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LETTER FROM EDITOR-IN-CHIEF

Dear Readers,

It is with great pleasure that I present Volume I of the Fordham Undergraduate Law Journal (FULJ). This inaugural volume reflects the inquiry, dedication, and sustained effort of our writers. The publication showcases rigorous engagement with contemporary legal issues and emerging social concerns.

FULJ serves as a platform for undergraduates to channel their intellectual curiosity into meaningful legal discourse. Our mission is to cultivate thoughtful analysis and encourage sustained engagement with the legal questions shaping today's world. As our first publication, this volume establishes the standards and intellectual direction that will guide future editions of the Journal. We remain committed to advancing scholarship within the pre-law community.

This volume would not have been possible without the commitment of our Staff Editors and writers. Special recognition is owed to the founding members of the Editorial Board, whose work in developing the Journal's structure and editorial standards made this publication possible. The Editorial Board extends its sincere gratitude for your interest in the Fordham Undergraduate Law Journal.

Sincerely,
Maggie Reznik
Editor-in-Chief

MISSION

The Fordham Undergraduate Law Journal provides a forum for the development and publication of undergraduate legal scholarship across a broad spectrum of topics. It is committed to advancing thoughtful engagement with the law by encouraging students to examine complex legal issues and contribute to contemporary discourse through structured research and analysis.

Through an intensive editorial process and collaborative review, members gain experience in evaluating arguments, strengthening analytical frameworks, and producing clear, well-supported work.

By providing a forum for sustained academic inquiry, FULJ encourages deeper legal and institutional awareness within the undergraduate community while establishing a foundation for continued engagement with the law.

ARTICLE

INJUNCTION AND INACTION: UNACCOMPANIED CHILDREN AND GOVERNMENT-FUNDED COUNSEL

*Daniel Gorelik**

Unaccompanied children in removal proceedings have long occupied an unstable position in American law: Congress directed the Executive Branch to ensure legal representation for unaccompanied children facing removal proceedings. However, the Executive's recent attempts to terminate and restructure funding for these legal services threaten to leave tens of thousands of vulnerable youth without legal representation by May 2026. This Article argues that the judiciary must enforce statutory protections to prevent the government from constructively defunding the mandated legal services program for unaccompanied children.

Although legal scholarship has extensively debated the constitutional dimensions of the right to appointed counsel in immigration courts and examined the inequities of removal proceedings, legal scholarship has yet to address the implications of Community Legal Services in East Palo Alto v. Department of Health & Human Services *and the procurement crisis that followed. Current legal discourse therefore leaves a blind spot regarding how executive agencies might circumvent statutory mandates through restrictive procurement terms. Applying the Supreme Court's recent framework in* Loper Bright Enterprises v. Raimondo*, this Article examines the ongoing administrative procurement strategy and argues that courts should review not only direct funding terminations but also successor contract terms that function as constructive defunding.*

In doing so, this Article makes two original contributions. It provides the first analysis of Community Legal Services in East Palo Alto *and its implications for judicial review of the unaccompanied children counsel mandate. Second, it introduces the concept of constructive defunding through the federal procurement process, identifying a mechanism by which the Executive can circumvent injunctions in federal social services programs by*

* B.B.A., 2026, Baruch College. I am grateful to the editors of the *Fordham Undergraduate Law Journal* for their thoughtful feedback and support throughout the editorial process. I owe particular thanks to my primary editor, Maggie, whose patience and incisive advice meaningfully strengthened this Article at every stage. As always, I extend my deepest love and gratitude to my family and friends for their encouragement.

preserving nominal funding while contracting away the substance of what the law requires.

INTRODUCTION

For decades, the 'Civil Gideon' movement has been on a quest for the right to appointed counsel beyond the criminal context to civil disputes involving fundamental human needs, but it has consistently run into a wall of constitutional due process precedents.[1] Proponents argue that, as a matter of due process, this right must extend to noncitizens facing removal, especially youth who arrive in the United States without parents or legal guardians.[2] Within the U.S. Department of Health and Human Services (HHS), the Office of Refugee Resettlement (ORR) has custody over these immigrant youth. They are legally defined as "unaccompanied alien children"—referred to throughout this Article as "unaccompanied children" or "UCs"—and they frequently face prosecutors and judges without a lawyer.[3] In 2024 alone, close to 100,000 UCs passed through ORR custody, roughly a quarter of whom were age 12 or younger.[4] Since the Constitution has not been interpreted to require appointed counsel for these children, Congress turned to a statutory solution.[5] Enacted unanimously in Congress, the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) directed the Executive Branch to ensure legal counsel for unaccompanied

1. *See* Turner v. Rogers, 564 U.S. 431 (2011) (holding that the Due Process Clause does not require a categorical right to appointed counsel in civil contempt proceedings, even if incarceration is possible, provided that alternative procedural safeguards are available to ensure a fair determination of the defendant's ability to pay).

2. *See* Andrew Leon Hanna, *A Constitutional Right to Appointed Counsel for the Children of America's Refugee Crisis*, 54 HARV. C.R.-C.L. L. REV. 257, 293 (2019) (arguing that the Fifth Amendment's guarantee of "fundamental fairness" compels a right to appointed counsel for immigrant children because it is the only way to ensure valid claims for relief are not mistakenly rejected).

3. Holly Straut-Eppsteiner, CONG. RSCH. SERV., IF12158, *U.S. Immigration Courts: Access to Counsel in Removal Proceedings and Legal Access Programs* 1 (Aug. 6, 2024), https://www.congress.gov/crs_external_products/IF/PDF/IF12158/IF12158.6.pdf [https://web.archive.org/web/20260122223016/https://www.congress.gov/crs_external_products/IF/PDF/IF12158/IF12158.6.pdf] (reporting that, as of March 2024, 44 percent of unaccompanied children in pending immigration proceedings lacked legal representation).

4. Off. of Refugee Resettlement, *Referrals*, ADMIN. FOR CHILD. & FAMS., https://acf.gov/orr/uac/referrals (last visited Dec. 2, 2025) (reporting 98,356 referrals of unaccompanied children in fiscal year 2024).

5. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1232(c)(5).

children "to the greatest extent practicable."[6] For more than a decade, federal contracts provided non-profit counsel to UCs in removal proceedings, repeatedly funded by earmarked appropriations.[7] However, Executive actions in early 2025 prompted a period of volatility for these children.[8] In February, the Executive Branch briefly suspended all legal services funding for UCs before rescinding that suspension. It then attempted to terminate funding for direct legal representation, placing roughly 26,000 children at imminent risk of losing access to counsel.[9] This precipitated litigation, *Community Legal Services in East Palo Alto v. Department of Health & Human Services* (*CLSEPA*),[10] which placed before the courts the question whether the Executive had discretion to terminate program funding under the TVPRA, ORR's Foundational Rule (the implementing regulation governing UC services), and the Administrative Procedure Act (APA).[11] Although the preliminary injunction in *CLSEPA* blocked that attempted termination and required the Executive to maintain the program, the conflict did not end there; it shifted into the federal procurement

6. *Id.* (directing the Secretary of Health and Human Services to ensure, "to the greatest extent practicable," that all unaccompanied alien children have counsel in legal proceedings).

7. *See, e.g.*, Full-Year Continuing Appropriations and Extensions Act, 2025, Pub. L. No. 119-4, div. A, tit. I, § 1101(a)(8), 139 Stat. 9, 11 (appropriating funds for refugee and entrant assistance, including the care of unaccompanied children pursuant to section 235 of the TVPRA).

8. *See* Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs., 155 F.4th 1099, 1100-01 (9th Cir. 2025) ("[S]ix days after the latest congressional appropriation, HHS, ORR, and the Department of the Interior . . . made an abrupt about-face. The Government cancelled all funding for direct representation of unaccompanied children.").

9. Letter from Jason Crow et al., Members of Cong., to Robert F. Kennedy, Jr., Sec'y of Health & Hum. Servs., & Doug Burgum, Sec'y of the Interior 1 (Mar. 26, 2025) (decrying the Administration's decision to "eliminate key federally-funded legal services for over 26,000 unaccompanied children in the United States") https://juliabrownley.house.gov/wp-content/uploads/2025/05/Quill-Letter-L23460-Letter-supporting-legal-services-for-unaccompanied-children-Version-3-03-31-2025-@-02-22-PM.pdf [https://web.archive.org/web/20260122202426/https://juliabrownley.house.gov/wp-content/uploads/2025/05/Quill-Letter-L23460-Letter-supporting-legal-services-for-unaccompanied-children-Version-3-03-31-2025-@-02-22-PM.pdf].

10. 155 F.4th at 1101.

11. 5 U.S.C. §§ 701(a)(2), 706(2)(A); 8 U.S.C. § 1232(c)(5); 45 C.F.R. § 410.1309(a)(4) (2024).

process. The Executive began pursuing a successor contract that would preserve nominal funding while narrowing how, where, and by whom representation could be delivered, for example, by defaulting to virtual rather than in-person orientations, by imposing new reporting obligations to ORR, and by conditioning direct representation on contractor pro bono percentages.[12]

CLSEPA arises in the wake of *Loper Bright Enterprises v. Raimondo*,[13] which overruled the *Chevron* doctrine, directing courts to exercise independent judgment by not deferring to an agency's view of ambiguous wording in statutes.[14] In that framework, this paper argues that although the Executive has broad discretion in administering immigration programs and allocating resources, it may not use that discretion to nullify statutorily required protections. Together with ORR's Foundational Rule and regular congressional appropriations, the TVPRA is best read to require HHS to ensure that UCs have meaningful access to legal counsel, thereby creating a binding obligation under the APA.

Part I of this Article develops the statutes and regulations governing representation for UCs and explains why *CLSEPA* correctly creates enforceable limits on the Executive's ability to terminate UC counsel funding post–*Loper Bright*. It then examines the post-injunction procurement crisis, explaining how the approaching expiration of the current bridge contract to ORR's prime legal-services contractor, combined with pending bid protests before the Government Accountability Office (GAO), creates an imminent gap in which no new contract can lawfully be awarded

12. *See* OFF. OF REFUGEE RESETTLEMENT, ADMIN. FOR CHILD. & FAMS., PERFORMANCE WORK STATEMENT: LEGAL SERVICES FOR UNACCOMPANIED ALIEN CHILDREN (UAC) 3–4, 7, 11 (Nov. 2025), https://sam.gov/workspace/contract/opp/8a053a53c46e431b9b393edd54f60b34/view [https://web.archive.org/web/20260418192325/https://sam.gov/workspace/contract/opp/8a053a53c46e431b9b393edd54f60b34/view] [hereinafter NOVEMBER 2025 PWS] (conditioning direct representation on ORR discretion, available appropriations, and contractor-proposed pro bono percentages; requiring dashboard/API reporting; restricting contractor publicity; and requiring ORR guidance when the contractor identifies conflicts among governing authorities).

13. 603 U.S. 369 (2024).

14. *Id.*

before the existing one expires. That gap, absent agency action, threatens to halt the UC legal services network even while the *CLSEPA* injunction remains in force. Part II then summarizes the government's arguments, emphasizing unreviewability, contract framing, and separation of powers. Part III responds to those objections by establishing that they rest on an incomplete reading of the statutory frameworks and do not justify treating the 2025 termination of funding as unreviewable. The section then analyzes whether the Executive's new strategy in the procurement process constitutes a form of constructive defunding that similarly violates the TVPRA and contradicts *CLSEPA*. Finally, the Conclusion suggests how Congress and future administrations could stabilize this protection going forward.

I. FRAMEWORKS SUPPORTING UC ACCESS TO COUNSEL

A. *TVPRA's Binding Mandate*

To understand how Congress intended the Executive to protect UCs, it is first necessary to dissect Section 1232(c)(5) of the TVPRA, which delineates the protected class, the form of assistance owed, and the degree of flexibility the agency retains in carrying out the statute.[15] This provision commands that the Secretary of HHS "shall ensure, to the greatest extent practicable," that UCs who are or have been in the custody of ORR or the Department of Homeland Security (DHS) "have counsel to represent them in legal proceedings . . . and protect them from mistreatment, exploitation, and trafficking."[16] This section designates UCs as the beneficiaries, the provision of counsel (tied to protection from abuse and trafficking) as the statutory objective, and HHS as the overseeing agency. Notably, the Court has long seen the operative verb "shall" as binding; in *Alabama v. Bozeman*,[17] the word "militates against an implicit exception," describing it as absolute and the "language of command."[18] Further, the "practicable" qualifier recognizes budget

15. 8 U.S.C. § 1232(c)(5)
16. *Id.*
17. 533 U.S. 146 (2001).
18. *Id.* at 153.

constraints while entitling HHS to flexibility in determining how best to deliver government-funded representation. Thus, it is unlikely that a court would treat the TVPRA's phrasing as merely precatory, especially in a system that has seen over 100,000 UCs annually in ORR custody, yet only about 26,000 receive such representation.[19] Moreover, the baseline language in the Immigration and Nationality Act (INA) notably differs: it permits representation only "at no expense to the Government," illustrating that Congress purposely deviated from the INA's general rule for this narrowly defined group, shifting UCs' representation from a passive privilege to an active obligation.[20] Read in this context, the TVPRA requires HHS to maximize access to legal counsel, leaving a question of how, not whether, to implement that assistance.

B. *ORR's Foundational Rule, Congressional Appropriations, and the Acacia Network*

In order to know how this question has been answered in practice, the next step is to examine how ORR and Congress turned the TVPRA into a program through regulation, appropriations, and a national contract network. ORR's Foundational Rule, issued in 2024, is the comprehensive regulation governing the care and custody of UCs. In it, ORR adopted a legal-services provision that sets forth concrete obligations for providing legal services to UCs consistent with the TVPRA.[21] The rule provides that when appropriated funds are available, and pro bono representation is not suitable, it "shall fund legal service providers" to deliver direct representation to UCs.[22] It then goes further to authorize grants and contracts with organizations so that all children who are or have been in ORR's care have access to counsel, "to the greatest extent practicable," in line with its goal of achieving legal representation

19. *See* Straut-Eppsteiner, *supra* note 3, at 1 (noting that 56 percent of pending UC cases had representation as of March 2024); Off. of Refugee Resettlement, *supra* note 4; Letter from Jason Crow et al., *supra* note 9, at 1 (identifying over 26,000 unaccompanied children at risk of losing legal representation).
20. 8 U.S.C. §§ 1229a(b)(4)(A), 1362.
21. 45 C.F.R. § 410.1309(a)(4) (2024).
22. *Id.*

for all UCs.[23] These directives spell out how the agency will operationalize the TVPRA. Further, Congress has repeatedly provided resources through annual appropriations for UCs' services, and committee reports have instructed HHS to use the funds to expand access to counsel for these children.[24] A recent Senate report, for example, indicates that funds allocated to HHS are expected to support publicly funded attorneys for UCs in immigration proceedings consistent with the TVPRA.[25] Since 2012, Congress has carried forward funding for UCs' legal services under this framework.[26] To convert these commitments into direct representation, ORR chose to fund them through the Acacia Center for Justice, a prime contractor with the authority to subcontract with legal service providers.[27] Acacia, a non-profit created with the sole objective of providing legal support for immigrants facing removal, distributes funding to a network of 99 subcontractor organizations in over 160 offices nationwide, providing know-your-rights presentations, screenings, and direct representation to tens of

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23. *See* Unaccompanied Children Program Foundational Rule, 89 Fed. Reg. 34,384, 34,526 (Apr. 30, 2024) (stating that the Office of Refugee Resettlement strives for 100 percent legal representation of unaccompanied children and will continue to work toward that goal to the extent possible).

24. *See, e.g.*, Full-Year Continuing Appropriations and Extensions Act, 2025, Pub. L. No. 119-4, div. A, tit. I, § 1101(a)(8), 139 Stat. 9, 11; Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. D, tit. II, 138 Stat. 460, 461 ("The explanatory statement regarding this Act, printed in the House section of the Congressional Record . . . shall have the same effect with respect to the allocation of funds and implementation of divisions A through F of this Act as if it were a joint explanatory statement of a committee of conference."); *see also* 170 CONG. REC. H1886, H2032 (daily ed. Mar. 22, 2024) (Explanatory Statement of the Further Consolidated Appropriations Act, 2024) (specifying that the language in Senate Report 118–84 "carries the same weight as language included in this explanatory statement and should be complied with"); *see* S. REP. NO. 118-84, at 169 (2023) (directing that one of the uses for the $5,406,258,000 appropriated for the UC program must be "to provide access to counsel, consistent with the goals of the Trafficking Victims Protection Reauthorization Act of 2008 for all children to have access to counsel in their immigration proceedings"). Since the explanatory statement has the same legal effect as a conference report for allocating funds, these instructions for HHS to use them for expanding UC's access to legal counsel carry significantly more weight.

25. S. REP. NO. 118-84, at 169.

26. *See* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, div. F, tit. II, 125 Stat. 786, 1077.

27. Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs., 155 F.4th 1099, 1101 (9th Cir. 2025) (noting that representation was being provided through a single agreement with the Acacia Center for Justice).

thousands of children each year.[28] These regulatory, fiscal, and contractual choices together constituted a functional UC counsel program. By early 2025, that framework was in place when the Executive terminated funding for direct representation, even though Congress continued to appropriate funds for the UC program.[29] That decision, and its inconsistency with the TVPRA framework, became the focus of the *CLSEPA* litigation.

C. *A Vehicle for Enforcing the TVPRA and the Foundational Rule*

Through its decision in *CLSEPA*, the Ninth Circuit shapes how courts can enforce limits on the Executive's discretion over UC counsel funding without dictating lawful policy choices. Eleven nonprofit legal services organizations within Acacia's subcontractor network sued HHS, ORR, and the Department of the Interior, whose Interior Business Center administered the Acacia contract, in the United States District Court for the Northern District of California after these agencies issued a "Cancellation Order," partially terminating Acacia's contract and ending funding for direct representation and other services.[30] The plaintiffs' complaint framed this termination as arbitrary and capricious under the APA, contending that the TVPRA and ORR's Foundational Rule necessitate the provision of access to counsel "to the greatest extent practicable."[31] Accordingly, the plaintiffs requested two forms of

28. *Unaccompanied Children Program*, ACACIA CTR. FOR JUST., https://acaciajustice.org/what-we-do/unaccompanied-children-program/ [https://web.archive.org/web/20251016070804/https://acaciajustice.org/what-we-do/unaccompanied-children-program/].

29. Letter from U.S. Dep't of the Interior, Interior Bus. Ctr., to Leah Prestamo, General Counsel, Acacia Ctr. for Just., *Notice of Partial Termination for the Government's Convenience* (Mar. 21, 2025), Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs., No. 3:25-cv-02847 (N.D. Cal. Mar. 31, 2025), ECF No. 24-3, https://ecf.cand.uscourts.gov/doc1/035025575333?caseid=447078 [https://ia601207.us.archive.org/11/items/gov.uscourts.cand.447078/gov.uscourts.cand.447078.24.3.pdf] (noting the termination of contract line items for direct representation, recruitment, and expansion) (filed as Exhibit 3 to Defendants' Opposition to Motion for a Temporary Restraining Order).

30. *Cmty. Legal Servs.*, 155 F.4th at 1099, 1101, 1111, 1113 (identifying the nonprofit plaintiffs and detailing the government's partial termination of the Acacia contract and related legal services).

31. *Id.* at 1101, 1103.

relief: a declaratory judgment that the Cancellation Order and related agency actions violated the TVPRA, the Foundational Rule, and the APA; and an injunction requiring the defendants to maintain UCs' access to counsel as required by those statutory and regulatory provisions.[32] The court granted this relief, first issuing a temporary restraining order and then a nationwide preliminary injunction that ordered the Executive to continue funding these programs.[33] The court further emphasized that, as subcontractors, the plaintiffs had no contractual relationship with the government and thus were not seeking monetary damages.[34] On appeal, the Ninth Circuit declined to stay the injunction, and it later denied rehearing en banc, reasoning that the plaintiffs' claims arise under the TVPRA and the Foundational Rule and seek only declaratory and injunctive relief.[35] By concluding that these claims are within APA review, the Ninth Circuit clears the way for courts, after *Loper Bright*, to decide what these laws require of Executive agencies rather than deferring to their shifting views of practicability.

D. *De Novo Review of the UC Counsel Mandate*

Moreover, viewing the *CLSEPA* dispute through the lens of *Loper Bright* sharpens the implications of that decision for how courts should interpret the TVPRA's open-textured language.[36] *Loper Bright* holds that courts must now engage in de novo interpretation of all questions of law under the APA. Agencies may still defend their interpretations, but courts no longer treat those views as the last word on statutory ambiguity.[37] Pre-*Loper Bright*,

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32. Complaint for Declaratory and Injunctive Relief ¶¶ 127–146, Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs., No. 3:25-cv-02847 (N.D. Cal. Mar. 26, 2025), https://ecf.cand.uscourts.gov/doc1/035025561074?caseid=447078 [https://ia601207.us.archive.org/11/items/gov.uscourts.cand.447078/gov.uscourts.cand.447078.1.0.pdf].

33. Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs., 780 F. Supp. 3d 897, 926–27 (N.D. Cal. 2025) (granting preliminary injunction); Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs., 777 F. Supp. 3d 1039, 1046 (N.D. Cal. 2025) (granting temporary restraining order).

34. *Cmty. Legal Servs.*, 780 F. Supp. 3d at 917.

35. Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs., 137 F.4th 932, 937–38 (9th Cir. 2025), *reh'g en banc denied*, 155 F.4th at 1099, 1103.

36. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

37. *Id.* at 413.

the government could have defended section 1232 of the TVPRA under the *Chevron* two-step test, arguing that "practicable" is ambiguous at step one and defending cutbacks to the UC legal services program as a "reasonable" policy judgment at step two.[38] At this second step, agencies enjoyed considerable latitude: when faced with statutory ambiguity, courts often upheld flawed interpretations as long as they were not plainly irrational.[39] Since this safety net is now gone, the judiciary will become emboldened to police federal agencies that overstep their statutory authorization. The Ninth Circuit's decision in *CLSEPA* fits this framework, even though the panel did not invoke *Loper Bright* by name. Instead of asking whether HHS's reading of "shall ensure" and "practicable" was a reasonable way to manage UCs' access to publicly funded counsel, the panel measured the Cancellation Order against the TVPRA's text, the Foundational Rule's instruction, and the long-running program Congress funded.[40] Through this lens, reducing UCs' access to direct representation to zero more clearly appears to exceed what Congress authorized. The government's strategic pivot to contractual restructuring raises a new question that *Loper Bright* now subjects to judicial review: whether HHS may use its discretion over contract terms to shrink the actual legal services program while keeping it nominally compliant with the TVPRA. Hence, *Loper Bright* implicitly strengthens the judiciary's authority to

38. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43, 865 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

39. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (explaining that once a statute is found ambiguous, courts must accept any reasonable agency construction even if the court believes a different reading is better); Allied Loc. & Reg'l Mfrs. Caucus v. EPA, 215 F.3d 61, 71 (D.C. Cir. 2000) ("Under Chevron, we are bound to uphold agency interpretations as long as they are reasonable—'regardless whether there may be other reasonable, or even more reasonable, views.'" (quoting Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1321 (D.C. Cir. 1998))); Mueller v. Reich, 54 F.3d 438, 442 (7th Cir. 1995) ("[A]bout all the court can do is determine whether the agency's action is rationally related to the objectives of the statute . . . .").

40. *See* 137 F.4th at 940–43 (distinguishing discretionary policy judgments from the TVPRA's text which "plainly imposes a mandatory duty," holding that "the greatest extent practicable" "certainly is not the same as 'to no extent at all,'" and enforcing the agency's "affirmative obligations" because "Congress has consistently appropriated funds to ensure compliance").

independently evaluate these issues and ensure that the Executive honors Congress's protections for vulnerable children.

E. *The Post-Injunction Procurement Crisis*

The preliminary injunction in *CLSEPA* did not resolve the underlying legal dispute; it changed its form. The injunction compelled the Executive to maintain a contractual stream of funding for UC legal services, but it did not guarantee that the program would remain fully intact past the life of the existing contract. Following the court's injunction in April 2025, HHS temporarily awarded a bridge contract of up to 12 months to Acacia, valued at up to $356 million, to maintain the program.[41] HHS justified the sole-source award on the grounds that Acacia had unique access to the necessary systems within the Administration for Children and Families (ACF), HHS's sub-agency housing ORR, that kept the program running.[42] Throughout the interim period of the bridge contract, however, the Executive funded Acacia through a series of incremental three-month extensions.[43] A letter to HHS signed by 103 congressional members argued that these short-term extensions have "continuously thrusted legal service providers and

41. *See* Joseph Wilson, OFF. OF ACQ. MGMT. SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., JUSTIFICATION AND APPROVAL FOR OTHER THAN FULL AND OPEN COMPETITION: UNACCOMPANIED ALIEN CHILDREN (UAC) LEGAL SERVICES 1–2, 5 (2025), https://www.highergov.com/document/oams-jofoc-orr-legal-services-adjudicated-redacted8-29-25-pdf-26b29a/ [https://web.archive.org/web/20260418212153/https://www.highergov.com/document/oams-jofoc-orr-legal-services-adjudicated-redacted8-29-25-pdf-26b29a/]

42. *See Unaccompanied Alien Children (UAC) Legal Services*, SAM.gov (June 11, 2025), https://sam.gov/opp/d23db19fe1c9460eb810759fb2ab7e6e/view [https://web.archive.org/web/20260418225114/https://sam.gov/web/20260418225114/https:] (describing the bridge contract as requiring a contractor with existing HHS/ACF systems access, necessary background investigations, nationwide capacity, and coordination with ORR staff, and explaining that the award was needed to avoid a gap in legally required services).

43. Award Page for Contract No. 75P00125C00016, USASPENDING.GOV, https://www.usaspending.gov/award/CONT_AWD_75P00125C00016_7570_-NONE-_-NONE- [https://web.archive.org/web/20260418231152/https://www.usaspending.gov/award/CONT_AWD_75P00125C00016_7570_-NONE-_-NONE-] (showing initial July 30, 2025 award action and subsequent Oct. 31, 2025 and Jan. 30, 2026 option exercises for the UAC Legal Services bridge).

unaccompanied children in a state of instability and uncertainty."[44] The current and final extension of funding under this bridge contract expires on April 30, 2026, with an optional extension through July 31, 2026, that does not take effect unless affirmatively activated by HHS.[45]

Meanwhile, HHS attempted to procure a long-term replacement with revised contractual terms. In accordance with the Competition in Contracting Act (CICA), which generally requires federal agencies to use "full and open competition" when awarding contracts, HHS solicited competitive proposals with an original deadline in December 2025.[46] This solicitation offer underwent numerous changes, with at least ten amendments by late March 2026.[47] The final offer deadline arrived shortly after, on April 3, 2026, and the offer entered its evaluation phase, with no award currently announced to the public.[48] Such a delay is consistent with the norm

44. Letter from Dan Goldman et al., Members of Cong., to Robert F. Kennedy, Jr., Sec'y, U.S. Dep't of Health & Hum. Servs. 1 (Feb. 2, 2026), https://goldman.house.gov/sites/evo-subsites/goldman.house.gov/files/evo-media-document/final-feb-2026-letter-to-hhs-re-unaccompanied-children-legal-services-contract.pdf [https://web.archive.org/web/20260419002028/https://goldman.house.gov/sites/evo-subsites/goldman.house.gov/files/evo-media-document/final-feb-2026-letter-to-hhs-re-unaccompanied-children-legal-services-contract.pdf].

45. Defendants' Status Report at 1, Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs., No. 3:25-cv-02847 (N.D. Cal. Apr. 6, 2026), ECF No. 153, https://ecf.cand.uscourts.gov/doc1/035026967433?caseid=447078 [https://dn711303.ca.archive.org/0/items/gov.uscourts.cand.447078/gov.uscourts.cand.447078.153.0.pdf] ("ORR's contract with the Acacia Center for Justice . . . expires on April 30, 2026, with an option to renew for the period May 1 through July 31, 2026.").

