

Leahy Law: Congressional Failure, Executive Overreach, and the Consequences, The

Nathanael Tenorio Miller

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Recommended Citation

Miller, Nathanael Tenorio (2012) "Leahy Law: Congressional Failure, Executive Overreach, and the Consequences, The," *Cornell International Law Journal*: Vol. 45: Iss. 3, Article 4.

Available at: <http://scholarship.law.cornell.edu/cilj/vol45/iss3/4>

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The Leahy Law: Congressional Failure, Executive Overreach, and the Consequences

Nathanael Tenorio Miller†

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Introduction

In June of 2011, at around eleven o'clock at night, police in Kandahar City, Afghanistan arrested two twenty-three-year-old men.¹ Referred to as Najib and Ahmad, they worked at a restaurant and were accused of feeding the Taliban.² They were taken to police headquarters and transferred to the custody of men wearing the uniform of the Afghan Border Police (ABP).³ The policemen tied a scarf to Najib's handcuffs and hung him from the ceiling.⁴ The officers then began to beat him with a metal baton and a length of cable.⁵ After the beating, the police threw Ahmad and Najib into the back of an armored Humvee, where they spent the night in handcuffs.⁶

† Barring any shenanigans, Nathanael Tenorio Miller intends to receive a J.D. from Cornell Law School in 2013. He would like to thank the ILJ staff for being generally awesome; Professor Aziz F. Rana, Neal Christiansen, Nanay, Tatay, and Tita Laura for making it all the way through the piece and providing critiques, advice, and comments; all of the organizations and agencies that assisted with research; the phenomenally brave journalists and aid workers who track this stuff; the rest of his family for helping with the whole moral compass thing; and Zach, for providing a soundtrack. The Jimi Hendrix Experience is suggested companion listening.

1. Matthieu Aikins, *Our Man in Kandahar*, ATLANTIC (Nov. 2011), <http://www.theatlantic.com/magazine/print/2011/01/our-man-in-kandahar/8653/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

The next morning, the officers brought the two young men to the governor's palace, which the United States military and the ABP jointly guarded.⁷ Near the back of the palace was a room containing only a gas-powered generator.⁸ The police forced Najib to lie on his back as they attached wires to his toes.⁹ The police then asked Najib to "[t]ell [them] the truth" and then switched on the generator.¹⁰ After Najib passed out from the pain, the police repeated the process with Ahmad.¹¹

Later that evening, the officers brought Najib and Ahmad to see the commander of the Border Police, Abdul Raziq.¹² Najib and Ahmad explained to Raziq that they had merely been sending spare food from their restaurant home with young boys so that the boys could feed their families. Raziq then ordered Najib and Ahmad released.¹³

What happened to Najib and Ahmad was not an isolated incident, perpetrated by individual soldiers or commanders.¹⁴ Instead, it is a symptom of the wider failure of the Afghan government to address human rights abuses within their armed forces. Three months after Najib and Ahmad's arrest, Human Rights Watch released a report documenting killings, rapes, arbitrary detentions, abductions, forcible land grabs, and illegal raids by irregular armed groups and the Afghan Local Police (ALP).¹⁵

This incident also demonstrates the consequences of the United States' circumventing its own laws to permit the distribution of military aid and equipment to countries that violate their citizens' human rights. In many instances, units receiving aid from the United States are responsible for extra-judicial killings, torture, extortion, and rape.¹⁶ The failure of legislation to prevent military aid from flowing to foreign military units responsible for atrocities stems in part from a long-standing pattern in which increasingly broad Executive power pushes back against legislative attempts to limit Presidential authority in foreign policy decision-making.¹⁷ Often, Congress legislates a foreign policy position and the Executive works around the intent, if not always the letter, of the law. Because of subsequent congressional inaction, and a series of Supreme Court decisions effectively depriving any potential party of means to sue for enforcement of human rights legislation, the Executive remains in firm control.¹⁸ Without any independent check on its authority, the Executive's internal

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *See id.*

12. *Id.*

13. *Id.*

14. *See* HUMAN RIGHTS WATCH, "JUST DON'T CALL IT A MILITIA": IMPUNITY, MILITIAS, AND THE "AFGHAN LOCAL POLICE" 3 (2011).

15. *See generally id.*

16. *See id.* at 6.

17. *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255, 1258 (1988).

18. *See id.* at 1305.

controls are insufficient to prevent funding units that have committed human rights abuses.

This Executive control has very real consequences for people around the globe. For Fiscal Year (FY) 2012, the Obama Administration requested \$12.8 billion for military aid to Afghanistan.¹⁹ In addition to Afghanistan, in 2012 the United States plans to supply \$3 billion in Foreign Military Financing (FMF) to the government of Israel,²⁰ \$1.3 billion to Egypt,²¹ \$350 million to Pakistan,²² \$44 million to Colombia,²³ \$20 million to Indonesia,²⁴ and \$15 million to the Philippines.²⁵ All of these governments are accused of widespread human rights violations.²⁶ While it is certainly not true that all beneficiaries of U.S. military aid commit human rights violations, that distinction is likely lost on the civilians who suffer the consequences.

In 1997, Senator Patrick Leahy introduced two laws, known as the "Leahy Law" or the "Leahy Amendment," (the law), which he envisioned as "an essential tool for protecting human rights."²⁷ The Leahy Law places conditions on the dissemination of U.S. military aid to countries accused of human rights violations.²⁸ Though the U.S. Department of State has used the law to prevent some aid from being distributed to units in Colombia, Indonesia, and Pakistan,²⁹ this Note will show that the law's construction and inherent difficulties in policing military sales have rendered it almost completely ineffective in preventing the human rights violations it

19. See OFFICE OF THE SEC'Y OF DEF., DEP'T OF DEF. BUDGET FISCAL YEAR (FY) 2012, JUSTIFICATION FOR FY 2012 OVERSEAS CONTINGENCY OPERATIONS AFGHANISTAN SECURITY FORCES FUND (ASFF) 2 (2011).

20. See U.S. DEP'T OF STATE, 2 CONGRESSIONAL BUDGET JUSTIFICATION: FOREIGN OPERATIONS FISCAL YEAR 2012 454, tbl. (2011) [hereinafter U.S. DEP'T OF STATE].

21. See *id.*

22. See *id.* at 455, tbl.

23. See *id.*

24. See *id.* at 453, tbl.

25. See *id.*

26. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES COLOMBIA 1 (2011) [hereinafter HUMAN RIGHTS PRACTICES COLOMBIA]; BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES EGYPT 1 (2011); BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES INDONESIA 1 (2011); BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES ISRAEL 3 (2011); BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES PAKISTAN 1 (2011); BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES PHILIPPINES 1 (2011) [hereinafter HUMAN RIGHTS PRACTICES PHILIPPINES].

27. *Human Rights*, PATRICK LEAHY: U.S. SENATOR FOR VT., <http://www.leahy.senate.gov/issues/human-rights> (last visited July 19, 2012).

28. See Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d (2006); Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, 125 Stat. 38 (2011).

29. See Eric Schmitt & David E. Sanger, *Pakistani Troops Linked to Abuses Will Lose Aid*, N.Y. TIMES (Oct. 21, 2010), www.nytimes.com/2010/10/22/world/asia/22policy.html?

was introduced to combat. Instead, the law succeeds in only partly distancing the United States from its allies' human rights abuses.

This Note accepts as part of its premise that the goals of the Leahy Law—protecting people from human rights violations or, at the very least, disassociating the United States from those human rights violations elsewhere in the world—are valid. To illustrate how the Leahy Law fails to achieve its goal, this Note outlines the procedure and mechanisms for U.S. foreign military aid and the Leahy Law's enforcement mechanisms. Next, it details Afghanistan, the Philippines, and Colombia as examples of regimes whose militaries routinely commit human rights abuses as documented by the State Department and international non-governmental organizations (NGOs). It then outlines four factors that prevent the Leahy Law from succeeding in preventing human rights violations: the statutory distinction between the two laws; the narrow definition of "unit"; the difficulty in tracking aid; and the fact that arms, and to a lesser extent training, are fungible commodities. This Note places the failure to enforce the Leahy Law into a constitutional framework and on a continuum with other examples of Executive power pushing back against congressional regulation of foreign policy, a pushback described in a 1988 article by Harold Koh.³⁰ This Note concludes by suggesting that because judicial oversight and enforcement are unlikely, in order to be effective the law must be re-written to make larger segments of foreign militaries ineligible for funding or to categorically deny funding to countries whose militaries have been accused of human rights violations.

I. Background: Military Aid

The United States government distributes aid under a variety of auspices. In general, foreign military financing (FMF) is the single largest block of unclassified funding solely dedicated to military use appropriated through the State Department.³¹ FMF is used to finance foreign governments' purchase of U.S. military equipment and training; the Obama Administration requested over \$5.5 billion for FY 2012.³² Economic Support Funds (ESF), another aid mechanism, are grants designed to support economic stability.³³ They can be used for civilian purposes, but can also be used to offset military expenditures.³⁴ International Military Education and Training (IMET) funds are for the education of military personnel on a wide variety of topics from human rights to weapons systems.³⁵ Non-proliferation, Anti-Terrorism, De-mining and Related Activities (NADR)

30. See Koh, *supra* note 17, at 1258.

31. See U.S. DEP'T OF STATE, *supra* note 20, at 16.

32. See *id.*

33. Int'l Consortium of Investigative Journalists, *A Citizen's Guide to Understanding U.S. Foreign Military Aid*, CENTER PUB. INTEGRITY (Aug. 12, 2011, 4:17 PM), <http://www.iwatchnews.org/2007/05/22/5772/citizen-s-guide-understanding-us-foreign-military-aid>.

