

# PENN UNDERGRADUATE LAW JOURNAL

## CONTENTS

ARE US CORPORATIONS BEING DODD-FRANK?:  
DISCLOSURE LAW AS AN INSTRUMENT OF SO-  
CIAL REFORM

*Emma Ireland*

DISTRIBUTIVE JUSTICE: ATTITUDES TOWARD  
ACCESS TO FEDERAL COURTS IN ENVIRON-  
MENTAL CITIZEN SUITS

Russell Patterson

PRIVATE MILITARY COMPANIES AND INTERNA-  
TIONAL LAW: THE GOOD, THE BAD, AND THE  
UGLY

*Trevor Kehrler*

Volume 4  
Number 1  
Winter 2016



# Penn Undergraduate Law Journal

Vol 4.

Winter 2016

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## TABLE OF CONTENTS

Letter from the Editor.....*i*

### FOREWORD

Regulating Toxic Chemicals through Precautionary Federalism

*Professor Sarah Paoletti, University of Pennsylvania Law School.....1*

### ARTICLES

Are US Corporations Being Dodd-Frank?:

Disclosure Law as an Instrument of Social Reform

*Emma Ireland, University of California, Berkeley.....5*

Distributive Justice:

Attitudes toward Access to Federal Courts in Environmental Citizen Suits

*Russell Patterson, Ohio State University.... 51*

Private Military Companies and International Law:

The Good, the Bad, and the Ugly

*Trevor Kehrer, University of Southern California.....83*

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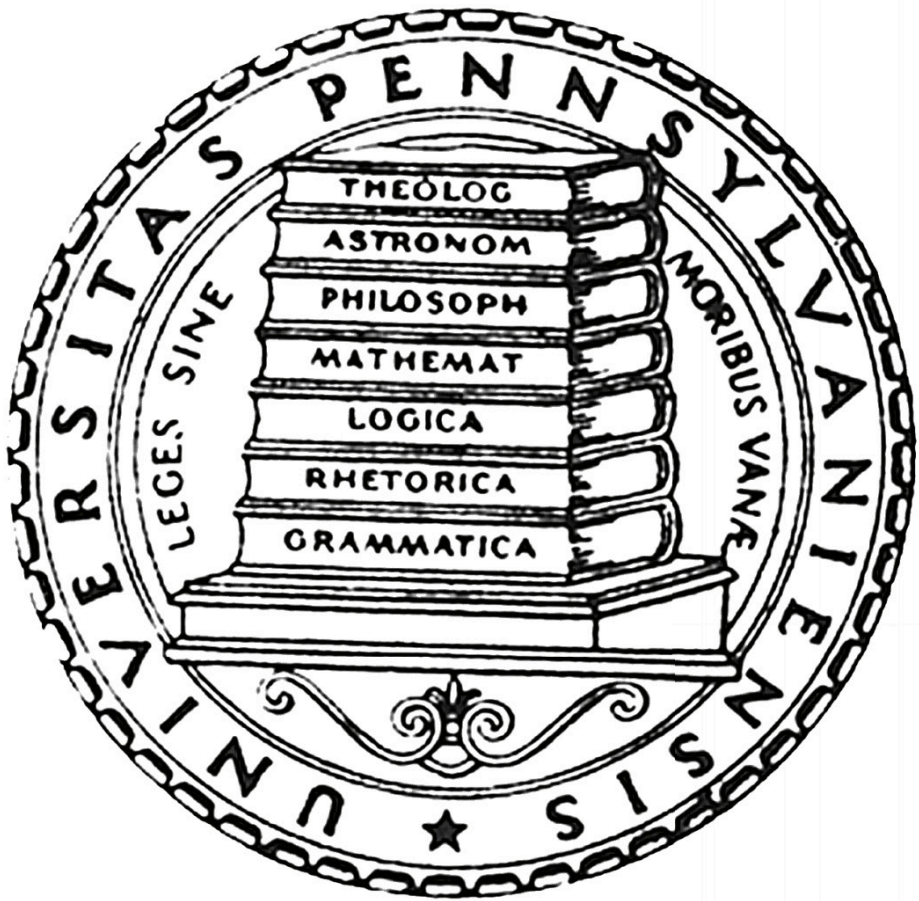
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## *Letter from the Editor*

Dear Reader,

It is with great pride that I present to you the Penn Undergraduate Law Journal's seventh issue, the fall edition of our fourth volume. The articles that follow are a testament to the insight, academic rigor, and intellectual curiosity of our student writers; without them, the Journal could not contribute to legal scholarly discourse. We owe a further debt of gratitude to the Journal's advisors, sponsors, and the University of Pennsylvania for their dedicated support. Finally, we extend a sincere thanks to our faculty contributor Sarah Paoletti, Practice Professor of Law and Director of the Transnational Legal Clinic at the University of Pennsylvania Law School, who has generously written this issue's foreword.

In this issue, our student authors engage in a range of relevant legal debates. Two of our authors, Emma Ireland and Trevor Russell Patterson, center their arguments on American domestic legislation. In her paper "Are US Corporations Being Dodd-Frank?: Disclosure Law as an Instrument of Social Reform," Ms. Ireland utilizes meta analysis and interviews to explore corporate responses to the 2010 Dodd-Frank legislation. In "Distributive Justice: Attitudes toward Access to Federal Courts in Environmental Citizen Suits," Russell Patterson explores the strong impact of ideology on circuit court decisions, as compared to district court decisions.

Our two remaining authors, Trevor Kehrer and Thomas Siu, focus on international law and its controversies, both historical and contemporary. In "Private Military Companies and International Law: the Good, the Bad, and the Ugly," Mr. Kehrer argues that, because it is difficult to hold private military companies accountable to human rights law, a new international instrument must be developed to encourage prosecution of lawbreaking entities. In his article "'A Poisoned Chalice?' A Legal and Historical Evaluation of the Nuremberg Tribunals and Crimes Against Peace," Mr. Siu analyzes the Nuremberg Trials through a critical lens, arguing that the international legal community ought to learn from the trials' shortcomings and irregularities.

Despite the topical diversity present in this issue, these articles share a commitment to critical analysis of the successes and shortcomings of international and domestic law. The debates to which these scholars contribute are critical, particularly in today's climate of intensified legal and political controversy, when intellectual merit is more important than ever. It is for this reason that I am proud to affirm PULJ's commitment to supporting

bright thinkers around the world. On behalf of the Penn Undergraduate Law Journal, thank you for reading.

Sincerely,

A handwritten signature in black ink, reading "Taryn MacKinney". The signature is written in a cursive style with a large, sweeping flourish at the end.

Taryn MacKinney  
*Editor-in-Chief*

## FOREWORD

### **ENFORCING RIGHTS IN CHALLENGING TIMES: UNDERSTANDING THE ROLE OF LAW, LEGAL MECHANISMS, AND LAWYERS**

Sarah H. Paoletti<sup>1</sup>

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Globalization has arguably been the driving force for change over the past several decades. There are almost no aspects of our lives that are not touched by and, in many cases, heavily influenced by globalization – whether that be in the products we purchase and all aspects of business, labor, telecommunications, education, health, and more. As people, innovations, ideas, and commodities cross borders, the legal system and those of us operating within the legal system have had to adapt. International and comparative law, and the mechanisms in place to enforce them, have been evolving to respond to transnationalism. But difficult questions persist about how the law and legal systems should evolve to respond in a manner that respects, protects, and promotes fundamental human rights.

A critical examination of how laws and policies operate can assist in providing important lessons for moving forward in a globalized world. How do different rights and obligations set forth on paper translate into the lives of those who are governed by them? The articles included in this edition of the Penn Undergraduate Law Journal seek to answer those questions – in the historical and present-day context, at the international level and domestic level. In the first article, “Are US Corporations Being Dodd-Frank?: Disclosure Law as an Instrument of Social Reform,” Emma Ireland of the University of California, Berkeley examines how provisions of the 2010 Dodd-Frank law, which substantially rewrote the rules for the financial regulatory system with the stated aim of increased transparency and accountability, has achieved social reform. She also touches on other non-legal pressures that must be brought to bear to ensure some level of success in practice. In doing so, Ireland examines the specific obligation of certain publicly listed corporations to disclose use or reliance on conflict minerals from the Democratic Republic of the Congo and adjoining countries.

In “Private Military Companies and International Law: the Good, the

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<sup>1</sup>Sarah H. Paoletti is a Practice Professor of Law and Director of the Transnational Legal Clinic at the University of Pennsylvania Law School.

Bad, and the Ugly,” Trevor Kehrer of the University of Southern California looks at the role of international law in regulating corporate accountability. In many cases, private military companies have argued for immunity from any wrong-doing, be it financial wrongdoing or human rights violations committed by contractors and their employees. Kehrer concludes that the existing United States and international legal systems have not succeeded in achieving accountability, and he argues for the creation of a new international instrument to govern the human rights obligations of private military companies and ensure accountability when rights violations are committed.

As we think about developing new mechanisms for regulating corporate accountability at the international level, it is also useful to critically examine past international mechanisms established to provide accountability. Thomas Siu of Patrick Henry College undertakes that examination in the context of international criminal law in “A Poisoned Chalice? A Legal and Historical Evaluation of the Nuremberg Tribunals and Crimes Against Peace.” The article helps unpack the role of international law and procedure in prosecuting crimes against peace.

Looking back to domestic legal regimes, in an area where local actions have global impact, “Distributive Justice: Attitudes Toward Access to Federal Courts in Environmental Citizen Suits” seeks to understand who gets to access the courts, as well as when access is allowed, in the litigation environmental claims. Author Russell Patterson of Ohio State University asks, where are citizens more or less likely to succeed in bringing litigation seeking to enforce certain environmental standards?

I would argue that each of the articles included herein – both those that take a historical approach and those that are more prospective – must be examined through the lens of globalization, and with an eye towards developing a keener understanding of the roles that our interdependency on other nations and their policies and practices have on human rights. Domestic laws and regulatory structures touch on issues that cross borders every day. Similarly, those actions that take place at the international level do not do so in a vacuum, and must connect to the realities on the ground.

What lessons we can extract from the examinations and critiques of law and legal mechanisms set forth in the enclosed articles? The answer to this question is particularly important today as we try to reconcile our growing global interdependence with events of the past year, marked by growing nationalistic political movements across the globe and a shift away from global engagement, most notably with Brexit and the presiden-

tial election of Donald Trump following a campaign built on an “America first” agenda. What role will law and legal systems play in ensuring justice and accountability in the face of today’s global challenges? International human rights law provides a set of common norms designed to protect and promote respect for human dignity without discrimination in all aspects of our lives, norms that transcend labels and transcend borders. But for the law to have meaning, we must ensure effective mechanisms are in place for their enforcement, and we must ensure meaningful access.

Migration has been described as the human aspect of globalization, and the present-day global refugee crisis is an area where international law and international legal systems are being tested by the rise of nationalism and protectionist attitudes of individual countries. For the past two years, the international community has been grappling with the “European refugee crisis,” so labeled because the humanitarian crisis experienced by people in Syria, Somalia, Sudan, and other countries has reached European shores. Unfortunately, while international law provides specific protections for refugees and sets forth fundamental human rights that transcend borders and immigration status, there persists a significant disconnect between rights and realities. Many of those seeking refuge in Europe continue to live in situations of severe insecurity.

In the United States, the “Central American Refugee crisis” has served as a dramatic lesson regarding this disconnect between rights and realities. The perceived increase in arrivals of Central Americans along the United States–Mexico border was responded to by the Obama Administration with increased use of detention, interference with the right to seek asylum, interference with the rights of the family, and lack of care given to ensure the best interests of the child.

The start of the Trump Administration has seen the signing of an executive order that banned entry of all persons from seven Muslim-majority countries for 90 days, suspended all refugee admissions for a period of 120 days, and indefinitely suspended admission of Syrian refugees. At the same time, two additional Executive Orders were followed by the implementation of memoranda that strip the procedural and substantive rights of broad swaths of immigrants seeking asylum in the United States and those already in country. The executive orders have been met with legal challenges and public protests. While the progressive human rights community has taken to the streets, and the conservative movement has sought to take advantage of the change in administrations to advance their own policy initiatives, law-

yers are hard at work determining what is binding law, what provisions – if any – violate existing US state and federal law, and how to respond to policy initiatives that run into conflict with established principles of international human rights law.

As the director of the Transnational Legal Clinic at the University of Pennsylvania Law School, I supervise law students in the direct representation of individuals in immigration proceedings and in international human rights advocacy aimed at protecting and promoting migrant rights. This position means I am confronted constantly with questions on how to translate human rights into reality. What steps can we take to ensure the rights that the United States, as a country, have signed onto under the Refugee Convention, the Convention Against Torture, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Discrimination, and the American Declaration on the Rights and Duties of Man, are respected, protected, and promoted? What opportunities are there for ensuring accountability and redress when those rights are violated? In some cases, it is as straightforward as providing our clients with representation before existing administrative mechanisms, and in other cases, it requires filing litigation in state and federal court, seeking to uphold the rule of law. But as the law changes, and those very structures established to provide recourse are stripped of jurisdiction, what is our role as lawyers?