46. 41 U.S.C. § 3301(a)(1); U.S. DEP'T OF HEALTH & HUM. SERVS., Solicitation No. 75P00126R00003, LEGAL SERVICES FOR UNACCOMPANIED ALIEN CHILDREN (UAC) 1, 18 (Nov. 24, 2025) [hereinafter UAC SOLICITATION], https://sam.gov/workspace/contract/opp/8a053a53c46e431b9b393edd54f60b34/view [https://web.archive.org/web/20260418192325/https://sam.gov/workspace/contract/opp/8a053a53c46e431b9b393edd54f60b34/view].

47. Legal Services for Unaccompanied Alien Children (UAC), Notice ID 75P00126R00003, SAM.gov, https://sam.gov/workspace/contract/opp/863a04e291464af48cc8e03e60623dd8/view [https://web.archive.org/web/20260420020252/https://sam.gov/workspace/contract/opp/863a04e291464af48cc8e03e60623dd8/view] (listing Amendments 0001 through 0010, the most recent of which, Amendment 0010, was posted March 24, 2026).

48. *Id.* (showing "Date Offers Due: Apr 03, 2026 2:00 PM EDT" and listing the contract opportunity as "Pre-Award").

for a contract of this complexity: a nationwide, best-value procurement, meaning an award that weighs price against non-price factors such as technical approach, with a one-year base period and four option years.[49] The practical issue, therefore, is whether the Executive can replace the existing nationwide network fast enough, and lawfully enough, to avoid violating the injunction that required the continuation of funding for UC legal services.

The delay in awarding a long-term contract has been further compounded by challenges to the successor procurement itself. HHS published an initial Request for Proposals (RFP) for UC legal services in November 2025.[50] The following month, Acacia filed a pre-award bid protest, a procedural challenge to the terms of the solicitation, with GAO to contest the RFP.[51] Rather than defending the solicitation, HHS committed to revising it, which prompted GAO to dismiss the protest as moot.[52] However, in a March 2026 letter to HHS, Senators Wyden and Murray argued the revisions worsened the restrictions from the original solicitation.[53] On April 1 and April 3, 2026, ICF Incorporated and Acacia, respectively, filed pre-award

49. UAC SOLICITATION, *supra* note 46, §§ B.2, F.2, M.3 (establishing a one-year base period followed by four one-year option periods; identifying the place of performance as "Nationwide"; and providing that award will be made on a best-value tradeoff basis); *cf.* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106528, DEFENSE CONTRACTS: BETTER MONITORING COULD IMPROVE DOD'S MANAGEMENT OF AWARD LEAD TIMES, at 1, 15 fig. 6, 22 fig. 10 (Mar. 14, 2024) (describing procurement administrative lead time as the period from solicitation to award and reporting multi-month median lead times for higher-value DOD procurements).

50. UAC SOLICITATION, *supra* note 46, at 1.

51. Defendants' Status Report at 1–2, Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs., No. 3:25-cv-02847 (N.D. Cal. Feb. 19, 2026), ECF No. 150, https://ecf.cand.uscourts.gov/doc1/035026777322?caseid=447078 [https://dn711303.ca.archive.org/0/items/gov.uscourts.cand.447078/gov.uscourts.cand.447078.150.0.pdf]

52. *Id.* at 1–2.

53. Letter from Ron Wyden, Ranking Member, S. Comm. on Fin., & Patty Murray, Vice Chair, S. Comm. on Appropriations, to Robert F. Kennedy, Jr., Sec'y, U.S. Dep't of Health & Hum. Servs. 1 (Mar. 23, 2026), https://www.finance.senate.gov/imo/media/doc/032426_letter_re_ucp_amended_rfp_wyden-murray.pdf [https://web.archive.org/web/20260328132609/https://www.finance.senate.gov/imo/media/doc/032426_letter_re_ucp_amended_rfp_wyden-murray.pdf].

bid protests on the amended RFP.[54] Under CICA and the Federal Acquisition Regulation (FAR) Part 33.104, a timely pre-award protest automatically suspends the agency's ability to award or proceed under the challenged solicitation. The agency may override the stay only on a written finding of urgent and compelling circumstances that significantly affect the interests of the United States.[55] Thus, HHS would have to provide written justification that proceeding is in the urgent interest of the United States.[56] Without an override, GAO's decision is not projected until mid-July 2026.[57] In the meantime, the procurement process is frozen just as the expiration of the current bridge contract with Acacia approaches, creating an impending clash between procurement law and the injunction in *CLSEPA*. Given GAO's resolution timeline, a new contract cannot be awarded before the Acacia bridge expires, absent agency override.[58] Such a timeline forces HHS to choose between two courses of action: to exercise its option to extend Acacia's contract, or to allow the bridge arrangement to lapse before a replacement contract can be awarded and mobilized, effectively suspending the UC legal services program. The latter option leaves tens of thousands of vulnerable immigrant children in active immigration proceedings without lawyers and violates the TVPRA's mandate to ensure representation, despite the court's injunction.[59]

54. *ICF Incorporated, LLC (75P00126R00003)*, B-424162.2, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/docket/b-424162.2 (filed Apr. 1, 2026); *Acacia Center for Justice (75P00126R00003)*, B-424162.3, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/docket/b-424162.3 (filed Apr. 3, 2026).

55. 31 U.S.C. § 3553(c)(1)–(2); 48 C.F.R. § 33.104(b)(1)–(2) (2025).

56. 31 U.S.C. § 3553(c)(2)(A)(i); 48 C.F.R. § 33.104(b)(1)(i) (2025).

57. ICF Incorporated, LLC (75P00126R00003), *supra* note 54 (decision due July 10, 2026); Acacia Center for Justice (75P00126R00003), *supra* note 54 (decision due July 13, 2026).

58. Defs.' Status Report, *supra* note 45, at 1; *ICF Incorporated, LLC (75P00126R00003)*, *supra* note 54 (decision due July 10, 2026); *Acacia Center for Justice (75P00126R00003)*, *supra* note 54 (decision due July 13, 2026).

59. *Unaccompanied Children Program*, *supra* note 28 (stating that the program "provides legal representation to more than 26,000 children in and released from" ORR custody and "legal orientations and information to thousands more"); *Cmty. Legal Servs.*, 780 F. Supp. 3d at 920–21, 926–27; 8 U.S.C. § 1232(c)(5).

II. OBJECTIONS TO TREATING CLSEPA AS REVIEWABLE

The federal government, along with the dissenting judges from the denial of rehearing en banc, has argued that the Ninth Circuit's approach in *CLSEPA* exceeds the proper scope of judicial review, raising concerns about jurisdiction, contractual remedies, and the extent to which courts should second-guess executive decisions about funding and enforcement.

A. *Funding Decisions as Unreviewable*

First, the government characterizes the Cancellation Order as outside the scope of judicial review, treating it as a decision that Congress left to the Executive's discretion over resource allocation.[60] It argues that the amount of funding devoted to direct representation falls within the APA's "committed to agency discretion by law" exception, and that the agency's assessment of its current resource needs therefore justifies partially terminating the Acacia contract.[61] *Lincoln v. Vigil*[62] guides this deduction, holding that when Congress provides a lump-sum appropriation without specific directives, the agency's allocation decisions enjoy a presumption of unreviewability under the APA.[63] On this basis, HHS analogizes its position to that of the agency in *Lincoln*. Much as the Indian Health Service in *Lincoln* discontinued the Indian Children's Program—a program unmentioned by statute—to redirect funds, HHS argues that it does not err by reallocating a lump-sum appropriation from direct representation toward know-your-rights presentations and pro bono coordination.[64] Thus, phrasing such as "to the greatest extent practicable" and "subject to ORR's discretion and available appropriations" does not constrain the agency; rather, it confirms that the agency's broad latitude in

60. *See Cmty. Legal Servs.*, 780 F. Supp. 3d 897, 918–19 (N.D. Cal. 2025).
61. *See id.*
62. 508 U.S. 182 (1993).
63. *Id.* at 192–93.
64. *Cmty. Legal Servs.*, 780 F. Supp. 3d at 919, 923.

terminating funding for UCs' access to counsel falls within the APA's narrow exception to judicial review.[65]

B. *Recasting CLSEPA as a Contract Dispute*

Second, even if the termination decisions were reviewable under the APA, the request to reinstate funding is fundamentally a contract claim, depriving the district court of jurisdiction. In essence, the subcontractors seek to restore contractual payments under the Acacia contract, making the dispute a contract claim in substance if not in form.[66] The Tucker Act supports this viewpoint, as it vests the Court of Federal Claims with exclusive jurisdiction over claims against the government arising out of any express or implied contract with the United States.[67] In *Megapulse, Inc. v. Lewis*,[68] the D.C. Circuit held that plaintiffs cannot disguise "essentially contractual" claims as APA actions to evade the Tucker Act.[69] Therefore, HHS and the dissenting Ninth Circuit judges treat *CLSEPA's* injunction as equivalent to a contractual funding agreement.[70] To reinforce this framing, they cite recent Supreme Court decisions addressing the termination of federal grants and contracts. These cases held that the APA's waiver of sovereign immunity does not extend to claims seeking to enforce contractual obligations to pay money, such as grant terminations, concluding that such disputes must proceed within the Court of Federal

65. Reply Brief for Defendants-Appellants at 25–28, Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs., No. 25-2808 (9th Cir. Aug. 14, 2025), ECF No. 84 (first quoting 8 U.S.C. § 1232(c)(5); and then quoting 45 C.F.R. § 410.1309(a)(4) (2024)),
https://ia600706.us.archive.org/28/items/gov.uscourts.ca9.fa8c5de7-38b8-42b8-a128-52bc0c624978/gov.uscourts.ca9.fa8c5de7-38b8-42b8-a128-52bc0c624978.84.0.pdf.

66. *Id.* at 13-14, 17-18 (arguing that "the relief that Plaintiffs essentially seek is continued funding through reinstatement of the Acacia contract" and is thus "fundamentally contractual relief").

67. Tucker Act, 28 U.S.C. § 1491(a)(1).

68. 672 F.2d 959 (D.C. Cir. 1982).

69. Id. at 967.

70. *See* 155 F.4th 1099, 1108, 1114 (9th Cir. 2025) (Bumatay & VanDyke, JJ., dissenting from denial of reh'g en banc) (arguing that "[n]o matter how hard we squint, we can't avoid the fact that this is a contract dispute. . . . Plaintiffs simply want money from the federal government," because they "seek[ ] specific performance of the [Acacia] contract").

Claims.[71] The dissent from the denial of rehearing en banc in *CLSEPA* firmly applied these precedents, arguing that the dispute is inextricably contractual because the plaintiffs' injuries stemmed directly from the contract's cancellation.[72] On this view, allowing *CLSEPA* to move forward would circumvent the Tucker Act's exclusive grant of jurisdiction to the Court of Federal Claims.

C. *Judicial Overreach Concerns*

The dissenting judges further warn that treating *CLSEPA* as an APA action invites an "imperial judiciary" to second-guess funding decisions and could create a "subcontractor exception," opening the floodgates for other federal fund recipients to challenge the Executive in court.[73] They characterize the district court's injunction as an intrusion on the Executive's authority to manage appropriations, arguing that forbidding the termination of payments substitutes judicial judgment for agency judgment.[74] Taken together, these arguments characterize *CLSEPA* as an overextension of judicial review that converts flexible statutory standards and routine funding decisions into private subcontractors' enforceable rights.

71. Nat'l Insts. of Health v. Am. Pub. Health Ass'n, 145 S. Ct. 2658, 2659 (2025) (holding that the APA's limited waiver of sovereign immunity did not provide jurisdiction to adjudicate claims based on the "termination of various research-related grants"); Dep't of Educ. v. California, 604 U.S. 650, 651 (2025) (per curiam) (stating that the APA's waiver "does not extend to orders 'to enforce a contractual obligation to pay money'" and that such suits belong in the Court of Federal Claims).

72. 155 F.4th at 1110 (Bumatay & VanDyke, JJ., dissenting from denial of reh'g en banc) (arguing that "Plaintiffs explicitly pled that the cancellation of the Acacia contract was the direct cause of their harm").

73. *Id.* at 1108, 1115–16 (warning that "[i]f subcontractors . . . were included" in the right to sue, "millions of entities would have the ability to sue the government directly" (internal quotation marks omitted)).

74. *Id.* at 1109, 1116 (arguing that "[c]ongress appropriates funding this way so that the Executive can make these choices," and that the injunction "interferes with the Executive's prerogative to set and review policies").

III. REBUTTING THE EXECUTIVE'S DEFENSES

This part argues that the Executive's defenses ultimately fail because they rely on a misapplication of *Lincoln* and the Tucker Act, while ignoring the statutory commands of the TVPRA.

A. Does Lincoln Shield?

The Executive's *Lincoln*-based defense of the Cancellation Order against judicial review misconstrues the TVPRA's mandate.[75] In *Lincoln*, an agency discontinued a program that no statute had mentioned. As clarified in *Shawnee Tribe v. Mnuchin*,[76] if Congress enacted a specific statutory mandate regarding how funds must be used, the *Lincoln* exception is inapplicable.[77] Therefore, *Lincoln* applies only when Congress has not narrowed the statute with restrictions.[78] In contrast, Congress directed HHS to fund and execute the UC counsel program.[79] Under *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*,[80] the APA bars review only in the rare case where there is "no meaningful standard" to apply.[81] The TVPRA and the Foundational Rule do not present such a case, because both supply workable standards for agency compliance. The TVPRA's and Foundational Rule's operative phrases: "shall ensure," "shall fund," and "to the greatest extent practicable," supply courts with the standards necessary to determine whether the agency has maintained a meaningful pathway to counsel for UCs.[82] Further, accepting the government's argument creates a perverse understanding where, by adding flexible qualifiers, Congress weakens its statutes, thereby undermining judicial review and rendering them effectively unenforceable. In short, treating the

75. *Compare id.* at 1108 (citing Lincoln v. Vigil, 508 U.S. 182, 192 (1993)), *with id.* at 1103 (Fletcher & Koh, JJ., respecting denial of reh'g en banc) (stating that the TVPRA's mandate to "ensure, to the greatest extent practicable," that children have counsel is "not the same as 'to no extent at all'").

76. 984 F.3d 94 (D.C. Cir. 2021).

77. *See Lincoln*, 508 U.S. 182, 193 (1993); *Shawnee Tribe*, 984 F.3d at 100.

78. *See Shawnee Tribe*, 984 F.3d at 100.

79. *See* 8 U.S.C. § 1232(c)(5); 45 C.F.R. § 410.1309(a)(4) (2024).

80. 586 U.S. 9 (2018).

81. *Id.* at 23 (quoting Lincoln v. Vigil, 508 U.S. 182, 191 (1993)).

82. 8 U.S.C. § 1232(c)(5); 45 C.F.R. § 410.1309(a)(4) (2024).

Cancellation Order as reviewable is consistent with *Lincoln* properly understood and prevents flexible statutory qualifiers from being used to revive the very problem of unrepresented UCs that Congress enacted the TVPRA to address.

B. The Tucker Act and APA Review

Furthermore, the government misinterprets Supreme Court contract cases, using the Tucker Act in a way that conflates enforcing statutes with enforcing contracts. To determine whether a claim is a disguised contract dispute that does not belong in district court, the Ninth Circuit applies the two-part test from *Megapulse*, examining the "source of the rights" asserted and the "type of relief" sought.[83] Here, the plaintiffs' rights derive from the TVPRA and the Foundational Rule, not from the terminated contract to which they are not privy.[84] Moreover, ordering the government to disburse funds as part of the judicial remedy in this case does not inherently classify the relief as "money damages."[85] Unlike the plaintiffs in *Department of Education v. California*,[86] who sought grant agreements through the APA,[87] the *CLSEPA* plaintiffs' requested equitable relief does not require reinstatement of the Acacia contract itself; ORR may satisfy the injunction through any contracting path that funds the mandated legal services. This point is reinforced by recent Ninth Circuit precedent in *United Aeronautical Corp. v. U.S. Air Force*,[88] wherein the majority found that when the plaintiffs' "rights and remedies, as alleged, are noncontractual," the Tucker Act would not bar jurisdiction.[89] The relief *CLSEPA* plaintiffs desire depends on the government's legal obligations, independent of the terms of the contract. This analysis shows that accepting the

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83. *Cmty. Legal Servs.*, 155 F.4th at 1102 (quoting United Aeronautical Corp. v. U.S. Air Force, 80 F.4th 1017, 1026 (9th Cir. 2023)).

84. *Id.* at 1103–04.

85. Bowen v. Massachusetts, 487 U.S. 879, 893 (1988) ("The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'").

86. 604 U.S. 650 (2025).

87. *Id.*

88. 80 F.4th 1017 (9th Cir. 2023)

89. *Id.* at 1026.

government's position would create a jurisdictional vacuum: the plaintiffs, subcontractors without a contractual relationship with the government, cannot invoke the Court of Federal Claims' Tucker Act jurisdiction.[90] If the district court also lacks jurisdiction, the Executive's violation of the TVPRA would be unreviewable, a result directly conflicting with the APA's "strong presumption" favoring judicial review.[91]

C. Maintaining Judicial Review

Finally, concerns about judicial overreach and a possible surge in similar suits by subcontractors and other third-party recipients of federal funds can be addressed by recognizing the narrow scope of the statutory question under *CLSEPA*. These concerns have force; courts cannot act as the government's contracting officers, deciding which providers are entitled to particular awards. The question in *CLSEPA* is narrow: whether a statute directing the Executive to "ensure, to the greatest extent practicable," that UCs have counsel grants HHS the legal authority to reduce funding for direct representation to zero.[92] That statutory question has not been resolved on the merits; the preliminary injunction has only restrained the Executive's conduct while the litigation continues. The subsequent procurement strategy employed by HHS further refines the question, shifting it to whether the agency satisfies the command to ensure counsel when formulating contract terms that methodically restrict effective representation. Specifically, the RFP switches from in-person to virtual services as the default, requires providers to report confidential case data directly to the agency, geographically restricts eligibility for counsel, and prohibits the use

90. *Cmty. Legal Servs.*, 155 F.4th at 1107 ("It is quite another to say that an individual who cannot sue in the Court of Federal Claims for any remedy also may not sue in district court.").

91. *Id.* ("But the APA embodies a 'strong presumption' favoring judicial review of administrative action." (quoting Mach Mining, LLC v. E.E.O.C., 575 U.S. 480, 486 (2015))).

92. 8 U.S.C. § 1232(c)(5).

of contract funds for litigation against the government.[93] The government therefore continues to defend its position in *CLSEPA* on the premise that it retains unreviewable authority to define "practicable," so long as some form of contractual funding exists.[94]

D. Constructive Defunding

Blocked by the *CLSEPA* injunction from terminating the program, the Executive utilized the federal procurement process to limit the scope of legal services. The amended Performance Work Statement (PWS) of the RFP contains a series of restrictive terms that, taken individually and collectively, decrease the quality and scope of representation the TVPRA mandates.[95] Five sections of the amended PWS warrant judicial review under the *Loper Bright* framework.

1. Legal Orientations

First, the PWS restructures legal orientations so that in-person attorney-client contact shifts from the former standard to the exception. Under § C.4.2.2 of the amended PWS, legal orientations are to be delivered via "audiovisual tools (e.g., recorded videos, online content)."[96] Further, the scope section of the PWS directs the contractor to "conduct virtual legal orientation," and under § C.4.2.2.1's material delivery requirements, in-person orientations are to be treated "only as individual exceptions."[97] Although the most recent amendment removed the prior requirement of advance

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93. OFF. OF REFUGEE RESETTLEMENT, ADMIN. FOR CHILD. & FAMS., PERFORMANCE WORK STATEMENT: LEGAL SERVICES FOR UNACCOMPANIED ALIEN CHILDREN (UAC) 4–6, 9–10, 18–23 (Amd. 0010 Mar. 24, 2026),

https://sam.gov/workspace/contract/opp/863a04e291464af48cc8e03e60623dd8/view [hereinafter AMENDED PWS]; see also Letter from Ron Wyden & Patty Murray to Robert F. Kennedy, Jr., *supra* note 53 (arguing that the amended RFP requires providers to report confidential information to the government and undermines attorney-client confidentiality).

94. *See* Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs., 780 F. Supp. 3d 897, 918–19 (N.D. Cal. 2025); AMENDED PWS, *supra* note 93, at 1–3, 9, 18–23.

95. See AMENDED PWS, *supra* note 93, at 4–10, 18–23; 8 U.S.C. § 1232(c)(5); *Cmty. Legal Servs.*, 780 F. Supp. 3d 897, 920–21 (N.D. Cal. 2025).

96. AMENDED PWS, *supra* note 93, at 5.

97. *Id.* at 1, 6.

written approval by the Contracting Officer's Representative (COR) for in-person orientations, it substituted a veto mechanism in its place.[98] The PWS now instructs the contractor to notify the COR in writing with the child's A-Number, the reason for the exception, the planned date, and the location within 24 hours of identifying the need with the COR retaining the authority to reject these in-person exception requests.[99] This restriction reverses the legal services framework established under Acacia, wherein in-person interaction and trauma-informed intake with these children allowed counsel to identify trauma, developmental needs, language barriers, and indications of trafficking.[100] As Senators Wyden and Murray noted in their March 2026 oversight letter, "legal service providers rely on in-person consultations to prevent further abuse, trauma, neglect, and exploitation," a standard that the Children's Immigration Law Academy regards as fundamental to identifying children who qualify for specialized protections, such as T-visas and Special Immigrant Juvenile Status (SIJS).[101] Moreover, the FY 2026 appropriations report directs ORR to ensure that legal orientations and screenings are provided in person by qualified providers, and that legal services are provided in person absent exigent circumstances.[102] Hence, the

98. *Compare* Letter from Ron Wyden & Patty Murray to Robert F. Kennedy, Jr., *supra* note 53, at 1, with AMENDED PWS, *supra* note 93, at 6.

99. AMENDED PWS, *supra* note 93, at 6.

100. NOVEMBER 2025 PWS, *supra* note 12, at 7–10 (requiring in-person orientations to the maximum extent practicable, delivery in the language best understood by the child, and tailored consultations for children with developmental delays, significant trauma, or trafficking concerns); CHILDREN'S IMMIGR. L. ACAD., AM. BAR ASS'N, PRO BONO GUIDE: WORKING WITH CHILDREN AND YOUTH IN IMMIGRATION CASES 27–28, 31, 43 (2026), https://cilacademy.org/wp-content/uploads/2023/10/2026-ABA-CILA-Pro-Bono-Guide.pdf [https://web.archive.org/web/20260421020840/https://cilacademy.org/wp-content/uploads/2023/10/2026-ABA-CILA-Pro-Bono-Guide.pdf] [hereinafter CILA GUIDE]; *Unaccompanied Children Program*, *supra* note 28.

101. Letter from Ron Wyden & Patty Murray to Robert F. Kennedy, Jr., *supra* note 53, at 3; *see also* CILA GUIDE, *supra* note 100, at 27–28, 31; NOVEMBER 2025 PWS, *supra* note 12, at 10.

102. S. REP. NO. 119-55, at 211–12 (2025) (directing ORR to ensure in-person Know Your Rights presentations and legal screenings, administered by qualified providers, and to ensure that legal services are in person absent exigent circumstances).

requirement in the PWS for remote and virtual orientations contradicts the legislative directives that accompanied the $4.7 billion appropriation from Congress for the UC program.[103] The PWS further allows the contractor to avoid performing orientations altogether, provided an extenuating circumstance exists. According to § C.4.2.2.1, the contractor may seek relief not only from the ten-business-day deadline for conducting orientations but also "from the requirement to perform the service."[104] This means that ORR retains the authority to excuse non-performance entirely by creating a system where UC may not receive legal orientation at all. Overall, making physical access to lawyers an exception rather than the norm, while not terminating UC access to legal services, narrows the quality and reach of the representation Congress expected ORR to provide.

2. Provider Independence

Second, the amended solicitation reduces the independence of legal providers by turning the representation function into a more government-facing and closely monitored one. It establishes government authority over the content of what attorneys may communicate to children during orientations. Section C.4.2.2.1 requires the contractor to develop an orientation script, submit it to the COR for review and approval, and provides that "any deviation from pre-approved content requires prior written approval from the COR."[105] This restriction diminishes the independence of an attorney-client relationship and enables the government to shape the information children receive about their relief options, procedural rights, and available legal resources. Further, the

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103. *Compare* AMENDED PWS, *supra* note 93, at 5–6 (requiring legal orientations through audiovisual tools and directing the contractor to conduct virtual legal orientation), *with* S. REP. NO. 119-55, at 210–12 (providing $4,770,077,000 in base funding for the UAC program and directing in-person legal screenings and in-person legal services absent exigent circumstances), *and* 172 CONG. REC. H1595 (daily ed. Jan. 22, 2026) (Explanatory Statement of the Consolidated Appropriations Act, 2026) ("Services must continue to be provided in accordance with the directives in Senate Report 119–55.").

104. AMENDED PWS, *supra* note 93, at 4.

105. *Id.* at 5.

updated solicitation terms require contractors to conduct "robust data collection, analysis, and reporting," including "real time case status," and to make that data available to ORR through dashboards and direct connection to existing ORR platforms and tools, including APIs.[106] These requirements are specific: contractors must disclose to the government the "A Number of UAC receiving direct legal representation," the "date, and outcome of the court appearance," the "immigration relief application/petition filed," the "final disposition of direct legal representation," and information regarding any UAC who "declines any direct legal representation service."[107] Read together with the March 2026 Senate letter's warning that providers may be compelled to report consultation outcomes and client-specific information to ORR, these terms create a conflict with ABA Model Rule 1.6's protection of client confidentiality and with corresponding state bar ethics rules.[108] Additionally, § C.4.1's attorney ethics provision now requires contractors to notify the COR in writing within 24 hours whenever a legal service provider identifies "an ethical or similar issue that may materially affect delivery of the required legal representation services," including a written explanation of the circumstances and the potential impact on service delivery.[109] This term effectively requires attorneys to report to the government the nature and scope of any internal professional conflict arising in the course of representing a child. An attorney who identifies a conflict arising from government misconduct, from a client's disclosure implicating federal agencies, or from the attorney's own assessment that the contract terms require conduct inconsistent with professional duties, faces a contractual obligation to disclose that conflict to the

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106. *Id.* at 1, 18.

107. *Id.* at 21–22.

108. *See* Letter from Ron Wyden & Patty Murray to Robert F. Kennedy, Jr., *supra* note 53, at 2 (warning that compelled reporting of consultation outcomes and client-specific relief information may violate attorney ethics rules requiring confidentiality and noting that such rules have been substantially incorporated in jurisdictions across the country); MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2024) (providing that a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent" or another enumerated exception applies).

109. AMENDED PWS, *supra* note 93, at 2.

COR within one day. The practical effect is predictable. A child who knows that disclosures about their trafficking history, their undocumented sponsor, or their fear of persecution will be transmitted to a government database administered by the agency overseeing their detention is unlikely to make those disclosures. Yet effective representation, and the TVPRA's anti-trafficking protections, depend on precisely those disclosures. Such a system creates an inherent ethical conflict between following the terms of the PWS to receive funding and maintaining attorney-client confidentiality.

3. Geographic Eligibility and the Loss of Appellate Representation

Moreover, the amended RFP introduces geographic eligibility restrictions. Under the PWS, direct representation after release from ORR supervision is tied to whether the child is placed with a sponsor residing "in the defined service area of the same legal service provider who provided the UAC legal services in ORR care."[110] The March 2026 Senate letter additionally notes that the solicitation also omits consultations for children held for more than six months or released from custody and excludes legal services for appeals to the Board of Immigration Appeals and motions to reopen or terminate.[111] In the immigration legal process, these are crucial instruments through which removal orders can be challenged. Such restrictions would apply to all UCs, regardless of their individual legal vulnerabilities or the complexity of their proceedings.

