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The Wing-Tat Lee Chair in International Law is held by Professor James Gathii. Professor Gathii received his law degree in Kenya, where he was admitted as an Advocate of the High Court, and he earned an S.J.D. at Harvard. He is a prolific author, having published over 60 articles and book chapters. He is also active in many international organizations, including organizations dealing with human rights in Africa. He teaches International Trade Law and an International Law Colloquium.

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We would like to recognize friends and alumni of Loyola who contributed this past year to our international law program by supporting Loyola's Vis Moot Program:

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WITHHOLDING DEMOCRACY: THE TIMELINESS OF SELF-GOVERNANCE IN A POST-CONFLICT OCCUPATION

L. Amber Brugnoli*

Abstract

In December 2017, the Human Rights and Election Standards initiative at the Carter Center,[1] in collaboration with United Nations Office of the High Commissioner for Human Rights (OHCHR), issued a Plan of Action that was the culmination of two years of analysis and debate regarding a human rights approach to elections.[2] Part of their plan recognized the need for well-written and targeted recommendations for implementing a transition to democracy.[3] This article is a first step towards drafting such recommendations.

The right to free and fair elections is a well-established norm in international law; some scholars even argue it is a fundamental human right.[4] Research and scholarly works in this area focus heavily on elections in newly-formed democracies within the developing world following civil war or other internal strife; little-to-no attention is paid to the responsibility an occupying power has to implement free and fair elections after it is victorious in armed conflict. While it is generally recognized no single electoral method is suitable to all nations and peoples, significant international and regional treaties, including the International Covenant on Civil and Political Rights, The Universal Declaration of Human Rights, The European Convention on Human Rights and Fundamental Freedoms, and the Charter of the Organization of American States, protect the claim of citizens to

* Assistant Dean, West Virginia University College of Law & Adjunct Professor, West Virginia University Department of Political Science. J.D., Ph.D. and M.A., West Virginia University; M.S., Troy University; B.A. & B.A., West Virginia University; United States Air Force JAG Corps: Active Duty 2004-08 with tours in Okinawa, Japan and Baghdad, Iraq; Reserves 2008-Present, currently assigned to Air Force Administrative Law Division, Pentagon. This article includes research conducted for completion of the author's doctoral dissertation; therefore, acknowledgement and thanks go to Professors Jim Friedberg and Scott Crichlow and Associate Dean Greg Elkins for their support during that process. Also, many thanks to Professors Jena Martin and Amy Cyphert for their first-reading of this article, and to Professors Kirsha Trychta, Elaine Wilson, Atiba Ellis, and Josh Fershee for their advice and recommendations during the drafting and submission process.

[1] The Carter Center was founded by former U.S. President James "Jimmy" Carter. Its mission, in partnership with Emory University, is guided by a fundamental commitment to human rights and the alleviation of human suffering. It seeks to prevent and resolve conflicts, enhance freedom and democracy, and improve health. The Center is based in Atlanta, GA.

[2] See *Human Rights and Election Standards*, ELECTION STANDARDS AT THE CARTER CENTER (2018), http://electionstandards.cartercenter.org/at-work/hres/ [hereinafter CARTER CENTER], for details of this initiative and its Plan of Action.

[3] For the Project's full Plan of Action *see generally Human Rights and Election Standards: A Plan of Action* (Dec. 2017), http://electionstandards.cartercenter.org/wp-content/uploads/2015/12/HRES_PlanofAction_web.pdf [hereinafter Plan of Action].

[4] See CARTER CENTER, *supra* note 2 for the partnership between the Carter Center and several offices of the UN on Human Rights and Election Standards.

universal and equal suffrage.[5] What is not established are the obligations on a victor and occupier, post-conflict, to enact free and fair elections for the people they now govern, even when the purpose of the conflict was to promote a democratic way of life.[6] The issue is particularly salient when a long-term occupation is established, effectively removing the defeated nation's ability to govern itself. And if the occupier is a long-standing democratic nation, even less attention is given to whether their decisions regarding electoral methods meet internationally-established norms.[7]

As a cornerstone of democracy, self-rule should be enacted as soon as possible, even if it results in new and less-experienced political leaders, but even the most basic question surrounding an alleged human right has yet to be answered: How soon post-conflict should the election process begin? Timeliness of elections for transitioning democratic nations is a new area of research. The importance of determining the appropriate time for implementing elections, with the proposition earlier is better, is illustrated in this article through three case studies wherein a victorious Western occupier (the United States) oversaw a transition to democracy. The first two case studies examine the post-World War II occupations of Japan and Germany, which contrast a short- and long-term timeline for implementation of a new national government, but also include early local and regional elections to promote self-governance and democratic roots. The third case is 2003 Iraq, which is an example of a long-term process—more than two years—leading up to the first democratic elections at the national level with no earlier votes at local or regional levels. Each of these separate approaches impacted party formation, demographic and social representation, and make-up of the respective nation's long-term government. A model approach is then presented, advocating for early, albeit not perfect, elections for the purpose of promoting democracy (i.e., citizens learn by doing) and establishing national legitimacy on the global stage through sovereignty.

[5] G.A. Res. 14668, at 171 (Dec. 19, 1966); G.A. Res. 217 A, art. 3 (Dec. 10, 1948); *European Convention of Human Rights,* Council of Europe (June 1, 2010), https://www.echr.coe.int/Documents/Convention_ENG.pdf; Charter of the Organization of American States, A-41, June 10, 1993.

[6] See, for example, the U.S.'s occupation of Iraq in 2003. The purported purpose of the invasion and subsequent occupation was, according to President George W. Bush and UK Prime Minister Tony Blair, a coalition aimed "to disarm Iraq of weapons of mass destruction, to end Saddam Hussein's support for terrorism, and to free the Iraqi people." *President Discusses Beginning of Operation Iraqi Freedom,* Operation Iraqi Freedom (March 22, 2003), https://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html.; However, the initial UN Resolution recognizing Iraq's occupation simply acknowledged the role of the U.S. and UK as occupying powers in Iraq and turned over control of the nation's oil exports to them. S.C. Res. 1483 (May 22, 2003); Three subsequent resolutions provided only vague references to short-term political institutions that should be established by the occupiers, and these concessions were largely in exchange for allowing the continued use of force in the country. For discussion see Ellen Paine, The "Multinational Force" Mandate (Nov. 16, 2007), https://www.globalpolicy.org/component/content/article/168/36717.html.

[7] *See generally supra* note 6.

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I. Introduction

In April 2003, the world watched as U.S. Marines toppled a statue of Saddam Hussein in Firdos Square in Baghdad while thousands of jubilant Iraqis cheered them on.[8] It was a symbol of what was happening around the country: one of the harshest and most brutal dictatorships in the world was falling, opening the way to a new life of freedom. For the first time in 30 years, the citizens of Iraq would control their own destiny—or so they thought. Instead, following the cessation of formal armed conflict, Iraqis saw their country descend into anarchy as they were governed by foreign occupiers and exiled politicians from behind thick concrete walls.[9] Their only interactions with governing officials came when these individuals deigned to visit local communities in armored cars, escorted by heavily armed bodyguards and wearing Kevlar vests.[10] And as the violence escalated and quality of life plummeted, they were repeatedly told by these same officials that Iraqis were not yet capable of governing themselves, and that they should put their trust in the American occupation. It would take more than two years for Iraqis to get their first taste of democracy.[11]

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[8] ABC News, April 9, 2003.

[9] For detailed accounts of events in Iraq from 2003-04, *see* Larry Diamond, Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq (2005); Paul L. Bremer, III & Malcolm McConnell, My Year in Iraq: The Struggle to Build a Future of Hope (2006); Peter Galbraith, The End of Iraq: How American Incompetence Created a War without End (2006), to name just a few of the available works on this topic.

[10] Diamond, *supra* note 9, and Peter Van Buren, *We Meant Well: How I Helped Lose the Battle for the Hearts and Minds of the Iraqi People*, American Empire Project (2011).

[11] *Id*. Larry Jay Diamond is a political sociologist and leading contemporary scholar in the field of democracy studies. He is a professor at Stanford University and a senior fellow at the Hoover Institution, a conservative policy think tank. He has published extensively in the fields of foreign policy, foreign aid, and democracy and serves as the director of the Center on Democracy, Development, and the Rule of Law. Diamond has served as an advisor to numerous governmental and international organizations at various points in his life, including the U. S. Department of State, United Nations, World Bank, and U.S.

In February 2015, the Carter Center[12] hosted a two-day conference on human rights and elections standards.[13] The conference was co-chaired by former U.S. President Jimmy Carter and U.N. Assistant Secretary-General for Human Rights Ivan Šimonović.[14] Over the next two years, key players in the field of human rights and election observation would work to develop guiding principles for co-operation between the two fields as part of the Center's Human Rights and Elections Standards initiative.[15] A key take-away from their eventual Plan of Action[16] was the need for well-written and targeted recommendations for implementing a transition to democracy. The Plan stressed the importance of recommendations that are "specific, measurable, attainable, relevant, and time-bound,[17] as appropriate, as well as sensitive to the country context".[18] This article is a first step towards drafting such recommendations.

Elections have been an integral part of the democratization process globally, as they are an institutionalized attempt at actualizing the essence of democracy[19]—rule of the people, by the people, and for the people. While there are many views on what democracy is or ought to be, a common denominator among modern democracies is elections.[20] Indeed, the role of elections in a democracy cannot be overstated. Every modern definition of representative democracy includes participatory and contested elections perceived as the legitimate procedure for the translation of rule by the people into workable executive and legislative power.[21] Though elections by themselves are not sufficient to make a democracy, no other institution precedes elections in instrumental importance for self-gov-

Agency for International Development. In 2003, he was requested by President George W. Bush to serve as senior policy advisor to the coalition in Iraq. In this role, he repeatedly urged the rapid construction of an interim Iraqi government through a transparent and legitimate process of dialogue. On both the war and post-war activities, the Bush administration ultimately pursued policies very different from what Prof Diamond recommended.

Peter Van Buren served in the U.S. Department of State for 24 years and spent a year in Iraq as part of a provincial reconstruction team. Following publication of his book, the Department of State began adverse proceedings against him, alleging he had not properly cleared his book for public release. Van Buren then chose to retire.

12 *Supra*, note 1.

13 See Carter Center, *supra* note 2 for detailed summaries of this conference and all subsequent gatherings for the Project.

14 *Id*.

15 *Id*. The Initiative is founded on the belief that greater and more sustained interaction between the international elections community and human rights mechanisms is needed to promote electoral reform, strengthen democratic governance, and foster the evolution of relevant international law on elections.

16 Plan of Action, *supra* note 3.

17 Together, these aims create the acronym SMART, a method of goal-setting attributed to Peter Drucker's Management by Objectives Toolbox found in his 1954 book. *See* Peter Drucker, The Practice of Management (1954). It is a widely accepted way to ensure objectives are clear and reachable.

18 Plan of Action, *supra* note 3.

19 G. Powell, Jr., Elections as Instruments of Democracy: Majoritarian and Proportional Visions (2000).

20 Oluwakemi Ayanleye, *Elections as a Tool of Democratization in Africa*, 60 OIDA Int'l J. of Sustainable Dev. 143, 156 (2013).

21 Staffan I. Lindberg, Democracy and Elections in Africa (2006).

ernment.[22] Elections in newly democratizing countries do not signal the completion of the transition to democracy, but rather foster liberalization and a self-reinforcing power for increased democracy.[23] In order to cement democratic principles in new democratic nations, therefore, it is vital for citizens to experience an election process as early as possible.

According to the National Democratic Institute (NDI), genuine elections are not merely a technical endeavor; they are a fundamental human right linked to a broad array of institutions and to the ability of citizens to exercise other civil and political rights.[24] Elections perform three major roles: 1) they are a vehicle for the participation of citizens in the democratic process and they help to build capacities central to achieving accountable, democratic governance; 2) they aid in bringing better quality of life by linking voters' interests to the act of selecting a candidate, party, or policy through public discourse; and 3) they are a means for managing the potential for violent conflict and advancing human security.[25] In 2015, then-UN Assistant Secretary General for Human Rights (and now UN Special Advisor on the Responsibility to Protect) Ivan Simonovic stated a human rights approach[26] to elections has been proven to equitably and sustainably empower people to claim their rights, mobilize support, and build accountability because this approach uses human rights principles and obligations, including freedom from discrimination, to guide elections work.[27]

Yet there is a gap in public international law in relation to electoral processes.[28] Election observer groups do not generally present their findings to human rights bodies and elections-related recommendations issued by the United Nations and its various human rights organs are commonly offered to states already under review;[29] little attention is given to those nations just beginning their transition to free and fair elections, whether they are attempting to do so on their own or under the administration of an occupier. Human rights actors are conducting capacity-building exercises on electoral issues, but they are not necessarily designed and implemented in coordination with the elections community.[30]

[22] *Id.*

[23] *Id.*

[24] *Political Parties,* NATIONAL DEMOCRATIC INSTITUTE, https://www.ndi.org/what-we-do/political-parties (last visited on January 26, 2018).

[25] *Id.*

[26] For a more detailed discussion of this approach, see a summary of comments from the February 2017 Carter Center conference. *Summary of Proceedings*, HUMAN RIGHTS & ELECTION STANDARDS (Feb. 11-12, 2015), http://electionstandards.cartercenter.org/wp-content/uploads/2015/12/HRES-Conference-Feb-11-12-2015-Final-Summary-of-Proceedings.pdf.

[27] Ivan Simonovic, Opening Remarks at the Carter Center's Conference on Human Rights and Election Standards (Feb. 11, 2015).

[28] Avery Davis-Roberts, Introductory Address at the Carter Center's Conference on Human Rights and Election Standards (Feb. 11, 2015).

[29] Hernan Vales, Panel Discussion on Global Human Rights Mechanisms and Election Standards at the Carter Center's Conference on Human Rights and Election Standards (Feb. 11, 2015).

[30] Michael O'Flaherty, Presenter on Cooperation and Coordination Between Election Observers and Human Rights Mechanisms at the Carter Center's Conference on Human Rights and Election Standards (Feb. 11, 2015).

Only after grave injustices occur on a broad scale do international governing bodies start to intervene.[31] While this restraint pays tribute to the sanctity of sovereignty in international law, it does little to prevent continued suffering and oppression in the nations at issue. Perhaps a better course of action would be akin to the consideration of reasonable limits on democratic rights necessary to prevent political activities aimed at abrogating the rights of other groups[32]—international standards could establish expectations regarding elections timelines and criteria, the violation of which would be considered an act against fundamental human rights. The framework presented in this article is intended to provide guidance for just that purpose.

Section II of this article will explain the legal basis and obligations—or lack thereof—of occupying powers, including the evolution of these obligations since the Second World War, and discuss the current status of 'occupation law'. Section III presents three occupation cases studies—Germany, Japan, and Iraq—and compares/contrasts the timing and implementation of their respective election processes and final formation of a sovereign government. Section IV then relies on the analysis of these case studies to propose a model framework for future occupations that would establish expectations and guidelines for implementing free and fair elections to meet human rights obligations under international law. Section V concludes with the recommendation that even though some nations may be on shaky ground in the beginning, it is far better to start them on the path to self-governance as soon as it is reasonably possible, rather than wait for the "perfect" set of factors to present themselves.

There is a need to find a solution to the dilemma of timing elections: while the post-conflict period is often the best time to push for reform, stakeholders are frequently fatigued.[33] Also, as will be highlighted in the case studies, there are frequently pressing humanitarian concerns, security dilemmas, and logistical hurdles demanding the occupier's attention, making it easy to delay what may be viewed as simply "procedural matters". Elections, the drafting of new laws, and selecting new leaders and other democratic norms may seem superfluous—at least in the short term—when a Western nation is running the show, because there is little fear such a nation would pose a threat to eventual democratic self-

[31] *See, e.g.*, international interventions in Columbia, Guatemala, El Salvador, Sierra Leone, the Democratic Republic of Congo, Liberia, South Sudan, the Philippines, Nepal, and Rwanda. In every case, human casualties were high even before there was discussion of a coordinated, international response.

[32] Such an approach is taken in most domestic constitutions in democratic nations, including South Africa, Canada, the United States, and members of the European Union. (Compiled language available at www.hrcr.org/safrica/limitations/limitation.doc).

[33] This assertion is true across all types of reform. *See* Susan Nicolai, *Opportunities for Change: Education Innovation and Reform During and After Conflict*, International Institute for Educational Planning 138 (2009); M. P. Bertone, M. Samai, J. Edem-Hotah, & S. Witter, *A window of opportunity for reform in post-conflict settings? The case of Human Resources for Health policies in Sierra Leone, 2002–2012*, Conflict and Health 8, 11 (2014); Graciana del Castillo, *Economic Reconstruction and Reforms in Post-Conflict Countries,* Center for Research on Peace and Development, Working Paper 25 (2015); Press Release, SECURITY SECTOR REFORM IN POST-CONFLICT STATES CRITICAL TO CONSOLIDATING PEACE, REPORT NEEDED AIMED AT IMPROVING UN EFFECTIVENESS, SECURITY COUNCIL SAYS, UN Press Release SC/8958 (Feb. 20, 2007), http://www.un.org/press/en/2007/sc8958.doc.htm.

government. But regardless of the occupier's status, an occupation power is not a government "of the people, by the people, and for the people"[34]. Without clearer guidelines and expectations asserting that free and fair elections are as substantial a human right as the concepts of equality and due process—in fact, the latter items often stem from the former—the status quo of occupation government could extend indefinitely, especially when the occupying officials can point to numerous other demands some may view as more pressing priorities.[35] Democratically-elected lawmakers are more likely to respect human rights of all kinds, including those of woman and girls.[36] If a nation is proclaiming itself as a new democracy and yet is delayed in the most fundamental exercise of democratic rights—voting—the resulting lack of capacity for the population to implement change or an inability to imagine a different outcome from the troubled one they have known can dampen will and limit the scope of creative solutions.[37] The case studies outlined below illustrate this fact all-too-clearly, and the model framework presents a possible solution for holding occupiers accountable, a solution that does not currently exist in international law.

II. History of Modern Occupation Law

When the United Nations was established, the word "democracy" was not mentioned in its Charter.[38] The question of democracy was only indirectly addressed by means of the then-newly accepted concept of human rights, briefly mentioned in the UN Charter[39] and later embodied in the 1948 Universal Declaration of Human Rights (UDHR).[40] Article 21(3) of the UDHR proclaimed the right to free and fair elections by stating "[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free procedures".[41] Though ambiguous, this article may be construed as making elections the basis of every legitimate government.[42] The right to free and fair elections was reaffirmed by Article 25 of the

[34] By its very nature, an occupying power is a foreign, external being; its authority cannot be considered as stemming from the people, regardless of the intent of the occupation. JEFFREY LEHAM & SHIRELLE PHELPS, WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2008) (discussing the definition of "military occupation").

[35] For example, in Iraq, serious violence and acts of insurgency made security a major concern within the first two months of the occupation. As will be discussed in the case studies in Section III, however, Germany and Japan also faced serious humanitarian concerns (though of a different type) and occupation officials were able to overcome them within six months.

[36] James Carter, Former U.S. President, Remarks on the Use of Election Standards by Observers (Feb. 12, 2015).

[37] Chad Vickery, Speech on Human Rights and Election Standards at the International Foundation for Electoral Systems (2015).

[38] UN Charter, 1945: http://www.un.org/en/charter-united-nations/.

[39] *See id.* at art. 1, 13, 55, 62, 68, and 76.

[40] G.A. Res. 217 A (Dec. 10, 1948), http://www.un.org/en/universal-declaration-human-rights/.

[41] *Id.* at art. 21(3).

[42] Although the UDHR, as a UN General Assembly Resolution, is not considered a legally binding instrument, the overwhelming majority of nations who voted in its favor and its continuous affirmation

1966 International Covenant on Civil and Political Rights (ICCPR), which is binding on states that have signed or ratified it.[43] The first UN document to directly consider a right to *democracy* was the General Assembly Resolution of 21 November 1997, entitled "Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies."[44] Generally, this resolution sought to express the UN's support for those nations attempting to achieve democracy and to examine options available for strengthening that support.[45]

When a nation first achieves independence, whether through internal uprising or revolt against an external power, most have democracy thrust upon them, without the benefit of developed democratic institutions and systems.[46] In Africa, this created a political leadership vacuum, as most newly elected leaders were inexperienced in the art of governance.[47] The leadership void permitted the rise of many military and autocratic leaders throughout the continent.[48] Typically, however, these scenarios are left to play out, deemed to be problems the new nation must resolve on their own; only when truly heinous atrocities occur does the international community move to intervene in a sovereign nation's independent governance.[49] But what about in those situations where a nation has already intervened? Post-conflict, what are the responsibilities of the intervening state to ensure the fundamental human right of elections are delivered to the people?

It is important to note the difference between human rights law and transitional justice:[50] whereas human rights law focuses on strengthening and protecting the basic rights and fundamental freedoms inherent to all human beings,[51]

over the years have led several authors to assert its guidelines have become part of customary international law. *See* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 *Ga. J. Int'l & Comp. L.* 287, 322 (1995-96); *see also* Thomas M. Franck, *The Emerging Right to Democratic Governance* 86 AM. J. INT'L L. 46, 61 (1992).

43 Anastasia Mavrommatis, *The International Covenant on Civil and Political Rights and Its Role in Promoting Democracy*, in HUMAN RIGHTS AND DEMOCRACY FOR THE 21ST CENTURY 255 (Kalliopi Koufa ed., 1999)(describing the role of the ICCPR in the promotion of democracy).

44 G.A. Res. 52/18 (Jan. 20, 2002).

45 *Id*.

46 *See*, e.g., Richard Joseph, *Democracy and Reconfigured Power in Africa*, BROOKINGS CURRENT HISTORY 324 (2011) (detailing the power vacuums that often result at the end of armed conflicts); Diamond, *supra* note 9 (discussing the situation in Iraq).

47 *See* Ayanleye, *supra* note 20, at 144.

48 *Id*.

49 *Supra* note 31.

50 In the 1990s, various American academics coined the term "transitional justice" to describe the different ways countries had approached the problems of new regimes coming to power and facing the massive rights violations of their predecessors. The term took hold due to the great interest in the way former Soviet Bloc countries were dealing with the legacy of totalitarianism. Over time, particular mechanisms have developed and become recognized as approaches to transitional justice, including prosecutions, fact-finding or "truth-seeking" inquiries, reparations programs, and reform initiatives. *See* International Center for Transitional Justice, *available at* https://www.ictj.org/about [hereinafter ICTJ].

51 *See* The Foundation of International Human Rights Law, *available at* http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html (discussing the basis of international human rights law).

transitional justice is defined as the legitimate response to massive violations of human rights;[52] thus, the latter is a result of a failure in the former.

Following mass atrocities and systematic abuses of power, transitional justice aims may include establishing accountable institutions and restoring the public's confidence in them; making access to justice a reality for the most vulnerable in society; ensuring marginalized groups play an effective role in a new, just society; building respect for the law; and facilitating the peace process and developing durable resolutions of conflicts.[53] Each of these aims would appear to match easily with the goals of a democratic nation; in fact, they would overlap considerably. It would seem that offering the people a chance at self-governance might, in itself, be a strong form of transitional justice. In fact, some of the recommendations in the model framework in Section IV include best practices from transitional justice scholars. By including these practices, the model seeks to inform and solidify the fact that free and fair elections are a fundamental human right, and their past absence, or a failure to provide them in the present, should be addressed as a need for transitional justice in order to renew the public's faith in their new government.

"Occupying Power" is the legal term for countries occupying an adversary's territory.[54] When Iraq fell to U.S. and British forces in 2003, it spurred many international legal scholars to reexamine the basic requirements of occupation law, given the extensive nature of the occupation and frequency with which extraterritorial military occupations had been occurring during the previous decade.[55] The Annexed Regulations to the Hague Convention IV of 1907, the 1949 Fourth Geneva Convention, and customary international law set forth the laws of belligerent occupation,[56] and both the Nuremberg Tribunal[57] and a 1993 Report

[52] ICTJ, *supra* note 50.

[53] *Id.*

[54] The definition of occupation and the obligations of the occupying power were initially codified at the end of the nineteenth century. The definition still in force and commonly used nowadays is the one contained in the Regulations Concerning the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 August 1907 (H.IV). Section III of the regulations details the rights and obligations of the military authority over enemy territory (Arts. 42–56). These are very old regulations that, according to the International Court of Justice, have acquired the status of international customary law.

[55] International Committee for the Red Cross Report on Occupation and Other Forms of Administration of Foreign Territory, Nov 2010, available at https://www.icrc.org/eng/resources/documents/interview/2012/occupation-interview-2012-06-11.htm [hereinafter ICRC Report] (noting the various occupations that occurred during the 1990s following the internal conflicts that arose after the break-up of the Soviet Union).

[56] Convention Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2277 [hereinafter 1907 Hague Regulations] (stating that a "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised".); Geneva Conventions of 1949 art. 2, Aug. 12, 1949 [hereinafter Geneva Conventions] (stating that, the four Geneva Conventions of 1949 apply to any territory occupied during international hostilities. They also apply in situations where the occupation of the state territory meets with no armed resistance).

[57] Charles Wyzanksi, *Nuremberg: A Fair Trial? A Dangerous Precedent*, THE ATLANTIC (April 1946) (detailing the Tribunal's references to the Allied occupiers' responsibilities towards the German people).

of the UN Secretary General[58] characterized the Hague Regulations as reflecting customary international law binding on all States.[59]

Occupation laws come into effect as soon as territory is "occupied"—that is, when the government of the occupied territory is no longer capable of exercising its authority, regardless of whether the occupation was initially deemed lawful.[60] Obligations and rights of the Occupying Power only extend to those areas their forces actually control.[61] Ultimately, whether territory is occupied is a question of fact,[62] but occupation does not imply an assumption of sovereignty; the Occupying Power is simply administering the area it has captured. Various attributes of sovereignty are often limited during occupations, however, as the Occupying Power assumes most of the executive functions of the former government, as well as some legislative and judicial responsibilities.[63] A "military government" administers the occupied territory; it may, however, permit segments of the local government to continue operating. In fact, a strong preference for allowing local authorities to perform governmental functions is evident throughout the body of occupation law.[64]

Despite being labeled "military government", the occupation government may be military, civilian, or mixed in composition.[65] Regardless of their makeup, occupation law imposes significant policing/law and order responsibilities on occupation forces, as it is primarily motivated by humanitarian considerations.[66] Occupation formally ends with the reestablishment of a legitimate government or other form of administration (such as by the UN) capable of adequately and efficiently administering the territory.[67]

Occupation law clearly preserves, to the extent possible, the role of a defeated population in governing their own country and facilitates the eventual transfer of a nation's authority back to its own people.[68] Duties of an Occupying Power are primarily found in Articles 42-56 of the 1907 Hague Regulations and the Fourth

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58 Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories U. N. Doc. A/RES/48/41 (December 10, 1993).

