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THE FOREIGN CORRUPT PRACTICES ACT: TOWARD A DEFINITION OF “FOREIGN OFFICIAL”

INTRODUCTION

The Mexican government is the only entity permitted to own and exploit Mexico’s natural resources, and as such, it may create other entities tasked with the management and distribution of those resources.¹ The Mexican government has used this mandate to create a petroleum company, Petróleos Mexicanos (“PEMEX”), which it wholly owns.² The Mexican government appoints every member of the PEMEX governing board and employs PEMEX’s other employees, as well.³

Exxon and Occidental are both American petroleum companies that compete for the ability to drill for oil in Mexican waters, and the Mexican government has authorized PEMEX to grant those concessions.⁴ Consider the following hypothetical:⁵ Exxon submits a bid of \$95 million⁶ for the drilling concession and Occidental submits one worth \$100 million. PEMEX has made no indication of which company it plans to choose, but arranges to select the winning bid and award the contract at a public ceremony to which both companies are invited.⁷ During the ceremony, but before PEMEX awards the contract, the chief executive officer and chairman of Exxon gives the chief executive officer of PEMEX a check for \$10 million, at which point PEMEX awards Exxon the drilling concession.⁸

Now, consider the U.S. Foreign Corrupt Practices Act (“FCPA”).⁹ The FCPA prohibits paying bribes to foreign offi-

1. United States v. Aguilar, 783 F. Supp. 2d 1108, 1119–20 (C.D. Cal. 2011).

2. *Id.* (noting that the PEMEX website indicates that it is “[a] government agency . . . created and . . . owned by the Mexican government.”).

3. *Id.*

4. *Id.*

5. The Central District of California posed this hypothetical in the course of *Aguilar*. *Id.* at 1119–20.

6. All figures are in U.S. Dollars.

7. *Aguilar*, 783 F. Supp. 2d at 1119–20.

8. *Id.* at 1119–20.

9. Foreign Corrupt Practices Act [FCPA], 15 U.S.C. §§ 78dd-1–78dd-3 (1998).

cial to improperly attain business abroad.¹⁰ Under the FCPA, a "foreign official" is "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such [entity]."¹¹

Do Exxon's actions fit within that framework? Should the Department of Justice ("DOJ") prosecute one or both of the parties for violating the FCPA? Is the president of PEMEX even a "foreign official"? The Central District of California in *United States v. Aguilar* asked the defendants during a hearing on this exact hypothetical,

whether any responsible Congressional leader would respond to such a DOJ inquiry by saying, "No, do not prosecute Exxon or its CEO, because PEMEX is a state-owned corporation and it was not the intention of Congress to consider any corporation an 'instrumentality' of any foreign government, regardless of the other facts warranting prosecution."¹²

The defendants answered the inquiry by suggesting that a Congressional leader may indeed respond in just such a way, provided he was uninfluenced by political considerations and elections.¹³ Although the court posited that "whether injected with truth serum or not, members of Congress would not deem such a prosecution to be beyond the purview of the FCPA merely because PEMEX is a state-owned corporation,"¹⁴ the debate has yet to be officially resolved in American jurisprudence. In fact, the *Aguilar* court posed this hypothetical precisely because it found that the legislative history of the FCPA did not point directly towards including or excluding employees of state owned corporations within the definition of "foreign official."¹⁵

10. *Id.*

11. FCPA, § 78dd-2(h)(2)(A).

12. *Aguilar*, 783 F. Supp. 2d at 1120.

13. *Id.*

14. *Id.*

15. *Id.* at 1119. As this Note went to print, the DOJ issued a guidance indicating that it does consider these employees within the purview of the FCPA. Although the guidance is "non-binding, informal, and summary in nature," it will be a useful tool for the courts when faced with defining "foreign official." See U.S. DEPT. OF JUSTICE AND SEC. EXCH. COMM'N, FCPA: A

Despite the potential ambiguity in the statute, the DOJ has been prosecuting a growing number of actions pursuant to the FCPA, increasing from five in 2004 to seventy-four in 2010.¹⁶ The settlement figures are also on the rise, with half of the ten biggest FCPA settlements, which in some cases topped \$350 million, occurring in 2010.¹⁷ This continued increase may be attributable in part to the Obama Administration, evidenced by U.S. Attorney General Eric Holder's 2009 proclamation that, because corruption is a "scourge on civil society" and "one of the greatest struggles of our time,"¹⁸ it requires vigilant enforcement. Yet even before the current administration, the DOJ and the Securities and Exchange Commission ("SEC") began increasing enforcement following the set of amendments that expanded the FCPA's scope in 1998.¹⁹ Additionally, the DOJ and SEC began encouraging firms to disclose FCPA violations voluntarily, and the firms have been doing so with greater frequency, as a result of the Sarbanes-Oxley Act and its disclosure requirements.²⁰

For many industries, doing business in corruption-prone areas may be something that simply comes with the territory, requiring a balancing between pursuing international business

RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT aii, 19–21 (2012).

16. *Bribery Abroad: A Tale of Two Laws*, ECONOMIST (Sept. 17, 2011) <http://www.economist.com/node/21529103>.

17. *Id.* ("[R]ecent years have seen a spike in enforcement, from five actions in 2004 to 74 in 2010. Five of the ten biggest settlements ever were last year, including a \$400 [million] fine against BAE systems, a British defense contractor, and a \$365 [million] fine against ENI, an Italian oil firm.")

18. Jon Jordan, *Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery*, 7 N.Y.U. J. L. & BUS. 845, 861 (2011).

19. Lucinda A. Low, Owen Bonheimer & Negar Katirai, *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, 1665 PLI/CORP. 711, 715 (2008).

20. *Id.* at 742–43; Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). Enacted on July 30, 2002 in an effort to curb corporate fraud, the Sarbanes-Oxley Act "regulat[es] accounting practices, imposes disclosure requirements on directors and officers and the corporations themselves as well as increases the penalties for violations of federal securities laws." John F. Olson, Josiah O. Hatch, & Ty R. Sagalow, *Possible Liabilities of Officers and Directors under Federal and State Statutes*, in DIR. & OFF. LIAB § 3:139 (Nov. 2011).

opportunities and avoiding running afoul of U.S. law.²¹ For example, in the energy industry, “the work of navigating ancient kingdoms and secretive relationships has become an integral part of finding new [oil] reserves, . . . [and] has led the industry . . . to the most difficult corners of the earth.”²² These energy companies, and other types of businesses, have been targeted in the upswing of DOJ and SEC prosecutions under the FCPA that began in 2004.²³ Likewise, Wal-Mart, which has been rapidly expanding across the globe, found itself in trouble in Mexico in early 2012, and Hollywood studios have had to answer similar questions about their dealings in China and the accompanying FCPA implications.²⁴

These businesses will also need to conform to the United Kingdom Bribery Act 2010 (“U.K. Act”), which was passed in 2010 and went into effect in July 2011.²⁵ This statute is even broader in scope and more restrictive than the FCPA, even if some consider it “better crafted,” because it is also fairer to firms.²⁶ The U.K. Act provides a compliance defense, which protects honest firms from suffering the most severe of consequences if a briber was “one rogue employee,” and the firm had a clear and effective anti-bribery program.²⁷ Regardless of the U.K. Act’s specific content, there can be no doubt that it presents additional anti-corruption hurdles that global businesses must meet if they want to avoid the courtroom.²⁸

As can be expected, the enthusiasm of the DOJ and SEC for the FCPA is not shared universally.²⁹ Some have suggested

21. Nathan Vanderklippe, *Jumping through hoops to win business in Libya: Canadian corporations face a thicket of ethical questions, hazy laws back home and local government greed*, GLOBE & MAIL, Mar. 22, 2011, at A20.

22. *Id.*

23. Thomas McSorley, *Foreign Corrupt Practices Act*, 48 AM. CRIM. L. REV. 749, 751 (Spring 2011); see also Vanderklippe, *supra* note 21.

24. See David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012, at A1; Edward Wyatt, Michael Cieply, and Brookes Barnes, *S.E.C. Asks if Hollywood Paid Bribes in China*, N.Y. TIMES, April 25, 2012, at B1.

25. *Bribery Abroad*, *supra* note 16; Chris Borg, Emma Radmore, and Madeleine de Remusat, *Bribery Act 2010: No More Excuses*, COMPLIANCE MONITOR, May 2011, at 1.

26. *Bribery Abroad*, *supra* note 16.

27. *Id.*

28. See *id.*

29. Shawn McCarthy, *Resource curse puts companies in crosshairs: U.S.-listed Canadian firms will be included in SEC international anti-corruption*

that this vigorous enforcement of the FCPA essentially serves as a "de facto sanction" against these corruption-prone countries,³⁰ while many players in big business see the FCPA as injurious to the United States' competitive advantage and as a major hindrance to business profitability.³¹ Essentially, they believe the FCPA "holds [American companies] to a higher standard" than their foreign competitors, which are permitted to conduct their business in a way that would technically violate the FCPA.³² The statute's additional restraints on American companies thus negatively affect their ability to compete in those markets.³³ The high chance of violating the FCPA and facing prosecution discourages about a third of British and a quarter of American companies from doing business in countries that are prone to corruption.³⁴ Due to concerns about "onerous compliance costs and competitive disadvantage," some companies would "prefer the rule-making be harmonized among major trading partners to reduce the potential for problems."³⁵ Although such harmonization would require significant work from the outset, an essential starting point, which would greatly improve companies' ability to plan their business abroad, would be solidifying a definition of "foreign official."³⁶

The particular question of how to define a "foreign official" under the FCPA is at issue for any type of corporation looking

rules, GLOBE & MAIL, Feb. 22, 2011, at B3 ("The oil industry, in particular, is raising alarms.").

30. *Id.*

31. See generally David S. Hilzenrath, *Can You Spot the Bribe? American Businesses Cannot Either*, WASH. POST, July 24, 2011, at G01 [hereinafter Hilzenrath, *Spot?*]; McCarthy, *supra* note 29; David S. Hilzenrath, *The Price of Global Business (in a Briefcase Full of Cash)*, WASH. POST, Mar. 24, 2011, at A14 [hereinafter Hilzenrath, *Price*].

32. Hilzenrath, *Price*, *supra* note 31 (quoting regulatory filing of Diebald, an Ohio-based producer of automatic teller machines).

33. *Id.* (quoting regulatory filing of Diebald, an Ohio-based producer of automatic teller machines).

34. *Bribery Abroad*, *supra* note 16.

35. McCarthy, *supra* note 29.

36. See *Bribery Abroad*, *supra* note 16; Bruce Zagaris, *U.S. Trade Associations Request Better Guidance on FCPA Implementation*, 28 INT'L ENFORCEMENT L. REP. 182, 182 (2012); Tom Hamburger, Brady Dennis & Jia Lynn Yang, *Wal-Mart Took Part in Lobbying Campaign to Amend Anti-Bribery Law*, WASH. POST, Apr. 24, 2012, at A01.

to do business abroad.³⁷ Energy companies are an illustrative example of the “foreign official” ambiguity problem because many energy companies are nationalized, wholly or partially, so their agents may arguably be considered public officials. Any U.S. companies looking to operate in compliance with the law, then, need to be able to identify which energy sector agents may trigger FCPA liability, though all too often this proves to be a difficult task.³⁸ Recent cases in the United States address the definition of “foreign official,” however, the courts have yet to provide a clear one.³⁹

When a statute’s text is ambiguous, courts may “turn to the legislative history to ascertain Congress’s intent.”⁴⁰ Additionally, if the legislative history is inconclusive, the court may apply the rule of lenity and construe the statute in favor of the defendant (in the case of “foreign official,” narrowly).⁴¹ However, “[t]he rule of lenity applies only where . . . resort[ing] to any and all other sources still results in a tie as to the proper interpretation.”⁴² Therefore, reviewing the stated motivations for enacting anti-corruption legislation in the United States, the U.K., and relevant international organizations, and subsequent

37. Joel M. Cohen et al., *Under the FCPA, Who is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1245–46 (2008).

38. *See id.* at 1268–69. Although some nations are trending towards privatizing nationally-owned companies rather than nationalizing private companies, that transition is often caught in a state of limbo, leaving those companies still partially state-owned. To provide one example, Iran privatized all of its major industries but specifically excluded its oil and gas industry from that process. *Id.*

39. *In Carson Case, DOJ Agrees ‘Foreign Official’ Knowledge is Required*, THE FCPA BLOG (Sept. 27, 2011, 1:28 AM), <http://www.fcpcbog.com/blog/2011/9/27/in-carson-case-doj-agrees-foreign-official-knowledge-is-requ.html>; *see* United States v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Cal. 2011); *see also* Aluminum Bahrain B.S.C. v. Alcoa Inc., No. 8–299, 2012 WL 2094029 (W.D. Pa. June 11, 2012); United States v. Carson et al., No. SA CR 09-00077-JVS, 2011 WL 5101701, at *2–5 (C.D. Cal. May 18, 2011) (employees of state-owned companies may fall within the FCPA’s meaning of “foreign official;” instrumentalities of foreign governments may include entities that are not departments or agencies of a foreign government and a categorical exclusion of state-owned companies may be improper).

40. United States v. Kozeny, 493 F. Supp. 2d 693, 701 (S.D.N.Y. 2007) (citing *Xia Ji Chen v. U.S. Dep’t of Justice*, 471 F.3d 315, 326 (2d Cir. 2006)).

41. *Id.*

42. *Id.* (citing *Johnson v. United States*, 529 U.S. 694, 713 n.13 (2000)).

American judicial interpretation of "foreign official,"⁴³ can provide guidance in the creation of an as-yet unsolidified definition of the term "foreign official" within the FCPA.⁴⁴

Part I of this Note will propose three analytical lenses through which one may examine anti-corruption legislation. Part II will use those lenses to survey comparative anti-bribery measures developed by the Organization for Economic Co-Operation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Convention") and also the United Kingdom. Part III will then focus those lenses on the FCPA itself, exploring its history and judicial interpretation. Part IV will examine the specific matter of "foreign official" in light of the general discussion of anti-corruption legislation and consider a definition using the three analytical lenses offered at the beginning of this Note.

I. THREE ANALYTICAL LENSES FOR DEFINING "FOREIGN OFFICIAL"

The following three analytical models may provide direction as to the intended meaning of "foreign official": the *Charming Betsy* Doctrine;⁴⁵ the level playing field argument;⁴⁶ and the public trust doctrine, which includes both the traditional and corporate proconsul variations.⁴⁷ Each proposed model will be described in turn.

A. *The Charming Betsy Doctrine: Complying with International Norms*

In 1804, the court in *Murray v. Schooner Charming Betsy* held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."⁴⁸ That concept has become known as the *Charming Betsy* Doctrine.⁴⁹ The *Charming Betsy* Doctrine has had a lasting impact on legislation, and compliance with international

43. *Aguilar*, 783 F. Supp. 2d at 1117.

44. *See id.*

45. *See infra* Part I.A.

46. *See infra* Part I.B.

47. *See infra* Part I.C.

48. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117–18, 2 L.Ed. 208 (1804).

49. *See, e.g., Aguilar*, 783 F.Supp.2d at 1116.

norms was an important factor behind the implementation of the FCPA.⁵⁰ The need and desire to align with the views of the international community influenced the anti-corruption legislation in the United Kingdom, as well.⁵¹ Thus, examining international definitions of “foreign official,” and the motivations behind the specific wording of said definitions in light of the *Charming Betsy* Doctrine, could help clarify the definition within the American legislation.

B. The Level Playing Field Approach: Promoting Fair Competition

Considering the motivating effect that compliance with international norms had on drafting the American and British anti-corruption legislation, reviewing the goals of the OECD Convention could help direct our understanding of the FCPA and the U.K. Act and, specifically, their respective uses of the term “foreign official.”⁵² The OECD is an independent organization that serves to “promote policies that will improve the economic and social well-being of people around the world.”⁵³ The ideas motivating the OECD in general, and the OECD Convention, provide another analytical lens: the level playing field. One major goal of the OECD Convention was to “level [the] playing field,”⁵⁴ or, in other words, to promote fair competition.⁵⁵ This popular concept deals with the competitiveness of markets that have been compromised by corruption.⁵⁶ Applying the level playing field concept to the U.K. and U.S. legislation, and to their respective definitions of “foreign official,” could therefore provide another route to clarification.

50. Nicholas Cropp, *The Bribery Act vs. the FCPA: Nuance vs. Nous*, [2011] CRIM. L.R. 122, 125–126 (2011).

51. *See id.* at 126.

52. *See* Cohen, *supra* note 37, at 1259–60. For a more extensive discussion of the OECD and its goals, see *infra* Part II.A.

53. *About the OECD*, ORGANIZATION FOR ECONOMIC DEVELOPMENT [OECD], <http://www.oecd.org/about/> (last visited Sept. 30, 2012).

54. Cropp, *supra* note 50, at 125.

55. *Id.* at 123.

56. *Id.* at 124–25.

C. The Public Trust Doctrines

1. Public Trust: The Traditional View

Some international organizations view corruption in terms of the public trust doctrine. In their view, the public grants certain individuals positions of power, and when those individuals corruptly exploit those positions, it is a breach of public trust.⁵⁷ For example, the OECD Convention defines corruption as the “abuse of public or private office for personal gain.”⁵⁸ Similarly, Transparency International is an international coalition against corruption that “work[s] cooperatively with all individuals and groups, with for-profit and not-for-profit corporations and organisations, and with governments and international bodies committed to the fight against corruption.”⁵⁹ It defines corruption as “behaviour on the part of officials in the public sector, whether politicians or civil servants, in which [those officials] improperly and unlawfully enrich themselves, or those close to them, by the misuse of the public power entrusted to them.”⁶⁰

2. Public Trust: The Corporate Proconsul View⁶¹

The “corporate responsibility” or corporate proconsul model is a variant of the public trust model and can elucidate the definition of “foreign official,” as well.⁶² This model has a similar concept to the traditional public trust model—that a duty is owed to the public at large stemming from the entity’s place of power

57. OECD, CORRUPTION: A GLOSSARY OF INTERNATIONAL STANDARDS 2 (2007) [hereinafter OECD, GLOSSARY].

58. *Id.* at 19.

59. *Who We Are*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/whoweare/organisation/mission_vision_and_values (last visited Aug. 26, 2012).

60. OECD, GLOSSARY, *supra* note 57, at 20.

61. In *The Foreign Corrupt Practices Act*, George Greanias and Duane Windsor contemplate corporations as being the holders of public trust. They discuss the idea of “the corporation as government proconsul.” This concept accounts for what the authors perceived as a “major change in government intervention in the private sector . . . from government action to achieve economic ends to government action intended to reach various social goals.” GEORGE C. GREANIAS & DUANE WINDSOR, *THE FOREIGN CORRUPT PRACTICES ACT: ANATOMY OF A STATUTE* 46 (1982).