4. Transaction-Based Funding and the Shift of Financial Risk

Furthermore, the amended PWS disincentivizes contracted legal providers by shifting to a transaction-based funding structure. Essentially, the Executive will pay a flat fee for the production of specific documents, such as a filed asylum application or a change-

110. *Id*. at 9.
111. Letter from Ron Wyden & Patty Murray to Robert F. Kennedy, Jr., *supra* note 53, at 2.

of-venue motion.[112] By tying an attorney's payment to completion of specific tasks, the contract aims to optimize the efficiency of the legal services UCs receive. In doing so, however, this system financially penalizes the contracted legal providers. Building trust with these children, many of whom have experienced trauma, or exploring novel legal remedies, is a time-intensive process.[113] This is why the standard payment model for legal services, and the model the Executive originally utilized with Acacia for the UC legal services program, is Time and Materials.[114] Under the payment model utilized in Acacia's contract, the government funded the program based on "Productive Direct Labor Hours."[115] This approach paid for the full-time presence of skilled legal personnel instead of a tally of filed forms. This ensured that providers had the guaranteed resources to maintain a physical presence in the communities where UCs were most concentrated. Given that immigration litigation is unpredictable, the Time and Materials structure allowed non-profits to pay for specialized labor without assuming financial risk.

Instead of paying directly for legal personnel, the 2026 solicitation shifts to a Firm Fixed Unit Price model for direct representation, utilizing a "Unit of Issue" system that triggers payment upon "evidence of service completion," such as a court receipt or a filing confirmation.[116] Since the expected volume of these tasks is high, the transition from a capacity-based model to a

112. AMENDED PWS, *supra* note 93, at 10–17.

113. *See* OFFICE OF REFUGEE RESETTLEMENT, ADMIN. FOR CHILD. & FAMS., LEGAL SERVICES FOR UNACCOMPANIED CHILDREN STATEMENT OF OBJECTIVES 6–7 (Jan. 14, 2022), https://sam.gov/opp/104a1117b87e418491a0e055c04ab9ec/view [hereinafter 2022 SOO]; CILA GUIDE, *supra* note 100, at 27–29, 31, 35.

114. *See* Stuart L. Pardau, *Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of Its Demise May Be Greatly Exaggerated*, 50 IDAHO L. REV. 1, 2, 10 (2014) (explaining that the billable hour became the "standard method of billing" and "remains the predominant method in which attorney fees are calculated"); INTERIOR BUS. CTR., DEP'T OF THE INTERIOR, REQUEST FOR PROPOSALS NO. 140D0422R0012—SINGLE AWARD CONTRACT FOR LEGAL SERVICES FOR UNACCOMPANIED CHILDREN 2 (Jan. 3, 2022), https://sam.gov/opp/104a1117b87e418491a0e055c04ab9ec/view [hereinafter 2022 RFP].

115. 2022 RFP, *supra* note 114, at 40, 45.

116. AMENDED PWS, *supra* note 93, at 10–17.

transaction-based model creates an issue of volume for providers.[117] While the Acacia contract estimated a 1,000 base-year caseload, the 2026 model anticipates a substantial increase in required tasks.[118] For SIJS alone, the solicitation lists 3,796 initial assessments and 12,894 post-submission follow-up units.[119] By separating a single immigration case into distinct initial and follow-up units, the Executive establishes a system that pays one flat fee whether a follow-up requires an address update on a child's file or contested litigation. This effectively disincentivizes the holistic advocacy necessary for these vulnerable youth. Furthermore, the 2026 model converts oversight functions, such as Legal Service Provider Network Management and Data Collection, into one Firm Fixed Price contract line item.[120] Since these functions are paid at a fixed rate, the contractor receives flat administrative funding that remains fixed even as the required transaction volume increases far beyond the baseline set in the previous contract. Ultimately, this financial restructuring functions as a form of constructive defunding. In the absence of guaranteed labor funding, non-profit legal service providers will have to bear the financial risk of difficult

117. *Compare* 2022 SOO, *supra* note 113, at 6–7 (describing staffing line items, flexible staffing during influx periods, and legal screenings generally measured by hours per case), *with* INTERIOR BUS. CTR., DEP'T OF THE INTERIOR, SINGLE AWARD CONTRACT FOR LEGAL SERVICES FOR UNACCOMPANIED CHILDREN, ATTACHMENT 3—QUESTIONS FORM 3–4 (Jan. 14, 2022), https://sam.gov/opp/104a1117b87e418491a0e055c04ab9ec/view [hereinafter 2022 Q&A] (recording an offeror's concern that eliminating the time-and-materials structure for representational services would severely hamper the contractor's ability to retain trained legal staff and respond to periods of higher migration), and OFF. OF REFUGEE RESETTLEMENT, ADMIN. FOR CHILD. & FAMS., PRICING WORKSHEET: UAC LEGAL SERVICES Tab 1 (Base Period) (Amd. 0010 Mar. 24, 2026), https://sam.gov/workspace/contract/opp/863a04e291464af48cc8e03e60623dd8/view [hereinafter 2026 PRICING WORKSHEET] (estimating 2,000 legal orientations, 4,500 legal consultations, and thousands of direct-representation service units).

118. *See* 2022 Q&A, *supra* note 117, at 22; 2026 PRICING WORKSHEET, *supra* note 117, Tab 1.

119. 2026 PRICING WORKSHEET, *supra* note 117, Tab 1; AMENDED PWS, *supra* note 93, at 14–15.

120. *See* 2026 PRICING WORKSHEET, *supra* note 117, Tab 1; AMENDED PWS, *supra* note 93, at 17–18.

cases and will be pressured to route the most time-intensive cases to the pro bono pool of lawyers.[121]

5. Pro Bono Absorption

Building upon the funding model shift, non-profit providers within the UC legal services program will face additional pressure to take on complicated cases pro bono. The funding constraints provision of the solicitation requires the contractor to "use pro bono services for any identified service not identified in this contract that pertain to protecting UAC 'from mistreatment, exploitation, and trafficking.'"[122] This quoted phrase, "mistreatment, exploitation, and trafficking," is taken directly from the TVPRA.[123] Thus, any legal work falling within the TVPRA's mandate, but not enumerated among the contract's specific billable tasks, including legal challenges to unsafe placements, advocacy to prevent labor exploitation, or non-enumerated protective actions on behalf of child trafficking victims, must be performed at the contractor's full expense.[124] Congress appropriated funds to protect UCs from the harms the TVPRA identified. The PWS, however, requires legal work addressing those harms—if it does not fit a specific billing category—to be absorbed as an uncompensated cost by the contracted organization. That constraint effectively converts a statutory obligation into a charitable activity. Read in conjunction with the ban on counting government-litigation pro bono hours toward required pro bono minimums, this constraint maximizes the financial burden of performing sensitive protective work and minimizes the financial incentive.[125]

Moreover, the PWS vests ORR with discretion over the broader population of UCs, making their representation contingent upon "the extent ORR determines that appropriations are available."[126]

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121. *See* 2022 Q&A, *supra* note 117, at 3–4; 2026 PRICING WORKSHEET, *supra* note 117, Tab 1; AMENDED PWS, *supra* note 93, at 10, 25.

122. AMENDED PWS, *supra* note 93, at 10.

123. 8 U.S.C. § 1232(c)(5)

124. *See* AMENDED PWS, *supra* note 93, at 10–11, 25; 8 U.S.C. § 1232(c)

125. *See* AMENDED PWS, *supra* note 93, at 10–11, 25.

126. AMENDED PWS, *supra* note 93, at 9–10.

The results are: geographic eligibility restrictions, reduced continuity of counsel, a smaller set of funded legal tasks, and a commoditized, two-tiered funding structure. In substance, therefore, the 2025 Cancellation Order attempted direct defunding of the UC legal services program, whereas the solicitation attempts constructive defunding through a narrower, but still substantial, contraction of the same program. The solicitation maintains a contract line for legal services, but restricts funded counsel's authorized scope, their geographic mobility in representing UC, the methods of attorney-client communication, and the independent functioning of the legal providers. Under the *Loper Bright* framework, a contract so constructed invites judicial evaluation of whether these terms are entitled to deference as a permissible exercise of "practicable" discretion.[127]

CONCLUSION

Overall, the 2025 termination of funding for direct legal representation of unaccompanied children was not a routine contracting decision, and the developments that followed sharpened that conclusion. As this Article argues, the TVPRA and ORR's Foundational Rule together require HHS to fund legal services when appropriations are available, and over a decade of earmarked congressional spending makes those appropriations an ongoing expectation that HHS must maintain.[128] The government's reliance on *Lincoln's* presumption of unreviewable allocation decisions overlooks the detailed standards Congress and ORR already

127. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 413 (2024); Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs., 137 F.4th 932, 940–43 (9th Cir. 2025); 8 U.S.C. § 1232(c)(5); 45 C.F.R. § 410.1309(a)(4) (2024).

128. *See* 8 U.S.C. § 1232(c)(5); 45 C.F.R. § 410.1309(a)(4) (2024); *Cmty. Legal Servs.*, 137 F.4th 932, 940–43 (9th Cir. 2025); *see also* Full-Year Continuing Appropriations and Extensions Act, 2025, Pub. L. No. 119-4, div. A, tit. I, § 1101(a)(8), 139 Stat. 9, 11; Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. D, tit. II, 138 Stat. 460, 461; 170 Cong. Rec. H1886, H2032 (daily ed. Mar. 22, 2024); S. REP. NO. 118-84, at 169 (2023); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, div. F, tit. II, 125 Stat. 786, 1077.

provided.[129] Its Tucker Act argument is similarly flawed because the purely equitable relief the plaintiffs seek does not require the court to enforce a contractual payment obligation.[130] Directly supporting these points, Congress specifically appropriated $4.7 billion for the UC program in fiscal year 2026 and directed ORR to ensure in-person legal screenings and other legal services.[131] At a minimum, the enacted appropriations show that Congress did not leave this program as an undifferentiated matter of Executive discretion. The Executive's defenses attempted to reframe a statutory violation as a contract dispute, with the goal of utilizing a jurisdictional barrier in place of a merits defense.

The *CLSEPA* injunction, while essential, did not solve the statutory problem. The government's subsequent procurement strategy demonstrates that the same statutory problem can reappear through contract design. By treating in-person orientations as a contract deviation, requiring ORR-facing data transmission, creating a restrictive contract funding structure, and narrowing continuity of representation when children move outside a provider's service area, the amended RFP attempts to preserve a nominal legal services contract while reducing the independence, continuity, and practical availability of counsel.[132] The April 30, 2026, expiration of the Acacia bridge arrangement, combined with the pending GAO protests against the successor solicitation,

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129. *See* Lincoln v. Vigil, 508 U.S. 182, 192–93 (1993); *Cmty. Legal Servs.*, 137 F.4th 932, 940–43 (9th Cir. 2025); 8 U.S.C. § 1232(c)(5); 45 C.F.R. § 410.1309(a)(4) (2024).

130. *See Cmty. Legal Servs.*, 155 F.4th 1099, 1102–04 (9th Cir. 2025); *Cmty. Legal Servs.*, 137 F.4th 932, 937–38 (9th Cir. 2025); Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs., 780 F. Supp. 3d 897, 917 (N.D. Cal. 2025); Bowen v. Massachusetts, 487 U.S. 879, 893 (1988); United Aeronautical Corp. v. U.S. Air Force, 80 F.4th 1017, 1026 (9th Cir. 2023).

131. S. REP. NO. 119-55, at 210–12 (2025) (providing $4,770,077,000 in base funding for the UAC program and directing ORR to ensure in-person legal screenings and in-person legal services absent exigent circumstances); 172 CONG. REC. H1595 (daily ed. Jan. 22, 2026) (Explanatory Statement of the Consolidated Appropriations Act, 2026) ("Services must continue to be provided in accordance with the directives in Senate Report 119–55 . . . .").

132. *See* AMENDED PWS, *supra* note 93, at 2, 5–6, 9–10, 18, 21–22; 2026 PRICING WORKSHEET, *supra* note 117, Tab 1; Letter from Ron Wyden & Patty Murray to Robert F. Kennedy, Jr., *supra* note 53, at 1–2.

confirms that this is not an abstract concern.[133] Unless ORR extends or replaces the bridge contract in a manner consistent with the injunction, the procurement process itself will produce the very lapse in representation that *CLSEPA* forbids.

The procurement crisis is not an isolated threat for unaccompanied children. Concurrently, the House of Representatives passed the Kayla Hamilton Act in December 2025.[134] The bill requires HHS to share sponsor data with the Department of Homeland Security (DHS), limits UC sponsorship to U.S. citizens and lawful permanent residents, and requires placement in secure detention facilities for children over the age of twelve who are deemed flight risks.[135] Although this act awaits Senate approval, its relevance to the procurement debate is direct. If enacted, the combination of expanded detention authority and the new RFP's geographic service-area restrictions would be particularly damaging. Children transferred between facilities under a new secure-detention rule could find themselves outside any contracted provider's service area, with no funded attorney and no appeal rights under the amended RFP.[136] A system that increases detention pressure while narrowing access to counsel by contract does not carry out the TVPRA to the greatest extent practicable.

The injunction has demonstrated that courts can and should enforce the TVPRA and the Foundational Rule as binding limits on executive discretion. Going forward, that enforcement must also encompass how the funded program is structured. A contracting framework that makes in-person contact the exception, requires attorneys to disclose client confidences to the government,

133. Defendants' Status Report, *supra* note 45, at 1; ICF Incorporated, LLC (75P00126R00003), B-424162.2, U.S. GOV'T ACCOUNTABILITY OFF. (Apr. 21, 2026), https://www.gao.gov/docket/b-424162.2; Acacia Center for Justice (75P00126R00003), B-424162.3, U.S. GOV'T ACCOUNTABILITY OFF. (Apr. 21, 2026), https://www.gao.gov/docket/b-424162.3.

134. Kayla Hamilton Act, H.R. 4371, 119th Cong. (as passed by House, Dec. 16, 2025).

135. *Id.* § 3(1) (proposed 8 U.S.C. § 1232(c)(2)(C)–(D)); *id.* § 3(2)(B) (proposed 8 U.S.C. § 1232(c)(3)(D)).

136. *See* AMENDED PWS, *supra* note 93, at 9; Letter from Ron Wyden & Patty Murray to Robert F. Kennedy, Jr., *supra* note 53, at 2.

eliminates funding for appeals, and cuts representation off at a geographic boundary is not a program designed to ensure counsel "to the greatest extent practicable."[137] It is designed to satisfy the minimum threshold necessary to avoid a finding of contempt. Courts should evaluate those structural choices against the TVPRA's text and the Foundational Rule's directives, just as the *CLSEPA* court evaluated the cancellation order.

Congress, in turn, has a role that the courts cannot fill. The appropriations process is the most direct tool available to protect the program from administrative attrition. It can provide specific directives tying UC legal services funds to defined service standards to remove the contracting flexibility that the current administration has used to narrow the program without formal termination. The pattern since March 2025 has been one of instability. The cancellation, short-term contract extensions, restrictive RFP, GAO protests, and looming contract expiration illustrate how unstable the program is and how exposed children are to shifts in executive priorities. Each step sustains the legal services program nominally while applying consistent pressure on the providers and children involved. Breaking that pattern requires legislative specificity; Congress should insist that all successor contracts fund UC legal services in a manner that is stable, independent, and capable of protecting the children the statute was written to protect. Only then will the Executive be constrained to stabilize the legal program on which unaccompanied children depend.

137. *See* 8 U.S.C. § 1232(c)(5); 45 C.F.R. § 410.1309(a)(4) (2024); Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs., 137 F.4th 932, 940–43 (9th Cir. 2025); AMENDED PWS, *supra* note 93, at 2, 5–6, 9, 18, 21–22; Letter from Ron Wyden & Patty Murray to Robert F. Kennedy, Jr., *supra* note 53, at 1–2.

NOTE

CHARACTERS AND COPYRIGHT IN THE AGE OF ARTIFICIAL INTELLIGENCE: DOES AI PLAY FAIR IN THE GAME OF FAIR USE?

Alessandro Testa Jr., Anshi Jangiti, Carol Nuñez, Tess Trammell, Sophia Rodriguez

Since the early 2020s, the rapid expansion of generative artificial intelligence (AI) has destabilized long-settled assumptions in U.S. copyright law. This article examines Disney and Universal's 2025 lawsuit against the AI image-generation company Midjourney, a case that sits at the center of an urgent debate over copyright law, AI, and the limits of fair use. Generative AI companies cannot rely on expansive interpretations of fair use when their tools enable the mass reproduction of protected characters in ways that threaten established licensing markets and undermine creators' control over their intellectual property. After outlining how Midjourney's diffusion-based generative model functions and the legal framework provided by the Copyright Act Sections 106 and 106A, the article analyzes the studios' claim that Midjourney systematically reproduces and distorts copyrighted characters without authorization. Midjourney, by contrast, argues that both its training process and outputs fall within the bounds of transformative fair use. Transformative fair use refers to a doctrine under U.S. copyright law permitting unauthorized use of protected material when the new work adds new expression, meaning, or purpose to the original, rather than merely superseding it.[1] To assess these competing theories, this article analyzes the lawsuit through precedent set by key intellectual property and entertainment law cases, collectively highlighting emerging legal questions regarding whether training data scraping constitutes unlawful copying, whether diffusion models contain compressed versions of copyrighted works, how courts

1. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994); *see* 17 U.S.C. § 107.

define "transformative use" in the context of AI, and whether AI-generated outputs serve as commercial competitors for protected works. Evaluating the potential industry-wide implications of the Disney Enterprises v. Midjourney *lawsuit, a ruling favoring Midjourney could expand the boundaries of fair use, normalize the unlicensed intake of copyrighted materials for training, and accelerate AI innovation by lowering barriers to entry. Conversely, a ruling for the studios could require licensing on a mass scale, reshaping the economics of AI development, strengthening creators' authorship, and imposing new constraints on generative systems. The outcome of this litigation will therefore play a defining role in establishing the permissible scope of AI training and output generation. It will also shape the future balance between technological innovation and intellectual property protection in the era of machine-generated content.*

INTRODUCTION

A. What is Midjourney?

According to Britannica, Midjourney is a subscription-based service founded in August 2021 by David Holz, but it was first publicly available through a server on the social media site Discord in February 2022. The AI tool did not get a dedicated website until

2024, and by the end of that year, it had twenty million registered users on the service.[2]

Britannica describes Midjourney as a "generative AI tool that creates images from user-generated text prompts. It can produce images in a photorealistic, painterly, cinematic, or surrealistic style."[3] According to IBM, generative AI is artificial intelligence with the capacity to take a prompt and create content like text, images, video, and more.[4] Midjourney, from the user end, is straightforward: type in a prompt, and it gives back to the user four images based on their request. An individual can modify these images and make them into videos.[5]

Midjourney is capable of AI image creation through the use of a combination of large language and diffusion models. The large language model translates the prompt into a vector, which is then used for diffusion.[6] The use of a diffusion model can be understood in three key stages. Diffusion is where the image is broken down, and then the AI analyzes how to reverse that process to reconstruct the image. Finally, the AI takes a sample of random data from its training data set, then uses the reconstruction process it learned on said data.[7] These training datasets consist of images that allow the

2. Laura Payne, *Midjourney*, BRITANNICA, https://www.britannica.com/technology/Midjourney (last updated Mar. 1, 2026) [/web/20260418000117/https://www.britannica.com/technology/].

3. *Id.*

4. Cole Stryker & Mark Scapicchio, *What Is Generative AI?*, IBM, https://www.ibm.com/think/topics/generative-ai [https://web.archive.org/web/20260418000312/https://www.ibm.com/think/topics/generative-ai] (explains what generative AI is and requires).

5. *Getting Started Guide*, MIDJOURNEY, https://docs.midjourney.com/hc/en-us/articles/33329261836941-Getting-Started-Guide [https://web.archive.org/web/20251112042043/https://docs.midjourney.com/hc/en-us/articles/33329261836941-Getting-Started-Guide] (shows the step-by-step process for how users interact with the service).

6. Payne, *supra* note 2.

7. Dave Bergmann & Cole Stryker, *What Are Diffusion Models?*, IBM, https://www.ibm.com/think/topics/diffusion-models [https://web.archive.org/web/20260418000736/https://www.ibm.com/think/topics/diffusion-models] (explaining diffusion-model training and image generation).

machine to generate results based on the prompt.[8] This breakdown demonstrates that input of imagery is necessary in order for the service to work and satisfy prompts. With this training process in mind, it is now possible to better consider whether or not Midjourney as a service constitutes a violation of U.S. Copyright Law.

B. Copyright Act Sections 106 and 106A

U.S. Copyright Law, also known as Title 17, is made to protect copyright holders from any potential violation of their rights and ensure they have autonomy over what they do with their work. Section 106 of the U.S. Copyright Law gives copyright holders the exclusive rights to carry out reproductions and derivative works, along with the distribution of these works.[9] Section 106A dictates that authors have the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right…"[10] This could have larger implications if Midjourney, as a service, not only allows for the reproduction of Disney and Universal's intellectual property but also the distortion of said property in any way the user pleases. However, an important stipulation to Sections 106 and 106A is the addition of Fair Use in Section 107.

C. Fair Use

Another important piece of U.S. copyright law to consider is Section 107: Limitations on exclusive rights: Fair use. This doctrine covers the use of copyrighted material that does not violate the rights of the copyright holder. Examples of this include "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[11] Fair use lists various other factors involved in deciding whether or not a piece of

8. Payne, *supra* note 2.
9. 17 U.S.C. § 106.
10. 17 U.S.C. § 106A(a)(3)(A).
11. 17 U.S.C. § 107.

copyrighted material falls within the exception. In particular, the purpose of use, nature of the copyrighted work, amount of the work used, and potential effects on the market value of the copyrighted work are considered.[12] This matters in the case of Disney Enterprises Inc. vs. Midjourney Inc. because Midjourney argues that fair use is an important reason they have not violated copyright. According to Midjourney, utilizing "statistical information embedded in copyrighted works" is permissible fair use.[13]

While ambiguous on what the statistical information may be, the writing explicitly indicates that this data is sourced from copyrighted works and is used to train their AI model. It is also worth noting that Disney and Universal provide numerous images created by the Midjourney service that directly depict characters from their own copyrighted works.[14] Interestingly, Midjourney is a subscription-based service with plans ranging from $10 to $120 per month.[15] Whether Midjourney profits from their service through public subscriptions to create unauthorized images of Disney's works is unresolved in light of fair use.

I. Case Introduction

For more than 100 years, Disney and Universal have delighted audiences around the world by investing in and fostering American creative innovation through the production of some of the greatest

12. 17 U.S.C. § 107(1)–(4).

13. Defendant Midjourney, Inc.'s Answer to Complaint at 3, Disney Enters., Inc. v. Midjourney, Inc., No. 2:25-cv-05275 (C.D. Cal. August 6, 2025) (demonstrates Midjourney's argument for training an AI with statistical information being fair use).

14. Complaint, *Disney Enters., Inc.*, No. 2:25-cv-05275 (C.D. Cal. June 11, 2025) (document contains images that depict Midjourney generated images which the Plaintiff argues violates their copyright).

15. *Comparing Midjourney Plans*, MIDJOURNEY, https://docs.midjourney.com/hc/en-us/articles/33329261836941-Getting-Started-Guide [https://web.archive.org/web/20260418002005/https://docs.midjourney.com/hc/en-us/articles/33329261836941-Getting-Started-Guide] (Describing the price range of Midjourney's services).

motion pictures and fictional characters of all time.[16] These characters have inspired many to create their own versions, often referred to as fan art. Fan art was mainly created using simple art supplies and one's imagination. However, as time has evolved, so has the ability to create fan art at rapidly dangerous rates through the use of AI. The concept of using AI for art became popular in 2022 when numerous platforms, including Midjourney, were either founded or made available to the public for free use.[17] In the lawsuit previously mentioned filed in the US District Court for the Central District of California in the Los Angeles Area, June 2025, both Disney and Universal Studios accused Midjourney of reaping the rewards of Plaintiffs' creative investment by selling an AI image-generating service ("Image Service") that functions as a virtual vending machine, generating endless unauthorized copies of the copyrighted works of Disney and Universal.[18] Disney, Universal, and their affiliated production companies argue that Midjourney is engaged in "systematic, ongoing, and willful copyright infringement."[19] Midjourney has chosen to double down on its unlawful actions by releasing and promoting a new version of their Image Service and teasing the soon-to-be-released commercial AI video service ("Video Service"). Without the authorization of large copyright holders such as Disney and Universal, Midjourney's Video Service will generate, publicly display, and distribute videos featuring Disney's and Universal's copyrighted characters.

Midjourney has already begun training its Video Service, meaning that Midjourney is likely already infringing Plaintiffs'

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16. Complaint, *supra* note 14, at 2. (Emphasis the lasting impact Disney and Universal have had on creative innovation).

17. Alexa Kayman & Etienne Segal, *Midjourney Business Breakdown & Founding Story*, CONTRARY RSCH. (May 23, 2025), https://research.contrary.com/company/midjourney [https://web.archive.org/web/20260418002642/https://research.contrary.com/company/midjourney] (Explaining a brief history of using AI to create art leading to the rise of Midjourney).

18. Complaint, *supra* note 14, at 2 (Describing the accusations Disney and Universal Studios have stated about Midjourney's use of AI relating to their copyrighted works).

19. Complaint, *supra* note 14.

copyrighted works in connection.[20] The core of Midjourney's defense is that its service operates within the bounds of fair use under copyright law and that the outputs are transformative. Midjourney argues that creating images incorporating elements from popular culture is not automatically infringing, as there are legitimate and non-commercial grounds for such creations. Examples of such protected speech are non-commercial fan art, social commentary, and parody, protected under fair use.[21] In this case against Midjourney, Disney and Universal are seeking statutory damages of up to $150,000 per infringed work, an amount which could exceed $20 million.[22]

II. Relevant Cases

Several judicial precedents are likely to inform the court's analysis in this case, shaping how the evidence may support either party's claims and defenses. In *Bartz v. Anthropic*, three authors alleged that Anthropic illegally downloaded millions of copyrighted books, many from shadow libraries, in order to train their AI model. Anthropic did not dispute that pirated materials were included, but argued that training an AI model is analogous to a student studying thousands of books to learn writing patterns; further, emphasizing that Claude does not store or output exact copies. The court accepted that using lawfully obtained copyrighted works to train generative models is "quintessentially transformative," but drew a line at the use of unlawfully acquired materials.[23] The case settled in 2025,

20. Kayman & Segal, *supra* note 17.

21. Jamie Lang, Disney, *Universal 'Cannot Have It Both Ways': Midjourney Slams Studios for Suing While Using GenAI*, CARTOON BREW (Aug. 7, 2025, 6:13 AM), https://www.cartoonbrew.com/law/disney-universal-midjourney-lawsuit-response-250197.html [https://web.archive.org/web/20260418004740/https://www.cartoonbrew.com/law/disney-universal-midjourney-lawsuit-response-250197.htm] (reporting Midjourney's argument that some AI-generated outputs may resemble parody, commentary, or fan art).

22. 17 U.S.C. § 504(c)(2); Complaint, *supra* note 14, at 2 (Stating the monetary amount of damages if Midjourney is found guilty of copyright infringement).

23. Bartz v. Anthropic PBC, 787 F. Supp. 3d 1007, 1022, 1033–1034 (N.D. Cal. 2025) (holding that training on lawfully acquired copyrighted works was fair use while denying summary judgment as to pirated-library copies).

signaling that AI companies may prefer confidential resolutions over uncertain jury determinations, simultaneously demonstrating that creators can challenge major tech firms and obtain some recognition. *Bartz v. Anthropic* directly informs the Disney case because it distinguishes between lawful and unlawful data acquisition, an issue central to whether Midjourney's training data was permissibly sourced.[24] The court's acceptance of transformative training is a favorable precedent for Midjourney, but its condemnation of shadow library scraping creates risk if Disney can show similar sourcing. The settlement also reveals the litigation trajectory Disney may expect, as AI companies may be pushed toward settlement rather than risking a landmark precedent.