59 The declaration these regulations are customary law is important under international law because it makes their standards and obligations binding on all nation-states, regardless of their membership or party status to various treaties or other international agreements.

60 See Article 42 of the Hague Regulations, supra note 54.

61 *Id*.

62 *Id*. The fact some resistance continues does not preclude the existence of occupation, provided the occupying force is capable of governing the territory to some degree. It is also not legally relevant if the occupiers claim to be "liberating" the population—justification of the conflict has no bearing on which laws apply.

63 *Id*.

64 *See,* e.g., Michael N. Schmitt, *Crimes of War: Law of the Belligerent Occupier,* George C. Marshall European Center for Security Studies, Germany (2003).

65 *Id*.

66 Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi Freedom*, 95 CAL. L. REV. 6 (Dec. 2007).

67 Schmitt, *supra* note 64.

68 ICRC Report, *supra* note 55.

Geneva Convention, Articles 27-34 and 47-78, as well as certain provisions of Additional Protocol I and customary international law.[69] The main rules of occupation law stress that the occupier's powers are not absolute and should be viewed as limited in duration, lasting only long enough for the defeated nation to re-establish its own form of government.[70] Most notably missing from the list of occupier obligations are any guidelines or expectations on an Occupying Power in regards to its day-to-day administering of the occupied territory. Where are the requirements for establishing a new form of government? What criteria should be used to select new national leaders? Should a new constitution be drafted? If so, through what process? Under what circumstances is it permissible to continue governing a nation, despite vehement local protest? Though elections are recognized as a fundamental right, these questions, which get to the heart of what a new nation will become post-occupation, are left to be determined on a case-by-case basis, thus resting an inordinate amount of power on the occupier—rather than the international community—to answer them as they see fit.

Since elections, as discussed above, are often the jumping-off point for both a new government and a new way of governing, it is reasonable to examine various approaches to their implementation in order to determine whether a model approach would aid future efforts. In an attempt to control some of the many variables, the case studies examined in this piece all involve occupations by the United States and are all considered the most monumental occupations in the modern era.[71] As a Western democracy, the United States is quite familiar with elections and the democratic process. The case studies were all true occupa-

[69] *Supra* note 54.

[70] *See* The 1907 Hague Regulations, *supra* note 56; Geneva Conventions, *supra* note 56; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, Annex I [hereinafter Additional Protocol I]; UN CHARTER (providing the following guidelines:

-The Occupying Power does not acquire sovereignty over the territory

-Occupation is only temporary

-The Occupying Power must respect the laws in force in the occupied territory, unless they constitute a threat to security or an obstacle to international law

-The Occupying Power must take measures to restore and ensure public order and safety

-The Occupying Power must ensure sufficient hygiene and public health standards, as well as provision of food and medical care

-The population cannot be forced to enlist in the occupier's armed forces

-Forcible transfers of populations from and within the occupied territory are prohibited

-Transfers of the civilian population of the Occupying Power into the occupied territory are prohibited

-Collective punishment is prohibited

-Taking of hostages is prohibited

-Reprisals against protected persons or their property is prohibited

-The confiscation of private property is prohibited

-The destruction or seizure of public enemy property is prohibited, unless required by military necessity

-Cultural property must be respected

-People accused of criminal offenses must be afforded internationally recognized due process

-Relief agencies (such as the ICRC) must be allowed to carry out humanitarian aid duties

[71] *See* JAMES DOBBINS, ET AL., *America's Role in Nation-Building: From Germany to Iraq*, RAND Corporation, 2003; *see* Marc Cogen & Eric de Brabandere, *Democratic Governance and Post-Conflict Reconstruction*", 20 Leiden J. Int'l L. 669, 669-93 (2007) (discussing free and fair elections in smaller occupations—East Timor, Kosovo, and Afghanistan).

tions,[72] with the U.S. having almost carte-blanche to administer each of its territories,[73] thus–in theory–removing delays and other obstacles caused by bureaucratic in-fighting, political posturing, group-think, and endless committee discussions. Most importantly, the timing of elections, and the decision as to whether national or local elections should come first, were altered in each case, allowing for a unique opportunity to compare each approach. These two factors are important components of the model framework set forth in Section IV.

III. A Tale of Three Occupations: Germany, Japan, and Iraq

Germany and Japan demonstrate how elections that start at the local level allow a new balance of social and political forces to emerge and coalesce. In 1945-46, President Truman's approach to democratization was a bottom-up effort, beginning with grassroots initiatives in small, local offices leading up to local, and then regional, elections.[74] In 2003-04, the Coalition Provisional Authority (CPA) in Iraq, under the direction of Ambassador Paul Bremer, never held local elections and never allowed the Iraqis to hold them, either. Rather, President Bush decided to implement national elections first, with the hopes of establishing a governing body capable of taking over as the sovereign authority in Iraq before the 2004 U.S. elections cycle.[75] In the end, however, it would take three different elections and various transitional bodies before Iraq finally had permanent leaders at ANY level—a process that took more than two years.[76]

A. Germany, 1945: De-centralized, Local Control

The Potsdam Conference[77] called for the establishment of *local* self-government "on democratic principles and, in particular, through elective councils as rapidly as possible and as is consistent with military security and the purpose of military occupation", with later extensions of authority to regional and state administrations.[78] Thus, the victorious Allied powers in Europe realized it was important to first implement democratic measures at smaller, local levels, before

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[72] *Id*.; 1907 Hague Regulation, *supra* note 56.

[73] *See* Edward N, Peterson, The American Occupation of Germany: Retreat to Victory, Wayne State University Press (1977); *See* Earl F. Ziemke, The U.S. Army in the Occupation of Germany, 1944-46, Center for Military History, United States Army, Washington, DC (1975). Initially, the Allied Control Council was expected to play a larger role in regards to governing Germany; however, the slow nature of collective governance became clear by mid-1945, and each victor—Britain, the U.S., France, and the Soviet Union—was left to govern its designated zone with little consultation with the other members).

[74] Ziemke, *supra* note 73.

[75] *See* Diamond, *supra* note 9.

[76] *Id*.; Phoebe Marr, A Modern History of Iraq (2011).

[77] Reports of the Potsdam Conference, available at https://www.loc.gov/law/help/us-treaties/bevans/m-ust000003-1224.pdf (The Potsdam Conference, held in the summer of 1945, was a meeting between "The Big Three" victors of World War II—Soviet leader Joseph Stalin, British Prime Minister Winston Churchill (replaced on July 26 by Prime Minister Clement Attlee), and U.S. President Harry Truman—in Potsdam, Germany, to negotiate terms for the end of World War II).

[78] *Id.*

attempting large-scale national elections.[79] To accomplish this, civil affairs/military government officers were stationed in every town and village throughout the U.S. sector—oversight and control of the process would be easy due to sufficient soldiers being on the ground and living within the communities.[80]

In early May 1945, the U.S. Army began to organize German provincial and district governments, including identifying citizens to serve in government positions.[81] Finding men with no Nazi involvement for the higher posts proved to be arduous business. Many of the potential candidates had not worked under the Nazis due to age or political affiliation, or they had held much lower ranks. Some were women, for whom the Nazi discrimination against their sex provided an advantage during the occupation period.[82]

In addition to weeding out the Nazis, military government officers recruiting Germans for appointments had to be careful to steer clear of over-involvement with other political factions. General Eisenhower repeatedly reminded army commanders the purpose of military government authorities was not to actually govern, but to oversee the German governmental authorities—a fine and delicate line.[83] A network of U.S.-appointed local councils and a central advisory council were eventually established as precursors to self-government.[84]

When SHAEF (Supreme Headquarters, Allied European Forces) began to look at German political activity in June 1945, it found none in the traditional sense of the term.[85] The vast majority of Germans were preoccupied with other things, such as food, housing, and other problems related to survival.[86] Additionally, no other party than the Nazi Party had existed legally, or even illegally, in any organized fashion since 1933.[87] In August 1945, military detachments were permitted to start licensing parties at the local level, but there was little to no interest from the public.[88] The detachments quickly realized German politics involved much more than parties and rivalries: the German appointees represented social, economic, and religious outlooks, in addition to political ones. Special interests, such as the Catholic Church or individual cliques, were determining policy direction.[89] Nevertheless, elections for small communities (less than 20,000 people) were scheduled for January 1946, and elections for larger towns and cities would

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[79] DOBBINS ET AL, *supra* note 71, at 14.

[80] ZIEMKE, *supra* note 73, at 272 (providing provides an extremely in-depth analysis of all aspects of the Allied occupation in Germany, with care to provide data and sources for each assertion. It is a compilation of three decades of work following the war).

[81] *Id*.

[82] *Id*.

[83] *Id*.

[84] Correlli Barnett, *Post-conquest Civil Affairs: Comparing War's End in Iraq and Germany*, The Foreign Policy Centre, 4 (2005).

[85] ZIEMKE, *supra* note 73, at 361-62.

[86] *Id*.

[87] *Id*.

[88] *Id.* at 362-63.

[89] *Id*.

be held a few months later.[90] The hope was active political life in Germany would rebound by late 1946.[91]

The first parties on the scene were the Communists and the Social Democrats, neither of which bore the Nazi taint, but both were opposed by the Church and lacked a working class majority.[92] The two strongest pre-Nazi parties showing signs of life were the Center Party and the Bavarian People's Party, so the U.S. was relatively generous in appointing their members to administrative posts, despite direct orders to avoid political favoritism.[93] Both the CP and the BPP let it be known—to the annoyance of U.S. officials—they would welcome repentant Nazis to their ranks.[94]

Throughout the nation, there was a concern about lack of experience and leadership within the new political parties. Except for a few survivors of the concentration camps, there was not an abundance of men with political backgrounds.[95] Outside of the senior Allied staff, most military officers and German politicians wanted the elections postponed; none of the parties who received licenses wanted to risk their existence in a premature test of strength, and several of their members already had jobs as appointees.[96] But General Lucius Clay[97], the U.S. officer placed in charge of military government, believed in learning by doing, so the Germans were sent to the polls whether they were ready (and willing) or not. Clay also realized that there soon would not be sufficient manpower to run the country if they did not get Germans into positions, as large numbers of U.S. officers were slated to return home in the latter half of 1945.[98]

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[90] Lest it seem this was a relatively easy feat, the challenges facing occupation officials should be clear. The last years of the conflict severely damaged Germany's physical infrastructure. *See*, e.g. Tony Killick, *Principals, Agents, and the Failings of Conditionality,* 9 J. ON INT'L. DEV. 483-95 (1997). A huge refugee crisis loomed, the economy collapsed, and hunger haunted nearly everyone. Additionally, nearly seven million Germans died during the war. *See, e.g.* Eva Bellin, *The Iraqi Intervention and Democracy in Comparative Historical Context*, 119 POLITICAL SCI. Q. 4 (2004-05). In most industrial areas, more than half the houses were damaged, while nearly two-fifths were beyond were repair. The transport system had been smashed by bombardment, with only 656 miles of rail track operable out of nearly 8,000 miles. All seven rail bridges across the Rhine were destroyed and the canal system suffered from similar damage. 1,500 road bridges were destroyed and there were desperate shortages of fuel and civilian vehicles. Essential ports were encumbered by wrecks and other obstructions; the telecommunications net was reduced to chaos. Coal was in short supply, and it served as the energy source for electric power, industry, and the remaining petrol plants. Millions of displaced persons had to be sheltered, fed, sorted out, and eventually repatriated to other parts of Europe, not to mention the several million German prisoners of war who needed to be disarmed and demobilized. *See, e.g.* Barnett, *supra* note 84, at 3.

[91] DOBBINS ET AL, *supra* note 71, at 15-16.

[92] ZIEMKE, *supra* note 73, at 361-62.

[93] *Id.*

[94] *Id.* at 361-63.

[95] *Id.* at 364-66.

[96] *Id.*

[97] General Clay, the U.S. viceroy in Germany, was an engineer by training and also an expert at reconstruction. His military experience consisted of assignments with the Army Corps of Engineers during the New Deal and as the Army's Chief of Materiel during World War II. He was able to use his expertise to restore public utilities, clear roads, and move rations and supplies to prevent starvation and disease. *See,* Barnett, *supra* note 84, at 13.

[98] ZIEMKE, *supra* note 73, at 364-66.

Despite American misgivings and local disinterest, the Germans went to the polls for local elections in January 1946 in astonishingly large numbers: 86% of those eligible voted.[99] General Clay and other military government officers found this particularly gratifying, since it justified the assertion the new administration was based on popular support.[100] But political principles were still obscure, since the successful parties welcomed former Nazis and either had strong ties to the Catholic Church or the Communist Party. The average German still did not recognize the personal responsibilities accompanying political freedom, but the time for discussion was over.[101] In April and May 1946, the Germans voted for regional councils, again with high turnouts. On June 14, 1946, detachments in the U.S. zone rescinded all existing military government directives, officially ending military government in Germany.[102]

The gradual implementation of self-governance allowed Germany's new political parties to build momentum and enabled occupation officials to adapt their procedures before larger-scale elections took place. By establishing local and regional governments early—the first began within eight months of the German surrender—the day-to-day running of the country became much smoother. Over the next few years, the Allied governments gradually relaxed control over German political life. A new German constitution would not be drafted until 1949,[103] however, giving both occupation officials and the population ample time to develop new economic, political, and social centers—in other words, allowing the Germans to decide what they wanted their new country to be. This is contrasted in Japan, as discussed below, where General MacArthur ordered national elections to be held within six months of surrender, though the close-held, grassroots approach remained the same.[104]

Beginning in February 1948, the three western occupying powers of Germany (the U.S., Britain, and France) began debating the political future of their respective zones. In June of that year, negotiations were concluded, leading to the development of a democratic and federal West German state.[105] The presiding ministers of Germany's regional states were directed to arrange a constitutional assembly to draft a constitution for the new state. According to papers known as the Frankfurt Documents,[106] the constitution was to specify a central government

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[99] *Id.* at 427-428 (Before the elections, military government detachments reviewed the 4,750,000 names on the voting lists and disqualified 326,000 for Nazi affiliations).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Basic Law for the Federal Republic of Germany* (May 23, 1949), http://www.refworld.org/docid/4e64d9a02.html (last visited Feb. 19, 2018).

[104] Jeff Bridoux, American Foreign Policy and Post-war Reconstruction: Comparing Japan and Iraq. (Routledge Taylor and Francis Group, 2011).

[105] Donald P Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 309 (Duke University Press, 2012).

[106] Participants at the Potsdam Conference had agreed that the foreign ministers of the four victorious powers should meet to implement and monitor the conference's decisions about postwar Europe. During their fifth meeting, held in London in late 1947, prospects for concluding a peace treaty with Germany were examined. Following lengthy discussions on the question of reparations, the conference ended with-

while simultaneously respecting the various regional administrations, and would contain provisions and guarantees of individual freedoms and rights.[107] The ministers were reluctant to begin this work, however, since they felt the creation of a West Germany state would mean a permanent separation from the eastern zone. On their own accord, they decided to implement the requirements of the Frankfurt Documents on a provisional basis.[108] They held a parliamentary council rather than a constitutional assembly, and the resulting document was referred to as a "basic law", not a constitution.[109] Thus, it was clear West Germany would not be the only state of German people—reunification and self-determination remained on the agenda. The Western Allied powers acquiesced to this approach.[110]

Delegates to the parliamentary council were appointed by the leaders of West Germany's regional states.[111] A preliminary draft of the "Basic Law" was prepared in August 1948, and final editing started on September 1. At this time, a larger, 65-member council was formed, with members being elected by the regional parliaments of their respective states.[112] The final draft of the Basic Law was passed by the council on May 8, 1949 and approved by the Western Allied powers a mere four days later.[113] The ratification process was quick, and on May 23, 1949, the German Basic Law was signed and promulgated.[114] It was followed by the first nation-wide elections in West Germany.[115]

Prior to 1945, Germany's experience with true democracy was close to nonexistent.[116] By the end of the war, its infrastructure was destroyed, it faced a massive humanitarian crisis, it was burdened with extensive war reparations, and its people were near exhaustion.[117] When the Allied occupation began, the majority military government opinion favored an extended period of tutelage.[118] If this

out any concrete decisions. The tense atmosphere during the talks and the uncooperative attitude of the Soviet participants convinced the Western Allies of the necessity of a common political order for the three Western zones. At the request of France, the Western Allies were joined by Belgium, the Netherlands, and Luxembourg at the subsequent Six Power Conference in London, which met in two sessions in the spring of 1948. The recommendations of this conference were contained in the so-called Frankfurt Documents, which the military governors of the Western zones issued to German political leaders on July 1, 1948. The documents called for convening a national convention to draft a constitution for a German state formed from the Western occupation zones. The documents also contained the announcement of an Occupation Statute, which was to define the position of the occupation powers within the new state.

107 Kommers, *supra* note 105, at 309.

108 *Id.*

109 *Id.*

110 *Id.*

111 Justin Collings, Democracy's Guardian: A History of the German Federal Constitutional Court 287 (Oxford University Press 2015).

112 *Id.*

113 Collings, *supra* note 111.

114 *Id.*

115 Edward Norman Peterson, The American Occupation of Germany: Retreat to Victory (Wayne State University Press 1977).

116 Bridoux, *supra* note 104, at 9.

117 *Id.*

118 Dobbins et al, *supra* note 71, at 14.

view had prevailed, the result might have been the same as the protracted and increasingly expensive train of denazification programs the Allies attempted to implement but ultimately backed away from (and, it should be noted, eventually handed off to the Germans to run, with great success).[119] General Clay made democracy as attainable an objective for U.S. forces as it was ever going to be by placing responsibility for its attainment where it would ultimately have to lay: with the German people.[120] By not attempting to undertake an extensive democratization program, the military government actually accomplished more.[121] 60 years later, the opposite approach was adopted in Iraq, with widespread civil education programs and "democracy talks" being attempted but no effort to actually engage citizens in the practice of democracy.[122]

In 1945, few people believed the German nation would recover from the war.[123] The winners of Germany's first post-conflict elections were Communists and Catholics—two groups loathed in American politics at the time.[124] But their victories sent a swift message to other constituencies: get it together or get out. By the time national elections arrived, many more "desirable" groups had made headway.[125] Within five years, the German people were in control of their country through a new democratic government, and Germany gradually transitioned from a former enemy into a strong potential ally in the Cold War.[126]

[119] Although denazification was one of the principal objectives of the early occupation period, its proposed scale quickly proved impractical. The occupying powers did not have the manpower or resources to accomplish such a thorough purging of German society, and the U.S. forces found it impossible to administer the state without interacting with and utilizing competent bureaucrats and officials, at least some of whom were complicit in the Nazi regime. *See,* Peterson, *supra* note 115, at 4; numerous detachments quickly protested that, under the rules, they could not find enough people to begin reorganizing the German administration. *See* ZIEMKE, *supra* note 73, at 382. By December 1945, it was clear the status quo could not continue. Before the end of the year, Clay said it was time for the German people to take charge of denazification. *See* ZIEMKE, *supra* note 73, at 429; from the beginning, the Germans approached denazification differently than the Americans. While the Allies only distinguished between active and nominal Nazis, the Germans recognized several levels of gradation, settling on five: major offenders, offenders, lesser offenders, followers, and exonerated, and adopted a scale of sanctions based on the offense, thus allowing for options other than permanent exclusion. The Germans meant to remove the Nazi stigma from the individual and reinstate him to a position within society. *See* ZIEMKE, *supra* note 73, at 400; By June of 1946, 90% of the Germans initially purged were rehabilitated. As the standard of living then rapidly improved throughout the sector, there was accelerated progress toward political goals. *See* RAY SALVATORE JENNINGS, "The Road Ahead: Lesson in Nation-Building from Japan, Germany, and Afghanistan for Postwar Iraq, "*Peaceworks* No 49. United States Institute for Peace, Washington, DC (April 2003).

[120] ZIEMKE, *supra* note 73, at 445.

[121] *Id.*

[122] *See* discussions of "democracy dialogues" in the works of Bremer, Diamond, and Van Buren, each of whom discusses thousands of civic education lessons provided in Iraq with no follow-through for actual democratic practices.

[123] Bellin, *supra* note 90, at 606-07.

[124] ZIEMKE, *supra* note 73, at 363.

[125] *Id.*

[126] Barnett, *supra* note 84, at 15-16.

B. Japan, 1945: Decentralized, National Control

Immediately after the Japanese announced their decision to surrender in August 1945, General Douglas MacArthur was appointed the Supreme Commander for the Allied Powers (SCAP) to oversee the occupation of Japan. Although he was technically under the authority of an Allied Powers commission, MacArthur took his orders from Washington.[127] Rather than establish an American military government to rule Japan during the occupation, as was done in Germany, MacArthur decided to employ the existing Japanese government.[128] This decision was based largely on two factors: 1) there was nothing similar to the "Nazi litmus test" to determine who should be purged from the new government; and 2) the U.S. military was severely lacking in Japanese language and technical experts.[129] Also, MacArthur realized imposing a new order on the island nation would be a difficult task, even with Japanese cooperation. It would be impossible, he believed, for foreigners to dictate radical changes on 80 million resentful people.[130] Thus, MacArthur's regime functioned by issuing direct orders to Japanese government officials and allowing them to manage the country.[131]

An important element of MacArthur's democratization strategy was to work locally among outlying communities, completely bypassing the conservative top and middle layers of the Japanese government.[132] Local elections were held in which women were permitted to vote for the first time, and roving teams of civics instructors were dispatched to cities and towns to discuss the nature of democracy.[133] Civil affairs officers, pulled from the military and civilian defense agencies, followed these teams and organized communities to begin reconstruction projects of local choosing. It was democracy in miniature and it helped communities address their real needs while developing an appreciation for political participation that proved useful after the return of sovereignty.[134] As democratic government emerged in Japan, direct-involvement programs such as these en-

[127] In Japan, the United States took the lead in the occupation because it played the predominant role in the final phases of the Pacific war. Unlike Germany, there would be no zones and no division of responsibility. The Potsdam Conference did not limit the actions the U.S. could take in carrying out the occupation, so they hoped to avoid the most troublesome aspects of the German occupation, where policy formulation and implementation was slowed and sometimes blocked by the need to forge agreements among the four parties. *See* Dobbins et al, supra note 71, at 28-29; 31.

[128] Dobbins et al, *supra* note 71, at 53; Bridoux, *supra* note 104; Bellin, *supra* note 90, at 600.

[129] *Id.*

[130] Douglas MacArthur, Reports of Douglas MacArthur (U.S. Government Print Office, 1966).

[131] Jennings, *supra* note 119, at 9-10. Once the occupation was underway, MacArthur sent troops and civil affairs officers on rounds of motorcycle diplomacy throughout the country to establish security and explain U.S. intentions while managing local expectations of the military government; Dobbins et al, *supra* note 71, at 32. In August 1945, MacArthur instructed the Japanese government to establish a liaison office to interact with SCAP headquarters. The Central Liaison Office was located in Tokyo and staffed by the Foreign Ministry. Liaison offices were also set up in each prefecture to serve local military government teams. The Central Liaison Office functioned as the primary channel for communication between the SCAP special staff sections and the Japanese government.

[132] Jennings, *supra* note 119, at 28.

[133] *Id.*

[134] *Id.*

couraged a critical mass of citizens to take part in elections and to engage in political discourse while making demands and articulating interests to their new leaders.[135]

The wording of the Potsdam Declaration[136] and the initial post-surrender measures[137] indicated neither MacArthur nor his superiors intended to impose a new political system on Japan unilaterally; rather, they hoped to encourage Japan's new leaders to initiate democratic reforms on their own.[138] MacArthur announced a national election would be held in April 1946, only seven months following the surrender.[139] He also called for the Japanese Diet[140] to pass a new election law to provide for free democratic elections, including the right of women to vote.[141] But by early 1946, MacArthur's staff and Japanese officials were at odds over the most fundamental issue: the writing of a new constitution.[142] The Japanese were extremely reluctant to replace the Meiji Constitution of 1889,[143] while the Americans desired a far more liberal document.[144] The Meiji Constitution concentrated actual political power in the hands of a small group of

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135 *Id.*

136 *See* Potsdam Conference, *supra* note 78.

137 U.S. Dep't of State, Department of State Bulletin, 423-427 (Sept. 23, 1945).This document set two main objectives for the occupation: 1) To insure that Japan would not again become a menace to the United States or to the peace and security of the world. 2) To bring about the eventual establishment of a peaceful and responsible government which would respect the rights of other states and would support the objectives of the United States as reflected in the ideals and principles of the Charter of the United Nations. The document also set four main policies to be pursued: Japanese sovereignty would include only the four main Japanese islands of Honshu, Hokkaido, Kyushu, and Shikoku, while the fate of additional islands was to be determined later (this provision was taken from the Potsdam Declaration of July 26, 1945); Japan was to be disarmed, and the military was not to play any important role in Japanese society in the future; Japanese society was to be encouraged to develop personal liberties, such as freedoms of religion, assembly, speech, and the press, as well as to develop democratically elected institutions; the Japanese economy was to be developed for peaceful purposes.

138 Jennings, *supra* note 119, at 16.

139 Dobbins et al, *supra* note 71, at 44; John W. Dower, Embracing Defeat: Japan in the Wake of World War II (W.W. Norton and Company, 1999).

140 The National Diet is Japan's bicameral legislature. It is composed of a lower house called the House of Representatives, and an upper house, called the House of Councilors. Both houses of the Diet are directly elected under parallel voting systems. In addition to passing laws, the Diet is formally responsible for selecting the Prime Minister. The Diet was first convened as the Imperial Diet in 1889 as a result of adopting the Meiji Constitution. The Diet took its current form in 1947 upon the adoption of the post-war constitution and is considered by the Constitution to be the highest organ of state power. See "Diet Functions", www.shugiin.go.jp

141 Jennings, *supra* note 119, at 28.

142 Bridoux, *supra* note 104, at 129, 134-36.

143 *See Meiji Constitution*, Encyclopedia Britannica (Aug. 3, 2011), https://www.britannica.com/topic/Meiji-Constitution. After the Meiji Restoration in 1868, Japan's leaders sought to create a constitution that would define Japan as a capable, modern nation deserving of Western respect while preserving their own power. The resultant document called for a bicameral parliament (the Diet) with an elected lower house and a prime minister and cabinet appointed by the emperor. The emperor was granted supreme control of the army and navy. A privy council advised the emperor and wielded actual power. Voting restrictions, which limited the electorate to about 5 percent of the adult male population, were loosened over the next 25 years, resulting in universal male suffrage. Political parties made the most of their limited power in the 1920s, but in the 1930s the military was able to exert control without violating the constitution.