62. *See id.* at 44 (explaining the possible quasi-political role of corporations).

and trust within society⁶³—only here the entity in that place of power and trust is a corporation rather than a public official.⁶⁴ The corporation, “by virtue of the financial, human, and natural resources that it commands, by the great wealth which it accumulates and expends, and by its ability to affect even those not directly affiliated with the enterprise, has power that is not merely economic but also social and political,”⁶⁵ and therefore is afforded public trust. Importantly, this corporate accountability concept is distinct from that of legal corporate responsibility.⁶⁶ Corporate accountability,

is rooted in the concept that corporations have been granted a franchise or license by society that is in the nature of a privilege. Continuation of that franchise requires an accounting of the corporation’s relationship with and contribution to society. The franchise comes with terms and conditions; thus the corporate community must hold itself accountable to society beyond legal compliance with statutes and regulations. Accountability extends to corporate power, corporate performance, and corrupt behavior. Legal compliance and ethical behavior are expected.⁶⁷

Because the public places its trust in the corporation, corporate corruption and bribery violates that trust.⁶⁸ Though neither iteration of the public trust doctrine defines “foreign official” *per se*, both may still provide valuable insight into the way many international actors approach the term.

II. COMPARATIVE LEGISLATION

Studying foreign anti-corruption legislation, in addition to policy proposals from international organizations, is a constructive exercise when analyzing vague domestic legislation such as definitional language within the FCPA. Doing so in this case is not only important for application of the *Charming Betsy* Doctrine, but it also helps to generally survey the anti-corruption landscape. The OECD Convention and the U. K. Act

63. *Id.* at 44, 46.

64. *Id.* at 46.

65. *Id.* at 44.

66. *See id.* at 35–36.

67. *Id.*

68. *Id.* at 45–46.

provide useful comparative legislation for the FCPA and also working definitions of the term "foreign official."

A. OECD Convention

The mission of the OECD is to promote equal economic footing for all countries through fair, multilateral trade and competition.⁶⁹ The OECD Convention was adopted in November 1997, entered into force in February 1999, and as of April 2012, thirty-four OECD member countries and five non-member countries had signed onto it.⁷⁰ The Convention "establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective."⁷¹

Generally, the OECD subscribes to the level playing field or fair competition model of validating anti-corruption legislation:

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the [OECD] shall promote policies designed:

to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and

to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.⁷²

However, the OECD has also faced outside pressure to adopt the fair competition approach. "[The] diplomatic pressure exerted by the United States on other nations to level the playing field internationally, was arguably a key factor in the creation of the 1997 OECD Convention, which in turn resulted in

69. OECD, GLOSSARY, *supra* note 57, at 2.

70. *Id.* at 19; *Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/briberyininternationalbusiness> (last visited Oct. 21, 2012).

71. OECD, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1.

72. OECD, GLOSSARY, *supra* note 57, at 2.

FCPA-like legislation in numerous signatory nations,” including the United Kingdom.⁷³ Moreover, the fact that the OECD strives to “accord[] with international obligations” suggests that the same motivations behind the *Charming Betsy* Doctrine were also at play during the drafting of the OECD convention.⁷⁴

B. The U.K. Act

The U.K. Act⁷⁵ criminalizes the bribery of government officials, both domestic and foreign; commercial bribery; the acceptance of bribes; and the failure of a corporation to prevent the offering of bribes.⁷⁶ Furthermore, the statutory language encompasses several types of entities,⁷⁷ including firms incorporated in the United Kingdom, those that have a business—or any part of a business—within the United Kingdom, and any person that is “associated” with such corporations.⁷⁸ The statute defines an “associated” person as anyone that acts on behalf of the corporation.⁷⁹

Although the U.K. Act is progressive in many respects, including its provision imposing strict liability on firms failing to prevent bribery, it also affords corporations some defenses.⁸⁰ To offer one important example, a corporation under investigation may escape liability by providing proof that it composed, diligently implemented, and informed employees and associates of adequate anti-bribery compliance rules.⁸¹

1. The U.K. Act and *Charming Betsy*

The *Charming Betsy* Doctrine, though a feature of U.S. law, represents an approach to enacting and interpreting a nation’s domestic legislation that played a crucial role in creating the U.K. Act. The OECD Convention put forth standards for anti-corruption legislation and made recommendations for the Unit-

73. Cropp, *supra* note 50, at 125.

74. OECD, GLOSSARY, *supra* note 57, at 2.

75. Bribery Act, 2010, c. 23 (2010) (Eng.) [hereinafter U.K. Act]. The U.K. Act was passed on March 30, 2011 and entered into force on July 1, 2011. Borg, *supra* note 25, at 1; Jordan, *supra* note 18, at 864.

76. U.K. Act, c. 23.

77. *Id.*

78. Jordan, *supra* note 18, at 865–66.

79. *Id.*

80. U.K. Act, c. 23.

81. Jordan, *supra* note 18, at 866.

ed Kingdom to bring itself into immediate compliance with those standards in 2003, 2005, and 2007.⁸² In October 2008, the OECD indicated, in its report on a British bribery case,⁸³ that it was "disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK."⁸⁴ Such criticism by the OECD, in which other international organizations and even other countries joined, likely influenced the U.K.'s decision to reform its anti-bribery legislation,⁸⁵ though the explanatory notes to the U.K. Act suggest that it was written in response to the country's self-realization that existing anti-corruption laws were outdated, convoluted, and "in need of reform."⁸⁶

82. OECD, *United Kingdom: Phase 2bis: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, at 5 (Oct. 16, 2008) [hereinafter OECD, *Phase 2bis*]; OECD, *Implementing the OECD Anti-Bribery Convention: Report on the United Kingdom 2007*, at 89 (July 17, 2006) [hereinafter OECD, *Implementing*]; see also Tim Pope & Thomas Webb, *The Bribery Act 2010*, 25(10) J. INT'L. BANKING L. & REG. 480, 480 (2010).

83. In 2004, the United Kingdom's Serious Fraud Office ("SFO") began an investigation into alleged bribery by BAE Systems PLC, a British exporter of military aircraft, in relation to a contract with Saudi Arabia for Al-Yamamah aircraft. See *The Queen on the Application of Corner House Research and others v. Director of the Serious Fraud Office*, [2008] UKHL 60, (appeal taken from [2008] EWHC (Admin) 246). The SFO halted the investigation in 2006 prompting the criticism by the OECD. See *id.* In 2008, the Divisional Court found that the SFO's discontinuation of the investigation into BAE Systems was unlawful. See *id.* The House of Lords overturned that decision on appeal, deciding that the Director of the SFO acted properly in taking into account threats made against the British public if the investigation continued, regardless of whether it was in violation of Article 5 of the OECD Convention. See *id.*

84. OECD, *Phase 2bis*, *supra* note 82, at 4; Pope, *supra* note 82, at 481.

85. *Id.* at 123 ("In reality, external pressures and concerted international criticisms of the UK's existing approach to corruption may have had greater impact on the genesis of the Act than is suggested.")

86. Cropp, *supra* note 50, at 122.

Explanatory Notes suggest that reform was needed because "the law in the United Kingdom was 'old and anachronistic' and that '[f]rom a purely legal perspective, the case for reform is a compelling one.'" [quoting Jack Straw MP] This language suggests that the 2010 Act originated with an internal realization that the U.K.'s antiquated bribery laws were in need of reform. The explanatory notes quote the Law Commission's November 2008 Report, "Reforming Bribery," in

In addition to the OECD's influence, the United States also may have impacted the United Kingdom's decision to revise its anti-corruption legislation.⁸⁷ The U.S. National Security Strategy identifies the fight against corruption as an integral part of its mission to protect human rights and to stimulate development and security around the world.⁸⁸ Transparency and accountability with regard to the finances of governments and their public officials are important parts of such anti-corruption effort.⁸⁹ The United States, in seeking to expand its security policies and to maintain competitive advantages for citizens engaging in foreign business, has exerted pressure on the United Kingdom to bring its own anti-corruption legislation up to international norms.⁹⁰

The language in provisions of the U.K. Act itself is also indicative of the United Kingdom's reaction to international pressure to reform its anti-corruption legislation.⁹¹ For example,

which the Commission similarly notes that "the current law is riddled with uncertainty and in need of rationalization."

Id.

87. *Id.* at 125.

Indeed the disadvantage occasioned to US corporations by the compliance requirements of the FCPA, and subsequent diplomatic pressure exerted by the United States on other nations to level the playing field internationally, was arguably a key factor in the creation of the 1997 OECD Convention, which in turn resulted in FCPA-like legislation in numerous signatory nations.

Id. The United States influenced the creation of the OECD Convention, which in turn influenced the United Kingdom to bring its anti-corruption legislation up to international norms. *Id.* See also, G. Sullivan, *The Bribery Act 2010: Part I: an overview*, 2 CRIM. L. REV. 87, 96-97 (2011) (U.K.).

88. Sullivan, *supra* note 87, at 96-97.

89. *Id.* ("Pervasive corruption is a violation of basic human rights and a severe impediment to development and global security. We will work with governments and civil society organisations to bring greater transparency and accountability to government budgets, expenditures and the assets of public officials.")

90. *Id.* at 97 ("Obviously, the United States will want to pursue this increasingly robust anti-corruption strategy at least cost to its competitive position. One can anticipate various forms of encouragement from the United States for the United Kingdom to do its bit.")

91. *Id.* at 94 ("Perhaps the most significant role for this new offence is to flag clearly that the United Kingdom is compliant with its treaty obligations to combat the bribery of public officials.")

the U.K. Act makes it a distinct offense to bribe a foreign official.⁹² This offense appears to be somewhat redundant, or even superfluous,⁹³ considering that other provisions of the U.K. Act adequately prohibit bribery. It seems that including the distinct offense of bribing foreign officials is meant to placate the OECD by adopting similar language to that promulgated by the Convention, and to visibly demonstrate the United Kingdom's effort to expeditiously improve upon its anti-corruption legislation.⁹⁴

2. The U.K. Act and the Level Playing Field Approach

Through its anti-corruption legislation, the United Kingdom also seeks to level the playing field, but not solely for the sake of curbing unfair advantages.⁹⁵ Bribery not only subverts the marketplace, but also diverts funds from public projects to corrupt individuals.⁹⁶ This results in a "human tragedy," in which "power is abused[,] the weak are exploited[, and] the dishonest rewarded."⁹⁷ The U.K. Act aims to rectify that wrong and to right the imbalance of power.⁹⁸

92. U.K. Act, c. 23, § 6(1)–(8); Sullivan, *supra* note 87, at 94.

93. *See id.*

94. Sullivan, *supra* note 87, at 94. In regards to the specific offense of bribing a foreign official,

There is reason to doubt whether this offence makes any substantive contribution to the criminalisation of bribery. Since 2001 UK corruption legislation has been given an extra-territorial dimension and it is difficult to envisage conduct falling within the new foreign public officials offence which would not also be covered by the two core bribery offences, subject to any jurisdictional constraints. Additionally, where foreign officials are bribed on behalf of UK companies, the companies are very likely to be exposed to liability under the failure of a commercial organisation to prevent bribery offence, which has a very wide jurisdictional base. Perhaps the most significant role for this new offence is to flag clearly that the United Kingdom is compliant with its treaty obligations to combat the bribery of public officials.

Id.

95. Pope, *supra* note 82, at 480.

96. *Id.*

97. *Id.* (internal citations omitted).

98. *See* Cropp, *supra* note 50, at 124; *see also* Randal C. Archibald, *Even as It Hurts Mexican Economy, Bribery is Taken in Stride*, N.Y. TIMES, April 23, 2012, at A4.

3. The U.K. Act and the Public Trust Doctrines

Certain aspects of the U.K. Act also suggest that the drafters of that statute considered “public trust” to be an important concept.⁹⁹ The U.K. Act criminalizes conduct that induces a foreign public official to improperly perform a relevant function or activity.¹⁰⁰ When defining those relevant functions or activities, the U.K. Act provides that the function or activity meet one of three conditions, namely that the person performing the activity is expected to do so in good faith, is expected to perform it impartially, or is in a “position of trust by virtue of performing it.”¹⁰¹ The three preceding conditions are “relevant expectations” under the U.K. Act, and the official function is performed improperly only if the performance breaches one of those “relevant expectations.”¹⁰² Section five of the Act provides a test to determine the impropriety of given conduct.¹⁰³ Notably, that test is based on “what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned.”¹⁰⁴ By adopting a reasonableness standard that focuses only on the British perspective, this test disregards the local custom and practice of the country in which the alleged action—i.e. bribery—may be taking place, unless that country permits or requires the action in question under its written law.¹⁰⁵

The U.K. Act also appears to be influenced by the idea of corporate responsibility, or the corporate proconsul approach to the public trust doctrine. This is evidenced in large part by provisions that afford targeted companies defenses that hinge on the company’s ability to prove internal cultures of responsibility. The Serious Frauds Office (“SFO”) “will expect to see not just paper-compliance, but rather an anti-corruption culture, *‘fully and visibly supported at the highest levels’* in the commercial organization.”¹⁰⁶ Some proponents of the public trust doctrine argue that the U.K. Act should aim for a “behavioural

99. Sullivan, *supra* note 87, at 88.

100. U.K. Act, c. 23, § 4; David Aaronberg & Nichola Higgins, *The Bribery Act 2010: All Bark and No Bite . . . ?*, 2010 ARCHBOLD REV. 5, 6 (2010) (Eng.).

101. Aaronberg, *supra* note 100, at 2.

102. U.K. Act, c. 23, § 4(2); Aaronberg, *supra* note 100, at 7.

103. U.K. Act, c. 23, § 5.

104. Aaronberg, *supra* note 100, at 2.

105. Sullivan, *supra* note 87, at 91.

106. Aaronberg, *supra* note 100, at 6 (emphasis in original).

change" in corporate Britain such that "no form of corruption is tolerated."¹⁰⁷

The United Kingdom's implicit desire for corporate responsibility is clear, both from the fact that it is much easier to prosecute companies under the bribery statutes¹⁰⁸ and from the fact that the U.K. Act provides an adequate procedures exception.¹⁰⁹ Lord Bach, the former Minister for Legal Aid, indicated in a December 2009 letter to the House of Lords that,

[i]t is not our intention to drag well run companies before the courts for every infraction. It would be wrong to leave organizations open to a heavy fine if a rogue element within its ranks bribes on behalf of the organization when those who manage it can show they have put in place procedures designed to prevent bribery on its behalf.¹¹⁰

The availability of the adequate procedures defense illustrates that the United Kingdom is not simply interested in prosecuting companies for violating the U.K. Act.¹¹¹ Rather, it is more interested in encouraging companies to make meaningful changes to their corporate culture and to make fighting corruption a priority.¹¹² Companies would be more inclined to formulate effective compliance programs if they knew it would help them avoid liability in the future.¹¹³ Indeed, the interplay between the "long-arm jurisdiction"¹¹⁴ and the adequate measures

107. *Id.* at 1.

108. *Id.* at 5, stating:

Section 7 [of the U.K. Act] is intended to make it much simpler to prosecute such organizations for bribery offences. Previously prosecutors had to identify the directing will and mind within a company at the time an offence was committed and obtain evidence of that person's knowledge and involvement. Unsurprisingly, there were few prosecutions. Under the new Act, prosecutors will need only to prove fault by an individual connected to a relevant organization—"A"—in order to engage this section.

Id.; see also U.K. Act, c. 23, § 7.

109. Aaronberg, *supra* note 100, at 5.

110. *Id.*

111. *Id.*

112. *Id.* at 1, 8.

113. *See id.* at 8.

114. The U.K. Act employs "long-arm jurisdiction" because, "nationals [and] closely connected persons of the regulated country, including companies incorporated in the regulated country, can be prosecuted regardless of where

defense strikes “an appropriate balance between the need to aggressively police corrupt activities in foreign jurisdictions and the need to protect corporations which have committed resources to establishing principles-based policies, procedures and controls, notwithstanding the nefarious acts of the corporation’s employees or agents.”¹¹⁵

III. THE FOREIGN CORRUPT PRACTICES ACT

A. *History*

Congress enacted the FCPA in 1977 following a confluence of events—the Watergate scandal, an SEC investigation, and a voluntary bribery disclosure program—that exposed the fact that American companies had been making millions of dollars in bribes to foreign officials.¹¹⁶ Congress responded to these findings by amending the Securities and Exchange Act of 1934, which resulted in the creation of the FCPA.¹¹⁷

The FCPA has two provisions: the anti-bribery prohibitions and specific accounting requirements.¹¹⁸ The anti-bribery provisions addressed the corrupt practices by which American businesses obtained business abroad, which frequently consisted of outright bribes to government officials or the payment of fees to “consultants” who then acted as intermediaries to facilitate bribes.¹¹⁹ The accounting provisions addressed the accompanying “slush funds, off-book accounts and other financial practices,” which served to conceal the corruption.¹²⁰

The FCPA prohibits corruptly paying a foreign official money or anything of value, either directly or indirectly, for certain purposes.¹²¹ Those purposes include attempting to influence any official act or decision, inducing the official to commit an

the corrupt activity took place around the world.” Cropp, *supra* note 50, at 136.

115. Cropp, *supra* note 50, at 136.

116. GREANIAS, *supra* note 61, at 1–3; McSorley, *supra* note 23, at 749–50; Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 442 (Winter 2010).

117. McSorley, *supra* note 23, at 749–50.

118. Low, *supra* note 19, at 718.

119. *Id.*

120. *Id.*

121. FCPA, 15 U.S.C. § 78dd-2(a) (1998).

unlawful action, or trying to secure an improper business advantage.¹²²

As noted in the Introduction of this Note, "foreign official" under the FCPA is,

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.¹²³

Judicial interpretation of "foreign official" is almost nonexistent. The court in *Aguilar* notes only that the FCPA does not define instrumentality and the court in *Aluminum Bahrain B.S.C. v. Alcoa Inc.* reserved judgment on whether or not employees of a holding company owned by the government of Bahrain were "foreign officials" in terms of the FCPA.¹²⁴

1. The FCPA and the *Charming Betsy* Doctrine

International pressure has had an impact on the creation of the FCPA similar to that which influenced the U.K. Act.¹²⁵ The United States Congress adopted the FCPA, and incorporated it into the Securities and Exchange Act of 1934,¹²⁶ following the Watergate scandal.¹²⁷ One main purpose of the FCPA was to repair international perception of the American democracy after it had faltered.¹²⁸ International views on anti-corruption, and OECD policies in particular, also influenced specific provisions of the FCPA during the amendment processes, which oc-

122. *Id.*

123. FCPA, 15 U.S.C. § 78dd-2(h)(2)(A) (1998).

124. *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1112 (C.D. Cal. 2011); *Aluminum Bahrain B.S.C. v. Alcoa Inc.*, 2012 WL 2094029 at *3 (W.D. Pa. June 11, 2012).

