THE AMERICAN SERVICEMEMBERS' PROTECTION ACT:
Pathways to and Constraints on U.S. Cooperation with the International Criminal Court

Julian Bava and Kiel Ireland[*]

In 2002, the U.S. Congress passed the American Servicemembers' Protection Act ("ASPA") in response to the establishment of the International Criminal Court ("ICC"). Congress feared that the ICC could be used to harass and detain American soldiers on foreign soil for purely political reasons. ASPA therefore sharply limited the U.S. government's ability to cooperate with the ICC in cases that are contrary to the national interest. Nevertheless, ASPA was not intended to prevent all U.S. cooperation with the ICC and should not be construed as such. The Dodd Amendment establishes a safe harbor that frees the government from ASPA's prohibitions if five requirements are met: that the United States must be "rendering assistance," that the assistance must be provided to "international efforts," that these international efforts must be aimed at "bringing to justice" certain individuals, that the target of the international efforts must be a "foreign national," and that the foreign national must be accused of "genocide, war crimes or crimes against humanity."

Additionally, this article analyzes various sections of ASPA in light of ordinary canons of statutory interpretation, as well as the president's Article II powers. Two additional ASPA waivers permit more freedom to cooperate with the ICC. For instance, the "Commander-in-Chief Waiver" allows the president to take certain military actions especially within the executive branch's authority – even if they otherwise violate ASPA – so long as Congressional notice is provided. The "Peacekeeping Waiver" allows the president to waive the ASPA restrictions when the United States chooses to take part in a peacekeeping operation deemed to be in the national security interest of the United States.

Keywords: American Servicemembers' Protection Act, Dodd Amendment, Foreign Relations Authorizations Act, Commander-in-Chief waiver, Peacekeeping Waiver

*Julian Bava is a third-year undergraduate at Stanford University majoring in Political Science and minoring in Human Rights. Kiel Ireland is a 2016 graduate of Stanford University Law School. The authors would like to thank Beth Van Schaack and Sarah Louie for their advice and support throughout this project.

I. INTRODUCTION

Secretary of State John Dulles had a careful line to toe when testifying before the Senate Judiciary Committee in 1953 on the possible U.S. ratification of two newly drafted human rights treaties. True to the American isolationist sentiment at the time, he stated that while the Eisenhower administration intended to "encourage the promotion everywhere of human rights and individual freedoms,"[1] it would not commit to "formal undertakings which commit one part of the world to impose its particular social and moral standards upon another part of the world community."[2] The difference in tone vis-à-vis U.S. engagement with international legal instruments is palpable. At the conclusion of the COP 21 climate negotiations, Secretary of State John Kerry remarked, "And now here today the world says thank you by restoring the global community's faith that we can accomplish things multilaterally."[3]

Nevertheless, the reluctance to commit to instruments of international cooperation demonstrated in 1953 still pervades today. Though the International Criminal Court ("ICC" or "the Court") was hailed by the Secretary-General of the United Nations, Kofi Annan, as "a giant step forward in the march towards universal human rights and the rule of law,"[4] this view was not necessarily shared by the U.S. government. In explaining the U.S. decision to withdraw its signature from the Rome Statute of the International Criminal Court ("Rome Statute"), Secretary of State Colin Powell stated that "the sovereign state is best positioned to balance the interest of peace, justice, democratic principles and societal stability against the need for prosecution."[5] This mistrust of the ICC—sowed by the Clinton administration and crystallized under President Bush— would ultimately lead the U.S. Congress to pass the American Servicemembers' Protection Act ("ASPA") in an effort to curtail US interaction with the Court.

Since its passage in 2002, it has generally been assumed by academics and policymakers alike that ASPA poses an insurmountable challenge to any potential U.S. cooperation with the ICC. Thus, the academic literature on this subject has primarily focused on ASPA's implications for U.S. foreign policy and the functioning of the Court itself. Rather than adopt such a defeatist approach, this article will engage in a critical analysis of the ASPA's text and legislative history in order to determine the true limits to, as well as avenues for, U.S.-ICC cooperation. A careful review of the substance and context of ASPA reveals that from a legal standpoint, the U.S. government is permitted to assist the ICC in a variety of ways that

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[1] 28 U.S. DEP'T OF STATE BULL. 592 (1953).

[2] *Id.*

[3] *See* John Kerry, Sec'y of State of the U.S., Remarks at COP21 Plenary (12 Dec. 2015).

[4] Press Release, Secretary-General, Secretary-General Says Establishment of International Criminal Court is Gift of Hope to Future Generations, UN Press Release SG/SM/6643/L2891 (20 July 1998).

[5] Colin Powell, *Demarche on the U.S. Government Policy on the International Criminal Court from Secretary of State to Ambassadors*, U.S. DEP'T OF STATE (2002).

range from logistical aid to financial support. This is qualified, however, by fundamental restrictions as provided by law.

In the first part of this analysis, the text of the so-called "Dodd Amendment" to ASPA will be analyzed in accordance with its legislative history and relevant canons of statutory interpretation. Though this will initially open up a variety of means of U.S.-ICC cooperation, the Dodd Amendment will be discussed in light of a separate bar on U.S. funding of the ICC known as the Foreign Relations Authorization Act of 2000 ("FRAA"). This article will then discuss the president's authority, as defined by ASPA, to communicate valuable intelligence to the ICC. While focusing on textual analysis, this part will introduce the role of the executive in interpreting and, in some cases, bypassing ASPA.

The next section will introduce the opportunity to waive key provisions within ASPA so long as certain requirements are met in fulfillment of a peacekeeping operation. Finally, the interplay between the president's powers as commander-in-chief and the Commander-in-Chief Waiver within ASPA will be examined in light of relevant legal precedent. In short, a robust analysis of the true extent of ASPA's prohibitions must consist of a diligent reading of the text, a methodical investigation of the legislative history, the application of relevant canons of statutory interpretation, and due consideration of the constitutional powers afforded to the U.S. president. This exercise will reveal that the largest obstacle to official U.S. cooperation with the ICC is not the law itself, but rather the politics of its application.

II. BACKGROUND

The International Criminal Court (ICC) is a permanent international judicial body established to prosecute genocide, war crimes, crimes against humanity and, eventually, the crime of aggression.[6] It is intended to end impunity for perpetrators of atrocities and to guarantee "enforcement of international justice."[7] It enjoys widespread support, with over 120 countries adopting its establishing treaty, the Rome Statute.[8] The ICC is currently investigating 10 conflict situations around the world[9] and has initiated or completed proceedings in eighteen cases,[10] including the recent

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[6] Rome Statute of the International Criminal Court arts. 1, 5 *opened for signature* 17 July 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002); *The Crime of Aggression*, COALITION FOR INT'L CRIM. CT., http://iccnow.org/?mod=aggression (last visited 9 Sept. 2016). The Rome Statute mandated that the Assembly of State Parties define the crime of aggression before the ICC could prosecute the crime. The Statute was amended in 2010 to define the crime of aggression and allow it to be prosecuted after January 1, 2017. *The Crime of Aggression*.

[7] Rome Statute, *supra* note 6, pmbl.

[8] *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

[9] *Situations Under Investigation*, INT'L CRIM. CT., www.icc-cpi.int/pages/situations.aspx.

[10] *Id.*

conviction of Jean-Pierre Bemba Gombo, an opposition leader in the Central African Republic whose troops systematically raped and murdered civilians in areas they controlled.[11]

The United States has maintained a fragile, yet evolving relationship with the Rome Statute and the Court. The Clinton Administration supported the creation of a permanent international criminal tribunal from the beginning of ICC negotiations.[12] Consequently, the United States was deeply involved in negotiating the contours of the Court from its initial proposal until the Rome Conference convened in order to finalize the Statute.[13] But concerns about the risk the Court would pose to U.S. soldiers or policymakers involved in military actions on foreign soil caused the United States to vote *against* adopting the statute at the end of the Rome Conference – a position that left it in the company of states such as China, Russia and Syria.[14] U.S. policy flipped again after the drafting and adoption of important foundational documents such as the Rules of Procedure and Evidence, with President Clinton signing the Rome Statute at the proverbial eleventh hour.[15] The treaty was never submitted to the Senate for advice and consent by President Clinton and President Bush would later attempt to rescind his predecessor's signature.[16]

While the executive branch has alternated between support and disapproval of the ICC, Congress has at times expressed strong opposition to the project over the years. Congress first signaled its mistrust of the ICC in the Consolidated Appropriations Act, 2000 (hereinafter referred to as the FRAA).[17] There, Congress prohibited "obligat[ing]"[18] any funds appropriated by Congress "for use by, or support of, the International Criminal Court" unless and until the United States becomes a party to the Court.[19]

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[11] Press Release, Int'l Criminal Court, ICC Trial Chamber III Declares Jean-Pierre Bemba Gombo Guilty of War Crimes and Crimes Against Humanity, Doc. No. ICC-CPI-20160321-PR1200 (21 Mar. 2016).

[12] *See* DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 165 (2011).

[13] *See id.* at 174–76, 179–95.

[14] *Id.* at 220–26; *see* JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL31485, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT 5-9 (2006).