In *Getty Images (US) Inc. v. Stability AI Ltd.*, Getty alleged that the company scraped millions of Getty photographs, including metadata and watermarked images, to train the Stable Diffusion model.[25] The complaint includes claims of direct copyright infringement, secondary liability, Digital Millennium Copyright Act violations, and trademark infringement related to outputs that resemble the Getty watermark. Due to Stability AI being headquartered in the United Kingdom, parallel litigation was filed there, making the U.K. proceedings relevant as comparative authority on how different jurisdictions approach AI training and copyright law.[26] Early rulings in the concurrent U.K. litigation concluded that model-training does not create infringing copies and dismissed certain copyright claims, though some trademark-based allegations survived.[27] Stability AI argues that using large

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24. *Id.*

25. Complaint at 1, Getty Images (US), Inc. v. Stability AI, Ltd., No. 3:25-cv-06891 (N.D. Cal. Aug. 14, 2025) (alleging that Stability AI copied many millions of copyrighted Getty images and associated text to train Stable Diffusion).

26. Terms of Service, STABILITY AI (effective July 31, 2025), https://stability.ai/terms-of-service [https://web.archive.org/web/20260418005628/https://stability.ai/terms-of-service] (identifying Stability AI Ltd. as an England-and-Wales company with a London registered address).

27. *Stability AI Largely Wins UK Court Battle Against Getty Images over Copyright and Trademark*, AP NEWS (Nov. 4, 2025), https://apnews.com/article/getty-stability-ai-image-copyright-trademark-fa2c561a33c7b6714a7657255a3fbdf1

collections of images to learn statistical patterns qualifies as transformative and may fall within fair use, while Getty contends that the generation of outputs that closely replicate distinctive elements of Getty's photographs demonstrates that the model must have copied protected expression rather than merely learned abstract patterns.[28] This dispute underscores the broader legal tension between fostering AI innovation and protecting creators' rights, while the ongoing U.S. litigation specifically examines how courts should define copying when it occurs through the internal numerical representations of model weights rather than through traditional reproduction. Getty's claims mirror Disney's concerns about unauthorized use of vast copyrighted visual libraries, especially regarding trademark-adjacent outputs such as characters and logos. The partial judicial skepticism about treating training as direct copying may aid Midjourney's defense. However, the survival of trademark-style claims could strengthen Disney's allegations if Midjourney outputs closely resemble protected Disney characters.

Another relevant case is *Andersen v. Stability AI Ltd.*, in which a group of illustrators claimed that Stability AI scraped their artwork to train Stable Diffusion, and in turn, Midjourney and DeviantArt, an online digital art platform that allows artists to share and distribute their work, facilitated subsequent infringement by enabling users to generate outputs resembling the plaintiffs' styles.[29] The court allowed core copyright infringement and

[https://web.archive.org/web/20260427222519/https://apnews.com/article/getty-stability-ai-image-copyright-trademark-fa2c561a33c7b6714a7657255a3fbdf1] (reporting that the U.K. court rejected Getty's remaining copyright claims because Stable Diffusion did not store or reproduce copyrighted works, while limited trademark infringement survived).

28. Complaint ¶¶ 12–14, 63–71, *Getty Images*, No. 3:25-cv-06891 (N.D. Cal. Aug. 14, 2025) (alleging copying, market substitution, and watermark-related confusion); Motion to Dismiss at 3, *Getty Images*, No. 3:25-cv-06891 (N.D. Cal. Oct. 14, 2025) ("The training process itself is described as entirely computational, wherein the models analyze images from vast datasets to learn statistical patterns between text and images.").

29. Andersen v. Stability AI Ltd., 744 F. Supp. 3d 956, 964–65, 974–77 (N.D. Cal. 2024); *About DeviantArt*, DEVIANTART, https://www.deviantart.com/about/ [https://web.archive.org/web/20260427122740/https://www.deviantart.com/about/].

secondary-liability claims to proceed past motions to dismiss, concluding that the artists plausibly alleged that the model may contain stored or compressed versions of their artwork within its model parameters, commonly referred to as weights, the numerical values adjusted during training that encode learned information.[30] Stability AI, Midjourney, and DeviantArt argue that diffusion models do not reproduce images but instead extract statistical features, producing new, non-derivative outputs. Plaintiffs counter that the models generate derivative works because they were taught using copyrighted art and may be overfit compared to original works. The court's decision to allow discovery is a significant development. It signals that the question of whether model weights contain copies is unresolved and fact-dependent.[31] If discovery uncovers embedded copies or high-similarity outputs, Disney may use that as evidence of infringement. Conversely, if the courts ultimately determine that diffusion outputs are sufficiently transformative, Midjourney gains a powerful precedent for defending against Disney's claims.

In *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, the Supreme Court held that Andy Warhol's licensed use of Lynn Goldsmith's photograph of Prince was not fair use because Warhol used the photograph for commercial licensing purposes, specifically to license an image of Prince to Condé Nast, Vanity Fair's parent company. Thereby, Warhol's employment of the image served the same commercial function as Goldsmith's original photograph. The court concluded that this use was not sufficiently transformative in that context.[32] Although the district court originally found Warhol's depiction transformative, the Second Circuit reversed the decision, concluding that the works were substantially similar and that the

30. *Andersen*, 744 F. Supp. 3d 956, 974. (denying in part motions to dismiss and finding that plaintiffs plausibly alleged their works "may be contained in Stable Diffusion as algorithmic or mathematical representations").

31. *Id.* at 974.

32. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 540 (2023) (holding that the first fair-use factor favored Goldsmith for AWF's challenged commercial magazine-license use).

commercial licensing was closely aligned with Goldsmith's own market.[33] The Supreme Court affirmed this decision, emphasizing that transformation must be evaluated relative to the user's purpose and context, not merely aesthetic differences between images. The case rebalanced fair-use analysis by reinforcing that transformativeness is not unlimited, and that courts must consider market substitution carefully. Disney is likely to rely heavily on *Goldsmith* to argue that even if AI-generated images appear different, they serve the same commercial purpose as Disney's own licensing markets — films, merchandise, consumer products, or avatar creation. This case provides doctrinal traction for claims that visual transformations are insufficient when the economic function overlaps. Midjourney, on the other hand, may attempt to distinguish the facts in *Goldsmith* by asserting that its outputs are not specific derivative works but statistically generated images without market substitution. Thus, *Goldsmith* becomes a central battleground in determining how transformation is evaluated in the context of AI.

III. IMPLICATIONS OF DISNEY V. MIDJOURNEY

A ruling in favor of Midjourney would influence how copyrighted data may be used as training content for AI models, potentially legitimizing the practice of extracting large databases without the need to obtain individual licenses. The decision would reinforce the argument that the use of large-scale data qualifies as fair use – especially when large-scale data training is considered transformative – while acknowledging the impracticality of individual licensing and suggesting that AI outputs evolve sufficiently beyond their inputs to avoid infringement.[34]

33. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 38–39, 49–54 (2d Cir. 2021) (concluding that the works were substantially similar and that the secondary use competed with the original photograph's licensing market), *aff'd*, 598 U.S. 508 (2023) (affirming only as to the first fair-use factor).

34. Stephanie Schmidt, Marc B. Collier, Logan Woodward & Ethan Glenn, *AI in Litigation Series: An Update on AI Copyright Cases in 2026*, NORTON ROSE FULBRIGHT (Mar. 2026),

A broader implication of this decision involves the economic dynamics of the AI sector. With lower financial obligations resulting from licensing requirements, the barriers to entry are lower, leading to a significant increase in the number of emerging AI firms and rapid innovation. At the same time, traditional firms that have not adopted AI may face a comparative disadvantage, as they continue to incur higher costs and operate at lower efficiency, limiting their ability to compete in increasingly saturated markets.[35] Moreover, this expansion will reshape the dynamics of the creative industries, as the increased use of AI is expected to significantly reduce the time and labor required for content production.[36] This lower entry cost could increase competition in the industry as smaller AI-based firms emerge. The shift might prompt institutions such as the Academy Awards and the Emmys to reassess their eligibility criteria for recognition amid the growing number of AI-assisted or AI-generated works. Additionally, this expansion may increase tensions between creators and technology companies, leading to potential reputational risks and backlash over concerns about the exploitation of artistic labor.

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https://www.nortonrosefulbright.com/en/knowledge/publications/ce8eaa5f/ai-in-litigation-series-an-update-on-ai-copyright-cases-in-2026 [https://web.archive.org/web/20260418011738/https://www.nortonrosefulbright.com/en/knowledge/publications/ce8eaa5f/ai-in-litigation-series-an-update-on-ai-copyright-cases-in-2026] (summarizing recent AI copyright litigation, including decisions addressing whether AI training may constitute transformative fair use).

35. Tania Babina & Anastassia Fedyk, *The Effects of AI on Firms and Workers*, BROOKINGS (July 1, 2025), https://www.brookings.edu/articles/the-effects-of-ai-on-firms-and-workers/ [https://web.archive.org/web/20260420202158/https://www.brookings.edu/articles/the-effects-of-ai-on-firms-and-workers/] (finding that AI adoption is associated with firm growth, increased employment, and heightened innovation, while noting uneven distributional effects).

36. U.S. COPYRIGHT OFFICE, IDENTIFYING THE ECONOMIC IMPLICATIONS OF ARTIFICIAL INTELLIGENCE FOR COPYRIGHT POLICY 12–13 (Feb. 2025), https://copyright.gov/economic-research/economic-implications-of-ai/Identifying-the-Economic-Implications-of-Artificial-Intelligence-for-Copyright-Policy-FINAL.pdf [https://web.archive.org/web/20260418012607/https://copyright.gov/economic-research/economic-implications-of-ai/Identifying-the-Economic-Implications-of-Artificial-Intelligence-for-Copyright-Policy-FINAL.pdf] (explaining that AI-generated works may have lower production costs than human-created works and that AI tools may reduce labor costs for human creators).

On the other hand, a ruling in favor of Disney and Universal would likely require AI developers to obtain licenses before using copyrighted material, allowing creators greater control over how their work is used. This outcome would restore bargaining power to artists and studios by enabling them to generate new revenue streams through training-data licenses and reasserting control over the conditions of use. Such a decision would impose a burden on smaller AI firms, as they might struggle with the additional costs associated with licensing, retraining, and restricting output to comply with new AI regulations.[37] At the same time, these higher entry costs could encourage firms to invest in responsible and transparent development practices, potentially increasing accountability within the industry.

Beyond concerns within the film industry, the decision would also affect other sectors, such as journalism. News organizations face similar challenges to companies like Disney, as their business models rely on copyrighted creative output. AI systems can use that output without licenses and generate content that reduces audience numbers, threatening revenue and compromising the authenticity of their content.[38] At the same time, publishers have begun to integrate AI to mitigate these risks. For example, the Associated Press and OpenAI partnered to streamline news production and editorial processes.[39] For everyday users, these developments could

37. Sebastian Pellejero, *AI Data Crunch Speeds Towards Napster Moment*, REUTERS BREAKINGVIEWS (Dec. 19, 2025), https://www.reuters.com/commentary/breakingviews/ai-data-crunch-speeds-towards-napster-moment-2025-12-19/ [https://web.archive.org/web/20260418012912/https://www.reuters.com/commentary/breakingviews/ai-data-crunch-speeds-towards-napster-moment-2025-12-19/] (arguing that AI licensing costs could favor incumbents and raise barriers for later entrants).

38. Gretel Kahn, *How AI Is Reshaping Copyright Law and What It Means for the News Industry*, REUTERS INST. (Jan. 30, 2025), https://reutersinstitute.politics.ox.ac.uk/news/how-ai-reshaping-copyright-law-and-what-it-means-news-industry [https://web.archive.org/web/20260418013115/https://reutersinstitute.politics.ox.ac.uk/news/how-ai-reshaping-copyright-law-and-what-it-means-news-industry].

39. *Associated Press, OpenAI Partner to Explore Generative AI Use in News*, REUTERS (July 13, 2023),

affect the reliability of online information, hindering their ability to distinguish between verified journalism and synthetic, AI-generated content.

The decision could shape the balance between AI innovation and intellectual property protection, and it will serve as a precedent to clarify the guidelines defining acceptable practices. Whether Midjourney or Disney prevails, the results will have significant consequences that extend far beyond the individual cases presented in court and the creative industry.

CONCLUSION

Federal judges handling this case and related AI copyright cases have appeared cautious towards expansive fair use defenses advanced by AI developers.[40] Notably, Judge John A. Kronstadt of the Central District of California is presiding over *Disney v. Midjourney*, a case filed in June 2025 that remains ongoing. The studios' complaint alleges that generative models systematically enabling the recreation or redistribution of protected visual content, especially where involving commercial impact or direct substitution for the original, cannot be characterized as either noncommercial or meaningfully transformative. [41] The complaint further asserts that protecting the incentive structure necessary for the creation of

https://www.reuters.com/business/media-telecom/associated-press-openai-partner-explore-generative-ai-use-news-2023-07-13/ [https://web.archive.org/web/20260418013338/https://www.reuters.com/business/media-telecom/associated-press-openai-partner-explore-generative-ai-use-news-2023-07-13/] (reporting that OpenAI licensed part of AP's archive and that AP received access to OpenAI technology).

40. Lulu Yang, *Framing the Future? Disney and Universal Challenge Midjourney over AI-Generated Imagery*, CTR. FOR ART L. (June 26, 2025), https://itsartlaw.org/art-law/framing-the-future-disney-and-universal-challenge-midjourney-over-ai-generated-imagery/ [https://web.archive.org/web/20260418013839/https://itsartlaw.org/art-law/framing-the-future-disney-and-universal-challenge-midjourney-over-ai-generated-imagery/] (noting that the application of fair use to AI training remains unsettled and that output-based infringement may present a more direct theory of liability).

41. Complaint, *supra* note 14, ¶¶ 1–10, Disney Enterprises, Inc. v. Midjourney, Inc., No. 2:25-cv-05275 (C.D. Cal. June 11, 2025) (alleging that Midjourney's commercial image generation service is not noncommercial or meaningfully transformative).

future beloved characters is foundational, not optional in American law.[41]

The rapid, unchecked proliferation of AI-generated art—highlighted by trends showing tens of millions of new machine-made images per day—poses a fundamental threat to authentic human creativity and the value of original work.[42] While cases like *Bartz v. Anthropic* and *Getty Images (US) Inc. v. Stability AI Ltd.,* demonstrate that courts sometimes see lawful AI training as "quintessentially transformative" and even recognize that diffusion models can, in some instances, avoid direct copying, the consensus in society and among most artists still strongly favors human labor and authorship. Recent data from the Pew Research Center and the Design and Artists Copyright Society indicate that majorities of both the general and working artists worry about AI's effect on human creativity and the unauthorized use of their work in model training; findings that highlight the real-world stakes of this litigation.[43] Judge Stanley Blumenfeld in *Disney v. Midjourney*, and the Supreme Court's *Warhol v. Goldsmith* decision, both reinforce that copyright's core purpose is to secure creators' rights and prevent the

42. *AI Image Statistics for 2024: How Much Content Was Created by AI*, EVERYPIXEL JOURNAL (Aug. 2023), https://journal.everypixel.com/ai-image-statistics [https://web.archive.org/web/20260418014242/https://journal.everypixel.com/ai-image-statistics] (reporting that users across major AI image platforms generate an average of 34 million images daily).

43. Alec Tyson & Emma Kikuchi, *How Americans View AI and Its Impact on Human Abilities*, PEW RSCH. CTR. (Sept. 17, 2025), https://www.pewresearch.org/science/2025/09/17/how-americans-view-ai-and-its-impact-on-people-and-society/ [http://web.archive.org/web/20260419172254/https://www.pewresearch.org/science/2025/09/17/how-americans-view-ai-and-its-impact-on-people-and-society/] (finding that 53% of U.S. adults believe AI will worsen human creative thinking and that 50% are more concerned than excited about AI's role in daily life); DESIGN & ARTISTS COPYRIGHT SOC'Y, ARTIFICIAL INTELLIGENCE & ARTISTS' WORK: A SURVEY OF ARTISTS ON AI (2024), https://cdn.dacs.org.uk/uploads/documents/News/Artificial-Intelligence-and-Artists-Work-DACS.pdf [https://web.archive.org/web/20260201173125/https://cdn.dacs.org.uk/uploads/documents/News/Artificial-Intelligence-and-Artists-Work-DACS.pdf] (finding that most surveyed artists were concerned about AI training on their works without permission).

kind of commercial substitution and market displacement that widespread AI art could cause.

At the same time, the perspective reflected in *Bartz v. Anthropic*, particularly the reasoning of Judge William Alsup, a Senior represented in these cases and by Judge William Alsup, a Senior U.S. District Judge for the Northern District of California who recognized the legitimacy of AI's creative potential under copyright law, suggests there is space for AI tools to contribute to new forms of expression, parody, and experimentation, especially when used ethically and without infringing on the economic interests or reputations of artists.[44] However, what is troubling is the speed at which AI platforms are capturing creative spaces and popular attention, often diluting the presence and value of thoughtfully made, original content.[45] Public sentiment verifies this, with overwhelming majorities of consumers and artists expressing greater trust and emotional attachment to human-crafted work over algorithmic output.[46]

Courts must be vigilant in the prevention of tech-driven shortcuts that leverage the labor of creators without permission or compensation, while carving out only careful, fact-specific exceptions for genuinely transformative use or responsible, limited AI creativity. If current trends continue unchecked, the world risks being flooded by machine-made culture at the expense of meaningful, individual human voices, and the law should evolve to prevent that outcome. The law must evolve to meet this moment, not

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44. Bartz v. Anthropic PBC, 787 F. Supp. 3d 1007, 1022, 1033–1034 (N.D. Cal. 2025) (holding that use of lawfully acquired copyrighted works to train large language models was transformative fair use, while denying summary judgment as to retention of pirated library copies).

45. EVERYPIXEL JOURNAL, *supra* note 42.

46. Lore Bellaiche et al., *Humans Versus AI: Whether and Why We Prefer Human-Created Compared to AI-Created Artwork*, 8 COGNITIVE RSCH.: PRINCIPLES & IMPLICATIONS, art. 42 (2023), https://pmc.ncbi.nlm.nih.gov/articles/PMC10319694/ [https://web.archive.org/web/20260418020121/https://pmc.ncbi.nlm.nih.gov/articles/PMC10319694/] (finding across multiple studies that participants tended to evaluate human-labeled artwork more positively than AI-labeled artwork).

to stifle innovation, but to ensure that human creativity remains the foundation upon which all creative progress is built.

NOTE

INTERPRETATIONS OF JURISDICTION AND ITS IMPLICATIONS ON BIRTHRIGHT CITIZENSHIP

Anastasia Dyeduk, Ashton Green, Orla Judalena, Ryan Chen

The Citizenship Clause of the Fourteenth Amendment states the following: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[1] *The meaning of this clause has been the subject of long-term legal debate over its qualifications for American citizenship. Currently, birthright citizenship is being challenged within the Supreme Court. At the beginning of April 2026, Supreme Court justices listened to both arguments for whether President Trump's Executive Order 14160 is legal. President Trump's order pursues the exclusion of children born on U.S. soil if their parents are on temporary visas or if they reside in the United States illegally. The justices had wavering opinions, where they analyzed terms within the Fourteenth Amendment and historical concerns.*[2]

INTRODUCTION

Throughout the history of the United States, birthright citizenship has been a question of issue in regards to its role in the

1. U.S. CONST. amend. XIV, § 1.
2. James Romoser, *With Trump Looking On, Justices Tread Cautiously on Birthright Citizenship*, WALL ST. J. (Apr. 1, 2026), https://www.wsj.com/us-news/law/with-trump-looking-on-justices-tread-cautiously-on-birthright-citizenship-790c6ebb.

country. Case laws and judicial opinions have set precedence as to there being a definitive and integral role reserved for birthright citizenship in this country, and as such, those precedents must be carried and enforced into the future. The findings aim to analyze the foundations of birthright citizenship, starting from its origins to present day, and examine the various aspects of birthright citizenship and its impact and implications on immigration in the United States.

The history of birthright citizenship in the United States is rooted in the English common law, where the principle of jus soli is prominent.[3] Jus Soli is the latin word for 'right of soil' or 'right of birthplace.' An individual has the right to be part of the soil they are born on, essentially, obtaining citizenship within the territory they are born in. In the United States, citizenship regulations derive from federal laws and the executive department, primarily the Department of State (DOS) and the Department of Homeland Security (DHS), which oversees agencies including the United States Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE). Birthright citizenship, however, derives from the Citizenship Clause of the Fourteenth Amendment to the U.S. Constitution, the supreme law of the land, trumping any federal laws.

The intentional language and wording of the Fourteenth Amendment must be closely analyzed because the foundation of birthright citizenship is determined based on the few words of the Citizenship Clause, specifically "jurisdiction thereof." These two words will be analyzed to determine their interrelation to the broader scope of birthright citizenship and immigration by examining the Fourteenth Amendment, statutes, case law, and judicial opinions.

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3. Michael Robert W. Houston, *Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants*, 33 VAND. J. TRANSNAT'L L. 693, (2000) (establishes that Jus Soli is fundamental in English common law which the U.S. takes its roots from).

I. THE LANGUAGE OF "JURISDICTION THEREOF"

The Fourteenth Amendment was ratified post-Civil War during the Reconstruction Era, aiming to protect the rights of former slaves and their descendants. The amendment includes due process of the law, equal protection of the law, and birthright citizenship.[4] These clauses were extended beyond African Americans to include immigrants as well. The Citizenship Clause in Section One of the Fourteenth Amendment states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[5] The structure, diction, and phrasing of this clause is critical, especially the phrase "jurisdiction thereof." It is the foundation of the entire clause and determines the basis and validity of birthright citizenship. The phrase "jurisdiction thereof" narrows down the authority vested in Congress, as well as serving to expand the principle of jus soli.

Historically, Native American tribes were a notable exception to birthright citizenship. The Snyder Act of 1924, also known as the Indian Citizenship Act, declared that all Native Americans born within the United States are granted full citizenship.[6] Prior to the Indian Citizenship Act of 1924, Native tribes were recognized as their own independent nation. Although Native tribes were physically located within the borders of the United States, they were regarded as existing outside its full territorial and political jurisdiction. This means that the Constitution did not apply to them and, in extension, the Fourteenth Amendment's Citizenship Clause. Here, the distinction between soil and jurisdiction is exemplified; Native Americans were born on U.S. soil but not under U.S.

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4. Grace Hemmingson, *The Fourteenth Amendment and the African American Struggle for Civil Rights*, VA. TECH UNDERGRADUATE HIST. REV., (2014) (argues intent behind the drafting of the Fourteenth Amendment which has been extended beyond its original target audience).
5. U.S. CONST. amend. XIV, § 1.
6. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (1924) (indicates the unique circumstances of Native Americans and their right to birthright citizenship).

jurisdiction, making them ineligible for birthright citizenship. The separation of jurisdiction was established and affirmed in the landmark Supreme Court case, *Elk v. Wilkins*. John Elk was a Native American born in the United States, a member of the Winnebago tribe. The City of Omaha refused to register Elk as a qualified voter because he did not satisfy the state and federal voting requirements, as he was not a United States citizen. Elk petitioned that he was a United States citizen because he was born in the United States, surrendered himself to the jurisdiction of the United States, and was thus a citizen under the Fourteenth Amendment. The Court ultimately ruled that members of recognized tribes were not part of the people of the United States because they owed their immediate allegiance to their tribes, recognized as distinct political communities.[7] Native Americans born within a recognized tribe were outside the political and economic jurisdiction of the United States since these tribes were considered distinct nations with their own economies and politics. Although geographically located within U.S. territory, Native tribes were considered outside the United States' jurisdiction. This distinction is significant because it affirms that jus soli is not equivalent to jurisdiction. "Jurisdiction thereof," as written in the Fourteenth Amendment's Citizenship Clause, is subject to limitations.

The landmark Supreme Court case, *United States v. Wong Kim Ark* (hereinafter referred to as "*Wong Kim Ark*"), set precedent for birthright citizenship, affirming the legality of birthright citizenship, citing the Fourteenth Amendment. Wong Kim Ark, the plaintiff, was born in San Francisco California, to two Chinese citizens who were lawful permanent residents of the United States. At age 21, he traveled to China to visit his parents, who had lived in the United States for the preceding 20 years, with the intention of returning thereafter. His re-entry was denied on the grounds that he was not a U.S. citizen under the Chinese Exclusion Act. This

7. Elk v. Wilkins, 112 U.S. 94, 99, 102 (1884) (holding that Native Americans were outside of the jurisdiction of the U.S.).

prohibited Chinese immigrants from entering the United States.[8] The Court ruled that individuals born in the United States are granted automatic citizenship on the basis of jus soli, with the exception of the parents being employed in any diplomatic capacity.[9] Since Wong's parents were neither employed in any diplomatic or official capacity under the Emperor of China, Wong was granted automatic citizenship under the Citizenship Clause of the Fourteenth Amendment.[10] This case set a precedent, emphasizing the principle of jus soli and recognizing it as a fundamental essence of the Citizenship Clause of the Fourteenth Amendment. Children born in the United States are granted automatic U.S. citizenship even if they were born to non-citizen parents.

The choice of wording in the foundation of the Fourteenth Amendment's Citizenship Clause is an unusual one because it is not specific enough to avoid different interpretations. One interpretation of "jurisdiction thereof" refers to the legal authority over persons. This refers to the United States' authority to determine the citizenship status of persons based on U.S. territory and soil, thereby giving it legal authority over them. The United States has jurisdiction or legal authority over all who are born within its physical territory and those who are naturalized because they all fall under "jurisdiction thereof." However, there are exceptions to the extent of jurisdiction: enemy forces occupying U.S. territory, accredited foreign diplomats, and historically Native Americans.[11] These examples demonstrate the limits of jurisdiction that the United States possesses, and thus, the principle of jus soli could not be applied to newborns that fell in these categories.

8. United States v. Wong Kim Ark, 169 U.S. 649, 650–53 (1898); Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

9. *Wong Kim Ark*, 169 U.S. at 653, 705 (holding that establishes and affirms birthright citizenship regardless of parents legal status based on the Fourteenth Amendment's Citizenship Clause).

10. *Id.* at 653, 705.

11. *Id.* at 682–83, 693.

The interpretation behind "jurisdiction thereof" established by judicial precedent set by *Wong Kim Ark* is further established by an older case, *Lynch v. Clarke*. Julia Lynch was born in New York City in 1819 to two undocumented individuals during their temporary stay. The three of them returned to their parents' native country that same year. Lynch returned to the United States fifteen years later to inherit real estate left to her by a relative. The New York legislature passed a bill earlier that year, which alleged that Lynch had never been naturalized and was therefore not entitled to any part of the inheritance. The Court ruled that since Lynch was born in the United States, that makes her a citizen of the United States according to common law.[12] Individuals born within the United States are unconditional citizens at birth, regardless of parental status, as dictated by common law originating in Great Britain, which served as the founding principle of the laws of the Thirteen Colonies. These rulings, rooted in common law and reaffirmed through the courts, set forth precedent that birthright citizenship is both authoritative and a constitutional right.

Despite precedent, there is still heavy legal and political discourse that continues to this day. Both critics and proponents of birthright citizenship argue on the technicalities of the wording and intent behind "jurisdiction thereof." Critics of birthright citizenship argued that the government has jurisdiction to exclude children of undocumented immigrants from birthright citizenship, due to the fact that the United States has legal authority over persons within its territories. On January 20, 2025, President Trump issued Executive Order 14160, "Protecting the Meaning and Value of American Citizenship." In this executive order, he redefined the terms of birthright citizenship, the powers vested into the federal government, and overturned decades of precedent.[13] Section 2. (a)

12. Lynch v. Clarke, 1 Sand. Ch. 583 (N.Y. Ch. 1844) (holding that those born in the U.S. are unconditional citizens despite parents' status in accordance with Great Britain common law).

13. Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025) (prohibits birthright citizenship under non-citizen parents).

states "It is the policy of the United States that no department or agency of the United States government shall issue documents recognizing United States citizenship."[14] This prohibits birthright citizenship to be granted for those who are not born under both a lawful permanent resident mother and father. The limitations on birthright citizenship that President Trump established in this executive order received backlash and resistance, with twenty-two states suing President Trump in an attempt to block the order, claiming that it is unconstitutional and it goes beyond the powers vested in the Executive and Legislative branches.[15]

II. JUDICIAL OPINIONS REGARDING THE CITIZENSHIP CLAUSE OF THE FOURTEENTH AMENDMENT

As the Supreme Court examines President Trump's executive order, the history of judicial opinions and interpretations of the Citizenship Clause was one of the justices' key talking points during their discussion in April of 2026.[16] The strongest interpretation of the Citizenship Clause, which grants citizenship to those born on U.S. soil, no matter parental status, is the conclusion in Justice Gray's judicial opinion in *Wong Kim Ark*.[17] Justice Gray states that the Constitution does not define "citizen of the United States" nor "natural-born citizen of the United States," where he references other cases to affirm his decision and explain the ambiguity within

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14. *Id.* § 2(a), 90 Fed. Reg. at 8449.

15. Mattathias Schwartz & Mike Baker, *Twenty-two States Sue to Stop Trump's Birthright Citizenship Order*, N.Y. TIMES (Jan. 21, 2025), https://www.nytimes.com/2025/01/21/us/trump-birthright-citizenship.html [https://web.archive.org/web/20260402010955/https://www.nytimes.com/2025/01/21/us/trump-birthright-citizenship.html].

16. James Romoser, Five Takeaways from the Birthright-Citizenship Hearing, WALL ST. J. (Apr. 1, 2026, 5:01 PM), https://www.wsj.com/livecoverage/supreme-court-us-birthright-citizenship-trump/card/five-takeaways-from-the-birthright-citizenship-hearing-sKAqqYlet1sDutLvWWop [https://web.archive.org/web/20260403104844/https://www.wsj.com/livecoverage/supreme-court-us-birthright-citizenship-trump/card/five-takeaways-from-the-birthright-citizenship-hearing-sKAqqYlet1sDutLvWWop].

17. United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898).

"natural-born citizen."[18] The terminology within the Constitution is heavily debated within judicial interpretations, making Justice Gray's reasoning strong evidence to protect his interpretation.

Despite Justice Gray's opinion, Chief Justice Fuller dissented in the decision of *Wong Kim Ark*. He stated that English common law should not be used to interpret the U.S. Constitution unless the latter uses the phrase and rights of the former. Furthermore, he believes that birthright citizenship differs from its English counterpart due to the varying nature of civil, status, and international principles when it comes to the United States. Chief Justice Fuller claims that citizenship involves international and political relations. Therefore, national citizenship falls under public law as a political idea, and references the case *Shanks v. Dupont* (hereinafter referred to as "*Shanks*") to conclude that this political ideology cannot be determined by common law. The case *Shanks* pertains to Thomas Scott, born in South Carolina, who held ownership over land on James Island. Scott died in 1782 and left two daughters, Ann and Mary, born in South Carolina. Ann moved to England with her British citizen husband, Joseph Shanks, where they had five children who were also British citizens before she died in 1801. The children claimed part of their grandfather's property on the grounds of the Jay's Treaty of 1794 between Great Britain and the U.S. The legal issue in this case was whether or not Ann and her children had a fair claim to Scott's land on James Island. The verdict of the case was that Ann was a British subject and had allegiance to Great Britain, and consequently, so did her children, and they were all entitled to a share of the land due to the 1794 treaty.[19] Chief Justice Fuller referenced the general rule of partus sequitur ventrem, which represents that the status of a child is determined by the mother's status, to illustrate the fact that parental status has been utilized to determine citizenship. Using this rule, he concludes

18. *Id.* at 654 (presents Justice Gray's reasoning for his interpretation of the Citizenship Clause).

19. Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 244–47 (1830); *Wong Kim Ark*, 169 U.S. at 705–06, 711–14 (Fuller, C.J., dissenting).

that the "natural-born rule" is not the only factor when it comes to citizenship, and urges that the circumstances of the parents and allegiance are considered when determining citizenship.[20]

However, Chief Justice Fuller's reasoning could be argued. Although he claims that the Citizenship Clause should not be interpreted under English common law because national citizenship for the United States involves international and political relations, English common law is also connected to political relations. The origins of citizenship in English common law can be found in *Calvin v. Smith*. In this case, Sir Edward Coke, deemed one of the most well-known jurists in England's legal history, stated that any individual born under the allegiance of a sovereign is a natural-born subject.[21] Allegiance is a political ideology, and if it is connected to birthright citizenship, English common law is inherently tied to political relations. In the end, Justice Gray's opinion was ultimately upheld by the Supreme Court. The belief that birthright citizenship does not depend on parental status, but rather on whether or not the child was born within the United States' jurisdiction. Previous cases help determine that the definition of "natural-born citizenship" is derived from common law, specifically English common law, as a precedent. Thus, partus sequitur partrem is not applicable and cannot be applied to the Citizenship Clause. Justice Gray's determination is the affirming interpretation of the Citizenship Clause of the Fourteenth Amendment.

The interpretation of the Citizenship Clause is debated by some current legal scholars. The ambiguity of "subjection to the jurisdiction thereof" is examined, claiming it illustrates a "social compact" principle in which people, in this case, the parents, must give allegiance to the nation in exchange for protection of their rights. Blackstone's 1760s commentaries are a treatise written by William Blackstone that describes 18th-century English common

20. *Wong Kim Ark*, 169 U.S. at 714 (Fuller, C.J., dissenting).
21. Calvin's Case (1608) 77 Eng. Rep. 377, (KB). (illustrates how English common law has political relations as presented in English court).

law, explaining concepts including allegiance to a sovereign and natural-born subjectship.[22] Edward Bates was the Attorney General under Abraham Lincoln, and in 1862, he issued a formal opinion interpreting United States citizenship before the Fourteenth Amendment. Specifically, the opinion addressed whether a free Black man born in the U.S. was a U.S. citizen. The opinion stated that being born in the U.S. grants citizenship, but it requires the individual's allegiance to the U.S.[23] *Wong Kim Ark* illustrates how they connected birthright citizenship to being born within U.S. allegiance, where they claim that this case allows room to interpret "subject to the jurisdiction."[24]

However, the legal scholars' argument does not apply to the Citizenship Clause in two ways. Firstly, the Citizenship Clause does not mention parental status; it focuses solely on the newborns. Secondly, the phrase "subject to" references the ability of the government to exercise power over the newborn, not parental actions. Overall, interpretations that focus on the parents' eligibility are irrelevant in the interpretation of to the Citizenship Clause because the sources and cases they use to argue their viewpoints do not apply to their arguments. The strongest interpretation, supported by legal scholars, common law, and judicial opinions, is that the Citizenship Clause guarantees citizenship to those born on U.S. soil, regardless of their parents' status.

III. COMPARING CITIZENSHIP LAWS IN CANADA AND GERMANY

A greater understanding and valuable comparison of citizenship laws can come about when comparing the United States to Canada

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22. 1 WILLIAM BLACKSTONE, COMMENTARIES 354 (describing natural allegiance as arising at birth for persons born within the king's dominions).

23. Citizenship, 10 Op. Att'y Gen. 382, 397 (1862) (a formal opinion that ties the requirement of allegiance to U.S. citizenship).

24. Vikram David Amar & Jason Mazzone, *The Birthright Citizenship Clause Means Exactly What It Says*, JUSTIA VERDICT (updated Feb. 23, 2026), https://verdict.justia.com/2025/03/10/the-birthright-citizenship-clause-means-exactly-what-it-says [https://web.archive.org/web/20260402180716/https://verdict.justia.com/2025/03/10/the-birthright-citizenship-clause-means-exactly-what-it-says].

and Germany, which have common law and civil law constitutional systems, respectively. The two countries differ in their positions and in the development of their constitutions, specifically their citizenship laws. The United States is comparable to Canada and Germany because each represents a distinct constitutional approach to citizenship and rights protections. Examining these systems alongside the Fourteenth Amendment underscores its distinctive role in constitutionally defining citizenship and structuring the scope of equal protection and due process in the United States.

The Canadian constitution was developed in two parts: the Constitution Act of 1867 and 1982, which incorporated the Canadian Charter of Rights and Freedoms.[25] These rights often refer to "citizens" without specifying exactly who is a Canadian citizen. Within citizens' constitutional guarantees, however, the constitution expresses that these rights apply only to such that "reasonable limits prescribed by law can be demonstrably justified in a free and democratic society."[26] The Charter also discusses democratic rights of citizens to vote and participate in elections.[27] Legal rights and equality rights are allotted to Canadian citizens, preventing them from unlawful search and seizure, imprisonment, and guaranteeing fair trials, as well as equality with non-discrimination based on race, sex, age, ability, or religion.[28]

Canada's definition of citizenship is set out in the Citizenship Act of 1977 and its later amendments. This law is federal legislation, not part of the Constitution. A Canadian citizen is defined as a person born on a Canadian vessel or aircraft, or a person "lawfully present and entitled to permanently reside in Canada" or has been "lawfully admitted to Canada for permanent residence."[29] This

25. Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.); Canadian Charter of Rights and Freedoms, ss. 1–2, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, c. 11 (U.K.).

26. Canadian Charter of Rights and Freedoms, s. 1.

27. *Id.* s. 3.

28. *Id.* ss. 8–11, 15.

29. Citizenship Act, R.S.C. 1985, c. C-29, s. 3(1) (Can.).

definition further applies to people who have removal orders unless they have exhausted appeals.[30] Section 15 equality rights in the Charter directly list the enumerated rights of citizens; however, they leave space for analogous rights that the court later recognizes.[31] These rights, while not specifically listed like sexual orientation and citizenship, which the court has recognized, display a flexible and evolving section of the Canadian Charter.

Compared to the United States, Canada's constitutional rights are more flexible and judicially centered. Even so, the Canadian Charter of Rights and Freedoms includes a limitations clause, whereas the United States Constitution appears more absolute, with limits developed through judicial rules rather than the constitutional text itself.[32] Canada also focuses on substantive equality, which takes into account specific applicable differences that may affect a person's life rather than applying a sweeping rule of equality. Overall, Canada's constitutional model is more specifically structured around balancing and justification, while the U.S. relies more on fixed constitutional categories and judicial precedents.

The German Constitution, known as the Grundgesetz or Basic Law, was adopted in 1949. Germany aimed to focus its constitution on ensuring human dignity and protecting rights. Article 3, commonly known as the equality clause, ensures people have equal representation before the law and cannot be disfavored based on race, sex, homeland, religion, or political opinion.[33] Similar to Canada, Germany does not define citizenship in its constitution but

30. *Id.*

31. Canadian Charter of Rights and Freedoms, s. 15, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, c. 11 (U.K.) (Canadian law guaranteeing equality rights).

32. *Id.* s. 1.

33. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW], arts. 1, 3 (Ger.). (German law guarantees human dignity and equality before the law).

in its Nationality Act, originally written in 1913. The act defines a German citizen as one born in the country, adopted, or naturalized.[34]

The German courts play a vital role in determining when rights have been infringed upon. For the government to treat these groups differently, they must pass a court review or a proportionality test.[35] They divide that decision into three elements: suitability, necessity, and proportionality. Suitability refers to whether the law or change could long term achieve the goal it states it will. Necessity focuses on making the law impede as few rights as possible. It also means the government must prove that the rights being affected will not cause people to lose privileges promised to them by law when they are altered or affected in some way in what is called proportionality.[36] While "Basic Law is silent on how to balance and evaluate conflicts of interests of different nature… case law identifies certain variables determining the standard of judicial control."[37] The courts bear the burden of determining what rights are protected under Article 3 and developing these rights over time for the German public.

Germany and the United States both have constitutions that protect due process and equality; however, they approach fundamental rights differently. In the Fourteenth Amendment, equal protection and due process are embedded in the Constitution but interpreted through judicial doctrines. Germany's Basic Law, in contrast, embeds human dignity and formal equality into its foundational principles, and when the government interferes, they must meet the proportionality test, which evaluates suitability, necessity, and balance of interests.[38] The German Federal Constitutional Court ensures no rights violations and provides a

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34. STAATSANGEHÖRIGKEITSGESETZ [StAG] [NATIONALITY ACT], § 3(1) (Ger.). (Defining German citizenship).

35. Yutaka Arai-Takahashi, *Proportionality—A German Approach*, AMICUS CURIAE, no. 19, 1999, at 11 (discussing the German proportionality test).

36. *Id.* at 12.

37. *Id.* at 12.

38. *See id.* at 12; GRUNDGESETZ [GG] [BASIC LAW], arts. 1, 3 (Ger.); U.S. CONST. amend. XIV, § 1.

centralized system for constitutional complaints in its court, allowing people to directly challenge infringements through the Federal Constitutional Court. In contrast, U.S. judicial review is decentralized and depends on the court system's pathways. Overall, Germany's citizenship is slightly more specific, balancing government interests with individual rights, whereas the U.S. emphasizes liberty as described in the Constitution and imposes limits through judicial interpretation.

When comparing the constitutional protections of citizens in Canada, Germany, and the United States, several similarities emerge in their approaches to equality, due process, and citizenship. Across all three countries, constitutions serve as the main legal framework for defining the rights and limitations on governments. In the United States, the Fourteenth Amendment guarantees equal protection under the law and due process, creating the basis for individual rights. Canada's Charter of Rights and Freedoms has a more flexible framework through Section 1, which allows rights to be limited if they can be justified in a free and democratic society. Germany's Basic Law emphasizes human dignity as the foundational principle for all rights, and the court uses a proportionality framework to assess whether government actions are justified. Together, these three constitutions demonstrate how democracies choose to balance individual freedoms, but each does so through different methods shaped by political, historical, and legal contexts.

One area of comparison is how each system defines and protects equality. The U.S. Fourteenth Amendment relies on judicial interpretation, through doctrines and strict scrutiny, to determine whether laws violate equal protection. While the text itself guarantees equality, the court determines its practical application through precedent rather than the Constitution's explicit language. Canada's Charter explicitly lists protected rights in Section 15, including race, sex, and ability, but also leaves room for the courts to recognize, over time, other forms of inequality that may not have been mentioned. Germany's Article 3 similarly guarantees equality and prohibits discrimination, but the German system places greater emphasis on judicial review, ensuring that any differential treatment meets its proportionality test.

Due process and protection offer another lens for comparison. In the United States, due process is enshrined in the Fourteenth Amendment, but its application depends on judicial interpretation. Canada, however, embeds due process in the Charter, allowing it to limit rights. This test explicitly weighs the benefits to society against the cost of the freedom lost. Germany's system goes even further by combining the principles of human dignity and the rule of law with judicial review, evaluating the suitability, necessity, and proportionality of governmental interference. This makes Germany's enforcement of due process particularly structured and consistent, while the U.S. system relies more on litigation through various levels of courts, and Canada requires government justification for limitations.

Another perspective is how each system understands citizenship and the rights that come with it. In the United States, the Fourteenth Amendment defines citizenship as being born or naturalized in the country, an idea that is then linked to fundamental rights. In Canada, however, citizenship is not defined in the constitution, but is defined through the Citizenship Act of 1977, with the Charter providing protections that apply specifically to citizens and allowing for adaptations through judicial interpretation. Germany, like Canada, does not define citizenship in its constitution; it is defined by the Nationality Act. The Basic Law focuses on protecting citizens' rights without defining who a citizen is. These differences illustrate how constitutions can define citizenship by describing their people's basic rights, as in the U.S., or by allowing other laws and judicial interpretation to define citizenship, as in Germany and Canada.

IV. DIPLOMATIC IMMUNITY – AN EXCEPTION TO CITIZENSHIP

To determine who qualifies as "subject to the jurisdiction" of the United States, one must consider both the intended scope of "jurisdiction," the current political climate, and, though few remain, historically recognized exceptions. With that, one notable exception is for children born in the United States to foreign diplomats. Although this exclusion from automatic, birthright citizenship is very narrow, it helps clarify the constitutional meaning of complete jurisdiction. Evaluating the history of the exception for diplomats reveals that the bar to birthright citizenship ultimately rests on international law.

When the United States constitutionalized birthright citizenship through the Fourteenth Amendment, the drafters retained the common-law interpretation of "jurisdiction," writing it to encompass not only physical presence, but to establish a standard of legal subjection and allegiance.[39] With that, through the interpretation of "jurisdiction," the Fourteenth Amendment carried forward the traditional English common-law exceptions, most relevantly those for children of foreign sovereigns and diplomatic agents. The legal and citizenship limits faced by diplomats were originally written in the Law of Nations in 1758, and then later codified in treaties such as the 1961 Vienna Convention on Diplomatic Relations, it was written that a foreign diplomatic agent is granted the right to "enjoy immunity from its civil and administrative jurisdiction."[40] Meaning their official acts and persons, except for the subsequently listed cases, fall outside of their host country's jurisdiction as they are not subject to local prosecution, taxation, or other legal constraints. Due to such

39. Peter H. Schuck & Rogers M. Smith, *The Question of Birthright Citizenship*, NAT'L AFFS. (Summer 2018), https://www.nationalaffairs.com/publications/detail/the-question-of-birthright-citizenship [https://web.archive.org/web/20260330145320/https://www.nationalaffairs.com/publications/detail/the-question-of-birthright-citizenship].

40. Vienna Convention on Diplomatic Relations arts. 29, 31(1), 34, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

practices, host countries and states have historically treated foreign diplomats, and by extension their respective families and children, as lacking the full state authority of the host country. The diplomatic exception highlights that "jurisdiction" in the Citizenship Clause refers to legal subjection to U.S. law rather than geographic presence, revealing a deeper, historic principle: citizenship should depend on political and legal allegiance rather than solely on one's birthplace.

Additionally, evident in the proceedings of the *Wong Kim Ark*, the case explicitly stated that the mother and father of Wong "were never engaged in any diplomatic or official capacity."[41] The diplomatic exception is a very limited and specific carve-out in the law. By applying the diplomatic exception in strict and particular circumstances to the fundamental rule of jus soli, the U.S. Supreme Court ultimately affirmed that the Fourteenth Amendment was declaratory of existing common-law standards rather than a radical departure from historical norms.

Furthermore, the diplomatic exception is codified in U.S. immigration law and administrative practices. For example, according to the policy of the U.S. Citizenship and Immigration Services (USCIS), a child who is born in the United States to an accredited foreign diplomatic officer does not qualify for U.S. citizenship under the Fourteenth Amendment, due to the fact that the child is not "subject to the jurisdiction" at birth.[42] If the respective child wishes to become a citizen, they must apply to be registered for lawful permanent residence. However, this could only be done if the diplomatic status is verified and a separate set of conditions is met. The implemented regulations reflect the

41. United States v. Wong Kim Ark, 169 U.S. 649, 653, 655–58, 693 (1898).

42. 8 C.F.R. § 101.3(a)(1), (d) (2026); U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, vol. 7, pt. O, ch. 3, *Children Born in the United States to Accredited Diplomats*, https://www.uscis.gov/policy-manual/volume-7-part-o-chapter-3 [https://web.archive.org/web/20260104143203/https://www.uscis.gov/policy-manual/volume-7-part-o-chapter-3].

functional compromise that results from this exception, as while denied automatic citizenship, the path to permanent residency and the subsequent process is available to all.

Reflecting on the current debates over the status of birthright citizenship, mainly centered on that which is held by children born to undocumented immigrants or temporary visa holders, the diplomatic exception serves as a constitutional boundary and an interpretive baseline. The exception stems from the unique immunities afforded to foreign diplomats under international law, which exempts them from U.S. jurisdiction. This categorical distinction sets them apart from nearly all other non-citizen residents, who, regardless of their immigration status, remain subject to U.S. law. Logically, as foreign diplomats are insulated, their U.S.-born children fall outside the Fourteenth Amendment's "complete" jurisdiction. In contrast, the children of undocumented or temporary residents are "subject to the jurisdiction," just like their parents.[43]

Therefore, modern courts and legal scholars treat the diplomatic exception as a narrow and historically grounded carve-out rooted in international law immunity, not a precedent for broader exclusions. In recent litigation challenging executive attempts to limit birthright citizenship, *Trump v. CASA, Inc.* (2025), federal judges have repeatedly emphasized the distinction between diplomatic immunity and ordinary immigration situations, citing this difference as evidence that the exception cannot be analogized. Thus, far from supporting efforts to curtail jus soli, the diplomatic exception demonstrates that the criteria for falling outside the Amendment's jurisdiction are specific and narrow, based on individual circumstances and the application of law.

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43. Plyler v. Doe, 457 U.S. 202, 210, 215 (1982); Rachel Reed, Can Birthright Citizenship Be Changed?, HARV. L. TODAY (Jan. 24, 2025), https://hls.harvard.edu/today/can-birthright-citizenship-be-changed/ [https://web.archive.org/web/20260127014737/https://hls.harvard.edu/today/can-birthright-citizenship-be-changed/].

CONCLUSION

The debates about birthright citizenship ultimately return to the words anchored in the Fourteenth Amendment. From the Reconstruction Era to the present, the courts have interpreted the words “jurisdiction thereof” as the line of separation in determining who belongs as a citizen of the country and who remains outside of it. The cases that shaped the doctrine, *Elk v. Wilkins* and *Wong Kim Ark,* show how much weight the framers of the Constitution put on the laws used. While opinions differ over what Congress and the executive branch mean by citizenship, judicial precedents continue to interpret "jurisdiction thereof” broadly, grounding birthright citizenship on the principle of jus soli.

Comparisons to other constitutional systems, such as those of Canada and Germany, highlight the ways different countries handle citizenship and the rights associated with each respective country. They also make it clearer the uniqueness of the United States' approach to citizenship. Unlike other countries that rely on balancing tests or additional laws, the United States ties citizens clearly to the constitutional text. This understanding, being based on text, allows meaning to be understood through precedent rather than judicial or legislative revisions. The Fourteenth Amendment was designed to be strong and concise, but its implications are far-reaching.

Recent policy efforts have attempted to narrow that principle while also discussing how the doctrine has been established. Attempts to reinterpret “jurisdiction thereof” in an attempt to exclude certain groups come into conflict with cases that originally defined the clause. The Supreme Court continues to assert that the amendments guarantee independence from parents' legal status or changing political agendas and instead focus on the fact of being born within the United States territory or under its authority.

NOTE

EVALUATING THE EFFECTIVENESS OF GLOBAL ENVIRONMENTAL TREATIES: BALANCING SOVEREIGNTY AND SUSTAINABILITY IN AN ERA OF CLIMATE LITIGATION

Arianna Marzolf, Arshia Chakravartti, Jasmin Ko, Marcus Gonzalez

The global climate crisis has inspired intense diplomatic efforts in the form of multilateral treaties to advance both climate mitigation and adaptation to this international threat. Yet, these efforts often face fierce resistance from climate-skeptic countries and companies that undermine the effectiveness of global environmental treaties through lobbying, anti-environment litigation, and misinformation. Despite extensive rhetoric endorsing the Sustainable Development Goals and environmental protection, these treaties have, in certain areas, failed to achieve substantial change. To understand how environmental treaties function in practice, it is imperative to analyze the successes and failures of different ecologically driven treaties. Robust data collection systems, attention to intersectional impacts, and sustained, incentive-aligned collaboration among states are consistently associated with high levels of compliance, more effective implementation, and measurable environmental outcomes in international climate governance. It is necessary to examine a wide range of international environmental treaties, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Ramsar Convention, the Amazon Cooperation Treaty Organization, and the Minamata Convention. Furthermore, treaties vary in terms of member-state participation, enforcement strategies, and the issues they were created to address, to identify broader trends. This reframing has significant implications for how policymakers, academics, and international institutions design and evaluate environmental agreements, suggesting that prioritizing adaptability, information transparency, and inclusive and timely participation may yield more durable and effective forms of global climate governance. This analysis is not

solely a critique of these statutes; it also acknowledges the parts that are effective while simultaneously condemning the less effective functions.

INTRODUCTION

For the past several decades, international treaties have been the subject of controversy and scrutiny. Many of these international agreements operate as forms of soft-law, meaning they rely on nonbinding commitments, voluntary compliance, and normative pressure rather than enforceable legal obligations. Despite widespread adoption, a 2022 analysis of 250,000 treaties found that a majority were not achieving their intended goals.[1] Biodiversity has continued to diminish, with "about 30% of species have been globally threatened or driven to extinction since the year 1500" despite efforts to mitigate it.[2] Rather than dismissing these treaties as ineffective, it is important to examine how soft-law structures may continue to influence environmental governance by indirect means.

The past United Nations Climate Change Conference (hereinafter referred to as "COP30") in Belém, Brazil, demonstrated

1. Steven J. Hoffman et al., *International Treaties Have Mostly Failed to Produce Their Intended Effects*, 119 PROC. NAT'L ACAD. SCI. U.S.A. e2122854119, at 1 (2022).
2. Forest Isbell et al., *Expert Perspectives on Global Biodiversity Loss and Its Drivers and Impacts on People*, 21 FRONTIERS ECOLOGY & ENV'T 94, 95 (2023).

the ever-increasing importance of alleviating climate-driven issues that impact natural ecosystems and human communities. This major annual event illustrates how party states engage in United Nations Framework Convention on Climate Change (UNFCCC) negotiations to advance efforts in mitigating global climate-related issues. It is important to note that COP30 has proposed certain improvements that address global environmental issues, such as committing to a triple adaptation finance and aligning financial flow with low greenhouse gas emissions and climate-resilient development.[3] Despite this, the summit concluded with no clear sight into how to shorten the gap between environmental ambition and evidence-backed reductions. This outcome reflects the continued influence of fossil fuel-dependent states in shaping negotiation outcomes, particularly in limiting the adoption of more stringent, evidence-based emissions reduction commitments.[4] Although parties acknowledged the need to curb fossil fuel dependence, the final agreement deferred meaningful action to future negotiations and imposed no timelines or enforcement mechanisms.[5]

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3. *COP30 Debrief on Relevant Outcomes and Opportunities in 2026*, U.N. CONF. ON TRADE & DEV. (Feb. 16, 2026), https://unctad.org/meeting/cop30-debrief-relevant-outcomes-and-opportunities-2026-0 [https://web.archive.org/web/20260208174812/https://unctad.org/meeting/cop30-debrief-relevant-outcomes-and-opportunities-2026-0] (summarizing COP30 negotiation outcomes, including commitments related to adaptation finance and efforts to align global financial flows with low-emission and climate-resilient development pathways).

4. UNEP, EMISSIONS GAP REPORT 2025 (2025), https://www.unep.org/resources/emissions-gap-report-2025 [https://web.archive.org/web/20251104162401/https://www.unep.org/resources/emissions-gap-report-2025#main-content] (finding that current national emissions reduction commitments remain insufficient to meet internationally agreed climate goals).

5. Press Release, Eur. Parl., *COP30 Outcome: Slow Progress, but Insufficient to Meet Climate Crisis Urgency* (Nov. 23, 2025), https://www.europarl.europa.eu/news/en/press-room/20251117IPR31438/cop30-outcome-slow-progress-but-insufficient-to-meet-climate-crisis-urgency [https://web.archive.org/web/20251123150815/https://www.europarl.europa.eu/news/en/press-room/20251117IPR31438/cop30-outcome-slow-progress-but-insufficient-to-meet-climate-crisis-urgency].