125. Cropp, *supra* note 50, at 125.

126. STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* v, xvii (2d ed. 2010); Cropp, *supra* note 50, at 125.

127. The Watergate scandal unearthed "myriad illegal contributions to President Nixon's reelection campaign and corporate slush funds used to bribe foreign officials and police." Stephen A. Fraser, *Placing The Foreign Corrupt Practices Act on The Tracks in The Race For Amnesty*, 90 TEX. L. REV. 1009, 1010 (2012).

128. DEMING, *supra* note 126, at xvii, 3; Cropp, *supra* note 50, at 125 n.13.

curred in 1988 and 1998.¹²⁹ For example, the United States implemented the OECD suggestions through the 1998 amendments by extending the jurisdiction under the FCPA to include considerations of the nationality of the perpetrators.¹³⁰ The 1998 Amendments also expanded the FCPA to allow prosecution of “any person” that commits bribery, whether or not the entity they work for was also prosecuted, where before only corporate persons—not individuals—had been held liable.¹³¹ The amendments indicate that not only was the United States conscious of its image abroad when it originally drafted the FCPA, but it also continued to make an effort to conform with international norms when it drafted the two rounds of amendments in 1988 and 1998.¹³²

2. The FCPA and the Level Playing Field Approach

Given the United States’ pressure on the OECD and other countries to adopt the level playing field approach, it follows that one could read the FCPA, and thus define “foreign official,” in light of that same concept of fair competition.¹³³ In *United States v. Kay*, although not specifically addressing the issue of defining “foreign official,” the Fifth Circuit subscribed to the view that Congress intended generally for the FCPA to promote fairness in competition.¹³⁴ The *Kay* court considered whether the illegal gain of tax reductions fell within the proscription of bribes that secure business abroad.¹³⁵ The court held that any payment to a foreign official that reduces a company’s costs—even if simply by reductions in customs duties and other taxes—indirectly benefits the company and affords an unfair advantage over its competitors in violation of the FCPA.¹³⁶

129. DEMING, *supra* note 126, at 3; Cropp, *supra* 50, at 125 n.18.

130. DEMING, *supra* note 126, at 7. Jurisdiction now depends only on whether or not the person has status as an American citizen or national, or whether an entity is subject to U.S. laws either by incorporation or because its principal place of business is situated in the United States. *Id.* at 7–8.

131. Cropp, *supra* note 50, at 125.

132. DEMING, *supra* note 126, at xvii, 3, 7–8; see Cropp, *supra* note 50, at 125.

133. Cropp, *supra* note 50, at 125.

134. See *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004) [hereinafter *Kay* ¶].

135. *Id.* at 747–48.

136. *Id.* at 749, 756.

3. The FCPA and the Public Trust Doctrines

Not only does the international community view corruption as an issue of public trust, but American judicial interpretation of the FCPA also does the same.¹³⁷ The court's treatment of the word "corruptly" in the FCPA is indicative of a traditional public trust model of analysis.¹³⁸ The Second Circuit noted the similar usage of the word "corruptly" in the FCPA and in 18 U.S.C. § 201, pertaining to bribery of public officials and witnesses.¹³⁹ In *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, the Second Circuit noted that, due to these similarities, Congress probably intended to incorporate the elements of domestic bribery within the FCPA.¹⁴⁰ Addressing bribery, the court stated that it had "repeatedly held in [the 18 U.S.C. § 201] context that 'a fundamental component of a 'corrupt' act is

Avoiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend. And this, in turn, enables it to take any number of actions to the disadvantage of competitors. Bribing foreign officials to lower taxes and customs duties certainly *can* provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining or retaining business.

Id. at 749.

137. See *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173 (2d Cir. 2003) [hereinafter *Schreiber*]; see also *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007) [hereinafter *Kay II*].

138. See *Schreiber*, 327 F.3d at 174.

139. *Schreiber*, 327 F.3d at 182–83. 18 U.S.C. § 201 refers to the Bribery of Public Officials and Witnesses. Subsection (b) provides in pertinent part that whoever,

(1) directly or indirectly, *corruptly* gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent— (A) to influence any official act . . . shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, *and may be disqualified from holding any office of honor, trust, or profit under the United States.*

18 U.S.C. § 201 (emphasis added).

140. *Schreiber*, 327 F.3d at 182–83.

a breach of some official duty owed to the government or the public at large.”¹⁴¹ The Second Circuit had elaborated previously on the concept of a breach of trust in *United States v. Rooney*, reporting that “[b]ribery in essence is an attempt to influence another to disregard his duty while continuing to appear devoted to it or to repay trust with disloyalty.”¹⁴² In making these findings, the court emphasized that it is the public who suffer when dishonest officials fail to serve them as they had been entrusted to do.¹⁴³

Beyond the interpretation of the word “corruptly,” American jurisprudence has also indicated that the FCPA as a whole is a statute about public trust.¹⁴⁴ In *United States v. Kay*, the Fifth Circuit affirmed the lower court’s decision to enhance the defendant’s sentence for violating the FCPA. The court predicated this enhancement upon the United States Sentencing Guidelines, which specifically allow for increased punishment if the defendant abused a position of trust.¹⁴⁵ Until this decision, no court had decided whether the FCPA qualified as a violation of public trust deserving of a sentencing enhancement. The Fifth Circuit held that violation of the FCPA, like embezzlement or fraud, did indeed warrant a sentencing enhancement for abuse of public trust.¹⁴⁶

The FCPA can also be analyzed in light of the corporate proconsul variation of the public trust doctrine. This version of the public trust doctrine developed as the American corporate environment shifted from focusing solely on profitability to also considering social responsibility.¹⁴⁷ This shift led to the “idea of the corporation as a means for implementing public policy. [The] idea of the business enterprise as government proconsul,”¹⁴⁸ and the FCPA was an example of the federal government using the corporation as a proconsul in foreign affairs.¹⁴⁹ The concept of the corporation as a government proconsul arguably developed because, “[the] American government [had]

141. *Id.* at 182.

142. *United States v. Rooney*, 37 F.3d 847, 852 (2d Cir. 1994).

143. *Id.*

144. *See United States v. Kay*, 513 F.3d 432, 460 (5th Cir. 2007).

145. *Kay II*, at 460; U.S.S.G. § 3B1.3, 18 U.S.C.

146. *Kay II*, at 460.

147. GREANIAS, *supra* note 61, at 39.

148. *Id.*

149. *Id.*

come to realize . . . that enormous economic power is the power to affect society at large."¹⁵⁰ In the United States, the bulk of economic power has been organized in the corporate form.¹⁵¹ "To effect major social change, it thus is argued, one must harness [the] enormous potential [of this corporate form]."¹⁵² Hence, American corporations became a leading force in reforms relating to racial and sexual discrimination, environmental protection, and equal employment.¹⁵³ Likewise, the FCPA developed from this corporate proconsul concept, and "[i]n a sense . . . is an extension of the corporate-governance movement."¹⁵⁴ Indeed, the FCPA's implementation illustrated that "very little of the system that gave rise to the proconsular strategy ha[d] been dismantled."¹⁵⁵ Therefore, a corporate proconsular analysis of the term "foreign official" may help solidify a precise and more general working definition.

B. Judicially Defining "Foreign Official"

American courts have acknowledged the undefined nature of "foreign official" under the FCPA; however, they have only provided limited assistance in remedying the issue. In fact, this uncertainty has allowed for a broadening of the term "foreign official," causing problems for American business.¹⁵⁶ Because most cases settle before reaching trial,¹⁵⁷ "judges have given little guidance as to what the FCPA's bewildering text actually means. So, for now, it means whatever an aggressive prosecutor says it does."¹⁵⁸

In addition to those defendants that neatly fit the statutory definition, federal prosecutors have been identifying individuals employed by state-owned companies as "foreign officials."¹⁵⁹ Doing so has made it difficult for companies to assess when their activities may come under the purview of the FCPA, especially when operating in markets in which wholly and partially

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 45.

155. *Id.* at 46.

156. Hilzenrath, *Spot?*, *supra* note 31.

157. Cohen, *supra* note 37, at 1245–46.

158. The Economist, *supra* note 16.

159. Hilzenrath, *Spot?*, *supra* note 31.

state-owned companies are common.¹⁶⁰ This, in turn, adversely affects American companies looking to do business in foreign markets.¹⁶¹ Consequently, businesses have begun challenging the imprecision of “foreign official” in their defense of allegations of FCPA violations. *United States v. Aguilar* and *Aluminum Bahrain B.S.C. v. Alcoa Inc* are two such cases.

1. United States v. Aguilar

The “foreign official” question surfaced in *United States v. Aguilar*, which was litigated in the Central District of California in 2011.¹⁶² Keith E. Lindsey,¹⁶³ Steve K. Lee,¹⁶⁴ and Lindsey Manufacturing Company¹⁶⁵ (“the Lindsey Defendants”), were charged with conspiracy to violate the FCPA and with substantive violations of the FCPA. In the same case, two Mexican citizens, Enrique Aguilar¹⁶⁶ and his wife Angela Aguilar¹⁶⁷ (“the Aguilar Defendants”), faced the same charges, *inter alia*, as the Lindsey Defendants.¹⁶⁸ The jury found the Lindsey Defendants and Angela Aguilar guilty of violating the FCPA, a first in the prosecutorial history of the FCPA since most defendants choose to settle before trial.¹⁶⁹ The defense, however, fought for dis-

160. *Id.*

161. *Id.*

162. *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1108–10 (C.D. Cal. 2011).

163. Keith E. Lindsey was the President of Lindsey Manufacturing and as such, he “had ultimate authority over all of defendant Lindsey Manufacturing’s operations.” Furthermore, Mr. Lindsey “also had a majority ownership interest in defendant Lindsey Manufacturing.” *Id.* at 1111.

164. Steve K. Lee was the Vice President and Chief Financial Officer of Lindsey Manufacturing, and as such, he controlled Lindsey Manufacturing’s finances. *Id.*

165. Lindsey Manufacturing Company, incorporated and headquartered in Azusa, California, is a privately held company that manufactures emergency restoration systems and other equipment for use by electrical utility companies. Additionally, “[m]any of defendant Lindsey Manufacturing’s clients were foreign, state-owned utilities, including [Comisión Federal de Electricidad (“CFE”).]” *Id.*

166. Enrique Aguilar, a director of Grupo International, was hired by Lindsey Manufacturing to obtain contracts with CFE for them. *Id.*

167. Angela Aguilar was an officer and director of Grupo International and as such managed the company’s finances. *Id.*

168. *Id.* at 1109 n.1, 1111.

169. *Lindsey Manufacturing Defendants Convicted On All Counts*, WALL ST. J., May 10, 2011, available at <http://blogs.wsj.com/corruption->

missal¹⁷⁰ of the indictment based on grounds of prosecutorial misconduct.¹⁷¹ The court granted the defense's motion, threw out the convictions of the Lindsey Defendants, and dismissed the indictment.¹⁷² Although the indictment ultimately was dismissed, the court's treatment of "foreign official" is still informative as to one member of the judiciary's view on the matter.

The indictment stemmed from the bribery of two highly ranked officials, Nestor Moreno and Arturo Hernandez, of the Mexican utility company Comisión Federal de Electricidad ("CFE"),¹⁷³ which is wholly state-owned.¹⁷⁴ The Lindsey Defendants allegedly made payments to the Aguilar Defendants

currents/2011/05/10/lindsey-manufacturing-defendants-convicted-on-all-counts/tab/print/ [hereinafter WSJ, *Lindsey*]. Enrique Aguilar was not convicted, as he was a fugitive and therefore not on trial. *Id.*

170. The Government responded by filing the Government's Response to the Defendants' Supplemental Brief in Support of their Motion to Dismiss the Indictment with Prejudice Due to Alleged Repeated and Intentional Government Misconduct on September 5, 2011. USA v. Noriega et al, 2:10CR01031.

171. As reported in the May 10, 2011 *Wall Street Journal* article,

Jan L. Handzlik of Greenberg Traurig LLP, who represented Azusa, Calif.-based Lindsey, and its president, Keith Lindsey, said, "We are very disappointed by the jury's verdict."

"We continue to believe in our clients' innocence and will pursue our motion to dismiss the indictment on grounds of prosecutorial misconduct," said Handzlik.

WSJ, *Lindsey*, *supra* note 169.

172. See United States v. Aguilar, 831 F.Supp.2d 1180, 1182 (C.D. Cal. 2011). The court found that

[t]he Government team allowed a key FBI agent to testify untruthfully before the grand jury, inserted material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants, improperly reviewed e-mail communications between one Defendant and her lawyer, recklessly failed to comply with its discovery obligations, posed questions to certain witnesses in violation of the Court's rulings, engaged in questionable behavior during closing argument and even made misrepresentations to the Court.

Id.

173. The Mexican Government owned CFE, an electric utility company that was responsible for supplying electricity to all of Mexico aside from Mexico City. *Aguilar*, 783 F. Supp. 2d at 1109.

174. *Id.*

through the Aguilar's company, Grupo Internacional De Ase-sores S.A. ("Grupo Internacional").¹⁷⁵ The Aguilar Defendants then allegedly routed large portions of those payments to the CFE officers as bribes.¹⁷⁶ According to prosecutors,

[f]or a government official, Nestor Moreno lived pretty large.

Moreno, the director of operations for Mexico's nationalized electricity monopoly, drove a \$297,000 Ferrari and owned a \$1.8-million yacht named Dream Seeker.

Moreno couldn't afford these luxuries on his salary at the Federal Electricity Commission in Mexico City. Instead, U.S. prosecutors alleged, they were gifts from [Lindsey Manufacturing Company,] an Azusa company that was peddling its electricity transmission equipment to foreign buyers.¹⁷⁷

Before winning on their prosecutorial misconduct claim, the Lindsey and Aguilar Defendants originally moved to dismiss the indictment on the grounds that officers or employees of state-owned corporations should not be considered "foreign officials" under the FCPA, arguing that "under no circumstances can a state-owned corporation be a department, agency, or instrumentality of a foreign government."¹⁷⁸ However, the court rejected this argument, denied the motion to dismiss, and stated that CFE could be considered an "instrumentality" of the Mexican government and therefore come within the reach of the FCPA. Thus, Mr. Moreno and Mr. Hernandez found themselves within the folds of the FCPA as "foreign officials."¹⁷⁹

The *Aguilar* court noted, however, that "[t]he FCPA *does not* define 'instrumentality,'"¹⁸⁰ and then undertook a discussion of what the word "instrumentality" may mean in terms of the FCPA.¹⁸¹ Both sets of defendants suggested that "instrumental-

175. Grupo Internacional was incorporated in Panama and headquartered in Mexico. Grupo Internacional claimed to provide sales representation services to companies doing business with CFE and would receive a percentage of the revenue that companies like Lindsey Manufacturing gained from their contracts with CFE. *Id.* at 1111.

176. *Id.*

177. Stuart Pfeifer, *COURTS: Bribes to foreign firms are targeted*, L.A. TIMES, March 11, 2011.

178. *Aguilar*, 783 F. Supp. 2d at 1110.

179. *Id.* at 1119–20.

180. *Id.* at 1112 (emphasis in original).

181. *Id.* at 1113–20.

ity” should be interpreted in light of the two words preceding it in the statute: “agency” and “department.”¹⁸² In light of this preceding language, they asserted, “instrumentality” should only include entities that possess the characteristics that are common to both “agencies” and “departments.”¹⁸³ The court entertained this argument, although it did not ultimately agree with it,¹⁸⁴ and proposed a “non-exclusive list”¹⁸⁵ of the characteristics that are consistent between agencies and departments:

- The entity provides a service to the citizens—indeed, in many cases to all the inhabitants—of the jurisdiction.
- The key officers and directors of the entity are, or are appointed by, government officials.
- The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park.
- The entity is vested with and exercises exclusive or controlling power to administer its designated functions.
- The entity is widely perceived and understood to be performing official (*i.e.*, governmental) functions.¹⁸⁶

The court continued the plain meaning analysis of “instrumentality” by considering how the FCPA uses the term, starting with a review of the structure, objective, and policy of the FCPA as a whole.¹⁸⁷ Having been defeated in their first effort, the defendants now argued that the FCPA focuses on only the bribery of governments and politicians and that this limitation was evident by Congress’ decision not to criminalize all foreign

182. *Id.* at 1114.

183. *Id.*

184. The *Aguilar* court disagreed with the defendants’ “all or nothing” view that “a state-owned corporation can never be an ‘instrumentality’ because state-owned corporations ‘do not always’ share the characteristics of departments or agencies.” The Court indicated that such a view is illogical as it fails to account for that which it “implicitly concedes,” namely, “that *some* state-owned corporations can and do share the characteristics of departments and agencies.” *Id.* at 1115 (emphasis in original).

185. *Id.*

186. *Id.*

187. *Id.* at 1115–16.

bribery during the drafting and amending processes.¹⁸⁸ The government countered that the FCPA should instead be construed according to the *Charming Betsy* doctrine.¹⁸⁹

The court ultimately found the government's *Charming Betsy* argument to be persuasive, focusing on the fact that the United States signed onto, and amended the FCPA in accordance with, the OECD Convention.¹⁹⁰ The OECD Convention defined "foreign public official" to include "any person exercising a public function for a foreign country, including for a public agency or public enterprise . . .," and defines "public enterprise" as "any enterprise, *regardless of its legal form*, over which a government, or governments, may, directly or indirectly, exercise a dominant influence."¹⁹¹ After signing the OECD Convention, the United States amended the FCPA in 1998 to include the OECD language "public international organizations" in its definition of "foreign official."¹⁹² The defense in *Aguilar* found it notable, however, that whereas Congress had added "public international organizations" into its definition of "foreign official" to conform with the OECD, it did not add "public enterprise" into the definition.¹⁹³

Both the government and the defense relied heavily on analyses of the FCPA legislative history to determine what Congress intended to fall within the meaning of "foreign official."¹⁹⁴ The defense argued that not only did Congress fail to insert "public enterprise" during the 1998 Amendment process, but they had also declined to target bribes intended to influence state-owned corporations when faced with previous opportunities to do so.¹⁹⁵ More specifically, "Congress rejected proposed bills that explicitly addressed payments to employees of state-owned corporations."¹⁹⁶ The failure of proposed Senate Bill of August 6, 1976, which would have defined "foreign official" as "essentially, officers, employees or others acting on behalf of a

188. *Id.* at 1115.

189. *Id.* at 1116; *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117–18, 2 L.Ed. 208 (1804).

190. *Aguilar*, 783 F. Supp. 2d at 1117.

191. *Id.* at 1116 (citing OECD Convention, art. 1) (emphasis in original).

192. *Id.*

193. *Id.* at 1118.