34. *Id.*

35. *Id.*

pays for de-mining, anti-terrorism, and nonproliferation training and assistance.³⁶ The United States provides anti-narcotics funding through the International Narcotics and Law Enforcement/Andean Counterdrug Initiative (INCLE). Peacekeeping Operations (PKO) pays for peacekeeping operations around the world.³⁷

In addition, Foreign Military Sales (FMS), which are sales from the United States government to a foreign government, and Direct Commercial Sales (DCS), which are overseas military sales by private U.S. companies,³⁸ also support foreign militaries. These funds are not appropriations, and therefore the Leahy Law does not cover them.³⁹

In order to comply with congressional oversight when appropriating foreign aid, the Administration makes annual requests to Congress for the Security Assistance budget.⁴⁰ The request, known as a Congressional Budget Justification (CBJ), itemizes expenditures by program and country.⁴¹ It is prepared by the Department of State in coordination with the Department of Defense's (DOD) Defense Security Cooperation Agency (DSCA).⁴² Congress then reviews and votes on the CBJ.⁴³

The U.S. intelligence community also administers classified programs.⁴⁴ It is possible that these programs distribute large amounts of military aid to governments and non-state actors, but because the budgets are classified there is no systematic way for the public to track the funds. Instead, oversight is limited to members of congressional intelligence committees.⁴⁵

II. Background: The Leahy Law

Subsections (a) and (b) of § 2378d of Title 22 of the United States Code state the following:

(a) In general. No assistance shall be furnished under this Act or the Arms Export Control Act to any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights.

(b) Exception. The prohibition in subsection (a) shall not apply if the Secretary determines and reports to the Committee on Foreign Relations of the

36. *Id.*

37. *See id.*

38. *See U.S. Arms Transfers: Government Data*, FED'N AM. SCIENTISTS, http://www.fas.org/programs/ssp/asmp/factsandfigures/government_data_index.html (last visited June 6, 2012).

39. *See* Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, § 8058(c) 125 Stat. 38 (2011); U.S. DEP'T OF STATE, *supra* note 20.

40. *Foreign Military Financing Program*, DEF. SEC. COOPERATION AGENCY, http://www.dsca.mil/home/foreign_military_financing_program.htm (last updated Nov. 15, 2010).

41. *See id.*

42. *Id.*

43. *Id.*

44. *See* Int'l Consortium of Investigative Journalists, *supra* note 33.

45. *Id.*

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 measures to bring the responsible members of the security forces unit to justice.⁴⁶

There is a corollary provision in the DOD Appropriations Act for 2011 that reads as follows:

(a) None of the funds made available by this Act may be 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, unless all necessary corrective steps have been taken.

(b) The Secretary of Defense, in consultation with the Secretary of State, shall ensure that prior to a decision to conduct any training program referred to in subsection (a), full consideration is given to all credible information available to the Department of State relating to human rights violations by foreign security forces.

(c) The Secretary of Defense, after consultation with the Secretary of State, may waive the prohibition in subsection (a) if he determines that such waiver is required by extraordinary circumstances.

(d) Not more than 15 days after the exercise of any waiver under subsection (c), the Secretary of Defense shall submit a report to the congressional defense committees describing the extraordinary circumstances, the purpose and duration of the training program, the United States forces and the foreign security forces involved in the training program, and the information relating to human rights violations that necessitates the waiver.⁴⁷

The Leahy Law applies to “foreign militaries, reserves, police, homeland security forces such as border guards or customs police, prison guards, and other units or individual members of units authorized to use force.”⁴⁸ The State Department and the DOD have debated how to define “unit.”⁴⁹ In a 1999 cable to all overseas embassies, the State Department defined the unit receiving training as the unit to be vetted.⁵⁰ Thus, if an individual is to be trained, that individual is to be vetted. If a platoon is to be trained, that platoon shall be vetted, rather than the brigade to which the platoon belongs. In the same cable, the State Department stated that “the vetting procedures should ascertain that no one against whom there are credible allegations of gross violations of human rights is currently assigned to the units in question.”⁵¹ However, in a GAO report, State Department officials did not believe that the vetting procedure required

46. Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d (2006).

47. Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, 125 Stat. 38 (2011).

48. U.S. Dep’t of State, *An Overview of the Leahy Vetting Process*, HUMANRIGHTS.GOV (May 14, 2012), <http://www.humanrights.gov/2011/10/06/an-overview-of-the-leahy-vetting-process/>.

49. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/NSIAD-99-173, *MILITARY TRAINING: MANAGEMENT AND OVERSIGHT OF JOINT COMBINED EXCHANGE TRAINING* 53 (1999).

50. *Id.*

51. *Id.* at 53-54.

screening every individual.⁵² After some discussion, the State Department determined that “vetting of every individual in a unit would be warranted if information received would merit a further review of the unit in question.”⁵³ Often investigators identify the sub-unit, which is generally a battalion or similarly sized unit.⁵⁴

The vetting process begins with the appropriate U.S. embassy running a preliminary search on the unit or individual that is slated to receive military aid, using Department of State Country Reports on Human Rights, U.S. government agency records including consular records and embassy files and databases, NGO human rights reports, and media articles.⁵⁵ Embassies may also choose to undertake checks with local police and government, as well as interview individual victims.⁵⁶ Once the investigation in the home country is complete, the State Department’s Bureau of Democracy, Human Rights, and Labor (DRL) in Washington, as well as regional bureaus, run further investigations.⁵⁷ If there is need for further review, the DRL can create a team to investigate the issue.⁵⁸

Derogatory information is reviewed case-by-case under a multi-factor totality of the circumstances test.⁵⁹ Credible evidence need not meet the same standard as admissible evidence in a U.S. court.⁶⁰ Among factors to be considered are the source, the details available, the applicability to the individual or unit, the circumstances in the relevant country, and the availability of corroborating information.⁶¹

Both appropriations bills also include a waiver provision.⁶² The Secretary of Defense may waive the Leahy Law contained in the Defense Appropriations Bill if there are “extraordinary circumstances,”⁶³ and the Secretary of State may waive the law if they find that the government of the recipient country is taking “effective measures” to bring the perpetrators of human rights violations to justice.⁶⁴ In 2005, Secretary of State Condoleezza Rice used a waiver to permit FMF to Indonesia.⁶⁵ In contrast to

52. *See id.*

53. Letter from Bert T. Edwards, Chief Fin. Officer, U.S. Dep’t of State, to Henry L. Hinton, Jr., Assistant Comptroller Gen., Nat’l Sec. & Int’l Affairs, U.S. Gen. Accounting Office (June 28, 1999), in U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 49, at 66.

54. Letter from Arturo A. Valenzuela, Assistant Sec’y of State, Bureau of W. Hemisphere Affairs, U.S. Dep’t of State (Jan. 26, 2011) (on file with author).

55. U.S. Dep’t of State, *supra* note 48.

56. *Id.*

57. *See id.*

58. *Id.*

59. *See id.*

60. *Id.*

61. *Id.*

62. *See* Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d (2006); Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, 125 Stat. 38 (2011).

63. Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 8058(c) 125 Stat. 38 (2011).

64. Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d (2012).

65. Charles “Ken” Comer, *Leahy in Indonesia: Damned if You Do (and Even if You Don’t)*, 37 ASIAN AFF.: AN AM. REV. 53, 60 (2010).

the techniques for avoiding the Leahy Law described below, there was significant political opposition to Indonesia's waiver.⁶⁶

III. The Effectiveness of the Leahy Law in Afghanistan

In early October of 2001, the United States invaded Afghanistan.⁶⁷ Several weeks later, Taliban soldiers fled Kabul.⁶⁸ Before the end of the year, the United States began the long process of developing, stabilizing, and strengthening the Afghan economic, social, and political environment.⁶⁹ Security in Afghanistan has remained elusive, with a United Nations report stating that between 2006 and 2010, 8,832 civilians were killed, with civilian deaths increasing each year.⁷⁰ As of mid-2012, 3,091 NATO soldiers had been killed.⁷¹

Between 2001 and 2010, Congress appropriated nearly \$52 billion for assistance to Afghanistan.⁷² Of this sum, 56% has gone to the Afghanistan Security Forces Fund (ASFF)—the account supporting the training and equipping of Afghan security forces, which the DOD monitors and controls.⁷³ In FY 2010, U.S. appropriations for Afghan aid were over \$14.6 billion.⁷⁴ About 63% of that was slated to go to security programs,⁷⁵ with over \$9 billion managed by the ASFF.⁷⁶ In the past two years that number has increased. For FY 2011, the ASFF outlay was \$11.2 billion and for FY 2012, the DOD has the authority to spend \$12.8 billion on the ASFF.⁷⁷ Prior to the establishment of the ASFF, FMF provided \$1 billion in military aid.⁷⁸

In contrast, the Department of State controls relatively few of the resources flowing from the United States to Afghanistan. In FY 2010, Afghanistan received approximately \$2.8 billion in aid from the Depart-

66. See Glenn Kessler, *Military Ties to Indonesia Resume Too Soon for Some*, WASH. POST (Nov. 23, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/22/AR2005112201751.html> (noting Senator Leahy's opposition to the waiver).

67. See, e.g., Patrick Wintour et al., *It's Time for War, Bush and Blair Tell Taliban*, OBSERVER (Oct. 7, 2001, 2:13 PM), <http://www.guardian.co.uk/world/2001/oct/07/politics.september11>.

68. See, e.g., David Rohde & Dexter Filkins, *A Nation Challenged: Combat; Taliban Withdrawing from Kabul as Rebels Move Toward Capital*, N.Y. TIMES (Nov. 13, 2001), <http://www.nytimes.com/2001/11/13/world/nation-challenged-combat-taliban-withdrawing-kabul-rebels-move-toward-capital.html?scp=9&sq=captured+kabul&st=nyt>.