[15] *See* David Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL L. REV. 47, 55–56, 66–68 (2001).

[16] SCHEFFER, *supra* note 12, at 247; US Renounces World Court Treaty, BBC NEWS (6 May 2002), http://news.bbc.co.uk/2/hi/1970312.stm.

[17] Consolidated Appropriations Act of 2000, Pub. L. No. 106-114, 113 Stat. 1536, 1501A-460 (1999) (codified as 22 U.S.C. § 7401 (1999)); the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001 was incorporated into the Consolidated Appropriations Act.

[18] *See* U.S. Gov't Accountability Office, GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process* 70 (2005). An "obligation" is a commitment by the government that creates a financial liability, such as a contract for services or an order for goods. *Id.* For further analysis of this provision, see *infra* Part I.A.1.

[19] 22 U.S.C. § 7401(b).

> None of the funds authorized to be appropriated by this or any other Act may be obligated for use by, or for support of, the International Criminal Court unless the United States has become a party to the Court pursuant to a treaty made under

Three years later, President Bush signed the American Servicemembers' Protection Act of 2002.[20] ASPA is a response to concerns that the International Criminal Court would exercise jurisdiction over U.S. nationals even if the United States were not a party to the court.[21] Its purpose, as demonstrated by the statute's name[22] and its numerous references to "U.S. citizens" and "members of the Armed Forces of the United States,"[23] is to safeguard "protections to which all Americans are entitled under the Bill of Rights" and ensure that "members of the Armed Forces of the United States [are] free from risk of prosecution by the International Criminal Court."[24]

Specifically, the legislation cites the purported possibility that American participants in international peacekeeping efforts could face prosecution before the ICC.[25] Beyond actual combatants, Congress also found that "senior elected and appointed officials" of the federal government – and even the president himself – could potentially be prosecuted by the Court.[26] This is because the Court could, theoretically, invoke the then-undefined "crime of aggression" in order to punish American policymakers for national security decisions like "responding to acts of terrorism."[27] Broadly speaking, ASPA cites fears of prosecutions of Americans for any crimes subject to its jurisdiction, including the possible exposure of American participants in peacekeeping operations.[28]

In light of these concerns, ASPA sets out a number of prohibitions in § 7423 and § 7425 that, when applicable, circumscribe the United States' ability to cooperate with the ICC.[29] These restrictions generally operate by identifying situations in which American officials and agencies could potentially support the ICC, and then proscribing such assistance. Select provisions of ASPA thus provide that:

- Federal courts, state courts and state entities and agencies (including localities) cannot cooperate with the ICC "in response to a request for cooperation submitted by the [ICC] pursuant to the Rome Statute."[30]
- No federal, state or local government may support the transfer of any U.S. citizen or resident alien to the ICC.[31]

Article II, section 2, clause 2 of the Constitution of the United States on or after November 29, 1999. *Id.*

[20] American Servicemembers' Protection Act, 22 U.S.C. §§ 7421–7433 (2002).

[21] *See* 22 U.S.C. § 7421(5).

[22] INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 189 (1991) (agreeing that the title of a statute is an important tool in determining its purpose).

[23] *See* 22 U.S.C. §§ 7421(8)–(9), 7423(d), 7423(f).

[24] *Id.* § 7421(7)–(8).

[25] *Id.* § 7421(5).

[26] *Id.* § 7421(9).

[27] *Id.*

[28] *Id.* § 7421(5).

[29] *See* 22 U.S.C. §§ 7423, 7425.

[30] 22 U.S.C. § 7423(b).

[31] *Id.* § 7423(d).

- Federal, state and local governments and courts cannot "provide support" to the ICC.[32]
- No funds appropriated by any provision of law may be used for the purpose of "assisting the investigation, arrest, detention, extradition, or prosecution" of any U.S. citizen or permanent resident by the ICC.[33]
- The president must establish procedures to ensure that "classified national security information and law enforcement information" is not transferred to the ICC.[34] These procedures should also prevent information provided to a third country from later being transferred to the ICC.[35]

These limitations are not absolute, however. First, the statute explicitly states that the restrictions described above in § 7423 and § 7425 do not apply to any action that the president takes with respect to a particular matter "involving the International Criminal Court" in exercising the commander-in-chief power found in Article II, Section 2 of the U.S. Constitution, or the general executive power found in Article II, Section 1, if the president notifies Congress of his intent to abrogate § 7423 or § 7425.[36]

Second, 22 U.S.C. § 7433 states that nothing in ASPA "shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity."[37] This provision was introduced via an amendment by Senator Chris Dodd and is often referred to as the "Dodd Amendment."[38] Where the requirements established by the Dodd Amendment are met, the provision provides a safe harbor for actions that might otherwise violate § 7423 or § 7425. In the next Part, this article will analyze the Dodd Amendment requirements and the types of assistance permitted under its provisions.

III. THE DODD AMENDMENT AND THE INTERNATIONAL CRIMINAL COURT

The text, purpose, and legislative history of the Dodd Amendment show that significant forms of cooperation with the ICC—such as providing manpower, sharing intelligence, and protecting witnesses—are actually permitted by ASPA under certain discrete circumstances. Because the applicability of the Dodd Amendment exception to the ASPA prohibitions

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[32] *Id.* § 7423(e).
[33] *Id.* § 7423(f).
[34] *Id.* § 7425(a).
[35] *Id.* § 7425(b).
[36] *Id.* § 7430(a).
[37] 22 U.S.C. § 7433. § 7422(a) gives the president the authority to waive § 7424 if the ICC enters into a binding agreement in which it promises not to prosecute U.S. service members, government officials, and other "covered" individuals. Because the conditions of this exception are largely out of the U.S. government's purview, § 7422 is not analyzed here. However, § 7422(c) provides a separate waiver mechanism that will be discussed below.
[38] 148 CONG. REC. S7267 (2002) (statement of Sen. Dodd).

is limited, it does not render the rest of ASPA inoperative, nor does it sanction all forms of assistance to the ICC. For instance, the restriction on "obligating" funds for or in support of the ICC found in the FRAA is not part of ASPA and therefore is not covered by the Dodd Amendment. Section 7401 thus acts as a separate bar to U.S. support for the Court and is analyzed where relevant below.

A. The Dodd Amendment's Requirements Applied to the International Criminal Court

Although this provision makes no mention of the ICC *per se*, the text of the Dodd Amendment leaves no doubt that it applies to the ICC as opposed to other international justice efforts. This subpart lays out the prerequisites within the Dodd Amendment's safe harbor and rebuts two prominent arguments for why the Dodd Amendment supposedly should not apply to cooperation with the ICC.

Closely read, the Dodd Amendment establishes five requirements for a particular action to fall within its safe harbor:

- First, the United States must be "rendering assistance."[39]
- Second, the assistance must be provided to "international efforts."[40] This would exclude purely domestic prosecutorial efforts.
- Third, these international efforts must be aimed at "bring[ing] to justice" certain individuals.[41]
- Fourth, the target of the international efforts must be a "foreign national."[42]
- And fifth, the foreign national must be accused of "genocide, war crimes or crimes against humanity."[43]

The relationship between the terms "support" and "assistance" within ASPA provides further evidence that the Dodd Amendment is intended to permit certain forms of cooperation with the ICC. "Rendering assistance" covers all forms of cooperation proscribed in § 7423 because the catchall prohibition in § 7423(e) places a blanket ban on all U.S. "support" of the ICC.[44] The activities prohibited by this section clearly would constitute "help or support" – the plain meaning of "assistance" – to the ICC if they

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[39] 22 U.S.C. § 7433.

[40] *Id.*

[41] *Id.*

[42] *Id.* It is immediately not clear from the U.S. Code whether a noncitizen permanent lawful resident of the United States is a foreign national for the purposes of ASPA. For example, 8 U.S.C. § 1101(22), which defines terms for immigration purposes, states that a "national of the United States" is someone who "owes permanent allegiance" to the United States irrespective of citizenship. But it does not clarify whether a lawful permanent resident "owes permanent allegiance" to the United States.

[43] 22 U.S.C. § 7433.

[44] 22 U.S.C. § 7423(e) ("Notwithstanding any other provision of law, no agency or entity of the United States Government or of any State or local government, including any court, may provide support to the International Criminal Court.").

were performed by the United States.[45] Because "support" is defined in ASPA as "assistance of any kind,"[46] the term "rendering assistance" ties directly to the broadest proscription in ASPA, outlined in § 7423(e).[47]

Turning to the second and third Dodd Amendment elements, the ICC is, by its name and nature, an "international effort." The ICC is aimed at bringing individuals who have committed serious international crimes to justice, ending impunity for these criminals, and enforcing international justice.[48] As Senator Leahy, a co-drafter of the Dodd Amendment, explained, had Congress wanted this provision to apply to international efforts other than the ICC, it would have included language like "international efforts besides the International Criminal Court" or "other international efforts."[49] To be sure, Representative Hyde—a cosponsor of ASPA—stated that "[the Dodd Amendment] simply reiterates that this legislation does not apply to international efforts besides the International Criminal Court to bring to justice foreign national [sic] accused of genocide, war crimes, or crimes against humanity."[50] The efforts described by Representative Hyde may be conceived to include hybrid tribunals or criminal proceedings in national courts. But as Senator Leahy makes clear, "the effect of the Dodd-Warner amendment is to qualify provisions of ASPA, including sections [7423], [7425], and [7430], in cases involving foreign nationals."[51] Indeed, language to exclude the ICC from the Dodd Amendment was proposed and rejected by the Conference Committee.[52] Because these pre-enactment statements of legislative intent come from drafters of § 7433, they have weighty persuasive value.[53]

The fourth and fifth requirements are self-explanatory, but set important limitations on the safe harbor. The Dodd Amendment identifies two categories of cases for which cooperation is allowed that are narrower than the ICC's jurisdiction: first, cases involving either foreign nationals and second, the crime of aggression.