194. *Id.* at 1117–19.

195. *Id.* at 1118.

196. *Id.* at 1117.

foreign government” and would have included state-owned corporations in the meaning of “foreign government,”¹⁹⁷ exemplifies one such rejection. Additionally, during a prior round of amendments to the FCPA in 1988, the amenders focused on “routine government action.”¹⁹⁸ The *Aguilar* defendants claimed the “routine government action” focus in 1988 was further evidence that Congress did not consider corporations to be included in that definition.¹⁹⁹ Lastly, as previously mentioned, Congress had a chance in 1998 to explicitly include “public enterprise” when amending the FCPA following the OECD Convention but did not do so.²⁰⁰

The government addressed the FCPA legislative history by arguing that the FCPA’s failure to mention explicitly state-owned companies did not mean that Congress meant to exclude them entirely.²⁰¹ Further, the government maintained that when Congress uses a general term such as “instrumentality,” it necessarily includes the more specific examples within that, such as state-owned company or public enterprise.²⁰²

Although the court acknowledged both sides of the legislative history debate, it ultimately held that, “the legislative history of the FCPA is inconclusive.”²⁰³ The court further stated that, “[a]lthough it does not demonstrate that Congress intended to include all state-owned corporations within the ambit of the FCPA, neither does it provide support for Defendants’ insistence that Congress intended to exclude all such corporations from the ambit of the FCPA.”²⁰⁴ The court’s refusal to clarify the meaning of “foreign official” by issuing such vague and inconclusive language resulted in a continued—if not heightened—confusion regarding the meaning of the term, and a definitive definition remains elusive.

197. *Id.*

198. *Id.* at 1118 (emphasis omitted).

199. *Id.*

200. *Id.*

201. *Id.* at 1118–19.

202. *Id.* at 1119.

203. *Id.*

204. *Id.*; see also *Aluminum Bahrain B.S.C. v. Alcoa Inc.*, 2012 WL 2094029, at *3 (W.D. Pa. June 11, 2012) (holding that the question of whether employees of a state-owned holding company are “foreign officials” within the meaning of the FCPA is an issue of fact for the jury).

2. *Aluminum Bahrain B.S.C. v. Alcoa Inc.*

The Western District of Pennsylvania addressed the “foreign official” question in June 2012 in *Aluminum Bahrain B.S.C. v. Alcoa Inc.*²⁰⁵ Aluminum Bahrain (“Alba”), a holding company owned by the government of Bahrain, alleged various fraud, conspiracy, and Racketeer Influenced and Corrupt Organizations Act (“RICO”) claims against defendant William Rice.²⁰⁶ These claims included an allegation that Rice was involved in illegal payments to foreign officials, and specifically alleged that “Bruce Hall, Zamil Al Joweiser and Yousif Shirawi, all executives and agents of Alba, received millions of dollars in bribes by virtue of their employment with Alba.”²⁰⁷ Rice moved to dismiss the complaint for failure to state a claim.²⁰⁸ The court denied Rice’s motion to dismiss.²⁰⁹

The *Alcoa* court held, *inter alia*, that the status of employees of Alba as “foreign officials” was still a question of fact. The court’s leaving of the “foreign official” question to interpretation by the fact-finder means that the term is still undefined. It also suggests that the factors constituting a “foreign official” are case sensitive, rather than determinable as a matter of law. Thus, with the meaning of “foreign official” rendered a question of fact, the definition is open to even further broadening, the full breadth dependent on the determination of the fact-finder within the given case. *Alcoa*, like *Aguilar*, was one of the few instances where an FCPA case made it to trial rather than settling,²¹⁰ making it one of the few opportunities to define “foreign official” judicially. Like the earlier case, the *Alcoa* court’s decision to leave this question to the fact-finder created more uncertainty and prolonged the “foreign official” issue.

The Eleventh Circuit will have an opportunity to assess the scope of “foreign official” in *United States v. Esquenazi*, in which the United States filed its appellate brief on August 21, 2012.²¹¹ It will have a chance to review the legislative history of the FCPA and “any and all other sources” that may assist in

205. *Alcoa*, 2012 WL 2094029, at *1.

206. *Id.*, at *1, *3.

207. *Id.* at *3.

208. *Id.* at *1.

209. *Id.*

210. Cohen, *supra* note 37, at 1245–46.

211. See Brief for the United States, *United States v. Esquenazi*, No. 11-15331-C (11th Cir. Aug. 21, 2012), 2012 WL 3638390 at *1.

disambiguating the term “foreign official,” and, if circumstances demand, it could decide to apply the rule of lenity and construe the definition in favor of the defendants.²¹² Using the following three lenses could be effective in helping the court untangle the information, and perhaps nail down a definition of “foreign official.”

IV. ANALYZING “FOREIGN OFFICIAL” UNDER THE THREE LENSES

The *Aguilar* court posed a hypothetical as to whether the president of PEMEX is a “foreign official,” discussed at the beginning of this Note.²¹³ As was made apparent in *Aguilar* and *Alcoa*, the FCPA legislative history is inconclusive, and no level of the judiciary has really spoken on the matter of “foreign official” either.²¹⁴ Therefore, to reach an answer, or at least a possible path towards an answer, it may be instructive to view the particular concept of “foreign official” in the same manner in which this Note analyzed the OECD Convention, the U.K. Act, and the FCPA in general. The three proposed lenses—the *Charming Betsy* Doctrine, the Level Playing Field approach, and the Public Trust doctrines—may help refine the analysis and bring a definition of “foreign official” into focus.

A. “Foreign Official” and the *Charming Betsy* Doctrine

Since complying with international norms was one of Congress’ motivating factors behind enacting and drafting the FCPA, one way to parse the statute’s definition of “foreign official” would be to mirror those of the international community. Both the OECD and the United Kingdom subscribe to a definition of “foreign official” broader than strictly an officer or employee of a foreign government. The OECD Convention provides that a “foreign public official” is “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.”²¹⁵ The OECD Convention specifies that a

212. See *United States v. Kozeny*, 493 F. Supp. 2d 693, 701 (S.D.N.Y. 2007).

213. *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1119–20 (C.D. Cal. 2011).

214. See *supra* Part III.B.

215. OECD, GLOSSARY, *supra* note 57, at 31.

“foreign country’ includes all levels and subdivisions of government, from national to local.”²¹⁶ The U.K. Act also includes within the definition of “foreign public official”²¹⁷ anyone that performs a public function “for any public agency or public enterprise of that country or territory (or subdivision of such country or territory.)”²¹⁸ The “public enterprise” language in both the OECD Convention provision and the U.K. Act prohibits bribing employees or agents of state-owned corporations.²¹⁹

As noted, “foreign official” in the FCPA is still not as well defined as it is under either the OECD Convention or the U.K. Act. The definition of “foreign official” in the FCPA was modified in 1998 to slightly mirror the language of the OECD Convention definition by including “any official or employee of a public international organization or any individual or entity acting on behalf of a public international organization.”²²⁰ However, there are still some uncertainties as to what exactly the definition of “foreign official” includes. Under the FCPA,

[t]he term ‘foreign official’ means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.²²¹

The use of the word “instrumentality” is ambiguous, as was discussed by the *Aguilar* court.²²² The term is broad and can encompass persons that would not otherwise appear to be “foreign officials,” such as employees of companies owned in whole or in part by a state government.²²³ However, inclusion of state-owned company employees is not specifically provided for with-

216. *Id.*

217. The OECD Convention and the U.K. Bribery Act employ the term “foreign public official” while the FCPA uses the term “foreign official.” See OECD, GLOSSARY, *supra* note 57, at 31; U.K. Act, c. 23, § 6(5); 15 U.S.C. § 78dd-1(f)(1).

218. U.K. Act, c. 23, § 6(5)(b)(ii).

219. OECD, GLOSSARY, *supra* note 57, at 31; U.K. Act, c. 23, § 6(5)(b)(ii).

220. OECD, GLOSSARY, *supra* note 57, at 20.

221. 15 U.S.C. § 78dd-1(f)(1).

222. See *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115–16 (C.D. Cal. 2011).

223. Cropp, *supra* note 50, at 136.

in the act.²²⁴ If the U.S. Congress were to follow the *Charming Betsy* doctrine, then it would likely include public enterprises and agents thereof in its definition of "foreign official," sweeping employees of state-owned corporations into the reach of the FCPA. Though Congress had a chance to modify the FCPA in this manner but chose instead to leave it broadly defined, the court in *Aguilar* appears to follow the path charted by the OECD and the United Kingdom.²²⁵ Furthermore, the court in *Aguilar* noted that the FCPA does not define "instrumentality," which in turn lends ambiguity to the definition of "foreign official."²²⁶ The court also indicated that using the FCPA's legislative history to interpret the meanings of those terms is inconclusive and the court should instead construe the terms according to the *Charming Betsy* doctrine.²²⁷ The court therefore was persuaded that the definition of foreign official should be examined with the lens provided by the OECD Convention.²²⁸

International norms regarding the meaning of "foreign official" would lend support to the United States' decision to include persons working for corporations wholly owned or partially owned by states in its own definition.²²⁹ Thus, if construing the PEMEX situation according to the *Charming Betsy* doctrine, looking to international sources such as the U.K. Act, then "foreign official" would be defined broadly and would include the president of PEMEX as a "foreign official."²³⁰ Exxon would therefore be subject to prosecution under the FCPA.²³¹

B. "Foreign Official" and The Level Playing Field Approach

To consider a definition of "foreign official" that levels the playing field, one could look to the *Kay* court for support. The *Kay* court's view of anti-corruption legislation as a means to level the playing field in international markets is in line with the general value of fair competition that underlies the FCPA

224. See 15 U.S.C. § 78dd-1(f)(1).

225. See *id.* at 1117.

226. *Id.* at 1112.

227. *Id.* at 1116 (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117–18, 2 L.Ed. 208 (1804)).

228. *Id.* at 1117.

229. See OECD, GLOSSARY, *supra* note 57, at 31; see also Bribery Act, 2010, c. 23, § 6(5) (Eng.).

230. *Id.*

231. *Id.*

itself, the OECD Convention, and the U.K. Act.²³² Applying this concept to the “foreign official” issue would likely result in a broad definition, since any kind of bribery, whether involving public officials or private persons, would create an unfair advantage.²³³

Assessing the PEMEX hypothetical according to the level playing field doctrine reaches a similar conclusion. The level playing field approach aims to eradicate bribery of any kind in order to create a fair and competitive marketplace, so Exxon’s undue influence on PEMEX’s decision in awarding the contract would also be subject to prosecution under this analysis.²³⁴

C. “Foreign Official” and the Public Trust Doctrines

Superimposing the public trust concept on the definition of “foreign official” may not necessarily support a broad-based definition.²³⁵ Although the OECD version of the public trust doctrine includes the abuse of private office,²³⁶ other adaptations, including that of the United States, seem to indicate that the doctrine would only pertain to public officials.²³⁷ However, the corporate proconsul variation of the doctrine does seem to sug-

232. *Id.*; H.R. REP. NO. 95-640, at 4–5 (1977), available at <http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf> (House of Representatives Committee Report accompanying the proposed bill to amend the Securities and Exchange Act of 1934 to address the problem of corporations engaging in questionable or illegal payments to government officials); OECD, GLOSSARY, *supra* note 57, at 2; Pope, *supra* note 82, at 480.

233. H.R. REP. NO. 95-640, *supra* note 232, at 4–5.

The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.

Id.

234. *See id.*

235. OECD, GLOSSARY, *supra* note 57, at 19, 20.

236. *See id.* at 19.

237. *Id.* at 19–20.

gest that a public trust definition of "foreign official" could be broader than originally contemplated.²³⁸

In view of this alternate iteration of the public trust doctrine, the scope of "foreign official" under that analytical lens is expanded.²³⁹ Whereas the traditional public trust doctrine might have limited "foreign officials" to individuals squarely in the public sphere, the corporate proconsul approach opens the door to liability of private individuals as well.²⁴⁰ If corporations can be guardians of public trust by virtue of being financial powerhouses, then it would be fair to include the associated individuals as a form of official encompassed by the FCPA.²⁴¹ Therefore, adhering to the corporate proconsul adaptation of the public trust model rather than the conventional version would support instead a broader definition of "foreign official," more like the scope of definitions sustained by the *Charming Betsy* and level playing field lenses.

In sum, the traditional public trust doctrine would apparently prosecute the president of PEMEX only if he were clearly an official of the Mexican government, rather than the president of a corporation that happens to be state-owned.²⁴² However, when the alternate version of the public trust doctrine—the corporate proconsul approach—is taken into consideration, this analytical model would conclude that Exxon's actions were violative of the FCPA.²⁴³

It is probably most prudent to define "foreign official" according to the corporate proconsul variant of the public trust lens. Given the expanding influence of corporations, this view would likewise expand their accountability. Broadly defining "foreign official" in terms of public trust would satisfy the motivations of the other models as well. The "foreign officials" are trusted to serve the public dutifully, and it is possible that the public could intend for those trusted officials to serve in a way that would not offend international norms or unfairly skew the playing field. Furthermore, "resort[ing] to any and all other sources," did not "still result in a tie," so application of the rule of lenity would not be necessary and courts would not be re-

238. GREANIAS, *supra* note 61, at 44.

239. *See id.* at 46; Aaronberg, *supra* note 100, at 8.

240. GREANIAS, *supra* note 61, at 46.

241. *See id.*

242. *See* OECD, GLOSSARY, *supra* note 57, at 19–20.

243. GREANIAS, *supra* note 61, at 46; *see supra* Part III.D.

quired to construe “foreign official” narrowly in favor of the defendants.²⁴⁴ Therefore, using the public trust doctrine to identify who is a “foreign official” would satisfy the proponents of each analytical lens, while also adjusting to the modernizing world in which corporations are increasingly situated in positions of public trust.

CONCLUSION

Whichever lens Congress or the courts decide to use to examine the problem of defining “foreign official,” it will likely direct their focus to a broad definition encompassing certain private individuals in addition to government officials.²⁴⁵ As for the PEMEX hypothetical, Exxon will likely find itself in trouble no matter which way the court views “foreign official.”

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244. See *United States v. Kozeny*, 493 F. Supp. 2d 693, 701 (S.D.N.Y. 2007).

245. See *supra* Part IV.

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OVER-DETENTION: ASYLUM-SEEKERS, INTERNATIONAL LAW, AND PATH DEPENDENCY

INTRODUCTION

We have seen this problem before.¹ We have examined the shocking case studies of asylum-seekers detained categorically and for prolonged periods of time before.² We have watched the United States shirk their international legal commitments to ensure the dignity and humanity of refugees before.³ Yet despite the ongoing outcry of non-governmental organizations (“NGOs”)⁴ and legal scholars,⁵ and despite recent attempts by the United States government to improve the immigration system,⁶ little has been done to adequately improve the plight of detained asylum-seekers desperate to avoid removal to a country in which they are likely to face persecution.⁷

1. See, e.g., President Barack Obama, Remarks by the President on Comprehensive Immigration Reform in El Paso, Texas (May 10, 2011) [hereinafter Remarks by the President] (transcript available at <http://www.whitehouse.gov/the-press-office/2011/05/10/remarks-president-comprehensive-immigration-reform-el-paso-texas>) (“[T]he truth is, we’ve often wrestled with the politics of who is and who isn’t allowed to come into this country. This debate is not new.”).

2. See, e.g., AM. BAR ASS’N, *Excessive Use of Detention*, in AMERICAN JUSTICE THROUGH IMMIGRANTS’ EYES 59, 59–72 (2004) [hereinafter A.B.A.].

3. See, e.g., Bridget Kessler, *In Jail, No Notice, No Hearing . . . No Problem? A Closer Look at Immigration Detention and the Due Process Standards of the International Convention on Civil and Political Rights*, 24 AM. U. INT’L L. REV. 571 (2009).

4. See, e.g., HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON (2009) [hereinafter SEEKING PROTECTION], available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf>.

5. See, e.g., A.B.A., *supra* note 2.

6. See, e.g., Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) [hereinafter Exercising Prosecutorial Discretion], <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

7. Compare Exercising Prosecutorial Discretion, *supra* note 6 (establishing prosecutorial discretion policy), with Julia Preston, *Obama Policy on Deporting Used Unevenly*, N. Y. TIMES, Nov. 13, 2011, at A16 (alleging that despite the factors to be considered in light of the prosecutorial discretion policy some groups see less benefits than others).

Against a backdrop of domestic concern—exacerbated by the attacks of 9/11⁸—that immigration carries inherent risks, the United States has detained non-citizens of all types for a variety of reasons⁹ and pursuant to broad legal mandates.¹⁰ While there are admittedly some conditions under which detention can be a legitimate governmental function, many countries often subject entrants to detention that is “arbitrary” or “unnecessary” in violation of international human rights laws and norms.¹¹ In the United States, the decision to categorically detain asylum-seekers—despite the existence of potential solutions in the international community, including successful

8. Kevin Sullivan & Mary Jordan, *Foreword to A.B.A.*, *supra* note 2, at v.

The horrific September 11, 2001 terror attacks on New York City and Washington, D.C. fundamentally changed the way our nation of immigrants views itself. Shameful episodes of anti-immigrant violence immediately after the attacks grabbed most of the headlines. But the more significant shift has played out more quietly in federal government offices where immigration policy is made. The United States government, acting on a new urgency to control immigration and American borders, has tightened an array of regulations that affect how people from other countries may enter or live in the United States.

Id. While the 9/11 terror attacks perhaps intensified this fear, the concern about the link between immigration and domestic terrorism may have begun much earlier. *See, e.g.*, Robert D. McFadden, *Immigration Hurts City*, *New Yorkers Say in Poll*, N. Y. TIMES, Oct. 18, 1993, at B4.

9. U.S. DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STAT. ANN. REP., IMMIGRATION ENFORCEMENT ACTIONS: 2010, at 1 (2011) [hereinafter IMMIGRATION ENFORCEMENT ACTIONS], available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf> (“Foreign nationals may be removable . . . for violations including failure to abide by the terms and conditions of admission or engaging in crimes such as violent crimes, document and benefit fraud, terrorist activity, and drug smuggling.”). While this Note will hone in upon the detention of refugees and asylum-seekers, it is important to remember that these groups are just a portion of the non-citizen population detained each year. *See id.*

10. *E.g.*, 8 U.S.C. § 1225(b)(1)(A)(ii) (2012) (expedited removal and, thus, mandatory detention, for all aliens arriving without having gone through the proper immigration channels).

11. U.N. High Comm’r for Refugees [UNHCR], *Alternatives to Detention of Asylum Seekers and Refugees*, ¶¶ 1–2, U.N. Doc. POLAS/2006/03 (Apr. 2006) (by Ophelia Field & Alice Edwards) [hereinafter *Alternatives to Detention*] (finding that many states presume detention for asylum-seekers despite contrary interpretations of international laws).