69. See CURT TARNOFF, CONG. RESEARCH SERV., *AFGHANISTAN: U.S. FOREIGN ASSISTANCE* 2 (2010).

70. See U.N. ASSISTANCE MISSION IN AFG. & AFG. INDEP. HUMAN RIGHTS COMM'N, *AFGHANISTAN ANNUAL REPORT 2010: PROTECTION OF CIVILIANS IN ARMED CONFLICT* i (2011).

71. See *Coalition Military Fatalities By Year*, OPERATION ENDURING FREEDOM, <http://icasualties.org/oef/> (last visited July 18, 2012).

72. TARNOFF, *supra* note 69, at Summ.

73. See *id.* at 2.

74. *Id.* at 12, tbl.1.

75. *Id.* at 2.

76. OFFICE OF THE SEC'Y OF DEF., *supra* note 19, at 2.

77. *Id.*

78. TARNOFF, *supra* note 69, at 10.

ment of State;⁷⁹ in FY 2012, Afghanistan was slated to receive close to \$2 billion from the Department of State.⁸⁰ The large majority of the FY 2012 Department of State funds designated for Afghanistan, almost \$1.6 billion, were earmarked as Economic Support Funds.⁸¹

This aid does not always end up benefiting the Afghans. The United States is currently training and arming two organizations, the ALP and the ABP,⁸² both of which have been accused of human rights abuses.⁸³

General David Petraeus, then the commander of the International Security Assistance Force, introduced the ALP program as part of a wider strategy to lower NATO troop levels.⁸⁴ As of August 2011, the Afghan government had recruited 7,000 men into the ALP.⁸⁵ By 2012, the DOD expected to increase the ALP to 30,000 men.⁸⁶ The ALP does not have a mandate to investigate crimes or arrest suspects.⁸⁷ Instead, the ALP is designed to “secure local communities and prevent rural areas from infiltration of insurgent groups”⁸⁸ and “improve security and stability at the district and local level.”⁸⁹ A military official told the British *Guardian* newspaper that President Hamid Karzai had opposed the ALP program, but had it “forced down his throat like a foie gras goose.”⁹⁰

The closest Afghan word for militias is *arbakai*.⁹¹ For several decades, local armed groups have subjected Afghans to serious human rights abuses. These groups include the following: non-military, armed men working for tribal leaders; criminal gangs; ideologically driven insurgents; and private security companies. They have participated in murder, beatings, extortion, and rape.⁹² While the ALP program was created with the best of intentions, many Afghans find it difficult to distinguish the ALP from the *arbakai*.⁹³

This stems from various violent occurrences around Afghanistan involving the ALP. For example, in October 2010, an ALP member was

79. U.S. DEP'T OF STATE, *supra* note 20, at 440, tbl.2a.

80. *Id.* at 455, tbl.

81. U.S. DEP'T OF STATE, CONGRESSIONAL BUDGET JUSTIFICATION, FOREIGN ASSISTANCE SUMMARY TABLES FISCAL YEAR 2012 26, tbl.3 (2011).

82. See OFFICE OF THE SEC'Y OF DEF., *supra* note 19, at 72.

83. See HUMAN RIGHTS WATCH, *supra* note 14, at 3; Aikins, *supra* note 1.

84. See HUMAN RIGHTS WATCH, *supra* note 14, at 4; Jeremy Kelly, *US-Backed Afghan Militias Accused of Human Rights Abuses*, *GUARDIAN* (Sept. 12, 2011, 3:53 AM), <http://www.guardian.co.uk/world/2011/sep/12/us-backed-afghan-militias-abuses?INTCMP=SRCH> (discussing the introduction of the ALP).

85. HUMAN RIGHTS WATCH, *supra* note 14, at 4.

86. See OFFICE OF THE SEC'Y OF DEF., *supra* note 19, at 55.

87. See AFGHAN MINISTRY OF INTERIOR, ADVISOR GUIDE 1-7 (2011).

88. HUMAN RIGHTS WATCH, *supra* note 14, at 53 (citing Sayed Salahuddin, *Karzai Approves Plan for New Afghan Police Force*, *REUTERS* (July 15, 2010, 6:22 AM), <http://www.reuters.com/article/2010/07/15/us-afghanistan-force-idUSTRE66E18X20100715>).

89. OFFICE OF THE SEC'Y OF DEF., *supra* note 19, at 82.

90. Kelly, *supra* note 84.

91. HUMAN RIGHTS WATCH, *supra* note 14, at 1.

92. See *id.* at 2.

93. *Id.* at 3.

accused of murdering two men in Bakhtabad village.⁹⁴ During a raid in February of 2011, an ALP unit in Shindand stole belongings, beat residents, and illegally detained six men.⁹⁵ In June of 2011, the ALP detained and beat two boys.⁹⁶ One of the boys had nails hammered into his feet.⁹⁷ In Baghlan province, the U.S. military recruited local strongman Nur-ul Haq and his men into the ALP; in August of 2010, while on patrol with U.S. soldiers, Haq and his men unjustifiably killed a nine-year-old boy.⁹⁸ In April of 2011, four Baghlan ALP members kidnapped a thirteen-year-old boy, took him to the house of an ALP sub-commander, and gang-raped him.⁹⁹

Afghan authorities have been unable to prosecute the ALP members. In Baghlan, the police have been unable to even question ALP members because of their relationship with U.S. forces.¹⁰⁰ In Bakhtabad, the police told family members of one victim that they could do nothing due to United States' backing of the ALP. When the family went to the U.S. troops, the soldiers informed the family that it was an Afghan police matter.¹⁰¹ Situations like these have contributed to an impression amongst Afghans that ALP members can act with impunity.¹⁰² The district governor of Khanabad, Nizamuddin Nashir, said that he could do nothing to check the power of the *arbakai*. As he told Human Rights Watch, "[t]hey collect *ushr* [informal tax], take the daughters of people, they do things against the wives of the people, they take their horses, sheep, anything."¹⁰³

The ALP is managed by the Afghan Ministry of Interior and is under the authority of a given district's chief of police.¹⁰⁴ The chief of police oversees the ALP training, validation process, and member screening.¹⁰⁵ ALP members are nominated by the local council, known as *shura*, and vetted by the Afghan intelligence service.¹⁰⁶ Despite Afghan oversight, the United States trains and provides technical assistance to the ALP units.¹⁰⁷ For FY 2012, the DOD has requested \$25 million in order to arm the ALP with 20,000 AK-47s,¹⁰⁸ \$1.875 million for radios,¹⁰⁹ \$30 million for 1,200 pickup trucks,¹¹⁰ and \$5.2 million for compasses, binoculars, global posi-

94. *Id.* at 6.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *See id.* at 6.

101. *Id.*

102. *See id.*

103. *Id.* at 32.

104. DEP'T OF DEF., REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN AND UNITED STATES PLAN FOR SUSTAINING THE AFGHANISTAN NATIONAL SECURITY FORCES 62 (2011).

105. *Id.*

106. *Id.*

107. *Id.*

108. OFFICE OF THE SEC'Y OF DEF., *supra* note 19, at 59.

109. *Id.* at 60.

110. *Id.* at 57.

tioning systems, tow straps, jumper cables, weapons mounts, and other items for ALP sites.¹¹¹ This is in addition to the \$1 billion for armored vehicles,¹¹² \$62 million for ammunition,¹¹³ \$35 million for medical equipment,¹¹⁴ \$491 million for pay,¹¹⁵ and \$1.9 billion for sustainment¹¹⁶ that are shared between the various departments of the Afghan National Police (ANP), of which the ALP is a part. The U.S. military has also tasked a conventional U.S. Army infantry battalion, 1-16 Infantry, to rapidly expand the ALP program, despite the alleged human rights violations.¹¹⁷

The ALP is not the only division within the ANP that has been widely accused of committing human rights violations. The *Atlantic* has documented a series of human rights abuses thought to be committed by Afghan General Abdul Raziq, acting chief of police in Kandahar City and a commander of the ABP.¹¹⁸

The ABP mandate is to perform border control and customs functions up to fifty kilometers from the Afghan border, as well as control the entry and exit of individuals and vehicles at international airports.¹¹⁹ While it not fully funded by the ASFF in the same way the ALP is, the ABP enjoys a great deal of U.S. support.¹²⁰ For FY 2012, the DOD has requested over \$1.1 billion for the training of the ANP, including the ABP.¹²¹ In addition, two private military firms, DynCorp and Xe, formerly Blackwater, trained Raziq's men, whose salaries are paid through the Law and Order Trust Fund for Afghanistan, a UN-administered fund to which the United States is the largest contributor.¹²²

The *Atlantic* linked Raziq to a series of massacres. On March 20, 2006, sixteen men, including a smuggler named Shin Noorzai, were in Kabul when a friend of one of the men invited them to a house and promised them music and entertainment.¹²³ The sixteen men were then drugged, bound, gagged, and loaded into government vehicles, including a green Ford Ranger displaying the seal of the Border Police.¹²⁴ The men were then brought to Spin Boldak, where Abdul Raziq, then a Border Police colonel, was based.¹²⁵ The men were all shot at close range by men under Raziq's command.¹²⁶

111. *Id.* at 64.

112. *Id.* at 58.

113. *Id.* at 78.

114. *Id.* at 76.

115. *Id.* at 77.

116. *Id.* at 72.

117. See DEP'T OF DEF., *supra* note 104, at 63.

118. See Aikins, *supra* note 1.

119. AFGHAN MINISTRY OF INTERIOR, *supra* note 87, at 1-5.

120. See OFFICE OF THE SEC'Y OF DEF., *supra* note 19, at 65, 72 (reporting the financial support the United States provides the Afghan National Police).