First, after considering ASPA's demonstrated purpose of protecting U.S. nationals, it is unsurprising that the Dodd Amendment would specifically proscribe government support for proceedings initiated against Americans at the ICC. Thus, the Dodd Amendment obviates concerns about the potential prosecution of a U.S. citizen or permanent resident while still supporting the clear American interest of promoting international justice. Secondly, Congress feared that the then-undefined "crime of aggression" would be used to prosecute American government

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[45] *Assistance*, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/assistance.

[46] 22 U.S.C. § 7432(12).

[47] *Id.* ("The term 'support' means assistance of any kind, including financial support, transfer of property or other material support, services, intelligence sharing, law enforcement cooperation, the training or detail of personnel, and the arrest or detention of individuals").

[48] *About*, INT'L CRIM. CT., www.icc-cpi.int/about (last visited 9 Sept. 2016).

[49] 148 CONG. REC. S7859 (2002) (statement of Sen. Leahy).

[50] 148 CONG. REC. H5221 (2002) (statement of Rep. Hyde).

[51] 148 CONG. REC., *supra* note 49, at S7859.

[52] *Id.* at S7267 (2002) (statement of Sen. Dodd).

[53] *See* Lewis v. United States, 445 U.S. 55, 63 (1980).

officials. The Amendment's drafters assuaged this concern by only allowing support of prosecutions of genocide, crimes against humanity, and war crimes.

Furthermore, these restrictions necessarily imply that the Dodd Amendment allows the provision of assistance only on a case-by-case basis. If there is a certain class of cases that cannot be legally supported by the U.S. government, it follows that each case must be evaluated for the Dodd Amendment criteria. As a result, the Dodd Amendment might be interpreted to bar more generalized aid to the ICC as an institution. All aid must be provided in an individualized manner, with the support going directly to a prosecution of a foreign national accused of genocide, war crimes, or crimes against humanity.

These requirements also limit the organs within the ICC that can receive support.[54] When judicial chambers are adjudicating cases that satisfy the fourth and fifth requirements, the United States could provide support (for example, it could send legal experts to help draft decisions or analyze evidence). The United States could offer help to the Office of the Prosecutor, but only to specific teams prosecuting cases that fit Dodd's requirements (as all current cases do). As of now, supporting the Office of Public Counsel for Victims is also permissible insofar as it works with victims involved in specific cases. Because there are no current prosecutions of non-foreign nationals (with respect to the U.S.) at the ICC and since the crime of aggression cannot be prosecuted until at least 2017,[55] the United States is in a position to legally assist many organs of the Court with all cases in the Court's current docket. On the other hand, aid to the Registrar, which is largely responsible for administrative tasks, would not be permitted by the Dodd Amendment, since it would not be tied to a particular prosecution of a foreign national accused of the qualifying crimes.

Additionally, the United States likely cannot contribute to an investigation unless there is a formal indictment that complies with the fourth and fifth requirements, though this result is not entirely clear from the Dodd Amendment's text. The requirements mandate that the foreign national be "accused" of particular crimes, but do not state how formal the accusation must be. In legal terminology, an accusation can be as simple as a witness's statement or as rigorous as a formal indictment after a grand jury investigation.[56] But the default position of ASPA is that support is barred—it is incumbent upon the U.S. government to justify any support by making an affirmative argument that the requirements of the Dodd Amendment are met. An investigation without a formal charging document limiting the case to a foreign national accused of the qualifying crimes might not meet the fourth and fifth requirements. Therefore, until

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[54] For a description of the various departments of the Court, see *How the Court Works*, INT'L CRIM. CT., www.icc-cpi.int/about/how-the-court-works (last visited 5 Feb. 2017).

[55] *See The Crime of Aggression*, *supra* note 6.

[56] *See Accusation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

there is a formal charge the Dodd Amendment is likely not satisfied and support is barred by ASPA.

There are two primary counterarguments to the foregoing textual analysis of the Dodd Amendment, which suggest that the Amendment should not be read to apply to the ICC itself: first, because this reading would make ASPA as a whole a nullity, and second, that the Amendment should not be read to apply to the ICC because the Amendment is a general provision and the other provisions of ASPA are specific. Neither argument is persuasive.

First, statutes should not be read in a way that "negate[s] their own stated purpose."[57] For example, in the recent case *King v. Burwell*, the U.S. Supreme Court rejected the petitioner's reasonable interpretation of a provision because it would likely create the exact problem Congress had been attempting to solve with the Affordable Care Act.[58] This rule of statutory interpretation requires two steps of analysis: ascertaining the purpose of a statute and ensuring that the interpretation of a provision at issue does not undermine that purpose. Put another way, the interpretation must be justified textually *within the provision* and *within the statutory scheme as a whole*.[59]

The purpose of ASPA is to protect Americans – especially American soldiers on foreign soil – from prosecution by the ICC.[60] Thus, if the interpretation of the Dodd Amendment detailed above – which permits the U.S. to support the ICC in prosecutions that meet the five requirements – allowed the government to aid prosecutions of U.S. soldiers, it would be invalid according to the counterargument. Such a reading would cause the Dodd Amendment to undermine the entire purpose of ASPA and therefore suffers the same weakness as the petitioner's argument in *Burwell*. The permissive interpretation of the Dodd Amendment outlined previously does not vitiate ASPA's protection of Americans; it simply focuses the statute's provision on the ICC issues that Congress found most concerning. As stated above, the fourth condition of the Dodd Amendment requires that any prosecution supported by the government only target non-U.S. nationals. As such, the purpose of ASPA – protecting American service members – is not undermined in any way by this reading of the Dodd Amendment.

An alternative argument for why the Dodd Amendment does not apply to the ICC itself was presented by Representative Henry Hyde during the ASPA debate. According to Representative Hyde, the Dodd Amendment applies to international efforts "besides" the ICC (such as the *ad hoc* criminal tribunals) because "under ordinary canons of statutory construction," the "specific controls the general."[61] ASPA's language is

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[57] N.Y. Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 420 (1973).

[58] King v. Burwell, 135 S. Ct. 2480, 2492–94 (2014).

[59] *Cf. id.* at 2494 n.4 (rejecting the dissent's argument that Congress drafted a "flaw[ed]" law that has a provision that contradicts the statute as a whole).

[60] *See* 22 U.S.C. § 7401(b).

[61] 148 CONG. REC. H5221–22 (2002) (statement of Rep. Hyde). If Representative Hyde's argument is that the Dodd Amendment is meant to apply specifically to ad hoc tribunals, his reading makes the Dodd Amendment "completely redundant," violating the presumption

"very specific about what is allowed and what is forbidden when it comes to assisting the International Criminal Court," so, the representative contended, "Had the Senate wanted to vitiate the restrictions of sections [7423 and 7425], it would have had to amend them, strike them, or expressly notwithstand them."[62]

Regardless of the accuracy of Representative Hyde's statement of the rules of statutory interpretation, his conclusion is incorrect. Even if the canons require the Dodd Amendment to "expressly notwithstand" the other provisions of ASPA, the Amendment does exactly that by beginning with "nothing in this subchapter." It is inconsequential that Congress used the word "nothing" instead of "notwithstanding" and referred to the whole subchapter instead of listing the provisions of ASPA.[63]

Representative Hyde is right that the specific usually controls the general, but that is only true when "conflicting provisions simply cannot be reconciled."[64] As discussed above, § 7423, § 7425 and § 7433 can be read together harmoniously. Furthermore, it is not clear that the Dodd Amendment is the more general provision. The general/specific canon usually applies when there is a general prohibition and a specific permission, or vice versa.[65] Here, there are three levels of prohibitions and permissions. The first layer is that "any other provision of law," as well as certain inherent powers, may afford the president general "permission" to take certain actions. To take one example, the president enjoys an inherent power to detail executive-branch personnel to other organizations if the detail is in the national interest.[66] Sections 7423 and 7425 are the second layer: they contain specific prohibitions controlling that general power when the ICC is involved. Section 7433, from this perspective, is the third, more specific, exception to *that* exception; it is specific permission to take certain actions involving the ICC that § 7423 and § 7425 generally prohibit.