NGO pilot efforts which use individualized risk-analysis¹² and “Alternatives to Detention”¹³ (“ATD”) programs—may amount to unnecessary or arbitrary detention that violates international human rights law.¹⁴ The arbitrary and unnecessary nature of these detentions may have a particularly egregious impact on the class of asylum-seekers¹⁵ affected, where the depri-

12. Risk analysis is used in this Note to mean an individualized determination of a detained asylum-seeker’s eligibility for parole or release to an Alternatives to Detention program, which includes an assessment of that individual determining identity, risk of flight, potential for posing danger to the community, or regarding any other justification for release. See SEEKING PROTECTION, *supra* note 4, at 72–73.

13. “Alternatives to detention” is a term of art meaning an “alternative means of increasing the appearance and compliance of individual asylum seekers with asylum procedures and of meeting other legitimate concerns which States have attempted to address . . . through recourse to detention.” *Alternatives to Detention*, *supra* note 11, at ¶ 4. They will be discussed in more depth throughout this Note.

14. See, e.g., UNHCR, *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, 51–87, U.N. Doc. PPLA/2011/01.Rev.1 (Apr. 2011) (by Alice Edwards) [hereinafter *Back to Basics*]; *Alternatives to Detention*, *supra* note 11, at ¶¶ 1–2 (presuming detention may violate international law).

15. A subtle distinction exists between a refugee and an asylum-seeker; the United States defines refugees as those seeking protection before they arrive in the country while asylum-seekers are seeking protection after arriving in the United States. DANIEL C. MARTIN, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGR. STAT. ANN. FLOW REP., REFUGEES AND ASYLEES: 2010, at 1, 4 (2011). The Department of Homeland Security further separates affirmative asylum-seekers, who apply for asylum at a port of entry or within one year of arrival in the United States, from defensive asylum-seekers, who file for asylum in order to avoid removal or those who are subject to expedited removal. *Id.* at 4. In contrast, international discourse distinguishes asylum-seekers from refugees on the basis that asylum-seekers “are individuals who have sought international protection and whose claims for refugee status have not yet been determined,” that is, their cases are still pending. 2009 UNHCR Stat. Y.B. 13, <http://www.unhcr.org/4ce532ff9.html>. The distinction is irrelevant for the purposes of this Note because the language within U.S. statutes grants authorization to seek asylum to the same non-citizens as those protected in the international definitions of “refugee.” Compare 8 U.S.C. § 1158(b)(1)(A) (2012) and 8 U.S.C. § 1101(42) (2012) with Convention Relating to the Status of Refugees [Refugee Convention], art. 1, July 28, 1951, 189 U.N.T.S. 150 and Protocol to the 1951 Convention Relating to the Status of Refugees [Protocol to Refugee Convention], Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. This Note will focus on defensive asylum-seekers who announce their intention to seek asylum at the port of entry to the Unit-

vation of liberty can exacerbate the traumas that led to their flight from their country of origin in the first place.¹⁶

The United States has recognized that the immigration system needs work.¹⁷ In the detention context, the United States has identified the need to incorporate risk analysis tools¹⁸ and ATDs in order to improve the process.¹⁹ However, the steps the United States has taken to develop and implement these tools have significantly deviated from the recommendations of experts in the field²⁰ and have failed thus far to bring the country

ed States and are thus trying to escape expedited removal and mandatory detention. 8 U.S.C. § 1225(b)(1)(A)(ii) (2012).

16. VERA INSTITUTE OF JUSTICE, TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM 1 (2000) [hereinafter VERA], available at <http://www.vera.org/download?file=615/finalreport.pdf> (“[D]etaining every noncitizen is neither just nor humane. Many people in removal proceedings are fleeing persecution in their own countries . . . Detention is an ordeal they should be spared.”).

17. THE WHITE HOUSE, BUILDING A 21ST CENTURY IMMIGRATION SYSTEM (2011), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf.

18. DORA SCHRIRO, U.S. DEP’T OF HOMELAND SEC., IMMIGR. AND CUST. ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 20–21 (2009), available at www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf. Dr. Schriro’s report identified a need for a “validated risk assessment instrument specifically calibrated for the U.S. alien population. The tool should assess initial and ongoing suitability for participation [in ATDs].” *Id.* at 20.

19. *Id.*

20. LUTHERAN IMMIGRATION AND REFUGEE SERVICE, UNLOCKING LIBERTY: A WAY FORWARD FOR U.S. IMMIGRATION DETENTION POLICY 21 (2011) [hereinafter UNLOCKING LIBERTY] available at <http://lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf>. Asylum experts relevant to this Note include international bodies, such as the United Nations High Commissioner for Refugees and the Executive Committee of the High Commissioner’s Programme, and NGOs like Amnesty International, Human Rights First, Vera Institute of Justice, Lutheran Immigration and Refugee Service, and International Detention Coalition. See UNHCR, *UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, (Feb. 26 1999), [hereinafter *UNHCR Guidelines*] available at <http://www.unhcr.org/refworld/docid/3c2b3f844.html>; Executive Committee of the High Commissioner’s Programme, *Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice*, UNHCR, U.N. Doc. EC/49/SC/CRP.13 (Jun. 4 1999) [hereinafter *Ex-Com on Detention*]; Amnesty Int’l, *Irregular Migrants and Asylum-Seekers: Alternatives to Immigration Detention*, AI Index POL 33/001/2009 (April 1,

into compliance with international law.²¹ This Note argues that unless the United States incorporates the recommendations of asylum experts to use thorough risk-analysis in creating an individualized ATD program, it will be unlikely to reduce the unnecessary or arbitrary detention of many asylum-seekers and will therefore be unable to meet the minimum human rights standards required under international law.²²

Part I of this Note looks at the current U.S. immigration detention system and some of the now well-established failures of the asylum detention process preventing the country from conforming to international human rights laws and norms. Part II explores the rationales behind detention of asylum-seekers with an eye toward how risk-analysis and ATDs can improve the system. Part III analyzes the current momentum for reform of the system in the context of *path dependency*, the notion that the future of the system will be dependent upon—and constrained by—decisions made now,²³ and addresses why it is essential to implement the recommendations of asylum experts *now*. Part IV discusses how the United States, by ignoring the recommendations of asylum experts regarding risk-analysis and alternatives to detention, has continuously violated international law. Part V lists the additional policy benefits to the United States should it adopt the proposed changes of asylum experts.

I. BACKGROUND

A. Current Status of the Detention System

Since its transition from the former Immigration and Naturalization Service (“INS”) to its current home as a subset of the Department of Homeland Security (“DHS”), the Immigration

2009) [hereinafter *Amnesty Int'l*]; SEEKING PROTECTION, *supra* note 4; VERA, *supra* note 16; UNLOCKING LIBERTY, *supra* note 20; R. SAMPSON ET AL., THE INTERNATIONAL DETENTION COALITION, THERE ARE ALTERNATIVES: A HANDBOOK FOR PREVENTING UNNECESSARY IMMIGRATION DETENTION (2011) available at <http://idcoalition.org/cap/handbook/>.

21. Compare Exercising Prosecutorial Discretion, *supra* note 6, with Preston, *supra* note 7.

22. E.g., ExCom on Detention, *supra* note 20; Alternatives to Detention, *supra* note 11.

23. Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332, 332 (1985).

and Customs Enforcement (“ICE”) division has rapidly expanded the scope of its detention power and the numerical capacity of individuals in detention.²⁴ The United Nations has defined detention as “the deprivation of liberty in a confined place, such as a prison or purpose-built reception or holding centre. It is at the extreme end of the spectrum of deprivations of liberty”²⁵ In the U.S. immigration context, the purview of detention includes “the authority . . . to detain aliens who may be subject to removal for violations of administrative immigration law.”²⁶

Throughout fiscal year 2010, ICE detained 363,064 non-citizens.²⁷ ICE now has bed-space to house 33,400 detainees daily and averages 33,330 detainees per day—a notable increase from the daily average of 27,990 in 2007.²⁸ As of 2009, asylum-seekers constituted about 1400 of these daily detainee totals.²⁹ In addition to a budget of over \$2 billion for its Immigration Detention and Removal Office (“DRO”), Congress gave DHS unsolicited additional funding to increase the total number of beds by 600, to 34,000 total, in fiscal year 2012.³⁰ The

24. See SCHRIRO, *supra* note 18, at 2, 4.

25. *Back to Basics*, *supra* note 14, at 8. See also Michael Flynn, *Immigration Detention and Proportionality*, *Global Detention Project, Working Paper No. 4*, 7–9 (Feb. 2011), available at http://www.globaldetentionproject.org/fileadmin/publications/GDP_detention_and_proportionality_workingpaper.pdf (“Coming up with a one-size-fits-all definition [of detention] is a challenging undertaking, especially when assessing a phenomenon that can radically change shape from one country to the next.”); *Holding Patterns: Can Advocacy Efforts to Reform Migration Detention Inadvertently Lead to the Growth of Detention Regimes?*, OPEN SOCIETY INSTITUTE, 34:00–38:40 (March 28, 2012), <http://c482907.r7.cf2.rackcdn.com/migration-detention-20120328.mp3> [hereinafter *Holding Patterns*] (discussing different definitions of detention).

26. SCHRIRO, *supra* note 18, at 4.

27. IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 9, at 4. This statistic includes all categories of non-citizens, not just asylum-seekers. *Id.*

28. *Fact Sheet: Detention Management*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT [ICE], <http://www.ice.gov/news/library/factsheets/detention-mgmt.htm> (last accessed June 22, 2012). ICE notes that these numbers do not include counts for non-citizens detained with the Mexican Interior Repatriation Program or the Office of Refugee Resettlement. *Id.*

29. SCHRIRO, *supra* note 18, at 11. 11,244 people were granted affirmative asylum in fiscal year 2010, with the highest percentage of those coming from China. MARTIN, *supra* note 15, at 5. This follows a general decreasing trend in grants of asylum over the past several years. *Id.*

30. H.R. REP. NO. 112-91, at 52 (2011); NATIONAL IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION

amount of available bed space may affect the amount of time an individual is detained.³¹ The average time of detention for asylum-seekers is controversial; some experts say it ranges from 47 to 109 days, while others indicate that it might be much longer.³²

Within the U.S. system, detention often consists of placement in county jails or commercialized detention centers.³³ While this Note does not explore human rights violations or improvements extant within the detention system beyond its arbitrary or unnecessary overuse, it is worthy of mention that extensive scholarship explores issues involving the general criminalization of the civil immigration system;³⁴ the effects of

DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 2 (2012), *available at* <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>.

31. Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 GEO. IMMIGR. L.J. 147, 157 (2008).

32. *Renewing America's Commitment to the Refugee Convention: The Refugee Protection Act of 2010: Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement for the record from Physicians for Human Rights), *available at* <http://rcusa.org/uploads/pdfs/PHR%20Testimony,%205-19-10.pdf>; UNLOCKING LIBERTY, *supra* note 20, at 12. The U.S. Supreme Court case *Zadvydas v. Davis*, which declared detentions of more than six months to be unreasonable and at odds with the U.S. Constitution, does not protect asylum-seekers because it only addressed the detention of those who were detained while awaiting deportation, as opposed to awaiting asylum proceedings. 533 U.S. 678 (2001).

33. Inter-American Commission on Human Rights, Organization of American States, Report on Immigration in the United States: Detention and Due Process, OEA/Ser.L/V/II, doc.78/10, 85–87 (2010) [hereinafter IACHR]. As of 2009, approximately 50% of all detainees were held in county jails that also contained prisoners. SCHRIRO, *supra* note 18, at 10.

With only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control. These standards impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population.

Id. at 2–3.

34. See generally Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010). Criminal and immigrant populations in detention are treated essentially the same. SCHRIRO, *supra* note 18, at 4.

family and child detention,³⁵ and the lack of adequate medical care,³⁶ access to legal representation,³⁷ and workable civil standards for detention.³⁸

B. The Process for Detaining Asylum-Seekers in the United States

Currently, non-citizens entering the United States without legally having gone through the proper immigration process in advance are automatically placed in expedited removal proceedings unless they express their desire to apply for asylum to an immigration officer.³⁹ Once they do so, an immigration officer will detain the asylum-seeker pending the filing of their asylum application and an interview with an asylum officer.⁴⁰ From this point forward, the asylum-seeker is subject to mandatory detention, unless and until they can establish a basis for discretionary parole or they are deported.⁴¹

After filing for asylum, the detainee proceeds to what is referred to as a “credible fear hearing” or “credible fear inter-

35. *Alternatives to Detention*, *supra* note 11, at ¶¶ 58-62.

36. See generally Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States*, 7 SEATTLE J. FOR SOC. JUST. 693 (2009).

37. HUMAN RIGHTS FIRST, *JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW*, 30 (2011) [hereinafter *JAILS AND JUMPSUITS*], available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf>.

38. SCHRIRO, *supra* note 18, at 4 (“ICE adopted standards that are based upon corrections law and promulgated by correctional organizations to guide the operation of jails and prisons.”).

39. 8 U.S.C. § 1225(b)(1)(A)(ii)(2012). Some exceptions do exist to bar an arriving alien from applying for asylum in the United States. Notably, he or she cannot have come from a safe third country where he or she could have sought asylum; additionally, subject to extenuating circumstances, he or she cannot have waited more than a year to apply for asylum after arriving in the United States or have had a previous unsuccessful asylum application. 8 U.S.C. § 1158(a)(2)(A).

40. 8 U.S.C. § 1225(b)(1)(A)(ii). While both are members of ICE, asylum officers are distinct from immigration officers in that they have “professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of [asylum] applications” and that more experienced asylum officers supervise them. 8 U.S.C. § 1225(b)(1)(E).

41. 8 U.S.C. § 1225(b)(1)(B)(ii); IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 9, at 2. Parole will be discussed in more depth below.

view,”⁴² which may take place up to forty-five days after the filing of an application for asylum.⁴³ At the hearing, one seeking asylum must establish to the satisfaction of an asylum officer that he or she has a “credible fear of persecution” in his or her home country.⁴⁴ This fear is defined as “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and other such facts as are known to the officer, that the alien could establish eligibility for asylum” under existing U.S. law.⁴⁵ At a credible fear hearing, an ICE officer has the sole ability to determine if the asylum-seeker has a credible fear that will likely support a future favorable asylum ruling by an immigration judge.⁴⁶ This is the first, but not only, opportunity for individual discretion or arbitrariness to seep into the asylum process.⁴⁷ If the determination of the asylum officer is unfavorable, the asylum-seeker will be slated for expedited removal “without further hearing or review.”⁴⁸ If favorable, the asylum officer will refer the asylum-seeker for asylum adjudication in front of an immigration judge.⁴⁹ By statute, the entire proceeding, excluding appeal, should be concluded within 180 days, although the

42. *E.g.*, Brané & Lunholm, *supra* note 31, at 150.

43. 8 U.S.C. § 1158(d)(5)(A)(ii)(2012).

44. 8 U.S.C. § 1225(b)(1)(A)(ii).

45. 8 U.S.C. § 1225(b)(1)(B)(v). Authority for asylum itself is based on 8 U.S.C. § 1158. The United States limits the available categories of persecution for which one can claim asylum to “race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42) (2012).

46. Gwynne Skinner, *International Law Weekend 2009-I: Bringing International Law to Bear on the Detention of Refugees in the United States*, 16 WILLAMETTE J. INT’L L. & DISPUTE RES. 270, 275 n.18 (2008). Other than a lack of credible fear, factors that might lead to rejection of a claim at this point may include “committing certain crimes, posing a national security threat, engaging in the persecution of others, or firmly resettling in another country before coming to the United States.” MARTIN, *supra* note 15, at 4.

47. *ExCom on Detention*, *supra* note 20, at 3 (stating that discretion leads to arbitrariness). For a criticism of the United States’ ability to determine credibility as being arbitrary in relation to refugee determinations, see Andrew F. Moore, *Unsafe in America: A Review of the U.S.-Canada Safe Third Country Agreement*, 47 SANTA CLARA L. REV. 201, 237–238 (2007).

48. 8 U.S.C. § 1225(b)(1)(B)(iii)(I). If the asylum-seeker makes a “prompt” request, he or she may have the decision reviewed by an immigration judge, which by statute must happen no later than seven days after the negative credible fear determination. 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

49. Skinner, *supra* note 46, at 275.

statute provides for the extension of this timeframe for “exceptional circumstances.”⁵⁰

As noted, prior to being granted asylum by an immigration judge, arriving asylum-seekers are subject to mandatory detention unless they can establish their basis for discretionary parole.⁵¹ This presumption in favor of detention is codified in 8 U.S.C. § 1182(d)(5)(A), which authorizes the Attorney General,

in his discretion[, to] parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.⁵²

Thus, asylum-seekers will only be paroled if an individualized case analysis reveals there is an “urgent humanitarian reason” or “significant public benefit” for so doing.⁵³ This basis for parole has also been defined as applying to those classes of aliens “whose continued detention is not in the public interest as determined by [ICE officials].”⁵⁴ In a policy shift effective early 2010, ICE began to interpret parole in the “public interest” under this section to require “that the alien’s identity is sufficiently established, the alien poses neither a flight risk nor a danger

50. 8 U.S.C. § 1158(d)(5)(A)(iii).

51. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 235.3(b)(2)(iii) (2012); Memorandum from John Morton, Assistant Secretary, U.S. Immigration and Customs Enforcement, to Immigration and Customs Enforcement, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture, at 2 (Dec. 8, 2009) [hereinafter *Credible Fear Parole*], available at http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf.

52. 8 U.S.C. § 1182(d)(5)(A)(2012).

53. 8 C.F.R. § 212.5(b)(5) (2012). Other classes enumerated under this section are more readily eligible for parole because they do not include a discretionary determination by an ICE official; these include individuals with serious medical conditions, pregnant women, juveniles, and those who are serving as witnesses in court proceedings. *Id.*

54. 8 U.S.C. § 1182(d)(5)(A). *See also* 8 C.F.R. § 212.5(b); *Credible Fear Parole*, *supra* note 51, at 2, 6–8.

to the community, and no additional factors weigh against the release of the alien.”⁵⁵

While this development is a positive shift because it streamlined and increased the transparency of parole decisions, the proof requirements remain an especially weighty burden for asylum-seekers.⁵⁶ Despite apparent sympathy to the circumstances of asylum-seekers, the policy emphasizes the discretionary nature of parole and requires the asylum-seeker to bear the burden of demonstrating this information to the satisfaction of an ICE officer.⁵⁷ The policy standards themselves recognize the inherent difficulties for asylum-seekers to provide adequate documentation or produce credible witnesses to corroborate their claims on asylum matters.⁵⁸ These difficulties may include a lack of travel documents, often associated with an asylum-seeker’s unwillingness or inability to contact their for-

55. Credible Fear Parole, *supra* note 51, at 6. In 2011, Morton issued an additional directive, entitled *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (“Exercising Prosecutorial Discretion”), which essentially incorporates the earlier memo and reiterates the discretion of ICE officers to grant parole to an asylum-seeker under specific circumstances. See *Exercising Prosecutorial Discretion*, *supra* note 6. ICE is quick to add that the established policy creates no private cause of action. Credible Fear Parole, *supra* note 51, at 10.

