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To The People: Enhancing Leahy Law Human Rights Enforcement Through a Private Cause of Action

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TO THE PEOPLE: ENHANCING LEAHY LAW HUMAN RIGHTS ENFORCEMENT THROUGH A PRIVATE CAUSE OF ACTION

I. INTRODUCTION

A sudden burst of machine-gun fire tore through the walls of Alfonso Bolivar Tubercuía's home in rural Colombia.¹ Seconds later, a grenade exploded, killing his wife, Sandra.² Alfonso's two young children miraculously survived the hail of bullets and shrapnel, prompting paramilitary commanders and their Colombian military allies to callously discuss what to do with the children.³ "Assassinate the kids, but silently," a paramilitary commander ordered.⁴ A paramilitary fighter complied; he "took the child by the hair and slit her throat with a machete."⁵ In total, eight civilians, including three children, were brutally massacred before paramilitaries and troops from the Colombian military's Seventeenth Brigade marched out of San José de Apartadó.⁶ Days after the massacre, community members and human rights organizations alerted the U.S. State Department to the ruthless killings and the role of the Seventeenth Brigade.⁷ The Colombian military's reported involvement in the massacre should have triggered the Leahy Law ("Leahy"), requiring at least a

¹ See Nadja Drost, *San Jose Apartado Massacre: Murder of Colombia's Peace Community*, HUFFINGTON POST (Mar. 16, 2010), http://www.huffingtonpost.com/2010/03/16/san-jose-apartado-massacr_n_501243.html [<https://perma.cc/4BLA-UAL4>] (depicting the joint attack by Colombian Army troops and right-wing paramilitaries on the civilian community of San José de Apartadó).

² See *id.* (detailing the grenade attack that killed Sandra Milena Muñoz).

³ See *id.* (explaining that the children emerged from the house after the initial attack and quoting a paramilitary fighter who participated in the killings, recalling that Alfonso "begged our commanders to please not kill the kids, that if they wanted to [they could] kill him but leave the kids alive").

⁴ *Id.*

⁵ *¿Qué Pasó en San José de Apartadó Hace 8 Años?*, CENTRO NACIONAL DE MEMORIA HISTÓRICA (Feb. 21, 2013), <http://www.centrodehistoriahistorica.gov.co/component/content/article/23-noticias/noticias-cmh/783-ique-paso-en-san-jose-de-apartado-hace-8-anos> [<https://perma.cc/VB7G-D>]64].

⁶ See *id.* (describing the presence of the Colombian military along with paramilitaries in San José de Apartadó); *La Condena a Cuatro Militares por la Masacre de San José de Apartadó*, VERDAD ABIERTA (June 14, 2012), <http://www.verdadabierta.com/component/content/article/75-das-gate/4060-revocal-parcialmente-sentencia-por-la-masacre-de-san-jose-de-apartado/> [<https://perma.cc/N2LH-J2RJ>] (reporting that the Superior Court of Antioquia found four Colombian soldiers guilty of conspiracy for joining paramilitaries on a patrol that ended in the San José de Apartadó killings).

⁷ See *Ambassador Meets with Peace Community about Uraba Massacre*, U.S. EMBASSY, BOGOTÁ (Mar. 18, 2005), https://www.wikileaks.org/plusd/cables/05BOGOTA2619_a.html [<https://perma.cc/5CPE-LGBC>] (recounting a March 16, 2005, meeting between San José de Apartadó community members, human rights advocates, the U.S. Ambassador to Colombia, and additional Embassy staff).

temporary prohibition on U.S. military assistance to the Seventeenth Brigade.⁸ However, in contravention to Leahy, the Seventeenth Brigade received U.S. security assistance the year following the massacre.⁹

The United States annually spends twenty-five billion dollars on military assistance for foreign security forces.¹⁰ Two statutes, 22 U.S.C. § 2304 and Leahy, are designed to bar military assistance to foreign security forces with credible allegations of human rights abuses.¹¹ Yet, Leahy, enacted to replace the failed § 2304, has not fully achieved its goal of withholding assistance to foreign security forces responsible for serious human rights abuses.¹²

This Note argues that Congress could substantially mitigate obstacles to enforcing human rights conditions on foreign security assistance by providing human rights victims with a private cause of action to enjoin

⁸ See 22 U.S.C. § 2378d(a) (2012) (prohibiting security assistance to units of foreign security forces when credible information indicates that they have committed a gross violation of human rights and the government is not effectively bringing the alleged perpetrator(s) to justice).

⁹ See AMNESTY INTERNATIONAL AND FELLOWSHIP OF RECONCILIATION, ASSISTING UNITS THAT COMMIT EXTRAJUDICIAL KILLINGS: A CALL TO INVESTIGATE US MILITARY POLICY TOWARD COLOMBIA 6-7 (2008) [hereinafter AMNESTY INTERNATIONAL] (quoting a statement from the State Department confirming that a member of the Seventeenth Brigade was “given a medical assistance training in 2006”).

¹⁰ See INTERNATIONAL SECURITY ADVISORY BOARD, DEPARTMENT OF STATE, REPORT ON SECURITY CAPACITY BUILDING 1 (2013) (explaining that the United States spends twenty-five billion dollars annually on security assistance to “improve the ‘security capacity’ of the recipient states”). Some U.S. security assistance reaches human rights abusers despite statutory restrictions on aid to abusive militaries. See, e.g., AMNESTY INTERNATIONAL, *supra* note 9, at 6-13 (collecting examples of Colombian military units receiving security assistance despite human rights concerns).

¹¹ See § 2304(a)(2) (requiring a suspension of U.S. security assistance to any country that “engages in a consistent pattern of gross violations of internationally recognized human rights”); § 2378d(a) (compelling a suspension of U.S. security assistance “to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights”).

¹² See *infra* Part II.B (examining the two key statutory measures that restrict security assistance to foreign security forces based on human rights criteria, as well as the limitations to judicial enforcement of the statutes). For example, the Colombian security forces received \$6.9 billion in military assistance between 2000 and 2014 despite reports by human rights organizations and the State Department of systematic and gross human rights violations by Colombian security forces. See, e.g., WINIFRED TATE, COUNTING THE DEAD: THE CULTURE AND POLITICS OF HUMAN RIGHTS ACTIVISM IN COLOMBIA 266 (2007) (clarifying that, while several Colombian battalions saw U.S. security assistance suspended due to Leahy, human rights groups insisted that Leahy was “not being fully implemented”); Nathanael Tenorio Miller, Note, *The Leahy Law: Congressional Failure, Executive Overreach, and the Consequences*, 45 CORNELL INT’L L.J. 667, 685 (2012) (arguing that human rights data suggested that Leahy was nearly a “categorical failure” in Colombia because U.S. security assistance continued despite documented human rights abuses by the Colombian military).

the State Department to enforce Leahy.¹³ Part II examines the statutory framework undergirding limitations on U.S. assistance to foreign militaries that engage in human rights violations.¹⁴ Part III analyzes Leahy's purpose, enforcement mechanisms, and the lack of a judicial remedy available to enforce human rights restrictions on foreign aid.¹⁵ Finally, Part IV proposes that Congress expand the Torture Victim Protection Act's ("TVPA") private cause of action to allow victims to seek injunctive relief against the State Department to enforce Leahy.¹⁶

II. BACKGROUND

Since the United States declared independence, policymakers have struggled to determine the proper role for human rights concerns in U.S. foreign policy.¹⁷ Efforts to legislate a role for human rights in decisions regarding U.S. security assistance to foreign security forces beginning in the 1970s were stymied by executive branch neglect.¹⁸ In 1997, Congress

¹³ See *infra* Part IV (analyzing how a private cause of action to enforce Leahy could enhance Leahy's effectiveness).

¹⁴ See *infra* Part II (scrutinizing the two key statutory measures that restrict security assistance to foreign security forces based on human rights criteria, as well as the limitations to judicial enforcement of the statutes).

¹⁵ See *infra* Part III (evaluating Leahy's purpose, statutory context, and the unavailability of judicial enforcement of Leahy provisions).

¹⁶ See *infra* Part IV (proposing a private cause of action to enforce Leahy).

¹⁷ See M. Glen Johnson, *Historical Perspectives on Human Rights and U.S. Foreign Policy*, 2 UNIVERSAL HUMAN RIGHTS No. 3, 2 (1980) (explaining that the founding fathers viewed the development of the United States as a triumph of liberty over tyranny and that this was a model for the rest of the world); see also David Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 GA. J. INT'L & COMP. L. 231, 232-37 (1977) (describing the history of human rights in foreign policy); PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS 205-06* (2003) (examining the role of the United States in the development of the Universal Declaration of Human Rights); William A. Fletcher, *International Human Rights and the Role of the United States*, 104 NW. U. L. REV. 293, 296 (2010) (analyzing the role of the United States in international human rights); Peter S. Michaels, Note, *Lawless Intervention: United States Foreign Policy in El Salvador and Nicaragua*, 7 B. C. THIRD WORLD L.J. 223, 227 (1987) (recognizing the United States's willingness to turn a blind eye to human rights concerns in foreign affairs). Human rights promotion during the founding period was typically narrowly focused on the United States as an example of human rights exceptionalism for the rest of the world to emulate. See Johnson, *supra* note 17, at 2 (quoting Paul A. Varg) ("Americans prided themselves on being the model republican society that the rest of the world would emulate."). International human rights advocacy has never been the exclusive domain of the U.S. government, and human rights advocacy and activism in the United States began shortly after independence. See GORDON LAUREN, *supra* note 17, at 37 (highlighting a citizen-led effort shortly after independence to end the international slave trade and domestic slavery).

¹⁸ See Pub. L. No. 93-559, § 46, 88 Stat. 1815 (1974) (creating the legislation that would be codified as 22 U.S.C. § 2304); see also Weissbrodt, *supra* note 17, at 238 (detailing § 2304's genesis, implementation, and early impact). Section 502B was not Congress's first foray into

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passed Leahy, which has proven more successful, if imperfect.¹⁹ Yet, any attempt to effectuate enhanced Leahy enforcement in federal court would be blocked by the political question and standing doctrines.²⁰

First, Part II.A describes § 2304, Leahy's predecessor and Congress's first attempt to condition security assistance on human rights performance.²¹ Second, Part II.B introduces Leahy, explaining the statute's provisions, its implementation mechanism, and its effectiveness.²² Finally, Part II.C summarizes the obstacles to judicial enforcement of Leahy and describes the TVPA, including its private cause of action to sue foreign nationals for civil damages for torture or extrajudicial killings.²³

legislating respect for human rights in foreign policy. See Weissbrodt, *supra* note 17, at 241 (describing Congress's first effort as "tentative, noncoercive[,] and limited"). Before amending the Foreign Assistance Act of 1961 to add § 502B, Congress passed the Foreign Assistance Act of 1973 with a provision requiring that the President deny economic and military assistance to countries holding political prisoners. Pub. L. No. 93-189, § 32, 87 Stat. 714 (1973). The provision stated that "[i]t is the sense of Congress that the President should deny any economic or military assistance to the government of any foreign country which practices the internment or imprisonment of that country's citizens for political purposes." *Id.* The State Department largely ignored § 32, which prompted Congress's more comprehensive action a year later, passing § 502B. Weissbrodt, *supra* note 17, at 241.

¹⁹ See 22 U.S.C. § 2378d(a) (2012) (restricting U.S. security assistance to units of a foreign security force if credible information indicates that the unit has committed a gross violation of human rights); Winifred Tate, *Human Rights Law and Military Aid Delivery: A Case Study of the Leahy Law*, 34 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 337, 340 (2011) (explaining that human rights advocates and congressional staff began to discuss alternatives to § 2304 due to frustrations over the statute's failures); Linwood Ham, *Human Rights Violations: U.S. Foreign Aid for Accountability and Prevention*, U.S. INST. OF PEACE (Mar. 29, 2015), <http://www.usip.org/olivebranch/2015/03/29/human-rights-violations-us-foreign-aid-accountability-and-prevention> [<https://perma.cc/U4L9-EMDK>] (recounting Senator Leahy's statement that the failure of the Executive Branch to enforce § 2304 led him to seek an alternative approach that would be more effective).

²⁰ See *infra* Part II.C (providing an overview of the obstacles to judicial enforcement of Leahy); see also *Abusharar v. Hagel*, 77 F. Supp. 3d 1005, 1006 (C.D. Cal. 2014) (barring judicial review of the State Department's determination pursuant to Leahy to allow U.S. military assistance to the Israeli military based on the political question doctrine and the court's determination that the claimant lacked standing). A political question is a "question that a court will not consider because it involves the exercise of discretionary power by the executive or legislative branch of government." *Political Question*, BLACK'S LAW DICTIONARY (10th ed. 2014) [hereinafter BLACK'S *Political Question*]. Standing is "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Standing*, BLACK'S LAW DICTIONARY (10th ed. 2014) [hereinafter BLACK'S *Standing*].

²¹ See *infra* Part II.A (providing an overview of the development, implementation, and failures of § 2304 of a human rights mechanism).

²² See *infra* Part II.B (introducing Leahy, including the statutory language, the State Department's role in implementing the statute, and the statute's effectiveness in barring human rights assistance to abusive foreign security forces).

²³ See *infra* Part II.C (reviewing key cases, analyzing the political question doctrine and the standing doctrine, introducing the only case in which a plaintiff sought an injunction against

A. *Section 2304: Congress's First Effort to Condition Security Assistance on Human Rights Performance*

Despite early signs of interest at the dawn of the nation, human rights were largely ignored in foreign policy until the twentieth century; thereafter, human rights concerns became a foreign policy tool that was wielded unevenly.²⁴ By 1974, the executive branch's inattention to

the State Department for failing to withhold foreign security assistance through Leahy implementation, and describing the Torture Victim Protection Act's ("TVPA") provision creating a private cause of action allowing the victims of human rights abuses abroad to sue foreign nationals in U.S. courts for damages).

²⁴ See Johnson, *supra* note 17, at 3 (observing that soon after the founding, the isolationist views of Hamilton and the Federalist prevailed). By 1832, economic and commercial expansion were the focus of U.S. foreign policy, and human rights promotion "played an insignificant role." *Id.* at 4. Between the late nineteenth century and the early twentieth century, U.S. foreign policy on human rights narrowly focused on the rights of self-governance and freedom of religion. See Weissbrodt, *supra* note 17, at 232 (positing that the genesis of human rights as a foreign policy concern is the promotion of self-governance and freedom of religion). The period immediately following World War II has been described as a "magical period" for human rights, with some arguing that the United States played a key role in the era's achievements. Fletcher, *supra* note 17, at 296. The Universal Declaration of Human Rights was a crowning achievement of that period, and many point to the important role played by Eleanor Roosevelt to suggest the United States was a central player in the human rights developments of the period. See GORDON LAUREN, *supra* note 17, at 205–06 (explaining the role of the United States in the development of the Universal Declaration of Human Rights); see also Fletcher, *supra* note 17, at 296 (depicting Eleanor Roosevelt's extraordinary leadership in getting the Declaration approved). There was a great deal of organized activism in support of both the United Nations charter and the Universal Declaration of Human Rights. See GORDON LAUREN, *supra* note 17, at 170–71 (detailing the unprecedented influence of the organizations and individuals who lobbied for "a people's peace"). However, even Ms. Roosevelt required the persistent advocacy of human rights activists. See *id.* at 206 (noting that as Ms. Roosevelt received advocacy letters from concerned individuals, Ms. Roosevelt told her colleagues that these advocates "look upon us . . . as their representatives").

During the Cold War, human rights were once again subordinated to national security goals. See Weissbrodt, *supra* note 17, at 234–35 (stating that during the Cold War, U.S. human rights concerns were selective, with vociferous protestations against human rights abuses in Soviet-backed countries while largely ignoring abuses committed by allies); see also Louis Henkin, *A Post-Cold War Human Rights Agenda*, 19 YALE J. INT'L L. 249, 252 (1994) (recognizing that U.S. policymakers regularly subordinated human rights concerns during the Cold War in favor of the "war effort"). Policymakers in Washington ignored human rights abuses committed by allies or even supported abusive regimes with military assistance. See Weissbrodt, *supra* note 17, at 234–35 (highlighting that during this period the United States condemned human rights abuses by Communist governments in Eastern Europe, North Korea, Tibet, and Cuba while ignoring abuses in Algeria, South Africa, Indonesia, Burundi, Pakistan, and Sudan). The U.S. government also channeled military assistance and sold weapons to allies with deficient human rights records. See, e.g., PETER KORNBLOH, *THE PINOCHET FILE: A DECLASSIFIED DOSSIER ON ATROCITY AND ACCOUNTABILITY* 213–14 (2003) (observing that just three years after the coup d'etat that brought Pinochet and the military junta to power, Chile was the fifth largest global arms purchaser from the United States

international human rights led Congress to legislate a human rights framework for foreign relations by amending the Foreign Assistance Act of 1961 to create § 2304.²⁵ Section 2304 was enacted and amended in an effort to ensure that human rights would be a focus of U.S. foreign policy.²⁶ Only one provision of § 2304 is relevant for purposes of this Note: the legislation's human rights restrictions on U.S. military assistance.²⁷

despite widespread human rights abuses); Michaels, *supra* note 17, at 223, 227 (suggesting that the 1.5 million dollars in daily military aid provided to El Salvador was illegal due to the gross violations of human rights committed by the Salvadoran military and paramilitary death squads).

²⁵ See Pub. L. No. 93-559, § 46, 88 Stat. 1815 (1974) (creating the legislation that would be codified as 22 U.S.C. § 2304); see also Jerome J. Shestack, *Human Rights in U.S. Foreign Policy: Retrospect and Prospect*, 28 VA. J. INT'L L. 907, 907 (1987-88) (noting that twenty-five years after the Universal Declaration of Human Rights, human rights had become a "non-starter" in U.S. foreign policy); Patricia M. Derian, *Human Rights in American Foreign Policy*, 55 NOTRE DAME L. REV. 264, 272 (1979-80) (indicating that Congress's action on human rights was due to inattention to the issue by the executive branch); Weissbrodt, *supra* note 17, at 238 (positing that the State Department's unwillingness to give human rights a more significant role in foreign policy spurred Congress to take action). Section 502B was not Congress's first foray into legislating respect for human rights in foreign policy. See Weissbrodt, *supra* note 17, at 241 (characterizing the first efforts of Congress as "tentative, noncoercive[,] and limited"). Congress had expressed concern "over the rampant violations of human rights and the need for a more effective response from both the United States and the world community." *Human Rights in the World Community: A Call for U.S. Leadership: Report of the Subcommittee on International Organizations and Movement of the House Committee on Foreign Affairs*, 93d Cong. (1974). Prior to amending the Foreign Assistance Act of 1961 to add § 502B, Congress passed the Foreign Assistance Act of 1973 with a provision requiring that the President deny economic and military assistance to countries holding political prisoners. Pub. L. No. 93-189, § 32, 87 Stat. 714 (1973). The provision stated that "it is the sense of Congress that the President should deny any economic or military assistance to the government of any foreign country which practices the internment or imprisonment of that country's citizens for political purposes." *Id.* The State Department largely ignored § 32, which prompted Congress's more comprehensive action a year later, passing § 502B. See Weissbrodt, *supra* note 17, at 241 (clarifying that it was State Department's inaction that led to Congress redoubling its efforts to spur executive branch action on human rights).