As we look for responses to the pressing challenges of our times, the articles contained herein remind us to look to multiple sources for historical and present-day lessons. We have much to learn not only from our own past and an examination of our own legal systems, but also from an examination of others' pasts, their mechanisms for justice and accountability, and individual and collective struggles to achieve fundamental human rights.

## ARTICLE

# ARE US CORPORATIONS BEING DODD-FRANK?: DISCLOSURE LAW AS AN INSTRUMENT OF SOCIAL REFORM

Emma Ireland

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### ABSTRACT

This study combines meta-analysis and interviews to examine how US corporations have responded to Section 1502 of the 2010 Dodd-Frank legislation, which requires certain publicly listed corporations to disclose annually whether they use or rely on any conflict minerals that originated in the Democratic Republic of the Congo or an adjoining country. Although current literature provides a basis for understanding how traditional forms of disclosure legislation affect corporate behavior, there is little research on how disclosure legislation that aims to promote social reforms affects corporate behavior. Section 1502 provides an example of such legislation, which I describe as “non-traditional disclosure legislation.” My research examines three aspects of Section 1502: 1) relevant non-corporate actors’ perceptions of the successes and challenges of Section 1502; 2) relevant corporate actors’ perceptions of the successes and challenges of Section 1502; and 3) what Special Disclosure Reports (“form SDs”), the public disclosures filed with the SEC by corporations under Section 1502, reveal about corporate compliance with this law. In examining these aspects, this research conducted a meta-analysis of form SD compliance reports and held semi-structured, in-depth interviews with corporate and non-corporate actors with relevant experience. This paper finds that industries and corporations that are consumer-facing and/or that attach strong importance to their brand or reputation have been effectively encouraged to go beyond mere compliance with Section 1502 and embrace social reform, while other industries and corporations have not gone beyond mere compliance. Based on these and other findings, this paper makes recommendations for using non-traditional disclosure legislation, aiming to contribute to a broader understanding of the effectiveness of this form of legislation in achieving social reforms in other contexts.

### INTRODUCTION

Corporate behavior is a leading cause of serious human rights abuses.

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There is an ongoing debate about the most effective way to compel corporations to behave responsibly throughout their supply chains. Significant practical challenges and other hurdles impede the achievement of major advances on issues of global social importance given enforcement and other limitations associated with domestic laws in developing countries, the level of consensus required to achieve meaningful global solutions and, in the United States, political resistance to direct regulation that might put US-based multi-national corporations at a competitive disadvantage. I have developed a personal interest in the potential for “light-touch” disclosure-based regulation of multi-national corporations and, in particular, in Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).<sup>1</sup>

Section 1502 is an example of what I have termed “non-traditional disclosure legislation,” or disclosure legislation that has a social or public policy goal as its main objective. I distinguish it from what I have termed “traditional disclosure legislation,” which focuses more directly on the business and affairs of corporations registered with the Securities and Exchange Commission (“SEC”) and has a more obvious basis in investor protection. While the literature comprehensively investigates how corporations respond to “traditional” disclosure requirements, little is known about how they respond to “non-traditional” disclosure legislation. This paper aims to contribute to the literature on this question. Non-traditional disclosure legislation in the United States raises constitutional issues that are not the subject of this paper.<sup>2</sup> However, assuming those issues are resolved, the question remains whether a disclosure-based approach can be effective in altering corporate behavior to achieve social goals. Recent, highly-publicized responses of leading consumer-facing corporations to adverse media reports concerning their supply chains suggests that such corporations are, out of concern for the value of their brand, prepared to make changes when damaging information comes to light.<sup>3</sup> By extension, it is interesting to consider whether

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1 Dodd-Frank Wall Street Reform and Consumer Protection Act, HR 4173, 111th Cong, 2d Sess (Jan 5, 2010) § 1502.

2 The recent court case *National Association of Manufacturers, et al v SEC, et al* saw a number of legal challenges to the rule. While most of these challenges were rejected, the court upheld a first amendment challenge stating the rule did “violate the First Amendment to the extent the statute and rule require[d] regulated entities to report to the Commission and to state on their website that any of their products have ‘not been found to be ‘DRC conflict free.’” This ruling meant that in the second year of filing (onwards), corporations were no longer required to describe its products as “DRC conflict free,” having “not been found to be ‘DRC conflict free,’” or “DRC conflict undeterminable” (though it could choose to do so voluntarily). They were, however, still required to disclose information required by the rest of the rule. See Keith F. Higgins, *Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule* (SEC, Apr 29, 2014), archived at <https://perma.cc/37Z2-CBLS>.

3 Consider, for example, the recent media storm surrounding Apple and their links to poor labor conditions and worker suicides in China that elicited a response from the CEO Tim Cook. The attention on this issue has been described as a “thorn in the side” of Apple, and in 2012, Apple even



disclosure-based legislation could lead to similar responses among consumer-facing corporations. It is also relevant to consider whether such legislation can be effective in addressing the behavior of corporations that are not consumer-facing and, therefore, have little incentive to go beyond merely complying with the law by disclosing the relevant facts.

The purpose of my research is to examine the ways in which US corporations have responded to Section 1502 of the 2010 Dodd-Frank Act. In conducting my research, I will ask: 1) what successes and challenges of the legislation have the relevant non-corporate actors perceived? 2) What successes and challenges of the legislation have the relevant corporate actors perceived? 3) What do the form SDs (the forms required by the legislation to be filed with the SEC) tell us about the corporate response to the legislation? I hope that this project will contribute to an understanding of the effectiveness of disclosure legislation in a broader context. I also hope that this project will encourage a further discussion about the effectiveness of “non-traditional” disclosure legislation as a means to combat corporate human rights abuses and promote other social goals.

## LITERATURE REVIEW

### Section 1502: An Overview

In 2010, President Obama signed into law legislation that overhauled the US system of financial regulation.<sup>4</sup> Dodd-Frank mandated greater federal oversight and regulation for financial institutions.<sup>5</sup> This was aimed at preventing another financial collapse similar to the one in 2008.<sup>6</sup> Buried in this legislation is Title XV, which contains several lesser-known “miscellaneous provisions.”<sup>7</sup> One of these provisions is Section 1502, which directs the SEC to draft a rule that requires corporations that file with the SEC to disclose their use of any “conflict minerals” – specifically tin, tantalum, tungsten and gold (also known as “3TG”)<sup>8</sup> – originating in the Democratic Republic of Congo (DRC) or its surrounding

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published a list of all its main suppliers in an attempt to amend its public image. See Poornima Gupta, Tim Cook Responds To Foxconn Worker Abuse Report: Apple Not Turning ‘Blind Eye’ (Huffington Post, March 28, 2012), online at [http://www.huffingtonpost.com/2012/01/27/tim-cook-foxconn\\_n\\_1237341.html](http://www.huffingtonpost.com/2012/01/27/tim-cook-foxconn_n_1237341.html).

4 Helene Cooper, Obama Signs Overhaul of Financial System (NY Times, Jul 21, 2010), online at [http://www.nytimes.com/2010/07/22/business/22regulate.html?\\_r=0](http://www.nytimes.com/2010/07/22/business/22regulate.html?_r=0).

5 Id.

6 Matt Taibbi, How Wall Street Killed Financial Reform (Rolling Stone, May 10, 2012), online at <http://www.rollingstone.com/politics/news/how-wall-street-killed-financial-reform-20120510>.

7 Dodd-Frank: Title XV - Miscellaneous Provisions (Legal Information Institute, Oct 11, 2015), online at [https://www.law.cornell.edu/wex/dodd-frank\\_title\\_XV](https://www.law.cornell.edu/wex/dodd-frank_title_XV).

8 The Dodd Frank Act (Global Witness, Jan 26, 2015), online at <https://www.globalwitness.org/campaigns/conflict-minerals/dodd-frank-act/>.

countries (known as the “covered countries”) in their products.<sup>9</sup> How and why did a non-traditional disclosure requirement relating to conflict minerals find its way into legislation primarily concerned with financial regulation?

The DRC has been embroiled in violent conflict for over twenty years, with much of the violence fueled by the export and sale of 3TG minerals.<sup>10</sup> Conflict minerals can earn armed groups hundreds of millions of dollars every year.<sup>11</sup> Government forces are forced to fight these violent factions for control of “mines and smuggling routes,” resulting in significant human suffering within the civilian population.<sup>12</sup> Once conflict minerals are smuggled out of the DRC and processed in smelters around the world, it is difficult to trace their origin.<sup>13</sup> These minerals are widely used in consumer electronic products, as well as in jewelry and automotive, aerospace, and medical equipment.<sup>14</sup>

In May 2008, Senator Sam Brownback proposed a bill that would have made it illegal to import into the United States products from the DRC that contain coltan or cassiterite.<sup>15</sup> Although this bill was defeated, it was one of several initiatives put forward by Senator Brownback (and others) to address the humanitarian crisis in the DRC. In 2010, Senator Brownback, with the help of human rights campaigners like Global Witness and the Enough Project, was successful in adding Section 1502 to Dodd-Frank.<sup>16</sup>

Section 1502 requires corporations filing with the SEC to disclose how and from where they source 3TG minerals, and obliges the SEC to specify the precise disclosure requirements.<sup>17</sup> The SEC issued its final rule in 2012.<sup>18</sup> Cor-

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9 Taibbi, *How Wall Street at 1* (cited in note 6). Other works, referenced for this thesis, that discuss the role of the SEC and the Dodd-Frank Act are as follows: Aulana L. Peters, *Necessary Constraints on the Free Market: The Role of the SEC* (US Securities and Exchange Commission, Mar 26, 1987) 3/26/1987. Online at <https://www.sec.gov/news/speech/1987/032687peters.pdf>; Schulte Roth & Zabel, LLP, *Form SD and Conflict Minerals Report (CMR) (Conflict Mineral Resources)*, online at <https://conflictmineralsresources.com/content/form-sd-and-conflict-minerals-report-cmr>; Mark A. Rush, *Corporate Responses to Investigative Requests by the Federal Government* (K&L Gates, 2014); *The Dodd-Frank Act: A Cheat Sheet* (Morrison & Foerster, 2010), online at <http://media.mofo.com/files/uploads/images/summarydoddfrankact.pdf>.

10 *The Dodd Frank Act*, Global Witness (cited in note 8).

11 *Conflict Minerals* (Enough Project), online at [http://www.enoughproject.org/conflicts/eastern\\_congo/conflict-minerals](http://www.enoughproject.org/conflicts/eastern_congo/conflict-minerals).

12 Michael R. Littenberg, *Alert: Conflict Minerals and Supply Chain Compliance: Musings on Conflict Minerals Compliance—The Year That Was, the Year That May Be and What You Should Be Doing Now* (Ropes & Gray LLP, Jan 19, 2016), archived at <https://perma.cc/7EJR-8FLG>.

13 *Id.*

14 *Id.*

15 Karen E. Woody, *Conflict Minerals Legislation: The SEC’s New Role as Diplomatic and Humanitarian Watchdog*, 81 *Fordham L Rev* 131 (2012).

16 Celia R. Taylor, *Conflict Minerals and SEC Disclosure Regulation*, 2 *Harv Bus L Rev* 105 (2012).

17 Littenberg, *Alert: Conflict Minerals and Supply Chain Compliance* (cited in note 12).

18 See US Securities and Exchange Commission, *SEC Adopts Rule for Disclosing Use of Conflict Minerals* (US SEC, Aug 22, 2012), online at <https://www.sec.gov/News/PressRelease/Detail/>

porations that fall under the rule are obliged to conduct “a reasonable ‘country of origin’ inquiry that must be performed in good faith” and then disclose what they find.<sup>19</sup> They must also conduct due diligence along their supply chain.<sup>20</sup> Some of the requirements set out in the SEC’s rule have been said by experts to lack guidance and specificity.<sup>21</sup> For example, a corporation must comply with the disclosure requirements only if the minerals are “necessary to the functionality or production”<sup>22</sup> of a product manufactured or contracted to be manufactured by that corporation, yet these terms are never defined.<sup>23</sup>

Although determining whether or not Section 1502 has been effective in changing the lives of the people in the DRC is an important issue,<sup>24</sup> this paper focuses on the separate and significant issue of Section 1502’s effectiveness in compelling corporations to change their corporate behaviour and practices. This question has relevance beyond the specific effects of Section 1502, as it offers an understanding of efficacy of “non-traditional” disclosure legislation generally. The literature relevant to the questions I am focused on falls broadly into three categories: literature that examines the corporate response to, and effectiveness of, disclosure-based legislation; literature that examines the corporate response to legislation in general; and literature that looks at intersection of the “expressive theory” of law and “norm theory.”

