understandings of the Constitution."[165] This belief that the Founders outlined a strong executive in the Constitution has been dominant among conservative lawyers and jurists for decades, and extends into the current day and our current government, including the Department of Justice.

In 2018, Attorney General William Barr[166], at the time a private citizen, wrote a nineteen page unsolicited memo to then Deputy Attorney General Rod Rosenstein. In that memo, Barr argued that Special Counsel Robert Mueller's supposed application of the obstruction of justice laws would undermine the presidency:

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[163] Steven Skowronek, "The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive", *Harvard Law Review* vol. 122, 2009, p.2077
http://harvardlawreview.org/wp-content/uploads/pdfs/skowronek.pdf

[164] Judge Brett Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, Minnesota Law Review, vol.93, 2009, p.1461
https://www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh_MLR.pdf

[165] Skowronek, "Insurgency," p.2077

[166] Barr was the Attorney General at the time this piece was written. He resigned on December 23rd, 2020

> Mueller should not be permitted to demand that the President submit to interrogation about alleged obstruction. Apart from whether Mueller has a strong enough factual basis for doing so, Mueller's obstruction theory is fatally misconceived. As I understand it, his theory is premised on a novel and legally insupportable reading of the law. Moreover, in my view, if credited by the Department, it would have grave consequences far beyond the immediate confines of this case and would do lasting damage to the Presidency and to the administration of law within the Executive branch.[167]

Here, Barr argues that even if Mueller did have a factual basis for questioning President Trump on obstruction of justice, he cannot do so because his theoretical interpretation of the law is wrong. This is a circular argument, because Barr is saying that even if Mueller has a legal basis to interview the president, he has no legal basis to do so. Barr also gives a hint of his maximalist views on the executive, because he asserts that simply allowing an interview with the president on obstruction would be bad for the office. Barr continues by arguing that "the Constitution vests plenary authority over law enforcement proceedings in the President, and therefore one of the President's core constitutional authorities is precisely to make decisions 'influencing' proceedings."[168] Under this theory, a prosecutor cannot imply that interfering in law enforcement proceedings would be obstruction of justice -- when in fact that is the very essence of obstruction of justice. But such an authority -- to make decisions that influence what the Justice Department does -- is not enumerated. Barr's argument renders the president a monarch. If the president can interfere with a law enforcement proceeding or refuse to cooperate with one, that would place them above the law. Barr also argues that obstruction of justice does not apply to "facially lawful act[s],"[169] but this argument also renders the president above the law because it does not matter if something is lawful on its face. The intent of the action is what matters: whether the president is attempting to obstruct the proceeding even if what they do is, as Barr would put it, "facially lawful." Now Barr argues that the impeachment clause still exists as a remedy. However, under a Unitary Executive, investigations that are a roadmap to impeachment, including congressional ones, are unconstitutional, because the Constitution does not have explicit provisions for them. After all, the theory holds that the president has authority over the whole executive branch, not Congress, and is therefore entitled to direct cooperation or lack thereof, with all investigations.

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[167] United States Department of Justice, William Barr, Memorandum "re: Mueller's 'Obstruction' Theory," June 8th, 2018, p.1 https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf

[168] Barr, "Obstruction," p.9

[169] Barr, p.9

Over the past year, we have seen a runaway executive guided by these theories. After the release of the Mueller Report, the Special Counsel documented 10 instances of potential obstruction of justice. Barr concluded that the evidence was insufficient. Mueller could not even offer a conclusion on that issue because DOJ policy forbids indicting a sitting president and to conclude that Trump committed a crime without an indictment, something that would give him his day in court, would leave the president unable to truly defend himself against such allegations.

So, Congress attempted to investigate further. However, President Trump directed former White House Counsel Don McGahn, a key witness, not to testify before the House Judiciary Committee under subpoena, citing a made-up doctrine of "absolute immunity."[170] The White House asserted executive privilege over documents across the administration. They also refused to allow many administration officials to testify before Congress. When they did, White House officials directed them not to answer any questions about their time in the White House. In fact, the White House even asserted executive privilege over the testimony of former Trump campaign manager Corey Lewandowski, who never worked in the White House.