²⁶ See Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246, 249-50 (1982) (arguing that when Congress's initial attempt at conditioning U.S. assistance on human rights in Public Law 93-189, § 32 was ignored by Secretary of State Henry Kissinger, Congress passed § 502B and subsequent amendments to tighten the law and ensure it would be enforced by the State Department). Section 502B is codified as 22 U.S.C. § 2304. 22 U.S.C. § 2304 (2012). The current version of the statute is considerably more comprehensive than the original, having been amended twenty-one times between 1974 and 2015. *Id.* In the literature, § 2304 is commonly referred to as § 502B, its location in the Foreign Assistance Act of 1961. See, e.g., Cohen, *supra* note 26, at 247 (referring to § 2304 as 502B in the text of the article and citing to 22 U.S.C. § 2304). This Note refers to it as § 2304, its location in the U.S. Code, for clarity and consistency.

²⁷ See § 2304(a)(2) (requiring a suspension of U.S. security assistance to any country that "engages in a consistent pattern of gross violations of internationally recognized human rights"). The relevant portion of the statute states:

Section 2304(a)(2) prohibits security assistance to “any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.”²⁸ The statute defines the

Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. Security assistance may not be provided to the police, domestic intelligence, or similar law enforcement forces of a country, and licenses may not be issued under the Export Administration Act of 1979 for the export of crime control and detection instruments and equipment to a country, the government of which engages in a consistent pattern of gross violations of internationally recognized human rights unless the President certifies in writing to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate and the chairman of the Committee on Banking, Housing, and Urban Affairs of the Senate (when licenses are to be issued pursuant to the Export Administration Act of 1979). [T]hat extraordinary circumstances exist warranting provision of such assistance and issuance of such licenses. Assistance may not be provided under part V of this subchapter to a country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights unless the President certifies in writing to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate that extraordinary circumstances exist warranting provision of such assistance.

Id.

Perhaps the most significant contribution of § 2304 to human rights has been the reporting requirement contained in § 2304(b). See Harold Hongju Koh, *Restoring America's Human Rights Reputation*, 40 CORNELL INT'L L.J. 635, 639 (2007) (describing the importance of the human rights reports required by § 2304). Harold Hongju Koh, a noted human rights scholar at Yale Law School, the Legal Adviser of the Department of State during the Obama Administration, and Assistant Secretary of State for Democracy, Human Rights, and Labor during the Clinton Administration, argued that the reports produced pursuant to § 2304 “have formed the heart of American human rights policy.” *Id.* Section 2304(b) requires that the Secretary of State provide Congress with an annual report on the human rights practices of any country proposed as a recipient of U.S. security assistance. § 2304(b). In practice, the State Department submits a report, commonly referred to as Country Reports on Human Rights Practices, for virtually every country in the world. See *On-The-Record-Briefing on the 2014 Country Reports on Human Rights Practices: Assistant Secretary of State for the Bureau of Democracy, Human Rights and Labor*, Tom Malinowski, ST. DEP'T (June 25, 2015), <http://www.humanrights.gov/dyn/2015/06/on-the-record-briefing-on-the-2014-country-reports-on-human-rights-practices/> [<https://perma.cc/87X4-SXJF>] (explaining that the 2014 Country Reports on Human Rights Practices, released in 2015, covered 199 countries and entities). Predictably, the Country Reports have not escaped political influence and at times have applied different standards for assessing the human rights practices of allies and foes. See David Sloss, *Hard-Nosed Idealism and U.S. Human Rights Policy*, 46 ST. LOUIS U.L.J. 431, 432 (2002) (arguing that “the country reports frequently contained half-truths about human rights abuses in friendly countries”).

²⁸ § 2304(a)(2). The statute broadly defines “security assistance” to include military assistance, economic support funds, military education and training, peacekeeping funding, anti-terrorism assistance, sales of defense articles, and certain weapon sales. § 2304(d)(2).

phrase “gross violations of internationally recognized human rights” to include torture, arbitrary detention, disappearance, and other violations of the right to life, liberty, and security.²⁹ Section 2304’s mechanism for conditioning U.S. security assistance on respect for human rights was an innovative effort by Congress to legislate a key role for human rights in foreign policy.³⁰ However, the Nixon and Ford administrations “openly disregarded” the statute.³¹ Congress was surprised that during the Carter Administration, which proclaimed the value of human rights and provided the only examples of security assistance withheld under § 2304, the State Department flouted § 2304.³² Nonetheless, the Carter

²⁹ § 2304(d)(1). While no uniform definition of a gross violation exists in international law, § 2304’s definition would appear to reflect the United Nations’s view of what constitutes a gross violation. See, e.g., UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS 6 (2012) (offering a list of abuses covered by the phrase gross violation of human rights). According to the United Nations Office of the High Commissioner for Human Rights, the acts generally understood as gross violations of human rights include: “genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination.” *Id.*

³⁰ See Cohen, *supra* note 26, at 247 (explaining that § 2304 was the principal legislative effort on human rights and security assistance); Weissbrodt, *supra* note 17, at 238 (highlighting Congress’s view that enacting § 2304 was an opportunity to “make human rights a focus for a larger congressional role in U.S. foreign policy-making”).

³¹ Cohen, *supra* note 26, at 249. The executive branch’s contempt for Congress’s efforts led to congressional efforts to make § 2304 binding on the executive branch. *Id.* at 253. President Gerald Ford vetoed the legislation, explaining that it raised constitutional problems because it would “seriously inhibit [his] ability to implement a coherent and consistent foreign policy.” SANDY VOGELGESANG, AMERICAN DREAM, GLOBAL NIGHTMARE: THE DILEMMA OF U.S. HUMAN RIGHTS POLICY 131 (1980). There is some evidence that Congress’s resolute determination that President Ford’s State Department incorporate human rights more centrally into its policy goals had an impact, albeit far from the impact sought by enacting § 2304. *Id.* at 131–32. While Congress did block some security assistance it viewed as inconsistent with § 2304, Kissinger’s most significant concession to human rights advocates in Congress was addressing human rights concerns more regularly in his speeches. *Id.* at 133.

³² Cohen, *supra* note 26, at 264–65 (describing the Carter Administration’s approach to implementation of § 2304). In his inaugural address, President Jimmy Carter announced the important place human rights would have in his administration: “Our moral sense dictates a clear-cut preference for those societies which share with us an abiding respect for individual human rights.” Jimmy Carter, Inaugural Address (Jan. 20, 1977). While in office, President Carter declared that “human rights is the soul of our foreign policy.” Cohen, *supra* note 26, at 264. The Carter Administration did cut security assistance to some countries it deemed abusive. VOGELGESANG, *supra* note 31, at 137. See also Cohen, *supra* note 26, at 264 (observing that the Carter Administration found “relatively few” governments met § 2304’s standard of engaging in a consistent pattern of gross human rights violations, and even less were subject to a suspension of assistance). Shortly after taking office, the Carter Administration invoked § 2304 to cut all security assistance to Ethiopia and Uruguay, while reducing assistance to Argentina by fifty percent. Cohen, *supra* note 26, at 272. A few other infamous Latin American regimes saw their security assistance evaporate by 1979. *Id.* at 272–

Administration's efforts remain the high water mark of § 2304's effectiveness.³³ Since Ronald Reagan took office in 1981, the U.S. government has not enforced § 2304's security assistance restrictions.³⁴

By the late 1990s, human rights advocates were growing increasingly frustrated with § 2304's failure to bar security assistance to abusive foreign forces, leading advocates in Congress and the human rights community to consider alternatives.³⁵ The executive branch justified its disregard for § 2304's security assistance restriction mechanism by asserting it was untenable to punish an entire country's security forces for the abuses of "a few bad apples."³⁶ Based on their experience with § 2304 and this critique, Senator Patrick Leahy's staff began developing an enforceable alternative to § 2304's assistance restriction mechanism.³⁷

73. Yet overall, the Carter Administration's determinations under § 2304 exhibited "tentativeness and caution." *Id.* at 264. This tentative approach frustrated human rights advocates in Congress and spurred congressional action. *Id.* at 254. In 1978, Congress amended § 2304 in an effort to make it legally binding on the executive branch. Pub. L. No. 95-384, §§ 6(a)-(d)(1), (e), 92 Stat. 730 (1978). In the bill's conference committee report, the committee indicated that the amendment changed the language in the bill to "substitute for the current policy statement a legal requirement to deny security assistance" to abusive governments. H.R. REP. NO. 95-1546, at 26 (1978) (Conf. Rep.). *See also* Cohen, *supra* note 26, at 254 (recognizing Congress's efforts to make § 2304 binding on the executive branch, rather than discretionary).

³³ *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 821 (1996) (positing that the executive branch has virtually never invoked § 2304 to cut off security assistance); Cohen, *supra* note 26, at 264 (explaining that, while the Carter Administration invoked § 2304 to cut off security assistance infrequently, it was applied in some cases).

³⁴ *See* STEINER & ALSTON, *supra* note 33, at 821 (commenting that there have been "virtually no cases in which military assistance or foreign aid was in fact cut off on human rights grounds"); NINA M. SERAFINO ET AL., CONG. RESEARCH SERV., R43361, "LEAHY LAW" HUMAN RIGHTS PROVISIONS AND SECURITY ASSISTANCE: ISSUE OVERVIEW 3 (2014) (stating that § 2304 "has been rarely if ever invoked" to suspend aid); Tate, *supra* note 19, at 340 (suggesting that § 2304 was never enforced); Elizabeth Powers, Note, *Greed, Guns and Grist: U.S. Military Assistance and Arms Transfers to Developing Countries*, 84 N.D. L. REV. 383, 409 (2008) (noting that § 2304 has rarely been employed to withhold military assistance on the basis of human rights). The Department of Defense argued against enforcement of § 2304's restriction on security assistance to abusive security forces, explaining that it is erroneous to punish a country's entire security apparatus due to the abuses of only some members of that force. Tate, *supra* note 19, at 340.

³⁵ Tate, *supra* note 19, at 340 (highlighting the role played by human rights advocates from Amnesty International and Senator Leahy's staff in discussing alternatives to § 2304).

³⁶ *Id.*

³⁷ *See id.* (relating the thought process of staff from Amnesty International and Senator Leahy's office as they set about developing a workable alternative to § 2304's failed restriction on security assistance); Ham, *supra* note 19 (quoting Senator Leahy as stating that the failure to invoke § 2304 led to his sponsorship of Leahy). Leahy is not the only alternative to § 2304's security assistance restriction mechanism. *See, e.g.*, Cohen, *supra* note 26, at 254 (describing other legislative mechanisms for restricting U.S. security assistance based on human rights concerns, such as country-specific conditions). Since 1974, Congress has

B. *Leahy: A Feasible Replacement for § 2304*

In 1997, Senator Patrick Leahy quietly added an amendment to the Foreign Operations Appropriations Act that developed a new mechanism

passed country-specific legislation limiting security assistance to particular countries. *Id.* While such limitations on assistance were prevalent in the 1970s and 1980s, a new generation of country-specific legislation began in 2000 when Congress proposed a \$1.3 billion security assistance package to Colombia. See ROBIN KIRK, MORE TERRIBLE THAN DEATH: VIOLENCE, DRUGS, AND AMERICA'S WAR IN COLOMBIA 261 (2003) (recounting human rights conditions added to legislation appropriating security assistance for the Colombian security forces); HUMAN RIGHTS WATCH, THE "SIXTH DIVISION:" MILITARY-PARAMILITARY TIES AND U.S. POLICY IN COLOMBIA 91 (2001) (explaining that concerned members of Congress added human rights conditions on security assistance to Colombia, including the requirement that the Colombian Military sever ties with brutal right-wing paramilitary groups). Country-specific human rights conditions on security assistance reinforce but, more importantly, supplement Leahy. See HUMAN RIGHTS WATCH, *supra*, at 91 (indicating that country-specific conditions were needed for Colombia despite Leahy's application to the security assistance). Leahy provisions must, by their nature, be generally applicable and, therefore, cannot be crafted to deal with the unique human rights challenges faced in any particular country. See, e.g., SERAFINO ET AL., *supra* note 34, at 3 (clarifying that Leahy applies broadly to all assistance appropriated under the authorization of the Foreign Assistance Act). The value of country-specific human rights conditions is that Congress can design them to most effectively address the unique and specific human rights challenges faced in that country. Compare Pub. L. No. 109-102, § 556(a), 119 Stat. 2172 (2005) (conditioning twenty-five percent of security assistance to Colombia on specific human rights goals, such as Colombian military cooperation with civilian prosecutors and severing links with paramilitary death squads), with 22 U.S.C. § 2378d(a) (2012) (creating broad standards applicable to every country in the world under consideration for U.S. security assistance). The application of country-specific conditions on security assistance to Colombia and Leahy illustrates the way these two mechanisms complement each other. See SERAFINO ET AL., *supra* note 34, at 3 n.6 (acknowledging that both Leahy and country-specific conditions apply to Colombia). Leahy generally withheld assistance from abusive units of the Colombian security forces and led to the prosecution of human rights violators. See *id.* at 15 (examining Colombia as a case study on Leahy performance and noting that security assistance was suspended to some units accused of human rights abuses and Leahy spurred accountability for abuses in some cases). However, Leahy struggled to deal with the major human rights challenge of collusion between the Colombian security forces and the brutal right-wing paramilitary groups because such collusion did not amount to a gross violation of human rights. See *The Ties That Bind: Colombia and Military-Paramilitary Links*, HUM. RIGHTS WATCH (Feb. 1, 2000), <https://www.hrw.org/legacy/reports/2000/colombia/> [<https://perma.cc/V8B5-WKNU>] (calling on Congress to expand Leahy to cover aiding and abetting a paramilitary group). Therefore, country-specific conditions were incorporated into the legislation authorizing security assistance to Colombia that required a portion of the security assistance be withheld until the Secretary of State certified, among other things, that the Colombian Government was investigating and prosecuting members of the Colombia security forces that had "aided or abetted paramilitary organizations." See Pub. L. No. 109-102, § 556(a)(2)(A), 119 Stat. 2172 (2005) (withholding twenty-five percent of Foreign Operations Appropriations security assistance to Colombia until the State Department certified that Colombia met specific human rights benchmarks).

for withholding assistance to abusive foreign security forces.³⁸ The amendment was modest, initially applying only to security assistance funds channeled through the State Department that fiscal year.³⁹ The following year Congress extended Leahy's provisions to funds for military training appropriated through the Department of Defense Appropriations Act.⁴⁰ Finally, Congress codified the Foreign Operations Appropriations version of Leahy in 2008.⁴¹ The Defense Department Appropriations version has not been codified and must be annually incorporated into the Defense Appropriations legislation.⁴² However, both versions of Leahy are substantially similar.⁴³ Given the similarities

³⁸ See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 570, 111 Stat. 2386 (1997) (enacting the original Leahy provision as part of the Foreign Operations Appropriations legislation); SERAFINO ET AL., *supra* note 34, at 3 (describing the genesis of Leahy); Tate, *supra* note 19, at 340 (depicting how Leahy was envisioned by Senator Leahy's staff and Amnesty International staff). The initial version of Leahy was passed a year prior, but was narrowly focused on counter-narcotics funds channeled through the State Department. Pub. L. No. 104-208, 110 Stat. 3009 (1996); SERAFINO ET AL., *supra* note 34, at 3 (recognizing the original focus on only counter-narcotics assistance).

³⁹ See Pub. L. No. 105-118, § 507, 111 Stat. 2386 (1997) (applying only to funds subject to the Foreign Operations Appropriations legislation); *see also* SERAFINO ET AL., *supra* note 34, at 3 (clarifying that Leahy was originally limited to funds appropriated through the Foreign Operations Appropriations legislation).

⁴⁰ See Pub. L. No. 105-262, § 8130, 112 Stat. 2279 (1998) (containing a Leahy provision applicable to a narrow category of Defense Department funding); *see also* SERAFINO ET AL., *supra* note 34, at 3 (recognizing the extension of Leahy to cover some Defense Department appropriations).

⁴¹ See 22 U.S.C. § 2378d(a) (2012) (codifying the version of Leahy that was incorporated into the Foreign Operations Appropriations legislation). Leahy was amended in 2011 and 2014 to redefine some terms, clarify Congress's vetting requirements, and add a reporting mechanism. Pub. L. No. 112-74, § 7034(k), 125 Stat. 1216 (2011); Pub. L. No. 113-76, § 7034(l), 128 Stat. 515 (2014). *See also* SERAFINO ET AL., *supra* note 34, at 1 (noting that Leahy was codified at 22 U.S.C. § 2378d). Before the 2011 amendment, when the assistance under consideration was training, the State Department would vet only the individual to be trained, rather than the "smallest operational group in the field," as the State Department's guidance required. *See id.* at 8 (recounting the State Department's individual-level scrutiny for training assistance before the 2011 amendment); DEPARTMENT OF STATE, LEAHY VETTING: LAW, POLICY, PROCESS 8 (2013) (outlining the State Department's guidance on interpreting the term "unit" for Leahy purposes).

⁴² See SERAFINO ET AL., *supra* note 34, at 1 (underscoring that the Defense Appropriations version of Leahy is not codified and, therefore, must be incorporated into the Defense Appropriations legislation annually).

⁴³ Compare § 2378d(a) (withholding security assistance appropriated pursuant to the Foreign Assistance Act when there is credible information that the recipient unit is responsible for a gross violation of human rights), *with* Pub. L. No. 113-76, § 8057, 128 Stat. 5 (2014) (prohibiting the transfer of security assistance appropriated pursuant to the National Defense Authorization Act when there is credible information that the recipient unit is responsible for a gross violation of human rights). Before a 2014 change to the Defense Appropriations version of the law, there was a significant difference in the laws. *See*

in the versions of the law and the scope of this undertaking, this Note focuses on the Foreign Assistance Act version of Leahy.⁴⁴

SERAFINO ET AL., *supra* note 34, at 4 (explaining that the 2014 change to the Defense Appropriations version of Leahy brought it more in line with the scope of the Foreign Assistance Act version of the law). Previously, the Defense Appropriations version of the law only applied to military training, not the provision of equipment, military sales, or joint operations, among other things. See, e.g., Pub. L. No. 112-10, § 8058, 125 Stat. 38 (2011) (restricting the Defense Department funds authorized by the Act “used to support *any training program* involving a unit of the security forces or police of a foreign country if the Secretary of Defense has received credible information from the Department of State that the unit has committed a gross violation of human rights”) (emphasis added). The 2014 version of the law expands the law’s reach to theoretically include all Department of Defense funding. See Pub. L. No. 113-76, § 8057, 128 Stat. 5 (2014) (stating that “[n]one of the funds made available by this Act may be used for *any training, equipment, or other assistance* for the members of a unit of a foreign security force if the Secretary of Defense has credible information that the unit has committed a gross violation of human rights”) (emphasis added). Today, there are only three differences in the two mechanisms, two of which are insignificant. See *Human Rights Vetting: Nigeria and Beyond: Hearing Before the Subcomm. on Afr., Glob. Health, Glob. Human Rights, and Int’l Orgs. of the H. Comm. on Foreign Affairs*, 113th Cong. 31 (2014) [hereinafter *Human Rights Vetting Hearing*] (statement of Lauren Ploch Blanchard, Specialist in African Affairs, Congressional Research Service) (highlighting differences in the current versions of the Foreign Assistance Act and Defense Appropriations versions of the law); SERAFINO ET AL., *supra* note 34, at 5–6 (comparing the current versions of the Foreign Assistance Act version of the law and the Defense Appropriations version of the law). The only significant difference is that the Defense Appropriations version includes a waiver mechanism if the Secretary of Defense determines that extraordinary circumstances merit waiving Leahy requirements. See Pub. L. No. 113-76, § 8057(c), 128 Stat. 5 (2014) (providing a waiver mechanism “if the Secretary of Defense determines that [it] is required by extraordinary circumstances”). However, the Secretary of Defense has yet to employ the waiver provision. See *Human Rights Vetting Hearing, supra* note 43, at 12 (statement of Lauren Ploch Blanchard, Specialist in African Affairs, Congressional Research Service) (arguing that the Defense Department’s failure to issue a waiver under Leahy suggests a very high bar for use).