144 Dower, *supra* note 139, at 4, 374-75, 383-84.

government leaders responsible to the emperor, not the people.[145] From 1930 to the end of the war, this governing group was dominated by the military.[146]

MacArthur desired a constitution in which power was vested in the people, not held by an elite few and only permitted to flow down to the population.[147] He communicated this view to the leaders of the Japanese government, who formed a committee to rewrite the Meiji Constitution.[148] A group of Japanese constitutional scholars began meeting in late 1945, but their recommendations were too conservative for U.S. officials—after four months of work, the committee had produced a revision with only minor word changes.[149] This version was rejected outright by U.S. officials.[150] In the end, it fell to the Americans to draft a new national charter for Japan. On February 3, 1946, MacArthur directed the government section of SCAP (Supreme Command – Allied Powers) to draft a constitution to guide the Japanese cabinet in its efforts. This "model constitution" would then be used by the Japanese in preparing another revision.[151] He urged extreme haste and secrecy because he wanted to go public with a Japanese-endorsed draft before the newly-established Far East Commission, an internal advisory board given jurisdiction over constitutional matters, convened in late February.[152] Also, the scheduled national election was barely two months away, and MacArthur saw this election as a test to whether the Japanese people would accept democratic changes in their political system.[153]

The job of writing MacArthur's "model constitution" fell to a team of about a dozen Army and Navy officers, all with special training in government affairs, plus a few civilian experts.[154] The team met secretly, using a 1939 edition of a book on world constitutions as their main reference.[155] This initial drafting convention lasted six days, and SCAP completed the entire document within two weeks.[156] It was presented to Japanese officials on February 19, 1946.[157] Much of the document was prepared by two senior army officers with law degrees, although other MacArthur appointees had significant influence, especially in regards to women's rights.[158] Though the document's drafters were not Japanese,

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145 *See Meiji Constitution*, *supra* note 143.

146 *Id.*

147 DOWER, *supra* note 139, at 4; DOBBINS ET AL, *supra* note 71, at 43.

148 *Id.*

149 *Id.* For example, the emperor became a "supreme" authority, rather than "sacred".

150 *Id.*

151 *Id.*

152 DOWER, *supra* note 139, at 4; DOBBINS ET AL, *supra* note 71, at 43.

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.* The length of time devoted to drafting a national constitutional seems to have no correlation to its success. For example, the Constitution of the United States was written in approximately 100 hours, but, as will be discussed below, even a temporary constitution in Iraq took more than four months.

157 DOBBINS ET AL, *supra* note 71, at 43.

158 DOWER, *supra* note 139, at 411.

the Meiji Constitution, demands of Japanese lawyers, opinions of pacifist political leaders, and the earlier Japanese drafts were all taken into account within the model constitution;[159] nonetheless, Japanese government leaders were shocked by the radical changes proposed in the "MacArthur Constitution".[160] The resulting document borrowed from the British system in establishing a cabinet and prime minister who were responsible to the National Diet. The guarantees of individual rights included wording similar to that found in the American Bill of Rights. One part, pertaining to equal rights for all citizens, even went beyond the legal protections Americans enjoyed at the time.[161] But the Japanese found it hard to accept the idea of "rule by the people", which conflicted with the Japanese tradition of absolute obedience to the emperor.[162] After disagreeing among themselves, the Japanese cabinet went to the emperor, who ended the deadlock by commanding the model become the basis for the new constitution of Japan.[163]

On March 6, 1946, the Japanese cabinet accepted the constitution and an outline of the document was presented to the Japanese public, followed by statements of approval by Emperor Hirohito and General MacArthur.[164] The population eventually accepted this hastily written and poorly translated document,[165] as did the Far East Commission after suggesting minor revisions.[166] Elections for national representatives occurred on April 10, 1946,[167] with the resulting body responsible for approving the constitution. The MacArthur draft, which proposed a unicameral legislature, was changed to allow a bicameral one, with both houses being elected.[168] In most other respects, the new government adopted the U.S. version in its entirety, including the symbolic nature of the emperor, guarantees of civil and human rights, and the renunciation of war.[169]

The Liberal Party was the biggest victor in the national elections, winning 148 of 464 seats in the Diet, with the Progressive and Socialist parties also having strong showings at 110 and 96 seats, respectively.[170] Voter turnout was 72.1%,[171]

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[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] Dower, *supra* note 139, at 33, 39; Y. Funabashi, *China's Long-term Strategy: Peaceful Ascendancy*, Int'l Herald Tribune (Dec. 30, 2003), https://www.nytimes.com/2003/12/30/opinion/asias-future-china-is-preparing-a-peaceful-ascendancy.html.

[163] Jennings, *supra* note 119, at 16.

[164] Dobbins et al, *supra* note 71, at 44; Dower, *supra* note 139, at 4.

[165] *See* Joshua Muravchik, Exporting Democracy: Fulfilling America's Destiny, (Aei Press, 1991). The Americans insisted the constitution be translated into Japanese literally, rather than idiomatically, because they feared that otherwise the translation could subvert its meaning. As a result, Japan's constitution reads poorly in its own language.

[166] Dobbins et al, *supra* note 71, at 44; Dower, *supra* note 139, at 4.

[167] *Id.* Under the new election laws, this was the first general election in Japan in which women were permitted to vote. 39 women were elected to national office, a number that would stand as the largest in Japan's history until 2005.

[168] Dower, *supra* note 139, at 407.

[169] *Id.*

[170] Dieter Nohlen et al, Elections in Asia: A Data Handbook 381, (OUP Oxford 2001).

[171] *Id.*

allowing U.S. officials to assert the validity of the elections, the same way they had in Germany. The three major parties that emerged from the election were loosely based around the major parties from the 1937 election, prior to the war.[172] Liberals and Progressives initially agreed to form a government under Liberal leader Ichiro Hatoyama, who would assume the position of Prime Minister; however, Hatoyama was promptly purged by U.S. officials for being a militarist,[173] so the new government was formed under Shigeru Yoshida, who became Prime Minister on May 22, 1946.[174] When the Diet met during the summer of 1946, the newly elected legislators voted a final approval of Japan's new democratic constitution, which became effective on May 3, 1947.[175]

The Japanese constitution would not have been written the way it was had MacArthur and his staff allowed Japanese politicians and constitutional experts to resolve the issues as they wished.[176] In late 1945 and early 1946, there was much public discussion on constitutional reform, and the MacArthur draft was apparently greatly influenced by the ideas of certain Japanese liberals.[177] The constitution's U.S. origins were deliberately kept quiet, but the awkward phrasing of the document made the secret hard to maintain.[178] Revision became a topic of fierce debate almost immediately, but many embraced the new constitution despite its foreign roots.[179]

Like Germany, Japan in 1945 was a country on the brink: it had suffered the destruction of two atomic bombs and the fire-bombing of its major cities,[180] its people were on the brink of starvation,[181] and its military had resorted to kamikaze tactics.[182] At the time of Japan's occupation, U.S. forces faced a regimented people and strong, conservative elites, but they were able to rally the population behind a common national cause—building a new democratic government.[183] In 1949, MacArthur made a sweeping change in the SCAP power structure[184] that

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172 *Id.*

173 Following the elections, successful Diet members were vetted by U.S. officials, as there had not been time to conduct investigations on every candidate prior to the election. It was discovered Hatoyama had committed numerous "militant acts" during the war.

174 DIETER ET AL., *supra* note 170, at 390.

175 *Id.*

176 DOBBINS ET AL., *supra* note 71, at 44; DOWER, *supra* note 139, at 4.

177 John W. Dower, *Don't Expect Democracy This Time: Japan and Iraq*, HISTORY & POLICY (Apr. 1, 2003), http://www.historyandpolicy.org/policy-papers/papers/dont-expect-democracy-this-time-japan-and-iraq.

178 DOBBINS ET AL., *supra* note 71, at 44; DOWER, *supra* note 139, at 4.

179 *Id.*

180 *See* U.S. STRATEGIC BOMBING SURVEY, THE UNITED STATES STRATEGIC BOMBING SURVEY: SUMMARY REPORT (EUROPEAN WAR) (1945), http://www.anesi.com/ussbs02.htm; U.S. WAR DEP'T, THE UNITED STATES STRATEGIC BOMBING SURVEY: SUMMARY REPORT (PACIFIC WAR) (1946) [hereinafter Pacific Survey], http://www.anesi.com/ussbs01.htm.

181 Bellin, *supra* note 90, at 601-02.

182 Pacific Survey, *supra* note 180, at 16, 24, 28.

183 Bridoux, *supra* note 104, at 133, 175.

184 *See generally* WILLIAM NESTOR, THE FOUNDATION OF JAPANESE POWER: CONTINUITIES, CHANGES, CHALLENGES CH. 10 (1990).

greatly increased the power of the Japanese government, and the occupation began to draw to a close. The Treaty of San Francisco,[185] which was to end the occupation, was signed on September 8, 1951; it came into effect on April 28, 1952, formally ending all occupation powers of the Allied forces and restoring full sovereignty to Japan.[186] Less than seven years after being an aggressor in the most destructive war the world had ever seen, the Japanese were again an independent people free to run their country as they wished. Since then, the Japanese have changed or done away with a number of the reforms instituted by MacArthur, but one reform remains firmly in place: the MacArthur Constitution.[187] In 70 years, the document has *never* been amended.[188]

C. Iraq, 2003: Centralized National Control

The 2003 occupation of Iraq began with the assumption an interim government made up largely of exiled opposition leaders[189] would quickly begin running the country. This assumption proved incorrect. When Ambassador Paul Bremer was named as head of the Coalition Provisional Authority (CPA) in May 2003,[190] he announced the U.S. would seek a UN resolution confirming America's status as an occupying power[191] and informed the exile opposition

[185] The Treaty of San Francisco, or more commonly known as the Treaty of Peace with Japan, was officially signed by 48 nations on September 8, 1951, in San Francisco, CA. It came into force on April 28, 1952 and officially ended the occupation of Japan. According to Article 11 of the Treaty, Japan accepted the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts imposed on Japan both within and outside the country. The treaty served to officially end Japan's position as an imperial power, to allocate compensation to Allied civilians and former prisoners of war who had suffered Japanese war crimes during World War II, and to return sovereignty to the Japanese government. *See* Treaty of Peace with Japan art. 11, signed Sep 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45, https://treaties.un.org/doc/Publication/UNTS/Volume%20136/volume-136-I-1832-English .pdf.

[186] This was true for the main islands of Japan; the United States continued to hold the chains of Iwo Jima and Okinawa until 1968 and 1972, respectively.

[187] DOBBINS ET AL., *supra* note 71, at 44; DOWER, *supra* note 139, at 4.

[188] *Id.*

[189] The U.S. assumption was underlying bureaucratic and military structures in Iraq would be left intact to govern the country while the top political leadership would be replaced by the exiled opposition to Saddam. The hard core of this exile group had operated outside Baghdad's control in the 1990s and was designated to receive support under the U.S.'s Iraq Liberation Act of 1998—a Congressional statement that "It should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq." The group consisted of a mix of Sunnis, Shias, and Kurds, but a gathering of this opposition in London in mid-December 2002 gave an indication of future problems. The Kurds wanted federalism with a high degree of separatism opposed by most others. Most objected to the leadership of Ahmad Chalabi, the apparent U.S. front-runner for Iraq's leadership who had strong ties to the CIA. Secularists had reservations about others' Islamist agendas, and the United States had concerns about one group's ties to Iran. Marr, *supra* note 76, at 260.

[190] THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ (2006) (this book also reviews the precursor to the CPA, the Office of Reconstruction and Humanitarian Assistance (ORHA), established under retired General Jay Garner. The intent of the ORHA was to oversee response to an expected humanitarian crisis in Iraq. When the crisis never arose and governance became an issue within a few weeks, it was replaced with the CPA).

[191] This was accomplished with UN Resolution 1453, which authorized the United States to exercise legal power in Iraq, as well as to spend any Iraqi funds. The resolution made no mention of creating democratic institutions based on free and fair elections, nor was this codified in the early CPA regula-

parties and other local leaders the idea of an interim government with real sovereign authority had been indefinitely postponed.[192]

A key element in establishing a counter-insurgency (COIN) effort is establishing a local government that can stand on its own so the people believe in their leaders. U.S. Army Field Manual 3-24, General David Petraeus'[193] best-selling doctrine[194] for COIN operations argues, "The primary objective of any counterinsurgency is to foster the development of effective governance by a legitimate government."[195] In contrast, the main critique in regards to the electoral process in Iraq concerned its timetable and the lack of involvement of local actors. While most experts agree a stable security environment is a highly desirable factor before holding elections, the various interim or transitional institutions put in place in Iraq caused great distrust among the population.[196]

Inside the CPA, there was widespread agreement Iraq would not be ready for national elections anytime soon. Analysts felt time was needed to allow more moderate, secular, and democratic parties in Iraq to develop their identities and support.[197] It was believed many months were needed before an Iraqi electoral commission could be appointed and organized to register voters and certify the eligibility of parties and candidates.[198] This was not merely a political judgment; the concern was that for elections to be fair, a level playing field must be established for the competing parties.[199] External experts advised against starting elections on a large scale, as holding national elections too early can strengthen extremist and rejectionist forces,[200] but Bremer and his top governance staff deliberately resisted calls, and even vetoed plans, for direct elections for some local and provincial councils.[201] Had a major effort been launched in early summer 2003, elections for a constitutional assembly could have been held by the spring

tions. The first reference to elections was not made until Security Council Resolution 1546, the same resolution that formerly recognized the new, interim government of Iraq in June 2004. This resolution welcomed the efforts of the interim government to work towards democratic elections. S.C. Res.1546, U.N.Doc. S/RES/1546 (June 8, 2004), http://unscr.com/files/2004/01546.pdf.

192 Ricks, *supra* note 190, at 165 (this decision inarguably contributed to the confusion and frustration the Iraqis were already experiencing, as they had been told by Gen Garner, head of the earlier ORHA, that the U.S. would hand over control within a few weeks).

193 Despite later falling from grace during his tenure as Director of the FBI, General Petraeus is still considered the most successful battalion commander of the Iraq war. While in charge of the 101st Airborne Division, his strategies and tactics of working with local leaders and living among the citizens would later become the foundation of the Army's new counter-insurgency manual, which was largely authored by Petraeus. He later returned to Iraq, in 2007, as commander of the entire multi-national force.

194 At one time, FM 3-24 was one of the Top 20 books on both Amazon and Google Books. U.S. Dep't of Army, Field Manual 3-24, Counter-Insurgency (2000) [hereinafter FM 3-24], https://www.hsdl.org/?view&did=468442.

195 FM 3-24, *supra* note 194.

196 *See*, *e. g.*, L. Diamond, *Building Democracy After Conflict: Lessons from Iraq*, (2005) 16 J. OF DEMOCRACY 9.

197 Diamond, *supra* note 9, at 72.

198 *Id* at 79.

199 DOBBINS ET AL., *supra* note 71, at 191, 205.

200 *Id*.

201 Diamond, *supra* note 9, at 79-80.

of 2004 using the existing provinces as multi-member districts, or foregoing districts altogether.[202] However, the CPA feared early elections would give advantage to radical Islamic forces, which were better organized, initially, than their more moderate or liberal opponents.[203] While this fear had some basis—87% of Iraqis wanted religious groups to share power in government and 56% wanted religious leaders to play a role in politics[204]—it also ignored the wishes of the people. Most Iraqis overwhelmingly endorsed basic democratic principles such as free and fair elections, free speech, even equal rights for women, and most possessed a keen desire to elect the members of any constitutional-drafting body.[205]

The CPA's refusal to consider early elections raised concerns among many observers, including the United Nations.[206] In July 2003, UN envoys proposed beginning a voter registration drive, but the issue was a non-starter for Bremer. He reiterated there were no voter rolls, no election law, no law on political parties, and no electoral districts.[207] He also argued electing a government without a permanent constitution "invites confusion and eventual abuse".[208]

During the summer of 2003, coalition military commanders were ordered to halt elections in towns and cities across Iraq, as the CPA preferred to use a system of consultation, indirect elections, and appointments to choose local mayors and councils.[209] At the national level, a seven member Leadership Council had been appointed prior to Bremer's arrival in Iraq.[210] This council was comprised of the heads of key exile parties who had not lived in the country for decades,[211] and Bremer desired a broader base with more diversity (the exiles on the Council were all Shia Muslims).[212] He spent more than two months attempting to locate suitable candidates, but most Iraqis were resistant to participating in an appointed government that delayed direct elections.[213] Eventually, Bremer and his staff announced a 25-member Interim Governing Council still dominated by exiled politicians.[214] Bremer insisted the Council be perfectly representative of the

[202] *Id.* at 48.

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id* at 46-47.

[207] This issue, however, raises a question: if Bremer was the ultimate authority in the country, why did he not initiate steps to create these things?

[208] Diamond, *supra* note 9, at 46-47.

[209] Van Buren, *supra* note 10, at 57.

[210] Before being relieved of authority, Jay Garner, head of the short-lived ORHA—had appointed a seven-member Leadership Council comprised of the heads of the key exile parties behind the Baghdad Conference. Diamond, *supra* note 9, at 40-41; Marr, *supra* note 76, at 271-72.

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.*

population, with the result being 18 members who were so obscure 2/3 of Iraqis could not offer an opinion on them.[215]

The Governing Council quickly became a source of frustration, as it was a completely ineffectual body.[216] Bremer repeatedly appealed to the Council to develop a timetable for drafting a constitution and electing a permanent government, while the Council insisted power be handed over to them immediately.[217] With no timeline for direct elections, the Council was never held accountable, and it was easy for them to blame Iraq's problems on the CPA. Polls continued to show most of Iraqis believed their country was controlled by Bremer (which, to a great extent, it was), and Council members spent most of their time lobbying each other and the Americans for positions in the new government.[218] Failure to agree on a Council leader resulted in a "rotating presidency" that changed each month.[219] Eventually, in September 2003, an impatient Secretary of State Colin Powell set a six-month deadline for the Iraqis to draft a new constitution, but by then the Council had been denounced by the population as a puppet of the American occupation.[220]

Following Secretary Powell's edict, Bremer published an op ed in the *Washington Post*, laying out a lengthy, seven-step roadmap to end the occupation.[221] First, a constitution would be written and ratified, followed by a national election.[222] This was opposite the approach taken by the U.S. in Germany and Japan, where elections were held to determine who had the authority to approve the new constitutions on behalf of the people. Neither U.S. officials, CPA staffers, nor Iraqis supported Bremer's plan.[223] The Bush administration wanted to transfer authority before the 2004 elections,[224] and most coalition aids—namely, the British—worried Bremer's plan was too slow and cumbersome.[225] Important religious and political leaders in Iraq declared it unacceptable to have the constitution prepared by unelected actors.[226] In November 2003, President Bush abruptly announced the occupation would end in June 2004, overruling Bremer's original plan.[227] Bremer then revealed a new series of steps later that month in which he

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215 Diamond, *supra* note 9, at 48.

216 *Id.* at 26, 43; Marr, *supra* note 76, at 272-73.

217 Diamond, *supra* note 9, at 49-50.

218 *Id*. at 26, 43; Marr, *supra* note 76, at 272-73.

219 Diamond, *supra* note 9, at 49-50.

220 *Id.* at 26; Marr, *supra* note 76, at 272-73.

221 UN Resolution 1511 mandated the United States to present a plan by December 2003 for transitioning to an Iraqi government.

222 Ricks, *supra* note 190, at 254; Marr, *supra* note 76, at 279.

223 *Id*.

224 *Id*.

225 *Id*.; Diamond, *supra* note 9, at 25.

226 Ricks, *supra* note 190, at 254; *see also* Diamond, *supra* note 9 (discussion of Shia Sheik al-Sistani, one of the most influential actors in Iraq, and not a member of the Governing Council. At one point, Sistani even issued a *fatwa*—a religious decree binding on the faithful—forbidding any followers from participating in a non-elected government).

227 *Id*.

abandoned the goal of drafting a constitution or holding a national election before the turnover; instead, the U.S. would transfer power to a temporary body.[228] The new plan proposed a national assembly to be chosen through a series of complex local caucuses, which would then select the interim government.[229] This interim body would be responsible for conducting a national election for a constituent assembly by March 2005. The constituent assembly's sole responsibility would be to draft a constitution and hold a referendum on it.[230] If successful, a second election would be held in December 2005 for a new national assembly, which would become Iraq's new constitutional government.[231] To govern the country in the meantime, the CPA and Governing Council were to work together to draw up a transitional administrative law (TAL).[232]

This plan also would not survive. The Governing Council resented having it imposed on them and most Iraqis opposed the complicated system of caucuses and the idea of an unelected, interim government.[233] Barely two weeks after it was announced, Bremer's second attempt to build a government was in serious trouble, and the CPA had less than two months to draft the TAL and get it adopted so they could begin work on the caucuses that would elect the transitional assembly. Many within the CPA did not understand how the caucus system was supposed to work, and most Iraqis felt the local and provincial councils would simply bow to American will because they were appointed by the CPA.[234] The United States was repeatedly finding itself on the *less* democratic side of arguments: Iraqi leaders called for an elected constitution-making body, Bremer said an appointed body would do; Iraqis wanted direct elections for local government, Bremer and other top officials vetoed them; Iraqis desired direct, transparent elections, the CPA proposed an opaque and convoluted process.[235] Ultimately, the UN intervened with a compromise: the caucuses would be scrapped and the interim government chosen by June 30, 2004. A transitional assembly would then be directly elected by December.[236] But the question remained as to how the interim government would be selected, and it would not be answered until the TAL was approved.

A preliminary draft of the TAL emphasized civil rights, a central government with an independent judiciary, and separation of powers.[237] Shia groups quickly demanded (and ultimately received) a provision forbidding the passage during the interim period of "any law that contradicts the universally agreed tenets of

[228] Marr, *supra* note 76, at 258; Diamond, *supra* note 9, at 51.

[229] *Id.*

[230] *Id.*

[231] *Id.* This plan postponed the drafting of the constitution for another 15 months and delayed the direct election of a new government for nearly two more years.

[232] Marr, *supra* note 76, at 279; Diamond, *supra* note 9, at 51.

[233] Diamond, *supra* note 9, at 76-81.

[234] *Id.*

[235] *Id.* at 128, 198, 201-02.

[236] *Id.* at 83, 137-38; Marr, *supra* note 76, at 282.

[237] Marr, *supra* note 76, at 281.

Islam".[238] Another provision of the TAL mandated the law "aim to achieve" at least one-quarter of the national assembly seats be awarded to women.[239] Staffers believed it possible to craft electoral rules to ensure this goal.[240] During one contentious meeting between the CPA and the Governing Council involving a debate on family law issues, the majority voted to repeal a reference to *shari'a* law[241] that had been previously approved.[242] A delegate from the one of the largest Shia parties walked out, claiming the majority was attempting to force things on the Council members and accused the CPA of not operating by consensus. Eight other Council members followed.[243] The deadline came and went without approval of the TAL.[244] During another marathon meeting, the Sunni delegation threatened to walk out, as well, when it became clear the CPA was negotiating with the Kurds for the possibility of a Kurdistan Regional Government.[245] Last-minute negotiations resulted in a document no party was satisfied with, and the Shia delegation refused to attend the much-publicized signing ceremony. The CPA, suffering one of its most embarrassing moments, cancelled the ceremony and renewed negotiations. The document was signed five days later.[246]

Immediately following the TAL signing ceremony, 12 members of the Governing Council issued a statement proclaiming their intention to "amend" certain provisions of the TAL they felt were undemocratic. There was no legal mechanism for them to do so, but the speaker stated they would seek to make changes before the June 30 transfer of power.[247] These same Council members warned the TAL would lack legitimacy until it was approved by a democratically-elected national assembly (which was not part of the CPA's planned agenda.)[248]

The TAL received mixed reviews. Some argued the Governing Council did not have the authority to adopt even an interim constitution.[249] People repeatedly asked why the document had not been submitted for consideration by civil society organizations, political parties, religious leaders, and the general public.[250] CPA staffers suggested Iraqis focus on the future constitution, since the TAL was

238 Language was also added forbidding laws contradicting democracy or fundamental human rights, but the TAL did not address the question of what would happen if there was a disagreement between the two provisions. According to one sheik, "In Shiite Islam, leadership comes from Allah, but Allah will not choose directly. When the people elect a leader, he will be the man selected by Allah, so there is no contradiction between Islam and democracy."

239 This language was weaker than the CPA wanted, even though the U.S. has no such law.

240 Diamond, *supra* note 9, at 147, 156.

241 *Shari'a* law is widely viewed as limiting women's rights to divorce and inheritance.

242 Diamond, *supra* note 9, at 172 (the provision was initially approved during an unusually poorly attended meeting of the council).

243 *Id*.

244 *Id.*

245 *Id.* at 164-65, 167, 171.

246 Diamond, *supra* note 9, at 173-76.

247 *Id.* at 177 (these Council members were all Shia Muslims).

248 *Id*.

249 *Id.* at 179-85, 197-98.

250 *Id*.

purely a temporary document, but this came across as dismissive of Iraqi concerns.[251] Most Iraqis noted the contradiction between the CPA's declared democratic intent and the lack of opportunity for democratic participation.[252] If civic education must be reinforced by what people see in real life, what the Iraqis observed was an interim constitution drafted and adopted without national debate; a postponement of direct elections, even at local levels; another round of appointed government officials; and perpetuation of control by the Governing Council, most of whom did not enjoy popular support.

In April 2004, the UN sent a new envoy,[253] Lakhdar Brahimi, to Baghdad to begin the delicate task of constructing the interim government. Most of the exile politicians resisted this move, believing the UN would ease de-Baathification,[254] and insisted on assurances the TAL would not be recognized in any Security Council resolutions before they would cooperate.[255] Brahimi wanted to cut the exiles from power and force them to run in the later elections, believing the leading officials in the interim government should agree not to be candidates for permanent positions.[256] Brahimi's first choice for president, Adnan Pachachi, rejected the position because he was a strong Arab who did not want to appear "American".[257] The top pick for Prime Minister, Adel Abdul Mehdi,[258] was vetoed by the Governing Council out of fear he would oppose Islamic law. In the end, Bremer selected Ghazi Al-Yawar[259] for president, an exile who had repeatedly thanked President Bush for overthrowing Saddam, and Ayad Allawi[260] was left as the only remaining suitable candidate for prime minister. The other mem-

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[251] *Id.*

[252] *Id.*

[253] The first UN Special Envoy to Iraq, Sergio de Mello, was killed when the UN building in Baghdad was bombed in August 2003.

[254] Diamond, *supra* note 9, at 246-53.