Now, the conservative legal movement might argue that these investigations were unenumerated, and therefore, the White House did not have to cooperate. However, the White House also obstructed the House of Representatives' impeachment inquiry this past year. In a letter to various committee chairs and to House Speaker Nancy Pelosi, White House Counsel Pat Cipollone said that "in order to fulfill his duties to the American people, the Constitution, the Executive Branch, and all future occupants of the Office of the Presidency, President Trump and his Administration cannot participate in your partisan and unconstitutional inquiry."[171] He cited various due process concerns and complained that the process was unfair. He did not, however, assert any legal basis for the White House's refusal to cooperate. In more finely worded language, he essentially invoked the president's war cries of "witch hunt" and "presidential harassment." Nor did he ever assert legal bases for blocking administration officials from testifying in the inquiry, only the nonexistent doctrine of "absolute immunity," which the Supreme Court rejected earlier this year in *Trump v. Vance*.

This refusal to cooperate with Congressional subpoenas even in an impeachment inquiry allows the president to run roughshod over a co-equal branch of government. The Executive does not get to decide whether it will cooperate with an impeachment inquiry, because under Article

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[170] Pat Cipollone, letter to Chairman Nadler re: McGahn testimony, May 20th, 2019 https://d3i6fh83elv35t.cloudfront.net/static/2019/05/PACLetterJN05.20.2019.pdf

[171] Pat Cipollone, letter on October 9th, 2019, p.2 https://docs.google.com/viewerng/viewer?url=https://www.whitehouse.gov/wp-content/uploads/2019/10/PAC-Letter-10.08.2019.pdf?utm_source%3Dtwitter%26utm_medium%3Dsocial%26utm_campaign%3Dwh

1, “the House shall have the sole power of impeachment.”[172] A refusal to cooperate because of perceived unfairness cannot stand. With no legal bases to adjudicate in the courts, this refusal constitutes a clear obstruction of Congress. There is nothing judiciable in ordering the blanket defiance of subpoenas. Merely ordering a blanket defiance of subpoenas, or as the president would put it, “fighting all the subpoenas” because “these are not impartial people,” is not something that can be litigated. In light of these actions, it is time for Congress and the next Department of Justice to make changes to the law and legal policy in order to restore the Constitutional order.

The first necessary change is to criminalize defiance or ordering defiance of congressional subpoenas absent the assertion of executive privilege or some other verified legal basis. One of the articles of impeachment against Trump was obstruction of Congress. This charge centers on the Trump White House’s ordering current and former administration officials not to comply with subpoenas. As mentioned above, he and Cipollone argued that current and former officials are "absolutely immune" from testifying to Congress, even under subpoena. This doctrine is nonexistent; it both nullifies the power of the legislature and helps to render the executive monarchical. Therefore, it must be illegal to defy subpoenas or to order others to do so.

On the point of cooperation, Congress should pass a law or rule change to authorize the Sergeant-at-Arms, in a committee hearing, to hold any witness in contempt of Congress if necessary without a full vote in either house of Congress or a decision from the Federal judiciary. Lewandowski repeatedly refused to answer questions under subpoena, claiming executive privilege, even though he did not work in the White House. Holding a vote in Congress or going through the court system leads to untenable potentially year-long delays and allows the Executive to stall and run out the clock on legitimate processes. Therefore, this change is also necessary to restore checks and balances.

It is not only the presidency that is out of control, but also the Department of Justice. Currently, the only remedy for crimes committed by the Attorney General of the United States is impeachment. This cannot stand. Because impeachment and removal of any government official is difficult to accomplish, it is nearly impossible to hold the Attorney General to account when he commits a crime such as lying under oath to Congress (as Attorney General Barr did in 2019)[173]. It should not be so difficult to hold the AG accountable, considering that it is a crime for anyone else to lie to Congress.