⁴⁴ See 22 U.S.C. §§ 2378d(a)–(d) (conditioning Foreign Operations Appropriations security assistance based on human rights criteria). The current version of Leahy reads:

(a) In general

No assistance shall be furnished under this chapter or the Arms Export Control Act to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.

(b) Exception

The prohibition in subsection (a) of this section shall not apply if the Secretary determines and reports to the Committee on Foreign Relations of the Senate, the Committee on Foreign Affairs of the House of Representatives, and the Committees on Appropriations that the government of such country is taking effective steps to bring the responsible members of the security forces unit to justice.

(c) Duty to inform

In the event that funds are withheld from any unit pursuant to this section, the Secretary of State shall promptly inform the foreign government of the basis for such action and shall, to the maximum

Subsection (a) of Leahy outlines the essence of the law: “No assistance shall be furnished to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.”⁴⁵ As a human rights mechanism, subsection (a) is similar to § 2304’s restriction mechanism.⁴⁶ However, Leahy restricts security assistance to “*any unit* of the security forces of a foreign country” that is allegedly responsible for a gross human

extent practicable, assist the foreign government in taking effective measures to bring the responsible members of the security forces to justice.

(d) Credible information

The Secretary shall establish, and periodically update, procedures to –

- (1) ensure that for each country the Department of State has a current list of all security force units receiving United States training, equipment, or other types of assistance;
- (2) facilitate receipt by the Department of State and United States embassies of information from individuals and organizations outside the United States Government about gross violations of human rights by security force units;
- (3) routinely request and obtain such information from the Department of Defense, the Central Intelligence Agency, and other United States Government sources;
- (4) ensure that such information is evaluated and preserved;
- (5) ensure that when an individual is designated to receive United States training, equipment, or other types of assistance the individual’s unit is vetted as well as the individual;
- (6) seek to identify the unit involved when credible information of a gross violation exists but the identity of the unit is lacking; and
- (7) make publicly available, to the maximum extent practicable, the identity of those units for which no assistance shall be furnished pursuant to subsection (a).

Id.

⁴⁵ § 2378d(a).

⁴⁶ Compare § 2304(a)(2) (withholding security assistance to any country if that country’s government “engages in a consistent pattern of gross violations of internationally recognized human rights”), with § 2378d(a) (restricting security assistance appropriated pursuant to the Foreign Assistance Act “if the Secretary of State has credible information that such unit has committed a gross violation of human rights”). Section 2304(a)(2) states that “[e]xcept under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.” § 2304(a)(2). Section 2378d(a) states that “[n]o assistance shall be furnished under this chapter or the Arms Export Control Act to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.” § 2378d(a). See *Human Rights Vetting Hearing*, *supra* note 43, at 31 (statement of Stephen Rickard, Executive Director, Open Society Policy Center) (comparing § 2304 and Leahy); Tate, *supra* note 19, at 340 (explaining that Leahy used § 2304’s approach, albeit with significant improvements, such as unit-level rather than country-level scrutiny).

rights violation.⁴⁷ This was a significant departure from § 2304's requirement that "no security assistance may be provided to *any country*" engaged in a pattern of gross violations of human rights.⁴⁸ Leahy's authors recognized that § 2304's restriction mechanism was failing because it painted a country's entire security force with the same brush.⁴⁹ Senator Leahy and his staff believed a narrower scope of scrutiny would allow this new measure to be more effective because it dealt with the major criticism of § 2304: that a few bad apples could trigger a suspension of security assistance to an entire country's security forces.⁵⁰

Leahy's unit-level scrutiny is a significant, but logical, outgrowth of § 2304's failures; Leahy's most revolutionary feature, and what made it stand apart from § 2304, is the statute's anti-impunity mechanism.⁵¹

⁴⁷ § 2378d(a) (emphasis added). The State Department construes the meaning of a unit of a foreign security force as "the lowest organizational element of a security force capable of exercising command and discipline over its members." SERAFINO ET AL., *supra* note 34, at 8. The State Department understood this as the appropriate definition based on Leahy's legislative history. DEPARTMENT OF STATE, *supra* note 41, at 8. State Department guidance suggests that a unit will most often be a battalion or its equivalent. *Id.* However, the State Department cautions that the meaning of the term unit "may be unique to the country, security force, and unit type." *Id.* In some instances, such as in the case of an army, an entity as large as a brigade or as small as a company will be considered a unit for Leahy Law purposes. See SECURITY ASSISTANCE MONITOR, APPLYING THE LEAHY LAW TO U.S. MILITARY AND POLICE AID 7 (2014) (describing the variations in the interpretations of a unit for purposes of Leahy).

⁴⁸ § 2304 (emphasis added). See Tate, *supra* note 19, at 340 (highlighting the significance of the shift from § 2304's country-level scrutiny to Leahy's unit-level scrutiny).

⁴⁹ See SECURITY ASSISTANCE MONITOR, *supra* note 47, at 3 (clarifying that Congress's decision to use unit-level scrutiny for Leahy was due to the executive branch's reluctance to apply § 2304's restriction mechanism because it required withholding "all security aid to a country's entire armed forces"); Tate, *supra* note 19, at 340 (explaining the rationale behind the unit-level scrutiny of Leahy).

⁵⁰ See Tate, *supra* note 19, at 340 (explaining that Leahy was designed to address the principal criticism of § 2304); *Human Rights Vetting Hearing*, *supra* note 43, at 31 (statement of Stephen Rickard, Executive Director, Open Society Policy Center) (recognizing Leahy's unit-level scrutiny as an intermediate step between § 2304's complete restriction on security assistance to an entire armed forces and no assistance restrictions). Critics complained that § 2304 created pariah countries that could never be cleared for security assistance after being barred by aid under § 2304. *Human Rights Vetting Hearing*, *supra*, at 31 (statement of Stephen Rickard, Executive Director, Open Society Policy Center) (comparing the impact of an adverse determination under Leahy and § 2304). However, under Leahy, U.S. security assistance can be resumed immediately upon the State Department determining that "the government of such country is taking effective steps to bring the responsible members of the security forces unit to justice." § 2378d(b).

⁵¹ See *Human Rights Vetting Hearing*, *supra* note 43, at 42 (statement of Elisa Massimino, President and Chief Executive Officer, Human Rights First) (asserting that Leahy "set the standard" for human rights mechanisms by linking security assistance to accountability within security forces); SECURITY ASSISTANCE MONITOR, *supra* note 47, at 2 (calling Leahy "a powerful tool to curb impunity among military and police that receive U.S. assistance").

Subsection (b) provides a path to remove the restriction on security assistance imposed by subsection (a).⁵² Under 22 U.S.C. § 2378d(b), subsection (a)'s requirement that security assistance be withheld if credible information indicates that the unit is responsible for a gross human rights violation is exempted if the State Department determines that the country "is taking effective steps to bring the responsible members of the security forces unit to justice."⁵³

Impunity, the failure to punish perpetrators for their crimes, is a significant human rights problem.⁵⁴ Impunity erodes the rule of law, leaving victims without any appropriate relief and diminishing the deterrent force of accountability.⁵⁵ Subsection (b)'s coercive use of U.S. security assistance to promote accountability for human rights abuses is unique.⁵⁶ Subsection (b) augments the statute's human rights impact, while also making it less susceptible to the criticisms that rendered § 2304 unenforceable.⁵⁷ As such, subsection (b) provides a significant incentive to a country to bring perpetrators of human rights abuses to justice, at least

⁵² See § 2378d (restricting security assistance based on human rights criteria but providing an exception). Leahy describes this mechanism as an "exception," but, in reality, it is a condition a unit responsible for a gross violation of human rights must meet before the United States can lawfully provide security assistance. See § 2378d(b) (providing an exception that allows for security assistance to a unit of a foreign security force despite credible information of a gross human rights abuse if the "country is taking effective steps to bring the responsible members of the security forces unit to justice").

⁵³ § 2378d(b). Senator Leahy indicated that subsection (b) target's one of Leahy's primary goals: ending impunity. See 160 CONG. REC. S4452 (daily ed. July 14, 2014) (Statement of Sen. Leahy) (highlighting Leahy's two primary goals). Senator Leahy recounted that one of Leahy's two goals is to "encourage foreign governments to bring to justice the individual members of units responsible for [gross violations of human rights]." *Id.* Senator Leahy noted that this added coercive mechanism was necessary because "[i]n many countries that receive U.S. aid[,] there is a long history of impunity for crimes committed by government security forces." *Id.*

⁵⁴ See UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, OHCHR REPORT 2011 44 (2012) (stating that "impunity is often the primary obstacle to upholding the rule of law" because "[h]uman rights become a mockery when killings, disappearances, torture, rape[,] and other forms of sexual violence go unpunished").

⁵⁵ See *id.* (detailing the impact of impunity on the rule of law and the victims of human rights abuses).

⁵⁶ See *Human Rights Vetting Hearing*, *supra* note 43, at 42 (statement of Elisa Massimino, President and Chief Executive Officer, Human Rights First) (recognizing the unique role of Leahy to spur accountability for human rights abuses within security forces).

⁵⁷ See, e.g., *id.* at 31 (statement of Stephen Rickard, Executive Director, Open Society Policy Center) (acknowledging that Leahy was an "intermediate step" and solved some of the problems that rendered § 2304 unenforceable); Tate, *supra* note 19, at 340 (commenting on the genesis of Leahy, which responded to the criticisms of § 2304 and developing a more workable alternative).

in the units of its security forces under consideration for U.S. assistance.⁵⁸ Simply transferring the offending party out of a unit does not constitute an “effective step.”⁵⁹ To meet the Leahy standard, the foreign government must “carry out a credible investigation and . . . the individuals involved [must] face appropriate disciplinary action or impartial prosecution in accordance with local law.”⁶⁰ Subsection (b)’s exception addresses one of the criticisms that rendered § 2304 unenforceable: it created pariah security forces that would effectively be subject to a permanent ban on security assistance.⁶¹ Leahy, in contrast and by design, provides for the prompt resumption of security assistance to any foreign security force’s unit provided the government disciplines or prosecutes troops alleged to have committed a gross violation of human rights.⁶²

⁵⁸ See § 2378d(b) (providing an exception to the restriction on security assistance if the foreign country takes “effective steps” to discipline or prosecute the perpetrator of a gross violation of human rights); *Human Rights Vetting Hearing*, *supra* note 43, at 30–31 (statement of Stephen Rickard, Executive Director, Open Society Policy Center) (describing the mechanism by which a foreign country facing a restriction on security assistance pursuant to Leahy can remedy the problem to allow for the resumption of aid, thus eliminating the § 2304 problem of creating pariah countries unable to ever access U.S. security assistance).

⁵⁹ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 13–866, ADDITIONAL GUIDANCE, MONITORING, AND TRAINING COULD IMPROVE IMPLEMENTATION OF THE LEAHY LAWS 6 (2013) (outlining State Department guidance for implementing Leahy that “specifies that transferring the offending individual or individuals from a unit does not constitute effective steps to bring the offending individuals to justice, nor does the mere opening of a formal investigation”); see also HUM. RIGHTS WATCH, *supra* note 37, at 95 (arguing that the U.S. Ambassador to Colombia and the Colombian military’s plan to transfer two officers allegedly responsible for human rights abuses out of a unit would not satisfy Leahy’s “effective steps” requirement).

⁶⁰ H.R. REP. NO. 105-401, at 91 (1997) (Conf. Rep.). See also H.R. REP. NO. 105-825, at 1168 (1998) (Conf. Rep.) (clarifying that Congress intended that foreign governments carry out a reasonable investigation into allegations of human rights abuses and that individuals found responsible for abuses face proper disciplinary action or prosecution). The State Department’s guidance on Leahy implementation mirrors this requirement. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 59, at 6 (recognizing that the State Department guidance indicates that “‘effective steps’ means that the foreign government must carry out a credible investigation and take steps so that individuals who are credibly alleged to have committed gross violations of human rights face impartial prosecution or appropriate disciplinary action”).

⁶¹ See *Human Rights Vetting Hearing*, *supra* note 43, at 30–31 (statement of Stephen Rickard, Executive Director, Open Society Policy Center) (describing how Leahy eliminated the § 2304 problem of creating pariah countries unable to ever access U.S. security assistance); Tate, *supra* note 19, at 340 (detailing the Defense Department’s concern that prohibiting security assistance to an entire security force constituted “unfairly punishing an entire institution for the work of a few bad apples”).

⁶² See § 2378d(b) (providing an exception to the prohibition on security assistance if “effective steps” are taken by the foreign government). Subsection (b) of Leahy reads:

The prohibition in subsection (a) of this section shall not apply if the Secretary determines and reports to the Committee on Foreign Relations of the Senate, the Committee on Foreign Affairs of the House of

Leahy's combination of security assistance restrictions and accountability mechanisms has produced surprisingly significant human rights results.⁶³ While the U.S. government rarely invoked § 2304 to restrict security assistance in four decades, in just one three-year period, Leahy barred U.S. security assistance to 2516 units of foreign militaries due to human rights concerns.⁶⁴ In 2011 alone, Leahy denied U.S. security assistance to 1766 foreign troops accused of human rights violations in forty-six countries.⁶⁵ Leahy successfully withheld military assistance to foreign security forces responsible for gross violations of human rights in Bangladesh, Colombia, Guatemala, Honduras, Indonesia, Mexico, Nigeria, Pakistan, Turkey, and Sri Lanka.⁶⁶

Representatives, and the Committees on Appropriations that the government of such country is taking effective steps to bring the responsible members of the security forces unit to justice.

Id.

⁶³ See, e.g., *Human Rights Vetting Hearing*, *supra* note 43, at 25–26 (2014) (statement of Stephen Rickard, Executive Director, Open Society Policy Center) (explaining that while Leahy implementation withheld security assistance in only one percent of cases studied in the three years before 2014, one percent of cases covered 2516 units of foreign militaries barred from receiving U.S. security assistance based on human rights concerns).

⁶⁴ See Cohen, *supra* note 26, at 264 (noting that the Carter Administration found “relatively few” governments met § 2304’s standard for triggering a suspension of assistance and even less saw any security assistance suspended). The Carter Administration invoked § 2304 to cut all security assistance to Ethiopia and Uruguay while substantially reducing assistance to Argentina. *Id.* at 272. Other countries in Latin America were subject to security assistance cuts in 1979. *Id.* at 272–73. In general, the Carter Administration’s implementation of § 2304 exhibited “tentativeness and caution.” *Id.* at 264. See also VOGELGESANG, *supra* note 31, at 140 (describing the Carter Administration’s approach to congressional human rights restrictions, such as § 2304). In contrast, Leahy has already been invoked on numerous occasions by Republican and Democratic administrations. See *Human Rights Vetting Hearing*, *supra* note 43, at 25–26 (statement of Stephen Rickard, Executive Director, Open Society Policy Center) (indicating that Leahy barred security assistance to 2516 units of foreign militaries based on human rights concerns in the three years preceding 2014); see also Lisa Haugaard, *The Law That Helps the U.S. Stop Heinous Crimes by Foreign Militaries*, SECURITY ASSISTANCE MONITOR (May 28, 2015), <http://www.securityassistance.org/blog/law-helps-us-stop-heinous-crimes-foreign-militaries> [<https://perma.cc/W58C-YQIB>] (outlining Leahy’s “noteworthy successes” in which “governments bring perpetrators to justice to receive U.S. security assistance,” citing specific examples in Honduras and Guatemala).

⁶⁵ Eric Schmitt, *Military Says Law Barring U.S. Aid to Rights Violators Hurts Training Mission*, N.Y. TIMES (June 20, 2013), <http://www.nytimes.com/2013/06/21/us/politics/military-says-law-barring-us-aid-to-rights-violators-hurts-training-mission.html> [<https://perma.cc/PHE6-U54E>] (recounting that the 1766 troops denied security assistance pursuant to Leahy were from 46 countries and represented a small fraction of the 200,000 troops vetted).

⁶⁶ See, e.g., Winifred Tate, *U.S. Human Rights Activism and Plan Colombia*, 69 COLOMBIA INTERNACIONAL 50, 66 (2009) (revealing that Leahy enforcement led to the security assistance suspensions to Mexico, Turkey, and Sri Lanka); SECURITY ASSISTANCE MONITOR, *supra* note 47, at 3 (highlighting Leahy’s impact by describing the security assistance suspensions to Colombia, Guatemala, and Honduras); Lora Lumpe, *What the Leahy Law Means for Human Rights*, OPEN SOC’Y FOUND. (Apr. 24, 2014), <https://www.opensocietyfoundations.org/>

voices/what-leahy-law-means-human-rights [https://perma.cc/6RHM-HAGL] (suggesting that the State Department refuses to publicize the cases in which Leahy enforcement led to security assistance suspensions for diplomatic reasons and recognizing that Leahy enforcement led to aid suspensions in Colombia, Indonesia, Pakistan, and Bangladesh).

Indonesia provides an illustrative example of Leahy enforcement. See *Indonesia: US Resumes Military Assistance to Abusive Force: Obama Administration Lifts Ban Despite Military's Lack of Reform, Accountability*, HUM. RIGHTS WATCH (July 22, 2010), <https://www.hrw.org/news/2010/07/22/indonesia-us-resumes-military-assistance-abusive-force> [https://perma.cc/HMD6-5226] [hereinafter *Obama Administration Lifts Ban*] (outlining Leahy issues in Indonesia). Leahy barred Indonesia's Komando Pasukan Khusus ("Kopassus") Special Forces, a notoriously brutal unit of the Indonesian Armed Forces, from receiving U.S. security assistance from 1999 to 2010. See *id.* (explaining that a decade-long ban on U.S. security assistance to Kopassus under Leahy was lifted in 2010). Credible information indicated that Kopassus was responsible for gross violations of human rights, including killings, disappearances, and torture. See *1999 Country Reports on Human Rights Practices Indonesia*, BUREAU OF DEMOCRACY, HUM. RIGHTS, & LABOR, U.S. DEP'T OF ST., (Feb. 23, 2000), <http://www.state.gov/j/drl/rls/hrrpt/1999/288.htm> [https://perma.cc/8ZHY-46LF] (recognizing killings of civilians committed by Kopassus); *Indonesia: Kopassus Conviction Small Step Towards Ending Impunity*, AMNESTY INT'L (Sept. 5, 2013), <https://www.amnesty.org/en/press-releases/2013/09/indonesia-kopassus-conviction-small-step-towards-ending-impunity/> [https://perma.cc/HU4Y-YUCN] (documenting the convictions of eight Kopassus troops for the extrajudicial execution of detainees); *Obama Administration Lifts Ban*, *supra* note 66 (describing the human rights abuses allegedly committed by Kopassus). According to Human Rights Watch, "[t]he [U.S.] government cut off all aid to the Indonesian military in 1999 as a result of widespread human rights violations in East Timor and has refused to resume aid to Kopassus in particular because of ongoing concerns about its record and lack of accountability." *Obama Administration Lifts Ban*, *supra* note 66. The decision to resume security assistance to Kopassus in 2010 was controversial, but the Secretary of Defense suggested renewed assistance was warranted due to steps taken by the Indonesian government to bring human rights abusers to justice, as outlined in Leahy's subsection (b). See 22 U.S.C. § 2378d(b) (2012) (detailing Leahy's "effective steps" exception for resuming security assistance); *Obama Administration Lifts Ban*, *supra* note 66 (criticizing the decision to resume security assistance, arguing that the steps taken to address impunity for past human rights abuses was inadequate); David S. Cloud, *U.S. to Resume Aid to Kopassus, Indonesia's Controversial Military Forces*, L.A. TIMES (July 23, 2010), <http://articles.latimes.com/2010/jul/23/world/la-fg-0723-indonesia-obama-20100723> [https://perma.cc/3RZ4-BWY2] (reporting that the Indonesian government agreed to remove Kopassus troops convicted of human rights violations).