[255] These concerns were genuine, as the U.S. intended to seek formal recognition of the TAL by the Security Council, including it in the same resolution endorsing the new government and formally recognizing Iraqi sovereignty. This would make it far more difficult for the permanent Iraqi government to drift away from any TAL provisions, thus dispelling the CPA's push it was "merely a temporary document".

[256] Diamond, *supra* note 9, at 246-53, 257.

[257] Pachachi chose to decline the post publicly, stating that he turned down the position "because I was accused of being the choice of the Americans. I had to refuse this offer, in order to preserve my reputation and my honor. Trying to portray me as a little soft on the Americans when I have been struggling for Arab rights all my life is not only false, it is unfair. I find it really insulting." ("Pachachi Slams 'Dirty Politics' in Iraq", *Arab News*, June 5, 2004).

[258] Mehdi was a trained economist who left Iraq in 1969 for exile in France. He worked for French think tanks and edited magazines in French and Arabic. He was educated in France, and is the son of a respected Shiite cleric who was a minister in Iraq's monarchy.

[259] Al-Yawar was scheduled to be the last holder of the rotating council presidency, with a term lasting until 30 June 2004, the date of the expected transition to official Iraqi sovereignty.

[260] A prominent Iraqi political activist who lived in exile for almost 30 years, Allawi, a Shia Muslim, became Iraq's first head of government since Saddam Hussein when the council dissolved on June 1, 2004 and named him Prime Minister of the Iraqi Interim Government. A former Ba'athist, prior to the war Allawi helped found the Iraqi National Accord, which today is an active political party. In the lead up to the 2003 invasion of Iraq, the INA provided intelligence about alleged weapons of mass destruction to MI6. Allawi has lived about half of his life in the UK, and his wife and children still live in Britain for security reasons.

bers of the Governing Council reluctantly approved these choices.[261] Brahimi was permitted to select 31 ministers, and he used criteria such as integrity, professional experience, and technical competence—factors he had hoped to use for the entire process.[262] Only six ministers had ties to major parties and six were women.[263]

The new Iraqi Interim Government was appointed on June 2, 2004, and the UN recognized Iraq's full sovereignty, effective June 30. Bremer went directly to the airport after the June 28th ceremony and immediately left the country.[264]

During 2004-05, several events would define Iraq's political system: three elections (two for a national assembly and one a referendum on the constitution), the drafting of the constitution itself, and the process of forming indigenous national and provincial governments based on election results.[265] These were the first genuinely free elections in Iraq's modern history, but they also solidified trends already under way: fragmentation of the state along ethnic and sectarian lines, a weak central government, and a deeply divided political elite.[266]

In November 2004, on-going disagreements among the various factions in the interim government ultimately resulted in the Sunnis withdrawing from the interim government and boycotting the January 2005 elections.[267] Twenty-three Shia groups then united to form an alliance in hopes of sweeping the results.[268] On January 30, 2005, the elections for the National Assembly were held. The overall conduct of the election was in accordance with international standards, although the turnout was low, especially among Sunni Arabs.[269] Only eight million people voted in Iraq's first democratic elections[270]—less than one-third of the population and barely half of the registered voters[271]—a much lower turnout than was seen in the 1945 occupation elections. The vast majority of seats in the Assembly went to the Shia alliance, with a small minority going to the Kurds, but no Sunni representation; of note, the Sunni population generally boycotted even voting in the elections, thus affecting their legitimacy.[272] Ultimately, the new

[261] Diamond, *supra* note 9, at 258-59, 262.

[262] Brahimi expressed frustration and disappointment over his role in Iraq soon after his arrival, going so far as to call Bremer a "dictator." (quoting Tom Lasseter, *UN's Brahimi: Bremer the "Dictator of Iraq" in Shaping Iraqi Government*, KNIGHT-RIDDER, June 3, 2004). He resigned from the UN Envoy on June 12, 2004, more than two weeks before the official transfer of sovereignty.

[263] Diamond, *supra* note 9, 258-59, 262.

[264] Lasseter, *supra* note 263.

[265] Marr, *supra* note 76, at 287-89, 301-02.

[266] *Id*.

[267] *Id.* at 286.

[268] *Id.* at 287-89, 301-02.

[269] U.N. Secretary-General, *Pursuant to Paragraph 30 of Resolution 1546*, ¶ 5, U.N. Doc. S/2005/141 (Mar. 7, 2005).

[270] *Id*.

[271] The World Bank shows the 2005 population of Iraq to have been 27.01 million, with 14.2 million registered to vote.

[272] Sunnis are roughly 1/3 of Iraq's population, a sizeable amount to have denounce the election process.

government continued to be led by the exile opposition parties and their leaders, with a significant shift to the more religiously-oriented parties.[273]

The Transitional Assembly took over for the interim government in May 2005, and a new constitution was negotiated by Shia and Kurdish members.[274] When a draft was presented to the public in August 2005, thousands of Sunnis staged protests.[275] In the referendum for the constitution, two key Sunni provinces rejected the document, almost leading to its failure due to Iraq's federal structure.[276]

Following the adoption of the Constitution in October 2005, which vested legislative authority in a council of representatives, national parliamentary elections were held on December 15, 2005.[277]

In the end, both elections reinforced Iraq's growing divides, as long delays in forming a cabinet and indecisions regarding the distribution of power contributed to the tension.[278] The new permanent government was not in place until May 20, 2006[279]—nearly two years after the U.S. returned sovereignty. Overall, 2005 saw powerful factions with armed militias become heads of ministries, positioning themselves as the new Iraqi oligarchy.[280] These same parties also swept the local elections, leading to complex power struggles in many areas, including Baghdad, where the power vacuum soon allowed sectarian and ethnic conflict to spiral out of control.[281] Provincial elections were not held, nor were local or national elections repeated, until January 31, 2009.[282]

Many have argued Iraq had only a brief experience with competitive elections in the 1920s and 30s, and even this was largely a charade.[283] From 1958 to 2003, Iraqis knew only rule by force.[284] However, these same attitudes and beliefs were expressed in regards to Germany and Japan in the 1940s—both were seen as militaristic and autocratic; both had experienced years of terror and oppression; and neither had a true democratic government in place.[285] In fact, each had lived with democratic elections for only about 15 years before powerful regimes began

[273] Marr, *supra* note 76, at 287-89, 301-02.

[274] *Id.* at 296-300.

[275] *Id.*

[276] *Id.*

[277] *Id.* at 299.

[278] *Id.* at 287-89, 301-02.

[279] *Id.*

[280] Bridoux, *supra* note 104, at 108.

[281] *Id.*

[282] *Stage being set for Iraqi elections as violence flairs*, CNN (Sep. 24, 2008, 2:52 PM), http://www.cnn.com/2008/WORLD/meast/09/24/Iraq.main/.

[283] *See, e.g.*, Bellin, *supra* note 90.

[284] *Id.*

[285] Bridoux, *supra* note 104, at 9.

to consolidate their power.[286] Yet each nation eagerly embraced a return to democracy and accepted newly implemented democratic ideals.[287]

There is no clear reason why local elections, at the least, could not have occurred in Iraq in the fall of 2003 or early spring 2004. The arguments put forth by Bremer and the CPA do not hold up when compared with the 1945 cases and their results. First, Bremer asserted he was concerned about the lack of secular political parties, but these groups still did not fare well in the national elections two years later. As General Clay learned in Germany, politics in most countries involves much more than parties and rivalries; there are also social, economic, and religious outlooks. In Germany, special interests, such as the Catholic Church and other cliques, were deciding which of their members should be in office.[288] The same situation occurred in Iraq, but it was not limited or moderated by a democratic process.[289] By the time the CPA began to initiate steps towards such a process, most Iraqis were fearful of the notion, believing special interests groups would simply mandate the outcomes of any elections.[290] Bremer's hesitancy only reinforced their fears, since he shared them. What was never explained to the people of Iraq is the fact that special interest groups play a large role in all democratic nations—individuals frequently turn to group affiliations, including religious ones, for guidance on how to vote.

Others have asserted there were no political parties to resurrect in Iraq in the spring of 2003,[291] but this is clearly not true; quite the opposite, in fact. Several exiled parties eagerly returned to Iraq following the fall of Saddam's regime, and more internal ones quickly emerged,[292] at much faster rates than they did in either Germany or Japan.

National elections in Iraq were also delayed because the CPA found the ideologies of certain groups distasteful, and they hoped to wait until more desirable groups could gain power and popularity.[293] This runs counter to Clay's experience in Germany, where "less desirable groups"—Communists and Catholics—were the most successful parties in the first election,[294] but other groups quickly got on the bandwagon or risked being ostracized altogether.[295] Similar to Iraq, MacArthur decided to have national elections first in Japan, as opposed to local

[286] Charles Tripp, A History of Iraq (Cambridge Uni. Press, 3rd Ed.) (2007).

[287] *See* Ziemke, *supra* note 73; *see also* Dower, *supra* note 139; Bridoux, *supra* note 105.

[288] Ziemke, *supra* note 73, at 361-62.

[289] *See, e.g.,* Diamond, *supra* note 9 (discussing Sheik Sistani's influence in Iraq, which the CPA largely ignored).

[290] *Id.*

[291] *See, e.g.,* Bellin, *supra* note 90; Marr, *supra* note 76; Diamond, *supra* note 9; Bremer, *supra* note 9 (all overviewing the numerous political factions in Iraq in 2003, many of which included armed militias).

[292] *Id.*

[293] Diamond, *supra* note 9, at 79.

[294] Ziemke, *supra* note 73, at 362-63.

[295] *Id.*

ones, but used straight-forward procedures,[296] unlike Bremer's extremely protracted approach.[297]

Ambassador Bremer thought it would take many months to find and appoint Iraqis capable of running elections; in 1945, occupation officials simply ran the elections themselves. In Iraq, it was deemed better to appoint leaders than allow elections, and more advisable to wait months for the "right" people (who ultimately never materialized or rejected the notion[298]) rather than directly oversee the process.

IV. Proposed Model: Local and Earlier is Better

In December 2017, the Democratic Elections Standards Project at the Carter Center[299] issued a plan of action for moving towards more defined human rights and elections standards.[300] The plan noted that while there are several mandates focused on the rights and freedoms critical to genuine elections, more detailed, targeted language is needed.[301] As noted above, part of the Project's recommendations following a two-year analysis of human rights and elections law is the development of specific recommendations for a human rights approach to elections.[302] This section attempts to take a first step in that direction by providing a framework for implementing elections as early as possible following a post-conflict occupation. To inform these recommendations, the following sources were referenced and analyzed: the Organization for Security and Cooperation in Europe's Office of Democratic Institutions and Human Rights (OSCE/ODIHR) Reference Guide to Democratic Elections Best Practice,[303] the vast collection of data accumulated by the Carter Center during its lead-up to the December 2017 plan,[304] and the constitutional framework for provisional self-government in Kosovo[305] (as an example of a Western-led, post-conflict occupation, though on a much smaller scale than those discussed above.) Additionally, the occupations of

296 *See* Dower, *supra* note 139, at 4.

297 Marr, *supra* note 76, at 280.

298 *See* Pachachi, *supra* note 257.

299 *Human Rights and Election Standards: A Plan of Action*, Carter Center (Dec. 1, 2017), https://www.cartercenter.org/resources/pdfs/peace/democracy/human-rights-and-election-standards-2018 (a nongovernmental organization, The Carter Center helps to improve lives by resolving conflicts; advancing democracy and human rights; preventing diseases; and improving mental health care).

300 *Id.*

301 *Id.*

302 *Id.*

303 OSCE/ODIHR DRAFT PAPER, INTERNATIONAL STANDARDS AND COMMITMENTS ON THE RIGHT TO DEMOCRATIC ELECTIONS: A PRACTICAL GUIDE TO DEMOCRATIC ELECTIONS BEST PRACTICE, Office for Democratic Institutions and Human Rights (Nov. 20, 2002), https://www.osce.org/odihr/elections/16859?download=true.

304 Carter Center, *supra* note 299.

305 UNMIK Regulation 2001/9 (May 15, 2001), http://www.assembly-kosova.org/common/docs/FrameworkPocket_ENG_Dec2002.pdf.

Germany, Japan, and Iraq were studied in-depth in order to obtain proper "lessons learned" in regards to the timing of election implementation.[306]

As the case studies above have illustrated, earlier is better when starting a post-conflict transition to democracy; however, in addition to knowing *when* to start, an occupier must also know *where*. The model framework presented below will stress the importance of starting at the local level, so as to build citizens' experiences with democracy before attempting large-scale, national elections with potentially as-yet-unknown candidates. Think tanks like the RAND Corporation[307] have previously recommended local elections be permitted early on, post-conflict, followed by national elections at a later date.[308] While it is important to also establish new national leadership sooner rather than later, since some new nations (such as Iraq) have neighbors capable of interfering in the elections process,[309] the decision to hold national elections first can actually delay the installation of a new, permanent government, thus allowing external forces to exert even more influence on the final outcome.

A. First Steps: Immediately Following Cessation of Conflict

If at all possible, a Security Council resolution should be pursued that both recognizes the occupation and sets forth the expectation that the occupation's purpose is to establish and develop meaningful self-government. Such a resolution—or, if not feasible, a proclamation by the occupier—should note the desire to respect the will of the people and acknowledge their historical, constitutional, and legal development. It should make clear the aim of any occupation is to enable the people to gradually take responsibility for the administration of their own nation, and that their provisions for self-government will be established through free and fair elections.

B. Setting Expectations: 1-Month Post-Conflict

When a nation finds itself in the position of Occupying Power following a conflict, it would benefit from a firmly established set of guidelines, which aim to root democratic practices within the population as soon as possible. In setting expectations for the occupied population, however, two major factors must be recognized: 1) the purpose of the *occupation* must be to promote stability and democracy, regardless of the reason behind the conflict (i.e., stop humanitarian

[306] *Id.* (much of the research conducted on each of these nations was done in a multi-factor analysis of post-conflict occupations conducted by the author for completion of her doctoral dissertation).

[307] RAND CORPORATION, https://www.rand.org/ (last visited Mar. 25, 2018) (the RAND Corporation is a nonprofit institution that helps improve policy and decision-making through research and analysis. RAND focuses on issues such as health, education, national security, international affairs, law and business, the environment, and more. It is funded through government grants and private endowments).

[308] Thomas Maulucci, Jr., *Comparing the American Occupations of Germany and Iraq*, 3 YALE J. INT'L AFFAIRS 120, 122 (2008).

[309] DOBBINS, ET AL, *supra* note 71, at 153.

suffering, remove a dictator, interstate conflict,[310] etc.); and 2) the occupier must have no aims to permanently occupy the territory. If both of these factors are not present, it is doubtful the occupation would be granted approval, or even acquiescence,[311] by the international community, causing a different set of variables, outside the scope of this article, to come into play. If these two factors are present, however, it is difficult to imagine a situation where this model could not be implemented.[312]

As an Occupying Power begins implementing the framework for a new provisional government, it must make clear that all persons—whether appointed to fill vacant positions, permitted to stay in previously-held posts, or later elected—must observe internationally-recognized human rights standards.[313]

In order to promote proper elections, an Occupying Power must immediately facilitate the safe return of refugees and displaced persons to their homes and assist with the recovery of their property and possessions.[314]

Local, regional, and national seats of government should remain the same, if for no other reason than to provide a sense of stability and continuity for the population; however, Occupation officials should be sensitive to where they establish their offices and headquarters within these locations. In Iraq, for example, CPA staff moved into Saddam's former palaces and jails in an attempt to send the message that the old regime was gone, but what the public saw was simply a new regime moving in.[315] Current municipalities and basic territories of self-

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[310] *Rule of Law – Democracy and Human Rights,* United Nations Human Rights Office of the High Commissioner, http://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/Democracy.aspx.

[311] *Id.* (in 2003, the U.S. was not granted approval by the Security Council to invade Iraq; however, it was later recognized as an occupying force in the country, along with Great Britain).

[312] *See* Ziemcke, *supra* note 73 (though many argue the security situation in Iraq made it far too difficult to begin a grassroots democratic movement, as the case study on Iraq illustrates, such an effort was never on the agenda, and the Iraqi people knew it. Also, while the CPA faced many obstacles in Iraq in regards to security issues (many of which it could—and has—been argued were of their own making—see Diamond's and Van Buren's work, specifically, for more discussion of this issue), the Allied powers in Germany and Japan faced as least as challenging a situation due to massive humanitarian crises).

[313] *Id.* (at a minimum, provisional institutions and their officers should be informed of the requirements within the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The occupier should ascertain those instruments commonly accepted regionally (such as the European Convention for the Protection of Human Rights and Freedoms), as well as other international protocols that may be applicable, generally. While this may include treaties or other forms of international agreements to which the occupied nation is not a party, it is important to note the provisional government will not be bound by the entirety of these protocols; rather, they will merely be expected to uphold the notions of individual liberties and protections found in these documents. Doing so will present a firm commitment to democracy and human rights on behalf of the new government.).

[314] *Id.* (in Germany, for example, after V-E Day, SHAEF (Supreme Headquarters – Allied Expeditionary Force) officials estimated the total number of displaced persons (DPs) in SHAEF-held territory—including those already repatriated—to be 5.2 million. The western Europeans were leaving as fast as transportation could be provided, at a rate of 200,000 a week in May. In June, the rate of Soviet DP repatriation reached 250,000 per week; however, towards the end of the year, this number would actually swell, as native Germans were expelled from other nations and Soviet citizens fled for Western territory. Nonetheless, all DPs were given priority transportation and found housing within a year.) *See also* Ziemcke, *supra* note 73.

[315] *See* Diamond, *supra* note 9 (the U.S. and CPA officials simply reconstituted much of Saddam's property for their own use—Saddam's Presidential Palace became CPA Headquarters, and later the U.S.

government should be maintained, and it must be clearly communicated to local agencies and institutions that they should keep functioning,[316] though purges and new appointed leaders may come later. Low-to-mid level bureaucracies must continue to operate, even with less-than-ideal staffing, facilities and experience, because these services have the most direct impact on every-day lives of citizens. It is especially important that this message be sent to local law and order officials, provided they were not complicit in human rights violations under the previous regime.[317]

C. Establishing Interim Processes: 1-3 Months Post-Conflict

Ideally, even prior to the end of hostilities, an Occupying Power will have considered whether they will purge the bulk of the defeated government or allow certain levels or positions to remain in place to help administer the nation. Part of this decision will rely on practical matters: in Germany, there was a clear "Nazi litmus test" that could be used to identify "undesirables", at least in the beginning;[318] in Japan, no such test existed, and other factors—such as language and technical barriers—made it more appealing to leave most Japanese officials in place and only purge the top levels. In Iraq, such a litmus test was available through membership in the Baath Party, and an approach similar to that in Germany was used—complete purging from government posts of all members.[319] Unfortunately, despite lessons learned in Germany in regards to the numerous setbacks the de-Nazification program faced,[320] the CPA pushed ahead with full de-Baathification in Iraq.[321] The result was an utterly non-functioning state and a complete power vacuum. Thus, it is vital an Occupying Power understand not just the "face" of a possible political enemy, but the depths of its nature, as well—most Nazis and Baath Party members were members in name only, and did not actually support the groups' aims.[322]

Regardless of which approach is selected (total purge vs. top level, or a combination of the two), some positions will need to be filled. The starting point should always be at the local level, which requires occupation personnel to operate

Embassy; other luxurious buildings, as well as privately-owned factories, were confiscated by the military and later "gifted" back to the Iraqis).

316 *Id.* (in Iraq, practically every soldier, law enforcement official, and government employee simply went home and never returned to work following the invasion. The result was a complete halting of all government services and lack of infrastructure maintenance, including water and sewage).

317 *Id.* (if so, a more immediate purge may be required, with rank-and-file officers remaining on staff to serve under occupation leadership).

318 *See* ZIEMCKE, *supra* note 119 (regarding the various approaches to de-Nazification in Germany).

319 *See* Diamond, *supra* note 9; Bremer, *supra* note 9, at 57 (for detailed discussions of the de-Baathification program implemented by the CPA in Iraq, see Diamond's work).

320 *See* ZIEMCKE, *supra* note 119.

321 *See* Bremer, *supra* note 9 (Bremer accomplished this with CPA Order #1, De-Baathification, which he issued on May 16, 2003).

322 *See* ZIEMKE, *supra* note 119, at 380-82 (during the author's deployment to Iraq in 2008, dozens of Iraqis discussed the near-mandatory nature of Baath Party membership. One gentleman who worked at the Central Criminal Court in Baghdad stated "your kids could not play soccer [at] school if you were not a member.").

within communities, not behind walls. Potential local leaders should be identified and approached to ascertain their willingness to serve. Ironically, political prisoners could be a great source of manpower in this endeavor, as enemies of a previous despotic regime could be powerful allies in democratic thought.[323] Most importantly, however, occupation officials should not attempt to skew appointments in favor of any one party or group, and should rely heavily on the wishes of the public, even if the result is "less desirable" candidates. Forcing selections on an unsupportive public would only serve to breed resentment towards the Occupation's stated goals, as Iraq clearly illustrates.

Exiled politicians should only be used in the new government if it is clear the public desires their return and supports their candidacy; otherwise, these individuals could be viewed as "elitists" who fled a bad situation while others remained to suffer.[324] At a minimum, a new nation should never be ruled entirely by exiles, especially those who have been away from the country for several years, if not decades.

Any individuals appointed or otherwise selected by occupation officials to serve in an interim capacity should be prohibited from candidacy in the first round of elections. This prohibition helps to eliminate favoritism (as well as the perception of it) and promotes an even playing field among the candidates.

D. Implementing Elections: 3-6 Months Post-Conflict

A date for local and regional elections, within this same time frame, should be set. Voting districts should be drawn with a view to providing regional equality and on the basis of objective criteria, such as population or geography, but tradition can also be a factor. If possible, current districts, or those in use before the previous regime came to power, should be maintained. If voter rolls are not readily available, other means of accounting for citizens can be used, based on available data. In Iraq, for example, information regarding payouts under the UN's Oil for Food program were used to establish the initial census following the war.[325]

A process for registering and approving political parties should be implemented, as well as a method for candidates to file for participation in a certain race. This process may or may not include a vetting process before a candidate can be placed on the ballot.

Potential candidates, political parties, and voters should be informed of the rules for the elections. These rules must be easily understood, published, and

[323] *Id.* (in Germany, for example, many future leaders were discovered amongst the concentration camp survivors).

[324] *See* Diamond, *supra* note 9 (this fact was frequently used in Iraq by those who distrusted the Governing Council, especially since most members were quite wealthy).

[325] Office of the Special Inspector General for Iraq Reconstruction, Applying Iraq's Hard Lessons to the Reform and Reconstruction of Stabilization Operations (2010), http://www.dtic.mil/dtic/tr/fulltext/u2/a515368.pdf (during the wide-spread looting that occurred following the coalition forces' arrival in Bagdad, the director of computer services at the Ministry of Trade secured the list of every Iraqi household eligible for food rations. After the official list vanished amid the looting, this copy was later used as a basis for registering voters in Iraq's first democratic elections).

made public, and should include the manner and location of voting, as well as any information necessary for a voter to cast a valid ballot.

It must be determined if Occupation officials will oversee the elections, or if there is a sufficient number of local appointees available to do so.

E. Selecting the Provisional Government: 6-9 Months Post-Conflict

Direct elections for local leaders should be held, followed soon after by regional elections. Judicial functions should be transferred to newly elected judges. Regional leaders should be heavily involved in discussions with Occupation officials regarding whether the first national election should rely on regional voting or a single, multi-member district. This decision, obviously, relies heavily on the ethnic, social, and political make-up of the country, as well as geography, population, and size.

F. Transfer of Sovereignty: 9-12 Months Post-Conflict

Direct elections should be held for at least one chamber of the national parliament or legislature. Following this first election of national leaders, it can be determined if a bicameral approach is preferred. Terms for these positions should be short—no more than two years—with reelection permitted. The main purpose of this provisional national parliament is to draft a new constitution, but its institutions would also have responsibility for greater governmental functions, including economic, financial, and fiscal policy; trade; health, welfare, and education programs; and labor, development, and environmental protection.

In regards to the drafting process, the occupier and the new parliament should work together to ensure certain provisions are enshrined in the constitution; for example, language should be included regarding basic electoral rights, due process, and equal protection under the law. Following approval of the constitution and passage of a public referendum, the Occupying Power should take all necessary measures to transfer powers and responsibilities to the provisional government.

If there is more than one nationally recognized or predominant language in a nation, each translated version of the constitution should be considered authentic, but one language should be selected to prevail in case conflict.

G. On-Going Responsibilities of the Occupying Power

For the duration of this transitional period, maintenance of law and order within the nation remains the prime responsibility of the Occupying Power. Though it may utilize native law enforcement agencies, law and order is of fundamental importance and cannot be passed off to a not-yet-steady government. This is why, often, even after the transfer of sovereignty, Occupation troops and other officials remain in-country.[326] This law and order responsibility includes

[326] Francisco Sagasti, "A human rights approach to democratic governance and development" *Realizing the Right to Development,* Office of the High Commissioner for Human Rights (Dec. 31, 2013), http://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIChapter9.pdf.

maintaining border security (a task largely ignored in Iraq, due to insufficient troop numbers), regulating possession of firearms, enforcing public safety regulations and laws, and conducting functions that aid in civil emergencies.

While elections are a critical way to promote a stable political environment in which human rights can flourish, it should be made clear that elections—even at the national level—are not, by themselves, an exit strategy; rather, they must be part of a long-term, institution-building process.[327] While it may be necessary to post-pone elections due to security concerns, the nature of the security problems must be strongly considered, and elections should never be postponed solely from fear of their results. Such security concerns are yet another reason to start elections at the local level, where greater oversight and control can be implemented and adapted, as needed, rather than starting on a grand scale with near-insurmountable obstacles. Iraq faced clear security concerns in 2003; however, most of the violence was not widespread until July 2003[328]—in other words, the CPA had more than two months to make an impact, during which their main statements related to delaying the return of sovereignty and postponement of elections. Germany and Japan were the losers in the most destructive war in history; their cities were destroyed, millions were homeless, countless others were starving or ill.[329] Yet both were well on the road to democracy within less than a year. While there are other factors to consider,[330] the timeliness of their democratic experience is, without a doubt, a significant point.

V. Conclusion

Lessons learned in 1945 should have been obvious in 2003, and Iraq now illustrates these points even more strongly. First, local, direct elections are an important stepping-stone and occupation authorities should not wait for more "desirable" parties to emerge. If the people are unhappy with their options, they will work to make more. Second, occupation officials should use the power they have to move the process along. If there are no election laws, draft them; no voter rolls, create them[331]. All this can be accomplished while still making it clear the new government will have the power to implement new laws, as appropriate. Finally, potential (and aspiring) national leaders must be held accountable. Interim appointees and other officials must not be allowed to hamstring the democratic process. Large committees and councils should be used with caution, as various obstacles to consensus will only stall the proceedings.