It should also be noted that § 7423(b) presents various windows of opportunity for the U.S. government to cooperate with the ICC irrespective of the subsection's relationship with the Dodd Amendment. Throughout ASPA one finds prohibitions applying to any "agency or entity of the United States government,"[67] a phrase that is curiously missing from § 7423(b). Rather than utilize this broader term, Congress instead chose to prohibit cooperation in response to a request from the ICC on the part of

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against superfluity. *Id.*; Kawashima v. Holder, 132 S. Ct. 1166, 1174 (2012). *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174–79 (2012) ("If possible, every word and every provision should be given effect."). That is because § 7423 already expressly excludes ad hoc tribunals from its prohibitions. *See* 22 U.S.C. § 7423(a)(1). Adding a section dedicated to excluding ad hoc tribunals, like the Dodd Amendment, would thus be superfluous.

[62] 148 CONG. REC., *supra* note 61, at H5222.

[63] *See, e.g.*, 22 U.S.C. § 7423(c) (stating that the prohibition is "notwithstanding any other provision of law" instead of listing provisions).

[64] SCALIA & GARNER, *supra* note 61, at 183.

[65] *Id.*

[66] Humphrey's Executor v. United States, 295 U.S. 602, 603 (1935).

[67] *See, e.g.*, 22 U.S.C. § 7423(c).

any "agency or entity of any State or local government, including any court."[68] This section does not appear to bar federal cooperation undertaken by the executive branch, perhaps in deference to its Article II powers in accordance with § 7430 (see Part II).

It follows that the U.S. government may respond to a request for cooperation so long as the agency that is capable of executing the request is neither a federal court nor a branch of state or local government. The Rome Statute details various forms of cooperation that the ICC may request of state parties (or consenting non-state parties).[69] Article 93 of the Rome Statute outlines additional means by which states may be asked or required to cooperate with the ICC aside from responding to traditional arrest warrants, for example. The invocation of § 7423(b) would plainly render most "other forms of cooperation" outlined under Article 93 of the Rome Statute permissible under U.S. law because they require the participation of neither the federal judiciary nor a state or local branch of government. Such forms of cooperation might include identifying suspects and their whereabouts; locating and providing evidence; interviewing experts, witnesses, or suspects; facilitating the travel of experts, witnesses, suspects; and identifying, tracing, or freezing suspects' financial assets.[70] These actions could be performed by federal law enforcement agencies or even the Department of Justice, as the agency is not a court *per se*.[71] Furthermore ICC's subject-matter jurisdiction only includes crimes that fall under federal, rather than state or local purview.[72] Thus § 7423(b) permits, in its own right, many forms of cooperation with the ICC, though its provisions are clearly bolstered by the Dodd Amendment.

B. The Dodd Amendment Applied to Specific U.S. Actions

The above analysis reveals that the Dodd Amendment permits the United States to support the ICC in certain cases, but each action must be evaluated individually to ensure that it satisfies the five Dodd Amendment requirements noted above. In this section, we analyze whether four potential U.S. actions are permitted by the Dodd Amendment: providing funds to the ICC, providing manpower to the ICC in the form of secondments or other *gratis* personnel, sharing national security information or intelligence with the ICC, and providing witness protection services for the ICC.

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[68] 22 U.S.C. § 7423(b).

> Notwithstanding section 1782 of title 28, United States Code, or any other provision of law, no United States Court, and no agency or entity of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute. *Id.*

[69] Rome Statute, *supra* note 6, art. 87(1)(a), (5).

[70] *Id.* art. 93(1).

[71] *About DOJ*, U.S. DEP'T OF JUSTICE, www.justice.gov/about.

[72] *See* 18 U.S.C. § 1091 (criminalizing genocide); 18 U.S.C. § 2441 (criminalizing war crimes).

1. Providing Funding to the International Criminal Court

The first question concerns whether the Dodd Amendment allows the U.S. government to provide appropriated funds to the ICC for any purpose. Two separate statutes bar such funding: 22 U.S.C. § 7401 (the FRAA), which is not part of ASPA, and § 7423(f), which is. Section 7401 provides that no funds appropriated by any act may be "obligated for use by, or support of, the International Criminal Court" unless and until the United States becomes a party to the Court. An "obligation" is any monetary liability for the U.S. government or an agency, whether it is payable immediately or in the future.[73] Thus, the FRAA bars providing any appropriated funds to the ICC for any purpose, including institutional support or the prosecution of specific cases. Because the FRAA is not part of ASPA, the Dodd Amendment does not provide any exceptions for cases involving foreign nationals accused of the three core crimes.[74]

Section 7423(f) provides that no appropriated funds "may be used for the purpose of assisting the investigation, arrest, detention, extradition, or prosecution" of a U.S. citizen or permanent resident by the ICC.[75] Section 7423(f) is not likely to conflict with the Dodd Amendment because § 7423(f) merely applies to U.S. citizens and permanent residents, and the Dodd Amendment only provides an exception for cases involving foreign nationals.[76] As such, if the FRAA were repealed, the Dodd Amendment would definitively allow for the provision of funding for specific cases involving foreign nationals.

However, it may be the case that § 7423(f) renders the FRAA inapplicable to cases involving foreign nationals in the event that the Dodd Amendment is invoked. Because § 7423(f) applies "notwithstanding any other provision of law," it may be inferred that this subsection is a *specific* provision that was meant to function in spite of any *general* prohibition.[77] In this case, § 7423(f) qualifies the FRAA as the statute that addresses the more narrow issue of funding ICC activities pertaining to foreign nationals. Absent this interpretation of the relationship between § 7423(f) and the FRAA, an inconsistency between the two statutes would emerge since

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[73] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 20.5 (2015), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/a11_current_year/a11_2015.pdf.

[74] Many agencies, including the State Department, generate revenue in addition to receiving appropriations. For example, the State Department's Bureau of Consular Affairs is fully funded by fees for services such as granting travel visas. *See About Us*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/about.html. Because § 7401 only applies to "funds authorized to be appropriated," it does not bar transferring fee-generated funds to the ICC. However, these funds would still be subject to ASPA.

[75] 22 U.S.C. § 7423(f).

[76] *See supra* note 42 (discussing whether "foreign national" includes permanent lawful residents of the United States).

[77] It is recognized canon of statutory interpretation that the specific governs the general. *See* Morales v. Trans World Airlines, 504 U.S. 374, 384–85 (1992); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 437–38 (1987).

ASPA clearly expresses an intent to allow the allocation of funds to ICC activities on a case-by-case basis. Absent any indication to the contrary, two statutes generally should not be read to conflict with each other provided that a rational reconciliation can be reached. Thus, it is reasonable to assume that Congress intended to allow the government to fund ICC activities in a manner consistent with the Dodd Amendment notwithstanding the FRAA.[78]

2. Secondments and Personnel Training

Providing manpower and training to the ICC is generally allowable under the Dodd Amendment. While no provision of ASPA directly prohibits the United States from providing manpower to the ICC, there are two indirect bars. First, § 7423(e) is a prohibition on "provision of support" to the ICC. "Support" is defined in § 7432(12) as "assistance of any kind," including "services" and "the training or detail of personnel." Clearly, a long-term assignment like a secondment would be prohibited by this language. This provision also extends, for example, to an FBI agent interviewing a witness and sending a summary of the interview to the ICC, since that would be a "service" rendered. Second, any provision must comply with the FRAA, which would ostensibly prohibit the use of appropriated funds for any such support.

If the Dodd Amendment requirements are met, some forms of staffing are allowed by ASPA. Providing attorneys for a prosecution team – assuming the trial is of a foreign national accused of genocide, war crimes, or crimes against humanity – would fall within the safe harbor. On the other hand, seconding a Department of Justice lawyer to the ICC's Registry to help overall administration would not be allowed, as that assistance would be to the ICC as an institution, not to a particular case that satisfied the Dodd Amendment requirements.

The United States could also provide training support to Court personnel under certain circumstances. This is a more complicated question, however, because even if the training is in connection with a specific case that satisfies the Dodd Amendment, the trainees will certainly apply that training in later cases outside the safe harbor. Still, as long as the purpose of the training is to assist with a particular (Dodd Amendment-satisfying) case, and only ICC personnel connected with that case are trained, the Dodd Amendment should permit the training.

It is important to note that even though the Dodd Amendment permits staffing and training, they cannot violate the FRAA's prohibition on expending appropriated funds.[79] There are at least two methods of avoiding this prohibition. First, the provision of manpower might not

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[78] *See* Morton v. Mancari, 417 U.S. 535, 550–51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); Georgia v. Penn. R.R. Co., 324 U.S. 439, 456-57 (1948) ("Repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former's giving way, and then only *pro tanto*, to the extent of the repugnancy.").

[79] *See* 22 U.S.C. § 7401.

require any expenditure by the U.S. government – for example, the ICC could pay the salary of the lawyer while he or she was detailed. In that case, there would be no expenditure of U.S. funds to support the secondment. The feasibility of this interpretation is supported by the Rome Statute itself. Though the "ordinary costs for execution of requests in the territory of the requested State shall be borne by that State,"[80] the Statute provides a list of exceptions that clearly encompasses the secondment of U.S. personnel. These include "costs associated with the travel and security of witnesses and experts," "travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar, and staff of any organ of the Court," "costs of any expert opinion or report requested by the Court," and "following consultations, any extraordinary costs that may result from the execution of a request."[81] Thus, the ICC already provides the institutional support necessary for a secondment that results in no expense of appropriated U.S. funds.