56. IACHR, *supra* note 33, at 45–47. The international community has reviewed and commented on the general shift in ICE detention policy under the Obama Administration. See, e.g., *id.* On the positive side, asylum-seekers no longer have to file for parole; a parole meeting is automatic within seven days of an asylum officer determining that the asylum-seeker has a credible fear of persecution. *Id.* There are provisions to improve the transparency of the process both through increased documentation and through informing asylum-seekers about the process and their rights within it. *Id.* However, there are criticisms in the international community that these changes do not adequately address the problems for detainees, as they still bear a potentially “insurmountable” burden of proof on the identity, flight risk, and security issues. *Id.* Furthermore, because of the discretionary nature of the process, there is great potential for arbitrary denials of parole, and thus arbitrary detention; this arbitrariness is especially obvious when considering regional disparities in parole denials. *Id.* Additionally, negative parole determinations remain reviewable only at the discretion of an ICE officer, which enforces the officer’s role as both “judge and jailer.” IACHR, *supra* note 33, at 45–47. See also Kalhan, *supra* note 34, at 51. For the policy itself, see *Exercising Prosecutorial Discretion*, *supra* note 6.

57. Credible Fear Parole, *supra* note 51, at 6–8.

58. *Id.*

mer government, or a lack of ties to any community within the United States as a result of their recent urgent arrival.⁵⁹ Asylum-seekers are additionally prejudiced because, by virtue of their situation, any attempt to meet this proof requirement to gain parole must be done while in detention.⁶⁰ Moreover, the same set of challenges, particularly the notion that “detention will often deprive the asylum-seeker of an opportunity to present his or her [case] or to have the assistance of counsel,”⁶¹ limit the asylum-seeker’s ability to successfully obtain parole.⁶² Furthermore, because the policy standards are non-binding, they can be changed at any time and thus do not provide any lasting guarantees even for the opportunity of parole.⁶³ As a result, the system remains weighted in favor of continued detention.⁶⁴

C. How the U.S. Detention System Violates International Human Rights Laws and Norms

Numerous legal scholars and advocacy groups have argued that the U.S. detention policy—featuring a presumption in fa-

59. *Id.*

60. Mark L. Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. (forthcoming 2012) (discussing how detention leads to “cascading deprivations” of rights of those detained—for example, the difficulties in obtaining counsel from detention may lead to higher rates of unsuccessful cases and time wasted arguing over appointed counsel for detainees); Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, 185, 223 (Erika Feller et al. eds., 2003) (“Detention will often deprive the asylum-seeker of an opportunity to present his or her case.”); SAMPSON ET AL., *supra* note 20, at 50 (“social isolation is a significant issue for most detainees.”). The parole determination “typically occurs within three weeks of apprehension.” UNLOCKING LIBERTY, *supra* note 20, at 20.

61. Goodwin-Gill, *supra* note 60, at 223. *See also*, Noferi, *supra* note 60, at 25–26 (“The difficulty of challenging an immigration detention and case while detained is compounded by the inability of most detainees to secure counsel—or, indeed, any adequate source of legal assistance.”).

62. *See* Goodwin-Gill, *supra* note 60, at 223; Noferi, *supra* note 60, at 25–26.

63. IACHR, *supra* note 33, at 45–47; Kalhan, *supra* note 34, at 51.

64. *See* Credible Fear Parole, *supra* note 51, at 6–8. *See also* IACHR, *supra* note 33, at 45–47; Kalhan, *supra* note 34, at 51.

vor of detention—violates international obligations.⁶⁵ Various treaties and conventions articulate an aversion to immigration detention in the vast majority of circumstances, finding it to be violative of human rights principles.⁶⁶ This includes the more specific rules regarding asylum-seekers who declare their desire to seek asylum once they are within the country to which they fled.⁶⁷ “In most cases, only if an individual’s claim to refugee status is examined *before* he or she is affected by an exercise of State jurisdiction . . . can the State be sure that its international obligations are met.”⁶⁸ This pre-approval, however, may prove challenging for asylum-seekers to attain given that the persecution many of them are fleeing might not provide the time or opportunity to plan ahead and apply for protection in another country before leaving their home country.⁶⁹

The United States is not a party to all of such conventions or treaties,⁷⁰ although it is arguably bound under customary international laws⁷¹ or norms to abide by them anyway.⁷² Codifi-

65. *E.g.*, SEEKING PROTECTION, *supra* note 4; VERA, *supra* note 16, at 31–32; UNLOCKING LIBERTY, *supra* note 20, 5–6; Brané & Lundholm, *supra* note 31.

66. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 9 (Dec. 10, 1948) [hereinafter UDHR] (against arbitrary detention of all people); Refugee Convention, *supra* note 15; Protocol to Refugee Convention, *supra* note 15, art. 31(2); 1966 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, arts. 9, 12 [hereinafter ICCPR] (against arbitrary and unnecessary detention).

67. *See, e.g.*, UDHR, *supra* note 66; Refugee Convention, *supra* note 15; Protocol to Refugee Convention, *supra* note 15; ICCPR, *supra* note 66, arts. 9, 12.

68. Goodwin-Gill, *supra* note 60, at 187 (emphasis in original). Here “State jurisdiction” indicates the country to which the asylum-seeker fled. *See id.*

69. *See, e.g.*, Credible Fear Parole, *supra* note 51, at 6 (recognizing that arriving aliens might not have travel documents because of flight).

70. For example, the United States “remains the only state, other than Somalia, which has not ratified the [Convention on the Rights of the Child],” a convention essential for guaranteeing rights of children and families in asylum and other contexts. Brané & Lundholm, *supra* note 31, at 153.

71. Customary international law is “international law that derives from the practice of states and is accepted by them as legally binding. This is one of the principal sources or building blocks of the international legal system.” BLACK’S LAW DICTIONARY 892 (9th ed. 2009).

72. Restatement (Third) of Foreign Relations Law § 111(1) (1987) (“International law and international agreements of the United States are law of the United States and supreme over the law of the several States.”). *See also*

cation of customary international law declares that a country “violates international law if, as a matter of state policy, it practices, encourages or condones . . . prolonged arbitrary detention.”⁷³ Admittedly, some international laws or norms have exigency exceptions that allow states to detain aliens in cases of “necessity.”⁷⁴ However, as most of those detained do not present any risks to the State from which they are seeking aid, these exigency exceptions do not justify the categorical detention of all asylum-seekers.⁷⁵

There are multiple international treaties that protect the rights of people seeking asylum, and many have prohibitions against “arbitrary” detention, “unnecessary” detention, or both.⁷⁶ Beginning with the Universal Declaration of Human Rights (“UDHR”), the international community has recognized “the right to seek and to enjoy in other countries asylum from persecution.”⁷⁷ Furthermore, the UDHR established that “no one shall be subjected to *arbitrary* arrest, detention, or exile.”⁷⁸ While establishing these rights that would come to form the basis of international human rights law, the drafters of the UDHR did not define many of the terms they used, including “arbitrary.”⁷⁹

The 1951 Convention Relating to the Status of Refugees (“1951 Convention”) expanded upon the UDHR by creating a multilateral treaty wherein “the contracting states shall not apply to the movements of such refugees restrictions other

The Paquete Habana, 175 U.S. 677, 700 (1900) (“International law is part of our law.”).

73. Restatement (Third) of Foreign Relations Law, § 702(e) (1987).

74. See, e.g., Refugee Convention, *supra* note 15, art. 31(2); Goodwin-Gill, *supra* note 60, at 232.

75. See *Back to Basics*, *supra* note 14, at 2 (“[L]ess than ten percent of asylum applicants . . . disappear when they are released to proper supervision and facilities.”).

76. UDHR, *supra* note 66, art. 9 (against arbitrary detention); Refugee Convention, *supra* note 15; Protocol to Refugee Convention, *supra* note 15; ICCPR, *supra* note 66, at arts. 9, 12 (against arbitrary and unnecessary detention). The two terms are interrelated, as detaining unnecessarily can constitute arbitrariness. See, e.g. Brané & Lundholm, *supra* note 31, at 157.

77. UDHR, *supra* note 66, art. 14(1)(III).

78. *Id.* art. 9 (emphasis added).

79. See UDHR, *supra* note 66, art. 14(1)(III) (not defining terms used); *The Foundation of International Human Rights Law*, http://www.un.org/en/documents/udhr/hr_law.shtml (last accessed June 22, 2012) (UDHR as basis for field of international human rights law).

than those which are *necessary* and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.”⁸⁰ While detention for identity verification, public safety, and national security have been given as examples of detention that could *potentially* be considered “necessary,” and therefore permissible under the 1951 Convention, some scholars have interpreted detention subsequent to these conditions to be only for extraordinary circumstances.⁸¹ While the United States did not sign the 1951 Convention, it did ratify the 1967 Protocol to the 1951 Convention that incorporated and modernized the Convention, thereby binding the United States to those international obligations.⁸²

In addition to the 1951 Convention/1967 Protocol restrictions against unnecessary detention, the 1966 International Covenant on Civil and Political Rights (“ICCPR”) prohibits detention from being “arbitrary.”⁸³ Under Article 9 of the ICCPR, arbitrary detention, though not precisely defined, is expressly prohibited.⁸⁴ Article 9 further holds speedy access to a court proceeding to be essential for anyone “deprived of his liberty by . . . detention.”⁸⁵

Because much of the language in these treaties is vague or undefined, the international community seeks guidance from both the United Nations High Commissioner for Refugees (“UNHCR”) and the Executive Committee of the UNHCR (“Ex-

80. Refugee Convention, *supra* note 15, art. 31(2) (emphasis added).

81. Goodwin-Gill, *supra* note 60, at 232.

82. Refugee Convention, *supra* note 15; Protocol to Refugee Convention, *supra* note 15. The United States signed the 1967 Protocol without any reservations, understandings, or declarations (“RUDs”) relevant to this analysis. Protocol to Refugee Convention, *supra* note 15.

83. ICCPR, *supra* note 66, art. 9(1). The United States ratified the ICCPR in 1992, attaching RUDs that limit some provisions, but none specifically relevant to this analysis. *Id.* The United States declared the Convention to be non-self-executing, or incapable of taking effect without implementing legislation. *Id.*; Kessler, *supra* note 3, at 577; BLACK’S LAW DICTIONARY 1482 (9th ed. 2009) (defining self-executing).

84. ICCPR, *supra* note 66, art. 9(1); Kessler, *supra* note 3, at 580 (“In the context of Article 9(1), [arbitrary] encompasses not just unlawful detentions, but also all those that are unjust, unpredictable, unreasonable, capricious, and disproportional.”).

85. ICCPR, *supra* note 66, art. 9(4).

Com”) in interpreting its obligations to refugees.⁸⁶ The ExCom has stated that

[W]ide discretionary powers [to detain] . . . are far too frequently applied in an arbitrary manner. For instance, a large number of asylum-seekers are detained on the formal basis that it is likely that they will abscond . . . international standards dictate that there must be some substantive basis for such a conclusion in the individual case.⁸⁷

The specious justification of needing to prove an asylum-seeker's identity is yet another example of arbitrariness in the detention process.⁸⁸ Proving identity “should not routinely be judged necessary” in light of the circumstances which lead asylum-seekers to flee persecution in the first place.⁸⁹ The ExCom guidelines emphasize that implementing individualized, “prompt, mandatory and periodic review of all detention orders before an independent and impartial body” of the destination-state's need to detain is fundamental to avoiding arbitrary detention.⁹⁰ Furthermore, the UNHCR has continually advocated for a presumption *against* detention.⁹¹

Scholars have additionally argued that arbitrary detention exists where there is “inappropriateness, injustice, and lack of predictability” in the detention process.⁹² “Arbitrary detention occurs when refugee applicants are detained on the basis of broad criteria that do not allow for individualized determina-

86. See, e.g., *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 n.22 (1987). The United States Supreme Court has held that at least one set of guidelines established by the UNHCR is helpful in interpreting 1967 Protocol obligations. *Id.* In discussing the Handbook on Procedures and Criteria for Determining Refugee Status, written by the UNHCR, the Court said, “the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.” *Id.* The Court noted that the guidance, while helpful, was non-binding. *Id.* See also, Skinner, *supra* note 46, at 278–79.

87. *ExCom on Detention*, *supra* note 20, at 3.

88. *Id.* at 4.

89. *Id.*

90. *Id.* at 3–4.

91. UNHCR *Guidelines*, *supra* note 20, at 3; UNHCR, *Detention of Refugees and Asylum-Seekers*, U.N. Doc. 44 (XXXVII) – 1986 (Oct. 13, 1986); *ExCom on Detention*, *supra* note 20, at 1.

92. Brané & Lundholm, *supra* note 31, at 156–57 (quoting GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 305 (2d ed. 1996)).

tions of the need for detention, when there is no administrative or judicial review, or when detention occurs for disproportionate or extended periods.”⁹³

U.S. practices are arbitrary because detention is applied as a “blanket policy;” chances for parole—varying “anywhere from 0.5% to 98%”—are inconsistent;⁹⁴ judicial review, in practice, is either unavailable or limited by judges citing a lack of jurisdiction; and because compliance rates are quite high, further supporting “the argument that the detention of asylum seekers is arbitrary because it is unnecessary.”⁹⁵ Moreover, there is evidence to suggest arbitrariness in parole decisions, as some watchdog groups have found that the choice to parole an asylum-seeker can sometimes be made based on available bed space in detention centers rather than the merits of an individual’s claim for release.⁹⁶ As put forth in the Restatement Third, “[A] single, brief, arbitrary detention by an official of a state party to one of the principal international agreements might violate that agreement; arbitrary detention violates customary law if it is prolonged and practiced as state policy.”⁹⁷ This weighs against the United States’ categorical detention of all asylum-seekers because, without sufficient individualized assessment, there is no way to ensure detention is necessary.⁹⁸ Additionally, because the U.S. policy leaves determinations of credible fear and parole to the discretion of individual ICE officers, any localized breach or non-compliance can result in international law violations.⁹⁹

The international community has noticed the United States’ violations of international law.¹⁰⁰ Following his May 2007 visit, the UN Special Rapporteur on Human Rights of Migrants expressed his “serious concern” with the status of the U.S. deten-

93. Moore, *supra* note 47, at 267.

94. Brané & Lundholm, *supra* note 31, at 157 (“[Parole policy] seems to depend more upon the personality of the district director and the available bed space than it does upon a reasoned policy of release criteria.”).

95. *Id.*

96. Moore, *supra* note 47, at 263, 269.

97. Restatement (Third) of Foreign Relations Law § 702 cmt. h (1987).

98. See Goodwin-Gill, *supra* note 60, at 219.

99. *Id.*

100. See, e.g., Special Rapporteur on Human Rights of Migrants, *Mission to the United States of America*, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008) (by Jorge Bustamante) [hereinafter *Mission to the United States*]; IACHR, *supra* note 33, at 144.

tion system.¹⁰¹ The Special Rapporteur “[came] to the conclusion that the United States ha[d] failed to adhere to its international obligations to make the human rights of the 37.5 million migrants living in the country . . . a national priority, using a comprehensive and coordinated national policy based on clear international obligations.”¹⁰² His report went on to discuss the various violations of international law within the United States¹⁰³ and made recommendations for improvement that included the complete elimination of mandatory detention.¹⁰⁴ Similarly, the Inter-American Commission on Human Rights produced in 2011 a comprehensive report on the U.S. immigration and detention system.¹⁰⁵ Along with urging the United States to “comply fully with the international human rights obligations under the American Declaration [of the Rights and Duties of Man],”¹⁰⁶ the Commission advocated for the country’s discontinuation of mandatory detention practices.¹⁰⁷

II. DISASSOCIATING FROM PRESUMPTIONS THAT FAVOR DETENTION

In order to become compliant with international law, the U.S. detention practices for refugees and asylum-seekers need to align more closely with the protection-based mandates of the aforementioned provisions that proscribe detention from being either arbitrary or unnecessary.¹⁰⁸ To do this, the United States needs to utilize risk-analysis and ATDs to release or parole detainees held without legitimate justification.¹⁰⁹ However, no alternative program can be successful until the U.S. immigration system shifts its application of immigration statutes from

101. *Mission to the United States*, *supra* note 100, at 2.

102. *Id.* at 3.

103. *See generally id.*

104. *Id.* at 24.

105. IACHR, *supra* note 33.

106. *Id.* at 155. In its reply to the draft version of the report, the United States was quick to point out that the American Declaration is “a nonbinding instrument that does not itself create legal rights or impose legal obligations on signatory states.” *Id.* at 7. The IACHR countered that the Declaration does create obligations for member and non-member states alike under the charter of the Organization of American States, the American regional counterpart to the United Nations, of which the United States is a member. *Id.* at 10.

107. *Id.* at 147.

108. *See* Part I.B., *supra*.

109. *See, e.g., Amnesty Int’l*, *supra* note 20, at 16.

the categorical mandatory detention of asylum-seekers to a more flexible system where detention is used only as a last resort.¹¹⁰ Many asylum experts have advocated for this and have created programs based on the “presumption against detention” model.¹¹¹ To understand how, by following suit, the United States could avoid arbitrary or unnecessary detention, it is first helpful to recognize the rationales it puts forth for using a mandatory detention policy in the first place.¹¹² Section A enunciates what risks the United States assumes when, rather than detain, it releases asylum-seekers into an ATD program and, by extension, the community. Sections B and C seek to understand the potential benefits of effectively implemented risk analysis and ATD programs as compared to those currently in operation within the U.S. system.

A. Detention Rationales

Countries often cite the inherent risks associated with admitting aliens as a rationale for detaining them.¹¹³ As discussed in Part I.B, the current U.S. detention policy centers on these risks by presuming detention for aliens unless they are able to establish: 1) their identity, 2) that they are not a flight risk and, 3) that they are not a danger to society; or they must establish they have an additional extenuating circumstance that justifies their release.¹¹⁴ By exploring the scope of these inherent risks, the United States can better address any actual risks and ultimately eliminate the use of detention that is excessive in matching the scope of that risk.¹¹⁵

The United States justifies detention—at least until there is satisfactory proof of the asylum-seeker’s identity—by citing the need to ensure that the alien will comply with specific proceedings, including meeting attendance, hearings, and, potentially,

110. See, e.g., JAILS AND JUMPSUITS, *supra* note 37, at 42.

111. See, e.g., SAMPSON ET AL., *supra* note 20.

112. See Brané & Lundholm, *supra* note 31, at 149–52 (exploring detention rationales).

113. See *id.*

114. Credible Fear Parole, *supra* note 51, at 2–3, 6–8. Extenuating circumstances include serious medical conditions, pregnancy, juvenile status, and aliens slated to serve as witnesses. 8 C.F.R. § 212.5(b); Credible Fear Parole, *supra* note 51, at 2.