327 *Id.*

328 *See* Diamond, *supra* note 9; Bremer, *supra* note 9.

329 *See* Ziemcke, *supra* note 73.

330 *Id.* (for example, security concerns, population cohesion, occupation legitimacy, consistency of governance, etc.).

331 *See* Diamond, *supra* note 9 (there is significant debate over whether voter rolls existed in Iraq; in fact, they did. Elections were routinely held under the Baath regime, though they were not competitive and largely for show. Nonetheless, voting districts comprised of approximately 250,000 people were well-established, able to serve at least as a starting point for future elections).

Between 1949 and 1960, the economy in West Germany grew at an unparalleled rate: low rates of inflation, modest wage increases and a quickly rising export quota made it possible to restore the economy and brought a modest prosperity.[332] According to official statistics the German gross national product grew in average by about 7% annually between 1950 and 1960.[333] Three national democratic elections were held, each resulting in a peaceful transfer of power.[334] During the same time frame, Japan saw its economy and education system reorganized and rebuilt. A former enemy, it also became a Western ally, and began to find its economic footing as a manufacturer of consumer devices and electronics.[335] In contrast, the 15 years since Iraq's occupation began have seen continued violence, widespread ethnic cleansing, and an on-going insurgency that culminated in a civil war.[336] Its first democratically-elected Prime Minister, Nouri al-Maliki, was forced to resign on August 14, 2014.[337]

332 LIBRARY OF CONGRESS, GERMANY COUNTRY STUDY: THE ECONOMIC MIRACLE AND BEYOND (1998), http://countrystudies.us/germany/137.htm.

333 *Id.*

334 *Id.*

335 Alan Taylor, *Japan in the 1950s*, THE ATLANTIC (Mar. 12, 2014), https://www.theatlantic.com/photo/2014/03/japan-in-the-1950s/100697/.

336 James D. Fearon, *Iraq's Civil War*, FOREIGN AFFAIRS, Mar/Apr 2007, https://www.foreignaffairs.com/articles/iraq/2007-03-01/iraqs-civil-war.

337 Morris Loveday & Karen DeYoung, *Maliki Steps Aside*, WASHINGTON POST (Aug. 14, 2014), https://www.washingtonpost.com/world/middle_east/maliki-agrees-to-step-aside-easing-iraqs-political-crisis/2014/08/14/4535fd40-23ed-11e4-86ca-6f03cbd15c1a_story.html?utm_term=.bb8932f05b88.

Tax Cuts and Jobs Act Reverses Short Lived *Grecian Magnesite Mining* Holding: Will the U.S. Depart from Global Norms in Tax Treaty Interpretation?

Jonathan William Benowitz*

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I. Introduction

Investors need certainty about the taxation of an investment to effectively decide among alternative investments.[1] For more than 25 years, foreign investors have faced uncertainty over how the United States would tax them on the gain realized on a disposition of an interest in a U.S. partnership. In June of 1991, the IRS issued Revenue Ruling 91-32,[2] which departed from the commonly understood interpretation of U.S tax law, and ruled that such gain would be treated as U.S. source effectively connected income and taxable by the United States. Moreover, the revenue ruling departed from the commonly understood interpretation of bilateral income tax treaties and held that such gain was attributable to a U.S. permanent establishment (PE) of the foreign investor by virtue of the part-

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[1] *See, e.g.*, Jason Piper, *Certainty in Tax*, Association of Chartered Certified Accountants (Nov. 2014), http://www.accaglobal.com/content/dam/acca/global/PDF-technical/tax-publications/tech-tp-cit.pdf; *cf.* Paul Ryan (@SpeakerRyan), Twitter, (June 22, 2017, 12:00 PM), https://twitter.com/SpeakerRyan/status/877964416842518528 ("Businesses need certainty from permanent tax cuts to invest in their businesses and plan for the future.").

[2] Rev. Rul. 91-32, 1991-1 C.B. 20.

nership having a PE.[3] A PE is a fixed place of business or other substantial base of operations that a U.S. based partnership would ordinarily have in the United States.[4] The more common interpretation of U.S. income tax treaties is that only the country of the investor's residency can tax the gain on the sale of an interest in a business unless that interest forms part of the business assets of the investor's own PE, in the absence of an explicit treaty provision to the contrary.[5] Thus, Revenue Ruling 91-32 held that foreign investors qualifying for the benefits of a U.S. bilateral income tax treaty would be subject to U.S. taxation on such a gain.

In July of 2017, the U.S. Tax Court in *Grecian Magnesite Mining* declined to follow the revenue ruling and held that gain (or loss) on disposition of a U.S. partnership by a foreign partner was not effectively connected income (or loss) and, therefore, not subject to U.S. taxation.[6] As the gain or loss was not subject to U.S. taxation, the court did not have to rule with respect to whether a U.S. income tax treaty protected an investor who qualified for the benefits of the treaty from U.S. taxation on the gain.[7] Less than six months later, Congress reversed *Grecian Magnesite Mining* in the recent tax overhaul popularly known as the Tax Cuts and Jobs Act of 2017[8] (TCJA). The change taxes foreign partners gain on sales, exchanges, and dispositions of U.S. partnerships occurring on or after November 27, 2017. Still unsettled is whether the IRS will continue to maintain that such gain or loss is attributable to a PE, overriding historic treaty interpretations of U.S. income tax treaties.[9] Here we will examine the Tax Court's decision in *Grecian Magnesite Mining* as well as the implications of its reversal by the TCJA.

Foreign direct investment (FDI) into the United States was 468.33 trillion dollars in 2017.[10] The United States has consistently ranked as the world's top investment destination.[11] Limited liability companies (LLCs) are popular for

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3 *Id.*

4 *See generally* Rufus Rhoades & Marshall Langer, U.S. International Taxation & Treaties: § 44.01 Introduction to the Permanent Establishment Concept, Lexis (database updated Mar. 2018).

5 *See, e.g.,* Dep't of the Treasury, U. S. Model Income Tax Convention of September 20, 1996 Tech. Explanation, https://www.irs.gov/pub/irs-trty/usmtech.pdf; Dep't of the Treasury, U. S. Model Income Tax Convention of November 16, 2006 Tech. Explanation, https://www.treasury.gov/press-center/press-releases/Documents/hp16802.pdf (only mentioning the taxation of a partner's distributive share of gains from the partnership's alienation of property in its discussion of gains from the alienation of moveable property).

6 *Grecian Magnesite Mining, Indus. & Shipping Co., SA, v. Comm'r*, 149 T.C. No. 3, US-TAXCOURT 11322 (July 13,2017), *appeal docketed,* No. 12-1268 (DC Cir. Dec. 18, 2017).

7 *Id.* at *5 n. 2.

8 Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, §13501, 131 Stat. 2054 [hereinafter TCJA].

9 *See* Dep't of the Treasury 1996, *supra* note 5; *See* Dep't of the Treasury 2006, *supra* note 5.

10 *Foreign Direct Investment Statistics: Data, Analysis and Forecasts*, Organization for Economic Cooperation and Development (July 31, 2017), http://www.oecd.org/investment/statistics.htm.

11 Paul A. Laudicina, The 2017 A.T. Kearney Foreign Direct Investment Confidence Index: Glass Half Full, ATKearney (2017), https://www.atkearney.com/documents/10192/12116059/2017+FDI+Confidence+Index+-+Glass+Half+Full.pdf/5dced533-c150-4984-acc9-da561b4d96b4; *See also* World Investment Report 2017, *Country Fact Sheet: United States*, United Nations Conference on Trade and Development, http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Country-Fact-Sheets.aspx.

foreign investors in strategic U.S. joint ventures and entrepreneurial enterprises,[12] and the United States treats most LLCs as partnerships for U.S. federal income tax purposes.[13] Subjecting new partnership transactions to U.S. tax can potentially affect the shape and structure of the U.S. and global economy, especially considering neo-classical theory of investment, which predicts increased investment when host country taxes fall, and decreased investment as foreign investment taxes rise.[14] Taxes on investors in partnerships can especially discourage small and medium-sized enterprises (SMEs) from investing in the U.S. as SMEs frequently use partnership or hybrid structures for cross-border business.[15] SMEs are responsible for most of the net job creation in OECD countries and make significant contributions to innovation, productivity and economic growth.[16] SMEs have a high compliance tax burden relative to their size, measured by turnover or profit, and one can argue that this disproportionate burden results in a misallocation of resources.[17] Disproportionate tax compliance costs may result in under-investment in SMEs.[18]

Taxing foreign partners' gains on partnership sales may also upset settled norms on the taxation of capital gains as historically set by bilateral tax treaties. The United States, its major trading partners, and many developing countries have entered into bilateral income tax treaties. The purpose of these treaties is to limit double taxation of income.[19] In keeping with this purpose bilateral income tax treaties generally limit the taxation of business profits of foreign persons to profits attributable to a permanent establishment of the foreign person in the country of non-residence.[20] Historically, it was understood that an ownership in-

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12 *See*, *e.g.*, Lowell Yoder, *The Limited Liability Company (LLC) is the Entity of Choice for a Joint Venture*, Forbes (Apr. 17, 2012), https://www.forbes.com/sites/lowellyoder/2012/04/17/the-limited-liability-company-llc-is-the-entity-of-choice-for-a-joint-venture/#765e756532d8; *LLCs: Is the Future Here? A History and Prognosis*, GP Solo Law Trends & News Business Law (Oct. 2004), https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/llc.html.

13 Domestic LLCs with two or more members are taxed as partnerships by default under U.S. federal tax law, while foreign LLCs frequently elect to be taxed as partnerships if they are not taxed as partnerships by default. *See* Treas. Reg. § 301.7701-2 (2016); Treas. Reg. § 301.7701-3 (2006) (stating that if it has only one owner, it can elect to be treated as a disregarded entity).

14 Organization for Economic Cooperation and Development, *Tax Effects on Foreign Direct Investment: Recent Evidence and Policy Analysis*, Tax Policy Studies No. 17 (Dec. 20, 2007), http://www.oecd-ilibrary.org/taxation/tax-effects-on-foreign-direct-investment_9789264038387-en. The effect of U.S. taxing disposition of the U.S. investment may be offset to the extent that a foreign corporate investor pays a reduced corporate income tax due to the TCJA's lower corporate tax rates. *See* TCJA, *supra* note 8, at §13001.

15 Organization for Economic Cooperation and Development, *Taxation of SMEs: Key Issues and Policy Considerations*, Tax Policy Studies No. 18, at 92, 92-94 (Oct. 12, 2009).

16 *Id.* at 22.

17 *Id.* at 93-94.

18 *Id.* at 94.

19 *See*, *e.g.*, Dep't of the Treasury, U.S. Model Income Tax Convention, 2016, https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-US%20Model-2016.pdf [hereinafter U.S. Model Income Tax Convention]; Organization for Economic Cooperation and Development, Model Double Taxation Convention on Income and Capital 2014, http://dx.doi.org/10.1787/9789264239081-en.

20 *See* U.S. Model Income Tax Convention, *supra* note 19, at art. 5; Organization for Economic Cooperation and Development 2014, *supra* note 19, at art. 5.

terest in a business was an investment of the owner, not itself the conducting of business, and therefore gain on its disposition was not business profits.[21] One of the exceptions is the United States-Netherlands income tax treaty, which specifically allows for the taxation of the disposition of an interest in a partnership that has a permanent establishment in a contracting nation.[22]

Revenue Ruling 91-32[23] upset that general understanding by holding that passive foreign investors were subject to U.S. taxation on the gain from the disposition of their interest in a U.S. partnership and attributable to a permanent establishment (PE) when the partnership has a PE in the United States. By declining to follow the IRS's long controversial ruling in Revenue Ruling 91-32,[24] the U.S. Tax Court in *Grecian Magnesite Mining*[25] would have implicitly cemented the general understanding of the protection afforded foreign investors in U.S. bilateral income tax treaties. TCJA's codification of Revenue Ruling 91-32[26] raises the specter that the IRS may assert, based on the same reasoning as in the revenue ruling, that a treaty protected foreign investor's gain on disposition of a U.S. partnership interest is taxable in the United States to the extent of the investor's pro rata gain on a hypothetical disposition of the partnership's U.S. assets.

II. Background

A. U.S. Taxation of Foreign Persons

The United States subjects its citizens, residents, and domestic corporations to income tax on their worldwide income.[27] Because other countries frequently also use a residency-based system of taxation, double taxation is generally avoided by means of either a unilateral grant of a tax credit for foreign taxes paid on income from foreign sources or by exclusions of certain foreign source income.[28]

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[21] *See*, *e.g.*, Tax Convention, U.K.-U.S. art. 13, July 24, 2001, S. Treaty Doc. No. 107-19; Tax Convention, Spain-U.S. art. 13, Feb. 22, 1990, S. Treaty Doc. 101-16; Tax Convention, China-U.S. art. 12, Apr. 30, 1984, S. Treaty Doc. 98-30.

[22] Tax Convention, Neth.-U.S. art. 14(3), Dec. 18. 1992, S. Treaty Doc. No. 103-6; Dep't of the Treasury, Technical Explanation of the Convention Between the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income art. 14(3) (1992), https://www.irs.gov/businesses/international-businesses/netherlands-technical-explanation.

[23] Rev. Rul. 91-32, *supra* note 2.

[24] *Id*.

[25] *Grecian Magnesite Mining, Indus. & Shipping Co., SA, v. Comm'r*, 149 T.C. No. 3, US-TAXCOURT 11322 (July 13,2017), *appeal docketed,* No. 12-1268 (DC Cir. Dec. 18, 2017).

[26] Rev. Rul. 91-32, *supra* note 2.

[27] *See* I.R.C. §§ 61, 872(a), 882(b) (2017). It is alone, with the exception of Eritrea, in taxing its citizens on their worldwide income. *See* U.S. State Dep't, Eritrea Investment Climate Statement 2015 (June 2015), https://www.state.gov/e/eb/rls/othr/ics/2015/241552.htm (Eritrea imposes a 2 percent tax on the income of its nonresident citizens).

[28] *See, e.g.*, I.R.C. §§ 901, 911 (2017).

Taxation of foreign persons is thought to require some sort of substantial or "genuine" connection to the taxing nation to justify taxation.[29] The U. S. Internal Revenue Code (I.R.C.) provides detailed rules for determining whether income will be treated as derived from U.S. or foreign sources.[30] For example, interest is generally sourced to the country of residence of the obligor,[31] while dividends are generally sourced to the country of incorporation of the corporation distributing the dividend.[32] Capital gain from the sale of personal property is generally sourced to the country of residence of the seller.[33] U.S. income taxation of foreign persons (non-resident aliens and non-domestic entities) is limited to two categories of income: (i) U.S. source fixed or determinable annual or periodical income (FDAP) and (ii) income (U.S. or foreign source) that is effectively connected to a trade or business conducted within the United States (ECI).[34]

FDAP includes certain investment income, like interest, dividends, rents, royalties and annuities, and certain compensation, like wages and salaries.[35] FDAP is taxed at a flat 30% rate that is withheld at the source of the payment of the FDAP.[36] There are numerous exceptions from taxation for certain FDAP items, such as for interest on portfolio investments.[37] Bilateral income tax treaties frequently reduce the rate of tax imposed by the country of source on certain FDAP or eliminate it entirely.[38]

To be subject to U.S. income tax, business income of foreign persons must be ECI, which means that both the foreign person must be engaged in a trade or business within the United States and the foreign person's income must be effectively connected to that trade or business. The I.R.C. does not define a trade or business within the United States other than to provide two primary exceptions from a U.S. trade or business,[39] although case law provides some guidance.[40]

[29] *See* Jérôme Monsenego, Taxation of Foreign Business Income within the European Internal Market: An Analysis of the Conflict between the Objective of Achievement of the European Internal Market and the Principles of Territoriality and Worldwide Taxation, 31 (2011), https://online.ibfd.org/collections/tfbi/html/tfbi_c02.html?WT.z_nav=crosslinks.

[30] I.R.C. §§ 861-65 (2017).

[31] I.R.C. §§ 861(a)(1), 862(a)(1) (2017).

[32] I.R.C. §§ 861(a)(2), 862(a)(2) (2017).

[33] I.R.C. § 865(a) (2017) (although there are special rules for the sale of inventory, depreciable property, and certain intangible property and sales through offices or fixed places of business); I.R.C. § 865(b)-(e) (2017).

[34] I.R.C. §§ 872(a), 882(b) (2017).

[35] I.R.C. § 1441 (2017).

[36] I.R.C. §§ 1441, 1442 (2017).

[37] *See, e.g.,* I.R.C. §§ 871(h), 881(c) (2017).

[38] *See, e.g.,* U.S. Model Income Tax Convention, *supra* note 19; Organization for Economic Cooperation and Development, Model Double Taxation Convention on Income and Capital, 2014, http://dx.doi.org/10.1787/9789264239081-en.

[39] I.R.C. §864(b) (2017) (The performance of services within the United States for a foreign employer is excepted from being treated as a trade or business within the United States if both the compensation is less than $3,000 and the individual is present within with United States for not more than 90 days in the taxable year. Also, trading in stocks, securities, or commodities is generally excepted if done through a resident broker, commission agent, custodian, or other independent agent or is done for one's own account).

The I.R.C. provides different rules for when income is treated as ECI depending on the source of income. Whether U.S. source FDAP type income and capital gains are ECI depends on the extent to which the income, gain, or loss is derived from assets used in or held for use in the conduct of the U.S. trade or business (the "asset use test") or whether the activities of the trade or business are a material factor in the realization of the income, gain, or loss (the "business activities test").[41] All other U.S. source income is ECI.[42] Foreign source income is ECI if the foreign person has an office in the United States to which the income is attributable and the income is (i) certain investment income derived in the active conduct of a banking, financing, or similar business in the United States, (ii) from the sale of personal property unless it is for use, consumption, or disposition outside the United States and a foreign office materially participated in the sale, or (iii) rents or royalties from patents, copyrights and the like derived in the active conduct of the trade or business.[43] Treaties modify these rules by requiring that the business income of the foreign person be attributable to a PE in the country of non-residence. A PE is usually defined as a branch, office, factory, or workshop, and often includes a place of management, place of natural resource extraction, a building site or construction or installation project if it lasts a certain extended period of time. It will also include the office of an agent, other than an agent of independent status, if the person has, and habitually exercises in that country, an authority to conclude contracts in the name of the foreign person.[44]

B. U.S. Taxation of a Foreign Person's Capital Gain and Loss

As noted, gain from the sale of personal property is sourced to the seller's place of residence.[45] There are special rules for the taxation of U.S. real property interests (USRPIs), which are broadly subject to U.S. tax with a special withholding tax to enforce administration of the tax.[46] A USRPI includes stock of a corporation if more than 50% of the value of the corporation's assets are USRPIs,[47] while I.R.C. Section 897(g) applies a look-through rule for partnership interests, but a temporary regulation applies this rule only if at least 50% of the value of the partnership's assets are comprised of USRPIs.[48] Since the enactment of the

[40] *See, e.g., Pinchot v. Comm'r,* 113 F.2d 718 (2d Cir. 1940); *M. L. Neill v. Comm'r,* 46 B.T.A. 197 (1942); *Herbert v. Comm'r*, 30 T.C. 26 (1958).

[41] I.R.C. § 864(c)(2) (2017).

[42] I.R.C. § 864(c)(3) (2017).

[43] I.R.C. § 864(c)(4) (2017).

[44] U.S. Model Income Tax Convention, *supra* note 19; I.R.C. §864(b) (2017).

[45] I.R.C. § 865(a)(2) (2017).

[46] *See* I.R.C. §§ 897, 1445 (2017); *see generally* The Foreign Investment Real Property Tax Act of 1980 (FIRPTA), which was enacted as Subtitle C of Title XI of the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2599, 2682 [hereinafter FIRPTA].

[47] I.R.C. § 897(c)(2) (2017).

[48] Treas. Reg. § 1.897-7T (1988).

special rules for the taxation of foreign investment in real estate in 1980,[49] the exception for real property interests has been reflected in most treaties.[50]

C. Partnership Taxation

A partnership is a flow-through entity for U.S. tax purposes that is generally not itself taxed, but is treated a conduit for taxing the partners.[51] A partner realizes capital gain on the sale or exchange of a partnership interest except to the extent of the partnership's unrealized receivables and inventory assets that are taxed as ordinary income.[52] As previously mentioned, gain from the alienation of personal property is generally sourced to the alienor's place of residence, which in the case of a nonresident alien or foreign entity would generally be outside the United States. For purposes of U.S. taxation, domestic LLCs are ordinarily treated as partnerships if they have more than one owner.[53] In contrast, foreign LLCs are ordinarily treated as corporations, although foreign LLCs with more than one owner may elect to be treated as partnerships.[54]

A partnership, including an LLC treated as a partnership, must pay a quarterly withholding tax on a foreign partner's share of estimated ECI.[55] This withholding tax did not extend to gain on disposition of an interest in the partnership. Now, TJCA imposes a requirement. effective January 1, 2018, on the transferee of a partnership interest to withhold 10% of the amount realized on the transfer of a partnership interest by a foreign person to the extent that the new act treats the gain as ECI.[56]

The United States taxes foreign investment in a U.S. corporation differently than foreign investment in a U.S. partnership. A U.S. corporation is subject to tax on its income (previously generally at a 34% or 35% rate),[57] and then a 30% (or lower treaty rate) tax is withheld on the payment of a dividend.[58] TJCA reduces the corporate tax rate to 21%.[59] Disposition of shares in a corporation will typically give rise to capital gain or loss, which generally is not subject to U.S. tax. If a foreign corporation is engaged in business directly through a branch, the branch is subject to U.S. tax at the same corporate rate as a U.S. corporation,[60] and then

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49 FIRPTA, *supra* note 46.

50 *See, e.g.*, Tax Convention, Japan-U.S., art. 13(1), Nov. 6, 2003, S. TREATY DOC. NO. 108-14; Tax Convention, Belg.-U.S., art. 13(1)-(2), Nov. 27, 2006, S. TREATY DOC. NO. 110-3.

51 I.R.C. § 865(a)(2) (2017).

52 I.R.C. §§ 741, 751 (2017); Treas. Reg. §1.741-1 (2000), Treas. Reg. § 1.751-1 (2004).

53 Treas. Reg. § 301.7701-2 (2016) (stating that an entity is disregarded if it has only one owner); Treas. Reg. § 301.7701-3 (2006) (stating that an entity can elect to be treated as a corporation).

54 Treas. Reg. § 301.7701-2 (2016); Treas. Reg. § 301.7701-3 (2006) (stating that if it has only one owner, it can elect to be treated as a disregarded entity).

55 I.R.C. § 1446 (2017).

56 TCJA, *supra* note 8.

57 *See* I.R.C. § 11 (2017).

58 I.R.C. §§ 871(a), 881 (2017).

59 TCJA, *supra* note 8.

60 I.R.C. § 882 (2017).

a branch profits tax is imposed on its dividend equivalent amount.[61] In contrast, a U.S. partnership does not pay an income tax, but its foreign investors are subject to tax currently on their share of the U.S. partnership's share of ECI at their applicable rate of tax.[62] Until the issuance of Revenue Ruling 91-32[63] it was generally thought that a disposition of a U.S. partnership interest, as with the disposition of shares of a corporation, would not generally be subject to U.S. tax. In mid-2017, the U.S. Tax Court in *Grecian Magnesite Mining*[64] ruled that there generally would not be a U.S. tax (which the IRS is appealing), but the TCJA imposes a tax for dispositions on or after November 27, 2017.

To understand the reasoning of the IRS in the revenue ruling and the Tax Court in *Grecian Magnesite Mining* case, it is necessary to know that the U.S. income tax rules relating to the taxation of partnerships and their partners reflect two broad approaches to taxation: the partnership as an entity (the "entity approach") and the partnership as an aggregation of the partners (the "aggregate approach"). Under the aggregate approach, the partners, not the partnership itself, are subjected to taxation with certain of the partnership's tax items attributed to the partners.[65] Under the entity approach, the disposition of a partnership interest is treated as the sale of a capital asset, rather than as a sale of the partnership's underlying individual assets,[66] with an exception for certain assets, such as inventory and accounts receivables.[67]

III. Discussion

A. Review of Revenue Ruling 91-32

Revenue Ruling 91-32[68] addressed the U.S. tax treatment of gains from the sale of a U.S. partnership interest by a nonresident individual. It described three situations. In the first situation, a nonresident alien individual sold his interest in a partnership that engaged in a U.S. trade or business and the partnership had real and personal property located both within and without the United States. The second situation posited the same facts, but provided the additional facts and value numbers regarding the partnership's real and personal property located outside the United States as well as personal property located within the United States. In the third situation, the foreign partner was a tax resident of a treaty country and the partnership had assets that were attributable to a PE in the United States and assets that were not attributable to that PE. The provisions of the tax

[61] I.R.C. § 884 (2017).

[62] *See* I.R.C. §§ 871(b), 882 (2017); TCJA, *supra* note 5, at § 11011 allows pass-through entities a 20% deduction for qualified business income. Foreign partners, like U.S. partners, are not generally subject to U.S. tax on distributions from the partnership. Thus, there is only one level of taxation.

[63] Rev. Rul. 91-32, *supra* note 2.

[64] *Grecian Magnesite Mining, Indus. & Shipping Co., SA, v. Comm'r*, 149 T.C. No. 3, US-TAXCOURT 11322 (July 13,2017), *appeal docketed,* No. 12-1268 (DC Cir. Dec. 18, 2017).

[65] *See* I.R.C. § 701 (2017).

[66] *See* I.R.C. § 741 (2017).

[67] *See* I.R.C. § 751 (2017).

[68] Rev. Rul. 91-32, *supra* note 2.

treaty were identical to those of the Draft U.S. Model Income Tax Treaty (1981).[69]

In the first two situations, the foreign partner's gain is subject to U.S. taxation as U.S. source ECI to the extent that the partner would have had U.S. source ECI if the partnership had disposed of all of its assets at fair market value on the date of the sale of the partnership interest.

In the third situation, the foreign partner's gain is subject to U.S. taxation as income attributable to a U.S. PE to the extent that the partner would have had income attributable to the partnership's PE if the partnership had disposed of all of its assets at fair market value on the date of the sale of the partnership interest.