Significantly, Leahy enforcement has not been limited to countries outside the political and national security spotlight. See, e.g., Adam Taylor, *Why Nigeria's President Thinks the U.S. has "Aided and Abetted" Boko Haram*, WASH. POST (July 23, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/07/23/why-nigerias-president-thinks-the-u-s-has-aided-and-abetted-boko-haram/> [https://perma.cc/9QGX-HRPJ] (highlighting the controversy surrounding Leahy's prohibition on security assistance to some units of the Nigerian security forces during their fight against Boko Haram). Leahy's prohibition on security assistance to a large percentage of the Nigerian security forces' units fighting Boko Haram in the wake of that group's kidnapping of 219 school girls created significant pressure on the Obama Administration, and the State Department in particular, to release the barred assistance. See *id.* (quoting House Foreign Affairs Committee Chairman Ed Royce stating that he and the Nigerian President discussed eliminating the "obstacle to greater U.S.-Nigeria cooperation" created by Leahy). Nevertheless, the State Department

Leahy's impact has not been limited to barring security assistance; the statute's anti-impunity measure has coerced accountability for human rights abusers in Indonesia, Honduras, Guatemala, Colombia, and Bangladesh.⁶⁷ In Honduras, for example, Juan Carlos "El Tigre" Bonilla ascended to lead the Honduran National Police despite credible allegations that he was responsible for gross human rights violations,

maintained its prohibition on security assistance to fifty percent of Nigeria's security forces. *See Boko Haram: The Growing Threat to Schoolgirls, Nigeria, and Beyond: Hearing Before the H. Comm. on Foreign Affairs*, 113th Cong. 29 (2014) (statement of Rep. Edward R. Royce, Chairman, House Committee on Foreign Affairs) (arguing that Leahy was barring active cooperation with the Nigerian military in its operations against Boko Haram); *Human Rights Vetting Hearing*, *supra* note 43, at 4 (statement of Rep. Christopher Smith, Chairman of the Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations of the House Committee on Foreign Affairs) (explaining that, according to the Under Secretary of State for Civilian Security, Democracy, and Human Rights, half of the Nigerian military is barred from receiving U.S. security assistance under Leahy); *Human Rights Vetting Hearing*, *supra* note 43, at 21 (statement of Colonel Peter Aubrey (Retired), President, Strategic Opportunities International) (complaining that despite Leahy's "noble intent," the statute includes a cumbersome and time-consuming vetting regime that renders emergency response efforts impossible and black lists foreign troops); Ali Weinberg, *Nigerian Military Human Rights Abuses Won't Stop American Search Assistance, Official Says*, ABC NEWS (May 14, 2014), <http://abcnews.go.com/blogs/politics/2014/05/nigerian-military-human-rights-abuses-wont-affect-american-search-assistance-official-says/> [<https://perma.cc/7UYP-VTPW>] (reporting on the efforts to provide assistance to the Nigerian military while acknowledging that some units are barred from receiving security assistance pursuant to Leahy); *Nigeria's Buhari Presses for Military Aid, Pledges "Zero Tolerance" for Corruption*, U.S. INST. OF PEACE (July 22, 2015), <http://www.usip.org/publications/2015/07/22/nigerias-buhari-presses-military-aid-pledges-zero-tolerance-corruption> [<https://perma.cc/KXS6-P3PR>] (quoting Nigerian President Muhammadu Buhari, who claimed that Leahy's "blanket application . . . on the grounds of unproven allegations of human rights violations leveled against our forces has denied us access to appropriate strategic weapons to prosecute the war against the insurgents"); *but see* UNITED STATES DEPARTMENT OF STATE OFFICE OF INSPECTOR GENERAL, INSPECTION OF EMBASSY ABUJA AND CONSULATE GENERAL LAGOS, NIGERIA 6 (2013) (indicating that in fiscal year 2012, only 211 troops out of 1377 vetted pursuant to Leahy, or only 15 percent of troops vetted, were prohibited from receiving security assistance).

⁶⁷ *See, e.g., Human Rights Vetting Hearing*, *supra* note 43, at 42–43 (statement of Elisa Massimino, President and Chief Executive Officer, Human Rights First) (noting that Leahy has spurred accountability for human rights violations in Colombia and Bangladesh); *Obama Administration Lifts Ban*, *supra* note 66 (recognizing the steps taken to address impunity for past human rights abuses in Indonesia before resumption of U.S. security assistance); Haugaard, *supra* note 64 (describing Leahy's impact, noting that "governments bring perpetrators to justice in order to receive U.S. security assistance," and citing specific examples in Honduras and Guatemala). Surprisingly, the State Department reported to the Government Accountability Office's investigators that "they are unaware of any case in which the Secretary of State has made the determination necessary to invoke the exception and provide assistance to an otherwise ineligible unit." U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, at 6.

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including participating in the Los Magníficos death squad.⁶⁸ The Honduran government removed Mr. Bonilla from his position due to pressure from the United States to take effective steps against Mr. Bonilla or risk a suspension of security assistance.⁶⁹

However, Leahy has sometimes failed, with security assistance reaching units despite credible information about a gross human rights violation.⁷⁰ Human rights groups and others have reported that Leahy failed to withhold security assistance to abusive units in Colombia, Afghanistan, the Philippines, Indonesia, Israel, and Honduras.⁷¹ Many consider Colombia the test case for Leahy, as the law was originally enacted in response to United States' interest in significantly increasing

⁶⁸ See Mark Weisbrot, Opinion, *Will Congress Act to Stop US Support for Honduras' Death Squad Regime?*, GUARDIAN (Mar. 30, 2013), <http://www.theguardian.com/commentisfree/2013/mar/30/congress-us-support-honduras-death-squad-regime> [<https://perma.cc/TG2V-SNNN>] (alleging Juan Carlos Bonilla, Director General of the Honduran police, had been investigated for his connection to death squads); Oscar Martinez, *The Macho Cops of Honduras*, N.Y. TIMES (Mar. 7, 2014), <http://www.nytimes.com/2014/03/08/opinion/hondurass-macho-cops.html> [<https://perma.cc/JLD2-CR6L>] (suggesting that Mr. Bonilla was removed from his position as Director General of the Honduran police due to allegations that he participated in a death squad—Los Magníficos—that was responsible for extrajudicial executions).

⁶⁹ See Martinez, *supra* note 68 (reporting on the pressure on Honduras to discipline Mr. Bonilla); see also Haugaard, *supra* note 64 (underscoring Mr. Bonilla's removal as the head of the Honduran police force as a Leahy success story).

⁷⁰ See, e.g., TATE, *supra* note 12, at 266 (explaining that, despite the State Department suspending U.S. security assistance to several Colombian battalions under Leahy, human rights groups maintained that Leahy was not being properly implemented); FELLOWSHIP OF RECONCILIATION & COLOMBIA-EUROPE-U.S. HUMAN RIGHTS OBSERVATORY, *THE RISE AND FALL OF "FALSE POSITIVE" KILLINGS IN COLOMBIA: THE ROLE OF U.S. MILITARY ASSISTANCE, 2000-2010* 4 (2014) (concluding that the commission of 5763 extrajudicial executions was correlated to U.S. security assistance to the Colombia military); Tenorio Miller, *supra* note 12, at 685 (positing that Leahy was nearly a categorical failure in Colombia because human rights data suggests that U.S. security assistance continued despite human rights violations by the Colombian military).

⁷¹ See AMERICAN FRIENDS SERVICE COMMITTEE ET AL., *U.S. HUMAN RIGHTS OBLIGATIONS WITH RESPECT TO THE PROTECTION OF THE PALESTINIAN PEOPLE AND HUMAN RIGHTS DEFENDERS: JOINT SUBMISSION TO THE UNITED NATIONS UNIVERSAL PERIODIC REVIEW OF THE UNITED STATES OF AMERICA* 7 (2014) (contending that the United States has not fully implemented Leahy Law obligations with regard to security assistance to Israeli security forces); AMNESTY INTERNATIONAL, *supra* note 9, at 6 (citing cases in which security assistance was delivered to units of the Colombian security forces despite credible information regarding a gross violation of human rights); Tenorio Miller, *supra* note 12, at 694 (highlighting Leahy Law failures in Colombia, Afghanistan, and the Philippines); *Obama Administration Lifts Ban*, *supra* note 66 (arguing that human rights concerns should have maintained a bar on U.S. security assistance to Indonesia's Special Forces); Weisbrot, *supra* note 68 (alleging that U.S. security assistance to the Honduran police force violated Leahy due to the persistent allegations of human rights abuses tied to the Director General of the Honduran police, who controls the entire force).

assistance to Colombian security forces.⁷² Although Leahy has shown that it can be effective in Colombia, Leahy was unevenly enforced there, allowing security assistance to reach notoriously brutal units of the Colombian military.⁷³ The high profile failures of Leahy have led some to explore whether judicial enforcement of Leahy could effectively secure the law's human rights promise.⁷⁴

⁷² See SERAFINO ET AL., *supra* note 34, at 15 (noting that “preventing U.S. assistance from benefiting perpetrators of human rights violations in the Colombian security forces was a major impetus for the introduction of the Leahy provisions” and affirming its importance by analyzing the implementation of Leahy in Colombia); THE CENTER FOR INTERNATIONAL POLICY, GETTING IN DEEPER: THE UNITED STATES’ GROWING INVOLVEMENT IN COLOMBIA’S CONFLICT 8 (2000) (“Colombia is a key test case for Leahy’s implementation.”); Tate, *supra* note 19, at 340 (describing Colombia’s role in the genesis of Leahy).

⁷³ See, e.g., TATE, *supra* note 12, at 266 (explaining the State Department suspended security assistance to several Colombian military units; however, human rights groups insisted that Leahy was “not being fully implemented”); KIRK, *supra* note 37, at 261 (recognizing that U.S. security assistance was provided to the Colombian military despite its involvement in gross human rights abuses through its operations with Colombian paramilitary death squads); AMNESTY INTERNATIONAL, *supra* note 9, at 6–7 (citing cases demonstrating that security assistance was provided to Colombian security forces’ units despite credible information regarding a gross violation of human rights); FELLOWSHIP OF RECONCILIATION & COLOMBIA-EUROPE-U.S. HUMAN RIGHTS OBSERVATORY, *supra* note 70, at 4 (concluding that there was a correlation between the commission of 5763 extrajudicial executions and U.S. security assistance to the Colombia military); FELLOWSHIP OF RECONCILIATION & U.S. OFFICE ON COLOMBIA, MILITARY ASSISTANCE AND HUMAN RIGHTS: COLOMBIA, U.S. ACCOUNTABILITY, AND GLOBAL IMPLICATIONS 35 (2010) (maintaining that Leahy’s implementation in Colombia indicates that the law is insufficient, in some cases, to prevent U.S. security assistance from reaching abusive troops); Tenorio Miller, *supra* note 12, at 685 (contending that Leahy approached a “categorical failure” in Colombia because U.S. security assistance continued notwithstanding the Colombian military’s abusive human rights record); Joshua Goodman, *Human Rights Watch Says Colombian Generals Escaping Punishment for Role in Civilian Killings*, U.S. NEWS & WORLD REP. (June 24, 2015), <http://www.usnews.com/news/world/articles/2015/06/24/report-colombia-generals-go-unpunished-in-civilian-killings> [<https://perma.cc/Y32B-N76W>] (reporting that Human Rights Watch called for a partial suspension of U.S. security assistance to Colombia over the Colombian military’s role in civilian killings).

⁷⁴ See *Abusharar v. Hagel*, 77 F. Supp. 3d 1005, 1006 (C.D. Cal. 2014) (considering a suit by a Palestinian-American seeking an injunction under Leahy against further military assistance to Israel due to human rights abuses); Tenorio Miller, *supra* note 12, at 692–94 (analyzing the availability of a judicial remedy for Leahy Law enforcement); see also *infra* Part III.C (arguing that judicial enforcement of Leahy is foreclosed by the political question and standing doctrines).

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C. *Judicial Enforcement of the Human Rights Restrictions on U.S. Security Assistance*

Judicial enforcement of human rights conditions on foreign military assistance has never been successful.⁷⁵ For decades, claimants have sought judicial review in U.S. courts as a last resort for enforcement of human rights restrictions on security assistance to foreign security forces because they believed the executive branch was eschewing its duty to enforce human rights restrictions.⁷⁶ However, courts have turned away all such cases on political question doctrine grounds or due to the plaintiff's lack of standing.⁷⁷

The political question doctrine is the first hurdle for a claimant seeking to enforce a restriction on U.S. security assistance.⁷⁸ The political question doctrine dates back to *Marbury v. Madison*; however, the modern test is derived from *Baker v. Carr*.⁷⁹ The Supreme Court recently affirmed this

⁷⁵ See generally Tenorio Miller, *supra* note 12, at 692–94 (evaluating the feasibility of judicial review of Leahy enforcement); see also *Crockett v. Reagan*, 720 F.2d 1355, 1356–57 (D.C. Cir. 1983) (finding that the suit by twenty-nine members of Congress against the President and other government officials to enjoin military assistance to El Salvador, claiming the assistance violated § 2304, was barred by the political question doctrine and, according to Judge Robert Bork's concurrence, a lack of standing); *Abusharar*, 77 F. Supp. 3d at 1006–07 (ruling that a Palestinian-American who sued in U.S. federal court under Leahy seeking an injunction against further military assistance to Israel lacked standing and the claim was barred by the political question doctrine); *Clark v. United States*, 609 F. Supp. 1249, 1251 (D. Md. 1985) (holding that plaintiff taxpayers lacked standing in their suit claiming that assistance to Nicaraguan rebels was barred by § 2304).

⁷⁶ See, e.g., *Crockett*, 720 F.2d at 1356 (resolving a suit brought under § 2304 by twenty-nine members of Congress against the President and other government officials to enjoin military assistance to El Salvador); *Abusharar*, 77 F. Supp. 3d at 1007 (considering a motion to dismiss a claim brought by a Palestinian-American who sued in U.S. federal court under Leahy seeking an injunction against further military assistance to Israel); *Clark*, 609 F. Supp. at 1249 (determining whether plaintiff taxpayers had standing to sue for reimbursement of their taxes used to supply security assistance to Nicaraguan rebels in violation of § 2304).

⁷⁷ See, e.g., *Crockett*, 720 F.2d at 1356–57 (barring the claimants' suit to enjoin security assistance due to the political question doctrine and, according to Judge Bork's concurrence, a lack of standing); *Abusharar*, 77 F. Supp. 3d at 1006–07 (ordering the dismissal of a suit to enjoin military assistance to Israel due to lack of standing and the political question doctrine); *Clark*, 609 F. Supp. at 1251 (deciding that claimants lacked standing in their suit claiming security assistance to Nicaraguan rebels violated § 2304).

⁷⁸ See, e.g., *Crockett*, 720 F.2d at 1356–57 (concluding that the claimants' suit to enjoin security assistance was barred by the political question doctrine); *Abusharar*, 77 F. Supp. 3d at 1006–07 (dismissing a suit to enjoin military assistance to Israel due to the political question doctrine). A political question is defined as a "question that a court will not consider because it involves the exercise of discretionary power by the executive or legislative branch of government." BLACK'S *Political Question*, *supra* note 20.

⁷⁹ See *Marbury v. Madison*, 5 U.S. 137, 166 (1803) (holding that the President has "important political powers" that he is to exercise at his own discretion, and thus, "is accountable only to his country in his political character, and to his own conscience"); see also

long-standing doctrine, holding that a case “involves a political question . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.”⁸⁰ Courts have consistently held that decisions regarding the provision of security assistance are the purview of the executive branch, not the judicial branch.⁸¹

The next obstacle for a claimant seeking to enforce a restriction on U.S. security assistance is establishing standing.⁸² A claimant cannot simply

Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department “Statements of Interest” in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L.J. 807, 826 (2006) (defining the political question doctrine as “a mechanism by which a court declines to hear a case that deals with issues more properly belonging before one of the ‘political’ branches of government”); James R. May, *Civil Litigation as a Tool for Regulating Climate Change: An Introduction*, 46 VAL. U. L. REV. 357, 359 (2012) (describing the political question doctrine and holding “that federal courts should not consider certain matters consigned to the representative branches”). The modern test is derived from *Baker v. Carr* and focuses on the first three factors announced in *Baker*. *Baker v. Carr*, 369 U.S. 186, 217 (1962); R. Andrew Smith, *Breaking the Stalemate: The Judiciary’s Constitutional Role in Disputes over the War Powers*, 41 VAL. U. L. REV. 1517, 1527 (2007) (recognizing that the *Baker* Court refined the boundaries of the doctrine). According to the *Baker* test, a case implicates a political question when it contains:

[(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [(2)] or a lack of judicially discoverable and manageable standards for resolving it; [(3)] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [(4)] or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [(5)] or an unusual need for unquestioning adherence to a political decision already made; [(6)] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

⁸⁰ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (internal quotations removed).

⁸¹ *See, e.g., Dep’t of the Navy v. Egan*, 484 U.S. 518, 529–30 (1988) (acknowledging that national security, foreign policy, and military affairs are the province and responsibility of the executive branch; therefore, the courts show the “utmost deference” to the executive branch in these areas); *Arar v. Ashcroft*, 585 F.3d 559, 575 (2d Cir. 2009) (underscoring the Supreme Court’s caution to lower courts on intruding into national security and foreign affairs issues constitutionally delegated to the executive branch); *Crockett*, 720 F.2d at 1356–57 (affirming the district court’s dismissal of claimants’ suit to enjoin security assistance on political question doctrine grounds); *Abusharar*, 77 F. Supp. 3d at 1006 (dismissing a suit to enjoin military assistance to Israel due to the political question doctrine).

⁸² *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499–500 (1975) (requiring that a plaintiff assert her own legal rights, and not simply those of public interest that other branches of government are better positioned to resolve, to establish standing); *United States v. Richardson*, 418 U.S. 166, 170 (1974) (finding that a plaintiff lacked standing to challenge the constitutionality of the Central Intelligence Agency’s (“CIA”) financial reporting); *Abusharar*,

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sue the government or its representatives to insist that they fully and fairly enforce a law.⁸³ To establish standing, “a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision.”⁸⁴ In *City of Los Angeles v. Lyons*, the Supreme Court held that to demonstrate standing for injunctive relief, “the threat to the plaintiffs [must be] sufficiently real and immediate to show an existing controversy.”⁸⁵ Of particular importance for a plaintiff seeking to enjoin foreign military assistance, the Court held that “past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.”⁸⁶

In the only case addressing judicial enforcement of Leahy, *Abusharar v. Hage*, a Palestinian-American with a home and family in the Gaza Strip, sued in U.S. federal court for an injunction to enforce Leahy and bar

77 F. Supp. 3d at 1007 (concluding that the plaintiff, a Palestinian-American lawyer bringing suit in federal court to enjoin further U.S. security assistance to the Israeli defense force, lacked standing to bring such a suit). Standing is defined as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” BLACK’S *Standing*, *supra* note 20.

⁸³ See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (holding that a claimant will not satisfy the standing doctrine and establish a case or controversy simply by advocating an interest “in the proper application of the Constitution and laws”); *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (emphasizing that the “concerns for state autonomy” that bar standing for a claimant seeking to compel the government to enforce its laws “apply with even greater force” when a claimant attempts to compel individual enforcement decisions); see also 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.10 (3d ed. 2008) (reviewing Supreme Court jurisprudence on the standing doctrine and highlighting that there is no standing in federal court for a citizen or taxpayer seeking to enjoin the government to abide by the law).