121. *Id.* at 65.

122. Aikins, *supra* note 1.

123. *Id.*

124. *Id.*

125. *Id.*

126. Shin's tribe had been feuding with Raziq's tribe over smuggling routes, and Raziq held Shin responsible for the 2004 killing of Raziq's brother. The colonel loaded

The State Department was aware of this claim against Raziq. In its 2006 report on human rights in Afghanistan, the State Department described the incident:

In March Commander Abdul Razaq of Kandahar province was removed from his post for allegedly attacking 16 rivals under the pretext that they were Taliban militants. The 16 men were Pakistani citizens who had traveled to Afghanistan for Afghan New Year celebrations. They belonged to a clan in Pakistan that Razaq blamed for the death of his brother two years earlier.¹²⁷

Nor is this the only time that Raziq's actions have been in the State Department's reports on human rights. The 2010 report contained another similar claim:

[O]n February 6, Shamshad TV and Radio Azadi reported that Afghan Border Police mistakenly killed seven civilians who were collecting firewood near a checkpoint in the border town of Spin Boldak, Kandahar Province.

the men into a convoy and headed out to a deserted stretch of the Afghan-Pakistani border. There, Raziq and his men unloaded their captives and shot all sixteen at close range with automatic weapons. Shin was the target; the other fifteen were collateral damage.

Upon his return to Spin Boldak, Raziq reported that he had intercepted Taliban fighters trying to cross the border from Pakistan and that he and his men had killed at least fifteen Taliban in a gun battle. Raziq told the Associated Press, "We got a tip-off about them coming across the border. We went down there and fought them."

An Afghan official working for the European Union in Spin Boldak was suspicious. He called his supervisor, Michael Semple, who contacted a senior official at the Afghan Interior Ministry. The senior Afghani official was able to send a team from the Criminal Investigations Department (CID) to Spin Boldak.

The day after the killing, the CID team arrived in Spin Boldak and quickly discovered that the bodies were still at the border and that the story of the battle was untrue. The men's wounds were inflicted at close range, the victims were clumped together at the bottom of a gully, their wrists showed signs of having been bound, and their clothes were clean and new. One of the CID members said that when "we asked the local police what happened . . . they said that Abdul Raziq came in five or six vehicles, and then they heard firing." Raziq refused to meet with the CID team.

The CID team reported their findings upon their return. Major General Abdur Rahman, then the deputy director of the Border Police, led a larger investigation. Semple, deputy to Francesc Vendrell, the European Union (EU)'s special representative to Afghanistan, was briefed on the case. He said, "[t]hey documented the killings in such a way that would leave no reasonable person in doubt that these were summary executions carried out by the Border Police." Yet no prosecution was ever initiated. Rahman later gave an interview to an Afghan TV station where he supported Raziq's version of the story.

Vendrell raised the issue of the killings with President Karzai. Karzai implied that Raziq "was an essential ally against whom he [Karzai] was not prepared to take action, irrespective of the nature of the allegations or the evidence." Vendrell was shocked. One of his tasks was to ensure there were no gross violations of human rights. He reported the incident to his headquarters in Brussels, where it was passed on to all EU governments. *Id.*

127. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2006 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: AFGHANISTAN (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78868.htm>.

Reports stated that the police officials involved in the shooting were taken into custody for interrogation.¹²⁸

The United States' response to the accusations against Raziq has been to continue its support, even suggesting that the United States provide a team to help assist Raziq with public relations. A leaked cable from the embassy in Kabul outlined the plan:

SCR [United States Senior Civilian Representative] suggested that a team of experts from Regional Platform-South (RP-S) and RC-S [Regional Command-South] come to Spin Boldak to help craft a media plan around the clean-up of the border, once a comprehensive anti-corruption initiative is in place. (Note: A proposed RP-S drafted Information Operations campaign includes short-term steps to do local radio spots announcing changes at the border, the setting up of billboards advertising the customs fees, and, if credible, the longer-term *encouragement of stories in the international media on the "reform" of Razziq*, the so-called "Master of Spin." End Note.) Razziq said he would welcome such a team.¹²⁹

These are just a few of the human rights abuses that NGOs,¹³⁰ journalists,¹³¹ and the State Department¹³² have documented in Afghanistan. With NATO forces increasingly relying upon the ALP and ABP to establish security, the human rights climate seems to be getting worse, not better.¹³³ The experience in Afghanistan demonstrates how difficult it is to avoid arming units that have committed human rights violations and how dire the consequences can be when the United States provides training, weapons, and materials to the wrong people.

IV. The Effectiveness of the Leahy Law in the Philippines

From the end of World War II until the early 1990s, the United States operated several major military facilities in the Philippines.¹³⁴ Since 2002, despite constant pressure to reassign the soldiers to Afghanistan or Iraq, six hundred elite U.S. soldiers have been deployed to the Joint Special Operations Task Force-Philippines.¹³⁵ These Army Special Forces, known

128. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: AFGHANISTAN 2 (2011), available at <http://www.state.gov/j/drl/rls/hrrpt/2010/sca/154477.htm>.

129. Cable from Embassy Kabul to United States Sec'y of State, 10KABUL589, Kandahar: Corruption Reforms By the Master of Spin, Media Campaign ¶ 4 (Feb. 17, 2010) (emphasis added).

130. See, e.g., OXFAM ET AL., NO TIME TO LOSE: PROMOTING THE ACCOUNTABILITY OF THE AFGHAN NATIONAL SECURITY FORCES 2 (2011).

131. See, e.g., Aikins, *supra* note 1.

132. See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, *supra* note 128.

133. See HUMAN RIGHTS WATCH, *supra* note 14, at 1-2.

134. See generally BUREAU OF E. ASIAN & PAC. AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTE: PHILIPPINES (2012).

135. See, e.g., Thom Shanker, *U.S. Military to Stay in Philippines*, N.Y. TIMES, Aug. 21, 2009, at A10; *US Plays Quiet Role in the Philippines*, BBC NEWS (Mar. 28, 2008, 4:51 PM), <http://news.bbc.co.uk/2/hi/asia-pacific/7316761.stm>.

as Green Berets, have been training Filipino forces and providing logistical and intelligence support.¹³⁶

Despite the presence of U.S. forces, the State Department's 2011 report on human rights in the Philippines was highly critical of the Philippine government.¹³⁷ The second paragraph of the report said the following:

Arbitrary, unlawful, and extrajudicial killings by elements of the security services and political killings, including killings of journalists, by a variety of state and non-state actors continued to be serious problems. Concerns about impunity persisted. Members of the security services physically and psychologically abused suspects and detainees, and there were instances of torture. Pretrial detainees and convicts were often held in overcrowded, sub-standard conditions. Disappearances occurred, and arbitrary or warrantless arrests and detentions were common. Trials were delayed, and procedures were prolonged. Corruption was endemic. Leftist and human rights activists reported harassment by local security forces. Problems such as violence against women, abuse of children, child sexual exploitation, trafficking in persons, child labor, and ineffective enforcement of worker rights were common.¹³⁸

The State Department's report further outlined a number of other human rights violations that had occurred in the Philippines. In 2010, the Philippine Commission on Human Rights (CHR), an independent government agency, investigated fifty-three new complaints of politically motivated killings involving sixty-seven victims.¹³⁹ The CHR suspected that some of the leftist activists killed were the targets of personnel from the Philippine National Police (PNP) and the Armed Forces of the Philippines (AFP).¹⁴⁰ The PNP task force responsible for monitoring extrajudicial killings had recorded 161 killings since 2001.¹⁴¹ Of these 161 cases, 99 were filed in court and prosecutors' offices, 61 were under investigation, and 1 was closed.¹⁴² During 2010, there was not a single conviction of a state actor.¹⁴³

The human rights abuses are not limited to extra-judicial killings. The CHR found that PNP and AFP forces were implicated in five of ten disappearance cases in 2010.¹⁴⁴ During that year there were no developments in earlier disappearance cases. The State Department report stated, "[i]nvestigative and judicial inaction on previous cases of disappearance contributed to a climate of impunity"¹⁴⁵ The State Department identified Philippine police, military, and law enforcement officers as suspects in

136. See SHANKER, *supra* note 135.

137. See HUMAN RIGHTS PRACTICES PHILIPPINES, *supra* note 26, at 1.

138. *Id.* at 1.

139. *Id.* at 2.

140. *Id.*

141. *Id.*

142. *Id.*

143. See *id.*

144. *Id.* at 3.