Second, the obligation might not be "for support of" the ICC. "Support" is not defined in the FRAA, but both the dictionary definition and the definition in ASPA would cover forms of assistance like secondments and training.[82] If a government employee at some point trains ICC officials, his or her salary would not implicate the FRAA as long as his or her principal duties are attached to a distinct position elsewhere in the government. The "obligation" is incurred when the employee signs the employment agreement.[83] Unless an employee's primary job is to train ICC officials, the employment agreement is not "for the support of" the ICC. It is "for" services provided to the U.S. government, one minor component of which may be this external training. In sum, if providing manpower or training does not require expending appropriated funds and falls within the Dodd Amendment safe harbor, it is permitted. Moreover, if an outlay is necessary, it may be justified on the grounds that the outlay is not "for" supporting the ICC.

3. Intelligence and Information Sharing

Sharing intelligence, much like providing manpower, is broadly allowable in Dodd Amendment-satisfying cases so long as the FRAA is not violated. Sharing intelligence and other information (including potential testimony or information from law enforcement agencies) with the ICC is initially proscribed by § 7423(e) – the ban on "support" of the ICC – since these kinds of information sharing fall within ASPA's definition of "support."[84] But Congress goes further in § 7425 by also requiring the

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[80] Rome Statute, *supra* note 6, art. 100.

[81] *Id.* art. 100(1)(a), (c)–(d), (f).

[82] *Compare* 22 U.S.C. § 7432(12) (defining "support" as "assistance of any kind" including "services" and "the training and detail of personnel"), *with Support*, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/support (defining support as "help that is given in the form of money and other valuable things").

[83] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 18.

[84] 22 U.S.C. §§ 7423(e), 7432(12).

president to establish procedures to prevent classified national security and law-enforcement information from flowing to the ICC.[85] These procedures must also ensure that information does not indirectly make it to the ICC via the United Nations or third countries that are a party to the Court.[86]

Just like the bar on staffing, which also derives from § 7423(e), the bar on intelligence sharing can be overcome through the Dodd Amendment when its requirements are met. That is, if the intelligence relates to a specific prosecution of a foreign national accused of genocide, war crimes, or crimes against humanity, then it can be shared with the ICC notwithstanding § 7423(e) and § 7425(a). Indeed, ASPA's potential for clogging the flow of information to allies was a primary motivation for Senator Dodd in drafting the Amendment because he feared that U.S. allies would respond to ASPA "by barring the sharing of information they may have, which we have a strong national security interest in having."[87] The prohibition on intelligence transfers established under § 7425 may be waived in Dodd Amendment-qualifying cases since any procedures established under ASPA should be presumed internally consistent and applied by intelligence as such.[88]

The FRAA's bar on obligating funds generally applies to intelligence sharing, but the prohibition is not implicated if two conditions are satisfied. First, the intelligence that is being shared must not have been gathered specifically for use by the ICC. For example, expending funds to intercept communications between members of the Movement for the Liberation of the Congo *with the purpose of* aiding the ICC's prosecution of Jean-Pierre Bemba is prohibited by the FRAA.[89] By contrast, if there is an independent national interest in gathering this information, and then that intelligence is later shared with the ICC (or made publicly available), then such information was clearly not gathered "for use by, or support of" the ICC.[90] Furthermore, it would be unnecessary to narrow the scope of US "national interest." To withstand scrutiny under the FRAA, any expenditure that results in the indirect or subsequent transfer of information to the ICC must simply satisfy the principle of legality. The agency that wishes to transfer information to the ICC must only prove that the activities undertaken to acquire the information fall under their normal jurisdiction, and that they were financed by funds appropriated for this

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[85] *Id.* § 7425(a).

[86] *Id.* § 7425(b).

[87] 148 CONG. REC. S5132, 5142 (daily ed. 6 June 2002) (statement of Sen. Dodd).

[88] *Cf.* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (noting that agencies must comply with the clearly stated intent of Congress when exercising authority delegated by Congress).

[89] *See* Wairagala Wakabi, *MLC Insider Says Bemba Did Not Have Satellite Phone,* INT'L JUST. MONITOR (13 Sept. 2013), www.ijmonitor.org/2013/09/mlc-insider-says-bemba-did-not-have-satellite-phone/. For details on the Jean-Pierre Bemba prosecution and conviction, see *Jean-Pierre Bemba Gombo at the International Criminal Court, Timeline*, INT'L JUST. MONITOR, www.ijmonitor.org/jean-pierre-bemba-gombo-timeline/.

[90] *See* 22 U.S.C. § 7401(b); Caitlin Lambert, *The Evolving U.S. Policy Towards the ICC*, INT'L JUST. PROJECT (6 Mar. 2014), www.internationaljusticeproject.com/the-evolving-us-policy-towards-the-icc/.

pre-designated purpose. Intelligence transfers meeting these criteria would not run afoul of the FRAA because the funds used in this instance are not expressly "obligated for use by, or for support of, the International Criminal Court."

Second, there must be no monetary cost in sharing the intelligence with the ICC. Presumably, nearly all intelligence sharing will be electronic, so this should not pose much of an obstacle. The ICC could also pay any costs associated with the sharing, or the United States could simply release intelligence publicly, giving the ICC access without directly "supporting" the Court.

4. Witness Protection

Witness protection is permitted by the Dodd Amendment, with the important caveat that the ICC must pay any expenses associated with the program. Witness protection, like providing manpower and sharing intelligence, may be barred by § 7423(e), which prohibits "support" for the ICC.[91] The definition of "support" in § 7432(12) includes several categories that could include witness protection, such as "services" and "law enforcement cooperation."[92] Additionally, the FRAA, which prohibits obligating funds "for use by, or for support of," the ICC, bars the United States spending money on witness protection if the sole purpose is to assist the ICC.

Like the other activities barred by § 7423(e) discussed above, there is little doubt that the Dodd Amendment allows the United States to provide witness protection services for the ICC, irrespective of nationality. The witness, of course, must be testifying in or connected to a case against a foreign national accused of genocide, war crimes, or crimes against humanity. For the same reason that witness protection services may fall within ASPA's definition of "support," they could be included within the meaning of "render[ing] assistance" in the Dodd Amendment.[93] "Assistance" and "support" are so closely related that in the dictionary these two words define each other.[94] A plain reading of the text therefore supports the argument that witness protection is permissible under the ASPA framework. Because no ambiguity arises in the interpretation of these two provisions, there is no need to look beyond the plain meaning of the text.[95]

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[91] 22 U.S.C. §§ 7423(e), 7432(12).

[92] *Id.* § 7432(12).

[93] *Id.* §§ 7423(e), 7432(12), 7433.

[94] *Compare Support*, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/support (defining "support" as "to give help or assistance"), *with Assistance*, MERRIAM-WEBSTER DICTIONARY, *supra* note 45 (defining "assistance" as "help or support").

[95] Caminetti v. United States, 242 U.S. 470, 485 (1917) ("the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.").

IV. THE PRESIDENT'S STATUTORY AUTHORITY TO TRANSFER INTELLIGENCE TO THE INTERNATIONAL CRIMINAL COURT

The Dodd Amendment provides a capacious but not unlimited exception to many of ASPA's prohibitions. It is therefore important to highlight other provisions of ASPA that may allow certain kinds of cooperation with the ICC. In particular, § 7425 requires the president to "prevent the transfer of classified national security information and law enforcement information to the International Criminal Court."[96] It is possible that this provision could be circumvented pursuant to other waivers within ASPA, but exercising any such failsafe may not be politically expedient. It is therefore important to consider that § 7425 itself may not bar the Executive branch from transferring critical information and evidence to the ICC. An analysis of the limitations of § 7425 must center on the definitions of "classified national security information" and "law enforcement information," as well as the relationship between the two terms.[97]

A. Classified National Security Information

The extent of Congress's constitutional authority to regulate the transfer of classified information is uncertain. The courts have generally refrained from interfering with the president's authority over matters of foreign policy, under which the transfer of intelligence to foreign entities presumably falls.[98] Congress has rarely raised objections to the president's Article II authority to direct the transfer of classified intelligence. The few exceptions principally dealt with Congress's prerogative to restrict the *retention* of classified information, not its *release*.[99] If anything, Congress and former presidents have demonstrated a presumption *against* strict classification and non-disclosure.[100] It is thus possible that § 7425 could infringe on the president's constitutional authority over matters of national security and foreign relations.

Assuming however that Congress acted within its authority in drafting § 7425, the term "classified national security information" leaves much to interpretation. "Classified national security information" is defined by § 7432(2) of ASPA as "information that is classified or classifiable under Executive Order 12958 or a successor Executive Order."[101] ASPA's definition indicates that national security information that is not

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[96] 22 U.S.C. § 7425(a).

[97] *Id.*

[98] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936); Haig v. Agee, 453 U.S. 280, 293–94 (1981).

[99] *See* S. REP. No. 105-165, at 5–6 (1998).

[100] *E.g.*, Exec. Order No. 12,958 § 1.3(c), 60 Fed. Reg. 19,826 (20 Apr. 1995) ("If there is significant doubt about the appropriate level of classification, it shall be classified at the lower level.").