⁸⁴ *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotation marks removed); *accord* *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (recognizing the three conditions for establishing standing).

⁸⁵ 461 U.S. 95, 103 (1983). See also *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (explaining the imminency requirement of the standing doctrine and clarifying that the “threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient”) (internal quotation marks omitted).

⁸⁶ *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983). In *Clapper v. Amnesty Int’l USA*, the Supreme Court indicated that the standing doctrine “serves to prevent the judicial process from being used to usurp the powers of the political branches.” 133 S. Ct. at 1146. Therefore, courts are likely to find a claimant lacks standing in cases in which the judicial branch is asked to “review actions of the political branches in the fields of [national security] and foreign affairs.” *Id.* at 1147. Thus, a Leahy plaintiff’s standing would face heightened scrutiny because significant national security and foreign affairs issues are implicated in vetting a foreign security force for the provision of U.S. security assistance. 160 CONG. REC. S4452 (daily ed. July 14, 2014) (Statement of Senator Leahy) (acknowledging that critics argue that Leahy clashes with national security interests because it creates obstacles to the provision of U.S. security assistance to foreign allies).

further military assistance to Israel.⁸⁷ Abusharar claimed that his Gaza Strip home had recently been destroyed in a bombing by the Israeli military and his father had died as a result of the Israeli siege of Gaza.⁸⁸ However, the court held that Leahy provides no private cause of action to sue for enforcement of Leahy, and the suit was barred by both the political question doctrine and the plaintiff's lack of standing.⁸⁹ Without a private cause of action that could overcome these obstacles to judicial enforcement, taxpayers and victims of human rights abuses abroad must rely on the State Department and congressional oversight for Leahy enforcement.⁹⁰

Yet, Congress has created a private cause of action to overcome long-standing barriers to a judicial remedy for human rights violations.⁹¹

⁸⁷ 77 F. Supp. 3d at 1006. A claimant like Abusharar may have felt compelled to seek judicial enforcement of Leahy because Leahy's application to U.S. security assistance to Israel is complicated by the importance placed on military cooperation with the Israeli defense forces, despite allegations of human rights abuses. See AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 2015/16: THE STATE OF THE WORLD'S HUMAN RIGHTS 201-02 (2016) (reporting human rights abuses committed by the Israeli security forces, including unlawful killings, extrajudicial executions, torture, and other ill-treatment of Palestinians); JIM ZANOTTI, CONG. RESEARCH SERV., RL33476, ISRAEL: BACKGROUND AND U.S. RELATIONS 26-27 (2015) (recognizing the belief that U.S. security assistance to Israel is a "pillar[] of a regional security order"); AMERICAN FRIENDS SERVICE COMMITTEE ET AL., *supra* note 71, at 6 (describing the Israeli military's responsibility for "grave and continuous" human rights violations). Members of Congress and human rights organizations have called for more robust enforcement of Leahy in relation to U.S. security assistance to Israel. See, e.g., Letter from Representative Betty McCollum to Ambassador Anne Woods Patterson and Assistant Secretary of State Tom Malinowski (Aug. 18, 2015) [hereinafter Letter from Representative McCollum] (calling on the State Department to investigate whether Leahy should bar U.S. security assistance to a company of the Israeli Border Police due to the unit's alleged role in extrajudicial executions); AMERICAN FRIENDS SERVICE COMMITTEE ET AL., *supra* note 71, at 7 (claiming that the United States has failed to properly enforce Leahy with regard to security assistance to Israeli security forces).

⁸⁸ *Abusharar*, 77 F. Supp. 3d at 1006.

⁸⁹ *Id.* at 1006-07.

⁹⁰ See *infra* Part III.C (analyzing the obstacles to judicial enforcement of Leahy and the need for a private cause of action).

⁹¹ See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (enacting a private cause of action to sue individuals for damages resulting from torture or an extrajudicial killing). The TVPA was codified as a note following the Alien Tort Statute ("ATS"). 28 U.S.C. § 1350 note (2012). The TVPA was intended to supplement the remedies available under the ATS. See Brief for Arlen Specter et al. as Amici Curiae Supporting Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) (clarifying, as the key proponent of the TVPA in the Senate, the relationship between the TVPA and the ATS). As the TVPA's legislative history demonstrates, Congress took a favorable view of the Second Circuit's application of the ATS in the seminal case *Filartiga v. Pena-Irala*, in which Paraguayan citizens sued another Paraguayan citizen under the ATS for wrongfully causing the death of their son by torture. See H.R. Rep. No. 102-367 (1991) (noting that the *Filartiga* opinion was "met with general approval"); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (accepting that the ATS can be used as a basis for federal court

Congress passed the Torture Victim Protection Act (“TVPA”) to “provide a Federal cause of action against any individual who, under actual or apparent authority, or under color of law, [sic] of any foreign nation, subjects any individual to torture or extrajudicial killing.”⁹² Courts have recognized justiciable claims under the TVPA to redress human rights concerns.⁹³ However, the statute is limited in scope and does not reach

jurisdiction over a tort claim); see also Rachael E. Schwartz, “And Tomorrow?” *The Torture Victim Protection Act*, 11 ARIZ. J. INT’L & COMP. L. 271, 283 (1994) (indicating that Congress looked favorably on the *Filartiga* opinion when considering the TVPA). Congress was dismayed by Judge Bork’s concurring opinion in the fractured District of Columbia Circuit decision in *Tel-Oren v. Libyan Arab Republic*, which sought to significantly limit the jurisdictional grant of the ATS. See H.R. Rep. No. 102-367 (1991) (acknowledging Judge Bork’s opinion); Schwartz, *supra* note 91, at 283–84. See also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 799 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that the ATS does not provide jurisdiction for a federal court to hear a case involving torture committed in a foreign country); Michael C. Small, Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163, 179 (1985) (contrasting the human rights impact of the *Filartiga* opinion and Bork’s opinion in *Tel-Oren*). Congress therefore explicitly stated that the TVPA was intended to create a private right of action to ensure U.S. courts would hear cases involving torture abroad. See H.R. Rep. No. 102-367 (1991) (asserting that the TVPA provides a private cause of action to allow federal courts to hear claims by victims of torture committed in foreign countries). The House Report indicated that the TVPA was intended to extend, rather than restrict, the remedy provided by the ATS. See *id.* (underscoring Congress’s view that the TVPA “would also enhance the remedy already available under § 1350 in an important respect: While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad”).

⁹² H.R. Rep. No. 102-367 (1991). See also Torture Victim Protection Act of 1991 (creating a private cause of action to sue individuals for damages resulting from torture or an extrajudicial killing); 137 Cong. Rec. H11244-04 (1991) (describing the purpose of the TVPA). Upon introducing the TVPA in the House, Congressman Romano Mazzoli said that the TVPA “clarifies existing law to make explicit that victims of torture can bring a Federal civil cause of action against their torturer.” *Id.* Two principal factors motivated Congress to pass the TVPA: a fractured District of Columbia Circuit decision in *Tel-Oren v. Libyan Arab Republic* questioning the reach of the ATS and ratification of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See Schwartz, *supra* note 91, at 275 (analyzing the legislative history of the TVPA to determine the Act’s purpose and Congress’s motivations in passing it). Congress viewed passing the TVPA as a necessary step in implementing the Convention Against Torture. See H.R. Rep. No. 102-367 (1991) (clarifying that the Convention placed a special emphasis on enforcement mechanisms and obligated state parties to adopt accountability measures against alleged torturers).

⁹³ See, e.g., *Yousuf v. Samantar*, 552 F.3d 371, 383–84 (4th Cir. 2009), *aff’d and remanded*, 560 U.S. 305 (2010) (ruling that Somali citizens’ TVPA claim against a former high-ranking Somali government official for torture and extrajudicial killing was not barred by the Foreign Sovereign Immunities Act and remanding to the district court for further action); *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005) (holding that Haitian citizens stated a TVPA claim against a former Haitian military officer for torture and extrajudicial killing); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002) (recognizing that survivors of victims stated a TVPA claim against former Director of Salvadoran National Guard and

Leahy enforcement.⁹⁴ Nevertheless, congressional action to expand the TVPA to provide a private cause of action to enforce Leahy would avoid the doctrinal barriers to its judicial enforcement.⁹⁵

III. ANALYSIS

Despite Leahy's surprising human rights achievements, foreign recipients of U.S. military assistance vetted under Leahy's provisions continue to violate human rights.⁹⁶ Similarly, human rights abusers are

former Salvadoran Minister of Defense, although the court affirmed the jury's verdict for the defendants); *Warfaa v. Ali*, 33 F. Supp. 3d 653 (E.D. Va. 2014) (denying a motion to dismiss a TVPA claim against a former Somali military officer brought by a Somali national who was allegedly tortured); *Xuncax v. Gramajo*, 886 F. Supp. 162, 198–99 (D. Mass. 1995) (awarding damages to Guatemalan citizens and a U.S. citizen in a default judgment on a TVPA claim against a former Guatemalan Minister of Defense).

⁹⁴ See 28 U.S.C. § 1350 note (2012) (limiting the scope of human rights abuses covered to torture and extrajudicial killings committed by individuals acting under the color of law). The TVPA reaches only what the statute defines as torture and extrajudicial killings perpetrated by individuals acting under the color of law. *Id.* While the statutory definitions of torture and extrajudicial killing are based on international human rights standards, they do not cover the full range of human rights abuses a plaintiff may have. See Christopher A. Whytock et al., *Foreword: After Kiobel – International Human Rights Litigation in State Courts and under State Law*, 3 U.C. IRVINE L. REV. 1, 4 (2013) (acknowledging that the TVPA is not an adequate replacement for the ATS because it is limited to cases of torture and extrajudicial killings). The Supreme Court further narrowed the TVPA's reach by holding that only natural persons are individuals under the statute, thus shielding corporations and organizations from TVPA claims. See *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012) (holding that the plain text and the legislative history of the TVPA indicate that Congress did not extend liability to corporations or other organizations); see also Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-Kiobel*, 102 CAL. L. REV. 1495, 1521 (2014) (explaining that *Mohamad* bars TVPA claims against corporations and organizations).

⁹⁵ See *infra* Part IV (proposing a private cause of action for Leahy enforcement).

⁹⁶ See *supra* Part II.B (reviewing the human rights achievements and failures of Leahy). Human rights advocates in Congress and in the non-governmental sector, who had watched with concern and disappointment as the executive branch failed to enforce § 2304, have been pleasantly surprised by Leahy's impact. See, e.g., *Human Rights Vetting Hearing*, *supra* note 43, at 25–26 (statement of Stephen Rickard, Executive Director, Open Society Policy Center) (indicating that Leahy enforcement withheld security assistance to 2516 units of foreign militaries due to human rights concerns in the three years before 2014); see also Lisa Haugaard, *The Law That Helps the U.S. Stop Heinous Crimes by Foreign Militaries*, SECURITY ASSISTANCE MONITOR (May 28, 2015), <http://www.securityassistance.org/blog/law-helps-us-stop-heinous-crimes-foreign-militaries> [<https://perma.cc/W58C-YQIB>] (outlining Leahy's "noteworthy successes" in which "governments bring perpetrators to justice in order to receive U.S. security assistance" and pointing to Honduras and Guatemala as examples of such successes); *Obama Administration Lifts Ban*, *supra* note 66 (highlighting the steps taken to address impunity for past human rights abuses in Indonesia before resumption of U.S. security assistance). In just one year, 2011, Leahy barred security assistance to 1766 foreign troops allegedly responsible for gross violations of human rights, a tremendous accomplishment. See Schmitt, *supra* note 65 (indicating that Leahy denied

not always brought to justice despite Leahy's vetting of their units.⁹⁷ Flawless enforcement is not the appropriate standard by which to judge Leahy; it is an aspirational statute, and its enforcement implicates significant national security interests.⁹⁸ Nevertheless, the analysis that follows demonstrates that Leahy, relying only on the State Department's enforcement and congressional oversight, cannot achieve the laudable human rights goals it was enacted to accomplish without statutory reform.⁹⁹

security assistance to 1766 troops from foreign militaries from forty-six countries based on human rights concerns in the three years before 2014). However, human rights organizations continue to express concern about Leahy enforcement failures, noting that U.S. security assistance continues to reach human rights abusers in foreign militaries. *See, e.g.*, TATE, *supra* note 12, at 266 (explaining that several Colombian battalions responsible for gross human rights violations were barred from receiving security assistance, yet human rights organizations recognized that Leahy was not being fully implemented); KIRK, *supra* note 37, at 261 (detailing how U.S. security assistance was provided to the Colombian military despite ongoing collaboration between the military and paramilitary death squads); AMNESTY INTERNATIONAL, *supra* note 9, at 6-7 (underscoring that security assistance was delivered to units of the Colombian security forces despite credible allegations of a gross violation of human rights); FELLOWSHIP OF RECONCILIATION & U.S. OFFICE ON COLOMBIA, *supra* note 73, at 35 (asserting that Leahy's implementation in Colombia indicates that the law is insufficient, in some cases, to prevent U.S. security assistance from reaching abusive troops); Tenorio Miller, *supra* note 12, at 685 (positing that continued U.S. security assistance to the Colombian military despite credible information alleging gross human rights violations suggested Leahy enforcement was nearly a categorical failure in Colombia); Goodman, *supra* note 73 (reporting that Human Rights Watch believed the Colombian military's role in civilian killings required a partial suspension of U.S. security assistance to Colombia).

⁹⁷ *See supra* Part II.B (examining the human rights achievements and failures of Leahy); *see also* AMNESTY INTERNATIONAL, *supra* note 9, at 6-11 (citing cases in which security assistance was delivered to units of the Colombian security forces without effective steps being taken to hold abusers accountable for human rights violations); AMERICAN FRIENDS SERVICE COMMITTEE ET AL., *supra* note 71, at 7 (contending that the United States has not fully implemented Leahy Law obligations with regard to security assistance to Israeli security forces, including the accountability requirement); Tenorio Miller, *supra* note 12, at 694 (describing Leahy's failure to spur accountability in Colombia, Afghanistan, and the Philippines); *Obama Administration Lifts Ban*, *supra* note 66 (arguing that Indonesia's government had not taken effective steps to hold human rights abusers accountable and, therefore, Leahy's bar on U.S. security assistance to Indonesia's Special Forces should not have been lifted); Weisbrot, *supra* note 71 (alleging that U.S. security assistance to the Honduran police force violated Leahy due to the persistent allegations of human rights abuses tied to the Director General of the Honduran police, who had yet to be held accountable for human rights abuses).

⁹⁸ 160 CONG. REC. S4452 (daily ed. July 14, 2014) (Statement of Senator Leahy) (suggesting that Leahy serves key national interests while acknowledging that critics claim that Leahy clashes with national security interests by creating "unacceptable obstacles to the ability of the U.S. military to engage with foreign counterparts").

⁹⁹ *See infra* Part III.A-C (assessing the effectiveness of Leahy as currently enforced).

In this section, Part III.A argues that Leahy's purpose is stymied by the lack of an effective accountability mechanism.¹⁰⁰ Second, Part III.B analyzes the role aggressive congressional oversight has played in enforcing Leahy, arguing that congressional oversight is not a sustainable solution for robust enforcement.¹⁰¹ Finally, Part III.C evaluates judicial enforcement of Leahy, finding that victims of human rights abuses abroad cannot currently enforce Leahy through the courts.¹⁰²

A. *The Lack of an Effective Accountability Mechanism Undermines Leahy's Purpose*

Leahy is not an isolated statute.¹⁰³ Leahy effectively replaced § 2304's restriction on military aid, which was rendered virtually useless by disuse.¹⁰⁴ Section 2304's failure as a mechanism to bar assistance to

¹⁰⁰ See *infra* Part III.A (analyzing how Leahy's purpose of preventing disbursement of U.S. military assistance to human rights abusers and encouraging foreign governments to bring human rights abusers to justice is stymied by the lack of an effective accountability mechanism).

¹⁰¹ See *infra* Part III.B (evaluating the role of aggressive congressional oversight of Leahy, led by Senator Leahy, and its long-term potential as an enforcement mechanism).

¹⁰² See *infra* Part III.C (examining key case law and finding that, absent a congressionally-created private cause of action, the political question doctrine and the challenges in establishing standing effectively bar judicial enforcement of Leahy, which point to the need for a statutory remedy).

¹⁰³ See Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (1961) as amended through Pub. L. No. 114-113, enacted December 18, 2015 (incorporating all conditions on foreign aid, including § 2304 and Leahy). The Foreign Assistance Act authorizes foreign assistance provided in the Foreign Operations Appropriations legislation and "lays out U.S. development policy and sets out the conditions under which U.S. foreign assistance is given." *Foreign Assistance Act of 1961*, OFF. OF POL'Y PLAN. & PUB. DIPL., BUREAU OF DEMOCRACY, HUM. RIGHTS & LAB., OF THE U.S. DEP'T OF ST. (July 1, 2003), <http://www.humanrights.gov/foreign-assistance-act-of-1961.html> [<https://perma.cc/52DH-Z6M4>]. Leahy is incorporated as § 620M of the Foreign Assistance Act of 1961. Foreign Assistance Act of 1961 Pub. L. No. 87-195, 75 Stat. 424 (1961) as amended through Pub. L. No. 114-113, enacted December 18, 2015.

¹⁰⁴ See *supra* Part II.B (describing the relationship between § 2304 and the Leahy Law). Senator Leahy stated that it was the failure of § 2304 as a human rights mechanism that drove him to develop an "approach that works." See Ham, *supra* note 19 (quoting Senator Leahy's statement that § 2304 was never invoked, which led him to seek an alternative approach that would be more effective). Others have noted that § 2304 was rarely, if ever, invoked to restrict U.S. security assistance on human rights grounds. See, e.g., *Human Rights Vetting Hearing*, *supra* note 43, at 31 (statement of Stephen Rickard, Executive Director, Open Society Policy Center) (highlighting that "the United States has been extremely reluctant to invoke Section [2304] even in the most extreme cases"); STEINER & ALSTON, *supra* note 33, at 821 (recognizing that there have been "virtually no cases in which military assistance or foreign aid was in fact cut off on human rights grounds"); SERAFINO ET AL., *supra* note 34, at 3 (acknowledging the limited use of § 2304 to suspend aid); Tate, *supra* note 19, at 340 (contending that § 2304 was never enforced); Powers, *supra* note 34, at 409 (asserting that § 2304 has rarely been employed to suspend security assistance).

abusive security forces is, at least in part, due to its requirement that all military assistance to a country be barred based on an adverse human rights finding.¹⁰⁵ Leahy was enacted as an “intermediate step” that triggers a bar on aid only to the “the bad apples,” rather than a country’s entire security forces.¹⁰⁶ Leahy, therefore, must be viewed as a statutory replacement of § 2304’s aid restriction mechanism.¹⁰⁷ Since Leahy was enacted in 1997, § 2304 has not been referenced in debates on aid to security forces with abusive human rights records, much less enforced, which buttresses this interpretation.¹⁰⁸ Placing Leahy in its appropriate statutory context highlights the importance of robust enforcement, as Leahy’s goals have subsumed those of § 2304’s security assistance limitation mechanism.¹⁰⁹

¹⁰⁵ See Tate, *supra* note 19, at 340 (explaining the major critique of § 2304, that it barred security assistance to an entire country based on the problematic actions of just a few bad apples).