145. *Id.* at 4.

twenty-two cases of alleged torture involving ninety-three victims.¹⁴⁶

The U.S. government has been concerned with the AFP and the PNP for several years. In 2005, the U.S. embassy in Manila dispatched a cable describing the situation:

The PNP management is a mess. Few PNP officials would even try to deny this reality [D]aily exposure to corrupt, inefficient, or badly managed police officials is a cancer upon the body politic. Systemic flaws need institutional reforms In the absence of such systemic PNP reform, popular impatience for better police performance and management—exacerbated by the belief that nearly everyone in the PNP is corrupt—may also encourage more public support for elected officials, such as the mayors of Davao and Cebu, who have openly supported the use of extra-judicial killings, coordinated in concert with local police forces under their control, as a means of controlling crime Such an outcome would be disastrous to the human rights climate in this treaty ally and democratic partner, and would also undermine or harm progress on major USG goals here to combat terrorism, narcotics trafficking, trafficking in persons, and other transnational problems.¹⁴⁷

Two years later, in 2007, Keith Luse, a senior congressional staff member, had a series of meetings with Philippine government officials, embassy staff, and NGOs.¹⁴⁸ While meeting with senior Philippine officials, Luse conveyed “serious Congressional concern about extrajudicial killings and explained that his trip was essentially a fact-finding visit to learn first-hand about the issue.”¹⁴⁹ In response, the Philippine Department of Foreign Affairs Undersecretary cited a number of steps the Philippine government had taken and stressed that the New People’s Army (NPA), the armed wing of the Communist Party of the Philippines, had conducted many of the killings in a purge.¹⁵⁰ The Philippine National Deputy Security Adviser’s explanation echoed the Undersecretary’s comment, adding that, “to the extent the Philippine military was involved, it was ‘rogue elements’ within it”¹⁵¹

In his comments, the Security Adviser cited the Melo Commission, an investigation into extrajudicial killings that President Gloria Macapagal-Arroyo started in 2006. The report offered a qualified critique of the military, dismissing the idea that the extrajudicial killings were part of an internal NPA purge.¹⁵²

Much of the Melo report centered on General Jovito Palparan, now both a Filipino Congressman and a fugitive.¹⁵³ Between February and

146. *Id.*

147. Cable from Embassy Manila, 05MANILA1506 Law Enforcement Corruption in the Philippines, ¶17 (Mar. 1, 2005).

148. Cable from Embassy Manila, 07MANILA2931 Staffdel Luse Visit to the Philippines, ¶ 1 (Aug. 29, 2007).

149. *Id.* ¶ 5.

150. *Id.*

151. *Id.* ¶ 6.

152. See JOSE A. R. MELO ET AL., INDEPENDENT COMMISSION TO ADDRESS MEDIA AND ACTIVIST KILLINGS 55 (2007).

153. See *id.* at 56–61.

August of 2005, Palparan commanded the 8th Infantry Division in the Eastern Visayas, and between September 2005 and September 2006 he commanded the 7th Infantry Division in Central Luzon.¹⁵⁴ Activists nicknamed Palparan "*Berdugo*," or "Butcher."¹⁵⁵ While the Melo report was unable to arrive at definite conclusion, it was highly critical of Palparan:

The rise in killings somehow became more pronounced in areas where General Palparan was assigned. The trend was so unusual that General Palparan was said to have left a trail of blood or bodies in his wake wherever he was assigned. He "earned" the moniker "*Berdugo*" from activist and media groups for his reputation. General Palparan ascribes his grisly reputation to his enemies, as part of their propaganda campaign to discredit him and to denigrate his excellent performance in implementing the various missions and programs assigned to him by his superiors.

General Palparan, clearly the man in the center of the maelstrom, admits to having uttered statements openly encouraging persons to perform extrajudicial killings against those suspected of being communists, albeit unarmed civilians. Worse, he was reported to have "expressed delight" at the disappearance of at least two persons, mere students, but who were suspected of being communist or activists.¹⁵⁶

On May 4, 2011, mothers of two missing University of the Philippines students filed a criminal case against Palparan.¹⁵⁷ The case alleges that the General and several of his officers were guilty of rape, causing serious physical injuries, arbitrary detention, and maltreatment of prisoners.¹⁵⁸ The complaint cites a farmer who was also abducted and has since testified in court.¹⁵⁹ The witness says that he saw several men torturing the students.¹⁶⁰ As of January 2012, Philippine authorities were still searching for Palparan,¹⁶¹ and there is a 1 million peso (approximately \$23,100) reward for his capture.¹⁶²

While Palparan commanded the 7th Infantry Division, the United States trained soldiers under his command on at least six different occasions.¹⁶³ This was despite the fact that the U.S. embassy in Manila knew of the accusations of human rights violations. In a cable entitled "Left-Wing

154. *Id.* at 21.

155. See *Palparan and His Men Must Face a Swift Trial Towards Imprisonment*, KARAPATAN (Aug. 7, 2011, 12:44 PM), <http://www.karapatan.org/node/435>.

156. MELO ET AL., *supra* note 152, at 56-57 (emphasis added).

157. KARAPATAN, *supra* note 155.

158. *Id.*

159. See *What Went Before: Abduction of UP Students Karen Empeño and Sherlyn Cadapan*, PHILIPPINE DAILY INQUIRER (Dec. 17, 2011, 2:48 AM), <http://newsinfo.inquirer.net/112599/what-went-before-abduction-of-up-students-karen-empeno-and-sherlyn-cadapan>.

160. See *id.*; see also KARAPATAN, *supra* note 155.

161. See *Palparan Bounty Raised to P1 Million*, SUN STAR (Jan. 5, 2012), <http://www.sunstar.com.ph/manila/local-news/2012/01/05/palparan-bounty-raised-p1-million-198984>.

162. *Id.*

163. See BUREAU OF POLITICAL-MILITARY AFFAIRS, U.S. DEP'T OF STATE, FOREIGN MILITARY TRAINING: JOINT REPORT TO CONGRESS, FISCAL YEARS 2006 AND 2007 (2007).

Activists Remain a Target in the Philippines,” the embassy discussed and dismissed the accusations against Palparan, saying:

Leftist organizations continue to blame elements of the GRP, especially the police and the AFP, for carrying out the attacks. Increasingly, critics are pointing to Major General Jovito Palparan Jr., the commander of the 7th Infantry Division in Central Luzon, who has been accused of human rights abuses in the past (though such allegations have never been proven). Palparan, who was recently awarded the Philippine Distinguished Service Star for meritorious actions as a division commander in Luzon and Samar, has dismissed allegations linking him to any extra-judicial killings, stating, “Those are all just propaganda to destroy the image of the government.” The AFP has challenged leftist groups to go to court to prove their allegations.¹⁶⁴

In 2009, in response to unprosecuted extra-judicial killings, the U.S. House of Representatives passed a resolution withholding \$2 million of the \$30 million requested for FMF to the Philippines for FY 2010.¹⁶⁵ The House tied the money to efforts to prosecute those suspected of extra-judicial killings.¹⁶⁶ The Obama Administration then lobbied Congress to get the restrictions removed.¹⁶⁷ Eventually, FY 2010 saw \$29 million in FMF disbursed to the Philippines.¹⁶⁸ In FY 2012, the State Department CBJ has requested \$15 million for FMF to the Philippines.¹⁶⁹

The funding requests for the Philippines demonstrate the relative inability of Congress to exert its political will, even when the amount of funding is relatively low. Moreover, the Philippines, a former U.S. colony that has maintained strong military ties to the United States, still suffers from human rights abuses. This indicates that joint training exercises and close cooperation between the U.S. and Philippine militaries are, on their own, not enough to stem human rights abuses.

V. The Effectiveness of the Leahy Law in Colombia

Like the Philippines, Colombia has a long history of U.S. military involvement, and U.S. military aid increased dramatically after 2001.¹⁷⁰ Unlike the Philippines, the majority of funding for Colombia is funneled through the International Narcotics and Law Enforcement/Andean Counterdrug Initiative (INCLE).¹⁷¹ For FY 2012, the Obama Administration requested \$160 million for INCLE and \$44 million for FMF.¹⁷² Up

164. Cable from Embassy Manila to U.S. Sec’y of State, 06MANILA1452 Left-Wing Activists Remain a Target in the Philippines, *The Blame Game* ¶ 3 (Mar. 3, 2006).

165. See Pia Lee-Brago et al., *Obama Asks US Congress to Remove Conditions on Military Aid*, *PHILIPPINE STAR* (Nov. 10, 2009, 12:00 AM), <http://www.philstar.com/Article.aspx?articleId=522045&publica>.

166. See *id.*

167. See *id.*

168. U.S. DEP’T OF STATE, *supra* note 20, at 445, tbl.2b.

169. *Id.* at 453, tbl.

170. See FELLOWSHIP OF RECONCILIATION & U.S. OFFICE ON COLOMBIA, *MILITARY ASSISTANCE AND HUMAN RIGHTS: COLOMBIA, U.S. ACCOUNTABILITY, AND GLOBAL IMPLICATIONS* 3 (2010).

171. See U.S. DEP’T OF STATE, *supra* note 20, at 455.

172. See *id.*

until at least 2009, the State Department published a report on the end-use of the funds provided through INCLE.¹⁷³ As for the remainder of the funding, since at least 2011, lists of units vetted for compliance with the Leahy Law are “classified to protect the operational capacity of Colombian military units.”¹⁷⁴

Also like the Philippines, NGOs and the State Department have accused the Colombian military of committing a myriad of human rights violations.¹⁷⁵ In its 2011 report on Colombia, the State Department said that “[p]olitical and unlawful killings remained an extremely serious problem, and there were some reports that members of the security forces committed extrajudicial killings”¹⁷⁶ A July 2010 report by the Fellowship of Reconciliation (FOR) reported “alarming links between Colombian military units that receive U.S. assistance and civilian killings committed by the army.”¹⁷⁷

The FOR study, “Military Assistance and Human Rights,” was thorough and damning.¹⁷⁸ Over a period of two years, the FOR examined more than three thousand extra-judicial killings and the roughly five hundred Colombian military units receiving U.S. military aid and training.¹⁷⁹ In 2007, twenty-three out of twenty-five brigade jurisdictions were accused of extra-judicial killings.¹⁸⁰ One hundred forty-two reported killings have been directly attributed to fourteen different mobile brigades, eleven of which were vetted to receive assistance.¹⁸¹ Of the 3,014 killings reviewed by the FOR, more than 1,500 were under investigation by the Colombian Attorney General’s office, but only 43 had reached a verdict.¹⁸² On average, the FOR report found that “extrajudicial killings increased on average in areas after the United States increased assistance to units in those areas.”¹⁸³ In the sixteen largest jurisdictions where military aid was increased, the number of reported executions averaged an increase of 56%.¹⁸⁴ The inverse was also true: in years when the United States most reduced the military assistance to a region, the number of reported executions fell by 56%.¹⁸⁵ Even after November 2008, where the number of reported military extra-judicial killings dropped significantly because of institutional practices designed to reduce the frequency of murder by the

173. See *Reports*, U.S. DEP’T OF STATE, <http://www.state.gov/g/inl/rls/rpt/index.htm> (last visited July 18, 2012) (providing internet links to end-use monitoring reports from 2001 to 2009).