[101] 22 U.S.C. § 7432(2); Exec. Order No. 12,958, *supra* note 100, at 19,825. This Executive Order "prescribes a uniform system for classifying, safeguarding, and declassifying national security information."

"classified or classifiable" is not covered by this term. This would imply that information concerning the whereabouts of a suspect under investigation by the ICC, or evidence linking this individual to the crimes of which he is accused, could be relayed to the Court so long as it is not formally classified. As the original classification authority, the president could declassify any information he wishes to transmit to the ICC so long as the process is consistent with Executive Order 12958 and any relevant provision of law.[102]

Executive Order 12958 further states that "[i]n no case shall information be classified in order to: (1) conceal violations of law, inefficiency, or administrative error; [or] (2) prevent embarrassment to a person, organization, or agency."[103] Refusal or neglect on the part of the original classification authority to declassify information relevant to the investigation or prosecution of an individual accused of genocide, crimes against humanity, or war crimes at the ICC may contravene both this and past executive orders governing the dissemination of classified material. Thus, the U.S. government would not be permitted to ignore an ICC request for assistance under the guise of protecting classified information. Unless releasing even a redacted version of the material would truly jeopardize national security, the original classification authority is obligated by Executive Order 12958 to release it to the custody of the ICC in this scenario. If the original classification authority is the president, however, he would have the power to issue another executive order either exempting the impugned material or amending Executive Order 12958. Moreover, without adequate Congressional or judicial oversight this point may be ignored in practice by an administration hostile to the ICC, but it nonetheless evidences a general presumption against withholding classified information unless strictly necessary to national security.

B. Law Enforcement Information

The precise definition of "law enforcement information" as referred to in § 7425 remains opaque. The term is not defined by ASPA and has not been plainly defined by any other federal statute. The Juvenile Justice and Delinquency Prevention Act provides some guidance by defining "law enforcement and criminal justice," for the purposes of the statute, as: "[a]ny activity pertaining to crime prevention, control, or reduction or the enforcement of the criminal law, including, but not limited to police efforts to prevent, control, or reduce crime or to apprehend criminals [or] activities of courts having criminal jurisdiction and related agencies (including prosecutorial and defender services)."[104] It appears that the term "law enforcement" may be linked to activities that support the criminal justice system. In other words, non-judicial means of investigating crime and facilitating the punishment of criminals fall within

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[102] Exec. Order No. 12,958, *supra* note 100, at 19,827.
[103] *Id.* at 19,829.
[104] 42 U.S.C. § 5603(6) (2012).

the ambit of law enforcement. This interpretation is supported by the definition of "law enforcement officer" within the Federal Employees Retirement System as "[an employee, the duties of whose position … are primarily…] the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States."[105]

Though these statutes bear little relation to the substantive provisions of ASPA, they are some of the few federal sources of law that provide insight to what Congress means by "law enforcement information." A clearer picture may be gleaned from these scattered provisions that suggests this term may refer to any material gathered by law enforcement officers in the course of their duty to prevent crime, conduct police investigations, and carry out the functions of the criminal justice system.

This definition would appear to prohibit the transfer of a broad range of documents and information to the ICC. Any information collected by U.S. law enforcement agencies—which include the Federal Bureau of Investigations, the Drug Enforcement Administration, and the Coast Guard, among other agencies[106]—could conceivably be withheld from the ICC under this provision of ASPA. However, it is important to note that the transfer of information that is of a law enforcement character may not run afoul of ASPA as long as the material was not originally collected for the purposes of facilitating a criminal investigation. In other words, information pertaining to foreign criminal conduct and law enforcement operations, collected for the purposes of national security by an intelligence agency, may not qualify as law enforcement information.

The Department of Defense has defined a series of access controls on unclassified, but nevertheless sensitive information. In particular, the "law enforcement sensitive" marking "denotes that the information was compiled for law enforcement purposes and should be afforded security in order to protect certain legitimate Government interests."[107] It is possible that "law enforcement information" may refer to any information marked with the classification "law enforcement sensitive," especially considering that this term is utilized in the context of classification. This Department of Defense manual suggests that the main purpose of the "law enforcement sensitive" marking is to protect confidential information, safeguard proprietary knowledge, maintain the integrity of law enforcement procedures, and preserve defendants' fair trial rights.[108] It is unlikely that

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[105] 5 U.S.C. § 8401(17)(A)(i)(I).

[106] See 8 U.S.C. § 1701(4) for a complete list.

[107] U.S. DEP'T OF DEF., DOD INFORMATION SECURITY PROGRAM: CONTROLLED UNCLASSIFIED INFORMATION, MANUAL NO. 5200.01-V4 18 (24 Feb. 2012).

[108] *Id.* at 18–19
including the protection of:

> (1) Enforcement proceedings.
> (2) The right of a person to a fair trial or an impartial adjudication; grand jury information.
> (3) Personal privacy, including records about individuals requiring protection in accordance with the Privacy Act of 1974, as amended.

any information that falls into these categories would be useful to any international criminal justice efforts. Thus, the law enforcement information that could be covered by ASPA would be of little consequence to an ICC investigation or prosecution.

C. National Security Versus Law Enforcement

The above discussion illustrates the potential for overlap between national security and law enforcement information. The blurred line between the two might lead one to believe that the prohibition of the transfer of "law enforcement information" covers any kind of material that "classified national security information" does not encompass. This claim would be erroneous because it assumes that this overlap erodes any difference between these two terms. In fact, law enforcement and intelligence gathering have been treated so distinctly by the government that the Attorney General and Director of Central Intelligence authorized a task force to investigate how the two communities might collaborate more efficiently.[109]

Law enforcement information can be distinguished from intelligence by the administrative rules to which it is subject. For example, the dissemination of law enforcement information is governed by restrictions such as "grand jury secrecy, pretrial discovery, and wiretap limitations."[110] Intelligence relevant to national security, on the other hand, is subject to the provisions outlined by the National Security Act of 1947.[111] Moreover, in establishing the Central Intelligence Agency, this Act expressly states that the organization "shall have no police, subpoena, law-enforcement powers, or internal-security functions."[112] Notwithstanding any potential for cooperation between law enforcement and intelligence agencies, the information produced by each should be considered distinct and separate for the purposes of analyzing § 7425. Thus, any intelligence relevant to an ICC investigation that is obtained by the CIA, the U.S. armed forces, or any other non-law enforcement agency could be transferred in a manner consistent with § 7425.

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(4) The identity of a confidential source, including a State, local, or foreign agency or authority or any private institution that furnished information on a confidential basis.
(5) Information furnished by a confidential source.
(6) Proprietary information.
(7) Techniques and procedures for law enforcement investigations or prosecutions. *Id.*

[109] *See* JOINT TASK FORCE ON INTELLIGENCE AND LAW ENFORCEMENT, REPORT TO THE ATTORNEY GENERAL AND DIRECTOR OF CENTRAL INTELLIGENCE i–v (1995), https://fas.org/irp/agency/doj/joint.pdf.

[110] *Id.* at 5.

[111] 50 U.S.C. §§ 3002, 3036(d)(2).

[112] *Id.* § 3036(d)(1).

V. THE PEACEKEEPING WAIVER

Another instance in which the president is entitled to act pursuant to a provision of ASPA concerns peacekeeping missions. Generally speaking, § 7422 provides the opportunity to waive § 7424, which imposes restrictions on the United States' ability to participate in peacekeeping missions. This provision was intended to protect American service members from prosecution by the ICC, but § 7422 recognizes that circumstances may arise in which it is in the U.S.'s interests to lend support to certain peacekeeping efforts. Section 7422(c) (hereinafter referred to as the "Peacekeeping Waiver")[113] therefore affords the president the opportunity to waive the provisions of § 7423 and § 7425 in the event that these sections inhibit U.S. cooperation with the investigation or prosecution of a "named individual."[114] This language emulates that of the Commander-in-Chief Waiver (see part IV) and the Dodd Amendment, which allow U.S. cooperation with the ICC on a "case-by-case basis." The pattern displayed suggests that Congress did not intend to limit the U.S.'s ability to provide isolated, discriminating support to the ICC so long as national interests are safeguarded.[115] Indeed, the Peacekeeping Waiver may be invoked given that four principal conditions are met:

- A waiver pursuant to § 7422(a) (or an extension under § 7422(b)) must be in effect;
- The president must have "reason to believe" that the named individual in question committed the crime of which he is accused;
- The ICC investigation must reflect American national interests;
- No "covered individual" may be investigated, arrested, detained, prosecuted, or imprisoned in conjunction with the case.[116]

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[113] 22 U.S.C. § 7422(c). The Peacekeeping Waiver contained within § 7422(c) should not be confused with the separate waivers provided by § 7422(a) and § 7424(c). While the § 7422(a) waiver is largely irrelevant to the discussion of the Peacekeeping Waiver, it should be noted that the §§ 7422(c) and 7424 waivers are interconnected in a manner described in this article.

[114] *Id.*

[115] 148 CONG. REC. S7859–60 (daily ed. 1 Aug. 2002) (statement of Sen. Leahy) ("It is not difficult to think of a number of instances when it would be in the interest of the United States to support such efforts [to try foreign nationals accused of war crimes, genocide, and crimes against humanity].").