¹⁰⁶ See *Human Rights Vetting Hearing*, *supra* note 43, at 31 (statement of Stephen Rickard, Executive Director, Open Society Policy Center) (acknowledging that Leahy was an intermediate step between § 2304’s requirement that all security assistance be cut off and no human rights restrictions on security assistance); Tate, *supra* note 19, at 340 (indicating that Leahy’s architects designed the statute to scrutinize units, rather than a blanket review of an entire country’s security forces, to address the major critique of § 2304, that it barred security assistance to an entire country based on the problematic actions of just a few “bad apples”).

¹⁰⁷ See Ham, *supra* note 19 (quoting Senator Leahy as stating that § 2304’s failures spurred Leahy). This conclusion is buttressed by Senator Leahy’s own comments indicating he intended Leahy to be a replacement for § 2304. *Id.* Senator Leahy said § 2304 was “never invoked.” *Id.* The Senator continued, “[i]t was clear to me then, as I read report after report of horrific crimes by Central American soldiers and police who were trained and equipped by the United States, that we needed a different approach. We needed an approach that works.” *Id.*

¹⁰⁸ See STEINER & ALSTON, *supra* note 33, at 821 (clarifying that there have been “virtually no cases in which military assistance or foreign aid was in fact cut off on human rights grounds”); SERAFINO ET AL., *supra* note 34, at 3 (2014) (stating that § 2304 is “rarely . . . invoked” to suspend aid); Tate, *supra* note 19, at 340 (suggesting § 2304 was never enforced); Powers, *supra* note 34, at 409 (noting § 2304 has rarely been enforced to bar military assistance on human rights grounds).

¹⁰⁹ See Ham, *supra* note 19 (quoting Senator Leahy as stating that § 2304’s failures spurred Leahy). While Leahy has effectively replaced § 2304’s mechanism for restricting foreign assistance to human rights violators, there are other country-specific human rights conditions on security assistance that complement Leahy and add to the statutory regime. See, e.g., Pub. L. No. 109-102, § 556(a), 119 Stat. 2172 (2005) (conditioning Foreign Operations Appropriations funds to Colombia on a series of human rights benchmarks); see also HUMAN RIGHTS WATCH, *supra* note 37, at 91 (recognizing that Congress added human rights conditions on security assistance to Colombia, including the requirement that the Colombian Military sever ties with brutal right-wing paramilitary groups, in addition to the existing Leahy conditions on security assistance). The role of Foreign Operations Appropriations conditions and their relationship to Leahy is compelling and worthy of analysis, but is beyond the scope of this Note.

Leahy has achieved a surprising level of success toward its two key goals: (1) preventing disbursement of U.S. military assistance to human rights abusers in foreign security forces; and (2) encouraging investigations and prosecutions of human rights abusers in foreign security forces.¹¹⁰ However, the statute relies exclusively on the State Department for enforcement, entrusting State Department bureaucrats to make Leahy determinations where foreign policy and national security considerations will regularly weigh against robust Leahy enforcement.¹¹¹

¹¹⁰ See 160 CONG. REC. S4452 (daily ed. July 14, 2014) (Statement of Sen. Leahy) (outlining Leahy's two primary goals). Senator Leahy described Leahy's first goal as "prevent[ing] U.S. taxpayer funded training, equipment, or other assistance from going to units of foreign security forces that have committed heinous crimes." *Id.* Senator Leahy indicated that Leahy was needed because "[w]e saw many instances when United States aid ended up in the hands of foreign military or police forces that had engaged in rape, murder, torture, or other gross violations of human rights, and the U.S. was tainted by association with those crimes." *Id.*

Leahy's second goal is to "encourage foreign governments to bring to justice the individual members of units responsible for [gross violations of human rights]." *Id.* Senator Leahy asserted that Leahy was required because "[i]n many countries that receive U.S. aid[,] there is a long history of impunity for crimes committed by government security forces." *Id.* Leahy is unable to create or catalyze a civilian commitment to extricate impunity, so it relies on coercion; impunity is often an entrenched human rights problem and either a major civilian commitment, significant coercion, or both are required to eradicate it. See, e.g., Mary Griffin, *Ending the Impunity of Perpetrators of Human Rights Atrocities: A Major Challenge for International Law in the 21st Century*, INT'L REV. OF THE RED CROSS (June 30, 2000), <https://www.icrc.org/eng/resources/documents/misc/57jqhj.htm> [<https://perma.cc/97QQ-RQHN>] (recognizing that impunity is among the most significant human rights challenges of the century and requires a major commitment to eradicate it).

Leahy's success toward its two goals comes into relief when compared with the impact of § 2304. See *supra* Part II.B (comparing the effectiveness of Leahy and § 2304 in barring U.S. security assistance foreign security forces accused of gross violations of human rights and spurring accountability in such units). For example, while § 2304 was rarely, if ever, invoked to restrict security assistance, Leahy withheld security assistance to 2516 units in foreign security forces in just one recent three-year period. See *Human Rights Vetting Hearing*, *supra* note 43, at 25–26 (statement of Stephen Rickard, Executive Director, Open Society Policy Center) (explaining that Leahy implementation withheld security assistance to 2516 units of foreign militaries based on human rights concerns); see also SERAFINO ET AL., *supra* note 34, at 3 (stating that § 2304 rarely suspends aid).

¹¹¹ See HUMAN RIGHTS WATCH, *supra* note 37, at 96 (concluding that Leahy is not applied in a uniform manner; when Leahy enforcement threatens a key national interest, enforcement becomes "highly subjective"). An argument could be made that uneven enforcement has been cured by congressional action to suspend U.S. military assistance in cases in which the State Department has allegedly failed to fully enforce Leahy. See, e.g., *Leahy Puts Colombia Aid on Hold*, L.A. TIMES (Apr. 20, 2007), <http://articles.latimes.com/2007/apr/20/world/fg-colombia20> [<https://perma.cc/6QAC-9DWN>] (clarifying that Senator Leahy unilaterally suspended aid to Colombia). However, ad hoc congressional action, while a proper exercise of congressional oversight, is not an adequate substitute for an effective statutory regime. See *infra* Part III.B (analyzing the role of ad hoc congressional oversight as a Leahy enforcement mechanism). Senator Leahy's unique position as the ranking member of the Senate Appropriations Sub-Committee for State, Foreign Operations,

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The State Department's unfettered control over the statutory enforcement mechanism creates a conflict of interest that has undermined Leahy's goals.¹¹²

Compared with § 2304, Leahy's vetting and aid prohibition mechanisms have made significant inroads toward Leahy's dual goals of barring aid to abusive security forces and coercing anti-impunity efforts.¹¹³ Nevertheless, Leahy has been unable to fully realize its goals due to uneven enforcement.¹¹⁴ Leahy's dependence on the State

and Related Programs allows him to exercise authority to suspend relatively small amounts of assistance as an accountability measure. See *Senate Appropriations Sub-Committee for State, Foreign Operations, and Related Programs Membership*, U.S. SENATE, <http://www.appropriations.senate.gov/subcommittees/state-foreign-operations-and-related-programs> [<https://perma.cc/ZN65-GPAU>] (providing a list of committee members and noting that Senator Leahy is the ranking member of the committee). Accountability beyond ad hoc congressional oversight is crucial because such an accountability mechanism is rendered ineffective when a sympathetic member of Congress is no longer in a key position to suspend aid unilaterally. See HUMAN RIGHTS WATCH, *supra* note 37, at 8 (calling for strict and consistent Leahy implementation).

¹¹² HUMAN RIGHTS WATCH, *supra* note 37, at 96 (acknowledging the tension between robust Leahy enforcement and national security interests). The State Department's primary mission is to execute U.S. foreign policy, with human rights being but one of a number of factors that influences foreign policy considerations. See Phillip R. Trimble, *Human Rights and Foreign Policy*, 46 ST. LOUIS U. L.J. 465, 465-66 (2002) (outlining the factors that influence foreign policy such as: security interests; economic interests including business, investment, and trade; economic development concerns; and human rights). When these influences come into conflict because the State Department must determine whether to suspend security assistance pursuant to Leahy despite the significant national security pressures to uphold the provision of security assistance, the State Department has made Leahy determinations that do not comport with the law. See, e.g., *id.* at 466 (contending that the supremacy of other foreign policy influences makes it "unrealistic to expect that pure human rights principles can always be implemented"). For example, in the case of Colombia, where the State Department failed to robustly enforce Leahy, other foreign policy influences trumped Leahy's human rights provisions. See HUMAN RIGHTS WATCH, *supra* note 37, at 96 (arguing that the State Department was not complying with U.S. law due to its failure to suspend security assistance to certain units of the Colombian military because continued funding was crucial to U.S. strategy in Colombia).

¹¹³ See, e.g., *Human Rights Vetting Hearing*, *supra* note 43, at 25-26, 31 (statement of Stephen Rickard, Executive Director, Open Society Policy Center) (recognizing the lack of enforcement of § 2304 while noting that Leahy's enforcement prohibited 2516 units of foreign security forces accused of human rights abuses from receiving U.S. security assistance).

¹¹⁴ See HUMAN RIGHTS WATCH, *supra* note 37, at 96 (asserting that Leahy was unevenly enforced and the State Department will circumvent Leahy enforcement if necessary to provide security assistance to a unit believed to be important to foreign policy objectives); Tate, *supra* note 19, at 343-45 (describing the choices made by the State Department regarding credibility and effective steps to bring perpetrators to justice that allow for varying degrees of enforcement); see also AMNESTY INTERNATIONAL, *supra* note 9, at 6-10 (providing examples of security assistance being provided to units of the Colombian security forces despite credible information that those units were involved in a gross violation of human rights); FELLOWSHIP OF RECONCILIATION & U.S. OFFICE ON COLOMBIA, *supra* note 73, at 35 (2010)

Department, an entity dedicated to executing the President's foreign policy and national security policies, is the Achilles' heel in fully achieving Leahy's goals.¹¹⁵

When foreign policy and national security interests clash with human rights concerns, the executive branch will invariably bend human rights standards.¹¹⁶ National Security Advisor Susan Rice boldly stated that human rights advocates should not count on the executive branch to uphold human rights standards in the face of national security concerns:

[W]e sometimes face painful dilemmas when the immediate need to defend our national security clashes with our fundamental commitment to democracy and human rights. Let's be honest: at times, as a result, we do business with governments that do not respect the rights we hold most dear. We make tough choices. When rights are violated, we continue to advocate for their protection. But we cannot, and I will not pretend that some short-term tradeoffs do not exist.¹¹⁷

Ms. Rice suggests that at times the State Department may simply disregard human rights requirements, such as Leahy, but more often than not, the results are more subtle.¹¹⁸

(concluding that the State Department's failure to fully apply Leahy in Colombia caused U.S. security assistance to reach units responsible for gross human rights violations).

¹¹⁵ See HUMAN RIGHTS WATCH, *supra* note 37, at 8, 96 (concluding that Leahy is not applied in a uniform matter; when Leahy enforcement threatens a key national interest, enforcement becomes highly subjective and, therefore, calls for consistent and strict enforcement of Leahy); Tate, *supra* note 19, at 343-45 (describing State Department techniques for interpreting Leahy's terms to allow for varying degrees of enforcement).

¹¹⁶ See, e.g., DEBRA LIANG-FENTON, IMPLEMENTING U.S. HUMAN RIGHTS POLICY: AGENDAS, POLICIES, AND PRACTICES 8 (2004) (indicating that human rights concerns are subordinated when in conflict with national security interests); William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 HARV. HUM. RTS. J. 249, 249 (2004) (explaining that policymakers generally view human rights and national security as in tension and subordinate the former to the latter); see also Robert P. Barnidge, Jr., *Should National Security Trump Human Rights in the Fight against Terrorism?*, 37 ISR. Y.B. OF HUM. RTS., 85, 109-10 (2007) (exploring the intersection of human rights and national security in the context of the fight against terrorism). President George W. Bush's National Security Strategy could not have stated this fact clearer: "Defending our [n]ation against its enemies is the first and fundamental commitment of the [f]ederal [g]overnment." PRESIDENT OF THE UNITED STATES OF AMERICA, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 1 (2002).

¹¹⁷ Susan E. Rice, National Security Advisor, Address at the Human Rights First Annual Summit (Dec. 4, 2013).

¹¹⁸ See HUMAN RIGHTS WATCH, *supra* note 37, at 8, 96 (calling for consistent and strict enforcement of Leahy because research showed that Leahy was not evenly enforced when consistent enforcement threatened a key strategic interest); Tate, *supra* note 19, at 343-45

Even with Congress's best efforts to draft Leahy to ensure proper enforcement, the State Department created ambiguities in the statute's language to allow for less restrictive enforcement when foreign policy and national security considerations trump Leahy's human rights concerns.¹¹⁹ For example, despite congressional efforts to clarify the term "credible," the State Department manipulates its definition to ensure enforcement flexibility.¹²⁰ Similarly, the State Department's view of what constitutes effective steps to investigate and punish perpetrators of human rights abuses varies arbitrarily.¹²¹ Not surprisingly, there is not unanimity in the State Department regarding Leahy enforcement.¹²² The Democracy, Rights, and Labor Bureau's opinion on Leahy enforcement predictably can be at variance with the view of the Western Hemisphere Bureau.¹²³

Broadening Leahy enforcement beyond the narrow confines of the State Department, where non-human rights considerations may corrupt the process, would provide a correction for some of these enforcement problems.¹²⁴ A private cause of action to enjoin the State Department to enforce Leahy would significantly reduce the risk of weak Leahy

(noting that fungible language provides the State Department's different actors the ability to massage Leahy standards to their desired level of enforcement).

¹¹⁹ See Tate, *supra* note 19, at 343–45 (explaining the usage of "credible" and "effective steps" to vary the impact of Leahy enforcement).

¹²⁰ See *id.* at 343–44 (describing how what constitutes "credible" information can vary within the State Department).

¹²¹ See *id.* at 344–45 (analyzing how the State Department determines what constitutes "effective steps").

¹²² See *id.* at 344 (conceding that at times there may be a conflict between the regional and thematic bureaus in the State Department regarding Leahy implementation). The State Department's Democracy, Rights, and Labor Bureau is charged with leading Leahy vetting, the key enforcement component. SERAFINO ET AL., *supra* note 34, at 7. In theory, the State Department's regional bureaus contribute to the vetting process as required. *Id.* However, in practice the regional bureaus insert themselves into the process frequently, arguing that they have greater expertise with which to make credibility determinations on information on alleged human rights abuses. See Tate, *supra* note 19, at 344 (recounting a State Department official's comments on regional bureaus' efforts to insert themselves into Leahy determinations, undermining the Democracy, Rights, and Labor Bureau's leadership on Leahy vetting).

¹²³ See Tate, *supra* note 19, at 344 (acknowledging the different bureaus' conflicting assessments of the human rights performance of Colombian military troops related to the different constituencies to which the bureaus responded). This conflict can be seen in other contexts as well. See, e.g., Symposium, *The Making of Filártiga v. Peña: The Alien Tort Claims Act after Twenty-Five Years*, 9 N.Y. CITY L. REV. 249, 257 (2006) (recognizing a conflict between a regional bureau and the Democracy, Rights, and Labor Bureau relating to a TVPA Supreme Court case).

¹²⁴ See *infra* Part IV (arguing that a private cause of action to enforce Leahy would democratize Leahy enforcement and check the State Department's uneven application of the statute).

enforcement while empowering human rights victims.¹²⁵ Absent a private cause of action, Leahy has relied on strong congressional oversight and transparent reporting on Leahy vetting decisions to pressure the State Department to robustly enforce existing Leahy Law mechanisms.¹²⁶

B. Aggressive Congressional Involvement in Leahy Enforcement is Not a Long-Term Solution for Robust Enforcement

Congress has played an aggressive role in ensuring Leahy is more successful than § 2304, but Congress's oversight limitations suggest the need for judicial review.¹²⁷ Congress has shown a keen interest in improving Leahy's effectiveness, extending and amending the law to mitigate concerns.¹²⁸ Meanwhile, members of Congress, specifically

¹²⁵ See *id.* (proposing a private cause of action for Leahy enforcement).

¹²⁶ See *infra* Part III.B (analyzing the role of congressional oversight in Leahy enforcement).

¹²⁷ See, e.g., Letter from 108 members of Congress to Secretary of State John Kerry (May 28, 2014) [hereinafter Letter to Secretary Kerry] (describing human rights concerns in Honduras and asking Secretary Kerry to “fully enforce the Leahy Law”); see also Letter from Ninety-Four Members of Congress to Secretary of State Hillary Clinton (Mar. 9, 2012) [hereinafter Letter to Secretary Clinton] (highlighting the human rights situation in Honduras and noting that the State Department “has an obligation to vigorously enforce the Leahy provisions”); Letter from Representative McCollum, *supra* note 87 (raising concerns about the Israeli security forces' alleged killing of a Palestinian and calling on the State Department to investigate whether Leahy is implicated). Senator Leahy himself, in his role as Chair or Ranking Member of the Senate Appropriations Subcommittee on State, Foreign Operations, and Related Programs, has unilaterally suspended U.S. security assistance due to human rights concerns. See, e.g., Paul Richter, *Senate Subcommittee Chairman Blocks \$650 Million in Aid for Egypt*, L.A. TIMES (Apr. 29, 2014), <http://www.latimes.com/world/africa/la-fg-wnegypt-aid-blocked-senate-leahy-20140429-story.html> [<https://perma.cc/HP6U-WE74>] (reporting on Senator Leahy's Senate floor speech announcing that he would block \$650 million in security assistance to Egypt due to human rights concerns); Ben Smith, *Leahy Says Legislation Doesn't Aim at Israel, but Could Hit It*, POLITICO (Aug. 16, 2011), <http://www.politico.com/blogs/ben-smith/2011/08/leahy-says-legislation-doesnt-aim-at-israel-but-could-hit-it-038422> [<https://perma.cc/3VCC-GW5E>] (quoting Senator Leahy's spokesperson, David Carle, as stating that Senator Leahy vigorously advocates for full and consistent Leahy enforcement); Patrick Markey, *U.S. Senator Freezes Colombia Aid on Rights Concerns*, REUTERS (Apr. 19, 2007), <http://uk.reuters.com/article/idUKN1930146220070419> [<https://perma.cc/V8NK-TP4B>] (confirming that Senator Leahy suspended \$55.2 million in security assistance for Colombia based on human rights concerns); SENATOR PATRICK LEAHY, *Comment of Senator Patrick Leahy on Mexico and the Leahy Law*, <http://www.leahy.senate.gov/press/comment-of-senator-patrick-leahy-on-mexico-and-the-leahy-law> [<https://perma.cc/J3KB-6KRU>] [hereinafter *Comment of Senator Leahy*] (advocating for robust enforcement of Leahy with regards to security assistance to Mexico due to the Mexican security forces' long history of human rights violations).