## Responses to Disclosure Legislation

In 1929, the stock market crashed, plunging the United States into the Great Depression. The deficiencies in the regulation of securities became abundantly clear and, in an effort to address these flaws and restore public confidence,

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PressRelease/1365171484002.

19 US Securities and Exchange Commission, SEC Fact Sheet (Jul 29, 2014), online at <http://www.sec.gov/News/Article/Detail/Article/1365171562058>.

20 Id.

21 Taylor, 2 Harv Bus L Rev (cited in note 16).

22 US Securities and Exchange Commission, Final Rule at \*81 (US SEC, Nov 13, 2012), online at <https://www.sec.gov/rules/final/2012/34-67716.pdf>.

23 Id at 10–9.

24 Other works, referenced for this thesis, that provide critiques of the SEC and Dodd-Frank Act are as follows: Barbara Black, *The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption Is Not Part of the SEC’s Mission*, 73.5 Ohio St L J 1093 (2012); Tom Burgis, *Dodd-Frank’s Misadventures in the Democratic Republic of Congo* (Politico, May 2015); Marcia Narine, *From Kansas to the Congo: Why Naming and Shaming Corporations through the Dodd-Frank Act’s Corporate Governance Disclosure Won’t Solve a Human Rights Crisis*, 25.2 Regent U L Rev 351 (2012–2013); Fidel Bafilemba, Timo Mueller, and Sasha Lezhnev, *The Impact of Dodd-Frank and Conflict Minerals Reforms on Eastern Congo’s Conflict*, (The Enough Project, June 2014); Patrick J. Keenan and Christina Ochoa, *Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation*, 3 Goettingen J Intl L 129 (2011); Too Big Not to Fail (Economist, Feb 18, 2012).

Congress passed the Securities Act of 1933,<sup>25</sup> as well as the more comprehensive Securities Exchange Act of 1934.<sup>26,27</sup> These measures aimed to close the information gap between investors and corporations by requiring regular and accurate corporate disclosure.<sup>28</sup> From that point onwards, disclosure became a fundamental and generally accepted – or “traditional” – part of securities regulation. Favored by legislators, it is viewed as a “compromise” solution that falls between doing nothing and more heavy-handed legislation.<sup>29</sup>

The use of disclosure as a way of addressing social concerns is a relatively new phenomenon. Accordingly, there is not a body of literature that examines the broad effectiveness of “non-traditional” disclosure legislation. There is a substantial volume of literature that focuses on “traditional” financial disclosure requirements and asks the question: what forces affect the ways in which corporate actors respond to these disclosure requirements? Healy and Palepu note that auditing and accounting regulations rarely work perfectly, leaving room for key corporate actors to make their own decisions about what they will disclose and how they will disclose it.<sup>30</sup> In extreme cases, corporate actors may simply lie (intentionally or otherwise) to their investors, or ignore the disclosure law all together.<sup>31</sup> While this may not be a common response, Donald C. Langevoort proposes a “behavioral theory of why corporations mislead investors.”<sup>32</sup> He suggests that “groupthink” within corporations can enhance overoptimistic interpretations of business performance, leading corporate actors to misrepresent information to their investors.<sup>33</sup>

Corporate responses to disclosure laws are often somewhere in between disclosing objectively false information and disclosing all potentially relevant information fully, accurately and fairly. Healy and Palepu, in conducting a review of the relevant empirical disclosure literature, examine the motivations for corporate managers when it comes to “voluntary disclosure” (i.e., when there is room to manoeuvre within the limits of the law), identifying the following six hypothe-

25 15 USC § 77a et seq (1933).

26 15 USC § 78a et seq (1934).

27 Taylor, 2 Harv Bus L Rev (cited in note 16).

28 *Id* at 110–111.

29 Stephen J. Choi and A.C. Pritchard, Behavioral Economics and the SEC, L and Econ Working Papers Archive: 2003–2009 4, 27 (2003); David Vogel, Private Global Business Regulation, 11 Ann L Rev Poli Sci 262, 265 (2008).

30 Paul M. Healy and Krishna G. Palepu, Information asymmetry, corporate disclosure, and the capital markets: A review of the empirical disclosure literature, 31 J of Accounting & Econ 406, 420 (2001).

31 Choi and Pritchard, Behavioral Economics and the SEC at 22 (cited in note 29).

32 Donald C. Langevoort, Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms), 146 U Pa L Rev 101, 101 (1997).

33 *Id* at 139–140.

ses that affect their decisions.<sup>34</sup>

a) Capital Markets Transactions Hypothesis

There is incentive to provide voluntary disclosure in order to reduce the cost of external financing by reducing the information asymmetry problem.

b) Corporate Control Contest Hypothesis

Managers will use voluntary disclosure to reduce the likelihood that their stock will be undervalued or to explain factors that might drive the share price down, in order to avoid manager turnover.

c) Stock Compensation Hypothesis

Managers are often rewarded with stock-based compensation plans. There is an incentive to use disclosure to increase the liquidity and the value of their stock.

d) Litigation Cost Hypothesis

Threat of litigation can work in two opposing ways. Firstly, it can encourage managers to disclose more information to avoid litigation from investors. But it can also encourage managers to disclose less information about future predictions, in case they are wrong.

e) Management Talent Signaling Hypothesis

Managers may have an incentive to make disclosures as early as they have the information available in order to give the impression to investors that they are on top of relevant information.

f) Proprietary Cost Hypothesis

There is a potential disincentive for managers to disclose information that will put them at a competitive disadvantage, even if that means raising the cost of additional equity. However, this hypothesis is somewhat dependent on the nature of the competition.<sup>35</sup>

Healy and Palepu acknowledge that the studies from which they draw their conclusions suffer from “significant endogeneity and measurement error problems.”<sup>36</sup> It can be difficult to isolate the specific forces that cause people to act a certain way. However, many of the claims are corroborated by Michael D. Guttentag, who conducts an in-depth analysis of the benefits and disadvantages to corporations of disclosure. He considers that disclosure improves the accuracy of share prices and provides a reliable indicator of a manager’s performance.<sup>37</sup> He also supports the claim that disclosure closes the information gap and reduces the cost of raising additional capital.<sup>38</sup>

Guttentag identifies a number of negative forces that may influence a corporate actor’s decisions concerning disclosure. First, there is the direct cost

34 Healy and Palepu, 31 *J of Accounting & Econ* at 420 (cited in note 30).

35 *Id* at 420–24.

36 *Id* at 427.

37 Michael Guttentag, *An Argument for Imposing Disclosure Requirements on Public Companies*, 32 *Fla St U L Rev* 124, 134 (2004).

38 *Id* at 135–36.

of collecting and disseminating the relevant information, which is often incurred equally by many corporations that are subject to the disclosure legislation.<sup>39</sup> Second, as was identified by Healy and Palepu, there are additional costs associated with the competitive disadvantages that arise from disclosure of important corporate information.<sup>40</sup>

The preceding literature, which is concerned only with “traditional” forms of economic disclosure, addresses how direct financial considerations affect the decisions of corporate actors with regards to disclosure legislation. In my thesis, I expand this investigation into the realm of “non-traditional” disclosure that promotes social goals. I ask: assuming the constitutional validity of “non-traditional” disclosure requirements, in what ways do they affect corporate behavior? I show that there is a consideration that is not adequately addressed in the existing literature: the potential costs associated with damage to brand value and reputation. These findings are supported by literature that examines corporate social responsibility.<sup>41</sup> For example, a statistical study by Jean B. McGuire, Alison Sundgren, and Thomas Schneeweis demonstrates that corporate reputation is not only linked to the financial performance, but also to assessments of risk.<sup>42</sup>

### **Corporate Response to Other Legislation**

A number of authors identify economic concerns as the main influencing factor when corporations react to legislation more generally. Although arguing against the common view that the law can, at times, be “voluntary” for corporations, Cynthia Williams discusses the “law-as-a-price” conception of law.<sup>43</sup> Under this conception, a corporation may consider that it is not obligated to follow the law, and may elect to “buy” the right to break the law by paying the penalty.<sup>44</sup> It follows that a corporation will never spend more on compliance than would be the cost of the maximum penalty for violation.<sup>45</sup> A corporate actor is entirely motivated by economic concerns in deciding how to respond to legislation. This is relevant because a corporate actor may be motivated to comply with Section 1502 only if it calculates that the costs of compliance outweigh the costs associ-

39 *Id* at 139.

40 *Id* at 140.

41 Jean B. McGuire, Alison Sundgren, and Thomas Schneeweis, *Corporate Social Responsibility and Firm Financial Performance*, 31 *Academy Mgmt* 854, 868 (1988); Jacquie L’Etang, *Public Relations and Corporate Social Responsibility: Some Issues Arising*, 13.2 *J Bus Ethics* 111 (1994). See also Philip L. Cochran and Robert A. Wood, *Corporate Social Responsibility and Financial Performance*, 27.1 *Academy of Mgmt J* 42 (1984); Gordon H. Fitch, *Achieving Corporate Social Responsibility*, 1.1 *Academy of Mgmt Rev* 38 (1976).

42 McGuire, Sundgren, and Schneeweis, 31 *Academy Mgmt* at 868 (cited in note 41).

43 Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 *NC L Rev* 1266, 1269–1270 (1998)..

44 *Id* at 1268.

45 *Id* at 1267.

ated with non-compliance (including fines, claims based on securities fraud and, perhaps, brand damage associated with the foregoing).

Some authors make a more optimistic argument about corporate behavior. For example, Christine Parker contends that corporate culture really can (and did) change in response to legislation. In examining how corporations responded to sexual harassment legislation in Australia, Parker credits the success of that legislation to the media attention that the issue of sexual harassment received.<sup>46</sup> Parker argues that increased media attention meant that more employees were able to identify harassment when they experienced it and were more likely to act on it.<sup>47</sup> Furthermore, she (perhaps naively) identifies a “corporate commitment to legal norms against sexual harassment”, as evidenced by the rise of internal policies and procedures to deal with complaints and to educate employees about their rights.<sup>48</sup>

However, Parker’s argument is challenged by the work of Lauren Edelman, who argues that corporations will respond to legislation in their own best economic interest. Instead of viewing the legal process as an authority that corporations “either obey or resist,” Edelman focuses on the overall process by which corporations comply.<sup>49</sup> Through a study of equal employment opportunity/affirmative action law, which she identifies as containing ambiguities and therefore the potential for manipulation,<sup>50</sup> Edelman claims that organizations will “test, negotiate and collectively institutionalize forms of compliance” that will maximize the simultaneous goals of “maintaining legitimacy” and “minimizing the law’s encroachment on managerial power.”<sup>51</sup> She identifies the use of “symbolic structures” – structures designed to make a visible effort to comply procedurally with the law without actually complying with its substance.<sup>52</sup> She gives the example of anti-discrimination policies which, on the surface appear to comply with the law, but that do not adequately address covert forms of discrimination.<sup>53</sup> It becomes extremely difficult for the public (and lawmakers) to determine the presence of “symbolic structures” because they become so diffused throughout industries.<sup>54</sup>

This final view of corporate responses to legislation is a particularly useful theory for my thesis, since Section 1502 is often ambiguous and susceptible to symbolic compliance. Admittedly, Edelman’s work deals with legislation

46 Christine Parker, *Public Rights in Private Government: Corporate Compliance With Sexual Harassment Legislation*, *Austl J Hum Rts*, 159 (1999).

47 *Id.*

48 *Id.*

49 Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, *97 Am J Sociology* 1531, 1534 (1992).

50 *Id.* at 1532.

51 *Id.* at 1535.

52 *Id.* at 1538, 1542.

53 Edelman, *97 Am J Sociology* at 1542 (cited in note 49).

54 *Id.* at 1545–1546.

that has substantive requirements (e.g., anti-discrimination law), whereas Section 1502 has no explicit substantive requirements: a corporation is not forbidden from sourcing conflict minerals; it simply must disclose that it is doing so. However, the SEC has acknowledged that there is an implicit substantive element to Section 1502 in that its purpose is to eliminate the use of conflict minerals by US corporations.<sup>55</sup> There is a risk that corporations could develop symbolic structures to comply with this substantive purpose of the law. I identify at least one certification scheme that is potentially a type of symbolic structure, namely the widely-adopted Conflict-Free Smelter Program (CFSP) – whereby “an independent third party audits smelter procurement and processing activities and determines if the smelter showed sufficient documentation to demonstrate with reasonable confidence the minerals they processed originated from conflict-free sources.”<sup>56</sup> Aside from a number of interviewees raising questions about its evaluation criteria and methods, one smelter that had been certified as conflict free was later found to be involved in processing conflict minerals.<sup>57</sup>

### Expressive Law Theory and Norm Theory

Literature at the cross-section of expressive law theory and social norms theory is directly relevant to my thesis in that it looks at the different ways that laws can affect behavior beyond their punitive powers. The concept behind expressive law theory is that “law can affect behavior ‘expressively’ by what it says rather than what it does.”<sup>58</sup> Some argue that the law simply expresses the underlying attitudes of a community or society. Others go further and argue that the law, in expressing certain values, changes them as well.<sup>59</sup> The main debate in expressive law literature is in whether or not the expressive function of the law is “intrinsically important” and morally justifies or even requires certain kinds of government actions. The expressive function of the law itself (and the ability of the law to change values) is generally accepted.