115. See Brané, *supra* note 31, at 149–52.

removal.¹¹⁶ The United States has declared, “asylum-related fraud is of genuine concern”¹¹⁷ and also wants to be certain before paroling an asylum-seeker that the person is not threatening to the community or the nation as a whole.¹¹⁸ Further, the current policy indicates that detention will continue if there are “serious adverse foreign policy consequences that may result if the alien is released or [if there are] overriding law enforcement interests.”¹¹⁹ Moreover, the U.S. immigration system is bogged down¹²⁰ and the caseload in immigration courts is high, increasing the time that asylum-seekers in detention must wait for their case to be heard.¹²¹

Yet if the U.S. method of detention is meant to serve as a deterrence to emigration, the strategy itself would violate international laws.¹²² Regardless of a host country’s detention policies, asylum-seekers will always impose some level of risk to that country.¹²³ Thus, to argue that U.S. asylum detention is an

116. Credible Fear Parole, *supra* note 51, at 6 (“likelihood of appearing *when required*”) (emphasis added).

117. *Id.* at 7.

118. *Id.* at 8.

119. *Id.*

120. See, e.g., Michael Matza, *Immigration Cases Clogging Federal Courts*, PHILA. INQUIRER, July 18, 2011, at A2 (“Despite the nationwide hiring of more than 40 additional [immigration court] judges in the past year, the number of deportation cases, asylum claims, and green-card fraud prosecutions ... is at an all time high: 275,000 and climbing.”); Dan Moffett, *Conveyor Belt to Deportation: Asylum Cases don’t get Attention they Deserve*, PALM BEACH POST, Feb. 16, 2010, at A14 (“the system is choked by an exploding caseload and an exponential increase in outside pressures...the backlog has gotten progressively worse in the last decade.”) (internal quotation marks omitted).

121. See, e.g., Lenni B. Benson & Russell R. Walker, *Enhancing Quality and Timeliness in Immigration Removal Adjudication, Report for the Administrative Conference for the United States*, June 7, 2012, 40–42, available at <http://www.acus.gov/wp-content/uploads/downloads/2012/06/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf> (suggesting that defensive asylum cases should be heard by asylum officers like affirmative cases are, rather than immigration judges, in order to speed the process).

122. Refugee Convention, *supra* note 15, at art. 31(2); Protocol to Refugee Convention, *supra* note 15 (incorporating the articles of the Refugee Convention); See *Alternatives to Detention*, *supra* note 11, at 228 (noting the fear that deterrence is the true rationale behind U.S. detention and parole policies).

123. *Back to Basics*, *supra* note 14, at 1. “Any reduction in global asylum numbers have been associated with non-entrée policies, including contain-

effective deterrence factor is to ignore the reason that people are seeking asylum in the first place: they consider the situation they are fleeing to be worse.¹²⁴ Risk-analysis tools and ATDs can work together to ameliorate the concerns that justify detention, and reduce the burden on the U.S. immigration system, by allowing for the parole of more asylum-seekers.¹²⁵

B. The Importance of Risk-Analysis

To address these limited, but admittedly legitimate, fears and still comply with international obligations, the United States needs to assess the level of risk that asylum-seekers pose on an individual level, regarding both danger to society and risk of flight.¹²⁶ Risk-analysis tools fill the gap between categorical detention and ATDs by ensuring that any method used for a person is necessary and not arbitrary, thus complying with international treaties.¹²⁷ Detention can be legitimate under international law only when an *individualized* assessment establishes that there is no lesser method that the government can take to mitigate the dangers posed by that particular non-citizen.¹²⁸ This is because

international human rights law requires that detention decisions be made on a case-by-case basis after an individualized assessment of the functional and legitimate need of detaining a particular individual, the understanding that anyone deprived of liberty is entitled to judicial review of this decision,

ment in regions of origin and interception/interdiction measures, or can be attributed to large-scale repatriation programmes." *Id.* at 1 n.4.

124. *Back to Basics*, *supra* note 14, at 2 ("[T]hreats to life or freedom in countries of origin are likely to be a greater push factor than any disincentive created by detention policies in countries of destination."). "The principal aim of asylum seekers and refugees is to reach a place of safety . . . those who are aware of the prospect of detention before arrival believe it is an unavoidable part of the journey, that they will still be treated humanely despite being detained." SAMPSON, *supra* note 20, at 11.

125. SAMPSON, *supra* note 20, at 22.

126. SCHRIRO, *supra* note 18, at 17, 20. While this Note focuses on risk-analysis as the capacity to reduce threats posed to the community, the assessments can also include screening for special vulnerabilities present in the individual that require attention. SAMPSON, *supra* note 20, at 22.

127. UNLOCKING LIBERTY, *supra* note 20, at 15.

128. See, e.g., *ExCom on Detention*, *supra* note 20, at 3 (noting that arbitrariness results unless there is an individualized determination that a person is likely to abscond).

and that any restriction of liberty should be the least restrictive means necessary.¹²⁹

An appropriate risk assessment tool would allow the United States to screen for the identified threats posed by non-citizens entering the country—lack of identity, risk of flight, and risk of danger—in order to make decisions about the level of supervision and support necessary to ensure compliance with the system.¹³⁰ Such a tool could allow the United States to increase legitimacy within the system through increased compliance while reducing detention costs in favor of less-costly ATDs.¹³¹

One criticism of the efficacy of any risk-assessment procedure is that there is a general absence of data at either the national or the international level regarding the success or failure of asylum-seekers to comply with proceedings or mandates.¹³² “The scarcity of governmental statistics with regard to those who abscond [or fail to comply with a removal order] severely weakens the empirical evaluation of one form of conditional release in comparison to another.”¹³³ One way to ensure that asylum-seekers are paroled or, if detained, that detention is in the least restrictive manner, is to increase predictability of asylum-seekers absconding by improving data collection via risk assessments.¹³⁴

An interesting parallel can be drawn to recent risk and data collection paradigms the U.S. Customs and Border Patrol (“CBP”) has utilized, in the context of national security, regarding the flow of people and goods through U.S. borders.¹³⁵ In response to increasing terror threats against the United States, CBP has utilized improved data analysis to distinguish be-

129. *Id.*

130. See SAMPSON, *supra* note 20, at 22 (“[A]ssessment enables authorities to make an informed decision about the most appropriate way to manage and support the individual as they seek to resolve their migration status and to make case-by-case decisions about the need to detain or not.”).

131. See *Unlocking Liberty*, *supra* note 20, at 41–42 (identifying the shortcomings of “standard risk assessment” as opposed to individualized risk assessment).

132. See *Alternatives to Detention*, *supra* note 11, at 24–25.

133. *Id.* at 25.

134. SCHRIRO, *supra* note 18, at 18–19.

135. See generally CUSTOMS AND BORDER PATROL, *CBP Launches Centers to Facilitate Processing of Imports*, October 20, 2011, available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/national/2011_news_archive/10202011_2.xml.

tween safe and unsafe traffic, goods, and passengers.¹³⁶ Speeding up the screening process for safe traffic actually increased CBP's ability to focus resources on who or what was a true threat.¹³⁷ Essential to speeding up safe traffic is the sharing of information not only within an organization but also between an organization and "safe" civilians, across multiple agencies, and among nations.¹³⁸ CBP's efforts provide a model for the way that ICE can speed up the parole of safe detainees in order to better focus on those that are unsafe.¹³⁹ Based on CBP's model, the United States might be able to speed asylum-seekers into parole or ATDs in a number of ways, such as having ICE offices become more efficient at reporting factors contributing to or detracting from compliance; requiring ICE and NGOs to compile data on asylum-seekers' compliance; or by sharing statistics with Canada and Mexico relating to risks posed by asylum-seekers and ultimate compliance.¹⁴⁰ The expedited process could have similar benefits as those seen by CBP—the ability to focus finances and personnel on true

136. Alan D. Bersin, Lecture, *Lines and Flows: The Beginning and End of Borders* 12, Ira M. Belfer Lecture, Brooklyn Law School (Oct. 6, 2011).

137. Bersin, *supra* note 136. See also, UNLOCKING LIBERTY, *supra* note 20, at 41 ("Using individualized custody determinations could improve efficiency by maintaining the detention levels necessary and *diverting those resources to more appropriate means of ensuring that immigrants report for immigration proceedings.*") (emphasis added).

138. Bersin, *supra* note 136, at 9–11.

139. Bersin, *supra* note 136. See generally U.S. CUSTOMS AND BORDER PROTECTION [CBP], OFFICE OF BORDER PATROL, NATIONAL BORDER PATROL STRATEGY (2004), available at http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/border_patrol_ohs/national_bp_strategy.ctt/national_bp_strategy.pdf. For example, the Northern Border Project has the goal of developing technology along the U.S./Canada border to better address the challenges of protecting that border. It includes testing an "Apex-Secure Transit Corridor" wherein members of the transit industry use government-approved technology when crossing the border to streamline the security screening process. U.S. DEPARTMENT OF HOMELAND SECURITY [DHS], CBP, NORTHERN BORDER DIVISION FACT SHEET, available at http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/border/secure_border/northern_border_fs.ctt/northern_border_fs.pdf (Last accessed Sept. 17, 2012).

140. Compare *id.* See also, *Holding Patterns*, *supra* note 25, at 28:30–30:18 (discussing frustration at how detention issues become localized despite the fact that many countries face them, but how governments are beginning to work together).

threats—while also avoiding unnecessary or arbitrary detention by releasing individuals who qualify into ATDs.¹⁴¹ To ensure that the process does not become discriminatory or too bureaucratic, expert input, trained staff, specific guidelines, and formal review should be a part of any new data analysis process.¹⁴²

While overriding long-standing aversions to sharing between countries could be a challenge at any level of cooperation, the benefits of increased data sharing and analysis in this digitized, information-driven society outweigh the drawbacks.¹⁴³ Data regarding compliance on a national or international level could influence detention planning on the whole and decisions made in individual cases in the same way data from pilot programs have already shaped decisions on a smaller scale.¹⁴⁴ Ultimately, by “designing effective alternatives to detention and knowing when they can and should be relied upon to work,” risk analysis, supplemented by data collection, can help to reduce unnecessary and arbitrary detention.¹⁴⁵

C. Why Alternatives to Detention are Important

In the spectrum between full detention and unrestrained liberty, ATDs occupy any method that is not at either extreme.¹⁴⁶ These methods include, from the most to the least restrictive: in-home detention and electronic monitoring; supervision or reporting; residency restrictions; release to community supervision; release on bail, bond, or surety; and documentation.¹⁴⁷ It is important to note, however, that just because a given method has been classified as an ATD does not mean it necessarily

141. See Bersin, *supra* note 138. See also, *JAILS AND JUMPSUITS*, *supra* note 35, at 29 (“if the data used during risk assessment is linked appropriately to a centralized database . . . the tool may provide much-needed information about release processes and classification decisions at all facilities in the detention system, improving the potential for oversight and accountability.”).

142. SCHRIRO, *supra* note 18, at 18–21; *Back to Basics*, *supra* note 14, at 81.

143. Bersin, *supra* note 138, at 9–11. Bersin noted that U.S. Customs and Border Patrol operates the “U.S. government’s largest collection, storage and dissemination functions with respect to unclassified data.” *Id.* at 10.

144. See VERA, *supra* note 16, at iii; *Alternatives to Detention*, *supra* note 11, at 24–25.

145. *Alternatives to Detention*, *supra* note 11, at 25.

146. *Back to Basics*, *supra* note 14, at 8–9.

147. *Id.* at 53.

complies with international law.¹⁴⁸ The intensity of a given ATD method varies, but in order to avoid violating international legal mandates it should comport with the level of risk established via risk-analysis on a case-by-case basis.¹⁴⁹ Because of this, asylum-seekers already eligible for parole without restrictions should not be placed in ATD programs that are more restrictive than parole as doing so would result in more restrictions on liberty than necessary.¹⁵⁰ ATDs should be utilized for those asylum-seekers who do not require more restrictive deprivations of liberty, such as detention, and not as a substitute for lesser restrictions like release on parole.¹⁵¹

Many ATD methods, if implemented properly, could allow the United States to harmonize the delicate balance between the systemic risks that lead to over-detention and the international human rights laws that only authorize detention as a last resort.¹⁵² This is because many ATDs occupy a middle ground, addressing the risks that detention is intended to prevent while allowing the asylum-seeker to be free from unnecessary or arbitrary detention.¹⁵³ Some programs utilize residency restrictions in a variety of ways, including “open centers, semi-open centers, [or] directed residence” that often allow the asylum-seeker to be released into the community with varying levels of supervision.¹⁵⁴ The most successful ATD programs utilize a combination of ATD methods designed to meet the needs and risks of individual asylum-seekers.¹⁵⁵

Yet even some ATD programs can violate international law; methods such as home detention and electronic tagging are “very intensive” methods in relation to the restrictions they place on liberty and can rise to the level of detention despite technical release.¹⁵⁶ It is possible that even allowing for release

148. *Id.* at 9.

149. Compare SAMPSON, *supra* note 20, at 22 with Part I.C., *supra*.

150. UNLOCKING LIBERTY, *supra* note 20, at 39.

151. *Id.*

152. See, e.g., SAMPSON, *supra* note 20 (presenting the “Community Assessment and Placement model,” which blends risk analysis and ATDs to meet humanitarian standards).

153. Sampson, *supra* note 20, at 53.

154. *Alternatives to Detention*, *supra* note 11, at 30–35.

155. See, e.g., Sampson, *supra* note 20, at 22.

156. UNLOCKING LIBERTY, *supra* note 20, at 38–39; *Holding Patterns*, *supra* note 25, at 36:36–38:40 (stating that these intensive methods should be a last resort).

on bail, bond, or surety—often considered less restrictive and typically involving no more restrictions on liberty than a financial or vouch-person guarantee—may violate international law where asylum-seekers remain unnecessarily detained simply because they have little access to funds or community sponsors, and not because they pose a threat.¹⁵⁷ As such, implementing these methods alone may not bring the United States into compliance with international law.¹⁵⁸

One example of a successful NGO pilot ATD program is the community supervision experiment titled “Appearance Assistance Program” (“AAP”), developed and tested in the late 1990s by the Vera Institute of Justice at the request of then-extant INS.¹⁵⁹ The program provided for asylum-seekers classified in its “intensive” track¹⁶⁰ to be released from detention to the supervision of AAP staff.¹⁶¹ The supervision included monthly monitoring and reporting requirements—both in person and via phone—and repeated flight-risk evaluations.¹⁶² AAP also offered support to asylum-seekers by giving information about obligations, hearing dates, the legal process, and the available services within the community.¹⁶³ By utilizing strategic intake interviews and supervision that had the potential to alert AAP staff of participant non-compliance or the threat thereof, AAP staff were able to recommend decreased, constant, or increased supervision, or even redetention if necessary.¹⁶⁴ Not only did asylum-seeker participants have high appearance rates at court dates¹⁶⁵—93%—thereby addressing the risks used to jus-

157. See, *Back to Basics*, *supra* note 14, at 54–55; UNLOCKING LIBERTY, *supra* note 20, at 38–39.

158. See, UNLOCKING LIBERTY, *supra* note 20, at 38. See also, Part I.C., *supra*.

159. VERA, *supra* note 16. The program divided non-citizens in the program into three groups. *Id.* at 1. Only the findings relating to the asylum-seeker group will be discussed in this Note.

160. The program also operated a low-intensity “regular” track, not the subject of this inquiry, wherein participants voluntarily enrolled in the program after being released on parole by INS. VERA, *supra* note 16, at 2.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 13–17.

165. The high appearance rates are as compared with appearance rates of 78% for asylum-seekers that were members of the control group, on parole but not participating in AAP. *Id.* at 27.

tify categorical detention,¹⁶⁶ but the program also reduced unnecessary detention by presuming release and only redetaining those who violated the conditions of release or who truly were a flight risk.¹⁶⁷

III. IMMIGRATION, DETENTION, AND PATH DEPENDENCY

Despite the expansive reach of ICE and DHS detention powers, the United States is on the edge of immigration reforms that have the potential to change the face of the immigration system and could bring the country within the standards mandated by international laws.¹⁶⁸ The Obama Administration began to discuss an overhaul of the immigration detention system in response to an unfavorable report by a DHS consultant.¹⁶⁹ Since then, a series of developments has energized the reform advocates seeking to alter the status quo of immigration and detention in the United States.¹⁷⁰ Attorney General Eric Holder made a 2011 announcement (“PD Memo”) that granted discretion to ICE officers to decline prosecution or detention in a number of situations, including those pertaining to asylum-seekers.¹⁷¹ Additionally, in late 2011, DHS began a review of 300,000 immigration cases with the aim of implementing the PD Memo and allowing the department to focus its limited resources on “deporting foreigners who committed serious crimes or pose national security risks.”¹⁷² Furthermore, ICE has recently developed and begun testing a risk assessment tool to be used in determining parole-eligibility for detainees, slated for

166. See Part II.A., *supra*.

167. VERA, *supra* note 16, at 16–17.

168. See generally, THE WHITE HOUSE, *supra* note 17; *Detention Reform Accomplishments*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT [ICE], <http://www.ice.gov/detention-reform/detention-reform.htm> (last accessed June 24, 2012) [hereinafter *Detention Reform Accomplishments*].

169. SCHIRRO, *supra* note 18; *Detention Reform Accomplishments*, *supra* note 170.

170. See Robert Pear, *Fewer Youths to Be Deported in New Policy*, N.Y. TIMES, Aug. 19, 2011, at A1; Preston, *supra* note 7; U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *ICE Parole Guideline is an Important First Step to Fix Flawed Treatment of Asylum Seekers in the United States*, (Dec. 23, 2009), available at <http://www.uscirf.gov/news-room/press-releases/2891.html>.