174. Valenzuela, *supra* note 54.

175. See FELLOWSHIP OF RECONCILIATION, *supra* note 170; HUMAN RIGHTS PRACTICES COLOMBIA, *supra* note 26.

176. HUMAN RIGHTS PRACTICES COLOMBIA, *supra* note 26, at 2.

177. FELLOWSHIP OF RECONCILIATION, *supra* note 170, at iii.

178. See *id.*

179. See *id.*

180. See *id.* at 7.

181. See *id.*

182. See *id.* at 8.

183. *Id.* at 101.

184. See *id.* at 10-11.

185. See *id.*

military, the drop was accompanied by a steep climb in the number of reported civilian killings by paramilitary groups.¹⁸⁶ While there are several explanations for these increases, including higher levels of violence in some areas than others,¹⁸⁷ an increased number of soldiers in assisted units, changes in population in jurisdiction of assigned units, possible differences in reporting killings by assisted units, and differing attitudes of U.S. officials,¹⁸⁸ the data suggests an almost categorical failure of the Leahy Law in Colombia.

Another source of conflict between the human rights goals of the Leahy Law and foreign military training is the Western Hemisphere Institute for Security Cooperation (WHINSEC), formerly known as the School of the Americas (SOA). Since its establishment in 1946, WHINSEC-SOA has trained over 60,000 members of Central and South American armed forces,¹⁸⁹ including over 9,500 Colombian soldiers.¹⁹⁰ Colombia holds over 60% of the seats available for students at WHINSEC-SOA.¹⁹¹ Some of these troops are alleged to have forced children to march in front of military columns to detonate landmines or spring ambushes.¹⁹² The Colombian soldiers have also been accused of mass-murder, disappearances, torture, and extrajudicial killings, including that of Archbishop Isaias Duarte.¹⁹³ In addition to Colombia, soldiers trained at the SOA have committed human rights violations in Bolivia, Chile, El Salvador, Guatemala, Honduras, and Paraguay.¹⁹⁴

Many of these human rights abuses were part of the SOA's curriculum. In 1996, the Pentagon admitted that seven training manuals used at the SOA were designed to advocate the systemic use of torture, blackmail, and executions to neutralize dissidents.¹⁹⁵ The manuals identified potential targets as "religious workers, labor organizers, student groups and others in sympathy with the cause of the poor."¹⁹⁶

In 2000, the House of Representatives narrowly voted down an attempt to close the SOA.¹⁹⁷ Instead, the SOA was renamed WHINSEC.¹⁹⁸ In 2007, WHINSEC survived another vote to close the school by six votes in the House of Representatives.¹⁹⁹ A month before the vote, Salvatore

186. *See id.* at iv.

187. *See id.* at 13.

188. *See id.* at 14.

189. *See* Bill Quigley, *The Case for Closing the School of the Americas*, 20 *BYU J. PUB. L.* 1, 3 (2005).

190. *See id.* at 11.

191. *See* *Colombian Paramilitary Confirms Collusion with SOA/WHINSEC Graduates*, SOA WATCH, <http://www.soaw.org/about-the-soawhinsec/victims-and-survivors/colombia/1541> (last visited July 18, 2012).

192. *See* Quigley, *supra* note 189, at 11.

193. *See id.*

194. *See id.* at 5.

195. *See id.*

196. *Id.*

197. *See id.* at 6.

198. *See id.*

199. *See* Eliana Monteforte, *WHINSEC Remains Open: Congress Narrowly Fails to Halt Funding the Former School of the Americas*, COUNCIL ON HEMISPHERIC AFFAIRS, (July 6,

Mancuso, the former commander of the paramilitary organization United Self-Defense Forces of Colombia, testified in a closed hearing in Medellin, Colombia.²⁰⁰ In his testimony, he said that he and other paramilitaries, which the U.S. State Department labeled “foreign terrorist organizations,” were a creation of state policy and collaborated with Colombian military and government officials who had been trained and served as instructors at WHINSEC-SOA.²⁰¹

The FOR posits two reasons for the failure of the Leahy Law in Colombia: the first is the inadequate information and a difference in bureaucratic priorities between the State Department, which had knowledge of human rights abuse; and the second is the other branches of the Executive, which prioritized arming Colombian allies.²⁰² While both reasons are plausible, the relatively high levels of human rights abuse documentation in Colombia and the relatively low threshold of “credible information” suggests that the latter, rather than the former, is more likely.

VI. Lessons to be Learned from Afghanistan, the Philippines, and Colombia

In practice, the Leahy Law is too easy to circumvent. If the Executive wished to finance military units that have committed human rights violations, it could fund the unit through covert operations or waive the Leahy Law. In addition, even if the law is not disobeyed outright, there are at least four factors that prevent the Leahy Law from effectively deterring human rights violations.

The first factor is the statutory distinction between the Foreign Aid and Defense Appropriations bills. The key difference between the two pieces of legislation is that the Leahy Law text within the Foreign Aid provision bans training and arms, whereas the Defense Appropriations Bill bans only training.²⁰³ The \$12.8 billion for the ASFF, appropriated through the Defense Appropriations Bill, is free of any restriction on the purchase of weapons for units that have committed human rights violations. Even if dedicated and competent diplomats carefully enforce the letter of the law, if the Executive wishes to arm human rights violators, all it has to do is appropriate the funds through the DOD rather than the State Department. This is precisely what is happening in Afghanistan. Even if it were shown that all \$62 million worth of ammunition was distributed to torturers and extortionists, it still would not violate the Leahy Law.

The second factor that prevents the Leahy Law from being an effective deterrent is the narrow definition of a “unit.” Particularly when combined

2007), <http://www.coha.org/whinsec-remains-open-congress-narrowly-fails-to-halt-funding-the-former-school-of-the-americas/>.

200. See SOA WATCH, *supra* note 191.

201. *Id.*

202. See FELLOWSHIP OF RECONCILIATION, *supra* note 170, at 15–16.

203. Compare Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, 125 Stat. 38 (2011), with Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d (2006).

with the next two factors, the difficulty in tracking aid and the fungible nature of arms and training, defining a unit as an individual limits the law's ability to prevent larger units from receiving funding. In order to receive military aid, a foreign commander could keep some people and units "clean" and commit offenses through other individuals. This is the approach that General Palparan may have taken in the Philippines, where some of Palparan's officers were trained by U.S. forces at the same time his unit was committing extra-judicial killings.

To a limited extent, individual embassies have experimented with expanding the requirements of the Leahy Law. Responsibility for vetting a unit that receives aid lies with the embassy; for some embassies, any membership in a suspect unit is an automatic bar to receiving training.²⁰⁴ In Indonesia, the U.S. embassy barred individuals from training if they were ever members of a unit that was accused of human rights violations.²⁰⁵ Unfortunately, this interpretation has been limited in its application.²⁰⁶ Even if a blanket ban were enforced, if the unit defined is a battalion, it would not limit the ability of a division commander such as Palparan to commit human rights violations with U.S. funds.

The third factor, the overall difficulty of tracking aid, is more of a bar to the enforceability of the Leahy Law than a weakness in the legislation. Once a country receives FMF financing, the DOD does not track unclassified information on how that country distributes the financing.²⁰⁷ All that is available from the public reports is the line-item funding disbursement.²⁰⁸ If a non-governmental agent wished to track how a country spends FMF aid, it has to track it through the recipient country's public documents.²⁰⁹ If the recipient country chose not to disclose how it spent the money and on which unit, there is no mechanism to keep the public informed of how U.S. military aid is being spent.

Unfortunately, the experience in Colombia, where INCLE funding was monitored for end-use compliance, suggests that publication of end-use monitoring information would not stop human rights violations. In Colombia, units that received publicized INCLE aid still committed human rights violations.²¹⁰ While it would be an invaluable tool in enforcing the Leahy Law, the availability of information is moot because few parties have standing to sue in U.S. courts.

204. See Comer, *supra* note 65, at 62.

205. See *id.*

206. See *id.*

207. See Letter from Paul J. Jacobsmeyer, Chief, Office of Freedom of Info., Dep't of Def., to Nathanael Miller, Cornell International Law Journal, (Nov. 15, 2011) (on file with author).

208. See generally U.S. DEP'T OF STATE, *supra* note 20.

209. See generally *id.*; Jacobsmeyer, *supra* note 207.

210. Compare U.S. DEP'T OF STATE, INL END USE MONITORING (EUM) REPORT 161 (2007), and BUREAU FOR INT'L NARCOTICS & LAW ENFORCEMENT AFFAIRS, U.S. DEP'T OF STATE, PROGRAM AND BUDGET GUIDE, FISCAL YEAR 2011 19 (2011), with FELLOWSHIP OF RECONCILIATION, *supra* note 170, at 7 (demonstrating mobile brigades received considerable continuing assistance despite being accused of human rights violations).