Effectiveness in environmental treaties refers to whether treaty frameworks meaningfully constrain environmentally harmful behavior rather than merely expressing shared intent. Soft-law treaties, by definition, rely on voluntary compliance and decentralized enforcement, which can both limit collective action and provide states with flexibility to adapt agreements to regional contexts. This dynamic is exemplified in treaties such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which uses trade restrictions and reporting requirements to discourage species exploitation despite uneven enforcement: the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat, which promotes conservation through site designation and international cooperation rather than coercive penalties, the Amazon Cooperation Treaty Organization, which facilitates regional coordination on deforestation and biodiversity protection while preserving state sovereignty, and the Minamata Convention, which relies on national implementation and regulatory systems to reduce mercury pollution. These agreements are especially relevant because they address distinct environmental issues, ranging from species protection to mercury pollution, while sharing a common reliance on weak or decentralized enforcement mechanisms. Their design demonstrates how soft-law approaches can influence state behavior indirectly, through mechanisms such as data reporting, collaborative frameworks, and normative pressure, even in the absence of binding legal authority.

While weak enforcement mechanisms across all four described treaties tend to undermine collective action and environmental conservation, they also offer countries opportunities to adapt generalized language to their specific regional contexts. Soft-law environmental treaties should be evaluated not solely by their enforcement capacity, but also by their ability to generate a convergence of standards, institutional learning, and sustained compliance.

I. CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA

To evaluate the effectiveness of CITES, it is crucial to focus on its enforcement mechanisms, capacity for timely action, consistency of compliance across a large number of member states, and vulnerability to external political and economic pressures. These factors are best understood within the broader environmental movement of the late 1900s, which led to the creation of international agreements like CITES. The 1970s were marked by a significant push towards progressive environmental policies, especially in the United States. The 1969 Santa Barbara oil spill,[6] a high-profile environmental disaster, and Rachel Carson's *Silent Spring*[7], brought public attention to the dangers of pesticides and toxic substances. It also led to large civilian mobilization, primarily on Earth Day 1970. Organized by Senator Gaylord Nelson, the protest united approximately twenty million Americans in environmental activism. The efforts of the public created significant political pressure for key government figures.[8]

CITES aims to regulate and restrict the global trade of endangered and threatened species. However, its effectiveness is relatively limited by weak internal enforcement mechanisms, such as the reliance on self-reporting and minimal penalties for breaking

6. UNIV. OF CAL., SANTA BARBARA, SANTA BARBARA OIL POLLUTION, 1969: A STUDY OF THE BIOLOGICAL EFFECTS OF THE OIL SPILL WHICH OCCURRED AT SANTA BARBARA, CALIFORNIA IN 1969 (prepared for Fed. Water Quality Admin., Dep't of the Interior, Program No. 15080 DZR 10/70, Oct. 1970), https://nepis.epa.gov/Exe/ZyPDF.cgi/9101CQ8N.PDF?Dockey=9101CQ8N.PDF [https://web.archive.org/web/20260426045548/https://nepis.epa.gov/Exe/ZyPDF.cgi/9101CQ8N.PDF?Dockey=9101CQ8N.PDF] (documenting the 1969 Santa Barbara oil spill as a major environmental disaster that contributed to an increase in public attention, leading to more federal attention to environmental protection issues in the U.S.).

7. RACHEL CARSON, SILENT SPRING (1962) (describing the environmental and ecological harms caused by widespread pesticide usage and contributing to modern environmental awareness in the U.S.).

8. Jack Lewis, *The Spirit of the First Earth Day*, 16 EPA J. 8, (Jan./Feb. 1990), (describing the origins of Earth Day as a mass public mobilization that elevated environmental protection into a national political priority).

the agreement. There are also external political factors, such as the European Union's single market, which facilitates barrier-free trade across several borders.[9] This makes it more difficult to track and regulate the movement of endangered species once they enter these markets. It also allows illegal trade to persist despite formal protections, ultimately undermining the treaty's ability to achieve its conservation goals.[10]

The creation of CITES required the effort and dedication of many professionals and was officially proposed to the 1963 General Assembly of the IUCN in Nairobi.[11] The proposal launched decades of negotiations and compromises, eventually ending in Washington, D.C., when the treaty was finalized in March 1973. Thereupon, only eighty countries agreed to abide by CITES. Today, one hundred and eighty-five parties have adopted the treaty, meaning only ten countries have not.[12]

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9. *What is CITES*, CITES, https://cites.org/eng/disc/what.php [https://web.archive.org/web/20220105191801/https://cites.org/eng/disc/what.php] (explaining that CITES regulates international trade in endangered species through a system of permits and appendices designed to prevent extinction); ELIZABETH H. FLEMING, THE IMPLEMENTATION AND ENFORCEMENT OF CITES IN THE EUROPEAN UNION: A TRAFFIC EUROPE DISCUSSION PAPER 3–5 (1994), https://www.traffic.org/site/assets/files/10208/cites-in-the-european-union.pdf [https://web.archive.org/web/20240101000000/https://www.traffic.org/site/assets/files/10208/cites-in-the-european-union.pdf]

10. U.N. OFF. ON DRUGS & CRIME, WORLD WILDLIFE CRIME REPORT 2020: TRAFFICKING IN PROTECTED SPECIES (2020), https://www.unodc.org/unodc/en/data-and-analysis/wildlife.html [https://web.archive.org/web/20220401000000/https://www.unodc.org/unodc/en/data-and-analysis/wildlife.html] (analyzing how transnational criminal networks, weak enforcement, and corruption enable illegal wildlife trafficking).

11. SPECIES SURVIVAL COMM'N, INT'L UNION FOR CONSERVATION OF NATURE, GUIDELINES FOR SSC MEMBERS ON ENGAGING IN CITES 1 (2022), https://www.iucn.org/sites/default/files/2022-07/20-iucn-ssc-guidelines-cites.pdf [https://web.archive.org/web/20240101000000/https://iucn.org/sites/default/files/2022-07/20-iucn-ssc-guidelines-cites.pdf] (outlining the role of scientific experts in advising CITES decision-making and supporting species conservation through evidence-based assessments).

12. *CITES FAQs*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/question-answer/cites-faqs [https://web.archive.org/web/20260101000000/https://www.fws.gov/question-answer/cites-faqs] (explaining how CITES permit requirements operate in practice

The assembly recognized that there was a significant need for "an international convention on the regulation of export, transit and import of rare or threatened wildlife species or their skins and trophies."[13] The assembly's recognition of the need for a treaty such as this proves that, even in the early 1960s, unregulated international trade was already posing serious threats to rare and endangered species. The treaty being ratified in nearly every nation makes it one of the most widely adopted international environmental agreements and demonstrates a global acknowledgment of the risks posed.[14]

CITES utilizes a classification system explained by three appendices, each representing different levels of risk and corresponding measures of protection. Appendix I reflects the treaty's strongest regulatory mechanism, prioritizing species facing the highest risk of extinction by imposing near-total bans on international commercial trade. This category includes approximately one thousand one-hundred twenty-four (~1,124) animal species and requires strict import and export permits before any transfer can occur.[15] To obtain approval, both the exporting

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and how the United States implements treaty obligations through domestic enforcement mechanisms).

13. Int'l Union for Conservation of Nature [IUCN], Res. 5, *Resolution on Illegal Traffic in Wildlife Species* (1963), https://portals.iucn.org/library/sites/library/files/resrecfiles/GA_08_RES_005_Resolution_on_illegal_traffic_in_wil.pdf [https://web.archive.org/web/20240616124220/https://portals.iucn.org/library/sites/library/files/resrecfiles/GA_08_RES_005_Resolution_on_illegal_traffic_in_wil.pdf], *quoted in* C. de Klemm & D. Navid, *Crocodilians and the Law*, *in* CROCODILES: THEIR ECOLOGY, MANAGEMENT, AND CONSERVATION 80, 97 (1989), https://portals.iucn.org/library/sites/library/files/documents/NS-1989-001.pdf [https://web.archive.org/web/20240101000000/https://portals.iucn.org/library/sites/library/files/documents/NS-1989-001.pdf] (providing a comprehensive specialist-group guidance on wildlife management and conservation practices relevant to international efforts to regulate trade in endangered species).

14. CITES FAQs, *supra* note 12.

15. EUR. COMM'N & TRAFFIC, REFERENCE GUIDE TO THE EUROPEAN UNION WILDLIFE TRADE REGULATIONS 14 tbl.1 (2024), https://www.ymparisto.fi/sites/default/files/documents/CITES%20Reference%20Guide_July%202024_clean%20final_0_0.pdf [https://web.archive.org/web/20260330000142/https://www.ymparisto.fi/sites/default/files/documents/CITES%20Reference%20Guide_July%202024_clean%20final_0_0.pd

state's CITES Management Authority and Scientific Authority must determine that the trade will not be detrimental to the species survival, the species was not illegally acquired, and that it will be transported and housed humanely; in many cases, the importing state must also issue authorization.[16] Iconic species such as rhinoceroses, elephants, and tigers are listed in Appendix I, which makes the commercial trade in poached materials, most notably ivory, skins, and horns, explicitly illegal under international law.[17] By concentrating its most stringent restrictions on the most vulnerable species and requiring oversight from designated national institutes, Appendix I illustrates both the ambition and limitations of CITES. Although the treaty establishes strong formal protections on paper, its effectiveness ultimately depends on uneven domestic enforcement and state willingness to comply.

Appendix II includes species that are not currently facing extinction, but could if there were no strict trade regulations. This classification makes up the majority of the listed flora and fauna, totaling approximately thirty-nine thousand. Trading in this category is allowed only with proper permits.[18] Appendix III has the smallest number of species, totaling approximately five-hundred thirty. This category is specific to a nation's request for international regulation of the listed species. The process of adding or removing species from these appendices requires a two-thirds majority vote at

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f]; Convention on International Trade in Endangered Species of Wild Fauna and Flora art. III, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES], https://cites.org/eng/disc/text.php [https://web.archive.org/web/20260421222340/https://cites.org/eng/disc/text.php] (establishing that international trade in Appendix I species is permitted only under strict conditions requiring prior export and import permits based on findings of non-detriment and lawful acquisition).

16. CITES, *supra* note 15, arts. III(2)–(3), IX(1).

17. *Checklist of CITES Species*, CITES, https://checklist.cites.org/ [https://web.archive.org/web/20260418211053/https://checklist.cites.org/#/en]; CITES, *supra* note 15, art. III(2)(b), (3)(b).

18. EUR. COMM'N & TRAFFIC, *supra* note 15, at 14 tbl.1, 16.

the Conference of the Parties, which convenes once every three years.[19]

This three-appendix classification system is intended to balance conservation protection with international trade regulation, though each appendix affects the treaty's effectiveness differently. For instance, while Appendix I provides the strongest safeguards for species on the brink of extinction by prohibiting all international commercial trade, its narrow scope implies that the level of protection is merely an afterthought as a result of severe population decline.[20] Furthermore, Appendix II, the largest of the three, aims to prevent future endangerment by allowing trade subject to strict regulation, but the flexible nature of enforcement processes creates challenges when considering criminals' ability to falsify permits or mislabel species.[21] Additionally, Appendix III relies on nations' vigilance and desire to request international assistance in regulating new species, yet it does not account for political factors that may prevent this or result in inconsistent or uneven efforts. The requirement of a two-thirds majority to amend this treaty, while enhancing its legitimacy, provides another significant hurdle regarding timely action in response to ever-escalating threats.[22]

Since the treaty largely relies on self-reported compliance and its one-hundred eighty-five member states with minimal consequences for violations, illegal wildlife trafficking often goes undetected. These issues are exacerbated in poorer nations due to

19. CITES, *supra* note 15, art. XV(1)(b); CITES FAQs, *supra* note 12.

20. *Appendices*, CITES, https://cites.org/eng/app/appendices.php [https://web.archive.org/web/20250101000000/https://cites.org/eng/app/appendices.php] (providing the official classification of species under Appendices I, II, and III, which determines the level of protection and trade restrictions under Cites).

21. EUR. COMM'N & TRAFFIC, *supra* note 15, at 105.

22. CITES, *supra* note 15, art. XV(1)(b); *Outline of Possible Amendments to Wildlife Trade Laws*, END WILDLIFE CRIME, https://endwildlifecrime.org/cites-amendments/ [https://web.archive.org/web/20240228193902/https://endwildlifecrime.org/cites-amendments/] (last visited Apr. 26, 2026). (describing the procedural process by which species are proposed for inclusion in or removal from CITES Appendices through Conference of the Parties voting and member state consensus mechanisms).

underfunded enforcement agencies, making enforcers less efficient and more likely to accept bribes, allowing illegal trade to continue or overlooking regulation violations, a vulnerability shown in corruption risk assessments of wildlife enforcement agencies.[23] However, other member states occasionally provide donations and funding to these struggling countries. Still, this gap between ambitious conservation goals and inadequate accountability remains, effectively diminishing the credibility of the treaty, revealing a central limitation of environmental soft-law. While treaties like CITES establish shared norms and expectations, they struggle to produce fully functional outcomes and uniform compliance when they lack robust and enforceable obligations.[24]

CITES was adopted more than a decade after its proposal. This delay was largely due to prolonged international negotiations and the need to reconcile competing interests among the large number of participating states. The lengthy process of ratifying global environmental treaties allowed for twelve additional years of unregulated trade in endangered species.[25] It is impossible to know how many species were subjected to mistreatment and extinction

23. Manuel Medina et al., *Where Are the Weakest Links in the Illegal Wildlife Trade Enforcement Chain? Lessons from Corruption Risk Assessments with Agencies in Three Countries*, WORLD WILDLIFE FUND (Apr. 2022), https://www.worldwildlife.org/pages/tnrc-where-are-the-weakest-links-in-the-illegal-wildlife-trade-enforcement-chain-lessons-from-corruption-risk-assessments-with-agencies-in-three-countries [https://web.archive.org/web/20251016125100/https://www.worldwildlife.org/pages/tnrc-where-are-the-weakest-links-in-the-illegal-wildlife-trade-enforcement-chain-lessons-from-corruption-risk-assessments-with-agencies-in-three-countries] (finding that corruption risks and under-resourced enforcement institutions in wildlife crime governance systems contribute to weak detection, inconsistent enforcement, and increased opportunities for illicit trade).

24. BASEL INST. ON GOVERNANCE, WILDLIFE CRIME—UNDERSTANDING RISKS, AVENUES FOR ACTION. PART 2: ILLEGALITY IN THE EXOTIC PET TRADE 14–17 (2021), https://baselgovernance.org/sites/default/files/2021-05/Part%202%20Illegality%20in%20the%20pet%20trade.pdf [https://web.archive.org/web/20240501000000/https://baselgovernance.org/sites/default/files/2021-05/Part%202%20Illegality%20in%20the%20pet%20trade.pdf] (documenting how enforcement gaps and resource constraints in wildlife trade regulation enable continued illicit activity despite formal legal frameworks and conservation commitments).

25. *What is CITES*, *supra* note 9.

during this time. Furthermore, it is known now that CITES provides "...varying degrees of protection to more than 40,000 species of animals and plants, whether they are traded as live specimens, fur coats or dried herbs."[26] This raises the question of how many species could have been protected if this delay had been prevented. Without strict enforcement, preventing the circumvention of this treaty becomes a fundamental challenge, leaving many species vulnerable. The safeguards currently in place, primarily search and seizure along borders as well as checking for required trading permits, can be infrequent and are often sporadic.[27]

European countries, in particular, face greater difficulty in properly enforcing this treaty's provisions. This is largely due to the European Union (EU) and the establishment of the Single Market, which allows free trade throughout the union. This union makes crossing borders within the EU, composed of twenty-eight countries, significantly easier, as citizens are allowed free movement and required to provide only one form of identification. Furthermore, the common currency makes unregulated trade even more difficult to track for authority bodies, increasing the risk of trafficked species moving undetected across borders.[28]

Criminal networks continuously exploit weak border patrol, falsify permits, mislabel shipments, and smuggle protected species.[29] Traffickers have also been known to fabricate the means by which they obtained a certain species, such as claiming wild-caught animals were captive-bred, to avoid restrictions. Even when shipments are intercepted, prosecution is often inconsistent or

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26. *What is CITES*, *supra* note 9.
27. BASEL INST. ON GOVERNANCE, *supra* note 24, at 13–14.
28. FLEMING, *supra* note 9, at 3–5.
29. Michelle Anagnostou & Brent Doberstein, *Illegal Wildlife Trade and Other Organized Crime: A Scoping Review*, 51 AMBIO 1615, 1618–20 (2022), https://doi.org/10.1007/s13280-021-01675-y [https://web.archive.org/web/20240418124533/https://link.springer.com/article/10.1007/s13280-021-01675-y] (identifying common methods used in illegal wildlife trade networks, including exploitation of weak border enforcement, falsification of permits, mislabeling of shipments, and smuggling of protected species through transnational criminal routes).

minimal, which does little to deter this lucrative crime, generating approximately twenty billion dollars annually.[30]

On black-market sites, the demand for rare, exotic, and luxury items derived from endangered species sustains illegal practices such as poaching and trading. In the eyes of the perpetrators, bribery or the risk of being caught is seen merely as a business cost, especially when considering the payouts for this illegal trade often surpass the funding for conservation enforcement. Without addressing the underlying economic motivations for the supply and demand of these endangered species, the treaty can only be as successful as the market allows for.[31]

II. RAMSAR CONVENTION ON WETLANDS OF INTERNATIONAL IMPORTANCE ESPECIALLY AS WATERFOWL HABITAT

Similar to CITES, the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat (hereinafter the "Ramsar Convention"), is an international environmental treaty developed in the 1970s, coinciding with the global push for environmental concern and conservation efforts.[32]

30. BASEL INST. ON GOVERNANCE, *supra* note 24, at 14; *30,000 Live Animals Seized in Global Operation Against Wildlife and Forestry Crime*, INTERPOL (Dec. 11, 2025), https://www.interpol.int/en/News-and-Events/News/2025/30-000-live-animals-seized-in-global-operation-against-wildlife-and-forestry-crime [https://web.archive.org/web/20260426202035/https://www.interpol.int/en/News-and-Events/News/2025/30-000-live-animals-seized-in-global-operation-against-wildlife-and-forestry-crime] ("Estimates put the annual value of wildlife crime at USD 20 billion, but the clandestine nature of the trade suggests that the real figure is likely much higher.").

31. *From Poaching, Trafficking, To Demand. Wildlife Crime Explained*, WORLD WILDLIFE FUND, https://www.worldwildlife.org/threats/illegal-wildlife-trade [https://web.archive.org/web/20260101000000/https://www.worldwildlife.org/our-work/wildlife/wildlife-crime/] (explaining how demand for wildlife products, combined with high illicit profits and relatively low risks of legal consequences, drives poaching and transnational illegal wildlife trade markets).

32. *Why the Ramsar Convention on Wetlands Matters More Than Ever*, WILDFOWL & WETLANDS TRUST (2021), https://www.wwt.org.uk/discover-wetlands/blog/why-the-ramsar-convention-on-wetlands-matters-more-than-ever [https://web.archive.org/web/20250901000000/https://www.wwt.org.uk/discover-

While CITES encompasses an overarching and broader base for protecting flora and fauna, the Ramsar Convention is a wetlands-specific framework that emphasizes the importance of protecting and sustainably managing wetlands, which have been identified as a key element of natural ecosystems. This treaty is binding, meaning that the Contracting Parties (member states that have joined the treaty) are under the obligation to ensure protection to designated wetlands and to adhere to the frameworks and directions detailed in the official text. Despite overall global participation in preserving these critical aspects of the ecosystem, due to its legal grounding in soft-law, this convention has little enforcement power. This complication once again brings into question the effectiveness and actionability of international treaties.

When authorities of domestic and international scales examine environmental issues, the headlining topics usually turn to marine protection, the regulation of toxic waste, and large-scale issues like deforestation. In the case of the Ramsar Convention, this treaty emphasizes the importance of wetlands on an international scale. This scale is seen in the number of member states that have joined this intergovernmental treaty. To date, one hundred seventy-three states have joined this treaty. Australia was the first signatory in 1974 when it designated the Cobourg Peninsula in the Northern Territory as a Ramsar site.[33]

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wetlands/blog/why-the-ramsar-convention-on-wetlands-matters-more-than-ever] (explains the origins of the international treaty and why wetlands are vital ecosystems).

33. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, 11 I.L.M. 963 (1972) [hereinafter Ramsar Convention] (states the direct contents of the ratified international treaty and includes the specific number of signatories and States Parties); Denunciation of the Convention by the Russian Federation, CONVENTION ON WETLANDS CONTACTS DATABASE (Dec. 22, 2025), https://contacts.ramsar.org/notification/view/3366; Australia Celebrates 50th Anniversary of the World's First Ramsar Wetland, AUSTL. DEP'T OF CLIMATE CHANGE, ENERGY, ENV'T & WATER (May 8, 2024), https://www.dcceew.gov.au/about/news/australia-celebrates-50th-anniversary-worlds-first-ramsar-wetland.

Upon the treaty's entrance into active enforcement in 1975, the Convention on Wetlands, commonly known as the Ramsar Convention, became "the first modern multilateral treaty aiming to conserve natural resources on a global scale."[34] Although a small component in larger environmental contexts, these ecosystems are often overlooked despite their central ecological role and their importance to human communities. The United States Environmental Protection Agency (EPA) has recognized the importance of wetlands, not just for the food webs that reside within and around them, but also for the ways wetlands benefit people. The official EPA site lists those benefits, noting that wetlands provide "natural water quality improvement, flood protection, shoreline erosion control, opportunities for recreation and aesthetic appreciation, and natural products for our use at no cost."[35]

Examining the specific frameworks and details that serve as obligations for the Contracting Parties, Article 2 emerges as one of the main actionable aspects of the convention. As stated in the treaty's text, this article outlines the requirements for member states to take primary steps in protecting wetlands designated as of international importance. The article states as follows:

> 1. "Each Contracting Party shall designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance, hereinafter referred to as 'the List' which is maintained by the bureau established under Article 8. The boundaries of each wetland shall be precisely described and also delimited on a map and they may incorporate riparian and coastal zones adjacent to the wetlands, and islands or bodies of

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34. David Farrier & Linda Tucker, *Wise Use of Wetlands Under the Ramsar Convention: A Challenge for Meaningful Implementation of International Law*, 12 J. ENV'T L. 21, 21 (2000) (outlines the legal grounding of the treaty and the implications it has in performing its intended goal of ecological protection).

35. *Why Are Wetlands Important?*, U.S. EPA (July 23, 2025), https://www.epa.gov/wetlands/why-are-wetlands-important [https://web.archive.org/web/20260420011319/https://www.epa.gov/wetlands/why-are-wetlands-important].

> marine water deeper than six meters at low tide lying within the wetlands, especially where these have importance as waterfowl habitat."[36]

While this article explicitly states the guidelines for identifying, designating, and incorporating important wetlands into this multilateral treaty, the implementation of such guidelines is only partially effective. This systematic and structured format for ensuring conservation has its benefits, but there are also drawbacks that should be examined. Due to the reliance on soft-law techniques, there is a lack of an overarching authority that can ensure the compliance of Contracting Parties. The absence of such an entity cultivates an honor system that relies on the proactivity of states and governments. The convention's weak enforcement capacity, in terms of how Contracting Parties should act to mitigate the encroachment on wetlands, reveals a flaw. While a severe level of attention has been placed on the listing process of these critical wetlands, "the Convention focuses narrowly on land and water use within wetlands rather than the broader catchments of which they are an intimate part."[37] This failure to broaden the scope of wetland conservation has made these ecosystems vulnerable to activities that occur outside of the designated zone, an oversight that places wetlands in danger of having their quantity and quality of water flow negatively impacted.[38]

This flaw shows that narrowing a treaty's scope does not necessarily result in tighter restrictions and more manageable guidelines for environmental conservation. Although the Ramsar Convention has been able to cultivate a comprehensive list of important wetlands and many have been placed under protection, the scope of that protection does not eradicate the dangers that are posed against these vital habitats.

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36. Ramsar Convention, *supra* note 33, art. 2.
37. Farrier & Tucker, *supra* note 34, at 22.
38. *Id.* at 24.

III. AMAZON COOPERATION TREATY ORGANIZATION

One of the most persistent struggles in global environmental governance is the gap between the urgency of ecological degradation and the limited capacity of multilateral institutions to ensure compliance. While flagship global treaties, such as UNFCCC and the Paris Climate Agreement, provide useful, universal frameworks for shared climate obligations, their enforcement is limited and is often considered too broad to be particularly effective at mandating state behavior.[39] In this context, regional environmental organizations offer a compelling alternative model: one that is flexible, politically feasible, and tailored to the ecological and socio-economic realities of a shared landscape. The Amazon Cooperation Treaty (ACT) demonstrates how these regional treaties shape state behavior through normative, informational, and institutional pathways.[40] This has contributed to domestically driven, state-level change toward the legal recognition of nature's rights, sustainable economic development, and continued international cooperation for the countries in the ACT.

The Amazon Cooperation Treaty, established in 1978 and revitalized in subsequent decades since then, is a tangible example of a regional environmental treaty that maintains political and environmental influence to this day.[41] Originally, the treaty sought to promote harmonious development of the Amazon region through cooperation in science, infrastructure, conservation, and Indigenous engagement. In this sense, the treaty supported and facilitated the anthropogenic development of the rainforest, with its preamble advocating for the "overall development of [the signatories'] respective Amazonian territories" and including a limited regard for

39. Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AM. J. INT'L L. 288, 290–94 (2016) (provides context to various legal treaties surrounding climate change).

40. Elizabeth G. Ferris, *The Andean Pact and the Amazon Treaty: Reflections of Changing Latin American Relations*, 23 J. INTERAM. STUD. & WORLD AFF. 147, 148–50 (1981) (Provides introduction to the ACT).

41. *Id.* at 152–54.

environmental conservation.[42] In fact, many experts have argued that the treaty is primarily pro-development, with the "number of references to indigenous people and conservation [being] merely incidental concerns" or used as a rhetorical cover to defend national property rights.[43] This is primarily due to the political context of the 1970s and the increasing globalization of the resource trade, which encouraged the Amazonian states to protect their natural resources primarily through the ACT.

However, the treaty has also been the foundation for extensive biodiversity and conservation projects through the 1995 revitalization and institutionalization of the treaty into the Amazon Cooperation Treaty Organization (ACTO).[44] Due to its greater independence and funding, this organization had more enforcement power and the flexibility to engage with various non-governmental organizations, multi-national companies, and the public sector to promote sustainable development. The ACTO itself was also better capable of adapting to new discoveries and strategies, as made apparent by the Bogotá Declaration reiterating forest protection and the decision to add a permanent indigenous representative earlier this year.[45] The organization is also highly effective in wielding soft-

42. Treaty for Amazonian Cooperation pmbl., July 3, 1978, 1202 U.N.T.S. 71 [hereinafter Amazon Cooperation Treaty].

43. Marc Pallemaerts, *Development, Conservation, and Indigenous Rights in Brazil*, 8 HUM. RTS. Q. 374, 381–83 (1986) (provides an example of a key flaw in the treaty's purpose).

44. Bernardo Salgado Rodrigues & Paulo Vinícius dos Santos Paiva, *The Resurgence of the Amazon Cooperation Treaty Organization (ACTO): Institutional Advancements in the Promotion of Sustainable Development Policies*, 2 REVISTA DE SEGURANÇA, DESENVOLVIMENTO E DEFESA 32, 34–38 (2025), https://rsdd.esd.gov.br/index.php/rsdd/article/download/67/51 [https://web.archive.org/web/20260427043537/https://rsdd.esd.gov.br/index.php/rsdd/article/download/67/51].

45. *Amazon Nations' Foreign Ministers Advance Bogotá Declaration for Forest Protection*, OTCA (Aug. 21, 2025), https://otca.org/en/foreign-ministers-who-are-members-of-acto-finalize-details-to-present-the-bogota-declaration-in-defense-of-the-amazon/ [https://web.archive.org/web/20260427043636/https://otca.org/en/foreign-ministers-who-are-members-of-acto-finalize-details-to-present-the-bogota-declaration-in-defense-of-the-amazon/] (emphasizes how the updated treaty was able to take a stronger position on environmental issues); *OTCA Gives Historic Green Light to Indigenous Rights in the Amazon*, OTCA (Aug. 22, 2025),

power through instruments like joint declarations, ministerial meetings, technical committees, and cooperation projects.