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[172] US Const., art. 1, sec. 2, cl. 5

[173] In testimony before a Senate subcommittee in April of 2019, Barr stated that he did not know if Mueller supported the conclusions in his March 24th letter to Congress about the Report. However, Barr received a letter from Mueller criticizing this letter, and the two spoke over the phone. Mueller said Barr’s conclusions were not inaccurate but that the press had covered his work incorrectly due to the letter. If Mueller said Barr’s conclusions were not inaccurate, he supported the conclusion. If he said it was inaccurate or incomplete, he did not support the conclusion. Either way, Barr would know.

When an Attorney General chooses to act as the president's personal lawyer, as Barr has done, there is little chance that he will appoint a special counsel to investigate potential illegal activity by the president or their administration. With that in mind, Congress should pass a law allowing a vote in both houses to appoint a special counsel to investigate allegations of presidential misconduct in the event that the Attorney General refuses to do so. A simple majority in both houses should be sufficient to authorize the appointment, and the resolution could originate in either chamber. The law should also require the other house of Congress to take up the resolution and vote on it, within a short time period (thirty days?) if the originating chamber passes it. Any such resolution should designate a specific special counsel, so that the Attorney General will not appoint a paper tiger.

Congress should also consider reviving the Independent Counsel statute, the Ethics in Government Act, which expired in 1999. This law gave the judiciary the authority to appoint a special counsel with the same authority as any special counsel that the DOJ appoints. This allows for oversight by authorities other than the Attorney General. The Attorney General cannot overrule charging decisions by the Independent Counsel, and the President cannot fire the Independent Counsel, which allows them to finish their investigation without interference.

Last, but certainly not least, the next Department of Justice should reverse the Office of Legal Counsel opinion barring the indictment of a sitting President of the United States.[174] Special Counsel Robert Mueller declined to make a traditional prosecutorial judgment on whether President Trump obstructed justice because of this policy. Attorney General Barr was then able to lie about whether the evidence was sufficient, when in fact there was overwhelming evidence to establish that the president obstructed justice. Had Mueller been able to say that, and speak for the evidence rather than letting it speak for itself, Barr could not have lied about it.

Nothing in the Constitution bars the indictment of a sitting president. Some would argue that the policy exists to ensure the separation of powers. They argue that it is the responsibility of the Congress to charge a sitting president with wrongdoing and to remedy such misconduct via impeachment. They argue that an indictment interferes with that power. However, I believe that an indictment and a prosecution are two different things. A prosecution is a proceeding, where the accused must defend themselves in a court of law, while an indictment is an allegation. I agree that a prosecution would interfere with the powers of the Congress, which include the power to impeach. If a president were to be found guilty in an ordinary court of law, no one would be able to remove them from office to serve their sentence since only Congress can vote to remove the president. Impeachment is the only way to remove anyone from office under the

[174] United States Department of Justice, Office of Legal Counsel, "A Sitting President's Amenability to Indictment and Criminal Prosecution: Memorandum Opinion for the Attorney General," October 16th, 2000 https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf

Constitution. An indictment, however, is merely a formal accusation of a crime. The prosecution does not have to take place while the president is in office. In fact, the indictment itself can be a recommendation of impeachment. In that regard, Congress, or the states, might also consider a Constitutional amendment to make indictment the penalty for statutory crimes other than treason or bribery, and in the event of an indictment, a trial can take place, and conviction will result in removal from office.

I believe that all of these changes will lead to a return to a limited executive branch as the Constitution intended. The Founders did intend for the president to have the ability to be decisive, but they did not intend to make the president a monarch. Therefore, they placed strict limits on what the president could do when they crafted the Constitution. Restoring the power of the legislature, the judiciary, and the justice system will bring about a return to the Constitutional system of checks and balances that the Framers designed in order to prevent autocracy.

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