The last factor goes to the heart of the failure of the Leahy Law: arms and training are fungible commodities. One M4 carbine can be replaced with another M4 carbine. Even if a country spends \$5 million of FMF disbursement on a unit that has never committed a human rights violation, there is no mechanism to prevent the recipient country from spending \$5 million of its domestic budget on a unit that has committed human rights abuses. The same principle applies to training. In all likelihood, the officers and men trained by the U.S. military will subsequently instruct their comrades who were barred from receiving the training firsthand. It is near impossible for the United States to prevent the soldiers it trains from sharing their expertise with those who have committed human rights violations.

VII. Contextualizing the Failure

In a 1988 article, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, Harold Koh, now the Legal Advisor of the State Department, placed the blame for the Iran-Contra scandal on “misguided people violating ineffective laws.”²¹¹ That is precisely the problem presented by the failure of the Leahy Law. A closer look at Koh’s analysis suggests that, even though there have been four Presidential administrations, two of which have placed Koh in positions of considerable influence,²¹² little has changed since Iran-Contra illustrated the ability of the Executive to overwhelm the Legislature on issues of foreign policy.

During the 1980s, the United States sold arms to Iran in order to support the right-wing Nicaraguan military organization, the Contras.²¹³ This directly violated the Boland Amendments, legislation attached to appropriation bills that read:

No funds available to the Central Intelligence Agency, the Department of Defense or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement or individual.²¹⁴

Koh argued that the scandal was the latest in a series of pushes by the Executive against congressional attempts to check presidential power.²¹⁵ The pattern is clearest when Koh discussed the War Powers Resolution.²¹⁶

211. Koh, *supra* note 17.

212. See *Biography: Harold Hongju Koh, Legal Adviser*, U.S. DEP’T OF STATE, <http://www.state.gov/r/pa/ei/biog/143262.htm> (last visited Jan. 22, 2012).

213. See Charlie Savage, *In Memoir, Cheney Addresses Controversies*, N.Y. TIMES (Aug. 25, 2011), http://www.nytimes.com/interactive/2011/08/26/us/politics/20110826_CHENEY_MEMOIR.html; see also Koh, *supra* note 17, at 1267.

214. *Iran-Contra Hearings; Text of Key Amendment*, N.Y. TIMES (July 16, 1987), <http://www.nytimes.com/1987/07/16/world/iran-contra-hearings-text-of-key-amendment.html>.

215. See Koh, *supra* note 17.

216. See *id.* at 1259-61.

Congress passed the War Powers Resolution in 1973 in reaction to the Vietnam War and the Johnson Administration using the Tonkin Gulf Resolution as a broad congressional authorization for dramatically escalating the conflict.²¹⁷ This statute required the President to consult with Congress, and prevented the President from deploying troops for more than sixty days without express congressional authorization.²¹⁸ In his article, Koh detailed a series of covert and overt military operations that the War Powers Resolution had failed to prevent, including “even the creeping escalation it was expressly designed to control.”²¹⁹

Over the two-and-half decades following the enactment of the War Powers Resolution, the Executive has consistently pushed back against such legislative control. Most recently, members of Congress on both ends of the political spectrum challenged the Obama Administration’s intervention in the Libyan Civil War.²²⁰ In June 2011, ten lawmakers, led by Rep. Dennis Kucinich and Rep. Walter Jones, filed a lawsuit asking a judge to withdraw from Libya.²²¹ Four months after the suit was filed, a federal judge dismissed the case.²²²

In the Libya debate, Koh, the State Department legal advisor, found himself on the other side of the discussion. In defense of the Obama Administration, Koh argued that U.S. forces were not engaged in “hostilities” in Libya.²²³ Instead, the United States was in a support role, despite the conflict costing the DOD roughly \$1.1 billion dollars and U.S. drones periodically firing missiles at Libyan targets.²²⁴

The reluctance of the Obama Administration to seek congressional approval of a Libyan intervention tracks with the reluctance of the Executive to fully implement the Leahy Law. In both instances, the Executive has sought primacy at the expense of congressional decision-making in foreign policy. This explains how Koh can be critical of executive overreach in his article but defend the Administration’s actions when he is operating as an advisor to the Secretary of State. While not to excuse any of the very real damage illegal wars wreak on society, viewed through the lens of his own article, Koh’s actions make perfect sense.

Koh describes two complementary views of how foreign policy decisions should be made. One is a normative view expressed in the National Security Act of 1947 and post-Vietnam era statutes.²²⁵ The other is a con-

217. *See id.* at 1259.

218. *See id.* at 1260.

219. *Id.*

220. *See, e.g.,* Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), <http://www.nytimes.com/2011/06/16/us/politics/16powers.html>.

221. *See id.*

222. *See Kucinich v. Obama*, No. 11-1096, 2011 WL 5005303 at *12 (D.D.C., Oct. 20, 2011).

223. *See Savage & Landler, supra* note 220.

224. *See Jessica Rettig, End of NATO’s Libya Intervention Means Financial Relief for Allies*, U.S. NEWS & WORLD REP. (Oct. 31, 2011), <http://www.usnews.com/news/articles/2011/10/31/end-of-natos-libya-intervention-means-financial-relief-for-allies>.

225. *See Koh, supra* note 17, at 1279-80.

stitutional vision guided by Justice Robert Jackson's seminal concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.²²⁶

The normative vision describes an Executive as the center of the system controlling all of "American governmental decisions regarding warmaking, intelligence, covert operations, military sales, and military aid."²²⁷ The National Security Act of 1947 created a system of management of military policy centralized in the presidency.²²⁸ The Act never mentioned courts or Congress as actors in foreign policy decision-making.²²⁹ Instead, it took subsequent post-Vietnam legislation to envision a broad basis for congressional coordination with the Executive.²³⁰ In addition to the War Powers Resolution, Congress has enacted a series of resolutions authorizing military force, including the Authorization for Use of Military Force Against Iraq Resolution of 2002²³¹ and the Authorization for Use of Military Force Against Terrorists.²³²

While this view envisions a decision-making role for Congress, Justice Jackson's view, instead of being solely concerned with efficient policy-making, turns attention to the constitutionality of the Executive's action.²³³ He lays out a three-tier structure for Congress' role in presidential action:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said . . . to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential con-

226. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

227. See Koh, *supra* note 17, at 1280.

228. See *id.*

229. See *id.* at 1281.

230. See *id.*

231. See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

232. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

233. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

trol in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.²³⁴

Justice Jackson based his view on executive practices that Congress has recognized as appropriate, legislation that has created a framework for government decision-making, and judicial decisions.²³⁵ In addition to mandating a constitutional role for Congress in foreign policy decision-making, Justice Jackson provided a strong role for the Judiciary in policing the constitutionality of executive decision-making.²³⁶

Taken together, both the normative and constitutional views for foreign policy decision-making describe several mechanisms through which Congress and the Judiciary have an active role in policing presidential action.²³⁷ Congress can pass laws prohibiting executive practices, and the Judiciary can mandate that those laws be enforced.²³⁸

Yet, in reality, any role for the Legislature and the Judiciary has been eviscerated.²³⁹ The reasons for the Leahy Law's failure to achieve its mandate are similar to what Koh described when he discussed Iran-Contra: executive initiative, congressional acquiesce, and judicial tolerance.²⁴⁰ Even if Congress enacts legislation prescribing foreign policy, actors within the Executive covertly and overtly push for greater control. In the case of the Leahy Law, the legislation itself is too weak to survive the pushback. And since the Judiciary has enacted a series of barriers to the enforcement of foreign policy legislation, even if the legislation were stronger, congressional decision-making is ineffectual.

In focusing on Congress' failure to pass legislation empowering the Legislature and the structural weaknesses of the current system,²⁴¹ Koh understates another explanation for Congressional weakness: the Members of Congress themselves. The views and policies of former Vice-President Richard Cheney are emblematic of executive initiative and the rejection of any role for the Judiciary and Congress within foreign policy decision-making. But Cheney pursued his vision of the Executive well before he became Vice-President. During the Iran-Contra scandal, Cheney was the highest-ranking House Republican on the congressional committee created to investigate the affair.²⁴² During the hearings, Cheney defended the Reagan Administration and in his memoir, Cheney said that he "thought it was . . . crucial to defend the presidency itself against congressional attempts to encroach on its power."²⁴³

234. *Id.* at 636-38.

235. See Koh, *supra* note 17, at 1284.

236. See *id.* at 1285.

237. See *id.* at 1287.

238. See *id.*

239. See *id.* at 1288.

240. See *id.* at 1258.

241. See *id.* at 1326-35.

242. See Savage, *supra* note 213.

243. *Id.*

Some of the Congressional reluctance to enforce its own power was on display when Congress voted on the use military force in Libya. When a House resolution to support the military intervention came to a vote, it was defeated 295 to 123.²⁴⁴ However, a House bill to prohibit money for military operations outside of support activities was also defeated 238 to 180.²⁴⁵ The Senate failed to vote on either measure, instead postponing the discussion to debate the U.S. debt ceiling.²⁴⁶ Even with Congress' constitutional ability to limit appropriations²⁴⁷ and unequivocal support from the Speaker of the House John Boehner, Members of Congress were largely content with a symbolic revocation of support.²⁴⁸ This reluctance to flex their institutional muscle could be another barrier in the successful application of the Leahy Law.