Although scholars frequently critique international soft-law regimes for their lack of enforceability, the ACTO demonstrates that regional environmental governance can succeed, in part, through soft-law mechanisms. Unlike universal treaties, which often require generalized obligations across vastly different national situations, regional agreements anchor cooperation in shared ecological, cultural, and political realities. For example, the ACTO is tailored to develop solutions that are feasible for developing countries and that target the pressing, specific issues of wildfires, river contamination, illegal mining networks, and nomadic Indigenous nations in the Amazon.[46] Moreover, the close proximity between these regional partners makes it easier to overcome logistical barriers, such as language differences and transportation costs.

Another essential aspect is the stability that a technocratic platform like the ACTO provides to the rotating political positions of the member countries. Technical committees, ministerial councils, and project-based collaborations operate with relative insulation from partisan turnover, and they are especially tight-knit due to the localized nature of the organization.[47] The cornerstone of this is the Amazon Regional Observatory, a reference group that "promotes the flow and exchange of information among the institutions, governmental authorities, scientific community, academia and civil society of the Member Countries."[48] Thus, soft-law enables

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https://otca.org/en/otca-gives-historic-green-light-to-indigenous-rights-in-the-amazon/ [https://web.archive.org/web/20260412062100/https://otca.org/en/otca-gives-historic-green-light-to-indigenous-rights-in-the-amazon/].

46. Henry W. McGee & Kurt Zimmerman, *The Deforestation of the Brazilian Amazon: Law, Politics, and International Cooperation*, 21 U. MIA. INTER-AM. L. REV. 513, 538–42 (1990) (highlights the benefits of the ACTO's regional nature).

47. Ferris, *supra* note 40, at 152–54.

48. AMAZON COOPERATION TREATY ORG., AMAZON REGIONAL OBSERVATORY: REFERENCE CENTER FOR INFORMATION ABOUT BIODIVERSITY, FORESTS, WATER RESOURCES AND INDIGENOUS PEOPLES 3 (2021), https://otca.org/wp-content/uploads/2021/11/livretoORA_en_digital.pdf [https://web.archive.org/web/20260208045336/https://otca.org/wp-

cooperation at the level where it matters most: not through sanctions, but through building information systems, routines, and expectations that shape how national policymakers and judges view environmental law, as shown by the successes of the ACTO.

This leads to the ACTO's most influential outcome: the incorporation of the treaty's principles into national jurisprudence through Supreme Court decisions. The most notable is the Colombian Supreme Court's landmark 2018 ruling recognizing the Amazon as a subject of rights, essentially recognizing the Amazon as a rights-bearing entity in the eyes of the law.[49] While this was a domestic decision, it mirrors the ACTO's exact language, logic, and overarching goals. Another notable decision is the Brazilian Supreme Federal Tribunal's finding in Arguição de Descumprimento de Preceito Fundamental 708 that frames the commitments from the Paris Agreement as constitutional human-rights obligations that must be followed by the government.[50] This decision, like its Colombian counterpart, is heavily informed by the wording and principles of the ACTO. Thus, the courts serve as a conduit for the soft-law doctrine that this regional treaty provides, allowing countries to slowly but effectively phase in higher environmental standards without giving up sovereignty.

Another pathway for the ACTO to have an effect is through other multinational bodies like the Organization of American States (OAS). Within the OAS system, the Inter-American Court for

content/uploads/2021/11/livretoORA_en_digital.pdf] (provides information about a key portion of the treaty).

49. Corte Suprema de Justicia [C.S.J.] [Supreme Court of Justice], Sala de Casación Civil, abril 5, 2018, M.P.: Luis Armando Tolosa Villabona, Sentencia STC4360-2018, Radicación No. 11001-22-03-000-2018-00319-01, at 45–46 (Colom.), https://cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf [https://web.archive.org/web/20260114150252/https://www.cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf] (held that the Amazon has legal rights, mirroring the argument of the ACTO).

50. Supremo Tribunal Federal [S.T.F.] [Supreme Federal Court], Arguição de Descumprimento de Preceito Fundamental 708, Relator: Min. Luís Roberto Barroso, j. 1 julho 2022, D.J.e. No. 194, 28 set. 2022 (Braz.) (held that the Paris Agreement is a human-right obligation, similar to the ACTO's logic).

Human Rights recently issued Advisory Opinion OC-23/17, which clarifies that states have legal obligations to prevent environmental harm with transboundary effects, effectively constitutionalizing ACTO's cooperative logic in the region.[51] This represents an overall trend where strict but optional environmental protections are slowly diffused into national law through judicial reasoning.

The ACTO is certainly not without flaws. Its protections against deforestation are weak, it often ignores the Indigenous voices that it sought to uplift, and it has historically been used to justify various economic development projects in the Amazon. Specifically, the treaty has consistently struggled with setting and enforcing a deadline to end deforestation, with it originally being pushed back to 2030, then completely scrapped as an idea.[52] Yet, the ACTO's impact on research and influence on environmental jurisprudence cannot be overstated. Thus, the ACTO case complicates the assumption that environmental soft-law is inherently weak. Instead, it suggests that regional soft-law regimes can outperform global hard-law agreements under certain conditions: shared ecological interdependence, political affinity, and the presence of regional judicial bodies capable of norm hardening. The treaty's legal evolution from a non-binding commitment to a self-enforced duty illustrates a model of governance that could be put in place for other transboundary ecosystems like the Congo Basin or the Altai Mountains, where countries have concerns over sovereignty. Regional soft-law is not a cure-all, but it offers a realistic and effective governance strategy for regions where hard law is politically unfeasible.

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51. Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 95–103 (Nov. 15, 2017).

52. Daniel Nepstad et al., *The End of Deforestation in the Brazilian Amazon*, 326 SCIENCE 1350, 1351 (2009).

IV. MINAMATA CONVENTION

The Minamata Convention on Mercury is a recent attempt made by the United Nations Environment Programme (UNEP) to regulate anthropogenic, human-made mercury worldwide. Implemented in 2017, the treaty is a comprehensive document addressing regulations governing mercury throughout its life cycle, including extraction, use, trade, storage, and disposal.[53] The development of the treaty and its name was inspired by the tragic case of mercury poisoning in Minamata, Japan, where waste from a chemical plant contaminated nearby bodies of water. Consumption of contaminated fish and shellfish poisoned with methylmercury would cause many individuals to later develop brain damage, chronic illness, or even death.[54] Since existing international environmental agreements had been insufficient to address rising mercury emissions, the UNEP decided to develop a multilateral, legally binding instrument regarding mercury in 2009.[55] The Minamata Convention asks that all 153 Parties take action against growing mercury emissions.[56] However, it includes flexible wording that could create problematic loopholes, such as exemptions and undefined standards, allowing states to work around certain obligations under the treaty.

Under Article 1 of the Minamata Convention, UNEP clearly states its objective: "is to protect the human health and the

53. Minamata Convention on Mercury, *opened for signature* Oct. 10, 2013, 3201 U.N.T.S. 3 (entered into force Aug. 16, 2017) [hereinafter Minamata Convention].

54. Masazumi Harada, *Minamata Disease: Methylmercury Poisoning in Japan Caused by Environmental Pollution*, 25 CRIT. REV. TOXICOL. 1, 3–7 (1995) (outlines the history behind the treaty and the origin of the treaties name).

55. UNEP, MINAMATA CONVENTION ON MERCURY AT A GLANCE 1 (2017), https://minamataconvention.org/sites/default/files/documents/2021-07/Minamata%20Convention%20on%20Mercury%20at%20a%20glance_COP1%202017_EN.pdf [https://web.archive.org/web/20260330013150/https://minamataconvention.org/sites/default/files/documents/2021-07/Minamata%20Convention%20on%20Mercury%20at%20a%20glance_COP1%202017_EN.pdf] (key facts regarding the Minamata Convention).

56. Parties and Signatories, MINAMATA CONVENTION ON MERCURY, https://minamataconvention.org/en/parties [https://web.archive.org/web/20260427054057/https://minamataconvention.org/en/parties].

environment from anthropogenic emissions and releases of mercury and mercury compounds."[57] The treaty's provisions reflect this ambition. Article 3 governs mercury mining and international trade, prohibiting new mercury mining and restricting exports except as permitted by the Convention.[58] Article 4 mandates the phase-out of mercury-added products and prohibits the manufacture, import, or export of covered products after the applicable phase-out date, subject to Annex A exclusions and registered exemptions.[59] Article 5 imposes limits on industrial processes that use mercury as a catalyst or reagent, while Article 7 addresses artisanal and small-scale gold mining (ASGM).[60] ASGM is the largest global source of mercury emissions.[61] If a Party determines that ASGM in its territory is "more than insignificant," the Party must develop and implement a national action plan and "submit its national action plan to the Secretariat no later than three years after entry into force of the Convention for it or three years after the notification to the Secretariat, whichever is later."[62] Articles 8 and 9 focus on emissions both on land and in the air. It simply outlines methods of reducing emissions and how parties should document and report their mercury emissions that affect the land and air.[63] Articles 10 through 12 cover the best environmentally friendly method for storing mercury waste and for remediation of contaminated sites.[64] The treaty also includes financial resources and mechanisms in Article 13.[65] Lastly, Article 15 establishes both reporting obligations and a designated compliance committee, which is designed to facilitate

57. Minamata Convention, *supra* note 53, art. 1.
58. *Id.* art. 3, paras. 3, 6.
59. *Id.* art. 4, para. 1; *id.* annex A; *id.* art. 6.
60. *Id.* arts. 5, 7.
61. *Artisanal and Small-Scale Gold Mining (ASGM)*, UNEP, https://www.unep.org/globalmercurypartnership/what-we-do/artisanal-and-small-scale-gold-mining-asgm [https://web.archive.org/web/20260427063741/https://www.unep.org/globalmercurypartnership/what-we-do/artisanal-and-small-scale-gold-mining-asgm].
62. Minamata Convention, supra note 53, art. 7, paras. 3(a)–(b).
63. *Id.* arts. 8–9.
64. *Id.* arts. 10–12.
65. *Id.* art. 13.

without enforcing compliance.[66] Although the Minamata Convention's approach and writing are commendable in how much it covers, it quickly reveals many weaknesses rooted in soft-law.

The Minamata Convention appears to be fundamentally sound, as it covers a wide range of situations; however, a recurring flaw within the treaty is its occasional use of discretionary or vague legal language. Numerous obligations are conditioned by terms like "where feasible," "as appropriate," or "except where the party has a registered exemption." Although it is likely that this was done to facilitate faster and more effective agreement among the nations, there is no written evidence to support this theory. Wording like this allows parties to exploit ambiguities or push the boundaries of the treaty in order to get away with keeping the reputation of participating in an environmental saving treaty, but not putting in the necessary effort. In 2025, Mexican criminal groups had been discovered taking advantage of these loopholes, as "over 200 tons of toxic mercury had been trafficked from Mexican mercury mines to illegal gold mines in Bolivia, Colombia, and Peru. This transnational trade, in violation of the Minamata Convention on Mercury, is fueling… the release of massive amounts of mercury in the Amazon."[67] This activity had mainly been undetected by authorities, showing the lack of security and enforcement certain countries have regarding the treaty. While the government is careful not to break any obligations, it is unwilling to allocate resources to ensure that citizens within its country also comply with the same regulations. These are not the only ways parties can find loopholes. For example, under Article 4, countries must gradually phase out mercury-containing products; however, they are allowed to register for

66. *Id.* art. 15, paras. 1–2.

67. *Traffickers Leave No Stone Unturned: What the Largest Exposed Mercury Smuggling Operation Tells Us About Gold, the Shortcomings of the Minamata Convention on Mercury, and the Convergence of Crimes in Latin America*, ENV'T INVESTIGATION AGENCY (July 24,2025), https://eia.org/report/traffickers-leave-no-stone-unturned/ [https://web.archive.org/web/20250724000000/https://eia.org/report/traffickers-leave-no-stone-unturned/] (details illegal mercury smuggling uncovered in Latin America).

exemptions that can last up to five years, and these can be extended further if approved by the COP. After the implementation of the treaty eight years ago, nineteen parties have already submitted applications for exemptions.[68] Article 5 restricts mercury use in certain industrial processes, those using mercury as a catalyst or reagent; however, it sets no strict deadline or emission caps, allowing discretion based on national circumstances and feasibility, a weakness that can be abused. Article 7 has arguably the most significant flaw regarding ASGM. ASGM is not subject to mandatory restrictions. Only parties whose ASGM within their territory is considered "more than insignificant," which is an undefined term within the treaty, are subject to developing a national action plan. Even then, the convention does not mandate actual bans or reductions in mercury use. It only requires that parties attempt reductions "where feasible."[69] As of 2025, only fifty-one countries that were part of the Minamata Convention submitted notifications stating that their ASGM was more than insignificant in their territory.[70] Given that ASGM is the largest global source of mercury emissions, this low number of submissions may suggest that many states are avoiding stricter obligations under the treaty by claiming their ASGM activity is insignificant. These forms of soft-law language allow states considerable flexibility in interpretation and undermine the treaty's entire purpose.

An issue related not to the treaty's content but to its feasibility is funding. Much like most government-enacted goals, reducing mercury emissions is extremely costly both directly and indirectly.

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68. Minamata Convention, *supra* note 53, art. 4, para. 1; *id.* art. 6, paras. 1, 5–6; Exemptions Under the Minamata Convention on Mercury, MINAMATA CONVENTION ON MERCURY, https://minamataconvention.org/en/parties/exemptions [https://web.archive.org/web/20260427070928/https://minamataconvention.org/en/parties/exemptions].

69. Minamata Convention, *supra* note 53, art. 7, paras. 2–3; *id.* annex C.

70. Conference of the Parties to the Minamata Convention on Mercury, *Information Provided by the Parties to the Secretariat Pursuant to Articles 3, 7, 8, 9 and 21 of the Minamata Convention on Mercury*, U.N. Doc. UNEP/MC/COP.6/INF/2 (Nov. 3, 2025).

The Minamata Convention's financial resources and mechanisms, outlined under Article 13, rely on two organizations and programs: the Global Environment Facility (GEF) trust fund and the Specific International Programme (SIP). These mechanisms were established to assist countries in developing mercury inventories, implementing safer technology, and training communities, particularly in low-income countries. That being said, both are supported by voluntary contributions and are significantly under-resourced.[71] While GEF receives general funding pledges, only a small fraction of that goes to mercury control. According to GEF's own website, "twenty-nine countries agreed to pledge the record support of $5.25 billion." Of that amount, approximately 4.9% of it is allocated to the Minamata Convention for the four-year period beginning in 2022. Although that is several hundred million dollars, when taking into account the number of nations and indirect costs over a four-year period, these funds are insufficient. SIP, which was established to "support capacity building and technical assistance," has limited reach. The grants provided by SIP are extremely small, much smaller than funding from GEF, and SIP is limited in what type of help it can actually offer. SIP can only fund smaller-scale projects, such as workshops, inventory creation, or training for regulators. Financial constraints are particularly severe in countries where ASGM plays a substantial role in the economy. ASGM is responsible for roughly 37% of global mercury emissions.[72] However, despite its environmental impact, ASGM is not heavily

71. Minamata Convention, *supra* note 53, art. 13, paras. 6–7; Conference of the Parties to the Minamata Convention on Mercury, *Decision MC-1/6, Specific International Programme to Support Capacity-Building and Technical Assistance*, U.N. Doc. UNEP/MC/COP.1/Dec.6 (Nov. 22, 2017); *Minamata Convention Receives Increased Funding Pledge from Global Environment Facility*, GEF (Apr. 12, 2022), https://www.thegef.org/newsroom/news/minamata-convention-receives-increased-funding-pledge-global-environment-facility [https://web.archive.org/web/20260427072203/https://www.thegef.org/newsroom/news/minamata-convention-receives-increased-funding-pledge-global-environment-facility]; Conference of the Parties to the Minamata Convention on Mercury, *Midterm Evaluation of the Specific International Programme to Support Capacity-Building and Technical Assistance*, U.N. Doc. UNEP/MC/COP.5/INF/16 (July 1, 2023).

72. *Artisanal and Small-Scale Gold Mining (ASGM)*, *supra* note 61.

regulated under the treaty. This is because ASGM supports millions of lives worldwide, including an estimated ten to nineteen million miners across seventy countries, while also contributing to national economies in Sub-Saharan Africa, Southeast Asia, and South America, with spillover effects on local communities and consumers. Reducing mercury use would not only require massive investment in cleaner equipment, but also risk job losses and reduced gold production. Many of these same countries, however, have still joined the Convention because doing so carries diplomatic benefits. Parties can gain international aid (even if limited) and improve their global reputation without having to immediately change their ASGM and mercury levels. This reveals a deeper flaw within the treaty, which, in an attempt to include many other countries, compromises its enforceability.

The Minamata Convention is a comprehensive effort to address the challenges that come with mercury regulation worldwide. Its ability to cover a wide range of issues, with an emphasis on protecting human health, makes it a widely cited document. However, the Convention also contains loopholes and limitations. While its flexible language and treaty's funding structure may have encouraged broad participation, those same features weaken accountability. The Convention is a great representation of both the strengths and weaknesses of soft-law approaches within multilateral instruments regarding environmental safety.

CONCLUSION

A comparative analysis of CITES, the Ramsar Convention, ACTO, and the Minamata Convention suggests that global environmental governance is characterized by persistent structural weaknesses under soft-law frameworks. The core limitation of these treaties lies in the consistent struggle to ensure uniform compliance and strong enforcement mechanisms. CITES and Ramsar prove that wide-ranging participation and undisputed credibility do not guarantee reliable outcomes, especially when the treaty relies on member-state self-reporting. In both cases, weak enforcement mechanisms, such as self-reporting, limited sanctions, and bureaucratic constraints, allow violations and environmental degradation to persist despite international consensus. Furthermore, the lack of international sanctions and sufficient funding poses a larger risk of weak enforcement.

Conversely, regional and targeted approaches, exemplified by the ACTO and the Minamata Convention, demonstrate how individual countries can interpret the soft-law framework differently, leading to limited consistency in application, especially across political cycles. While global environmental treaties have been developing and improving since earlier conventions and conferences in the 1970s, this analysis provides insight into what frameworks are beneficial for preserving critical environmental matters and what tactics prevent stronger adherence to environmental and climate-related concerns. The broad utilization of soft-law strategies does allow states to determine how to manage their vital ecosystems and environmental networks with regional knowledge, but the laxity of enforcement prevents these treaties from effectively bringing about visible action.

NOTE

SPEECH UNDER COMMAND: FREEDOM OF SPEECH AND THE UNIFORM CODE OF MILITARY JUSTICE

Andrea Downey-Almodovar, Ava Stanza, Daniella Devaney, Kaithlyn Sims

The United States military operates on a strict hierarchical system that separates personnel by rank and job. This hierarchy is abetted by the very purposeful use of ambiguity of the written code of conduct and unwritten rules enforced in ways many would find restrictive. The antithetical nature of the Uniform Code of Military Conduct is that it both governs and imposes discipline to create a cohesive military force while simultaneously employing purposeful measures of ambiguity that can restrict soldiers' individual liberties. However, when it comes to those who do not neatly fit into the categories of active duty or civilian, the rules they rely on become blurred, as they are expected to maintain the same standards as active duty personnel while also having some flexibility in interpreting them. With the rise of social media, rules surrounding speech in uniform no longer apply, forcing the soldier to find a new way to maintain their strict uniformity and control. The military's far-reaching impact stems from its methods, which can ultimately unjustly restrict many aspects of a service member's life; yet, despite the rules imposed on them, many find ways to push back. Current and former servicemembers work to express themselves openly, fighting back against punishments and the increasingly restrictive rules being adopted to suit the military's interests.

Introduction

The United States military is separated into six branches and four types of service members: enlisted personnel, non-commissioned officers (hereinafter “NCO”), warrant officers, and commissioned officers. Enlisted service members across the branches range from E-1 to E-4, which signify their pay grade and correspond to specific titles that vary by branch, such as the lowest rank of E-1 in the Army being a Private, but the same rank in the Air Force is known as an Airman Basic.1 Enlisted service members are required to go to basic training or boot camp, where they are taught the military's culture and values, such as honor, integrity, and commitment to comrades above all else.[2] Ranks E-1 through E-3 are generally solely going through training or initial assignments before they reach a specialty as an E-4.[3] Once an enlisted officer has successfully risen through the ranks, they will become an NCO. They will begin as an E-4 and progress to an E-9, gaining a specialty and receiving training in leadership and combat. Their training focuses primarily on technical expertise and mentoring, whereas enlisted personnel will focus more on combat training, and commissioned officers will focus more on leadership and decision-making.[4] Warrant officers range from W-1 to W-5; they are officers who hold warrants that allow specialization in fields such as technology. The ranks of a commissioned officer range from O-1 to O-10, making up the highest ranks within the military. They are required to have a college degree in a needed skill and will enter under a formal presidential commission.

1. Tamila McDonald, Military Rank and Insignia Charts, VETERAN.COM (updated May 15, 2025), https://veteran.com/military-ranks-insignia-charts/ [https://web.archive.org/web/20260416234754/https://veteran.com/military-ranks-insignia-charts/] (describing U.S. military rank and pay-grade charts by branch and identifying enlisted, non-commissioned-officer, warrant-officer, and commissioned-officer ranks).

2. *See* Mark Dziak, *Understanding Military Culture*, EBSCO RESEARCH STARTERS (2025), https://www.ebsco.com/research-starters/military-history-and-science/understanding-military-culture (describing military culture as including discipline, rank hierarchy, rigorous training, integrity, loyalty, camaraderie, and commitment to comrades); McDonald, *supra* note 1 (stating that E-1 through E-3 service members are in training status or initial assignments and that basic training or boot camp immerses recruits in military culture and values).

3. McDonald, *supra* note 1.

4. Army Education and Training System Overview, ARMY COOL, https://www.cool.osd.mil/army/training_system_overview/index.html [https://web.archive.org/web/20240407130542/https://www.cool.osd.mil/army/training_system_overview/index.html] (education and training for the development of various military ranks to ensure efficiency).

The letters of each rank help differentiate roles, while the numbers create a rigid hierarchy of command in which some give orders and others comply. That hierarchy is especially pronounced between officers and enlisted personnel, as even the lowest commissioned officer, O-1, will outrank all enlisted ranks, E-1 through E-9.[5] Officers enter the military in a position of leadership, and while they respect the enlisted personnel they work with, they do not treat them at the same level as their fellow officers. This can lead to restrictive policies that limit people's freedom of speech.

While not an official policy within the military handbooks, the acronym RHIP, meaning rank has its privileges, invades colloquial speech and operations across branches.[6] The premise of this acronym is that senior or superior-ranking personnel have the ability to use their position to pass off responsibilities they do not want; junior officers are expected to comply because they will eventually gain the ability to do this when they reach a high enough rank.[7] Civilians are granted the privilege to speak on their behalf; however, in the military, this becomes an abstract notion. One of the primary focuses of the military is forming a completely centralized, uniform, and neutral-looking workforce because they are creating the image that they are focused solely on their mission.[8]

Within a civilian context, such restrictions may appear unusually rigid or counterintuitive. Contrastingly, the military is required to maintain a standard of discipline and order because failure to maintain ranks endangers the person who fell out of rank,

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5. *See* U.S. Army Ranks, U.S. ARMY, https://www.army.mil/ranks/ [https://web.archive.org/web/20260411194626/https://www.army.mil/ranks/] (describing Army enlisted, warrant-officer, and officer ranks); McDonald, *supra* note 1.

6. David Stonerock, *Rank Has Its Privileges* 2 (R05, U.S. Army Sergeants Major Acad., student paper, n.d.), https://cgsc.contentdm.oclc.org/digital/api/collection/p15040coll2/id/1865/download (explaining that RHIP abbreviates "rank has its privileges" and is invoked when lower ranks perceive higher ranks as receiving special treatment).

7. David Fitzkee, *Religious Speech in the Military Freedoms and Limitations*, PARAMETERS 59, 59 (2011), https://press.armywarcollege.edu/cgi/viewcontent.cgi?article=2594&context=parameters.

8. *Id.*

their unit, and the task force, the grouping of multiple units, risking efficiency to complete the mission, and could result in a failure to complete missions.[9] Military personnel are placed in a situation requiring them to choose between the culture ingrained in every aspect of their training and their personal beliefs. Military leaders understand that there are risks to restricting freedoms; however, they have a duty to enforce constraints as they find it justified to ensure that an order is fulfilled.[10] Leaders also have the added responsibility of censoring themselves more than their subordinates do. Leaders live in a state of noblesse oblige, where their privilege of being a higher rank may contradict their obligations to their unit, as they have to ensure that the rights and feelings of their subordinates are being maintained.[11] Much of what they are expected to do is not even in their job description or within the branch's rules, yet they are expected to follow it nonetheless. It is these unspoken rules that keep the military running, while also creating the issues surrounding what freedom of speech service members actually have.

The military exists as a balancing act between the handbook they must follow and the desire to express themselves without compromising their beliefs while wearing a uniform. For many enlisted personnel, these contradictions have created significant challenges. While most issues are handled internally within units, there are extreme cases in which infringements on freedom of speech occur, even beyond what is considered normal in the military. Even in those extreme cases, there are issues, and the standard for determining what actually causes freedom of speech infringements is clearly subjective. In order for a violation to go through, it has to be proven that it compromised the group's ability to complete its

9. *Id.*
10. Jessica Wolfendale, *Obedience* 3, https://www.usna.edu/CoreEthics/Essays/Wolfendale_-_Obedience.pdf.
11. *See* Col. JD Willis, *Noblesse Oblige: The Original Core Value!*, GOODFELLOW AIR FORCE BASE (Sept. 26, 2011), https://www.goodfellow.af.mil/Newsroom/Article-Display/Article/375225/noblesse-oblige-the-original-core-value/ (explaining that noblesse oblige requires proper conduct and an obligation to protect and serve subordinates).

mission effectively due to perceived favoritism or alienation.[12] However, depending on the group's mission, it may be found that the violation was not severe enough to meet that standard, even though in another scenario it would. These policies contribute to the growing repressive conditions, including political limitations and the distance between people's actions and thoughts, that enlisted members are facing.[13] When personnel voice their opinions, they may feel their opportunities for advancement are limited, which can create challenges as they attempt to progress their careers. The hierarchical system does not help because when leaders openly express their views about their subordinates, those lower ranks may feel compelled to stay quiet and agree. Failure to follow these cultural norms could result in alienation, especially as word spreads quickly. Disagreeing with leadership could lead to a lack of trust within the unit and to hesitation in expressing opinions out of fear of being reported.

Military culture emphasizes collective missions and goals rather than individuals. Starting at boot camp, all military personnel are expected to adapt to this culture without question because that is the way things work, and it is needed to fulfill their duties.[14] Reading their policies, it is evident that this is the underlying message, even when they try to be inclusive and allow freedom of speech. Military personnel are expected to watch what they say, how they say it, and how they express themselves within the strict regulations. For every written rule, there seem to be three unwritten rules, which is why the transition from civilian life to military life and vice versa is often so daunting. Personnel may end up falling into the practice of blind

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12. *See* United States v. Wilcox, 66 M.J. 442, 448–49 (C.A.A.F. 2008) (requiring a "reasonably direct and palpable" connection between protected speech and the military mission or military environment for Article 134 punishment).

13. *Political Activities Guidance for Members of the Armed Forces*, https://dodsoco.ogc.osd.mil., (last visited Apr. 9, 2026) [https://web.archive.org/web/20250917073559/https://dodsoco.ogc.osd.mil/Portals/102/faqs_political_activities_armed_forces.pdf] (policy guidelines that dictate what service members are allowed to do in and out of uniform).