55 Fact Sheet: Disclosing the Use of Conflict Minerals, U.S. Securities and Exchange Commission (SEC, Jul 29, 2014), archived at <http://www.sec.gov/News/Article/Detail/Article/1365171562058>.

56 The Conflict-Free Sourcing Initiative, Conflict-Free Smelter Program (CFSP): Supply Chain Transparency Smelter Audit Procedure for Tungsten \*3, (Nov 19, 2014), archived at [https://webcache.googleusercontent.com/search?q=cache:5mNehzAggNAJ:https://www.ropesgray.com/~media/Files/Mini-Sites/CSRSC/CFSP\\_AuditProcedure\\_W\\_ENG.ashx+&cd=4&hl=en&ct=clnk&gl=us](https://webcache.googleusercontent.com/search?q=cache:5mNehzAggNAJ:https://www.ropesgray.com/~media/Files/Mini-Sites/CSRSC/CFSP_AuditProcedure_W_ENG.ashx+&cd=4&hl=en&ct=clnk&gl=us).

57 Swiss refiner Argor-Heraeus, which had been deemed conflict free by the CFSP, was accused of laundering DRC gold. See BBC, Swiss refiner Argor accused of laundering DRC gold (BBC, Nov 4, 2013). Online at <http://www.bbc.com/news/world-europe-24811420>.

58 Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 *Or L Rev* 339, 339 (2000). See also Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 *U Pa L Rev* 1363 (2000); Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *U Pa L Rev* 1503 (2000); Robert Cooter, *Expressive Law and Economics*, 27 *J Legal Stud* 585 (1998)

59 *Id.* at 340.



Social norms theory is best illustrated by Cass Sunstein's work *Social Norms and Social Roles*. Sunstein argues that there are sets of norms that govern almost every aspect of society and that these norms are socially enforced.<sup>60</sup> Furthermore, every person occupies different roles (e.g., daughter, teacher, friend or employer) and that there are norms attached to these roles that dictate how we behave.<sup>61</sup> These norms affect how individuals act by changing the incentives and costs attached to rational thought – a cost associated with violating a norm that one must consider (while perhaps not legal) is social backlash.<sup>62</sup> Sunstein gives the example that corporations take note of social norms and social expectations and advertise their product based on “reputation” of the product rather than its “intrinsic value.”<sup>63</sup>

The ways in which these two bodies of literature connect to each other is directly relevant to my thesis – namely in the idea that the expressive function of the law, in both expressing and changing values, can change social norms and affect behavior without any punitive threat. Sunstein, along with other authors (e.g., Posner), touches on this. Sunstein argues that using the law to change social norms through expression may be the cheapest and most effective way to make positive change.<sup>64</sup> He gives examples of times when the law has effectively changed social norms, including in relation to marriage, smoking, discrimination, and gender roles.<sup>65</sup> He goes on to delineate five “tools” that governments can employ to change social norms (each getting progressively more invasive): 1) education, 2) persuasion, 3) taxation/subsidization, 4) restrictions, and 5) coercion.<sup>66</sup>

For the purposes of this paper, I would argue that Section 1502 (and other “non-traditional” traditional disclosure legislation) is a type of law that expresses certain values about our global commitment to human rights. It has the potential to change norms around what corporations are expected to disclose to their investors and consumers, and also how they should source their minerals. Non-traditional disclosure legislation represents a “light-touch” approach that falls somewhere between “education” (in that it seeks to provide consumers and investors with more “information”) and “persuasion” (in that the very act of requiring this disclosure suggests a very definite set of values around this issue).<sup>67</sup>

Much of the literature in this area has considered the ways in which individuals respond to expressive laws and changing social norms, rather than

60 Cass R. Sunstein, *Social Norms and Social Roles*, 96 *Colum L Rev* 904, 914–915 (1996).

61 *Id.* at 921–922.

62 *Id.* at 916, 941, 945.

63 *Id.* at 926.

64 Sunstein, *Social Norms and Social Roles* at 947 (cited in note 60). See also Eric A. Posner, *Law and Social Norms* (Harvard 2009).

65 *Id.* at 948.

66 *Id.* at 948–952.

67 *Id.* at 949.

corporations. Melvin Eisenberg notes that much work has focused on how corporations respond to incentives and disincentives, but less research has been done on how corporations respond to “social norms.”<sup>68</sup> The expected pressure from disclosure law does not come from punitive measures, or legal incentives and disincentives, but from the “social norms” that are created by the law. These social norms lead to social enforcement which, as noted by Sunstein, change the cost-benefit analysis of compliance to take account of the cost of social backlash. However, for corporations, this calculation is likely accounting for social backlash, not as intrinsically negative, but in terms of the (potential) material loss that comes from consumers turning away from their products. Eisenberg looks at the ways in which social norms that are not explicitly written into the law affect corporations in three particular areas: fiduciary duties, corporate governance and take-over bids.<sup>69</sup> He notes that laws send an important message to the community with regards to what is considered to be important, and goes on to say that, “this message increases both the likelihood that the norm will be internalized and the reputational penalties for violating the norm.”<sup>70</sup> Ultimately he concludes that “the conduct of corporate actors in these areas is in significant part a result of social norms.”<sup>71</sup>

## STATEMENT OF RESEARCH METHODS

My research was primarily inductive, in that it proposes a working hypothesis about corporate behavior, and explorative, in that there is no prior socio-legal research on the effectiveness of “non-traditional” disclosure legislation or the corporate response to Section 1502. For this project, my unit of analysis was corporations. My main unit of observation was the official compliance reports produced by a number of corporate and non-corporate organizations and, to the extent that I conducted interviews, my unit of observation was also the individual. Due to the nature of my project, I used different research strategies for each sub-question examined.

### **Sub-question one: what successes and challenges have the relevant non-corporate actors perceived?**

In answering this question, I conducted semi-structured, in-depth interviews with a range of relevant non-corporate actors that included NGOs, SEC officials, academics and legislators. Interviews allowed me to obtain detailed information from key informants who are most relevant to my study (as opposed

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68 Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 *Colum L Rev* 1253, 1253–1254 (1999).

69 *Id* at 1265.

70 *Id* at 1269–1270.

71 *Id* at 1265.

to a survey which would be more helpful in obtaining shallower information about a wider range of people).<sup>72</sup> In collecting a sample, I turned to convenience and snowball sampling, depending on who was willing to speak with me. I initiated communication through email and then followed up with a phone interview. Occasionally these interviewees referred me to other relevant people. In general, my interviews lasted for about half an hour (two lasted over an hour) and were all conducted over the phone. In total, I conducted five interviews with non-corporate actors, all of whom will remain anonymous.

The strength of this method is that it allowed me to obtain highly detailed information from relevant and knowledgeable people. The weakness of this method is that, by relying on convenience sampling, my interview subjects varied across a broad range of sectors without a large number of people in each. I was only able to interview one or two people from each represented non-corporate area, which limited my ability to draw firm conclusions about the general beliefs of a particular “type” of interviewee (e.g., the general beliefs of legislators or NGOs). Furthermore, there is a risk of bias in responses of the interviewees. There are external influences that could affect any of these non-corporate actors’ responses. While these sources may not be motivated by corporate or industry preservation, there is still the chance that they are motivated by their own personal or professional legacy. One organization may have an interest in overemphasizing the value of its work (for example, an NGO representative argued that a particular tool was less valuable because it did not implement a framework that they had played a fundamental role in developing), or a legislator may want to portray Section 1502 as more effective than it has been. I considered and attempted to allow for these potential sources of bias when analyzing the results of the interviews.

### **Sub-question two: what successes and challenges have the relevant corporate-actors perceived?**

In answering this question, I conducted semi-structured in-depth interviews with corporate actors, including individuals from auditing firms, industry associations, corporate law firms, and in-house counsel. In collecting a sample, I turned to convenience and snowball sampling because of the practical and logistical difficulties associated with obtaining interviews with corporate actors. I discovered that there is a tightly knit group of individuals who work very intensively on these issues and, therefore, I was able to make connections with a number of influential and knowledgeable people. In general, the corporate actors were more willing to speak with me than non-corporate actors. I initiated communication through email and then followed up with a phone interview. In general, my interviews lasted for about half an hour, and all were conducted over the phone.

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72 Russell K. Schutt, *Investigating the Social World: The Process and Practice of Research* 288 (Sage 8th ed 2015).

In total, I interviewed twelve corporate actors (five in-house counsel, three corporate lawyers, two audit firm representatives, and two industry representatives).

My main interest was in knowing about the interviewees' professional experiences in this area. I wanted to know what they perceived as some of the successes and challenges of this legislation and how they saw corporations responding to it. I also wanted to know if they found that corporations are principally concerned with simply complying with the law (i.e., filing the form correctly) or if there is a substantive element to much of their work (i.e., do corporations look for a legal way to put the best 'spin' on their corporate policies?).

The strength of my approach is that it allowed me to obtain "inside" information about how corporations make decisions relating to their disclosures and what motivates those decisions. Without interviews, it is impossible to know whether a corporation that has, for example, reported its conflict free status a) is and always had been conflict free, b) has made changes to its supply chain in order to achieve conflict free status, or c) is simply misrepresenting its status.

However, in this case there was clearly a significant risk of bias. Corporate actors are highly likely to be motivated by their own personal and professional interests, as well as the reputation of the organization for which they work. Accordingly, I considered the potential motivations behind responses when conducting my analysis.

In-house counsel will obviously run the risk of biasing their responses in favor of their own corporations. As counsel, their role is to protect their business and to represent them in all matters. It is possible that these individuals would seek to portray their corporation's policies in a positive light. A similar risk exists with industry associations who will potentially seek to portray their industry in a positive light, as well as seek to balance or avoid discussing the differing (and often opposing) viewpoints of the association's members. I attempted to mitigate the risk of bias by an assurance of anonymity, and by keeping discussions and questions limited to general experiences with Section 1502 rather than focusing on any particular corporation's practices.

Corporate law firms and auditing firms advise and consult with a number of different clients on how best to comply with disclosure legislation generally, and often seek to develop what they regard as "best practices" and interpretations where the rules are vague. In the context of Section 1502, their involvement appears to range from helping entirely to write a corporation's disclosure form, to reviewing an already-completed form and providing feedback. Since they advise a range of different clients and are not necessarily invested in portraying one industry/corporation as better than another, they represented an important and potentially less biased source of information. However, they do have an interest in promoting the services that they offer and may downplay the level of compliance or be more focused on the role of independent third parties in the enforcement structures for Section 1502.

**Sub-question three: What do the form SDs (the forms required by the legislation to be filed with the Securities and Exchange Commission) tell us about their response?**

In answering this question, I conducted a meta-analysis of a number of compliance reports and publications that were produced by relevant stakeholders. Section 1502 requires that every corporation file an ‘SD form’ every year with the SEC. These forms are publicly available on EDGAR (the SEC’s database of corporation’s filings over time). A number of stakeholders have analyzed these filings for specific years, over different years, and across industries. They have conducted statistical, quantitative, and qualitative analysis about the content and quality of the reports and have drawn numerous conclusions that focus on the extent of compliance and over-compliance by corporations. I collected all publicly-available third party reports and studies that were pertinent to my research questions and conducted a meta-analysis, focusing on what conclusions are similar across the documents, how they differ, and what conclusions can be made about specific industries and changes over time. The data that is covered by the reviewed third party reports and publications is substantial, and the analysis conducted by the third parties is beyond what I could feasibly have completed within the time limitations of this project. SD filings are notoriously complex and ambiguous documents, which take considerable time to analyze effectively and consistently. The reports and publications (which can be grouped and analyzed in three broad categories) that are reviewed are the following:

1. Reports that examine the filings of a specific year
  - Calendar year 2013
    - KPMG’s Conflict Minerals and Beyond
    - Global Witness and Amnesty International’s Digging For Transparency
    - Responsible Sourcing Network’s Mining the Disclosures: An Investor Guide to Conflict Mineral Reporting
  - Calendar Year 2014
    - KPMG’s Conflict Minerals Filing Research Analysis
    - Professor Chris N. Bayer’s Dodd-Frank Section 1502 – RY2014 Filing Evaluation (commonly known as The Tulane Study)
2. Reports that examine the changes in the filings over the two reporting years
  - Ropes and Gray’s Alert: Conflict Minerals and Supply Chain Compliance
  - Responsible Sourcing Network’s Mining the Disclosures 2015: An Investor Guide to Conflict Mineral Reporting in Year Two
3. Reports that examine the filings of specific industries
  - PricewaterhouseCoopers’ 2014 Conflict minerals filing review: Aerospace & Defense Sector
  - PricewaterhouseCoopers’ 2014 Conflict minerals filing review: Auto

sector

- PricewaterhouseCoopers' 2014 Conflict minerals filing review: Industrial products sector
- PricewaterhouseCoopers' 2014 Conflict minerals filing review: Retail sector
- PricewaterhouseCoopers' 2014 Conflict minerals filing review: Technology sector

The strength of this method is that it allowed me to make use of a vast data source that is consistently provided by law in a way that was directly relevant to my research. It also allowed me to draw comparisons over time and across industries.