Revenue Ruling 91-32 recognized that the gain on the sale of the partnership interest was the gain on the sale of a separate asset under I.R.C. section 741 and not from the sale of the partner's share of the partnership's assets. Nevertheless, it made reference to the FIRPTA[70] rules to conclude that it is "appropriate" to treat a foreign partner's disposition of his interest in a partnership as a disposition of an aggregate interest in the partnership's underlying property for purposes of determining the source of the gain and whether it was ECI. In support of this conclusion, the revenue ruling cited *Unger v. Commissioner,*[71] in which the business profits of a partnership with a U.S. PE were attributed to a foreign partner. Unlike *Unger*, however, the gain in the revenue ruling was not business profits of the partnership, but of the partner. Just the same, the revenue ruling concluded in the first situation that: (1) gain from the sale of the partnership interest was sourced to the U.S. because it was "attributable" to the foreign partner's fixed place of business in the United States, and (2) such gain was effectively connected income under the "asset use test" of I.R.C. section 864(c)(2) because the value of the partnership's business activity affected the value of the partnership interest.

The revenue ruling noted that characterizing the entire amount of gain or loss would effectively subject to U.S. tax items that may not be described in I.R.C. section 864(c), which defines income that is ECI. Accordingly, the revenue ruling determined that the amount of the foreign partner's gain on disposition of his partnership interest that should be treated as ECI is the partner's share of the partnership's gain that would be ECI in a hypothetical sale of the partnership's assets on the date that the foreign partner disposed of his interest. The revenue ruling did not cite authority for this proposition. Citing the "general principle" that the burden of proof is on the taxpayer, the revenue ruling also stated that the gain on disposition will be presumed to be U.S. source ECI in its entirety unless the partner is able to produce information showing what his distributive share of net ECI and net non-ECI gain or loss would be if the partnership had sold all of its assets.[72]

[69] Dep't of Treasury, U.S. Model Income Tax Convention, 1981, *reprinted in* 1 TAX TREATIES 158 (1982).

[70] FIRPTA, *supra* note 46.

[71] *Unger v. Comm'r*, 58 T.C.M. (CCH) 1157 (1986).

[72] Rev. Rul. 91-32, *supra* note 2.

Without separately analyzing whether a foreign partner's gain or loss on the disposition of an interest in the partnership would be treated as attributable to a PE under the applicable U.S. income tax treaty (here, the U.S. Model Treaty), the revenue ruling simply declared that the principles of attributing to a PE are analogous to those governing whether an item is ECI. The revenue ruling comes to this conclusion although it admits that "the 'attributable to' concept of the Treaty is more limited in scope than the 'effectively connected' concept of the Code,"[73] by generally citing Revenue Ruling 81-78.[74] Without support, the revenue ruling stated that it is appropriate under the applicable treaty to look beyond a foreign partner's interest in a partnership to the partner's interest in the underlying assets of the partnership.[75] To determine the amount of the foreign partner's gain on the disposition of his partnership interest attributable to a U.S. PE, the revenue cites to OECD's Model Income Tax Treaty.[76] The commentary associated with the OECD's treaty simply remarks that some countries tax a partnership while others do not.[77] If a partnership is not subject to tax, the partnership itself is not a beneficiary of a treaty in the absence of a specific provision in that article addressing partnerships.[78] Concluding that under the Treaty the foreign partner's gain on disposition of its interest in a partnership is subject to U.S. taxation, the revenue ruling held only to the extent that the partner's potential distributive share of unrealized gain of the partnership is attributable to the partnership's U.S. PE.[79]

B. Commentary on Revenue Ruling 91-32

The revenue ruling, prior to its codification in the TCJA, had been heavily criticized as a tortured reading of both the partnership and the international tax rules.[80] There are two possible approaches to the taxation of gain or loss on a partnership transaction. The first approach starts with I.R.C. section 741 provides

[73] *Id.*

[74] Rev. Rul. 81-78, 1981-1 C.B. 604.

[75] *Id.*

[76] *Id.*

[77] *See* Organization for Economic Cooperation and Development, *Comments. on the Articles of the Model Tax Convention*, http://www.oecd.org/berlin/publikationen/43324465.pdf.

[78] *Id.*

[79] Rev. Rul. 91-32, *supra* note 2.

[80] *See, e.g.,* Kimberly S. Blanchard, *Rev. Rul. 91-32: Extrastatutory Attribution of Partnership Activities to Partners*, 76 Tax Notes 1331 (1997) ("an outlandish hodgepodge of half baked theories"); Kenneth Harris & Francis Wirtz, *The Interplay Between Partnership and International Tax Rules in the* Internal *Revenue Code: Revenue Ruling*, 91-32, 20 Tax Mgmt. Int'l J. 345, 350 (1991); William W. Bell & David B. Shoemaker, *Revenue Ruling 91-32: Right Result for the Wrong Reasons*, 9 J. Partnership Tax'n 80 (1992) (IRS is "relying principally upon 'the nature of things' and then adding its own gloss and substance"); Alan R. Hollander, *Is a Sale of a Partnership Interest 'Attributable' to the Partnership's Place of Business? The Missing Analysis in Rev. Rul. 91-32*, 52 Tax Notes 1321 (1991) ("surprising"); Philip F. Postlewaite, *The Omnipresence of Subchapter K in the International Arena?,* 93 Taxes 143 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548749 ("articulated rationale . . . is clearly suspect"); Edwin J. Reavey & Richard M. Elliott, *Sales of U.S. Partnership Interests by Foreign Partners: New Rules After Rev. Rul. 91-32*, 91 Tax Notes Today 50-27 (1991) ("no basis for [conclusion]").

gain or loss on the exchange of a partnership interest is generally treated as an intangible capital asset.[81] Under the general sourcing rule for sales and exchanges of personal property, capital gains are sourced to the residence of the seller.[82] This approach applies entity theory to the sale of a partnership interest.[83] Some commentators contend that this approach would also lead to an exemption from taxation under I.R.C. section 864(c)(4) because capital gains of a foreign person are normally foreign source income under I.R.C. section 865(a).[84]

The revenue ruling's analysis, or lack thereof, has been soundly criticized by commentators.[85] The revenue ruling relies on the I.R.C. section 865(e)(2) exception from the general rule of I.R.C. section 865(a) to treat the gain as U.S. source. That exception requires that the income be "attributable" to the U.S. office of the partnership. Blanchard claims the revenue ruling's statement that supports the attribution is tautological, bolstered with a citation to the wholly irrelevant *Unger*[86] case, neither of which addresses how a gain becomes attributable to an office or other fixed place of business.[87] Hollander provides a similar criticism of the revenue ruling's mere assertion that the sale of the partnership interest is attributable to the partner's fixed place of business in the United States and, thus, U.S. source income, but does not provide an analysis for this conclusion.[88] Instead, the revenue ruling moves to analyze whether the gain is ECI.[89]

For this analysis, the revenue ruling uses the "asset-use" test found under I.R.C. section 864(c)(2)(A) and Treasury Regulations section 1.864-4(c)(2). However, applying the asset-use test would lead to the conclusion that the assets were not effectively connected unless the proceeds are reinvested in the business.[90] Obviously if a partnership interest is disposed of in a sale, its proceeds are not reinvested in the business. In addition, the asset use test does not cover income that is not either capital gains or FDAP and some of the proceeds would be neither.[91]

A number of the commentators believe that the revenue ruling's holding to allocate the gain would technically make sound policy if the policy maker's goal was to tax capital gains on the sale of a partnership. However, some question

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81 *See* I.R.C. § 751 (2017) (providing exceptions from this treatment).

82 I.R.C. § 865 (2017).

83 Postlewaite, *supra* note 80. The revenue ruling ignores the implications of I.R.C. section 741 and instead, under an aggregate theory, treats the partnership interest as an aggregate of the partner's interest in each of the partnerships' assets and treat's the partner as if the individual assets were disposed of in a deemed sale.

84 *See, e.g.,* Blanchard, *supra* note 80.

85 *See*, *e.g.*, *id*.; Bell & Shoemaker, *supra* note 80; Hollander, *supra* note 80; Postlewaite, *supra* note 80.

86 Unger v. Comm'r, 58 T.C.M. 1157 (1986).

87 Blanchard, *supra* note 80.

88 Hollander, *supra* note 80.

89 *Id*.

90 Bell & Shoemaker, *supra* note 80, at 84.

91 *Id*.

whether taxing these gains is sound policy.[92] Blanchard specifically questions why, since a foreign shareholder may avoid the individual level of corporate tax on a similar share of a corporate interest, which the foreign investor not be allowed to avoid the partner level tax on a sale of a partnership interest.[93] What most commentators agree is that there was insufficient statutory support for the United States to tax a foreign partner on the disposition of an interest in a U.S. partnership.[94]

C. Review of *Grecian Magnesite Mining* Case

Grecian Magnesite Mining (GMM) was a Greek corporation that mined, produced and commercialized magnesite in Greece. GMM had all its offices and facilities in Greece and no office, employees, or business operations in the United States. In 2001, it purchased a 15% interest in Premier, a U.S. LLC (taxed as a partnership) headquartered in Pennsylvania, with offices in several other states, which was engaged in the magnesite mining business in the United States. GMM hired a lawyer and a CPA to handle its U.S. tax obligations.[95]

In 2008, one of GMM's partners requested Premier to redeem its interest, which obligated Premier to make the same offer to the other partners. GMM opted to sell its interest in the partnership. On advice of the CPA, it filed a Form 1120-F "U.S. Income Tax Return of a Foreign Corporation" to report its distributive share of the partnership items of income and loss, but it did not report any income from the redemption of its partnership interest. GMM did not receive the final payment for the redemption until January 2, 2009, although the parties treated it as having been made on December 31, 2008.[96] In 2009, GMM received a Schedule K-1 "Partner's Share of Income, Deductions, Credits, etc." from Premier showing a capital account balance of zero and no items of income or loss.[97]

The IRS audited and adjusted both 2008 and 2009. GMM later conceded that the portion of the proceeds attributable to USRPIs were subject to U.S. tax and taxable by the United States under the United States – Greece Income Tax Treaty, but not the remainder of the proceeds.[98]

GMM's gain on the disposition of its interest in the partnership was a capital gain that was not U.S. source income and therefore could not be ECI. As a result, the gain was not subject to U.S. tax.

The court reviewed certain basic principles of partnership taxation to determine the character and the nature of the gain from GMM's sale of its partnership interest. I.R.C. section 701 exempts the partnership itself from tax and limits

[92] Reavey & Elliott, *supra* note 80; Blanchard, *supra* note 80.

[93] Blanchard, *supra* note 80.

[94] *Id.*; Bell & Shoemaker, *supra* note 80; Hollander, *supra* note 80.

[95] *Grecian Magnesite Mining, Indus. & Shipping Co., SA, v. Comm'r*, 149 T.C. No. 3, US-TAXCOURT 11322 at *6-*7 (July 13,2017), *appeal docketed,* No. 12-1268 (DC Cir. Dec. 18, 2017).

[96] *Id.*

[97] *Id.* at *7-*10.

[98] *Id.* at *11-*12.

taxation to the partners in their individual capacities. When a partnership redeems a partner's interest through a payment, I.R.C. section 736(b)(1) provides that the liquidating payment is a distribution by the partnership. I.R.C. section 731(a) provides that in the case of a distribution, gain is recognized only if any money distributed exceeds the partner's basis in the partnership and any gain recognized by that provision is treated as a capital gain.[99] In addition, I.R.C. section 741 (with narrow exceptions) generally treats the sale of a partnership interest as the sale of a capital asset.[100]

Reasoning that the entity approach predominates in the I.R.C.'s treatment of a transfer of partnership interests as a transfer of interest in a separate entity, the court rejected the Commissioner's aggregation approach such that the gain would be deemed to arise from the sale of GMM's interest in the assets that make up the partnership's business.[101] The court also looked to the language of I.R.C. section 741 that provides that income realized on the sale of a partnership interest is to be considered as gain from the sale of a capital asset, noting that "Congress used the singular 'asset', rather than the plural 'assets,'" which it found to be more consistent with the treatment of the sale of a partnership interest according to the entity approach than the aggregate approach.[102] Instead, the Tax Court concluded that the express wording of I.R.C. section 731(a) could not be clearer that an entity approach applied as it provides that any gain or loss under that subsection "shall be considered as gain or loss from the sale or exchange of the partnership interest of the distributee partner."

The court also reviewed the relevant international tax law. The Commissioner admitted that if the gain was foreign source, it could not fall within the limited categories of foreign source income that could be ECI under I.R.C. section 864. Rather, it had to be U.S. source if it were to be treated as ECI.[103] The Commissioner asked the court to give deference to Revenue Ruling 91-32,[104] but the court found the revenue ruling's analysis to be cursory and lacking "the power to persuade."[105] The court therefore performed its own analysis.[106] The court identi-

99 *Id.* at *4-*5.

100 *Id.* at *5.

101 *Id.* at *15-*16.

102 *Id.* at *21-*26. The court also rejected the Commissioner's argument that enactment of I.R.C. section 897(g), under which amounts received by a foreign person in exchange for all or part or its interest in a partnership are taxable gain or loss to the extent attributable to USRPIs, indicated Congress' intent to treat a foreign partner's disposition of his partnership interest as a disposition of an aggregate interest in the partnership's underlying property. Instead, the Court found that the enactment of I.R.C. section 897(g) reinforces its conclusion that the entity theory is the general rule for the sale or exchange of an interest in a partnership because "[w]ithout such a general rule, there would be no need to carve out an exception to prevent U.S. real property interests from being swept into the indivisible capital asset treatment that section 741 prescribes." *Id.* at *27.

103 *Id.* at *13-*14.

104 Rev. Rul. 91-32, *supra* note 2.

105 *Grecian Magnesite Mining, Indus. & Shipping Co., SA, v. Comm'r*, 149 T.C. No. 3, US-TAXCOURT 11322 at *34 (July 13,2017), *appeal docketed,* No. 12-1268 (DC Cir. Dec. 18, 2017).

106 *Id.* at *35-*37. The court noted that there is no I.R.C. section that specifically provides the source of a foreign partner's income from the sale or liquidation of its interest in a partnership, it looked to

fied the redemption of the partnership interest to be the relevant sale for tax purposes rather than a hypothetical sale of the partnership's assets. The court found that the revenue ruling "missed the mark" by analyzing whether Premier's U.S. office would have been a material factor in a hypothetical sale of the underlying partnership assets.[107] In addition, the court found that the Commissioner had conflated the office being material to the ongoing value of a business with the office being material in the distinct situation of a sale of an interest in that business.[108]

For all these reasons, the court found the source of income to be foreign and therefore not ECI. As a consequence, the gain was not subject to U.S. income tax. Because the court found that gain was not subject to U.S. income tax under the U.S. tax law, it did not have to consider whether the United States — Greece income tax treaty prohibited the United States from taxing the gain.[109]

D. Commentary on the *Grecian Magnesite Mining* Case

The early commentators on the case agree that *Grecian Magnesite Mining*[110] was generally a win for foreign investors.[111] There will always be exceptions to the rule. One commentator pointed out that the case's reasoning would make it easier for the IRS to assert U.S. taxation in the common fact pattern for United States-based private equity funds that invest in operating partnerships. This structure involves an upper-tier partnership engaged in buying and selling lower-tier partnership interests, and the court's material-factor analysis would be relevant in finding U.S. source income. Therefore ECI on the sale of interests in the lower-tier partnerships.[112]

Other commentators looked at the structuring implications of the case for private equity and other funds from a different standpoint.[113] These commentators are concerned with whether to use a U.S. or foreign blocker corporation to pre-

§865(a)'s default source rule for gain realized on the sale of personal property, which treats the gain realized by a foreign person as foreign source income.

107 *Id.* at *41.

108 *Id. at* *41-*44 (The question is whether the office was a material factor in the realization of income in the specific transaction. The court held that the material factor test is not satisfied because Premier's actions to increase its overall value were not an essential element to GMM's realization of income on the sale of its interest; in addition, the ECI regulations required that the income be realized in the ordinary course of the business carried on by the office, and the court found that the gain on the sale of the partnership interest missed this test as well).

109 *Id.* at *5.

110 *Id*. at *1.

111 *See, e.g*., Courtney Snelling, *The Grecian Battle and the Attributes of the Prevailing Entity* (Jul. 31, 2017) https://www.bna.com/grecian-battle-attributes-b73014462447; Kristen E. Hazel, Sandra P. McGill & Susan E. O'Banion, *United States: Grecian Magnesite Mining v. Commissioner: Foreign Investor Not Subject To US Tax On Sale Of Partnership Interest*, (Nov. 7, 2017), http://www.mondaq.com/404.asp?404;http://www.mondaq.com:80/unitedstates/x/643688/tax+authorities/State+And+Local+Tax+Aspects+Of+Republican+Tax+Reform+Framework&login=true.

112 KPMG, Foreign partners: Tax Court rejects IRS's position in Rev. Rul. 91-32 (2017), https://home.kpmg.com/content/dam/kpmg/us/pdf/2017/07/tnf-taxcourt-july17-2017.pdf [hereinafter KPMG].

113 Hazel, McGill and O'Banion, *supra* note 111; David A. Sausen, Laurie Abramowitz & Sarah C. Solveichik, *Grecian Magnesite Decision Could Have Significant Tax Implications for Non-US Investors*

vent foreign investors from having to recognize ECI.[114] They noted that after the case the use of a foreign blocker, as opposed to a U.S. blocker, would have a tax advantage on disposition in that its gain on the sale of a partnership interest with a U.S. trade or business would not be subject to U.S. tax.[115]

From a tax law standpoint, commentators noted that the case was a victory for the entity approach over the aggregate approach for characterization of foreign partner's dispositions of a partnership interest.[116] However, they differed in their view of the implications of the case. One commentator explicitly questioned whether many taxpayers actually followed the holdings in Rev. Rul. 91-32.[117] Others implicitly suggested that some do not. They advised taxpayers who did follow the revenue ruling to file protective amended returns claiming the benefits of Tax Court holding.[118] Most commentators noted that the taxpayer victory may be short-lived, questioning whether the IRS would appeal the case, issue regulations incorporating the holding of the revenue ruling,[119] or seek a legislative "fix."[120]

E. Changes Made by the 2017 Tax Cut and Jobs Act

The Obama Administration had previously proposed codifying Revenue Ruling 91-32[121] in its budget proposals for Fiscal Years 2013 and 2015.[122] The Administration's reason for the change was that if a partnership made the election allowed under I.R.C. section 754 to increase the partnership's basis in its assets upon a transfer of an interest in the partnership to reflect the transferee's basis in its partnership interest. The foreign transferor partner was not taxed by the United States on the foreign partner's gain from the sale of the foreign partner's interest, that gain would forever escape U.S. taxation.[123] The Administration was concerned that foreign partners' may take a position that was contrary to the holding of Revenue Ruling 91-32[124] because there was no I.R.C. provision that

in a US Fund (2017), https://www.apks.com/en/perspectives/publications/2017/09/grecian-magnesite-decision-could-have.

114 *Id*. In addition, a blocker corporation would protect U.S. tax-exempt entities from having to recognize unrelated business taxable income.

115 *Id*.

116 KPMG, *supra* note 112. https://home.kpmg.com/content/dam/kpmg/us/pdf/2017/07/tnf-taxcourt-july17-2017.pdf.

117 Snelling, *supra* note 111.

118 *See, e.g.,* Hazel, McGill & O'Banion, *supra* note 111.

119 The IRS included providing guidance under I.R.C. section 864 to implement Rev. Rul. 91-32 in its 2016–2017 Priority Guidance Plan, available at https://www.irs.gov/pub/irs-utl/2016-2017_pgp_initial.pdf.

120 *Id.;* KPMG, *supra* note 112.

121 Rev. Rul. 91-32, *supra* note 2.

122 Dep't of the Treasury, Gen. Explanation of the Admin. Fiscal Year 2013 Revenue Proposals 96 (2012) [hereinafter Dep't of the Treasury 2012]; Dep't of the Treasury, Gen. Explanation of the Admin. Fiscal Year 2015 Revenue Proposals 51-52 (2014) [hereinafter Dep't of the Treasury 2014].

123 *Id*.

124 Rev. Rul. 91-32, *supra* note 2.

explicitly provided that gain from the sale or exchange of a partnership interest would be treated as ECI.[125] The proposal would have treated the gain or loss from the sale or exchange of a partnership interest as ECI to the extent that it was attributable to the transferor's distributive share of the partner's distributive share of the partnership's unrealized gain or loss that is attributable to ECI property.[126] It would have also adopted a withholding tax regime similar to that of FIRPTA[127] to ensure collection of the tax.[128]

The TCJA overrides *Grecian Magnesite Mining*[129] for sales or exchanges on or after November 27, 2017. It treats a foreign partner as having effectively connected gain or loss to the extent that the foreign partner would have received effectively connected gain or loss if the partnership had liquidated its assets at fair market value on the date of the disposition of the partnership interest.

To prevent avoidance of its provisions, the Act gives the I.R.S. the authority to provide appropriate regulations for application of the provision, including with respect to corporate transactions in which no gain or loss is recognized, which includes corporate liquidations described in I.R.C. section 332 and corporation reorganizations described in I.R.C. sections 332, 351, 354, 355, 356, or 361. In addition, the TCJA adopts a withholding tax regime that requires the purchaser of the interest, to withhold 10 percent of the amount realized unless the selling partner certifies that the partner is not a foreign person.[130] The withholding provisions apply to sales and exchanges after December 31, 2017.

Unlike FIRPTA,[131] the TCJA does not include a treaty override, and treaty provisions that may limit U.S. taxation of foreign partners remain in force for foreign partners entitled to the benefits of U.S. income tax treaties.[132] The current U.S. Model Income Tax Treaty[133] does not contain a provision specially allowing for the taxation of gains on disposition of partnership interests. The Treasury Departments' technical explanation of the 2006 U.S. Model Income Tax Treaty, like the technical explanation of the 1996 U.S. Model Treaty,[134] cites Revenue

[125] Dep't of the Treasury 2012, *supra* note 122; Dep't of the Treasury 2014, *supra* note 122.

[126] Dep't of the Treasury 2012, *supra* note 122; Dep't of the Treasury 2014, *supra* note 122. This TCJA codified the first two holdings of Revenue Ruling 91-32. TCJA *supra* note 8.

[127] FIRPTA, *supra* note 46.

[128] Dep't of the Treasury 2012, *supra* note 122; Dep't of the Treasury 2014, *supra* note 122.

[129] *Grecian Magnesite Mining, Indus. & Shipping Co., SA, v. Comm'r*, 149 T.C. No. 3, US-TAXCOURT 11322 (July 13,2017), *appeal docketed,* No. 12-1268 (DC Cir. Dec. 18, 2017).

[130] This withholding regime is similar to FIRPTA's withholding of a purchaser of a U.S. real property interest. *See* FIRPTA, *supra* note 46.

[131] FIRPTA, *supra* note 46.

[132] *See* Allyson Versprille, *Senate Tax Proposal Would Override Grecian Magnesite Decision,* Daily Tax RealTime (Nov. 10, 2017), https://www.bna.com/senate-tax-proposal-n73014472032/.

[133] Dep't of Treasury, U.S. Model Income Tax Convention of November 15, 2006, https://www.irs.gov/pub/irs-trty/model006.pdf.

[134] Dep't of the Treasury, U. S. Model Income Tax Convention of September 20, 1996 Tech. Explanation, https://www.irs.gov/pub/irs-trty/usmtech.pdf.

Ruling 91-32 in connection with the article on gains but only to state a non-controversial proposition.[135]

The analysis that follows will concentrate on the uncertainties that have been created by the passing of this new law, particularly in regards to whether the IRS will interpret the law to allow the IRS to tax foreign persons covered under treaty provisions.

IV. Analysis

A. Will the IRS attempt to tax treaty protected partners disposing of partnership interests?

There are only two articles of U.S. bilateral income tax treaties under which a foreign enterprise or foreign individual entitled to the benefits of a U.S. income tax treaty disposing of a partnership may be subject to U.S. tax: the article on gains or the article on business profits.

U.S. income tax treaties generally limit the taxation of gains of foreign persons to gains on disposition of U.S. real property interest, certain ships, aircraft, and containers, and business property of a PE, including gains from the sale of such a PE.[136] This provision has changed little over the years.[137]

The United States — Netherlands Income Tax Treaty signed in 1992 contains the exact verbiage of the 2006 and 2016 U.S. model income tax treaties. The Treasury Department's explanation of the Dutch Treaty's provision on capital gains adds that the provision permits gains from the alienation of an interest in a partnership that has a PE to be taxed as gains attributable to such a PE, "regardless of whether the assets of such partnership consist of personal property as defined in Article 14."[138] This explanation does not appear in other treaty commentary or in the Treasury Department's commentary of the 1996 and 2006 U.S. model treaties. Instead, the explanations of the 1996 and 2006 U.S. model treaties provide merely that a resident of the other Contracting State that is a partner in a partnership with a PE in the United States generally will have a U.S. PE as a

[135] Dep't of the Treasury, U. S. Model Technical Explanation Accompanying the U. S. Model Income Tax Convention of November 15, 2006, 45-46, https://www.treasury.gov/press-center/press-releases/Documents/hp16802.pdf; *see* Blanchard, *supra* note 80. Revenue Ruling 91-32 is cited in the Technical Explanation for the proposition that a partner in a partnership having a U.S. PE will generally be treated as having a U.S. PE, a non-controversial proposition that has long been acknowledged in cases such as *Unger* and *Donroy*. This proposition underpins the Model Treaty's approach of allowing the United States to tax a foreign partner's distributive share of income *realized by the partnership* with a U.S. PE from the disposition of movable property forming *part* of the partnership's U.S. business property.

[136] Dep't of the Treasury, U.S. Model Income Tax Convention, art. 13, 2016, https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-US%20Model-2016.pdf.

[137] *See* Dep't of the Treasury, U.S. Model Income Tax Convention, art. 13, 1996, https://www.irs.gov/pub/irs-trty/usmodel.pdf (adding to personal property gains attributable to the enterprise such gains "attributable to a fixed base that is available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services").