14. *Dep't. of Veterans Affairs*, *1.3 Military Culture* (4) (last visited Apr. 9, 2026) (starting when they first joining military personnel are expected to follow pre-established rules in service of the bigger mission)

obedience, which follows a system of unquestioned compliance, without regard for individual moral evaluation.[15] Personal morality enables individuals to continually express their viewpoints by providing a framework for critical thinking. The removal of this aspect can result in moral disengagement, where individuals fall into the rhythm of taking orders, without accepting personal responsibility for how those orders impact others and themselves.[16] It is a limitation that may result in people losing themselves, as the practical authority to fully examine and express the opinion of an order is not available to everyone at the same level.[17] That is why their standards and descriptions of issues like freedom of speech are written in very ambiguous, fluid terms. They are intentionally written to prompt service members to contemplate before acting or speaking, since receiving a written reprimand can hinder promotion and limit access to the privileges associated with higher-ranking leadership positions. These dynamics implicitly assume that leaders will internalize and uphold unwritten norms, reinforcing the hierarchical culture. Ultimately, while the military is focused on its missions, it is also attempting to maintain a brand as a protector of all citizens, even if that means using harsh methods of control against the citizens who work for it.

I. CURATED ATMOSPHERE AGAINST SPEECH

Freedom of speech is an essential element of the First Amendment of the U.S. Constitution, which fundamentally protects the right to advocate for oneself. Advocating for oneself publicly is a right that all rational citizens should have without conditions; however, the Military operates under a separate justice system, unique to the civilian system, with procedural laws outlined in the Uniform Code of Military Justice (UCMJ). This system imposes

15. *Blind Obedience: A Double-Edged Sword*, PHILARCHIVE, https://philarchive.org/rec/MALBOA-2, [https://web.archive.org/web/20260417000256/https://philarchive.org/rec/MALBOA-2] (personnel may fall into the practice of following orders regardless of how that may violate personal beliefs).
16. *Id.*
17. Fitzkee, *supra* note 6, at 59.

vague, at times inconsistent conditions that complicate this right. Pervasive hierarchical structures in the military, compounded with inconsistent justice and punishment, make speaking out more complicated for servicemembers. Concerningly, action taken in accordance with conditions set by the articles of the UCMJ may have caused servicemembers who have been victims or witnesses of assault, harassment, or unfair treatment to refrain from seeking justice by reporting misconduct in fear of repercussions. The UCMJ and its omnipresence in military life extend beyond its explicit function of punishing misbehavior and misconduct outlined in its articles to create the intended atmosphere of discipline and rigid structure. The conflict lies partly with the unpredictability of the enforcement of Article 134, aptly labeled "the general article."[18]

Two cases that explore where Article 134 is enforced in the context of punishing speech are landmark cases that set precedent for interpreting constitutional rights, such as freedom of speech, within the military, which are *United States v. Wilcox*[19] and *Parker v. Levy*.[20] The case follows Captain Howard Levy, an Army physician, who was charged with Article 134, among other articles regarding statements he made in uniform towards other servicemembers which included him urging black enlisted men to refuse orders to go to Vietnam and referring to Special Forces personnel as "liars and thieves," "killers of peasants," and "murderers of women and children."[21] Levy argues that the punishment for his statements violated his 1st and 5th amendment rights and that the articles he was punished under were "unconstitutionally vague."[22] Ultimately, Levy was not acquitted, and this case upheld the validity of Article 134. Stating that military personnel are not excluded from the protections of the First Amendment, but because of the nature of the military, there is a "fundamental" need for obedience, and the essential need for

18. 10 USC§ 934 (2018).
19. United States v. Wilcox, 66 M.J. 442, 444–45 (C.A.A.F. 2008).
20. Parker v. Levy, 417 U.S. 733, 736-37 (1974).
21. *Id.*
22. *Id.*

discipline can permit actions within the military that would be unconstitutional outside of it.[23] This decision made it clear that, in the context of military life, some constitutional rights are not inalienable; they are context-dependent and, in the court's view, the notion of an obedient and cohesive force is enough to tolerate broad, imprecise legal standards in the military that would protect individual rights.

United States vs. Wilcox follows a soldier who used an online site to express racist and anti-government extremist views while identifying himself publicly on the site as a servicemember, circumstances that brought the defendant to the attention of military leadership after civilian law enforcement was involved.[24] "Appellant first came to the attention of the Army Criminal Investigative Division (CID) when a civilian police officer noticed an online profile containing racist views in which the author identified himself as a 'US Army Paratrooper."[25] A large part of the evidence comes from conversations between him and a decoy police officer. From this, the courts decided to punish Wilcox under several other articles that criminalize disobedience and false statements, but the accused's violation of Article 134 was the principal reason for the appeal, given its broad and interpretive nature, which makes conviction much more arguable than that under the other articles, which rely on clear determinations. Article 134 relies heavily on the defendant's conduct, creating one, a measurable impact on good discipline and order and/or harming the overall reputation of the military.[26]

The court argued that the Appellant's speech was in violation of Article 134 because: the general public has access to the Appellant's public comments, and upon reading them, may find the Army, which was described by the Appellant, a disreputable institution. Additionally, the Appellant undermined the good order and discipline of his environment because of the potential of susceptible

23. *Id* at 758.
24. United States v. Wilcox, 66 M.J. 442, 444–45 (C.A.A.F. 2008).
25. *Id.*
26. *Id.*

soldiers discovering the Appellant's anti-government sentiments and extreme views and believing disloyalty and racial intolerance is acceptable conduct in the Army."[27] Ultimately, Wilcox was acquitted. The court found no evidence of either an actual or potential adverse impact on good order and discipline, or actual or potential discredit to the armed forces, stemming from the Appellant's online profile or statements. Conversely, the defense presented evidence from soldiers within the Appellant's unit confirming his positive working relationships with minorities in the unit and indicating that his racist views had not negatively affected his military performance or the unit itself."[28] The public and politically incorrect statements made by Wilcox, while they were egregious to most, and do not precisely align with the Department of War, are nevertheless insufficient under the facts of the case to impose criminal punishment using Article 134.

The construction of Article 134 is not intended to protect the rights of the soldier but to increase the potency of the prosecution. While the reasoning in *Parker v. Levy* supports the necessity of such vagueness to promote cohesion within the armed forces, it nonetheless leaves room for inconsistencies, even in the initial reporting of alleged misconduct before it goes to court. This creates a more concerning atmosphere, one where vulnerable servicemembers, afraid of punishment, opt into self-censorship. Article 134 states, "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."[29] The article's sole purpose is to be used to fill in any gaps that other articles are unable to punish. The vagueness of punishment for offenses outlined in the

27. *Id* at 449-50.
28. *Id* at 452.
29. 10 U.S.C. § 934 (2018).

language of the article like, "prejudices good order" or "brings discredit upon the armed forces" allows for the discretion of the punishments to be in the hands of whoever may be in command or the leadership community. This lack of explicit backing from a reliable framework creates very different outcomes for the soldier, depending on the "morals" command may have, or, even more concerning, the soldier's fate may depend on the dubious assumption that the enforcer is consistently just and reasonable.

II. RESERVISTS AND OFF-DUTY SPEECH

The Supreme Court has made it clear that military members have limited free speech in order to protect national interests. There are a variety of offenses that are illegal for service members but allowed for civilians, and most occur while service members are acting in their capacity as members of the armed forces, whether physically on base or in official uniform. Actions such as distributing anti-military information, inciting disobedience, and even private obscene speech between military servicemembers are disallowed under the Uniform Code of Military Justice, and have been successfully prosecuted against servicemembers.[30] It is not particularly difficult to conceptualize why many of these actions would be against national interest, as they clearly violate the important hierarchy and respect that create military cohesion while on active duty on base. Matters become less clear, however, when applying the same code of conduct to military service members who are not on duty, particularly military reservists, who are effectively in the military as a part-time job and primarily live their lives as civilians.

30. *Free Speech and Social Media Issues Affecting Military Members*, U.S. AIR FORCE JUDGE ADVOCATE GEN.'S CORPS (Mar. 10, 2013), https://www.afjag.af.mil/LinkClick.aspx?fileticket=x9OMCddZNbM%3D&portalid=77 [https://web.archive.org/web/20250127200537/https://www.afjag.af.mil/LinkClick.aspx?fileticket=x9OMCddZNbM%3D&portalid=77].

Military reservists cannot participate in political activities while in uniform, no matter whether they are on or off active duty, or even while retired.[31] Such activities are seen as a representation of the military's political stance and are thus disallowed. Despite this, as a result of their status in between both the military and civilian spheres, they are allowed to run for public office that normal military members are not, as long as they make clear their reservists status.[32] Because holding public office is in itself inherently political, it is showing a relatively extreme amount of freedom that reservists are able to hold office, especially when considering that they are not allowed to wear their uniform to a protest for that same office. Reservists live on the border between civilian and active-duty regulations; when they are assigned to active duty, they conform to the stricter regulations that bar them from political work. However, when they are not labeled for active-duty work, they exist on a less strict plane with other civilian workers, allowing them access to political life. The civilian and active-duty sectors serve as regulatory divides, but the fluidity of reservists shows that these regulations could be applied equally across all personnel. Still, the military continues to enforce policies disproportionately.

Reservists also effectively switch statuses based on the number of consecutive days they are active. The Department of Defense Directive 1344.10 specifies that most military restrictions on free speech only apply to reserve members when they are "serving involuntarily under a call or order to active duty that specifies a period of active duty of more that 270 days during a period of declared war or national emergency; or other period when a unit or

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31. Political Season Do's and Don'ts for Reservists, AIR FORCE RESERVE COMMAND (Sept. 1, 2016), https://www.afrc.af.mil/News/Commentaries/Display/Arti,cle/946973/political-season-dos-and-donts-for-reservists/ [https://web.archive.org/web/20260420233515/https://www.afrc.af.mil/News/Commentaries/Display/Arti,cle/946973/political-season-dos-and-donts-for-reservists/].

32. U.S. DEP'T OF DEF., DIRECTIVE 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY § 4.3.1.1 (Feb. 19, 2008), https://www.esd.whs.mil/Portals/54/Documents/DD/issu,ances/dodd/134410p.pdf.

individual of the National Guard or other Reserve Component has been involuntarily called or ordered to active duty as authorized by law."[33] They have distinct differences in available actions, delineated by whether they are in a current capacity more aligned with the military or with their civilian life.

While the rule of law makes efforts to display its commitment to a separation of the different facets of reservist life, having one governed under constitutional law and the other under UCMJ law, this distinction often does not always occur in practice, nor is it always successful at protecting such rights. This tension is illustrated in the case of *Yarbrough v. The United States Space Force, et al.* Jace Yarbrough, a Space Force Reserve member, was disciplined by the military for making religious and political statements while off duty at a private retirement party for a friend. Yarbrough was issued a Letter of Admonishment (LOA) for his statements, which were cited as "insubordinate, disrespectful, and unbecoming of an officer in the military."[34] Despite multiple attempts to escalate the concern that the military was overstepping its jurisdiction by reaching into his civilian life as a reservist, Yarbrough was unsuccessful in getting the LOA rescinded. The case is still ongoing, and as such, his military career is adversely affected by an incident outside of the scope of military jurisdiction.

The military's own institutional power and the large reach it grants itself create an atmosphere unfriendly to the exercise of free speech by reservists off duty. Even the written protections in military law are not strong or clear enough to prevent the persecution of unpopular religious or political speech that should be legal by their own decree. Reservists specifically are more vulnerable to unfair treatment because the vast majority of their time is spent as a civilian member with all of the privileges thereof,

33. *Id* § 4.6.1.7.
34. *Complaint* at 1, *Yarbrough v. U.S. Space Force*, No. 4:23-cv-00876 (E.D. Tex. Oct. 3, 2023).

yet they become an unclear area to deal with when they return to military service.

III. Digital Expression and Military Discipline

The inability to clearly identify whether a servicemember is acting in their capacity as an individual or as a spokesperson for the military complicates free speech, but also has workarounds in place to maintain it as much as possible. The ambiguity reflects a structural limitation of the UCMJ, where it fails to adapt to modern outlets for freedom of speech, namely social media.

Even while on active duty, which is the status most vulnerable to the regulations of the military rather than civilian courts, service members can "write a letter in a newspaper, blog, or social media" where they assert that their "personal political views" belong to themselves and are not a representation of "The Department of Defense or Department of the Air Force".[35] Even as political speech is protected by such disclaimers, general speech is more likely to fall under the wide umbrellas of subordination or disrespect. Subordination is understood in this context as conduct in which military personnel challenge lawful orders issued by military authority. Similarly, speech that is perceived as disrespectful may include service members expressing an overt dissatisfaction or criticism with the U.S military, which erodes its involvement in global war and conflict. Despite the breadth and subjectivity of these categories, they yield disproportionate consequences for service members, enabling the arbitrariness of disciplinary action.

35. Secretary of the Air Force Public Affairs, *Political activity Dos and Don'ts for Airmen, Guardians, DoD employees*, AIR FORCE (2024), https://www.af.mil/News/Article-Display/Article/3741488/political-activity-dos-and-donts-for-airmen-guardians-dod-employees/ [https://web.archive.org/web/20260421010108/https://www.af.mil/News/Article-Display/Article/3741488/political-activity-dos-and-donts-for-airmen-guardians-dod-employees/] (Military personnel have to assert that their opinions belong to their own and not the U.S military).

While the Department of Defense attempts to provide clarification on these matters, their instruction is that "DoD personnel who are acting in a private capacity have the First Amendment right to further release or share publicly released unclassified information through non-DoD forums or social media, provided that no laws or regulations are violated."[36] The laws or regulations in question are vast and far-reaching, and the declaration does not attempt to limit the power of any military regulation. Even by clarifying that they are acting as private individuals and not servicemembers, military personnel could still face sanctions for internet speech like complaining about aspects of their job or their superiors.[37] As a 21st-century advancement, the global platform of social media offers service members the ability to express their dissatisfaction with their experiences within the military, such as the prevalence of sexual assault and homophobia.[38] Despite holding identifiable information that it is the individual's account and likeness, the military still perceives this free speech as criticism that is susceptible to punishment under the UCMJ. This suggests a disjunction between society's recognition of the internet as a form of free speech and the UCMJ's regulations.

While the military recognizes active service members' ability to post on social media as private individuals, it is relatively unwilling

36. U.S. DEP'T OF DEF., DOD INSTRUCTION 8170.01, ONLINE INFORMATION MANAGEMENT AND ELECTRONIC MESSAGING 24 (2021). (Demonstrates the limited capacity for military personnel to utilize the internet to express their experiences within the military).

37. U.S. Dep't of the Army, Off. of the Judge Advoc. Gen., Admin. L. Div., *Social Media and Appropriate Conduct for Speech by Soldiers and Army Civilians* (Feb. 7, 2024), https://home.army.mil/riley/2917/0896/9991/240207_Social_Media_Policty_Info_Sheet.pdf [https://web.archive.org/web/20260213171059/https://home.army.mil/riley/2917/0896/9991/240207_Social_Media_Policty_Info_Sheet.pdf] (Military personnel are still susceptible to punishment for internet usage and expression).

38. MARJORIE COHN & KATHLEEN GILBERD, *Sexual Harassment and Sexual Assault in the Military*, *in* RULES OF DISENGAGEMENT 105 (2009), https://www.jstor.org/stable/j.ctt9qfz98.9 (Homophobia and sexual assault within the military are prevalent issues that service members have used the internet to voice their concerns).

to limit the authority of lower-tier regulations within the armed forces. By leaving the scope of the internet posting allowance to such a wide array of figures, the practical rules become more opaque.

IV. CONSCIENTIOUS OBJECTORS

Within a dual jurisdiction, conscientious objectors refer to military service members who do not fulfill their directives due to their conflicting moral, ethical, and, or religious beliefs.[39] Formally constructed to allow military personnel to refuse military orders, the protection of conscientious objection is eroding, particularly as 21st-century advancements expand avenues for criticism of military authority. The government has failed to adapt UCMJ regulations to permit military members to use these channels to exercise their free speech rights. Notably, the advancement of social media has presented a challenge and opportunity for military personnel who can reach a larger target audience to express their experiences within the military. Yet this presents a platform where their dissatisfaction is monitored and tracked. Considering that UCMJ regulations undergo annual review, the U.S. government has sufficient opportunity to better accommodate them to allow free speech in the military. However, a persistent issue remains where the U.S. government has not increased protections for conscientious objectors.

As military personnel assert conscientious objection, the U.S. military considers their noncompliance punishable under the UCMJ. However, the U.S. military creates a greater barrier to free speech by mandating a conscientious objection status. Conscientious objection status is a certain legal classification that requires a servicemember to possess a "firm, fixed, and sincere objection" in order to categorize their non-participation as moral and ethical

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39. Selective Serv. Sys., *Conscientious Objectors* https://www.sss.gov/conscientious-objectors/ [https://web.archive.org/web/20260421011234/https://www.sss.gov/conscientious-objectors/] (last visited Mar. 30, 2026). (Demonstrates the numerous reasons why a conscientious objector may not fulfill their military orders).

reasons as opposed to insubordination.[40] To acquire conscientious objection status, service members must appear before a court and undergo a formal application. Despite recognition of a "sincere" objection, the U.S military does not guarantee approval of 'Missing Movement,' which suggests that the military still retains sole authority over the personal beliefs of servicemembers.[41] This demonstrates a power imbalance in which the government holds the power to determine whether expression is free speech or merely dissatisfaction.

A military personnel's reasoning for insubordination is not legally protected nor considered. Evidently, section 887 of Article 87 ('Missing Movement') in the UCMJ outlines how military personnel who "misses the movement of a ship, aircraft, or unit…through neglect or design…shall be punished as a court-martial may direct."[42] In this manner, "neglect" refers to "missing movement" resulting from carelessness and oversight, whereas "design" applies to soldiers whose intentional defiance is tied to their personal disagreement with the movement itself. The concurrent jurisdiction imposed on military personnel restricts autonomy, as they are prohibited from rejecting military orders. It could be ascertained that service members are censored from expressing their opinions, values, and beliefs. Individuals in the military service, who hold authorized force, are arguably subordinated and forced to offer their physical agency for the national government to carry out consequential actions.

"Neglect" is described as "carelessness or failure to meet responsibilities" and "design" as "willfully and deliberately missing

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40. The Guide for Conscientious Objectors in the Military, Center on Conscience & War (2024), https://centeronconscience.org/mil-co-guide-2024-2/ [https://web.archive.org/web/20260421011450/https://centeronconscience.org/mil-co-guide-2024-2/] (Outlines the requirements necessary for military personnel to obtain conscientious objector status).

41. *Id.*

42. 10 U.S.C § 887 (2025). (Missing movement is defined by the action of military personnel failing to fulfil their military orders).

movement."[43] This would include a service member having the premeditated intention not to fulfill military orders. A servicemember may justify their missing movement to religious, moral, or ethical reasons that oppose the outlined order. These reasons for defiance are acceptable in the mundane, and they are barred for military personnel. The reason for 'intent' is noticeably punished more severely than military personnel neglecting their orders. Nevertheless, those who engage in intentional objection often formally announce their non-participation, which provides sufficient time for military officers to make logistical arrangements.

The statute accounts for, and does not authorize, military personnel to engage in willful missing movement that aligns with their beliefs or rights of expression. A missing movement is defined by three major features: "the accused was required in the course of duty to move with a ship, aircraft, or unit, the accused knew of the prospective movement of the ship, aircraft, or unit; and the accused should have noticed the movement through design or neglect."[44] A conscientious objector's entitlement to politically and purposefully disapprove of a military order still renders their action unjustified and punishable. This suggests that the UCMJ prioritizes controlling military personnel for national interests over respecting servicemembers' autonomy. It is discovered that the UCMJ's prohibition on "neglect by design" undermines the accused's reasoning for failing to fulfill military orders.

43. Mike Waddington, *Understanding Article 87 UCMJ: Missing Movement by Neglect and Its Legal Implications*, Gonzalez & Waddington (2012), https://ucmjdefense.com/understanding-article-87-ucmj-missing-movement-by-neglect-and-its-legal-implications/ (Intentional and unintentional conscientious objection are the two recognized categories under the UCMJ that are both punishable).

44. *UCMJ Article 87: Missing Movement; Jumping From Vessel*, My Military Lawyers (2019), https://www.mymilitarylawyers.com/ucmj-article-87-missing-movement-jumping-from-vessel/ [https://web.archive.org/web/20260421012741/https://www.mymilitarylawyers.com/ucmj-article-87-missing-movement-jumping-from-vessel/] (Three features determine conscientious objection).

This demonstrates how a service member, working as military personnel, is seen as less entitled to their free speech rights with the intention of preserving an impartial national reputation. Under Article 87, a service member who acts as a conscientious objector to a military order in accordance with their "right to free speech" is perceived as a "threat to national interest", rendering them punishable.[45] This reflects the bifurcated framework between civilian and military protections, where free speech is classified as a threat for military personnel and a protected liberty for civilians.

Notably, the court case *United States v. Ehren K. Watada* (2007) demonstrates that conscientious objectors, despite maintaining personal disapproval with their orders, are still punishable under the UCMJ. In January 2006, Watada was commissioned for deployment to Iraq in June of 2006 per his obligations as a first lieutenant of the United States Army. Seeking to balance both his right to free speech and his military status, Watada submitted a document to the U.S. military outlining why he would not be deployed to Iraq in June 2006. The defendant sought to be transferred to a different station rather than to Iraq. However, these requests were denied by military officials, supporting the notion that the honoring of conscientious objection is weakening.

Watada held a demonstrable basis for his conscientious objection and protested his movement as he believed that the war in Iraq was "illegal" and "unlawful." Despite this, the court found Watada guilty of breaching Article 87 ('Missing Movement') of the UCMJ on June 22, 2006, when he refused to board the bus necessary for deployment to Iraq. Watada engaged in public disapproval of the Iraq war, stating that his "participation would make me party to war crimes."

45. *Watch What You Say - Don't Violate UCMJ*, Joint Base McGuire-Dix-Lakehurst, https://www.jbmdl.jb.mil/News/Article-Display/Article/246536/watch-what-you-say-dont-violate-ucmj/ [https://web.archive.org/web/20260421014251/https://www.jbmdl.jb.mil/News/Article-Display/Article/246536/watch-what-you-say-dont-violate-ucmj/] (last visited Mar. 30, 2026). (Demonstrates the rationale of military officials when punishing conscientious objection in certain cases).

Furthermore, Watada was also perceived as violating Article 133 'Conduct Unbecoming of an Officer and a Gentlemen' when he publicly expressed his dissatisfaction with being discharged. Watada expressed disapproval in a press conference where he declared that, "It is my conclusion as an officer of the armed forces that the war in Iraq is not only morally wrong but a horrible breach of American law."[46]

A military personnel's interest in justifying their conscientious objection only further compounds punishment, which underscores the notion, as highlighted by Articles 133 and 87, that the U.S. government fails to meaningfully consider the beliefs of its military personnel. Aligning with the UCMJ's weakening respect for conscientious objection, Watada's actions were subject to punishment. Examining free speech in the military, a critic asserts the importance of political dissent including conscientious objectors akin to Ehren K. Watada as creating an "avenue for accountability of public officials, an inspiration for social change, and a way for individual citizens to define their personal identities," rendering dissent as a cementation and manifestation of the conscientious objector's "own opinions."[47] Indeed, Watada's justification for missing movement was under the intention that it was morally necessary to disavow deployment to Iraq.

In this demonstration, Watada's defense for engaging in conscientious objections was the belief that participating in the Iraq war breached the United Nations International Laws of Human

46. Charles Burress, "Officer's Refusal of Iraq Deployment Divides the Japanese American Community: The Case of Lt. Watada," Asia-Pacific Journal 4, no. 9 (September 2006): 5–7, https://doi.org/10.1017/s1557466006005444 [https://web.archive.org/web/20260421020345/https://www.cambridge.org/core/journals/asia-pacific-journal/article/officers-refusal-of-iraq-deployment-divides-the-japanese-american-community-the-case-of-lt-watada/A55965B9B68F5001E58FE11950879DF3] (An Asian-Pacific focus source that accounts for Watada's refusal to participate in the Iraq war).

47. Sarah N. Rosen, Comment, *Be All That You Can Be? An Analysis of and Proposed Alternative to Military Speech Regulations*, 12 U. PA. J. CONST. L. 875, (2010) (Supports the rationale of conscientious objectors, akin to Watada, in ensuring a democratic military atmosphere).

Rights. Particularly, Article 3 "everyone has the right to life, liberty, and security of person" supports the accused's position for a moral reason to not participate in the Iraq war.[48] Furthermore, Watada invoked the Nuremberg Principles, adopted in 1946 after World War II, to argue his case that participating in the Iraq war would make him guilty of "war crimes."[49] This demonstrates how Watada believed that his entitlement to his First Amendment rights to free speech was not acceptable in the UCMJ's Article 87, missing movement. This presents concerns about restrictions on a military personnel's ability and right to disobey orders that they believe are morally unjust and "illegal."[50] Watada invokes the Nuremberg Principles, permitting military personnel the right not to obey all orders, to imply that his orders were not morally justifiable or rational. An apparent tension between the military personnel's autonomy to express their free speech rights and the military's regulations limiting their individual right to be conscientious objectors.

In response to Watada's moral justification, Captain Dan Kuecke, as part of the prosecution, claimed that Watada's missing movement contravened the soldiers who proceeded to serve in Iraq. Military officials condemning soldiers for resisting orders demonstrates the conformity culture established within the military. Watada, akin to numerous soldiers, undergoes public

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48. United Nations, *Universal Declaration of Human Rights*, UNITED NATIONS (1948), https://www.un.org/en/about-us/universal-declaration-of-human-rights [https://web.archive.org/web/20260417004137/https://www.un.org/en/about-us/universal-declaration-of-human-rights]. (Outlines the conflict between human rights and the military's punishment of conscientious objectors).

49. REPORT OF THE CITIZENS' HEARING CITIZENS' HEARING ON THE LEG ON THE LEGALITY OF U.S. ACTIONS IN IRA ACTIONS IN IRAQ: THE CASE OF LT. EHREN WATADA, 2, https://sites.evergreen.edu/zoltan/wp-content/uploads/sites/358/2018/01/REPORT.pdf [https://web.archive.org/web/20260417001238/https://sites.evergreen.edu/zoltan/wp-content/uploads/sites/358/2018/01/REPORT.pdf].

50. MARJORIE COHN & KATHLEEN GILBERD, *Dissent and Disengagement*, *in* RULES OF DISENGAGEMENT 61, [62] (2009), https://www.jstor.org/stable/j.ctt9qfz98.7 (Asserts that conscientious objectors may perceive their stance as justified under the perception that the military orders are illegal).

shame that compromises their career and personal life when displaying a rational objection to military orders.

In 'Dissent and Disengagement,' scholars Cohn and Gilberd ascertain that conscientious objectors, akin to Watada, are regarded as more radical than they are. They posit that in an "institution that values conformity and often sees it as evidence of discipline," a conscientious objector's reasons for holding opposing beliefs are undermined and perceived as a "strong form of protest." Whereas, it should be perceived as an individual's right to expression. This underscores the persecution's disapproval of Watada's missing movement for reasons of "design." Watada's entitlement to the and invoking of the Nuremberg Principles render him as disobedient in an institution that depends upon absolute acquiescence. As Watada's case ended in a mistrial, the government should similarly recognize the disjunction between the UCMJ's regulations and the human right of free speech. Conscientious objectors face the inevitable criticism for voicing their opinions, demonstrating the double standard that remains within the jurisdiction. Watada's case demonstrates the immense backlash that arises when service members express their First Amendment rights, which underscores the notion that emerging military personnel may feel hesitant to express their beliefs in a similar way. It is ascertained that without the necessary protections of conscientious objectors being upheld, the tension between civil and military interests will only exacerbate.

CONCLUSION

In evaluating freedom of speech within the military, it becomes evident that the cost of a military personnel's First Amendment rights is their job security. The government's reliance on hierarchy, rank, and visibility to narrow the scope of freedom creates an environment in which military personnel reap greater benefits from compliance than from expressing dissenting perspectives. Prioritizing national interest and strict expectations of cohesion, the government uses vague dual-jurisdiction laws to treat freedom of speech as a threat rather than a right.

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