¹²⁸ See SERAFINO ET AL., *supra* note 34, at 3–4 (outlining the language of the original version of Leahy and the subsequent amendments to the law). Leahy was originally a rider on the Foreign Operations Appropriations legislation and thus applied only to funds channeled through the State Department and required affirmative congressional action to annually renew the measure. See Pub. L. No. 105-118, § 570, 111 Stat. 2386 (1997) (applying only to

Senator Leahy himself, have provided aggressive oversight over Leahy enforcement, even unilaterally suspending aid to ensure Leahy compliance when the State Department has failed to properly enforce the statute.¹²⁹ While Congress's substantial engagement with Leahy has ensured the legislation is more effective than § 2304, there are limitations to these avenues, and only a statutory remedy that allows for judicial review of Leahy enforcement can ensure proper oversight.¹³⁰

Congress has adapted Leahy on numerous occasions to improve its effectiveness, including significant amendments in 2011 and 2014 aimed at addressing a serious flaw in the statute, but absent judicial review, Leahy's enforcement problems will continue.¹³¹ Human rights

funds subject to the Foreign Operations Appropriations legislation); *see also* SERAFINO ET AL., *supra* note 34, at 3 (acknowledging the limited application of the original Leahy measure). Congress later incorporated a similar measure into the Defense Department Appropriations legislation and codified the Foreign Operations Appropriations version of the measure. *See* Pub. L. No. 105-262, § 8130, 112 Stat. 2279 (1998) (containing a Leahy provision applicable to Defense Department appropriations, albeit a narrower category of assistance than that covered by the codified version of Leahy); 22 U.S.C. § 2378d (2012) (codifying the Foreign Operations Appropriations version of Leahy). In 2011, Leahy was amended to change and redefine some terms, clarify Congress's vetting requirements, and add a reporting mechanism. *See* Pub. L. No. 112-74, § 7034(k), 125 Stat. 1216 (2011) (amending Leahy to change the term evidence to information and editing some other terms, defining the "credible information" requirement, and requiring unit vetting when considering training an individual). This amendment attempted to correct a substantial problem with vetting for U.S. security assistance for training. *See* SERAFINO ET AL., *supra* note 34, at 8 (explaining the State Department's individual-level scrutiny for training assistance before the 2011 amendment); Pub. L. No. 112-74, § 7034(k), 125 Stat. 1216 (2011) (requiring that the entire unit be vetted, rather than just the individual, when individual training assistance is proposed). In 2014, Congress extended this solution to training assistance to apply to all assistance. *See* Pub. L. No. 113-76, § 7034(l), 128 Stat. 515 (2014) (modifying Leahy to ensure that the entire unit is vetted even if the security assistance is targeted at an individual).

¹²⁹ *See, e.g.*, Letter to Secretary Kerry, *supra* note 127 (calling on Secretary Kerry to "fully enforce the Leahy Law" in Honduras); Letter to Secretary Clinton, *supra* note 127 (advocating for a vigorous enforcement of Leahy in Honduras); Letter from Representative McCollum, *supra* note 87 (requesting that the State Department investigate whether Leahy was being enforced properly with respect to Israel); Richter, *supra* note 127 (reporting that Senator Leahy would block \$650 million in security assistance to Egypt due to human rights concerns); Smith, *supra* note 127 (recognizing that Senator Leahy vigorously advocates for full and consistent Leahy enforcement).

¹³⁰ *See infra* Part IV (arguing that Leahy's inherent limitations require a statutory remedy that would allow for third party Leahy enforcement via a private cause of action).

¹³¹ *See* SERAFINO ET AL., *supra* note 34, at 3-4 (describing the original Leahy legislation and subsequent amendments). Leahy was originally a rider on the annual Foreign Operations Appropriations funding measure and, therefore, applied only to security assistance provided by the State Department and required affirmative congressional action to annually renew the measure. *See* Pub. L. No. 105-118, § 507, 111 Stat. 2386 (1997) (imposing human rights restrictions on U.S. security assistance but applying only to funds appropriated in that legislation); *see also* SERAFINO ET AL., *supra* note 34, at 3 (recognizing that the original Leahy measure was limited in scope). Congress subsequently codified the Foreign Operations

organizations raised concerns that the State Department was releasing security assistance to tainted units by vetting only the individual troops within the unit that would receive assistance, such as training.¹³² In response, Congress took statutory action to reverse the State Department's interpretation that an individual could be considered a unit.¹³³ This statutory reform closed a loophole exploited by the State Department, but failed to address the underlying problem: depending exclusively on the State Department, with its inherent conflict of interest, for Leahy enforcement.¹³⁴ Recognizing the inherent problems independent State Department enforcement presents and the failure of statutory amendments aimed at perfecting Leahy's language to ensure robust State

Appropriations version of the measure and incorporated a similar measure into the Defense Department Appropriations legislation. See § 2378d (codifying Leahy's Foreign Operations Appropriations version in the U.S. Code); Pub. L. No. 105-262, § 8130, 112 Stat. 2279 (1998) (containing the Leahy provision applicable to security assistance provided through the Defense Department Appropriations legislation). Leahy was amended in 2011 to remedy a loophole employed by the State Department to avoid vetting an entire unit when proposing training for an individual, as well as some other modifications. See Pub. L. No. 112-74, § 7034(k), 125 Stat. 1216 (2011) (altering Leahy to ensure units are vetted when training for an individual is proposed, redefine some terms, and add a reporting mechanism); SERAFINO ET AL., *supra* note 34, at 8 (detailing the State Department's individual-level scrutiny for training assistance before the 2011 amendment and the amendment's impact). In 2014, Congress amended Leahy to ensure that units, rather than individuals, were being vetted for all assistance. See Pub. L. No. 113-76, § 7034(l), 128 Stat. 515 (2014) (amending Leahy to require unit-level vetting even if the security assistance is targeted at an individual).

¹³² See, e.g., HUMAN RIGHTS WATCH, *supra* note 37, at 95 (explaining that the U.S. Ambassador to Colombia and the Colombian military sought to transfer two officers allegedly responsible for human rights abuses out of a unit to circumvent Leahy); see also Tenorio Miller, *supra* note 12, at 672 (citing a 1999 State Department cable indicating that if an individual is to be trained, then the individual, not the unit, should be vetted).

¹³³ See Pub. L. No. 112-74, § 7034(k), 125 Stat. 1216 (2011) (changing the State Department's narrow interpretation by stating that "when vetting an individual for eligibility to receive United States training the individual's unit is also vetted"). In 2014, Congress acted again to ensure that this broader interpretation of unit would not be limited to the training context. See Pub. L. No. 113-76, § 7034(l), 128 Stat. 515 (2014) (extending the requirement that a unit be vetted for any U.S. security assistance). Leahy now states that "when an individual is designated to receive United States training, equipment, or other types of assistance, the individual's unit is vetted as well as the individual." 22 U.S.C. § 2378d(d)(5).

¹³⁴ See SERAFINO ET AL., *supra* note 34, at n.24 (quoting a Senate Appropriations Committee report accompanying the 2011 amendment that criticized the State Department's interpretation of a unit as an individual). The Senate Appropriations Committee had harsh words for the State Department and its narrow interpretation of the unit as an individual in certain circumstances, saying it was "contrary to the letter and intent of the law and has limited its effectiveness." S. REP. NO. 112-85, at 15 (2011). The Committee further reprimanded the State Department, saying it "expects the [State] Department to implement the law faithfully and effectively." *Id.*

Department enforcement, Congress, and Senator Leahy specifically, has taken on an unusually active oversight role.¹³⁵

If Senator Leahy believed the State Department could be trusted to effectively enforce Leahy, then his vigorous oversight of the State Department's Leahy enforcement would be unnecessary.¹³⁶ However, Senator Leahy, who wields significant power over the State Department's budget and foreign assistance generally, has taken advantage of his unique position to pressure the State Department.¹³⁷ He has served as either the chairman or the ranking member of the Senate Appropriations Subcommittee on State, Foreign Operations, and Related Programs for over twenty years, a position that allows him to unilaterally cut off portions of foreign assistance.¹³⁸ Lax Leahy enforcement by the State Department requires substantial oversight by Senator Leahy, even forcing him to freeze foreign assistance to security forces that appear to be running afoul of Leahy.¹³⁹

¹³⁵ See Ham, *supra* note 19 (recounting a quote by Senator Leahy stating that Leahy is not an easy law to apply, at least in part due to the national security interests at stake). On numerous occasions, members of Congress have sent letters to the Secretary of State, alerting the State Department to allegations of gross violations of human rights committed by units of foreign security forces, calling on the State Department to enforce Leahy and prohibit such units from receiving U.S. security assistance. See, e.g., Letter to Secretary Kerry, *supra* note 127 (outlining human rights abuses by units of the Honduran security forces and requesting that the State Department "fully enforce the Leahy Law"); Letter to Secretary Clinton, *supra* note 127 (calling on the State Department to vigorously enforce Leahy in Honduras); Letter from Representative McCollum, *supra* note 87 (appealing to the State Department to review whether Leahy was being properly enforced with respect to security assistance to the Israeli defense force).

¹³⁶ See Smith, *supra* note 127 (quoting Senator Leahy's spokesperson, David Carle, as stating that Senator Leahy vigorously advocates for full and consistent Leahy enforcement). While Senator Leahy's general human rights advocacy and his responsibility for other human rights measures has contributed to his unilateral suspension of security assistance, his desire to ensure Leahy is rigorously enforced is a driving force behind many of his efforts. See, e.g., Comment of Senator Leahy, *supra* note 127 (describing the Mexican military's dismal human rights record and stating that "no one in Congress has worked harder than I have to keep our aid to Mexico from going to those who commit such crimes. I will continue to do that").

¹³⁷ See STATE, FOREIGN OPERATIONS, AND RELATED PROGRAMS, *Jurisdiction*, <http://www.appropriations.senate.gov/subcommittees/state-foreign-operations-and-related-programs> [<https://perma.cc/ZN65-GPAU>] (highlighting the programs subject to the Subcommittee's jurisdiction).

¹³⁸ See SENATOR PATRICK LEAHY, *Foreign Assistance*, <https://www.leahy.senate.gov/issues/foreign-assistance> [<https://perma.cc/3NT3-FTGQ>] (explaining that Senator Leahy has been the Chair or Ranking Member of the Senate Appropriations Subcommittee on State, Foreign Operations, and Related Programs for more than two decades).

¹³⁹ See Richter, *supra* note 127 (detailing Senator Leahy's Senate floor speech in which he announced he would block \$650 million in security assistance to Egypt due to human rights concerns); Smith, *supra* note 127 (quoting Senator Leahy's spokesperson, David Carle, as saying "the State Department is responsible for [Leahy] evaluations and enforcement

Senator Leahy's actions are laudable and unsurprising given his long history advocating for human rights and his desire to see his legislation enforced; however, this approach is not a long-term solution to Leahy's enforcement problems.¹⁴⁰ First, Senator Leahy has only frozen assistance in extreme cases, and in other cases, security assistance has continued in an apparent violation of Leahy.¹⁴¹ Second, a single Senator, no matter how influential and steadfast, cannot be depended on to single-handedly guarantee Leahy enforcement oversight.¹⁴² However, allowing human

decisions and over the years Senator Leahy has pressed for faithful and consistent application of the law"); Markey, *supra* note 127 (recounting that Senator Leahy suspended \$55.2 million in security assistance destined for Colombian human rights concerns); *Comment of Senator Leahy*, *supra* note 127 (clarifying that the State Department is responsible for enforcing Leahy and that Senator Leahy "hopes and expects that they will"). The Senator's statement said: "the Mexican Army and police have a long history of violating human rights with impunity, and no one in Congress has worked harder than I have to keep our aid to Mexico from going to those who commit such crimes. I will continue to do that." *Id.*

¹⁴⁰ See, e.g., *Eclipse Award*, CTR. FOR VICTIMS OF TORTURE (June 2015), <http://www.cvt.org/sites/cvt.org/files/attachments/u11/downloads/Eclipse%20Award%20Recipients%202015.pdf> [<https://perma.cc/4ZWJ-QKDB>] (highlighting a selection of Senator Leahy's numerous human rights achievements). Senator Leahy is up for re-election in 2016 and, even if he wins the election and returns to Washington, he is closer to the end of his career than the beginning. See Alexander Bolton, *2016 Retirements Could Complicate Dems' Comeback Plans*, HILL (Nov. 28, 2014), <http://thehill.com/homenews/campaign/225488-2016-retirements-could-complicate-dems-comeback-plans> [<https://perma.cc/FJX3-WASL>] (noting that Senator Leahy is up for re-election in 2016); SENATOR PATRICK LEAHY, *Biography*, <http://www.leahy.senate.gov/about> [<https://perma.cc/QF2U-ZE4V>] [hereinafter *Senator Leahy Biography*] (relating that Senator Leahy is seventy-six years old and has served in the Senate for forty-two years). While there are other members of Congress that strongly advocate for human rights, it is unusual to have such a senior member of Congress remain in a key leadership position on the sub-committee that holds the purse strings on foreign aid for over two decades and be willing to expend significant political capital by unilaterally suspending foreign aid on human rights grounds. See, e.g., Congressman Jim McGovern, *Human Rights*, <http://mcgovern.house.gov/issues/human-rights> [<https://perma.cc/W7JQ-S2MA>] (describing Congressman Jim McGovern as "one of the foremost voices for human rights in Congress").

¹⁴¹ Compare Markey, *supra* note 127 (stating that Senator Leahy suspended \$55.2 million in security assistance destined for Colombia due to human rights concerns), with AMNESTY INTERNATIONAL, *supra* note 9, at 6-11 (citing cases in which units of the Colombian security forces were credibly accused of a gross human rights violation, yet security assistance was provided to the unit despite the allegation); FELLOWSHIP OF RECONCILIATION & U.S. OFFICE ON COLOMBIA, *supra* note 73, at 36 (recognizing Leahy failed to halt U.S. security assistance to abusive troops); TATE, *supra* note 12, at 266 (explaining that human rights groups believed Leahy was not being fully enforced in Colombia, even though several Colombian battalions saw U.S. security assistance suspended due to Leahy; human rights groups insisted that Leahy was "not being fully implemented"); Tenorio Miller, *supra* note 12, at 685 (arguing that human rights data suggested Leahy was nearly a categorical failure in Colombia); Goodman, *supra* note 73 (publishing Human Rights Watch's call for a partial suspension of U.S. security assistance to Colombia over the Colombian military's role in civilian killings).

¹⁴² See Bolton, *supra* note 140 (reporting that Senator Leahy is one of the most senior members of the Senate and is up for re-election in 2016). Senator Leahy was elected to the

rights victims themselves, a singularly motivated group, to challenge uneven State Department enforcement in U.S. federal court could effectively remedy Leahy's intractable enforcement problems.¹⁴³ Recognizing the limitations of perfecting the legislative language to ensure enforcement and congressional oversight of executive branch enforcement of human rights restrictions on foreign security assistance, determined individuals and victims of human rights abuses have turned to the courts to enjoin enforcement.¹⁴⁴

C. Judicial Enforcement of Leahy

An analysis of relevant case law indicates that, absent congressional action to create a private cause of action for enforcement, judicial enforcement of human rights conditions on foreign military assistance is improbable.¹⁴⁵ A Central District of California case and other analogous cases demonstrate that the political question doctrine and a potential plaintiff's lack of standing render Leahy judicially unenforceable at this time, suggesting the need for a statutory remedy.¹⁴⁶

Senate in 1974 and is seventy-five years old; at some point he will leave the Senate. See *Senator Leahy Biography*, *supra* note 140 (providing biographical information on Senator Leahy, including his age).

¹⁴³ See *supra* Part IV (arguing that a private cause of action to enforce Leahy is a feasible and effective solution to the uneven enforcement of Leahy under the exclusive control of the State Department).

¹⁴⁴ See *supra* Part II.C (describing efforts of judicial enforcement of human rights restrictions on U.S. security assistance).

¹⁴⁵ See Tenorio Miller, *supra* note 12, at 694 (concluding that it would be virtually impossible to successfully sue to enforce Leahy after analyzing the possibilities for judicial enforcement of Leahy).

¹⁴⁶ See, e.g., *Dep't of the Navy v. Egan*, 484 U.S. 518, 529-30 (1988) (acknowledging courts must show utmost deference to the executive branch in the areas of national security, foreign policy, and military affairs because they are the province and responsibility of the executive branch); *United States v. Richardson*, 418 U.S. 166, 170 (1974) (determining that the claimant in a suit challenging the CIA's financial reporting); *Arar v. Ashcroft*, 585 F.3d 559, 575 (2d Cir. 2009) (recognizing that courts must treat executive action on foreign policy, military affairs, and national security matters with deference); *Crockett v. Reagan*, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983) (upholding the District Court's dismissal of a suit by members of Congress to enjoin security assistance to El Salvador, holding that the claim was barred by the political question doctrine); *Abusharar v. Hagel*, 77 F. Supp. 3d 1005, 1006 (C.D. Cal. 2014) (granting a motion to dismiss a suit brought under Leahy in which the plaintiff sought a suspension of U.S. security assistance to the Israeli defense forces).

Even if, *arguendo*, the political question doctrine, standing, and sovereign immunity were not barriers to judicial relief, the *Chevron* doctrine would be an obstacle to most Leahy suits. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (articulating the *Chevron* doctrine of judicial deference to an agency determination). In most suits seeking to enforce human rights conditions on military assistance, a plaintiff sues for an injunction against aid to an abusive foreign military force. See, e.g., *Crockett*, 720 F.2d at 1356 (outlining the plaintiffs' claims, including their request for an injunction against further

Absent congressional action specifically authorizing a private cause of action to enforce Leahy, the political question doctrine would stymie any Leahy challenge.¹⁴⁷ Courts are exceedingly deferential to the executive branch regarding issues of national security, foreign policy, and military affairs, all of which are implicated by Leahy.¹⁴⁸ In *Abusharar v. Hagel*, the court declared that Leahy enforcement was a “quintessential political question” and held that “the decision to provide military support to a foreign nation” is not subject to the jurisdiction of the court.¹⁴⁹ The

security assistance to El Salvador). If such a suit were brought under Leahy and it was not dismissed due to the political question doctrine or a lack of standing, the court would examine the case on the merits. See *Abusharar*, 77 F. Supp. 3d at 1007 (dismissing a suit under Leahy due to lack of standing and the political question doctrine). Under Leahy, the focus of the inquiry would be on whether the State Department properly vetted the unit in question and whether the individuals in the unit were properly vetted. See SERAFINO ET AL., *supra* note 34, at 7-10 (recounting the importance of the vetting process in Leahy enforcement). However, Congress did not directly address the vetting process in the statute. See 22 U.S.C. § 2378d(d)(5) (2012) (mentioning only that an individual’s unit must be vetted even when only the individual is to receive security assistance). The vetting process was delegated to the State Department. See SERAFINO ET AL., *supra* note 34, at 9 (detailing that, while vetting is a multi-stage process with input from various agencies, it is led by the State Department). Under *Chevron*, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron U.S.A., Inc.*, 467 U.S. at 837. Thus, even a suit on the merits that survived a motion to dismiss would be unlikely to survive summary judgment under *Chevron*. See SERAFINO ET AL., *supra* note 34, at 7 (recognizing that the State Department has developed the vetting policy as it is not described in the statute).

¹⁴⁷ See, e.g., *Abusharar*, 77 F. Supp. 3d at 1006-07 (dismissing a suit to enjoin Leahy enforcement on political question grounds, among others). The Supreme Court has consistently held that a case “involves a political question . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.” *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (internal quotation marks omitted). The political question doctrine was first articulated in *Marbury v. Madison*. See *Marbury v. Madison*, 5 U.S. 137, 166 (1803) (holding that the President has “important political powers” that he is to exercise at this own discretion and, thus, “is accountable only to his country in his political character, and to his own conscience”); see also *Baxter*, *supra* note 79, at 826 (recognizing that the political question doctrine is “a mechanism by which a court declines to hear a case that deals with issues more properly belonging before one of the ‘political’ branches of government”). *Baker v. Carr* provided the modern political question doctrine test. 369 U.S. 186, 217 (1962).

¹⁴⁸ See, e.g., *Dep’t of the Navy*, 484 U.S. at 529 (concluding that the courts should show the “utmost deference” to the executive branch on matters implicating national security, foreign policy, and military affairs because they are the province and responsibility of the executive branch); *Arar*, 585 F.3d at 575 (explaining that the Supreme Court counseled lower courts to refrain from intruding into matters constitutionally delegated to the executive branch, such as national security and foreign affairs). Leahy enforcement implicates all three of the issues cited by the Court as requiring the utmost deference: national security, foreign policy, and military affairs. See SERAFINO ET AL., *supra* note 34, at 1 (noting that Leahy implicates important national interests).