[138] Dep't of the Treasury, Technical Explanation of the Convention Between the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income art. 14(3) (1992), https://www.irs.gov/businesses/international-businesses/netherlands-technical-explanation.

result of the partnership, citing Revenue Ruling 91-32. The United States generally may tax a partner's distributive share of income realized by a partnership on the disposition of business property of the partnership in the United States.[139]

It is curious that the IRS points the reader to Revenue Ruling 91-32, but cites it for the noncontroversial principal that a partner is treated as having a PE if the partnership has a PE and not for the revenue ruling's controversial holding that a foreign partner would be taxed on the gain realized on disposition of the partner's interest in the partnership.[140] Instead, the explanation merely states that a partner may be taxed on their distributive share of the partnership's gain on the disposition of personal property of the partnership's U.S. PE. This suggests that Treasury had concerns over the validity of the revenue ruling's holding and its acceptability to the U.S.' treaty partners.[141] The 2006 Protocol to the United States – Germany Income Tax Treaty also included a provision that nothing in the gains article will prevent gains realized by a resident of a contracting state from the sale of an interest in a partnership that has a PE in the other contracting state from being treated as a taxable gain from moveable property of a PE.[142]

A central feature in U.S. income tax treaties has long been to limit income taxation of business profits to those attributable to a PE in the taxing jurisdiction.[143] The U.S. Treasury's explanations of the business profits article of the U.S. model treaties do not mention the disposition of an interest in a partnership.[144]

It is unclear whether Revenue Ruling 91-32 was referring to the business profits article or the gains article because it mentions both "gain from the alienation of moveable property," which is covered by the gains article, and "attributable to" a PE, which is generally covered by the business profits article. Indeed, the revenue ruling mentions that the attributable to concept is analogous to the ECI concept, but fails to mention that it is "somewhat different" from the ECI concept, as pointed out by the Treasury explanation of the business profits article.[145] The Treasury understands, as pointed out by some commentators, that a partnership is not engaged in the business of selling its interests. The Treasury also understands that the partners typically are not engaged in the business of trading in partnership interests, with the exception of traders who hold partnership interests in inventory.[146]

139 Dep't of the Treasury, *supra* note 134, at 42-43; Dep't of the Treasury, *supra* note 136, at 45-46.

140 *Id.*

141 *Id.*

142 Protocol Amending Tax Convention, Ger.-U.S., art. XVI (13), June 1, 2006, S. Treaty Doc. No. 109-20 (2006), https://www.irs.gov/pub/irs-trty/germanprot06.pdf.

143 *See* Rhoades & Langer, *supra* note 4.

144 *See e.g.*, Dep't of the Treasury, *supra* note 135, at 21. The explanation does include a discussion of the on-going profits of a partnership with a PE, just not the case of a disposition of interest in a partnership.

145 *Compare* Rev. Rul. 91-32, *supra* note 2, with Dep't of the Treasury, *supra* note 135, at 22.

146 *See, e.g.,* Hollander, *supra* note 80.

The passage of the TCJA raises the question: will the IRS seek to apply the TCJA's codification of Revenue Ruling 91-32 in the treaty context, upsetting the general understanding of these agreements? The treaty context is especially important since most U.S. trade is conducted with countries that have signed tax treaties with the United States. Businesses within these countries have established expectations of what can be taxed.

The TCJA codified the revenue ruling's analysis by modifying I.R.C. Section 864(c) to treat gain and loss on the sale or exchange of a U.S. partnership interest as in whole or in part ECI.[147] The legislative history is silent as to its application to treaties.[148] The IRS could conceivably try to apply the reasoning of Revenue Ruling 91-32 in a future case against a treaty-protected partner.

B. What are the potential consequences?

1. *The logic of* Grecian Magnesite Mining *in the treaty context*

At first blush, it does not appear Revenue Ruling 91-32's treaty holding would be accepted by the U.S. Tax Court in the absence of a mention of the legislative history of applying the revenue ruling's holding to treaties.[149] The court's rejection in *Grecian Magnesite Mining* of the reasoning of Revenue 91-32 in the absence of a specific statutory provision suggests that the court might similarly reject this reasoning in the treaty context, especially where a few U.S. treaties adopted a specific provision in their gains article to allow for such taxation.[150] The notion of "attributable to" in the PE context is typically more limited than in a non-treaty context. The court may have rejected the attribution of the sale to a PE on similar grounds. However, the holding in *Grecian Magnesite Mining* was reversed by Congress in the TCJA, and a higher court could conceivably view Congress as approving of the logic of the revenue ruling, even applicable in the treaty context.

2. *Response from Treaty Partners*

Surprise "tax traps" discourage businesses from investing in the United States. Treaty countries expect to be generally the jurisdiction taxing the capital gains of its tax residents, except in those limited contexts explicitly enumerated in treaties.[151] Affected investors can seek consideration by competent authority to avoid double taxation, when provided for in bilateral treaty arbitration provisions,[152]

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[147] TCJA, *supra* note 8.

[148] H.R. Rep. No. 115-466, at 509-512 (2017) (Conf. Rep.).

[149] See *id.*

[150] *See, e.g.,* Tax Convention, Neth.-U.S. art. 14(3), Dec. 18. 1992, S. Treaty Doc. No. 103-6 (1992); Protocol Amending Tax Convention, Germany-U.S., art. XVI (13), June 1, 2006, S. Treaty Doc. No. 109-20 (2006), https://www.irs.gov/pub/irs-trty/germanprot06.pdf.

[151] Jeswald W. Salacuse & William P. Streng, International Business Planning: Law and Taxation § 16.04 (2018) ("Many bilateral income tax treaties reserve to the state of residence the exclusive right to tax capital gains, even as to those capital gains realized in the source country.").

[152] *See* Rhoades & Langer, *supra* note 4, at § 62.04.

but that can be a costly and time-consuming process. Treaty partners may be unaware of the U.S.'s treaty interpretation.

V. Proposal

The IRS should respect the traditional understanding of treaty protection afforded by U.S. treaties. These norms are a mutually beneficial arrangement that both ease investment between the treaty countries and set a standard for future treaties. However, in the current environment foreign investors in the United States cannot be sure that their country's treaty will protect them from United States taxing gain on their sale of a U.S. partnership interest. This uncertainty may affect the structure of foreign investment and even discourage investment in U.S. business ventures.

The international business community would welcome clarification by the IRS that it will respect its own historic boundaries. An argument can be made that, generally, when the United States fails to uphold its prior treaty commitments, its global leadership is diminished.[153] Moreover, despite the United States commonly following international norms, its relatively rare departures are magnified in the eyes of the world.[154] In the tax treaty context, where the relationship with important trade partners are implicated, a spirit of mutuality is more important.

The IRS may be unwilling to follow this proposal. Just as it is appealing the *Grecian Magnesite Mining* decision as to pre-TCJA transactions,[155] the IRS may want to apply its expansive interpretation to treaties without an explicit understanding with treaty partners.

VI. Conclusion

The TCJA's codification of Revenue Ruling 91-32 undermines the significance of the *Grecian Magnesite Mining*[156] case in encouraging international investment and keeping U.S. tax rules consistent with expectations of taxation in the context of international business. The taxation of gain on the disposition of a U.S. partnership interest can be a tax trap that undermines the intent of TCJA to make the United States more competitive. It also discourages foreign investment in the United States, particularly if the IRS extends the taxation to dispositions covered by U.S. income tax treaties without an explicit change to the applicable treaty.

[153] *See Why The Sheriff Should Follow The Law*, THE ECONOMIST (May 23, 2014), https://www.economist.com/blogs/democracyinamerica/2014/05/america-and-international-law.

[154] *Id.*

[155] *Grecian Magnesite Mining, Indus. & Shipping Co., SA, v. Comm'r*, 149 T.C. No. 3, US-TAXCOURT 11322 (July 13,2017), *appeal docketed,* No. 12-1268 (DC Cir. Dec. 18, 2017).

[156] *Id.*

Failed Herd Immunity: American Business Compliance and the United States Cyber-Security Policy's Clash with the European Union's General Data Protection Act

William Dimas*

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I. Introduction

In biology, the concept of herd immunity refers to the process of protecting a whole group from a disease by immunizing a critical mass of its populace.[1] Once that critical mass is immune, the likelihood of outbreak is reduce significantly, leading to the longevity of the group.[2] The herd immunity model goes beyond animals, however, and can be applied to the future of personal data security around the world. On May 25, 2018, the European Union will enforce its new data protection laws, the General Data Protection Regulation (GDPR).[3] All foreign companies and organizations that operate within the European Union or with data processing outside of the EU will need to comply with the GDPR if they wish to carry on their business and store and process European data.[4] With their requirements of compliance, the EU is exporting their data privacy values abroad and setting a standard for the international community to establish for their own citizens, offering the world a privacy vaccination. While a step towards future rights for the international community, it is more likely that organizations will create two-tiers of data protection systems in order to comply with the new regulations and continue to maintain many of their data processing and selling

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[1] Emily Willingham & Laura Helft, *What is Herd Immunity?* NOVA, http://www.pbs.org/wgbh/nova/body/herd-immunity.html.

[2] *Id.*

[3] Matt Burgess, *What is GDPR? The Summary Guide to GDPR Compliance in the UK*, Wired (Apr. 19, 2018), http://www.wired.co.uk/article/what-is-gdpr-uk-eu-legislation-compliance-summary-fines-2018.

[4] Burgess, *supra* note 3.

practices. These data values will have a minimal effect on influencing data protection policy for U.S. citizens. Through continued massive surveillance and the intent of passing the FISA Amendments Act of 2017 (H.R. 4478) in an effort to renew and expand the Executive branch's power over data collection and surveillance under Section 702, the Executive branch seeks to circumvent the GDPR rights and private sector compliance. While the GDPR will likely mitigate some of the average consumer threats from external forces and sale of information from private businesses, the expansion of H.R. 4478 and the temporary ban on "about target" searches will override the protections that the EU has afford to its citizens, negating the vaccination attempts by the EU. In other words, the critical mass will not be reached.

The background is split into two parts. The first section will focus on the history of data protection in Europe, the problems that led to the replacement of the previous legislation called the Data Protection Directive 95/46/EC (DPD), and the contents of the GDPR. This will include the goals of the new legislation and the rights that have been carved out for EU citizens.

The second section will analyze the cyber-threats that currently faced by the American public and the international community and the ineffectual options for retaliation or prevention of cyber-attacks. This will establish why providing citizens with the opportunity to protect their own information through various rights is a security bonus.

Delving into the history of Foreign Intelligence Surveillance Act (FISA), this article will assess the scope of current U.S. cyber security programs and regulatory agencies under Foreign Intelligence Surveillance Act (FISA) Amendments of 2008, and the new amendments to FISA under H.R. 4478 upon these agencies.

The analysis will focus on the theory of herd immunity and how U.S. businesses and organizations will integrate the compliance requirements of the GDPR when processing European data, while still providing massive amounts of data to national security agencies allowed under the exceptions to these rights for surveillance and under the expansion of FISA Amendments Act of 2008 through the H.R. 4478. As total compliance is an the unreasonable expectation and the creation of a two-tiered system of data protection will ultimately leave international and European data at greater risk from the cyber-security threats and government overreaching. In Part 2, the discussion will turn to preventing either group from being protected preventing either group from being protected and simultaneously allowing a potential FISA renewal to circumvent the rights completely.

Finally, the proposal will discuss the need for a restriction on FISA and a change in the American view of the commodity of data in order to ensure the effectiveness of the GDPR. Without this change, the GDPR, while effective in the short-term, will not be an international change, despite being the premiere protection of consumer data rights.

II. Background

A. European Data Protection History and the GDPR

Citizens of EU member states are protected under a stronger and more holistic framework than the United States has because the EU has a recognized right to data privacy.[5] Europe's strong history of data protection extends back to the early days of the UN.[6] In the aftermath of World War II and at the beginning of the Cold War, the UN recognized how the collection and storage of civilians' personal information allowed governments, like the Nazis, to target individuals and groups during purges.[7] This gruesome realization influenced the European Convention on Human Rights to include protections of data, basing European's rights on dignity and honor.[8] While some European nations established their own data protection acts in the late 1970s, the UN began drafting guidelines to govern data for other states to adopt.[9] The process was slow and arduous, but ultimately finalized a decade later.[10]

Fifteen years later, in October 1995, the DPD was passed and became the guiding principles for adjudicators in the EU data protection realm for the next twenty years.[11] The DPD were based on the Fair Information Principles, providing rights to information, access to the data, and the ability to rectify the data, if necessary.[12] These rights were a minimum standard for national law and the various member states could add more additional protection laws, depending on what they believed was necessary.[13] Paired with these rights, the DPD employed an adequacy requirement, requesting that Member States deal exclusively with third parties, further requiring countries to provide adequate protection for data.[14]

5 Paul J. Watanabe, *An Ocean Apart: The Transatlantic Data Privacy Divide and the Right to Erasure*, 90 S. Cal. L. Rev. 1111, 1114 (2018) [hereinafter Watanabe].

6 Steven S. Mccarty-Snead & Anne Titus Htlby, *Research Guide to European Data Protection Law*, 42 Int'l J. Legal Info. 348, 360 (2014).

7 *Id.*; *see also* Charles Hawley, *Fifty Million Nazi Documents: Germany Agrees to Open Holocaust Archive*, Spiegel Online (Apr. 19, 2006), http://www.spiegel.de/international/fifty-million-nazi-documents-germany-agrees-to-open-holocaust-archive-a-411983.html (30-50 million documents detailing the exterminations within the camps in clear detail, the sheer volume of information reinforces the dangers that can occur when personal data is abusively collected).

8 William McGeveran, *Friending the Privacy Regulators*, 58 Ariz. L. Rev. 959, 967 (2016) [hereinafter McGeveran].

9 Paul de Hert & Vagelis Papakonstantinou, *Three Scenarios for International Governance of Data Privacy: Towards an International Data Privacy Organization, Preferably a UN Agency?* 9 I/S: J. L. Pol'y Info. Soc'y 271, 281-82 (2013) (France and Germany had already implemented data protection policies, with the French Law on Informatics, Data Banks and Freedoms (1978) and the first Federal Data Protection Act (1977)).

10 *Id.* at 282.

11 Watanabe, *supra* note 5, at 1119.

12 de Hert & Papakonstantinou, *supra* note 9, at 10.

13 McGeveran, *supra* note 8, at 969.

14 The EU-US Privacy Shield Framework is based on this adequacy principle. *See also* de Hert & Papakonstantinou, *supra* note 9, at 279.

By 2012, the DPD was ineffective and unable to cope with modern technological strategies that threaten personal information online.[15] While the DPD was founded on many of the same principles as the GDPR legislation, its minimum requirements led to a lack of standardization throughout EU member states, hindering the data transfer channels between nations.[16] The obligations of companies under the legislation created administrative burdens and excessive costs.[17] The inherent distrust in the data protection abilities between member states threatened potential economic stagnation, as the benefits of trading and operating within a member state with weaker data protection laws exposed the information to a variety of cyber-threats and thefts. The U.S. National Security Agency (NSA) further exacerbated the fears of intrusions into EU data privacy when Snowden leaked information revealing the NSA systematic and chronic data collection and storage practices, without the employment of proper oversight and respect for the privacy rights under the DPD.[18] After four years drafting and revisions, the GDPR was approved in 2016, with an enforcement date of May 25, 2018.

Replacing the DPD and drawing upon Article 8(1) of the Charter of Fundamental Rights of the European Union, the GDPR posits that every European citizen has a right to protection of personal data. The intention behind this right is to encourage freedom, increase security, and support justice.[19] In addition to the protections, the GDPR seeks to strengthen the economics of the EU and harmonize the cyber-laws to encourage trust and growth.[20]

Article 5 of the GDPR sets forth the principles and limitations for organizations that fall under its jurisdiction.[21] The data must be lawfully and fairly processed, in a transparent manner and for an explicitly, specified purpose. To accomplish this, the GDPR will include restrictions on the length of time that

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[15] *GDPR Timeline of Events*, EUGDPR.ORG, https://www.eugdpr.org/gdpr-timeline.html; de Hert & Papakonstantinou, *supra* note 9, at 311 (frameworks for new data protection acts were reviewed starting in 2009, but the first drafts of the what would become the GDPR were presented in 2012).

[16] General Data Protection Regulation, COUNCIL OF THE EUROPEAN UNION (Apr. 6, 2016) at art. 9, http://data.consilium.europa.eu/doc/document/ST-5419-2016-INIT/en/pdf [hereinafter GDPR]; *see also* Scott J. Shackleford & Scott Russell, *Operationalizing Cybersecurity Due Diligence: A Transatlantic Study*, 67 S.C. L. REV. 609 (Spring 2016) (the continuous struggle of centralization, in which EU member states seek to maintain their sovereignty and individual national goals, while simultaneously seeking to create more accountability and smoother operations complicates the future of cybersecurity policy despite the newest legislation).

[17] Francoise Gilbert, *European Data Protection 2.0: New Compliance Requirements in Sight-What Proposed EU Data Regulation Means For U.S. Companies*, 28 SANTA CLARA HIGH TECH. L.J. 815, 817-18 (2012).

[18] Ewen Macaskill & Gabriel Dance, *NSA Files Decoded*, THE GUARDIAN (Nov. 1, 2013), https://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded.

[19] GDPR, *supra* note 16, at preamble; Rohan Massey, Heather Sussman, et al., *Countdown to Compliance: One Year to go until GDPR Enforcement*, ROPES & GRAY 1, 2 (May 26, 2017) [hereinafter *Countdown to GDPR Compliance*].

[20] GDPR, *supra* note 16; *Countdown to GDPR Compliance*, supra note 19.

[21] GDPR, *supra* note 16, at art. 5.

data may be held and for long that data may be used to identify the citizen.[22] This Fair Processing Principle will carry over from the DPD, relating to collection, disclosure, retention, and disposal of personal data.[23]

The GDPR will continue to guard European citizens' rights regarding the ability to access their own personal data. It will also impart a right to erasure; a right to rectification; new rules regarding consent; data portability rights; a right to be informed; a right to object; and rights related to automated decision making including profiling.[24]

The right for a citizen to be informed is guaranteed under Articles 13-15 of the GDPR.[25] When collecting and processing data, a data controller must inform citizens as to the purpose of the collection of data the recipient of the data, and the time frame for the collection of the data.[26] If a data controller has received personal data from another source, the controller must state where the information originated, the legal basis for that information, other recipients of that information, and the categorization of data received.[27] Article 15, known as the right of access, allows the citizen to request and obtain a confirmation from the data controller as to whether the personal data is being used and the reason for its use. Further, as an additional safeguard, when information is transported outside of this country, the data controller must list the protective measures utilized by the recipient country to protect personal data.[28]

Under the right to erasure, commonly dubbed "the right to be forgotten" in the U.S., individuals may request the removal of processed personal data if: (1) the data is no longer a necessity; (2) has no relation to the original purpose; (3) the individual has withdrawn consent; (4) the data was unlawfully processed under the GDPR; (5) the data must be deleted for compliance; or the data references a minor.[29] The right to erasure also existed under the DPD and was most notably applied in a case from the Court of Justice of the European (CJEU), in which Google Spain was ordered to honor requests to remove unnecessary data.[30] The court cited the economic incentives to remove out-of-date information as a boon to Google. Following the establishment of a request mechanism to have data

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22 *Id.*

23 Processing Personal Data Fairly and Lawfully (Principle 1): What Does Fair Processing Mean? INFORMATION COMMISSIONER'S OFFICE (last visited on Dec. 4, 2017) https://ico.org.uk/for-organisations/guide-to-data-protection/principle-1-fair-and-lawful/.

24 GDPR, *supra* note 16; *Countdown to GDPR Compliance*, supra note 19, at 2; Watanabe, *supra* note 5, at 1120-21.

25 GDPR, *supra* note 16, at arts. 13-15; *§51.04 The General Data Protection Act*, 6-51 COMPUTER L. 1, 5-7(2016) [hereinafter *§51.04 GDPR*].

26 *Id.* at 5-6 (Article 13).

27 *Id.* at 6 (Article 14).

28 *Id.* at 6-7.

29 GDPR, *supra* note 16, at art. 17; Right to Erasure, INFORMATION COMMISSIONER'S OFFICE, https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-erasure/ (last visited Dec. 3, 2017).

30 *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.J. C-131/12, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0131&from=EN.

removed, Google reported receiving hundreds of thousands of requests for data to be removed from every EU member state.[31]

In conjunction with the right of erasure, Article 7 requires conditional consent dependent on the processing of particular data.[32] Data controllers must ensure that the consent that they have received is specific to the purpose under which they are processing the data. Citizens are allowed to freely give and revoke consent in relation to the processing of their data.[33] Article 9 of the GDPR provides a list of personal data types, ranging from racial origins to political affiliations to sexual orientation, which may never be processed except for circumstances with explicit consent or the use in defense of legal claims.[34]

Known as the right of portability, Article 20 of the GDPR allows citizens the right to receive the data from the data controller in a form that the citizen may employ for personal use.[35] The data controllers must provide two types of data to the citizen upon request: (1) data actively and knowingly provided and (2) data observed via use of the service of a device.[36] Data controllers are required to maintain the minimum amount of information for the limited duration that a citizen uses the service provided. Third parties are only allowed to see the maximum amount of information they need to accomplish their action, rather than having access to an entire individual's metadata on the app.[37]

Article 3 of the GDPR expands the territorial scope of the individuals and organizations that must comply with the legislation under the new law.[38] To overcome the previous ambiguity of whether the Directive applied, the GDPR is explicit and states that all data controllers and data processors that work with EU data will be responsible for complying, regardless of their place of business. Furthermore, all non-EU business will have to select an EU representative if they process the data of EU citizens.[39] This includes organizations that provide free goods and services to customers in the European markets.[40] EU states are responsible for ensure that their laws comply with the GDPR.

[31] W. Gregory Voss & Celine Castets-Renard, *International and Comparative Technology Law: Proposal for an International Taxonomy on the Various Forms of the "Right to be Forgotten": A study on the Convergence of Norms*, 14 COLO. TECH. L.J. 281, 287 (2016) (519,733 search engine results, as of April 2, 2016, indicate the right is widely exercised in the EU).

[32] *§ 51.04 GDPR*, *supra* note 25, at 4.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 32-33.

[36] *Id.* at 33 (The GDPR does not require data that has been inferred based off the other forms be provided to the data subject).

[37] *Id.*

[38] Linda V. Priebe, *How EU Data Privacy Reform Will Impact US Telecom Cos.*, LAW360 (Mar. 21, 2017), https://www.law360.com/articles/903685/how-eu-data-privacy-reform-will-impact-us-telecom-cos-.

[39] GDPR Key Changes, https://www.eugdpr.org/.

[40] AJ Dellinger, *EU's GDPR: What Will American Companies Have to Do to Comply*, INT'L BUS. TIMES (Aug. 1, 2017), http://www.ibtimes.com/eus-gdpr-what-will-american-companies-have-do-comply-2573002.

Data controllers and data processors will also have heightened responsibilities related to security, requiring that the implementation of security measures be proportionate and appropriate for the risks that are present, rather than simply having an arbitrary level of security.[41] The previous requirements on alerting the affected parties of security breaches without undue delay for telecommunication companies under the Directive will be expanded under the GDPR to include all companies.[42] In the event of a breach that impacts personal data, entities will be required to report that breach within 72 hours.[43]

To regulate compliance, the GDPR establishes a European Data Protection Board (EDPB) to guide the formation of compliance. EDPB will approve code practices and certification schemes for various entities. As an appellate body, the EDPB reviews disputes that will inevitably arise.[44] Failure to comply with the new regulations or infringing on a person's rights will result in a fine of either 4% or 20 million pounds, whichever amount is larger.[45]

These rights are not absolute rights under Article 23 and Chapter IX of the GDPR and will be subjected to a variety of limitations, such as for the national defense, persecution of a crime.[46] Under a necessary and proportionate standard of review, member states are allowed to introduce exemptions and derogations that would further allow the processing of data beyond the limits set for in Article 5.[47]

B. Cyber Threats and the New Battlefield

In 2014, the United States charged five Chinese military hackers with computer hacking, economic espionage and other offenses directed at targets within various United States industries, ranging from nuclear power to the metals products industry.[48] After assessing the theft, this event was described as one of the greatest exchanges of economic wealth in history by U.S. officials. The threat of cybercrime has continued to rise and became the second most reported economic crime affecting organizations in 2016.[49] Many companies were not equipped to deal with attacks. Less than 37% of the affected companies had cyber security

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[41] Michael Drury & Julian Hayes, *England & Wales,* CYBERSECURITY 28, 30 (Benjamin A. Powell & Jason C. Chipman ed., 2018); Gilbert, *supra* note 17, at 819.

[42] *Id.*

[43] Shannon Yavorsky, GDPR- Unlocking the Security Obligations, LAW360 (July, 20, 2017).

[44] Drury & Hayes, *supra* note 41, at 819.

[45] *Id.*

[46] *Id.*

[47] *Exemptions*, INFORMATION COMMISSIONER'S OFFICE, https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/exemptions/ (last visited on Apr. 12, 2018).

[48] Press Release, U.S. DEP'T OF JUSTICE, U.S. CHARGES FIVE CHINESE MILITARY HACKERS FOR CYBER ESPIONAGE AGAINST U.S. CORPORATIONS AND A LABOR ORGANIZATION FOR COMMERCIAL ADVANTAGE (May 19, 2014), https://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor.

[49] *Global Economic Crime Survey 2016:Adjusting the Lens on Economic Crime: Preparation Brings Opportunity Back Into Focus*, PwC (2016) https://www.pwc.com/gx/en/economic-crime-survey/pdf/GlobalEconomicCrimeSurvey2016.pdf.

plans in the event of a cyber hack.[50] These hacks have left hundreds of millions of Americans exposed to identity theft and reveals major flaws in the handling of American data and the lack of defense mechanisms.[51] In a world where the battlefields have morphed, civilians and civilian infrastructure have become prime and poorly defended targets besieged by unceasing cyber-attacks.[52]

As one of the most powerful equalizing strategies, cyber-attacks provided nations who employed cyber tactics the ability to cripple critical infrastructure as a deterrent, collect military secrets, and employ industrial espionage while acquiring a massive economic advantage.[53] Speed and anonymity provide significant advantages to states employing aggressive, offensive cyber strategies against other nations who must sink huge quantities resources for defense.[54] The devastating effects of cyber-attacks can immediately plunge a country into a state of emergency or slowly deplete their technological capabilities and tactics over time.[55] Most attacks are difficult to trace and even harder to identify the perpetrator, leaving no one to hold accountable and allowing for plausible deniability from state actors.

Additionally, the available responses for hacks are limited, as nations often lack the jurisdiction to properly prosecute hackers, especially those operating in foreign countries.[56] Convictions, similar to the ones the five Chinese hackers were handed, are rare. Many believe the best strategy is to establish international guidelines through diplomacy but that has been ineffective. During his tenure as president, President Obama attempted to reach agreements with Chinese President Xi Jinping, but failed to make any major headway before leaving office.[57]

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50 *Id.*

51 Michael Riley, Jordan Robertson, and Anita Sharp, *The Equifax Hack has the Hallmarks of State-Sponsored Pros*, BLOOMBERG BUSINESSWEEK (Sept. 29, 2017) https://www.bloomberg.com/news/features/2017-09-29/the-equifax-hack-has-all-the-hallmarks-of-state-sponsored-pros [hereinafter *The Equifax Hack*]; Andrew Ubaka Iwobi, *Stumbling Uncertainly into the Digital Age: Nigeria's Futile Attempts to Devise a Credible Data Protection Regime*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 13, 30 (Winter 2016) (discussing Lord Hoffman's analysis in R v. Brown as to the invasive nature of modern technology through data collection and transmission).