[116] 22 U.S.C. § 7422(c)(2) (2002).

> (A) a waiver pursuant to subsection (a) or (b) of the prohibitions and requirements of section 2005 and 2007 is in effect;
>
> (B) there is reason to believe that the named individual committed the crime or crimes that are the subject of the International Criminal Court's investigation or prosecution;
>
> (C) it is in the national interest of the United States for the International Criminal Court's investigation or prosecution of the named individual to proceed; and
>
> (D) in investigating events related to actions by the named individual, none of the following persons [covered United States persons, covered allied persons, or individuals who were covered United States persons or covered allied persons] will

The last three stipulations are straightforward and easily applicable to any number of ICC cases. First, if the U.S. had wished to support the prosecution of Jean-Pierre Bemba, for instance, it could have pointed to the Pre-Trial Chamber's conclusions as to whether a "reasonable basis" for investigation existed.[117] Second, it is certainly in the U.S. national interest to support the prosecution of suspected war criminals as this supports counter-terrorism efforts, strengthens peacebuilding initiatives, and sustains the rule of law worldwide.[118] The last requirement is no more difficult to satisfy: the U.S. may simply support the cases that pose no threat to U.S. personnel or other "covered individuals."

However, the first prerequisite—that a § 7424(c) waiver be in effect—may require a series of presidential actions that follow the establishment of a United Nations Peacekeeping Force pursuant to Chapters VI or VII of the UN Charter. Because § 7422(c)(2)(A) specifically references the peacekeeping provisions of § 7424, the Peacekeeping Waiver may only be applied in the case of a Chapter VI or VII mission. Invoking a § 7424(c) waiver becomes unproblematic to acquire by, among other ways, allowing the president to certify that U.S. involvement in the mission is simply in the national interest.[119] Completing this process would allow the U.S. to

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be investigated, arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court with respect to actions undertaken by them in an official capacity[.] *Id.*

[117] Rome Statute, *supra* note 6, art. 15(3).

[118] Jane Stromseth, Acting Head, U.S. Dep't of State Office of Global Criminal Justice, Remarks at Fourteenth Session of the International Criminal Court Assembly of States Parties (19 Nov. 2015), https://2009-2017.state.gov/j/gcj/us_releases/remarks/2015/249814.htm.

[119] 22 U.S.C. § 7424(c) (2002).

> The certification referred to in subsection (b) is a certification by the President that—
>
> (1) members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court because, in authorizing the operation, the United Nations Security Council permanently exempted, at a minimum, members of the Armed Forces of the United States participating in the operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by them in connection with the operation;
>
> (2) members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court because each country in which members of the Armed Forces of the United States participating in the operation will be present either is not a party to the International Criminal Court and has not invoked the jurisdiction of the International Criminal Court pursuant to Article 12 of the Rome Statute, or has entered into an agreement in accordance with Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against members of the Armed Forces of the United States present in that country; or
>
> (3) the national interests of the United States justify participation by members of the Armed Forces of the United States in the peacekeeping or peace enforcement operation. *Id.*

participate in a peacekeeping operation *without* obtaining formal or express assurances that U.S. personnel are protected from ICC investigation or prosecution. From a political standpoint, such assurances may not be impossible to obtain; indeed, the United States has already secured a series of bilateral agreements in which other nations pledge not to transfer U.S. persons to the ICC.[120] If, however, the U.S. hoped to support an eventual ICC case against individuals involved with the conflict, a § 7424(c) waiver must be triggered in order to implement the Peacekeeping Waiver that applies to §§ 7423 and 7425, which pose the biggest obstacles to U.S. cooperation with the ICC. The § 7424(c) waiver alone would only allow U.S. participation in a UN peacekeeping mission. This section must be combined with the Peacekeeping Waiver in § 7422(c) in order to provide the opportunity to waive ASPA's other provisions in order to support "an investigation or prosecution of a named individual by the International Criminal Court."[121]

Some ambiguity exists with respect to whether an individual ICC case supported by the U.S. pursuant to the Peacekeeping Waiver must be tied to an actual peacekeeping operation authorized by a § 7424(c) waiver. Nowhere in § 7422 is this link specifically established. A strict reading of the text could theoretically allow the president obtain a § 7422(c) waiver for a case as long as *any* prior § 7424(c) waiver has been issued, regardless of its connection to the present situation.[122] This interpretation may contravene the intent of the statute, but the ambiguity suggests at the very least that the peacekeeping requirement may not be as stringent as it appears *prima facie*. Congress may have left this ICC-peacekeeping link deliberately vague in order to allow the president the greatest amount of latitude in choosing which ICC cases to support, which would be consistent with the broad presidential authorities ASPA grants in subsequent sections. In conjunction with the Dodd Amendment, this section provides strong evidence to suggest that ASPA was not intended to hinder international efforts, including those undertaken by the ICC, to bring to justice foreign nationals on a case-by-case basis.

To be sure, the Congressional Research Service reached a conclusion that contradicts our interpretation of § 7422(c) in saying that, "if the ICC enters into and abides by an agreement under sections [7422](a) or (b), section [7422](c) permits the President to waive sections [7423] and [7425]."[123] The basis for stating that the Peacekeeping Waiver is contingent upon an ICC agreement likely rests in § 7422(a), which states that, "a waiver under this subsection may be issued only if the President . . . determines . . . that the International Criminal Court has entered into a binding agreement."[124] The CRS's interpretation of the statute is incorrect

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[120] *See Status of US Bilateral Immunity Agreements*, COAL. FOR INT'L. CRIM. CT. (11 Dec. 2006), www.iccnow.org/documents/CICCFS_BIAstatus_current.pdf.

[121] 22 U.S.C. § 7422(c) (2002).

[122] 22 U.S.C. § 7422(a) (2002).

[123] ELSEA, *supra* note 14, at 14.

[124] 22 U.S.C. 7422(a)(2).

because it ignores the key phrase "under this subsection."[125] Only the separate § 7422(a) waiver, as opposed to the Peacekeeping Waiver found in § 7422(c), requires an ICC agreement based on a plain reading of the text.

VI. PRESIDENTIAL POWER AND THE COMMANDER-IN-CHIEF WAIVER

Unlike the other statute-based avenues within ASPA that may permit cooperation with the ICC, Congress implemented one provision that principally relies on the interaction between presidential and legislative authority. Section 7430 preserves the president's ability to cooperate with the ICC as commander-in-chief in spite of §§ 7423 and 7425 on a "case-by-case basis."[126] While the Dodd Amendment prescribes all three branches of government the authority to cooperate with the ICC in specific circumstances, the scope of the "Commander-in-Chief Waiver"[127] is limited to the inherent or concurrent powers of the president as head of the armed forces.

Section 7430(c) of the Commander-in-Chief Waiver specifically states that "[n]othing in this section shall be construed as a grant of statutory authority to the President to take any action."[128] Given this provision, the Commander-in-Chief Waiver might be read as a truism that simply affirms the powers obviously afforded to the president by the Constitution in any circumstance. Nevertheless, such a reading would not explain why Congress would limit this waiver to exercises of presidential authority on a "case-by-case" basis. If an act is expressly within the powers of the president, the executive is allowed to carry it out regardless of whether it is on a case-by-case basis. This is particularly so if Congress and the president do not share the power concurrently or, as is the case of the waiver, Congress has delegated any concurrent power to the president. In light of these conditions, any attempt by Congress to limit the president's ability to waive §§ 7423 and 7425 would be an unconstitutional restriction of presidential power.[129]

This situation leaves two possible interpretations: that Congress erred in constructing this section or that it intended to acknowledge the president's authority to engage in specific acts otherwise prohibited by §§ 7423 and 7425 on a limited basis. Given a reasonable alternative, statutes

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[125] *Id.*

[126] 22 U.S.C. § 7430(a).

> Sections [7423] and [7425] shall not apply to any action or actions with respect to a specific matter involving the International Criminal Court taken or directed by the President on a case-by-case basis in the exercise of the President's authority as Commander in Chief of the Armed Forces of the United States under article II, section 2 of the United States Constitution or in the exercise of the executive power under article II, section 1 of the United States Constitution. *Id.*

[127] For ease of reading, § 7430 will be referred to as a waiver even though it is not a waiver in the formal sense. It only annuls previous provisions of ASPA if they conflict with Presidential prerogatives.

[128] 22 U.S.C. § 7430(c) (2002).

[129] *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).

generally should not be read to conflict with the Constitution.[130] Section 7430 evidences the proposition that ASPA is not a collection of scattered prohibitions that are meant to impose a blanket ban on cooperation with the ICC. Instead, this section further demonstrates how the language of the Dodd Amendment permeates the entire statute, suggesting that the United States may pursue cooperation with the ICC on cases in which U.S. nationals are not subject to prosecution.