A weakness of this approach is that I was limited to only the data that is analyzed and reported by these reports and studies. Furthermore, my work is subject to the biases of the third parties that produced the relevant reports and studies. NGOs focused on this issue (like Global Witness, Responsible Sourcing Network, and Amnesty International) have an interest in holding corporations accountable. Many are pushing corporations not only to comply with the minimum disclosure requirements of the law, but also to broader standards of more responsible sourcing practices and/or corporate social responsibility. There is a risk, therefore, that NGO-authored reports could present the disclosures of corporations in an overly negative light. Global Witness could, arguably, be one exception in this sample. A driving force behind the initial legislation, Global Witness could conceivably have an interest in presenting the disclosures in an overly positive light in an effort to show how effective the legislation has been.

Dr. Bayer's report, as an independent study, is not necessarily subject to the same biases as an NGO-authored report. While independent studies are at risk of biases from the project's source of funding, Bayer states that "the data were collected and the report written without input on the part of the study's Advisory Panel or the study's funder."<sup>73</sup> Bayer also asserts and justifies that he "had no known vested interests [in]... the findings of this study."<sup>74</sup>

Finally, Pricewaterhouse Coopers, KPMG and Ropes and Gray all advise corporate clients on how best to comply with the SEC ruling. Furthermore, KPMG performed two out of six independent private sector audits (IPSA) for the reporting year of 2014.<sup>75</sup> The intended audience of these documents is almost certainly such clients. While it is not clear whether this reality may bias the reports and publications of these entities in either direction (for example, either negative-

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73 Chris N. Bayer, *Dodd-Frank Section 1502 – RY2014 Filing Evaluation* (Development International, May 10, 2015), archived at <https://perma.cc/GXB5-JUBR>.

74 *Id.*

75 Littenberg, *Alert: Conflict Minerals and Supply Chain Compliance* (cited in note 12).

ly portraying filings to compel corporations to seek out their services or positively portraying filings to encourage lagging corporations to use their services to “catch up”), it is worth noting that these documents are likely designed to either recruit new clients or advise and assure current clients that their firm remains a leader in this field. These risks of biases were mitigated by considering a range of different reports and studies in the hope that my conclusions could be supported from multiple third party sources.

## FINDINGS

### **Non-Corporate Actor Interviews**

The following are the key findings of these interviews. They have been grouped into responses to the general questions that were asked or into issues that repeatedly came up.

*Do you have an opinion about the overall effectiveness of the conflict mineral provision? Why/why not?*

Interviewees generally provided two types of responses to this question. First, respondents addressed how effective Section 1502, and the resulting SEC rule, had been in achieving its implicit goal of changing the conditions in the DRC (and covered countries). There was almost unanimous agreement that it was extremely difficult to conclusively answer this question. While some felt that this rule had created a “de facto embargo” on even legitimate mining efforts in these covered countries (the new demands of corporations that their supply chain be conflict free has seen suppliers simply move business across the borders), others noted that the effect of Section 1502 has been to change “the conversation” in the covered countries around this issue. One interviewee claimed that Section 1502 was never meant to solve all of the problems within the conflict mineral trade, and was intended to work with other local law reforms. Since those reforms need to come from the local governments (which Congress cannot control), Section 1502 was seen as a means to put pressure on local governments by highlighting the problem with conflict minerals. This interviewee acknowledged that there is now a lot of scrutiny on the mining sector – where before it was taboo to question the local governments and the way things operated, there are now a number of civil society initiatives in these countries (such as reporting hotlines). While conditions are far from perfect, this interviewee argued that this legislation had created a “sense of hope.”

Second, interviewees addressed how effective section 1502, and the resulting SEC rule, had been in achieving its explicit goal of ensuring public and transparent disclosure regarding sourcing practices of 3TG minerals. There was a general consensus among interviewees that corporations who were supposed to file under the SEC’s rule did so. No corporation, for whom conflict minerals were

obviously “necessary to the functionality or production” of a product manufactured or contracted to be manufactured by that corporation, was simply ignoring the existence of the rule or failing to file a specialized disclosure report. There was, however, a difference of opinion among interviewees over whether, in the content of these disclosure reports, corporations were effectively complying with the specific requirements of the rule. Some interviewees felt that corporations had successfully understood and effectively complied with the rule while others felt they had evaded many of the legal requirements. An NGO representative felt that corporations, in filing, were not complying as fully as they could or should have been while another interviewee felt that there had been “phenomenal movement” on the part of corporations that far outperformed the effects of similar legislation.

*Do you feel that Section 1502, and the resulting SEC rule, has changed the policies and practices of corporations? How so/why not?*

There were two main views represented by the interviewees in answer to this question. First, the majority of interviewees felt that corporations had been motivated to adjust their policies and practices because of this rule. Second, a number of interviewees felt that corporations had not responded to section 1502, and the resulting SEC rule beyond mere compliance. Aside from a few “outlier” corporations that were motivated by concerned individuals or a particular corporate culture, these interviewees felt that corporations had not really engaged with the intent of this legislation. Almost all interviewees were of the the opinion that Section 1502 had changed the way corporations operated in some way. One academic stated that there had been “phenomenal movement” on the part of corporations that far outperformed the effects of similar legislation. Another interviewee stated that the transparency mandated by 1502 had deeply affected corporate culture and the ways that corporations viewed disclosure, risk and their supply chain.

Among the group of interviewees that felt this rule had effectively changed corporate behavior, it was felt (almost unanimously) that section 1502, and the resulting SEC rule, had the greatest effect on the behavior of consumer-facing corporations, who were seen to have made the biggest changes to their sourcing practices. It was argued that for corporations for whom brand reputation was an invaluable asset and who were directly consumer-facing, it made good business sense to protect against negative publicity resulting from embarrassing disclosures. However, it was also argued by some interviewees that section 1502 had been effective (albeit less so) at reaching corporations beyond those consumer-facing corporations. Non-US listed corporations, private corporations, and non-consumer-facing corporations who supply to consumer-facing corporations that are subject to Section 1502, can be indirectly compelled to become more socially responsible through supplier contracts with consumer-facing corporations seeking to ensure their whole chain of supply is conflict-free. I have termed this



outcome the “trickle-down effect.”

*Do Consumers/Investors care about this issue?*

About one third of interviewees felt that consumers and investors did not care about the sourcing practices and conflict mineral disclosures of their corporations. One individual stated that corporations would be hard-pressed to find much of a competitive advantage in being able to disclose positive statements about these issues. These interviewees claimed that corporations who changed their behavior were simply motivated by concerned employees or a particular corporate culture.

Another one third of interviewees felt that there was a risk to corporations that consumer and investor choices were influenced by that corporation’s conflict mineral sourcing practices and disclosures. An academic argued that consumers and investors cared about this issue and therefore certain corporations were motivated by competition to rethink their policies and practices. An NGO representative gave the example that certain corporations, like Intel, were even publishing their efforts on their website with explanatory videos in order to enable consumers and investors to better understand the ways in which they were addressing conflict minerals in their supply chain.

A final third of interviewees felt that while consumers claim to care and to be socially responsible, very few actually follow through with their purchasing decisions. When presented with a cheaper but less ethically responsible option, these interviewees felt that consumers are inclined to select the cheaper option. Furthermore, even for consumers that would select the more ethically responsible option, an interviewee explained that it can be nearly impossible for a layman to decipher the disclosure filings. Many of these filings appear very similar (both in terms of appearance and content) and are, at times, confusing and convoluted. It can be extremely difficult (and time consuming) for a consumer to decipher which corporations are outperforming others. Given their views that it was unlikely these disclosures would affect the purchasing decisions of consumers, these interviewees felt that it was hard to view corporate conflict mineral policies as something that would matter to an investor.

*How have different industries responded to this legislation?*

Interviewees largely drew similar conclusions with regards to this issue. Interviewees generally made distinctions between non-consumer-facing industries (who they claimed were less responsive to the legislation) and consumer-facing industries (who they claimed were much more responsive to the legislation). Further, almost every interviewee specifically identified the electronics and technology industries as being the most progressive on this issue. Several interviewees conjectured that the reason for the technology and electronics industries’ responsiveness to the rule is that these industries had been targeted about the

issue of conflict minerals before Dodd-Frank was passed. They noted that in 2006 the link was publicly made between cell phones and conflict minerals and they felt that this link has remained with the public.<sup>76</sup> Since then, the technology and electronics industries have been more aware of these issues than other industries. It was revealed by the interviewees that individual corporations from the technology and electronics industries began to cultivate an understanding of their supply chain well before the rule was finalized in anticipation of it. Furthermore, interviewees identified that the technology and electronics industries' response was in direct opposition to a number of other industries that refused to prepare for the SEC's ruling in the two years after Dodd-Frank was first passed and before the rule was finalized. One interviewee drew similarities with the textiles industry, which has been hyper aware of and active around issues to do with inhumane labor and working conditions since they have been repeatedly and publicly linked to such atrocities.

*Is this legislation a legitimate use of the SEC?*

Interviews presented a generally unified response to this question of whether requiring the SEC to make rules in this area is an appropriate use of securities laws. While a number of corporate actors claimed that Congress was misusing securities laws and the SEC to promote policy objectives, and that the SEC had "no business" dealing with this issue, all of the non-corporate interviewees were in general agreement that a valid case could be made for the use of the SEC to address this issue. It is worth recognizing that almost all of these non-corporate interviewees have potential biases that would incline them to make a case for validity of Section 1502, and most are not themselves legal experts.

The stated purpose of the SEC is to "protect investors,"<sup>77</sup> and many interviewees acknowledged that Congress likely used SEC disclosure legislation under the auspices of investor and consumer protection because it was the most politically feasible option to address this issue. The legislator and the SEC official both recalled that many members of Congress barely knew the provision existed when Dodd-Frank was passed (it was added at the last minute). Furthermore, it was noted that Section 1502 put its opponents in difficult position of wanting to fight it but not wanting to oppose something designed to promote human rights in a seemingly harmless way. Since disclosure legislation does not legally require corporations to change their behavior and, therefore, arguably does not put American corporations at a global competitive disadvantage, the provision proved to be difficult to oppose.

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76 See Tom Berry and James Goodman, *earth calling...The environmental impacts of the mobile telecommunications industry* (Forum for the Future, Nov 2006), online at <http://www.forumforthefuture.org/sites/default/files/project/downloads/earthcalling.pdf>.

77 US Securities and Exchange Commission, *What We Do* (US SEC, Jun 10, 2013), online at <https://www.sec.gov/about/whatwedo.shtml>.

However, while these interviewees acknowledged the likely motivation for Section 1502 was not “investor protection,” most felt that there was a theoretical justification for the rule on this basis. One academic asserted that the SEC has a job to ensure that, wherever possible, there is symmetry of relevant information between the investor and the corporation. A formerly high-ranking SEC official (who was heavily involved with developing the SEC rule) began by stating that they did not feel at the time that there was any point in questioning the validity of the legislation. They felt that Congress had required the SEC to act, and so they had to fashion a rule regardless of how they felt about it. However, upon reflection, this individual felt that this was certainly an issue that fell under the purview of “investor protection” and, therefore, the SEC. They felt that the sourcing practices of corporations was absolutely something that could influence consumers’ purchasing decisions and, therefore, affects investors. They stated that this would likely be particularly true in the “jewelry and electronics industries” where sustainability issues are naturally investor issues.<sup>78</sup>

#### *What was the most effective part of Section 1502?*

Almost every interviewee had a different opinion about the most effective part of this provision; however, they can broadly be grouped into three main responses. First, one of the most effective results of this rule was identified as more meaningful engagement with smelters and refiners. This often took place through the Conflict-Free Sourcing Initiative (CFSI), founded in 2008 by the electronics industry to help corporations from all industries in “addressing conflict minerals issues in their supply chains” (“About Conflict-Free Sourcing Initiative”), and their Conflict-Free Smelter Program (CFSP) which audits and certifies smelters as conflict free (“About Conflict-Free Sourcing Initiative”). Interviewees acknowledged that the smelters and refiners were the most effective way of addressing conflict minerals in the supply chain since they were the “choke point” of this chain – meaning there are limited number of them in the world and all conflict minerals have to be processed through them. However, while they felt that the universally adopted CFSI has done a lot of good in bringing together a number of industries on this issue, it may not be as effective as it seems. One representative argued that the audit protocols of the CFSP are not transparent enough and do not actually comply with OECD guidelines. As mentioned before, there have been times when a conflict-free certified smelter was later accused of involvement in conflict.