52 *See*, Frédéric Mégret, *War and the Vanishing Battlefield*, 9 LOY. U. CHI. INT'L L. REV. 131 (2011) (discussing the shifts away from traditional confined battlefields and the difficulties this proposes for the enforcement of the laws of war).

53 Magnus Hjortdal, *China's Use of Cyber Warfare: Espionage Meets Strategic Deterrence*, J. OF STRATEGIC SEC. 4, NO. 2, 1 (2011).

54 *Id.*

55 Scott J. Shackleford & Scott Russell, *Operationalizing Cybersecurity Due Diligence: A Transatlantic Study*, 67 S.C. L. REV. 609 (Spring 2016).

56 Jyh-An Lee, *The Red Storm in Unchartered Waters: China and International Cyber Security*, 82 U. MO.-KAN. CITY L. REV VOL. 82, NO. 4., 951, 959 (2014).

57 Aamer Madhani, *Obama, Xi get Closer but Gap Remains on Cybersecurity*, USA TODAY (June 8, 2013), https://www.usatoday.com/story/news/politics/2013/06/08/obama-xi-take-stroll/2403823/.

III. Discussion: The Shield and the Net, U.S. Cyber-Security Strategies and Future

While the European Union has chosen to protect those rights, U.S. policy seeks to expand the national security expectations of surveillance to combat the threats above. US privacy law has, by contrast, largely developed in a "patchwork", with an array of state and federal statutes of common law doctrine.[58] At the federal level, the strongest data protection rights come from data protection regimes like the Health Insurance Portability and Accountability Act ("HIPAA") and the Children's Online Privacy Protection Act ("COPPA").[59] In a manner similar to the EU under the DPD, the majority of data protections are provided at an individual state level and these wildly vary from state to state.[60] Due to this lower threshold for privacy and censorship laws, users have different experiences when visiting websites in the United States, as opposed to within the EU.[61]

While the Fourth Amendment of the Constitution provides protection from unreasonable search and seizures from the government, it does not guarantee a right to personal information stored from private actors.[62] Since 9/11, many of the original protections for U.S. citizens regarding their data have been eroded, including the protections provided by the Foreign Intelligence Service Act of 1978 (FISA 1978). FISA 1978 was originally drafted with a dual purpose in mind. In the wake of the Watergate Scandal, it was discovered that CIA operatives had conducted missions on domestic soil, breaking their mandate.[63] The CIA infiltrated political activist groups, unions and other elements of domestic society, as they believed these groups were working with foreign dissidents and spies to disrupt national security.[64] Thus, FISA 1978 was written to operate as both a limit on the surveillance powers of the Executive branch and as a framework to conduct international intelligence gathering and countermeasures, including instances when the data of U.S. citizens are involved.[65] Under the minimization principle, analysts are and are still required to reduce the effect and intrusions on the rights of Americans when collecting data investigating foreign intelligence and nationals.[66]

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[58] McGeveran, *supra* note 8, at 965.

[59] *Id.*

[60] *See*, Watanabe, *supra* note 5, at 1122 (the state that provides the strongest protections, California, has its own version of the right of erasure exclusively for minors).

[61] Victor Luckerson, *Americans Will Never Have the Right to be Forgotten*, TIME (May 14, 2014), http://time.com/98554/right-to-be-forgotten.

[62] U.S. CONST. amend. IV; Sherri J. Deckelboim, Note, *Consumer Privacy on an International Scale: Conflicting Viewpoints Underlying the EU-U.S. Privacy Shield Framework and How the Framework Will Impact Advocates, National Security, And Businesses*, 48 GEO. J. INT'L L. 263, 272 (2016).

[63] The Foreign Intelligence Surveillance Act of 1978, DEP'T OF JUSTICE, https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1286 [hereinafter FISA 1978 Overview Page].

[64] *Id.*

[65] FISA 1978 Overview Page, *supra* note 63; United States v. Rosen, 447 F. Supp. 2d 538, 542 (E.D. Va. 2006). *See also*, Macaskill & Dance, *supra* note 18, at 3.

[66] FISA 1978 Overview Page, *supra* note 63.

Starting in 1995, FISA 1978 has been revised and amended seven times, the most notable being the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act and the FISA 2008 Amendments Act of 2008 (FISA 2008).[67] In 2008, the FISA regulation was updated to include Section 702, which provided the authority for security agencies to compel telecommunication networks to aid in the acquisition of foreign intelligence information related to non-US persons residing in foreign countries.[68] The framework followed shares some similarities with FISA 1978. To request information, analysts must show that they have properly determined the location to be outside of the U.S. and have taken steps to minimize and remove the domestic communications.[69] Any data collected that still includes a U.S. citizen and a foreign national target is permissible so long as the intrusion into the data of American citizens is minimized. Analysts compile this information into a certification, in lieu of a search warrant, showing that the proper collection procedures were followed.[70] An annual review process is used to ensure protocols are up-date and followed.[71]

Under Section 702, the NSA describes data collections as "upstream" and "downstream" collection.[72] Within Upstream collection, the NSA intercepts data over fiber cables and from infrastructure. The NSA collects data and communications throughout the world, most of which goes through the United Kingdom and the United States.[73] The NSA defines "upstream" data collection as "[collections acquired from] communications 'to, from, or about' a Section 702 Selector".[74] Of the two collection methods, "upstream" accounts for smaller accounts, with some estimates sitting at 9% of the total data collection.[75] The "about target" data is information that is communicated between individuals, who are not targets themselves, about a topic or discussion that is a target in question.[76] This allows the NSA to collect information from anyone, including two parties of American citizens, so long as the NSA identifies a specific target and relation to the threat

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67 *Id.*

68 FISA Amendments Act of 2008 Section 702 Summary Document, OFFICE OF GENERAL COUNSEL 1, 3 (Dec. 23, 2008).

69 Upstream v. PRISM, ELEC. FRONTIER FOUND, https://www.eff.org/pages/upstream-prism (last visited Dec. 4, 2017).

70 *Id.* at 6-12.

71 Ellen Nakashima, *NSA Halts Controversial Email Collection Practice to Preserve Larger Surveillance Program*, WASH. POST (Apr. 28, 2017) https://www.washingtonpost.com/world/national-security/nsa-0halts-controversial-email-collection-practice-to-preserve-larger-surveillance-program/2017/04/28/e2ddf9a0-2c3f-11e7-be51-b3fc6ff7faee_story.html?utm_term=.31e7ae911c71.

72 Public Statement, NSA Stops Certain Section 702 "Upstream" Activities, NAT'L SEC. AGENCY (Apr. 28, 2017), https://www.nsa.gov/news-features/press-room/statements/2017-04-28-702-statement.shtml [hereinafter Public Statement].

73 Macaskill & Dance, *supra* note 18, at 3 (the NSA nicknamed the flow of data 'home field advantage' due to the high amounts that travel through allied territory).

74 Public Statement, *supra* note 72.

75 Nakashima, *supra* note 71.

76 Public Statement, *supra* note 72.

being investigated.[77] This is a circumvention to the minimization principle set forth in the original FISA.[78] Following serious missteps and abuses of civil liberties and the potential repeal of Section 702 as whole and cease spying in court, NSA offered to regulate themselves and voluntarily cease the "about target" searches.[79] The removal allowed Section 702 surveillance to continue collecting large quantities of data "upstream", only when the communications were between foreign nationals.[80]

In tandem with the upstream collection operations, PRISM is the downstream data collection counterpart responsible for collecting data from major US Internet companies.[81] Defined as "[the collection of] communications 'to or from' a Section 702 selector", Prism collected data, such as search history and emails, directly from participating business' servers, beginning with Microsoft on September 11, 2007.[82] Prior to the Snowden's document lease, major businesses were complying with security requests for data were releasing up to 20,000 customer accounts per year and it frequently data collected from Prism usually appeared in the President's daily intelligence report.[83] Many of the companies that were provided data through PRISM later denied knowledge when the existence of the program was revealed.[84]

In response to the Snowden revelations, an Austrian student and Facebook user, Max Schrems, learned that his data was being collected by Facebook's subsidiary in Ireland and transferring it to the United States improperly.[85] Bringing his claim to the Irish Data Protection Commissioner, the initial case was thrown out because the US was deemed to ensure 'adequate' levels of protection under the Safe Harbor framework.[86] Schrems appealed to the High Court of Ireland and the case was placed in the Court of Justice of the European Union (CJEU).[87] The Advocate General of the EU, Yves Bot, described the Safe Harbor as a compromised framework that acted as a conduit for the US data collection programs under the NSA, rather than as a recourse mechanism for EU citizens.[88] As a

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77 Nakashima, *supra* note 71.

78 *Id*; Michelle Richardson, *Time to Permanently End NSA's "About" Searches in Communications Content under FISA 702*, Center for Democracy & Technology, (Jun. 22, 2017) https://cdt.org/blog/time-to-permanently-end-nsas-about-searches-in-communications-content-under-fisa-702/.

79 Nakashima, *supra* note 71.

80 Public Statement, *supra* note 72.

81 Macaskill & Dance, *supra* note 18, at 3; *See also*, Nakashima, *supra* note 71.

82 Macaskill & Dance, *supra* note 18, at 3 (the PRISM slides were leaked by Edward Snowden in 2013).

83 Mark Prigg, *Technology Giants Reveal How Often They are Ordered to Turn Over Information to the Government (and it's Thousands of Times a Month)*, Daily Mail (Feb. 3, 2014), http://www.dailymail.co.uk/sciencetech/article-2551277/Technology-giants-reveal-ordered-turn-information-Government.html; Nakashima, *supra* note 71.

84 Macaskill & Dance, *supra* note 18, at 3.

85 Schrems v. Data Protection Commissioner, Electronic Privacy Information Center (last visited Apr. 2, 2018), https://epic.org/privacy/intl/schrems/ [hereinafter EPIC Schrems].

86 EPIC Schrems, *supra* note 85.

87 *Id.*

88 *Id.*

guaranteed right under the EU charter, the failure to provide adequate recourse made the Safe Harbor framework inoperable.[89] The CJEU agreed and ruled that the Safe Harbor framework did not ensure the adequacy threshold due to the intrusive nature of the American data collection system for Schrems.[90]

Due to a combination of mistrust of U.S. data collection and massive surveillance, coupled with serious, external cyber-threats, a framework was established to enable the secure international transfer across the Atlantic. While the EU and U.S. were renegotiating the Safe Harbor framework prior to the Schrems decision, the invalidation disrupted the flow of transatlantic data.[91] Known as the EU-US Privacy Shield, the U.S. Department of Commerce and European Commission established a voluntary method for companies to implement protections and receive approval to meet adequacy standards under the DPD.[92] To overcome the past problems with the DPD, the Privacy Shield framework allows businesses certify that they reach adequate levels of data protection and allows European business to know who allows their citizens recourse.[93] Its goals are to support the transatlantic transfer of data and imbue more trust into the system of data protection.[94] The U.S. government has done little to reinforce European trust in such frameworks.[95]

To further complicate the diplomatic situation, H.R. 4478 was passed and signed, renewing and amending Section 702 and FISA 2008 on January 19, 2018.[96] Controversy surrounded the amendment of FISA 2008 in late November, 2017, as it provided lawmakers with less than 48 hours to make decisions regard-

[89] Case C-362/14, Maximillian Schrems v Data Protection Comm'n, Opinion of the Advocate General Bot (Sept. 23, 2015), ¶218, http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd4c797cdcac6340d7a77ba9c727a1d350.e34KaxiLc3qMb40Rch0SaxuRaN90?text=&docid=168421&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=524326 ("[. . .owing to the breaches of fundamental rights described above, the safe harbor scheme which it establishes cannot be regarded as ensuring an adequate level protection of the personal data transferred").

[90] EPIC Schrems, *supra* note 85. Schrems has filed a second trial, denoted colloquially as *Schrems II*, that focuses on the validity of standard contractual clauses and whether the transfers under this method in fact adequate. Adam Finlay & Paul Lavery, Validity of Standard Contractual Clauses to be referred to CJEU, McCann FitzGerald (Oct. 4, 2017) https://www.mccannfitzgerald.com/knowledge/privacy/validity-of-standard-contractual-clauses-to-be-referred-to-cjeu.

[91] Safe Harbor Invalidation, Cooley LLP, https://www.cooley.com/news/insight/2015/2015-safe-harbor-invalidation (last visited on Apr. 2, 2018).

[92] The Swiss and U.S. also have a Privacy Shield Framework Agreement. Privacy Shield Overview, U.S. Dep't of Commerce, https://www.privacyshield.gov/Program-Overview (last visited Apr. 4, 2018).

[93] *Id.*

[94] *Id.*

[95] Cameron F. Kerry, *Trump Puts U.S.-EU Privacy Shield at Risk*, Brookings Tech Tank (June 14, 2017) https://www.brookings.edu/blog/techtank/2017/06/14/trump-puts-u-s-eu-privacy-shield-at-risk/ (Currently, the Privacy Shield is supported solely by an Obama executive order that extends privacy protections to foreign nationals. Repealing this executive order would result in a defunct version of Privacy Shield).

[96] *Id.*, (after providing an extension to the expiry period of FISA 2008 twice); Highlights of S. 139, as Amended The FISA Amendments Reauthorization Act of 2017 https://intelligence.house.gov/uploadedfiles/s_139_highlights_final.pdf [hereinafter Highlights of S. 139].

ing its content.[97] The amendments added a probable cause-based requirement to view data under Section 702 for FBI criminal investigations unrelated to national security and a new specific query procedure that builds on the foundation of the minimization principles.[98]

H.R. 4478 would widen the pool of individuals and organizations that could be searched by including those engaging in a vast range of cybercrimes, regardless of who actually accessed the computer.[99] While some feared H.R. 4478 would reauthorize the collection of "about target" data, the bill requires a mandatory and temporary cessation of "about target" collections for the foreseeable future.[100] The amendment leaves the door open and allows the Attorney General and the Director of National Intelligence to declare their intent to resume "about search" collections to congressional committees.[101] A 30-day period of congressional review would determine whether such searches should resume.[102] However, the ACLU fears that political gridlock will stop Congress from acting in time during such a period, resulting the codification of such searches.[103]

Efforts were made to include unmasking rules, a polarizing issue involving House Intelligence Chairman Devin Nunes claiming to have information relating to the Obama administration 'unmasking' names of the Trump's transition team within reports for political gain.[104] Under the minimization requirements of FISA, domestic citizens are not to be included except when the information is already public available, the intelligence information would not make sense without the U.S. citizen's identity, and/or when the U.S. citizen might be working with a foreign nation.[105] This leads to the potential abuse of revealing the identity of U.S. citizens who are unrelated to the search, violating their rights. Despite being exclude from H.R. 4478, the Director of National Intelligence issued new procedures detailing the approval process with a standard of "fact-based justification" and the need for a concurrence from the intelligence community general

97 Neema Singh Guliani, *NSA Surveillance Bill Would Dramatically Expand NSA Powers*, Am. Civ. Liberties Union (Nov. 30, 2017), https://www.aclu.org/blog/national-security/privacy-and-surveillance/new-surveillance-bill-would-dramatically-expand-nsa (those falling under the national security exception would greatly increase as 'malicious cybercrimes' are broadly defined and likely could include anything from smaller acts of piracy to terrorist communications and recruiting, regardless of whether the computer owner had committed the crime).

98 Highlights of S. 139, *supra* note 96; Karoun Demirjian, *House Intelligence Committee Passes spy-bill Renewal, But on Party Lines*, The Wash. Post (Dec. 1, 2017), https://www.washingtonpost.com/powerpost/house-intelligence-committee-passes-spy-bill-renewal-but-on-party-lines/2017/12/01/8aa2367e-d686-11e7-95bf-df7c19270879_story.html?utm_term=.4b86f9fd5bf3.

99 Guliani, *supra* note 97.

100 Highlights of S. 139, *supra* note 96; Daniel Wilson, *House Panel Approves Surveillance Renewal Bill* Law360, https://www.law360.com/articles/989972/house-panel-approves-surveillance-renewal-bill/; Guliani, *supra* note 97 (about data targets information specifically about a person, without looking into an individual's own communications or data).

101 Highlights of S. 139, *supra* note 96.

102 Amendment in the Nature of A Substitute to S. 139, 1, 23 (Jan. 19, 2018) https://intelligence.house.gov/uploadedfiles/s_139_text_as_amended.pdf.

103 Highlights of S. 139, *supra* note 96; Guliani, *supra* note 97.

104 Highlights of S. 139, *supra* note 96.

105 *Id.*

counsel to allow the unmasking of presidential transition team members in the days prior to H.R. 4478's renewal.[106]

IV. Analysis: A Breakdown in Herd Immunity: The GDPR Effects on Business and the Security's Field

Herd immunity is most effective when that critical number of the group is immunized.[107] In cyber security, the concept is illustrated well when analyzing the period of the DPD. EU member states that had weaker and inconsistent laws for protecting data were more exposed and allowed for major exploitation.[108] Without the consistent immunities throughout a majority of the member states, this patchwork of data protection laws were largely ineffective for the EU.[109] In creating the GDPR, the EU's goal to harmonize data laws, curb the effects of data breaches, and provide citizens with some control over their data is now being offered to the international community as vaccination in order to reach a new critical mass.[110]

To acquire the critical mass quickly, GDPR mandatory compliance begins on May 25, 2018 and there will be no trial period to test what methods are most effective.[111] American businesses and international data controllers that process EU data will bound to comply and held liable for breaches and potentially subject to the astronomically high fines.[112] The expectation by European lawmakers is that all businesses were aware of the compliance requirements and would have already mapped out their current data processing and data handling methods.[113] Such mapping may include isolation and identification of what information should be processed pursuant to the GDPR, which third party members are receiving information, allocating a budget in case of breaches and noncompliance with the new regulation, and implementing mechanisms that support data rights, such as Google Spain creating erasure request forms for their site.[114] These new procedures are expensive and require a massive number of employees to estab-

[106] Press Release, Director of National Intelligence, *DNI Coats Establishes New Intelligence Community Policy on Request for Identities of U.S. Persons in Disseminated Intelligence Reports*, (Jan. 11, 2018); Rebecca Shabad, *Director of National Intelligence Issues New Guidelines for Intel Report Unmasking*, (Jan. 11, 2018) https://www.cbsnews.com/news/director-of-national-intelligence-issues-new-guidelines-for-intel-report-unmasking/.

[107] Willingham & Helft, *supra* note 1.

[108] Scott J. Shackleford & Scott Russell, *Operationalizing Cybersecurity Due Diligence: A Transatlantic Study*, 67 S.C. L. Rev. 609 (Spring 2016).

[109] Gilbert, *supra* note 17, at 819.

[110] Caroline Krass, Jason N. Kleinwaks & Ahmed Baladi, *A GDPR Primer for US-Based Cos. Handling EU Data: Part 1* Law360, http://www.gibsondunn.com/publications/Documents/Krass-Kleinwaks-Baladi-Bartoli-A-GDPR-Primer-For-US-Based-Cos-Handling-EU-Data-Part-1-Law360-12-12-2017.pdf [hereinafter *GDPR Primer*] (through mandatory compliance).

[111] GDPR Primer, *supra* note 96.

[112] *Id.*

[113] *Countdown to GDPR Compliance*, *supra* note 19, at 3-4.

[114] *Id.*

lish and maintain a data processing system that complies with the GDPR.[115] For some Fortune companies, the technology alone will cost $1,000,000.[116] Companies are expected to maintain close watches over third parties and any information set to a third country must meet the adequacy test.[117]

The GDPR 'vaccine' will likely provide some benefits for international citizens. For example, data breaches that affect EU data will likely also affect all data process within a specific company, regardless of the separate systems for processing. With those breaches reported to the EU within 72 hours under the new requirements, the citizens and the governments will be more aware of the potential that data was stolen and can better monitor and respond to other potential threats.[118] Watchful eyes on third parties may alert companies to potential misuse of a user's data but 22% of U.S. companies reported that there was no budget established to support third party legal consequences.[119]

However, with the American data still under a separate system and with the questions about the enforceability of the fines, corners will likely be cut.[120] Any EU data processing automatically requires a company comply with the GDPR, meaning companies that rarely come into contact with data from the EU may be unaware of the potential fines and could be underprepared to protect information.[121]

While it might behoove some companies economically to create a single-tier system based on the GDPR, it is incredibly unlikely that U.S. businesses will adopt these standards for the American data. Currently, data, metadata, and information are huge commodities for both national security protections and for businesses.[122] Data demand is high and the analytics of that data reveals habits, needs, and opportunities to make money.[123] The data protections of the GDPR would limit the forms of data that could be transferred and would have to explain why that data was being transferred to the consumer, a process that would di-

115 Tobias Bräugtigam, *How to Budget for a GDPR Project: A Primer*, International Association of Privacy Professionals (Nov. 29, 2016) https://iapp.org/news/a/how-to-budget-for-a-gdpr-project-a-primer/; Tara Seals, *GDPR: True Cost of Compliance Far Less Than Non-Compliance*, Info Security Group https://www.infosecurity-magazine.com/news/gdpr-true-cost-of-compliance/; Ray Schultz, *The Price of Compliance: Study Uncovers GDPR Costs*, MediaPost, https://www.mediapost.com/publications/article/309342/the-price-of-compliance-study-uncovers-gdpr-costs.html.

116 *Fortune and FTSE Firms to Spend Millions Gearing up for GDPR Compliance, New Survey Show,* Paul Hastings (Oct. 25, 2017)https://www.paulhastings.com/news/details/?id=1c74ed69-2334-6428-811c-ff00004cbded, [hereinafter *Fortune and FTSE Compliance*].

117 *Id.*

118 *The Equifax Hack*, *supra* note 51, (companies like Uber and Equifax would no longer be able to hide the hacks).

119 *Countdown to GDPR Compliance*, *supra* note 19, at 3-4; *Fortune and FTSE Compliance*, *supra* note 108.

120 Dellinger, *supra* note 40 (at this moment, there are questions as to whether the fines will even be enforceable on U.S. based companies).

121 GDPR Primer, *supra* note 96.

122 Vasuda Thirani & Arvind Gupta, The Value of Data World Economic Forum (Sept. 22, 2017) https://www.weforum.org/agenda/2017/09/the-value-of-data/.

123 Alan Lewis & Dan McKone, *To Get More Value from Your Data, Sell it,* Harvard Business Review (Oct. 21, 2016).

rectly affect the profitability of the information that is being sold. If the data were to be stripped down and limited by what a company is absolutely allowed to have, the commodity price and its potential effectiveness are also diminished. Additionally, implementing the two-tiered system is economically advantageous because if consumers were informed each time their data was transferred and why, the economic viability of the data exchange would be reduced.[124] While the lowered value could revolutionize data protection, a two-tiered system subject to extensive fines for failures to comply leaves companies with less to invest in defenses.[125] With such unprotected security gaps, the herd of data processors is ultimately left exposed.

These same businesses would have to comport each of their multi-level, data security frameworks to a new set of regulations for data requests and still try to honor the data rights of its EU citizens.[126] The succinct collection of data under the right to data portability would benefit national security surveillance. When requested, businesses will simply hand over data and metadata crafted for the portability, including any additional inferences from the algorithms that would not have been included for the data subject. While placing the limits on the amount of time that a data controller may hold information decreases the chances of either the government requesting it or the information being robbed due to a hack, most information is never permanently deleted.[127] If "about target" collections were to allowed to resume, the collection of multiple data points from different data collectors could be synthesized and used to illustrate data as if it had been collected under the PRISM project, diluting the privacy protections of EU citizens under the GDPR.[128]

V. Proposal: Vaccination

As long as there is a disparity in the level of security used to protect European data from all other data, there will be strain on the resources that are utilized to protect such data. To alleviate the strain of the two-tiered system on the data protection, Congress needs to pass a permanent ban on "about target searches". International governments should involve their own citizens by implementing Fair Processing Requirements and the Right to be Informed from the GDPR.

By eliminating the "about target" searches, Congress would prevent the Executive branch from overstepping by collection information of foreign and domes-

124 Joseph W. Jerome, Buying and Selling Privacy: Big Data's Different Burdens and Benefits Stan. L. Rev. (Sept. 2013)("[A]ny given individual's data only becomes useful when it is aggregated together to be exploited for good or ill") https://www.stanfordlawreview.org/online/privacy-and-big-data-buying-and-selling-privacy/.

125 Dellinger, *supra* note 40.

126 *Countdown to GDPR Compliance*, *supra* 19, at 3-4.

127 Kim Komando, *How to Delete Yourself From the Internet*, USA Today (June 23, 2017) https://www.usatoday.com/story/tech/columnist/komando/2017/06/23/how-to-delete-yourself-from-the-internet/102890400/.

128 Charlie Savage, *N.S.A. Halts Collection of Americans' Emails About Foreign Targets,* N.Y. Times (Apr. 28, 2017) (the "about target" search has been referred to as a "backdoor search loophole").

tic individuals who are not the targets of the investigation themselves.[129] While other forms of data collection will still occur, by eliminating this egregious form, the data collected will more squarely fall in line with the GDPR's exception for national defense under Article 23, as at least one individual in the communication will be the suspected and targeted individual.[130]

Furthermore, by providing citizens with more consumer notifications on their data, the accountability would extend beyond the companies. When properly informed of the locale of the data and the intended recipients, citizens can provide a new level of inoculation to the protection scheme. By expanding Articles 13-15 of the GDPR to American data, consumers could take an active role in monitoring the intended data recipients and the protective measures during the data utilization.[131] While U.S. privacy allows companies to compile data under the First Amendment, notification of data utilization and the intended data users acknowledges consumers' concerns.[132] This would force companies to be more transparent. Transparency translates to accountability. Companies would be held accountable should a data breach occur.[133]

By melding in some GDPR data rights and restricting the 'about target' searches, the burden on companies to maintain a two-tier system will reduce and allow for more resources to go towards cyber defense.

VI. Conclusion

Data protection rights are most effective when each party is involved with processing, collecting, and updating the information, while protecting themselves through similar means. The GDPR offers the international community the latest inoculation to protect citizens' data rights. However, so long as broad exceptions to these rights exist and countries, like the U.S., have different privacy standards and data collection methods, an inoculation will be ineffective for attaining a critical mass to protect the herd. Adopting even some of the data rights gradually would provide the U.S. with an additional fighting chance on the battlefield of cyber warfare.

[129] *Id.*

[130] Drury & Hayes, *supra* note 41, at 819.

[131] GDPR, *supra* note 16, at Articles 13-15.

[132] Deckelboim, *supra* note 62, at 272.

[133] Yavorsky, *supra* note 43 (such as implementing higher levels of encryptions or pseudonymization to hide a data users' attributable features from the data).