Congress has clearly acknowledged the vested interest of the president in preserving his powers as commander-in-chief with regards to the application of ASPA. Therefore, it is necessary to determine the extent to which this prerogative allows the president to unilaterally cooperate with the ICC. Justice Robert Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* is hailed as particularly useful guide for evaluating the reach of presidential power.[131] Justice Jackson's formula is composed of three classes of executive action that vary by the degree of constitutional scrutiny that each merits. If the president acts "pursuant to an express or implied authorization of Congress," then "his authority is at its maximum."[132] Justice Jackson also recognized a "zone of twilight" in which the president may exercise some concurrent authority with Congress in the absence of legislative action to the contrary.[133] Lastly, the president's power "is at its lowest ebb" when he acts against Congress's "express or implied will." In this instance, the president "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[134] The *Youngstown* framework may be used to analyze the president's commander-in-chief powers as they relate to ASPA. Two prominent facets of the president's commander-in-chief powers that are relevant to ASPA's provisions include military intervention and intelligence sharing. Each of these components may potentially govern the U.S. government's ability to apprehend suspects for the ICC and share vital information with the Court.

Justice Jackson's concurrence in *Youngstown* provides conditional support for unilateral actions undertaken by the president pursuant to his powers as commander-in-chief. The Constitution expressly delegates this military capacity to the president and distinguishes it from the powers afforded to Congress.[135] Thus, even if ASPA represents Congress's "express or implied" opposition to cooperation with the ICC, "exclusive presidential control" may be sustained because the courts may validly "disabl[e] the Congress from acting upon the subject."[136] Moreover, the Commander-in-Chief Waiver may amount to tacit Congressional approval for presidential cooperation with the ICC as long as it is "in the exercise of the President's authority as Commander in Chief of the Armed

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[130] *See* Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944).

[131] *See* Medellín v. Texas, 552 U.S. 491, 494 (2008).

[132] Youngstown Sheet & Tube Co. et al. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[133] *Id.* at 637.

[134] *Id.*

[135] U.S. Const. art. II, § 2.

[136] *Youngstown*, *supra* note 132, at 635–38.

Forces of the United States" and on a "case-by-case basis."[137] If so, this would place the executive action within Justice Jackson's "zone of twilight," in which the constitutionality of the act may be evaluated in light of "the imperatives of events and contemporary imponderables, rather than on abstract theories of law."[138] There are several circumstances in which the president might exercise his or her commander-in-chief or Article II powers in ways that would implicate the ICC.

A. Military Intervention

One example of such a "contemporary imponderable" could include current U.S. efforts to undermine the activities of the Lord's Resistance Army (LRA). Since 2011, the Obama Administration has sent approximately 300 service members to Uganda to assist national and regional efforts to apprehend key LRA leaders who, incidentally, have also been indicted by the ICC.[139] Though Congress has expressed support for sending military and intelligence assistance to "apprehend or remove" top LRA commanders, Congress neglected to include international justice efforts under the umbrella of transitional justice mechanisms available to the president.[140] Instead, it was the sense of Congress that the president "is authorized to support… efforts to promote transitional justice and reconciliation on both local and national levels."[141] Other appropriations bills and defense authorization acts have echoed Congressional support for the broad aim of eliminating the LRA, but have fallen short of approving military efforts to cooperate an international tribunal (including surrendering captures suspects and sharing intelligence).[142]

The resulting "zone of twilight" provides ample opportunity for presidential action. The commander-in-chief may legitimately utilize the Armed Forces to apprehend a suspected LRA war criminal notwithstanding ASPA. This is a clear exercise of the president's executive power to use force in accordance with U.S. security interests. A more nuanced question is whether the U.S. military may then surrender the suspect directly to the ICC. Though such an act would not represent the participation in hostilities, if the transfer utilizes Department of Defense funds appropriated for the general mission, the transfer may represent an exercise of the president's powers as commander-in-chief.

This is not necessarily a hypothetical situation. When Séléka rebels in the Central African Republic captured and surrendered Dominic

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[137] 22 U.S.C. § 7430(c) (2002).

[138] *Youngstown*, *supra* note 132, at 637.

[139] *Letter from the President—IDLs—War Powers Resolution*, WHITE HOUSE OFFICE OF PRESS SEC'Y (25 Mar. 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/03/25/letter-president-idls-war-powers-resolution.

[140] *Id.*

[141] Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, Pub. L. No. 111-172, § 7, 124 Stat., 1209, 1213 (2010).

[142] *See* ALEXIS ARIEFF ET. AL., CONG. RESEARCH SERV., R42094, THE LORD'S RESISTANCE ARMY: THE U.S. RESPONSE 13–16 (2006).

Ongwen—an LRA commander indicted by the ICC who already intended to defect— to American custody, U.S. forces on the ground transferred him to the African Union, which then handed him to the Central African Republic (CAR). The CAR subsequently extradited Ongwen to the ICC.[143] Perhaps to avoid running afoul of ASPA, the U.S. exercised what could be described as an unnecessary abundance of caution in constructing a complex chain of custody. Though this may have been a safe way to assure compliance with ASPA, the above interpretation of the president's Article II authorities would have permitted a direct transfer to the ICC. Rather than an inconsequential legal point, this observation carries serious political implications. Many states have notoriously allowed suspects wanted by the ICC to enter and leave their territory at will.[144] Thus, the combination of local hostility toward the ICC and the prevalence of corruption could allow a suspect transferred by the U.S. to a third-party state to walk free. Direct transfer to the ICC from American custody obviates this risk and cements U.S. commitment to ending impunity. The latter may bolster future efforts to prevent mass atrocities, a stated U.S. national security objective.[145]

B. Military Intelligence Sharing

It is possible that some U.S.-gathered intelligence may be shared by the president pursuant to his powers as commander-in-chief. Particular "facts on the ground" may be crucial to an ICC investigation into violations of international law, and in situations where the U.S. maintains an armed presence the military has the capacity to relay the details of a suspect's criminal activities and whereabouts to the ICC. If this intelligence-gathering serves a military objective and is carried out by military personnel on the orders of the Department of Defense, then 10 U.S.C. ("Title 10"), which governs military and Department of Defense operations, is rendered operative.[146] Because the president retains ultimate authority over the agencies that are governed by Title 10, it is within his powers as commander-in-chief to direct their intelligence operations. Therefore, the transfer of this intelligence to the ICC would be in fulfillment of a military objective that does not run afoul of ASPA. The exercise of these forms of presidential power and authority need not adhere to the safe harbor

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[143] For details on transfer of Dominic Ongwen to the ICC, see *First Ugandan Suspect, LRA Commander Dominic Ongwen, Transferred to the ICC in The Hague*, WOMEN'S INITIATIVES FOR GENDER JUSTICE (21 Jan. 2015), http://4genderjustice.org/statement-on-transfer-of-lra-commander-to-the-icc/.

[144] *See Court Worry at Omar al-Bashir's Kenya Trip*, BBC (28 Aug. 2010), www.bbc.com/news/world-africa-11117662; *ICC Asks South Africa to Explain Failure to Arrest Bashir*, REUTERS (7 Sept. 2015), www.reuters.com/article/us-safrica-icc-bashir-idUSKCN0R71A120150907.

[145] THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY, *Presidential Study Directive on Mass Atrocities* (4 Aug. 2011), www.obamawhitehouse.archives.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities.

[146] Andru E. Wall, *Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities, and Covert Action*, 3 HARV. NAT'L SEC. J. 85, 125 (2011) ("If the activity is conducted by a DoD element that is not part of the Intelligence Community, then the activity is a military operation conducted only under Title 10 authority.").

elements of the Dodd Amendment under ASPA since they establish an independent exception to ASPA's prohibitions.

VII. CONCLUSION

Because the existing literature on ASPA's legal implications is so slight, it was necessary to conduct an original textual analysis of the law. Most scholarship merely attests to ASPA's political consequences which, though great, shed no light on its legal significance. In fact, the notion that ASPA represents an immutable barrier to U.S. cooperation with the ICC may have allowed its adverse political consequences to endure for over a decade. Rather than assuming that ASPA is an intractable barrier to U.S-ICC cooperation, this article explores the various opportunities for mutual assistance that Congress left available. It has thus been shown that the case for legal U.S. cooperation with the ICC is more than an academic exercise—it may be plausibly translated into a substantial relationship between the two parties.

This article addressed very few political considerations in order to provide a legalistic account of what policies may be feasible provided adequate political will. Naturally, it is incumbent upon Congress and the president to employ the legal tools that are available to them. It is beyond the scope of our argument to surmise whether the American political climate will ever permit full U.S. support for the ICC. Moreover, if unfettered cooperation with the Court is ever to be achieved, both ASPA and the FRAA must ultimately be repealed. Though the Obama administration has markedly increased U.S. efforts to end impunity for international crimes through the work of the State Department and other agencies, it still must contend with laws that isolate the country from key components of the international atrocities prevention framework, such as the Rome Statute.

Barring any new act of Congress, however, there is ample reason for any Presidential administration to remain hopeful about the prospects of U.S.-ICC cooperation. As detailed above, ASPA would allow the U.S. to provide multiple forms of in-kind support to the Court ranging from intelligence transfers to personnel secondments. When analyzed in conjunction with the other, ASPA and the FRAA may even allow financial support for ICC cases that seek to bring a foreign national to justice for genocide, war crimes, or crimes against humanity. Though these vital instruments of atrocities prevention may remain dormant for some time, the U.S. government will be ready to implement them once it musters will to do so.