Second, an NGO representative felt that the most effective part of this Section was that it raised awareness about the issue of conflict minerals. They claimed that NGOs like themselves did a good job of taking these disclosures and

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<sup>78</sup> Other, similar information that this SEC official felt should be disclosed to investors were environmental impact disclosures and campaign contribution disclosures of corporations.

showing that this was not just an issue that affected the technology and electronics industry but all industries.

Finally, an academic argued that the most effective part of the legislation was the fact that it was enacted through the SEC. They argued that a similar law with no enforcement mechanism would not be very desirable. Instead, the use of disclosure laws works with legal incentives and disincentives for compliance. Not only is there an incentive to have desirable disclosures, but there are also the legal ramifications that are associated with filing with the SEC. Any such filings are subject to legal action if they misrepresent information or do not adequately comply with the law. Admittedly, the ability of the SEC to enforce its own rule in this case is somewhat limited. As the SEC official noted, there is simply not the expertise within the SEC to properly enforce its own rule. Additionally, they felt that the State Department had not been helpful in providing knowledge and to help with enforcement. However, the official envisioned that SEC enforcement could improve over time, especially as academics and NGOs produce compliance reports that can help to inform SEC officials. Ultimately, whether or not the SEC is able to enforce its rule in practice, there is always the risk of third party legal action that corporations must contend with when filing with the SEC.

*What was the least effective part of Section 1502?*

The responses regarding the least effective part of Section 1502 were also extremely varied. While almost all interviewees questioned whether this provision had achieved its intended effect on the lives of the people in the covered countries, there were different opinions on what was ineffective with regards to changing corporate behavior. These responses can broadly be grouped into four responses.

First, an NGO representative noted that corporations have consistently experienced difficulty in obtaining reliable data from their suppliers, significantly hindering the quality of their disclosures. In the first two reporting periods, requests for information often caught suppliers off-guard and relied on good business relationships for accurate and honest responses. The interviewee hoped that, as time progresses, suppliers will be able to predict these yearly requests and will have the infrastructure in place to provide responses. Furthermore, as sales contracts come up for renewal, it is expected that these requests can be worked in so that suppliers are contractually obligated to provide honest responses.

Second, an NGO representative felt that the ambiguity of the law has left many corporations unsure about what is specifically required of them. This in turn has meant that in the first years of reporting, while corporations determine how their competitors are disclosing, many are barely complying because no corporation wants to be the first to “over-disclose.” They feel that too many corporations are taking advantage of the option to claim an “undeterminable” status. In particular, this interviewee would like to see more corporations seek

and disclose the risks that they identify in their supply chain. They feel that such disclosure would be dangerous for a corporation only if that corporation did nothing about the risk that they identified. The SEC official feels that confusion over disclosure requirements will improve over time. While they feel that it is not the job of the SEC to explain to corporations how to comply, the problems eventually work themselves out through industry initiatives that outline best practices for their members. Additionally, the SEC will provide informal guidance and answer questions about compliance regularly. Eventually a number of issues will present themselves time and again, and the SEC will turn informal guidance into formal guidance.

Third, the legislator felt that the whole provision had been poorly constructed because of how it was passed into law. The fact that it was slipped into the Dodd-Frank bill at the last minute meant that lobbyists, corporations, industry representatives, and other stakeholders did not have the chance to comment on it. This individual felt that had those stakeholders been consulted, it would have been far better constructed. One resulting failure was identified by an academic, who noted that the number of corporations filing under the rule was around 1,300 (well below the expected 5,500+ that had been estimated by the SEC). Had stakeholders been consulted, perhaps a more accurate estimate could have been reached or the legislation could have been drafted in a way that more explicitly required those 5,500+ corporations to file under the rule.

Finally, the SEC official identified a more practical failing of this provision – namely, that however effective it is, the official felt that there is no potential for further similar “non-traditional” disclosure laws. According to this individual, there were a number of unique circumstances that allowed for this provision to be passed into law and the aftermath effectively prohibited any future similar efforts. They spoke of how this provision happened to have bipartisan support and was addressing an issue that had not had much media focus. It was slipped into a much bigger bill in such a way that no-one knew that it was even there, and it was driven by a number of atypical organizations that the SEC does not deal with on a regular basis (such as Global Witness and the Enough Project). Additionally, similar initiatives were being developed abroad around the same time and so the SEC was under pressure from NGOs to develop a rule and lead the way for international efforts. Furthermore, according to this official, the political aftermath of this provision left both Congress and the SEC with “zero appetite” to pursue anything similar again. They stated that a number of complaints were voiced at the roundtable discussion about the rule.<sup>79</sup> Republicans in particular argued that this was an illegitimate use of the SEC and it was not even clear how this rule would change the lives of people in the covered countries.

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79 The transcript of the roundtable can be found online at <https://www.sec.gov/spotlight/conflictminerals/conflictmineralsroundtable101811-transcript.txt>.

Additionally, even though the SEC was late in developing this rule, many felt slighted that the SEC would address this issue from Dodd-Frank before any of the other “more important” provisions. The SEC official said that working on this rule was one of the hardest things they had to do while working at the SEC.

### **Corporate Actors**

The following are the key findings of these interviews. They have been grouped into responses to the general questions that were asked or into issues that repeatedly came up.

*Do you have an opinion on the effectiveness of the conflict mineral provision at changing corporate behavior? Why/Why not?*

There was a general consensus among corporate actors that the effectiveness of this legislation at changing the lives of the people in the covered countries remains an open question. There was greater variation in their opinion on the overall effectiveness of this legislation in compelling corporations to comply with the law and become more socially responsible. Due to the number of different fields of involvement with this legislation represented by these corporate actors, their responses are broken down by field.

First, corporate counsel was divided on the issue. About half of corporate counsel felt that this legislation had been ineffective for three reasons. 1) Interviewees felt that since this legislation only has disclosure requirements (as opposed to the substantive requirements of direct legislation) corporations were in no way inclined to go beyond compliance. They noted that corporations could take advantage of the option to disclose that they simply “cannot determine” the conflict status of their conflict minerals, and after a court’s recent ruling, they were not even required to do that. 2) An individual claimed that the SEC “lost interest” in the rule after they drafted it, failing to follow through to ensure that filers were properly complying. They further felt that the legislation was an example of Congress quickly responding to a “spotlight issue” that had recently received public attention and that, because of this, it was poorly constructed. This same individual did accept that this legislation, as a “shame act” that did not put any substantive demands on corporations, was difficult to oppose and therefore more politically feasible. 3) Another interviewee was skeptical about the rule’s effectiveness without independent audits and felt it would become far more effective after the audits were required. However, among these respondents, one individual conceded that they found it hard to believe that any corporation, after uncovering through due diligence that they were “embroiled in conflict,” would do nothing about it.

The other half of corporate counsel argued that Section 1502 was highly effective in compelling corporations to change their behavior. Broadly, they cited one main reason: it was very wide-reaching in its effects. One interviewee stated

that it has “certainly had a positive impact on U.S. corporations” and beyond, and that while many industries felt that they would not be affected by the rule, it has since become apparent that the rule is much further reaching than just the electronics industry (or even consumer-facing industries). This individual talked extensively about the “trickle-down effect” that their own corporation (as a non-consumer-facing corporation) experienced.<sup>80</sup> They ultimately felt that, in spite of the efforts of some industries to actively resist the legislation, all industries would eventually have to accept it as the new reality. They went on to say that despite the length of time it took for this provision “to get legs,” it was evidence that the disclosure model can work as an instrument for social reform. It is worth noting that each of the interviewees that acknowledged the effectiveness of Section 1502 also represent corporations that are generally considered (in published reports that rank and score corporations based on their disclosures) to have performed highly.

Second, the two industry association representatives interviewed had very different opinions about this issue. One felt that the legislation had been extremely effective and that corporations now, in general, had a much better understanding of their supply chain going right back to the source. Conversely, the other representative felt that the legislation had been poorly conceived and that it was “another example of legislators listening to Hollywood stars.”<sup>81</sup> They accepted, however, that their industry association advises all of its members to follow the rule to the “best of their abilities” and that it really depends on the corporation about whether they go beyond compliance – “some do and some don’t.” They also acknowledged the “trickle-down” effect of the legislation, noting that the effect of the legislation “reverberated down the supply chain.” Furthermore, they also acknowledged that even if Section 1502 was illogical and poorly conceived, it was the most politically feasible option for addressing this issue. While NGOs and legislators had previously been seeking a ban on the purchasing of any conflict minerals (direct legislation), this disclosure legislation presented, in their view, a more realistic compromise.

Third, corporate lawyers and auditors, better positioned to provide a comparative perspective on how corporations have responded to Section 1502 and resulting SEC rule, generally felt that the rule had been somewhat effective. One corporate lawyer felt that corporations did not do much more than comply

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80 Interestingly, another in-house counsel interviewee stated that their corporation (as a non-consumer-facing corporation) did not view becoming conflict-free as beneficial in maintaining consumer-facing clients. However, this person also stated that their corporation did not make parts that were “necessary to the functionality” of their client’s products and so would never be reported on.

81 The Enough Project is supported by a number of celebrities, including George Clooney, Matt Damon, Don Cheadle, Angelina Jolie, and Sheryl Crow. See Celebrity Upstanders (Enough Project), online at <http://www.enoughproject.org/about/celebrity-upstanders>.

with the minimum requirements of the law. However, the four other individuals felt that there were a number of effective aspects of this legislation and that there had been a “significant effect on corporate behavior as a result [of the legislation].” Some specific ways in which Section 1502 had been effective were identified by the interviewees. Firstly, the “trickle-down” effect was observed, with the rule affecting thousands of corporations directly and also thousands of corporations indirectly (although perhaps less strongly). Secondly, a few interviewees noticed a number of common changes within corporations, including the hiring of new/firing of old suppliers, renewal of contracts to include obligations on suppliers, greater amounts of available data, more internal programs and, in particular, huge progress with understanding smelters and refiners. One corporate counsel lawyer, affirming these views, attested that their response rate from suppliers rocketed in the last calendar year to 90 percent (from 30–40 percent).

These same individuals identified a few ways in which the legislation had been ineffective. Firstly, with the lack of specificity of what should be included in the disclosure, some interviewees noted that many of their clients chose to err on the side of less disclosure until they could see more fully what their competitors were doing. They chose to do this, firstly, because they did not want to unnecessarily “over-disclose” and thus set the bar too high, and secondly, because they feared the risk of litigation associated with disclosing too much information to potential litigants. As one individual noted, the SEC has yet to provide feedback on a single SD filing, and so corporations remain in the dark about what is expected of them. Secondly, and more damaging in their opinions, was the court’s first amendment ruling that many feel has greatly weakened the effectiveness of this rule. Since corporations are no longer required to state a specific conflict mineral status on their disclosure form, some feel that the the legislation lost one of its most effective requirements.

### *How have different industries responded to this legislation and why?*

Almost every respondent drew a distinction between consumer-facing and non-consumer-facing industries, with consumer-facing industries performing the highest in terms of compliance and best practices. Like the other respondents, most corporate respondents identified the electronics and technology industries as being particularly advanced and responsive to this rule. As previously stated, these findings are consistent with the compliance reports. Respondents were split between two opinions about why consumer-facing industries and corporations reacted differently to the legislation.

First, five respondents argued that a corporation or industry’s response to the rule had to do with individual corporate/industry philosophy, with a number arguing that there was simply no commercial benefit to be gained by going beyond compliance (particularly because they felt that investors and consumers just did not care). One industry representative argued that the electronics and



technology industry was taking the lead on this issue because they have always had a reputation and industry-wide culture of being forward-thinking. They see social responsibility issues as an important part of that culture and a way of the future. One auditor noted something similar about specific corporations, saying that the reason why corporations like Apple and Intel have “pulled out in front” is because they have a belief in the value of what is being attempted by this legislation. Interestingly, two in-house counsel said that their corporations had taken the intentions of this legislation seriously because of the corporate philosophy of each respective institution, which emphasized a “culture of compliance.” While one of these individuals emphatically stated that they did not view their efforts as a competitive maneuver, the other acknowledged that one of their well-known peers had clearly positioned their conflict work as a consumer-outreach effort (thereby acknowledging that some corporations could be motivated by commercial gain).