¹⁴⁹ 77 F. Supp. 3d at 1006.

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predictable result in *Abusharar* would be the outcome in any judicial action to enforce Leahy; absent congressional action to expressly authorize judicial action, Leahy enforcement in U.S. courts is foreclosed by the political question doctrine.¹⁵⁰

Without a congressionally authorized private cause of action, any suit by a plaintiff seeking judicial enforcement of Leahy would be dismissed due to a lack of standing.¹⁵¹ For a plaintiff to have standing to sue for enforcement of Leahy, she would bear the burden of demonstrating that she has a “personal stake” in an existing controversy.¹⁵² A Leahy plaintiff must show that she “has suffered an injury in fact that is caused by the conduct complained of and that will be redressed by a favorable decision”; however, today a court would find that a Leahy claim is simply a general harm that could be better redressed by a coordinate branch of government.¹⁵³ A Leahy claimant cannot show that the threat of future harm is “sufficiently real and immediate to show an existing controversy” because the risk of repetition is extraordinarily remote.¹⁵⁴ Of particular importance for a Leahy claimant, the Supreme Court has held that “past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any

¹⁵⁰ See, e.g., *Dep’t of the Navy*, 484 U.S. at 529 (acknowledging that national security, foreign policy, and military affairs are the province and responsibility of the executive branch; therefore, the courts show the “utmost deference” to the executive branch in these areas); *Arar*, 585 F.3d at 575 (recognizing that courts must hesitate to adjudicate cases that deal with foreign policy, military affairs, or national security, absent congressional authorization); *Crockett*, 720 F.2d at 1355 (affirming the district court’s dismissal of a suit to enjoin security assistance on political question doctrine grounds); *Abusharar*, 77 F. Supp. 3d at 1006–07 (dismissing a suit brought under Leahy to enjoin military assistance to Israel due to the political question doctrine).

¹⁵¹ See, e.g., *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975) (demanding a plaintiff assert her own legal rights, and not simply those of public interest that other branches of government are better positioned to resolve, to establish standing); *Abusharar*, 77 F. Supp. 3d at 1007 (determining that the plaintiff, a Palestinian-American lawyer bringing suit under Leahy in federal court to enjoin further U.S. security assistance to the Israeli defense force, lacked standing).

¹⁵² *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011); see *Warth*, 422 U.S. at 499–500 (requiring a plaintiff assert legal rights rather than general interests better resolved by other branches of government).

¹⁵³ *Camreta*, 131 S. Ct. at 2028; see *Abusharar*, 77 F. Supp. 3d at 1007 (granting a motion to dismiss because the plaintiff lacked standing to bring a suit to judicially enforce Leahy because he did not demonstrate injury in fact, causation, and redressability).

¹⁵⁴ *City of L.A. v. Lyons*, 461 U.S. 95, 103 (1983). The key to a suit to judicially enforce Leahy is the Court’s requirement that there be a threat of future harm, not just past harm. *Id.* Therefore, a Leahy claimant would have to show not just that they were somehow harmed by continued U.S. security assistance to the local military, but that such an injury was likely to repeat in the future. See *Abusharar*, 77 F. Supp. 3d at 1007 (holding that the plaintiff must show injury in fact, causation, and redressability).

continuing, present adverse effects.”¹⁵⁵ A compelling Leahy plaintiff may persuasively allege past harm, but demonstrating a real and immediate threat of future harm due to a failure to enforce Leahy would be exceedingly difficult.¹⁵⁶

Abusharar, the only attempt at judicial enforcement of Leahy, demonstrates what would likely be the result of any other judicial enforcement efforts; virtually any conceivable Leahy plaintiff would lack standing before the court to challenge the statute.¹⁵⁷ Due to the inherent difficulty with establishing standing in a Leahy enforcement action, it is unsurprising that the court found *Abusharar* lacked standing in his case.¹⁵⁸ In *Abusharar*, the only case on point, the plaintiff attempted to establish standing by alleging an injury caused by the continued provision of United States-supplied weapons to the Israeli defense force despite credible allegations of gross violations of human rights.¹⁵⁹ However, the court dismissed *Abusharar*’s suit for an injunction against military aid to Israel, simply stating that he failed to demonstrate injury in fact, causation, and redressability.¹⁶⁰ Establishing standing presents a nearly

¹⁵⁵ *Lyons*, 461 U.S. at 103.

¹⁵⁶ See *Abusharar*, 77 F. Supp. 3d at 1007 (granting a motion to dismiss a claimant’s attempt to judicially enforce Leahy because the claimant failed to demonstrate injury in fact, causation, and redressability, and, therefore, failed to establish standing).

¹⁵⁷ See *id.* (dismissing a suit to judicially enforce Leahy because the claimant failed to establish standing by demonstrating injury in fact, causation, and redressability); *United States v. Richardson*, 418 U.S. 166, 171 (1974) (finding that the plaintiff failed to establish standing to maintain a suit challenging the constitutionality of the CIA’s financial reporting). A plaintiff that could even theoretically establish standing would likely be a foreign national living in a war zone targeted by United States military assistance; however, a suit by a foreign national would be barred by sovereign immunity. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) (“It would make a mockery of the doctrine of sovereign immunity if federal courts were authorized to sanction or enjoin . . . actions that are, concededly and as a jurisdictional necessity, official actions of the United States.”).

¹⁵⁸ See *Abusharar*, 77 F. Supp. 3d at 1006 (holding that the plaintiff failed to state a claim on which relief could be granted because he lacked standing). *Abusharar*’s outcome was predictable given the court’s approach in other similar cases. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975) (requiring that a plaintiff assert her own legal rights, and not simply those of public interest that other branches of government are better positioned to resolve, to establish standing).

¹⁵⁹ *Abusharar*, 77 F. Supp. 3d at 1006. In many ways, *Abusharar* was a uniquely positioned Leahy claimant; he was a Palestinian-American living in California and thus presumably paying federal taxes that were being used to fund foreign security forces. *Id.* Yet he had a home and family in the Gaza Strip. *Id.* Furthermore, he had allegedly suffered an injury due to the actions of a foreign security force that was funded by U.S. security assistance. *Id.* *Abusharar* claimed that his Gaza Strip home had recently been destroyed in a bombing by the Israeli military and his father had died as a result of the Israeli siege of Gaza. *Id.*

¹⁶⁰ *Abusharar*, 77 F. Supp. 3d at 1006. Without a private cause of action to enforce Leahy, this result was predictable and likely the reason *Abusharar* is the only case on point. See *infra*

insurmountable obstacle to obtaining judicial relief under Leahy without a clear indication from Congress authorizing private actions to enforce Leahy.¹⁶¹ However, just as with the political question doctrine, congressional action to create a private cause of action to enforce Leahy in U.S. courts would eliminate the standing problem for potential claimants.¹⁶²

IV. CONTRIBUTION

Leahy's purpose, the ad-hoc nature of congressional oversight, and the lack of available judicial review requires congressional action to remedy the statutory deficiencies described in this Note. A private cause of action would eliminate the judicial barriers to Leahy enforcement in federal courts and democratize Leahy enforcement by allowing victims to enjoin further security assistance to the perpetrators who committed the violations until effective steps are taken to punish them.¹⁶³ Such a cause of action should be enacted as part of the TVPA because it would complement and enhance the remedy provided by the TVPA to the victims of human rights abuses. The cause of action would also further the goals of Leahy by providing a backstop to ensure that no security assistance is provided to human rights abusers even when the State

Part IV (proposing a private cause of action to enforce Leahy as a solution to the obstacles to judicial enforcement).

¹⁶¹ See *Abusharar*, 77 F. Supp. 3d at 1006 (holding that the plaintiff lacked standing to maintain a suit to judicially enforce Leahy); see also *infra* Part IV (positing that a private cause of action to enforce Leahy would eliminate the obstacles to judicial enforcement).

¹⁶² See *infra* Part IV (analyzing the impact of a congressionally created private cause of action to enforce Leahy and its impact on current obstacles to judicial enforcement, standing, and the political question doctrine).

¹⁶³ See *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (accepting that review of national security and foreign affairs is justiciable, despite deference to the executive branch's constitutional authority in these areas, when Congress has specifically authorized judicial review). Today a court would undoubtedly dismiss a Leahy enforcement action, as the Central District of California court did in *Abusharar*. See 77 F. Supp. 3d at 1006 (dismissing a suit to enjoin military assistance to Israel due to lack of standing and the political question doctrine). However, express congressional authorization of such an action by amending the TVPA to incorporate a private cause of action to enforce Leahy would satisfy the Court's requirement of congressional authorization of judicial review of matters typically subject to the political question doctrine. See *Dep't of the Navy*, 484 U.S. at 530 (indicating that when Congress specifically authorizes judicial review, national security, foreign policy, and military affairs may be subject to judicial review); *Arar v. Ashcroft*, 585 F.3d 559, 575 (2d Cir. 2009) (recognizing that judicial barriers to judicial review of foreign policy and national security matters are eliminated by congressional authorization of judicial review). The standing problems presented by a Leahy enforcement action are similarly remedied by congressional action to create an express cause of action. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (accepting that "Congress may grant an express right of action to persons who would otherwise be barred by prudential standing rules").

Department declines to enforce Leahy due to a conflict of interest with the national security or foreign policy priorities.¹⁶⁴ Congress should enact a private cause of action to enforce Leahy as an amendment to the TVPA to underscore that the measure is a complement to the remedies currently available to human rights victims under U.S. law.

This Note proposes a simple, yet powerful, amendment to the TVPA to create a private cause of action to enjoin the State Department to enforce Leahy that would significantly enhance the statute's effectiveness. This amendment complements the existing private cause of action already available under the TVPA while adding a powerful tool for human rights victims to further the goals of Leahy: barring U.S. security assistance to human rights abusers and promoting accountability for human rights abuses. First, Part IV.A proposes an amendment to the TVPA to incorporate a private cause of action to enforce Leahy.¹⁶⁵ Next, Part IV.B provides commentary on the proposed amendment and addresses possible counterarguments.¹⁶⁶

A. *Proposed Amendment to 28 U.S.C. § 1350 Note (Torture Victim Protection)*

The TVPA created a private cause of action to seek damages to redress certain human rights abuses abroad; adding a private cause of action to enjoin the State Department to enforce Leahy would be a logical expansion of the statute.

SEC. 2. ESTABLISHMENT OF CIVIL ACTION

(a) LIABILITY.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) EXHAUSTION OF REMEDIES.—A court shall decline to hear a claim under this section if the claimant has not

¹⁶⁴ See Rice, *supra* note 117 (recognizing that the U.S. government advocates for human rights, but human rights advocacy will bow to national security interests when the two clash).

¹⁶⁵ See *infra* Part IV.A (proposing an amendment to 28 U.S.C. § 1350 note (2012)).

¹⁶⁶ See *infra* Part IV.B (addressing the counterarguments to this Note's proposed amendment).

exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

(d) ENJOINING SECURITY ASSISTANCE IN VIOLATION OF THE LEAHY LAW.—*An individual who is the victim of a gross violation of human rights committed by a unit of the security forces of a foreign country that is under consideration for assistance under the Foreign Assistance Act or the Arms Export Control Act may bring a suit in equity to enforce 22 U.S.C. § 2378d (2012).*¹⁶⁷

B. Commentary

Leahy's most significant shortcoming, uneven enforcement, could be remedied through a simple, yet powerful, statutory cure: a private cause of action to enforce Leahy. Leahy has prevented security assistance from reaching abusive units of the security forces and spurred accountability for human rights abuses in Indonesia, Honduras, Guatemala, Colombia, Bangladesh, and Nigeria.¹⁶⁸ However, in some of these same countries, Leahy was unable to bar security assistance to units of the security forces allegedly responsible for gross violations of human rights.¹⁶⁹ Leahy is a relatively new statute, and Congress has recognized the need to perfect it and has been willing to do so.¹⁷⁰ Expanding the power to enforce Leahy

¹⁶⁷ The proposed legislation would be passed as an amendment to the TVPA. 28 U.S.C. § 1350 note (2012). The TVPA currently has three sections; however, § 1 provides the title of the statute and § 3 provides statutory definitions. *Id.* The proposed amendment would be enacted at the end of the current § 2. The regular portion of the text comes from 28 U.S.C. § 1350 note (2012). The italicized portion of the text represents the additions made by the author.

¹⁶⁸ See *supra* Part II.B (describing Leahy's successes in prohibiting the distribution of U.S. security assistance to foreign security forces with abusive human rights records and spurring accountability for human rights abuses).

¹⁶⁹ See *supra* Part II.B (discussing Leahy's enforcement failures).

¹⁷⁰ See § 2378d (representing Leahy in its current form). Leahy was first passed in 1997 and was substantially amended numerous times since then. See SERAFINO ET AL., *supra* note 34, at 3–4 (describing the original Leahy enactment and the subsequent amendments to the law). After initially appearing two decades ago as an amendment to the Foreign Operations Appropriations legislation and applying only to funds channeled through the State Department, Leahy has been annually added to the Defense Appropriations legislation, codified, and amended. See Pub. L. No. 113-76, § 7034(l), 128 Stat. 515 (2014) (amending Leahy to clarify terms and provide guidance on vetting); Pub. L. No. 112-74, § 7034(k), 125 Stat. 1216 (2011) (modifying Leahy to define the "credible information" requirement and requiring unit vetting when considering training an individual); Pub. L. No. 110-161, § 651,

beyond the State Department could serve to pressure the State Department toward more effective enforcement while also ensuring egregious enforcement failures can be remedied through the courts.

Critics may argue that subjecting the executive branch's foreign security assistance decisions to judicial review violates constitutional separations of powers and ties the hands of policymakers attempting to deal with national security threats. However, providing victims of human rights abuses the opportunity to challenge a State Department determination in federal court is a procedural, rather than substantive, change. Enhanced Leahy enforcement via judicial review would implicate national security no more than properly vigorous State Department enforcement. Thus, any criticism that Leahy's enforcement could undermine policymakers' ability to address national security must be addressed in the statutory scheme itself, rather than by attacking the enforcement mechanics. Thus far, such arguments have been unpersuasive to Congress.¹⁷¹ Moreover, creating a private cause of action to enjoin the State Department to enforce Leahy would provide for more uniform enforcement of Leahy without radically changing Congress's approach to human rights enforcement or subjecting foreign affairs determinations to judicial scrutiny.

First, Congress has already recognized the importance of a judicial remedy for the victims of human rights abuses committed abroad.¹⁷² The TVPA created a private cause of action for damages in U.S. courts for the victims of torture and extrajudicial killings committed abroad against foreign individuals.¹⁷³ The human rights abuses subject to claims under the TVPA, torture and extrajudicial killings, already closely mirror the violations subject to Leahy scrutiny.¹⁷⁴ Allowing a U.S. court that can

121 Stat. 2341 (2007) (codifying Leahy); Pub. L. No. 105-262, § 8130, 112 Stat. 2279 (1998) (containing a Leahy provision applicable to Defense Department appropriations).

¹⁷¹ See *Human Rights Vetting Hearing*, *supra* note 43, at 13-15 (statement of Lauren Ploch Blanchard, Specialist in African Affairs, Congressional Research Service) (noting the criticisms of Leahy restricting security assistance by executive branch officials, including officials from the Defense Department, and members of Congress).

¹⁷² See § 1350 note (2012) (establishing a private cause of action to redress human rights abuses, such as torture and extrajudicial executions, committed abroad); see also *supra* Part II.C (describing the TVPA's private cause of action providing a civil damages remedy to victims of human rights abuses abroad).

¹⁷³ See § 1350 note (creating a private cause of action for victims of human rights abuses); see also *supra* Part II.C (detailing the TVPA's private cause of action).

¹⁷⁴ Compare DEPARTMENT OF STATE, *supra* note 41, at 7 (providing a statutory definition for gross violation of human rights), with § 1350 note (defining torture and extrajudicial killing). Leahy does not include a definition of gross violation of human rights; therefore, the State Department applies § 2304's definition. DEPARTMENT OF STATE, *supra* note 41, at 7. Thus, a gross violation of human rights is "torture or cruel, inhuman, or degrading treatment or punishment[;] prolonged detention without charges and trial[;] causing the disappearance

award damages to a victim under TVPA to consider a suit to enjoin further security assistance to the security forces responsible for the violations if that assistance violated Leahy would provide a more complete remedy for the victim.

Second, a private action to enforce Leahy would not represent an undue interference in foreign affairs in violation of the political question doctrine. The Supreme Court has clarified that congressional authorization of judicial review of military and national security affairs eliminates the barriers generally erected to protect these areas of executive branch authority.¹⁷⁵ Therefore, if Congress creates a private cause of action to enforce Leahy, the political question doctrine should not present an obstacle, as Congress has authorized the court's consideration of the question.¹⁷⁶

V. CONCLUSION

Leahy has significantly outperformed its predecessor, § 2304, in withholding U.S. security assistance to human rights abusers. However, the State Department has failed to fully enforce Leahy. Enforcement gaps

of persons by the abduction and clandestine detention of those persons[;] other flagrant denial of the right to life, liberty, or the security of person (e.g. extrajudicial killing); [and] [p]olitically-motivated rape." DEPARTMENT OF STATE, *supra* note 41, at 7. The TVPA applies to extrajudicial killings and torture. § 1350 note. The Act defines an extrajudicial killing as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." § 1350 note. The Act defines torture as

[A]ny act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and mental pain or suffering [caused violence or the threat of violence].

Id.

¹⁷⁵ See *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (acknowledging that review of national security and foreign affairs is justiciable when Congress has specifically authorized judicial review); *Arar v. Ashcroft*, 585 F.3d 559, 575 (2d Cir. 2009) (clarifying that barriers to judicial review of foreign policy and national security matters, such as the political question doctrine, are eliminated by congressional authorization of judicial review).

¹⁷⁶ See *Dep't of the Navy*, 484 U.S. at 530 (holding that the traditional judicial deference to "the authority of the [e]xecutive [branch] in military and national security affairs" is not an obstacle to judicial review of these matters when "Congress specifically has provided otherwise"); *Arar*, 585 F.3d at 575 (recognizing that judicial review of foreign policy and national security matters is possible when Congress so authorizes).

have allowed foreign security forces accused of gross violations of human rights access to U.S. security assistance, including the Colombian brigade responsible for the San José de Apartadó massacre.

Amendments aimed at perfecting Leahy have provided measureable improvements in enforcement and aggressive congressional oversight has provided a corrective for enforcement gaps. However, amendments to Leahy's procedures cannot eliminate all risk of enforcement gaps and ad-hoc congressional oversight is not an effective solution. For victims of abusive security forces and taxpayers concerned with seeing lethal U.S. security assistance in the hands of abusive militaries, the stakes are simply too high to rely exclusively on the State Department for Leahy enforcement.

By incorporating a private cause of action to enforce Leahy to the remedies already available to human rights victims under the TVPA, Congress could empower victims and democratize Leahy oversight. Imagine the outcome if the victims of the San José de Apartadó massacre had been able to file suit in a U.S. court to enjoin U.S. security assistance to the Seventeenth Brigade. The power of a private cause of action in the hands of the victims may have spared the U.S. government the embarrassment of funding a Colombian army unit that brutally massacred eight civilians, including three children. More importantly, it could have pressured the Colombian government to more swiftly bring the perpetrators to justice. The amendment proposed herein would have opened the doors of federal courts to human rights victims to assist the government in barring U.S. security assistance to foreign forces responsible for gross human rights violations.

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