VIII. Judicial Barriers to Enforcement

In a series of decisions, the Supreme Court has made it virtually impossible for anyone to sue to enforce the Leahy Law. Any challenge to the Leahy Law is likely to fail because of sovereign immunity,²⁴⁹ because enforcement is a political question,²⁵⁰ or because any conceivable plaintiffs would lack standing.²⁵¹

Iran-Contra presents a good indication of what would happen if foreign citizens tried challenging the Leahy Law. In *Sanchez-Espinoza v. Reagan*, when twelve citizens of Nicaragua sued for redress of injuries to themselves by the Contras, then-Circuit Judge Antonin Scalia barred the complaint on sovereign immunity grounds.²⁵² Scalia said:

It would make a mockery of the doctrine of sovereign immunity if federal courts were authorized to sanction or enjoin, by judgments nominally against present or former Executive officers, actions that are, *concededly and as a jurisdictional necessity*, official actions of the United States. Such judgments would necessarily "interfere with the public administration," or "restrain the government from acting, or . . . compel it to act." These consequences are tolerated when the officer's action is unauthorized because contrary to statutory or constitutional prescription, but we think that exception

244. See, e.g., Jennifer Steinhauer, *House Spurns Obama on Libya, but Does Not Cut Funds*, N.Y. TIMES (June 24, 2011), <http://www.nytimes.com/2011/06/25/us/politics/25powers.html>.

245. See *id.*

246. See *Senate Postpones Libya Vote Amid Budget Dispute*, ASSOCIATED PRESS (July 5, 2011, 5:03 PM), http://www.msnbc.msn.com/id/43644092/ns/politics-capitol_hill/t/senate-postpones-libya-vote-amid-budget-dispute/#.T2fF547w82k.

247. See U.S. CONST. art. I, § 8.

248. See Steinhauer, *supra* note 244.

249. See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985).

250. See *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979); *Arar v. Ashcroft*, 585 F.3d 559, 575 (2d Cir. 2009).

251. See *Raines v. Byrd*, 521 U.S. 811, 830 (1997); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 226-27 (1974); *U.S. v. Richardson*, 418 U.S. 166, 179-180 (1974); *Kucinich v. Obama*, No. 11-1096, 2011 WL 5005303 at *8 (D.D.C., Oct. 20, 2011).

252. See *Sanchez*, 770 F.2d at 207.

can have no application when the basis for jurisdiction requires action authorized by the sovereign as opposed to private wrongdoing. . . .

. . . The support for military operations that we are asked to terminate has, if the allegations in the complaint are accepted as true, received the attention and approval of the President, the Secretary of State, the Secretary of Defense, and the Director of the CIA, and involves the conduct of our diplomatic relations with at least four foreign states²⁵³

More recently, in *Arar v. Ashcroft*, the Second Circuit said that it “has recognized ‘the generally accepted view that foreign policy was the province and responsibility of the Executive Thus, unless Congress specifically has provided otherwise, courts traditionally have been *reluctant* to intrude upon the authority of the Executive in military and national security affairs.’”²⁵⁴

Moreover, in *Goldwater v. Carter*, the Supreme Court ruled that the authority to terminate treaties is a political question and therefore non-justiciable.²⁵⁵ In his concurrence, Justice Powell said “[t]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.”²⁵⁶ While there have been systemic flaws that lead to the lack of enforcement of the Leahy Law, given the deference to the Executive on matters of foreign policy, it is highly unlikely to lead to a constitutional impasse.

Nor do Members of Congress have standing to sue. In *Raines v. Byrd*, the Supreme Court denied Members of Congress the ability to challenge laws based upon a diminution of congressional power.²⁵⁷ The Court said that, “appellees have alleged no injury to themselves as individuals, the institutional injury they allege is wholly abstract and widely dispersed, and their attempt to litigate this dispute at this time and in this form is contrary to historical experience.”²⁵⁸

With respect to the Leahy Law itself, a District Court gave two reasons in denying Representative Kucinich’s suit to stop U.S. military action in Libya that cut against any congressional suits to enforce the Leahy Law. The first was the ability of the legislators to seek a legislative remedy,²⁵⁹ and the second was congressional action,²⁶⁰ in this case voting against defunding the Libyan intervention. Since a legislative remedy to a lack of enforcement of the Leahy Law is theoretically available and there have been successive appropriations bills passed that have had the effect of funding

253. *Id.* at 207–08 (emphasis in original) (internal citations omitted).

254. *Arar*, 585 F.3d at 575 (quoting *Dep’t of Navy v. Egan*, 484 U.S. 518, 529–30 (1988)).

255. See *Carter*, 444 U.S. at 996.

256. *Id.* at 996 (Powell, J., concurring).

257. See *Raines v. Byrd*, 521 U.S. 811, 829830 (1997).

258. *Id.* at 829.

259. See *Kucinich v. Obama*, No. 11-1096, 2011 WL 5005303 at *7 (D.D.C., Oct. 20, 2011).

260. See *id.*, at *8.

the military units at issue, it is highly unlikely that a suit brought by Members of Congress will survive a challenge.

Due to the difficulty in tracking FMF to a particular unit, and therefore the impossibility of demonstrating that the U.S. arms and training were the cause of a specific injury, it is similarly unlikely that other groups of plaintiffs will have standing to sue. The Supreme Court ruled, in *Schlesinger v. Reservists Committee to Stop the War*, that unless a citizen has been personally injured "standing to sue may not be predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share."²⁶¹ Further, in *United States v. Richardson*, the Supreme Court ruled that taxpayers did not have standing to sue because "to invoke judicial power the claimant must have a 'personal stake in the outcome,' or a 'particular, concrete injury,' or 'a direct injury,' in short, something more than 'generalized grievances.'"²⁶² However, the possibility of any plaintiff meeting these requirements is *de minimis*.

Due to sovereign immunity and the political question and standing doctrines, the Judiciary cannot check presidential violations of the Leahy Law. Without Congress clearly articulating a cause of action, the courts will continue to bar any potential plaintiffs from seeking a judicial remedy. It is up to Congress, not the courts, to give strength to the Leahy Law.

Conclusion

Foreign Military Financing is an important foreign policy tool. It provides military strength to allies and gives the United States additional leverage in dealing with foreign governments. Similarly, training soldiers of other nations provides significant benefits to the United States. Such training sharpens the military capacity of allies and improves relationships between U.S. and foreign troops. If coupled with effective human rights training, U.S. support is likely to prevent some human rights abuses.

Unfortunately, it is difficult to see how U.S. aid and training has helped curtail human rights abuses committed by the militaries receiving the funds. Afghanistan, the Philippines, and Colombia are just three examples of nations that receive enormous sums in military aid but disburse these sums in ways that may aggravate, rather than prevent, human rights abuses. Sometimes, as with the Afghan Local Police in Afghanistan and the paramilitaries in Colombia, those abuses border on state policy. At other times, including the extrajudicial killings in the Philippines, the human rights abuses are compounded by a systemic failure to prosecute the perpetrators.

The United States often claims to be a beacon of freedom and democratic government.²⁶³ Much of its moral legitimacy in foreign affairs is

261. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974).

262. *U.S. v. Richardson*, 418 U.S. 166, 179-80 (1974) (internal citations omitted).

263. See generally *Democracy & Human Rights*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/foreign-policy/presidents-speech-cairo-a-new-beginning/democracy->

based upon its efforts to ensure freedom and democracy around the world. When its allies are found to commit human rights violations—with the acquiescence or encouragement of U.S. officials—it undermines this moral legitimacy. And, where the human rights violations are enabled even in part by U.S. funding and training, the United States limits its own access to the moral high ground.

The Leahy Law is an attempt to enhance U.S. moral legitimacy in foreign affairs. As the law stands, however, it does a poor job. Without considerable changes in the language of the legislation, the Leahy Law will still be vulnerable to executive pushback against congressional influence. Since history suggests that pushback is inevitable, it is up to Congress to create a stronger law.

One way for Congress to strengthen the Leahy Law would be to make larger segments of the recipient military ineligible for military aid. While this would deprive the Executive of some operational flexibility, it sends a much stronger message in favor of human rights. To deny a recipient country all military aid would greatly improve the deterrence effect of the Leahy Law. It would also effectively counter the problem of arms being a fungible commodity. Even if the law were to define unit at the division or corps level, it would more effectively secure compliance with human rights norms.

Congress should also eliminate the disparity in language between the Defense and Foreign Aid Appropriations Bills. Without violating the Leahy Law, the Executive can arm questionable units if Congress approves the funding under the Defense Appropriations Bill. If the law is not changed, the United States will continue to claim that it cannot arm those who have committed human rights violations while doing just that.

The Judiciary needs a defined role in enforcing the Leahy Law, and without congressional action this is impossible. Given the courts' reluctance to become involved in foreign affairs, Congress should clearly articulate the boundaries of any potential cause of action. If those who have been victimized by units receiving U.S. funding can sue in federal court, it is much less likely that units will commit human rights violations or that the Executive will fund units that could commit human rights violations.

Involving the Judiciary does raise the potential for a defendant to force either the United States or the recipient government to disclose damaging secrets in court. However, narrowing the scope of inquiry could alleviate concerns with graymail: did the United States provide funding to a unit that committed a human rights violation? Either an injunction or a verdict with damages attached would substantially disincentivize funding units that could conceivably commit human rights violations.

Lastly, foreign military financing should be more transparent. In addition to seeing which country receives funding, the public should see how and on whom that money is spent. End-use monitoring should be required

human-rights (last visited July 18, 2012) (discussing U.S. commitment to “advancing governments that reflect the will of the people”).

and publicized. After all, if the goal of the legislation is to prevent U.S. tax dollars from funding those who commit human rights violations, U.S. taxpayers should be able to see that the objective is accomplished. And if the goal of the Leahy Law is to show the world that the United States pays more than lip services to human rights, the world should be able to see that the United States is willing to stand by that commitment.

The Leahy Law is a well-intentioned piece of legislation that could be drastically improved. Instead of being the latest casualty in the long-running dispute between the Executive and Congress in foreign policy decision-making, or a sop to the consciences of concerned citizens, it should be strengthened and enforced. It could be an important tool to enforce human rights, direct congressional influence in foreign policy, and increase U.S. moral legitimacy. And it might save a few lives.