The second half of respondents argued that a corporation or industry was motivated by commercial gains in responding to this rule. Five respondents felt that the over-performance of consumer-facing industries could be explained by the demands of investors and consumers whose purchasing decisions were affected by issues around corporate social responsibility. One in-house counsel representative felt that this legislation was an example of Congress recognizing the value of the corporate brand and harnessing it to achieve a political result. A corporate lawyer felt that consumers posed a very real risk to investors since they were certainly affected by this issue. They argued that consumer-facing industries (especially highly branded corporations like Apple) do receive direct requests from consumers about their social responsibility, and that there is evidence that these issues do, at times, affect their purchasing decisions. Some recognized that even if all consumers were not persuaded by this issue, it was certainly a topic that affected the younger generation’s, or “millennials’,” purchasing decisions. Given that the electronics and technology industries are highly reliant on millennial consumers,<sup>82</sup> there is a competitive advantage to branding oneself as a leader in preventing conflict and a massive risk associated with being embroiled in a social responsibility scandal. Furthermore, there is no way to tell when consumers will organize and launch a social media (or other public) campaign that will affect the value of the brand. Certainly it would seem that the perceived consumer and investor reactions to this issue would explain the over-performance of consumer-facing industries and corporations.

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82 Danielle Cassagnol, Millennials Heavily Influence Electronics Purchases, CEA Study Finds (Consumer Technology Association, Jan 31, 2013), online at <https://www.cta.tech/News/News-Releases/Press-Releases/2013-Press-Releases/Millennials-Heavily-Influence-Electronics-Purchase.aspx>.

*Is this legislation a legitimate use of the SEC?*

Interviewees identified a common complaint with Section 1502 and the resulting SEC rule. Five out of six respondents felt that this legislation was “using securities law in a way that it was never intended.” One individual stated that this was in no way an SEC issue – “if governments cannot deal with this problem, then why should private corporations?” These comments often came up in the context of discussing the effectiveness of this legislation, with respondents saying that the legislation was not tackling this issue in the most effective way that it could. Interestingly, none of the respondents that made this complaint felt that investors cared about this issue, and two of the respondents that did not specifically raise this concern did feel that these disclosures were an issue that investors would be concerned with. This would imply that if a respondent felt that this was an issue that would concern an investor, they could understand how this rule might be legitimately enforced by the SEC (whose stated mission is to protect investors). If a respondent did not feel that this was an investor protection issue, they felt that this was an illegitimate use of the SEC.

*What was the most effective part of Section 1502?*

Interviewees identified two main effective elements of Section 1502. First, respondents felt that this legislation had raised awareness about an important issue (and corporate social responsibility more generally) and brought like-minded industries and corporations together to address a common problem. One respondent added that the effectiveness of this legislation at raising awareness is greatly aided by NGOs and other similar stakeholders that seek to keep corporations accountable to the public (particularly through their publications).

Second, it was felt that the elements of Section 1502 and the SEC rule that imposed stronger enforcement mechanisms were particularly effective. For example, several respondents felt that the audit requirement of the legislation made the rule particularly effective because it forces corporations to take their due diligence efforts more seriously.<sup>83</sup> Similarly, another respondent felt that the integration of internationally recognized standards of due diligence into the rule (currently the OECD standards) allows corporations to hold suppliers accountable.

*What was the least effective part of Section 1502?*

Interviewees identified three main elements of the rule that were least effective. First (and perhaps unsurprisingly), the most common complaint about this legislation among corporate actors was that it put an “incredible burden” on

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<sup>83</sup> Note that, in the calendar year of 2013, only four Independent Private Sector Audits (IPSAs) were conducted. Six IPSAs were conducted in the calendar year of 2014 (Littenberg, Alert: Conflict Minerals and Supply Chain Compliance [cited in note 12]).

corporations and was a “phenomenal amount of work” that imposes a significant compliance cost.<sup>84</sup> Furthermore, one interviewee felt that the reality of these costs and efforts (often borne by already over-worked employees who are not specialized in this area) incentivizes a de-facto embargo in the region of these covered corporations. It ends up being far cheaper and easier for corporations to simply source these conflict minerals from other regions across the borders (leaving a number of ethical miners destitute).

The second major concern was the very real difficulties that corporations face in getting responses from suppliers and locating the origin of their conflict minerals (and the amount of time that is spent “mapping” this data rather than achieving material results). Both the corporate lawyers and auditors said that they sympathized with the claims of corporations about the practical difficulties they face and, in their experience, found these claims to be true. In-house counsel representatives repeatedly talked about the difficulties that they face in compelling suppliers to comply with their due diligence requests. Before these demands could be worked into contractual obligations with suppliers, corporations were forced to rely on good business relationships to receive responses from them – there is no enforcement mechanism for suppliers, as the law often does not apply to them. Furthermore, many suppliers were not expecting to have to answer these sorts of questions and simply did not have the infrastructure in place to adequately address them. Again, it is quite possible that this issue will resolve (or at least improve) over time as supplier contracts are renewed.

Third, the large duplication of effort – made worse by the poor response rate from suppliers – was identified by interviewees as extremely burdensome and ineffective. One supplier may supply to a number of corporations, yet all of these corporations conduct their own separate due diligence, leaving one supplier to be reviewed multiple times. To address this problem, a respondent suggested that it would be far more effective to have some type of data-sharing mechanism, although this could raise competition law concerns. More often it was suggested that the rule should be aimed at ensuring that smelters and refiners (as the “choke point”) are conflict-free in order to be most efficient. One person suggested that the legislation could have regulated smelters or refiners that wanted to import into the United States but acknowledged that this would not cover all smelters or refiners. Another suggested that international legal mechanisms could regulate all smelters or refiners but also acknowledged the limited capacity of international legal frameworks.

The Conflict Free Smelter Program, or CFSP (part of the Conflict Free

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84 Dr. Bayer calculates that the total cost to corporations in the second year of filing was \$709.7 million, or about half a million dollars per filing (Bayer, Dodd-Frank Section 1502 – RY2014 Filing Evaluation (cited in note 73)).

Sourcing Initiative, or CFSI, discussed above),<sup>85</sup> was mentioned during the interviews rather frequently in connection with ideas about focusing attention on the smelters or refiners. The CFSI (associated with the electronics industry association) has also developed the Conflict Mineral Reporting Template (CMRT), which is a “a free, standardized reporting template... that facilitates the transfer of information through the supply chain regarding mineral country of origin and smelters and refiners being utilized.”<sup>86</sup>

However, as with non-corporate actors, the confidence in these tools varied among these respondents. While some felt that the CFSI is an extremely effective organization, many others (while acknowledging the necessity of industry wide efforts) felt that this particular initiative needs to be “tightened.” One individual felt that these tools were fundamentally ineffective but had now, unfortunately, become the norm for conducting inquiries and reporting. They felt that the forms were confusing, only available in English, and created by a small legal team that was unable to adequately address the compliance requirements of the legislation. Furthermore, they said that the tools were originally the brainchild of the electronics industry association and had been created for, and only with the input of, association members and were now being applied on a multi-industry scale. It was felt that there was not enough continuing scrutiny on the quality of these actual tools.

### **Form SD analysis**

Each year on May 31st (or the next business day), every public corporation that is subject to the SEC’s final rule on conflict minerals must submit (at the very least) a specialized disclosure form (form SD), and often an additional Conflict Minerals Report.<sup>87</sup> A corporation must conduct a “reasonable country of origin inquiry” (RCOI) into the origin of its 3TG conflict minerals that is “designed to determine whether any of the conflict minerals originated in the Democratic Republic of the Congo or an adjoining country” (the covered countries).<sup>88</sup> If, after the RCOI, a corporation determines that it has no reason to believe that its 3TG conflict minerals came from these covered countries (or that they came from scrap or recycled material), then it can simply disclose these findings in a form SD, along with a description of the RCOI.<sup>89</sup> If, after the RCOI, a corporation has reason to believe that any of its 3TG conflict minerals originated in the covered countries and are not from scrap or recycled sources, that corporation

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85 See About the Conflict-Free Sourcing Initiative (Conflict Free Sourcing Initiative), online at <http://www.conflictreesourcing.org/about/>.

86 See Conflict Minerals Reporting Template (Conflict Free Sourcing Initiative, 2016), archived at <https://perma.cc/Q376-A65F>.

87 See US Securities and Exchange Commission, SEC Adopts Rule (cited in note 18).

88 Id.

89 Id.

must exercise due diligence (currently, in accordance with the OECD framework) on the “source and chain of custody” of its conflict minerals.<sup>90</sup> Finally, after that due diligence, a corporation can either 1) file only a form SD (if the results of the due diligence determines that the conflict minerals did not originate in the covered countries or did originate from scrap or recycled materials) or 2) file a form SD and a separate Conflict Minerals Report (if the results of the due diligence could not confirm that the conflict minerals did not originate in the covered countries or did originate from scrap or recycled materials), which is far more comprehensive.<sup>91</sup> Three explicit conflict determination labels were presented in the SEC’s rule that initially required corporations to disclose their conflict status as “DRC conflict free,” having “not been found to be ‘DRC conflict free,’” or “DRC conflict undeterminable.”<sup>92</sup> After the court ruling, these determination labels became optional.<sup>93</sup>

For each of the two years for which there has been filing data, roughly 1,300 corporations have filed form SDs (representing trillions of dollars worth of market capitalization),<sup>94</sup> with about 80 percent of these also filing Conflict Mineral Reports.<sup>95</sup> These public filings provide a wealth of information and data about how corporations have responded to this legislation. There have been a number of reports and publications that analyze quantitatively and qualitatively the data from form SDs and Conflict Mineral Reports. This section provides a meta-analysis of the most important reports and publications and posits explanations for their key findings.

## Reports That Examine the Filings of a Specific Year

### Calendar Year 2013

For the reporting year of 2013, KPMG examined the filings of 232 corporations (197 of which filed both form SDs and Conflict Mineral Reports),<sup>96</sup> Global Witness and Amnesty International examined the filings of 100 corporations (five top-performing corporations across 10 most relevant industries, supplemented by 50 more randomly selected corporations),<sup>97</sup> and the Responsible Sourcing Network examined the filings of 51 corporations (top three corporations by market

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90 Id.

91 See US Securities and Exchange Commission, SEC Adopts Rule (cited in note 18).

92 Higgins, Court of Appeals Decision on the Conflict Minerals Rule (cited in note 2).

93 See note 1.

94 Bayer, Dodd-Frank Section 1502 – RY2014 Filing Evaluation at \*2 (cited in note 73).

95 Littenberg, Alert: Conflict Minerals and Supply Chain Compliance at 1–2 (cited in note 12).

96 Conflict Minerals and Beyond (Part Four): Lessons for an integrated compliance program \*7 (KPMG International, Oct 2014), archived at <https://perma.cc/5UZP-6CQY>.

97 Digging for Transparency: How U.S. Companies are Only Scratching the Surface of Conflict Mineral Reporting 6 (Global Witness and Amnesty International, Apr 22, 2015), archived at <https://perma.cc/PQF8-8AJR>.

capitalization across 17 most relevant industries).<sup>98</sup> The following are some of the key findings from these reports.

*Corporations are generally not going beyond mere compliance*

The vast majority of corporations are not going beyond the minimum requirements of the rule in their disclosure filings and are potentially at risk of failing to meet these minimum requirements of the law. The ambiguity of the final rule leaves open to interpretation (at times) what is required by law and what is best practice. Hence a report's results are dependent on an organization's understanding of the rule. According to Global Witness and Amnesty International, 79 percent of corporations failed to meet the minimum requirements of the law.<sup>99</sup> The Responsible Sourcing Network, which relied on a number of performance indicators that combine legal requirements and preferred best practices,<sup>100</sup> found that the average score of their sample was 47/100, with only two corporations scoring above 75.<sup>101</sup> KPMG notes that while the specific disclosure requirements by law are highly ambiguous, only 8 percent of the corporations they reviewed met the stated expectations of NGOs.<sup>102</sup> In other words, there is a general consensus that, even if corporations are not failing to comply with the law, they are certainly not exceeding its requirements.