171. Exercising Prosecutorial Discretion, *supra* note 6.

172. Julia Preston, *U.S. to Review Cases Seeking Deportations*, N. Y. TIMES, Nov. 17, 2011, at A1; Exercising Prosecutorial Discretion, *supra* note 6.

nationwide implementation in 2012.¹⁷³ The United States has also consolidated multiple former ATD programs into one – the Intensive Supervision Appearance Program II (“ISAP II”) – and executed a contract with a private company to administer it.¹⁷⁴ Finally, several senators introduced a bill during the 112th session to enact “comprehensive immigration reform” which includes provisions for the protection of asylum-seekers.¹⁷⁵

The importance of this reform momentum can be illustrated by the theory of *path dependency*, first popularized by economist Paul David in the mid-eighties, wherein “individual decision[-]making early on in the path may lead to a ‘lock-in’ of a pattern that is collectively suboptimal.”¹⁷⁶ To illustrate the theory, David examined the series of decisions made by individual business owners and individual typists to buy and be trained on QWERTY keyboard models. The purchase of these keyboards led to the “lock-in”, or enduring prominence, of the suboptimal keyboard configuration long after the technology that required said layout had been phased out.¹⁷⁷ The lock-in of a given method creates “the very heavy disincentives that face those who would wish to depart significantly from that which has gone before,” and acts to reinforce the existing situation.¹⁷⁸ It is significantly more difficult to alter the course after the method becomes “locked-in” because of the “technical interrelatedness, economies of scale, and quasi-irreversibility of investment” that lead to the method becoming entrenched despite other, better, methods being available.¹⁷⁹

173. UNLOCKING LIBERTY, *supra* note 20, at 21.

174. *Detention Reform Accomplishments*, *supra* note 170; UNLOCKING LIBERTY, *supra* note 20, at 31–32.

175. S. 1258, 112th Cong. (2011).

176. David Wilsford, *Path Dependency, or Why History Makes it Difficult but Not Impossible to Reform Health Care Systems in a Big Way*, 14 J. PUB. POLICY 251, 252 (Jul.–Dec. 1994).

177. David, *supra* note 23. David declared the configuration suboptimal because winning speed-typists typically utilized a Dvorak Simplified Keyboard (“DSK”) layout and because a U.S. Naval study revealed that the cost of retraining typists to use the DSK layout could be recouped within ten days due to the increased efficiency of the typists on that keyboard. *Id.* at 332. By the time the technological limitation that required the QWERTY configuration – jamming typebars – was obsolete, the configuration was already locked-in. *Id.* at 333–34.

178. Wilsford, *supra* note 178, at 253–54.

179. David, *supra* note 23, at 334. In the QWERTY example, David describes “technical interrelatedness” as the positive feedback loop between

The U.S. detention of asylum-seekers is similar to the QWERTY conundrum.¹⁸⁰ The prominence of the presumption in favor of detention can be, in part, explained by the positive feedback loop between the public and political responses to terrorism.¹⁸¹ Decisions made in response to terrorism have contributed to the prominence of mandatory detention for asylum-seekers, at least until they can prove they are not a risk.¹⁸² Now it is clear that categorical mandatory detention is suboptimal, as it violates international laws.¹⁸³ Despite being obsolete, the presumption in favor of detention might now be locked-in because it is easier to continue using it than to alter infrastructure and training to facilitate eliminating it.¹⁸⁴

individuals choosing to learn QWERTY typing because business owners seek to hire QWERTY-trained typists and business owners purchasing QWERTY machines and thus seeking to hire QWERTY-trained typists. *Id.* at 334–35. “Economies of scale” are represented by the decrease in “user costs of a type-writing system based upon QWERTY . . . as it gained acceptance relative to other systems.” *Id.* at 335. David illustrates the “quasi-irreversibility of investments” as the point in development when QWERTY keyboards became “locked-in” because “it became privately profitable [for non-QWERTY manufacturers] in the short run to adapt machines to the habits of men...rather than the other way around.” *Id.*

180. *See generally, id.*

181. *See, e.g.,* Homeland Security Act of 2002, 6 U.S.C. § 101 *et. seq.* (2002) (establishing DHS, changing the INS to ICE, and mainly focusing its mission statement on the prevention of terrorist attacks through securing the homeland); Alison Mitchell & Todd S. Purdum, *A Nation Challenged: The Lawmakers; Ashcroft, Seeking Broad Powers, Says Congress Must Act Quickly*, N. Y. TIMES, Oct. 1, 2001, at A1 (indicating lawmakers urged strict immigration control in response to national security concerns after 9/11, but that the momentum for control began after the 1993 World Trade Center bombings); McFadden, *supra* note 8, at B4 (“[M]ost New Yorkers think illegal immigrants pose a serious threat of terrorism and believe that the [1993 World Trade Center] bombing would not have occurred if immigration controls had been tighter.”); Brané, *supra* note 31, at 150–151 (discussing security as a common reason that countries might choose to detain). *See generally*, David, *supra* note 23.

182. *See, e.g.,* Homeland Security Act of 2002, 6 U.S.C. § 101 *et. seq.* (2002) (establishing DHS and ICE); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 302, Pub.L. 104-208 Div. C, 110 Stat. 3009-546 (1996) (creating mandatory detention for some classes of non-citizens). *See generally*, David, *supra* note 23.

183. *See* Part I.C., *supra*; *See generally*, David, *supra* note 23.

184. *See generally*, David, *supra* note 23. *Compare* Exercising Prosecutorial Discretion, *supra* note 6, *with* Preston, *supra* note 7.

Digressing from the path is not impossible.¹⁸⁵ Radical deviations from the status quo become more likely when institutional frameworks that keep to the current path, like ICE policies in favor of detention, meet with unpredictable external forces, like the current momentum for U.S. immigration and detention reform.¹⁸⁶ Like political reform momentum, external forces in the *path dependency* context are “fleeting comings together of a number of diverse elements into a new, single combination.”¹⁸⁷ Because of this, U.S. immigration and detention reform is at a critical juncture where immense change is possible.¹⁸⁸ It is essential that the United States capitalize on this opportunity and reform in a way that brings its practice into compliance with international law standards as this moment is fleeting and changes in the elements, such as the inauguration of a new political party into power, could close the window of opportunity.¹⁸⁹ In addition to haste, it is imperative to alter the status quo in a way that does actually bring the United States within international law mandates because anything else could potentially lock-in a new, equally suboptimal method.¹⁹⁰

IV. IGNORING RECOMMENDATIONS OF ASYLUM EXPERTS LEADS TO INEFFICIENT REFORMS IN THE ASYLUM DETENTION SYSTEM

Rather than taking full advantage of the opportunity to bring its immigration and detention system into compliance with international human rights law, the United States has constructively ignored the recommendations of asylum experts and, thus, recent efforts at progress have failed to amount to any significant decrease in unnecessary or arbitrary detention.¹⁹¹ In

185. David, *supra* note 23, at 334.

186. Wilsford, *supra* note 178, at 270.

187. *Id.* at 256–58, 270.

188. *See generally, id.*

189. *See, id.* at 254.

190. *See, David, supra* note 23, at 336, stating

Despite the presence of the sort of externalities that standard static analysis tells us would interfere with the achievement of the socially optimal degree of system compatibility, competition in the absence of perfect futures markets drove the industry prematurely into standardization *on the wrong system* – where decentralized decision making subsequently has sufficed to hold it. (emphasis in original).

191. *Compare* Exercising Prosecutorial Discretion, *supra* note 6, *with* Preston, *supra* note 7.

some instances NGOs have achieved high success rates in designing and piloting programs that implement their recommendations for risk analysis and ATDs.¹⁹² However, as this Part will illustrate, the United States has repeatedly decided against implementing their recommendations and has instead moved toward a suboptimal path in which reformed programs continue to violate international obligations.¹⁹³

A. The United States Takes Steps Toward Suboptimal Risk-Analysis

When ICE, DHS, and the Obama Administration pledged an overhaul of the U.S. immigration and detention system, they identified the need for a risk assessment mechanism that would facilitate non-citizens in being either paroled or enrolled into ATD programs.¹⁹⁴ At the beginning of 2010, ICE worked with various NGOs, led by the Lutheran Immigration and Refugee Service (“LIRS”), to develop this “risk assessment tool.”¹⁹⁵ The exact details of this tool have not been made public.¹⁹⁶ However, both LIRS and Human Rights First indicated that ICE’s tool is designed to use “objective criteria to guide decision-making regarding whether or not an alien should be detained or released; the alien’s custody classification level, if detained; and the alien’s level of community supervision (to include an ICE ATD program), if released.”¹⁹⁷ LIRS noted that the tool “includes mathematically weighted factors that should signal the likelihood of threat to the community based on past

192. See, e.g., UNLOCKING LIBERTY, *supra* note 20, at appendices B, C, D, 54–61; VERA, *supra* note 16.

193. See, e.g., UNLOCKING LIBERTY, *supra* note 20, at 29.

194. SCHRIRO, *supra* note 18, at 17, 20. While ICE does have a system in place that “classifies detainees as low, moderate, or high custody[, t]he primary basis for classification is criminal history[.]” and its purpose is to aid in housing already detained aliens and not for risk analysis associated with parole. *Id.* at 17.

195. *Detention Reform Accomplishments*, *supra* note 170; UNLOCKING LIBERTY, *supra* note 20, at 21.

196. UNLOCKING LIBERTY, *supra* note 20, at 21.

197. UNLOCKING LIBERTY, *supra* note 20, at 20; JAILS AND JUMPSUITS, *supra* note 35, at 29. While LIRS did not indicate where they received the information, Human Rights First quoted email correspondence between their office and ICE officials, dated October 1, 2011. *Id.*

behavior as well as of absconding for each and every individual ICE apprehends.”¹⁹⁸

The tool, slated for nationwide implementation in 2012, has already garnered criticism from those to whom ICE has granted advanced exposure.¹⁹⁹ In reviewing a pilot version, the UNHCR expressed concern that the “tool, based on a mathematical calculation, risks becoming a bureaucratic, tick-box exercise and may lead only to artificial individual assessments rather than real ones. It also appears heavily weighted in favour of detention.”²⁰⁰ Based on these assessments, it seems that this aspect of ICE’s tool could become arbitrary and thus would not satisfy international obligations.²⁰¹ The continued presumption for detention also violates the guidance for implementing the policies advocated in the UDHR, 1951 Convention, 1967 Protocol, and ICCPR.²⁰²

Furthermore, although designed subsequent to ICE consultations with NGOs specializing in asylee and refugee protection,²⁰³ the tool apparently falls short of asylum experts’ recommendations.²⁰⁴ LIRS, after providing support to ICE in the development stages of the tool, found it contains a “total absence of individualized assessment of risk for people subject to mandatory detention. There is also no standard assessment of risk with judicial review for people eligible for parole, such as arriving asylum-seekers who are found to have a credible fear of return.”²⁰⁵ These apparent shortcomings affect the ability of the United States to sufficiently satisfy international standards by, specifically, avoiding arbitrariness through individualized assessments and judicial review.²⁰⁶

198. UNLOCKING LIBERTY, *supra* note 20, at 20.

199. *Id.* at 20-21, 41.

200. *Back to Basics*, *supra* note 14, at 81.

201. *See* Part I.C., *supra*.

202. *See* UDHR, *supra* note 66, at art. 14(1) (III); Refugee Convention, *supra* note 15; Protocol to Refugee Convention, *supra* note 15; ICCPR, *supra* note 66, at art. 9(1). *See also* Part I.C., *supra*.

203. *Detention Reform Accomplishments*, *supra* note 170; UNLOCKING LIBERTY, *supra* note 20, at 21.

204. UNLOCKING LIBERTY, *supra* note 20, at 21 (“While the list [of special vulnerability factors to be included in the tool] falls short of the recommendation from experts to ICE, the creation of a tool can be followed by improvement of it.”).

205. *Id.* at 41.

206. *See supra*, Part B.1.

By ignoring the recommendations of LIRS and other asylum experts involved in the development of the tool, ICE squandered a valuable opportunity to comply with international law.²⁰⁷ Subsequent to viewing ICE's new tool, LIRS published their recommendations to ICE regarding a risk assessment tool.²⁰⁸ It envisions a dynamic individualized assessment procedure that encourages release, or, if some form of detention is necessary, the least restrictive ATD or detention procedure necessary to mitigate the risks presented by the individual alien.²⁰⁹ It also allows for review of a determination should there be a change in circumstances or risk factors for an asylum-seeker.²¹⁰ Had ICE adopted a risk-assessment tool in line with these recommendations, it would allow for a greater chance of eliminating arbitrary, unnecessary detention.²¹¹ Instead, ICE has selected a suboptimal path that has the potential to “lock-in” continuing violations of international human rights law for future iterations of the tool.²¹²

B. ICE Takes Steps Toward Suboptimal ATDs

In 2004, Congress approved funding for ATD programs and ICE solicited bids for the contract to manage them.²¹³ Various NGOs—including the Vera Institute—bid for the contract, basing their qualifications on their expertise in refugee, asylee, and immigration services.²¹⁴ In a further example of the United States selecting to move down a suboptimal path, ICE “gave the contract to Behavioral Interventions Inc., a private company whose model was based on the use of electronic monitoring.”²¹⁵ Behavioral Interventions Inc. (“BI”) and its parent company still hold the U.S. ATD contract.²¹⁶

207. See UNLOCKING LIBERTY, *supra* note 20, at 21 (stating issues with ICE's risk analysis tool “will severely limit its capacity to advance the efficiency of custody and removal operations as a whole”).

208. *Id.* at appendices B, C, D, 54–61.

209. *Id.* at appendix B, 54–55.

210. *Id.*

211. See *id.* at 20–22.

212. See David, *supra* note 23, at 335–36; Wilsford, *supra* note 178; Part III, *supra*.

213. UNLOCKING LIBERTY, *supra* note 20, at 29.

214. *Id.*

215. *Id.*

216. *Id.*

Commonly used in the criminal judicial system, home curfew and electronic tagging are the most restrictive ATDs, and, as noted above, are considered by some to be an additional form of detention.²¹⁷ BI currently uses ICE's congressional ATD funding to combine those most restrictive methods with reporting requirements—"installation of biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants"²¹⁸—to administer a single program: the Intensive Supervision Appearance Program II ("ISAP II").²¹⁹ While for the first time in 2009 ICE included the presence of a "needs-based case management component" as a requirement for a company to obtain the ATD contract, this appears to be an as yet unfulfilled commitment.²²⁰ In looking at the restrictive nature of these methods, scholars have noted, "sometimes what is called an alternative to detention may in fact be an alternative form of detention."²²¹

This is especially true when considering that "rather than looking to the current detention populations and utilizing various supervision methods as a step down from unnecessary detention, [ISAP II] is seeking individuals already released into the community to increase restrictions of liberty on more people."²²² The use of ISAP II in these scenarios remains arbitrary and subject to the discretion of the ICE officer analyzing the parole eligibility of an asylum-seeker.²²³ For example, while "[a]liens should be assigned conditions of supervision according to an assessment of the alien's flight risk and danger to the community[, in ISAP II] assignment to a[n ATD] program is determined in part by residency," as only those asylum-seekers detained in close proximity to a regional ISAP II office are eli-

217. *Back to Basics*, *supra* note 14, at 53–54; *Alternatives to Detention*, *supra* note 11, at 36–38; UNLOCKING LIBERTY, *supra* note 20, at 38.

218. UNLOCKING LIBERTY, *supra* note 20, at 31.

219. *Id.* at 31–32.

220. *See id.* at 31.

221. *Alternatives to Detention*, *supra* note 11, at 4 (emphasis in original).

222. UNLOCKING LIBERTY, *supra* note 20, at 32. This theory is additionally supported by statements of ICE officials to Congress in explaining their 2012 budget requests: "[T]he ICE Assistant Secretary noted that the cost of ATD per individual is higher than detention per detainee . . . because the individuals enrolled in ATD remain in the system significantly longer than those in detention." H.R. REP. NO. 112-91, at 53 (2011).

223. *See* Part I.B. & Part I.C., *supra*.

gible to participate.²²⁴ “ICE has not requested-and Congress has yet to authorize-sufficient funding to expand ATD programs nationally-so that any immigration detainee who is eligible for an ATD program could be placed into it.”²²⁵

Furthermore, ICE’s plan for ISAP II “would *not* use ATDs as an alternative that would decrease the use of existing detention beds...[t]he total number of individuals in ICE custody or supervision, whether detained on Alternatives to Detention, would increase under this plan.”²²⁶ Thus, the United States continues to unnecessarily detain parole-eligible asylum-seekers by placing them into ISAP II.²²⁷ “ICE’s plan also explicitly precludes the use of ATDs for individuals who are technically subject to ‘mandatory detention.’”²²⁸

V. POLICY BENEFITS TO UNITED STATES SHOULD IT ADOPT THE RECOMMENDATIONS

In addition to the benefit of being in compliance with international human rights laws, there are numerous advantages for the United States should it adopt the proposed programs.²²⁹ First, the country can maintain its status as a leader in the international community in good faith, and a stance of internal compliance will better position the country to encourage other nations to follow suit.²³⁰ Next, much of U.S. foreign policy in the war on terror depends on how the country is perceived in the international community and among individual populations.²³¹ Because many people will still be deported, how they feel about the process and what they say to others upon return to their countries may have an impact on public image in areas where the United States desperately needs support.²³² A reputation of humanitarian treatment and fair dealings could go a long way.

224. SCHRIRO, *supra* note 18, at 20.

225. JAILS AND JUMPSUITS, *supra* note 35, at 27.

226. *Id.* at 28 (emphasis in original).

227. UNLOCKING LIBERTY, *supra* note 20, at 39.

228. JAILS AND JUMPSUITS, *supra* note 35, at 28.

229. *E.g.*, Brané, *supra* note 31, at 170.

230. *Id.*

231. *Id.*

232. *Id.*

Finally, there is an enormous potential for financial savings.²³³ Currently, it costs \$95 per day to detain an asylum-seeker, but only \$22 per day to support that same person in an alternative program.²³⁴ Some estimate that the disparity could be even more extreme, with ICE overhead costs bringing detention costs up to \$164 per detainee per day while some forms of ATDs cost as little as thirty cents per day.²³⁵ While the numbers include more than just asylum-seekers, the savings associated with detaining only those who present a true risk, such as only detaining those who have “committed violent crimes, the agency could save nearly \$4.4 million a night, or \$1.6 billion annually—an 82% reduction in costs.”²³⁶

CONCLUSION

When coupled with an efficient and individualized risk analysis program, Alternatives to Detention adequately address the risks of releasing the majority of asylum-seekers into the community during the pendency of their asylum processing.²³⁷ Instituting this combination would benefit the United States financially and in its international standing in addition to allowing the United States to comply with its international human rights obligations regarding the detention of asylum-seekers.²³⁸ The United States should move quickly to adopt the recommendations of asylum experts, capitalizing on the current momentum for reform in the detention system and decisively ending its violations of international human rights laws.

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233. *Back to Basics*, *supra* note 14, at 85.

234. *Id.*

235. NATIONAL IMMIGRATION FORUM, *supra* note 30, at 2.

236. *Id.* at 8.

237. See SAMPSON, *supra* note 20, at 22; *Amnesty Int'l*, *supra* note 20, at 16.

238. See SAMPSON, *supra* note 20, at 22; *Amnesty Int'l*, *supra* note 20, at 16.

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