*There is large variation between high performing corporations/industries and low performing corporations/industries*

There is a large discrepancy between the filings of high-performing corporations/industries and the rest. The filings reveal that there are whole industries that, in general, perform better than others, with the electronics and technology industries consistently identified as high-performing. Within these industries, there are also individual corporations (usually consumer-facing) that have distinguished themselves as leaders in compliance. It is clear that these corporations and industries have made the issue of responsible sourcing a priority.

Conversely, the "lagging" and "laggard" industries fall far behind these performers.<sup>103</sup> KPMG concluded in their report that electronics and automobile corporations seem to be the "most advanced" in their efforts, with 91 percent having a conflict minerals policy that they communicated to their suppliers<sup>104</sup>

98 Andrew Arriaga, Patricia Jurewicz, and Kathleen Brophy, *Mining the Disclosures: An Investor's Guide to Conflict Mineral Reporting 4* (Responsible Sourcing Network and Sustainalytics, 2014), archived at <https://perma.cc/TJ2S-XXMB>.

99 Digging for Transparency at \*5 (cited in note 97).

100 Arriaga, Jurewicz, and Brophy, *Mining the Disclosures* at 6 (cited in note 98).

101 *Id.* at 26.

102 KPMG, *Conflict Minerals and Beyond* at \*7 (cited in note 96).

103 Arriaga, Jurewicz, and Brophy, *Mining the Disclosures* at 27 (cited in note 98).

104 KPMG, *Conflict Minerals and Beyond* at \*7 (cited in note 96).

(compared with the general population's rate of 82 percent).<sup>105</sup> Responsible Sourcing Network reached a similar conclusion that, while only 10/51 corporations listed the names of their smelters or refiners, half of these were in the technology industry.<sup>106</sup> They found that while the technology industry averaged above the 80th percentile of their sample, industries like Energy Equipment and Services fell within the 7th percentile. ]<sup>107</sup> The discrepancy between high and low performers is even clearer in the performances of individual corporations, with the Responsible Sourcing Network stating that there are "specific companies that are leading and whole industries that are lagging behind."<sup>108</sup> Responsible Sourcing Network found that while the highest score they gave was 92/100, the lowest was 15/100, and while the average score was 47/100, there were two corporations that scored above 75.<sup>109</sup> They single out specific high performing corporations like Intel (the highest ranked), Qualcomm, Apple,<sup>110</sup> and Boeing.<sup>111</sup> It is clear from these statistics that there are a few corporations and industries that have made responsible sourcing a priority, and that these corporations are consumer-facing.

*Corporations consistently struggled to get reliable responses from their suppliers*

Corporations consistently reported low response rates from their suppliers, and many did not have procedures in place to follow-up with non-responses from their direct suppliers.<sup>112</sup> Global Witness and Amnesty International found that the average response rate from suppliers was 69 percent.<sup>113</sup> Responsible Sourcing Network notes that many corporations reported confusion or difficulty in obtaining full results from suppliers.<sup>114</sup>

*There is almost universal reliance on the Conflict Minerals Reporting Template and the Conflict Free Smelter Program*

KPMG found that 93 percent of its sample was working with CFSI in some capacity.<sup>115</sup> Global Witness and Amnesty International found that 94 percent of its sample exclusively relied on the CMRT<sup>116</sup> and that 69 percent of their

105 Digging for Transparency at \*15 (cited in note 97).

106 Arriaga, Jurewicz, and Brophy, Mining the Disclosures at 19 (cited in note 98).

107 Id at 28.

108 Id at 6.

109 Id at 27.

110 Arriaga, Jurewicz, and Brophy, Mining the Disclosures at 4 (cited in note 98).

111 Digging for Transparency at \*27 (cited in note 97).

112 Id at 16

113 Id at 17.

114 Arriaga, Jurewicz, and Brophy, Mining the Disclosures at 26 (cited in note 98)..

115 KPMG, Conflict Minerals and Beyond at \*7 (cited in note 96).

116 Digging for Transparency at \*16 (cited in note 97).

sample relied on the CFSP to verify metal processors.<sup>117</sup> Responsible Sourcing Network had similar results, stating that most corporations used a publicly available list of conflict-free smelters (like the CFSP), yet only 39 percent participated in schemes that generated those lists.<sup>118</sup>

*There was widespread failure to disclose the country of origin of the conflict minerals and the smelters and refiners in the supply chains*

In general, corporations consistently failed to disclose both the country of origin of their conflict minerals and a full list of the specific smelters and refiners in their supply chains. According to Global Witness and Amnesty International, corporations performed poorly in identifying the origin of minerals and the smelters and refiners in their supply chain.<sup>119</sup> 85 percent of their sample had not contacted the smelters or refiners that processed their minerals,<sup>120</sup> only 46 percent described the facilities used to process minerals (if known), and 61 percent met the requirements to describe the country of origin (if known).<sup>121</sup> The Responsible Sourcing Network similarly noted that very few corporations in the sample group provided a list of possible countries of origin,<sup>122</sup> and only 10/51 listed smelter or refinery names.<sup>123</sup>

*Compliance with the OECD guidelines was ambiguous*

Following the OECD due diligence guidelines is legally required for corporations that file a Conflict Minerals Report. The SEC rule says that such corporations must conduct due diligence on their supply chain that conforms to a “nationally or internationally recognized due diligence framework,” and the OECD guidance was (and still is) the only such framework.<sup>124</sup> Yet corporate compliance with these guidelines is somewhat sporadic. KPMG notes that while 89 percent of their sample stated that they followed OECD guidelines, only 51 percent explicitly used the five-step framework of the guidelines.<sup>125</sup> Similarly, Global Witness and Amnesty International found that 96 percent of their sample stated that they conformed to the OECD standard.<sup>126</sup> while only 46 percent provided information about what they had done to follow all of the five-step framework.<sup>127</sup> Finally, The Responsible Sourcing Network found that 22 percent

117 Id at 25.

118 Arriaga, Jurewicz, and Brophy, *Mining the Disclosures* at 15 (cited in note 98).

119 *Digging for Transparency* at \*15 (cited in note 97).

120 Id at 2.

121 Id at 15.

122 Arriaga, Jurewicz, and Brophy, *Mining the Disclosures* at 14 (cited in note 98).

123 Id at 19.

124 *Digging for Transparency* at \*6 (cited in note 97).

125 KPMG, *Conflict Minerals and Beyond* at \*6 (cited in note 96).

126 *Digging for Transparency* at \*7 (cited in note 97).

127 Id at 26.



of its sample did not describe using a single one of five OECD due diligence steps, with step four (third party audits) being the least referenced.<sup>128</sup>

### Calendar Year 2014

For the reporting year of 2014, KPMG analyzed the filings of 235 corporations and the Tulane Study analyzed all filings.<sup>129</sup> The following are some of the key findings from these reports.

*Compliance was relatively high, with form SD-only filers showing higher levels of compliance*

The Tulane Study revealed that, for the reporting year of 2014, the level of compliance with the law was relatively high, with form SD-only filers showing better compliance. The report found that 97 percent of form SD-only filers were at or above the 75 percent compliance mark, compared with 76 percent of conflict mineral report filers.<sup>130</sup> Furthermore, 74 percent of SD-only filers had 100 percent compliance scores compared with 13 percent of conflict mineral report filers.<sup>131</sup> For corporations filing conflict mineral reports, the Tulane Study also assessed performances in “good practices” (as separate from compliance with legal requirements) and found that, on average, “good practice” scores were 40 percentage points lower than compliance scores.<sup>132</sup>

*Many corporations chose not to use explicit determination labels and very few claimed to be conflict-free*

The Tulane study concluded that 58 percent of corporations did not use the explicit determination labels set out by the SEC rule.<sup>133</sup> The majority of filers (65 percent) concluded, either specifically or by implication, that the 3TG minerals in their products were DRC conflict undeterminable.<sup>134</sup> A few corporations did not state any conclusion (implied or otherwise) about the status of conflict minerals sourced from the covered countries, which the study concluded violated the disclosure requirements of the rule.<sup>135</sup> Indeed, KPMG concluded 76 percent of their sample did not clearly mention the status of their products.<sup>136</sup> Importantly, only 39 filers (or 4 percent) of corporations claimed (either explicitly or implic-

128 Arriaga, Jurewicz, and Brophy, *Mining the Disclosures* at 17 (cited in note 98).

129 KPMG, *Conflict Minerals Filing Research Analysis 1* (KPMG LLP, Sept 2015), archived at <https://perma.cc/E6VS-B2NF>.

130 Bayer, *Dodd-Frank Section 1502 – RY2014 Filing Evaluation* at \*2 (cited in note 73).

131 *Id.* at 19–21

132 *Id.* at 2..

133 Bayer, *Dodd-Frank Section 1502 – RY2014 Filing Evaluation* at \*18 (cited in note 73).

134 *Id.*

135 *Id.*

136 KPMG, *Conflict Minerals Filing Research Analysis* at 2 (cited in note 129).

itly) that all of their products were “DRC Conflict Free.”<sup>137</sup> Similarly, KPMG found that only 2 percent of its sample declared that its products were “DRC Conflict Free.”<sup>138</sup>

*Supplier response rate was somewhat higher than first year, but still not very high*

Less than half of the filers disclosed the response rate of their suppliers.<sup>139</sup> The Tulane Study found that of the corporations that did disclose this information the average response rate was 81 percent (with a broad range from 13 percent to 100 percent).<sup>140</sup> KPMG found that of all the corporations in their sample, only 36 percent disclosed supplier survey responses above 50 percent.<sup>141</sup> These statistics may not be fully representative since corporations with higher response rates could be more likely to disclose them.

*Heavy reliance on CFSI continues*

The Tulane study revealed that the CFSI is still very dominant. According to the study, 82 percent of filers use their CMRT and 64 percent relied on the list of conflict-free smelters and refiners generated by the CFSP.<sup>142</sup> Additionally, 48 percent of the filers actively required or expected their suppliers to source from these conflict-free smelters or refiners, and 56 percent reported that their supply chains included one or more conflict-free smelters or refiners.<sup>143</sup>

*Higher rates of smelter and refinery disclosures while country of origin disclosures remain low*

The rates of disclosure of smelters and refiners are still relatively low but would seem to show significant improvement from the first year of reporting. KPMG notes that while 46 percent<sup>144</sup> did not disclose a list of any of the smelters in their supply chain, an improved 27 percent disclosed a full list of all identified smelters (with more providing a partial list of smelters and refiners).<sup>145</sup> However, disclosures of the country of origin of a corporation’s 3TG minerals remains low. The Tulane Study states that the most notable shortcoming was that more than

137 Bayer, Dodd-Frank Section 1502 – RY2014 Filing Evaluation at \*18 (cited in note 73).

138 Id.

139 Tulane found 46 percent [Bayer, Dodd-Frank Section 1502 – RY2014 Filing Evaluation at 23 (cited in note 73)]; KPMG found 41 percent [Conflict Minerals Filing Research Analysis at 5 (cited in note 129)].

140 Bayer, Dodd-Frank Section 1502 – RY2014 Filing Evaluation at \*23 (cited in note 73).

141 KPMG, Conflict Minerals Filing Research Analysis at 2 (cited in note 129).

142 Bayer, Dodd-Frank Section 1502 – RY2014 Filing Evaluation at \*24 (cited in note 73).

143 Id at 24–25.

144 The Tulane study found that just half of the filers did not disclose the facilities used to process the necessary 3TG minerals [Bayer, Dodd-Frank Section 1502 – RY2014 Filing Evaluation at \*20–21 (cited in note 73)].

145 KPMG, Conflict Minerals Filing Research Analysis at 4 (cited in note 129).

half of the filers did not disclose the countries of 3TG origin.<sup>146</sup> Still, KPMG acknowledges that 66 percent of its sample mentioned conducting a RCOI and gave the results in their filings (note that these results may not have explicitly named the county of origin if the inquiry did not yield a conclusive answer).<sup>147</sup>

*Industry performance variation is not identified*

The Tulane study examined the performance of whole industries in the manufacturing division (the most relevant industries with respect to section 1502) and did not find wide variation in performances. The average compliance score was 84.5 percent with a high score of 88.8 percent (Telephone & Telegraph Apparatus) and a low score of 79.1 percent (Laboratory Analytical Instruments).<sup>148</sup> There is no available data on the comparable performances of all industries for that reporting year.

**Reports That Examine the Changes in the Filings Over the Two Reporting Years**

There are two significant reports that look at how the corporate disclosure filings have changed over the two years for which corporations have been reporting. Ropes and Gray's report looks at the filings of all corporations for both reporting years in an attempt to advise clients on "the year that was" and to make predictions about complying in the future.<sup>149</sup> The Responsible Sourcing Network also produced another report in its "Mining for Disclosures" series called "Mining the Disclosures 2015: An Investor Guide to Conflict Mineral Reporting in Year Two." This report not only analyzed the filings of 155 corporations from the 2014 reporting period (including the original 51 from the 2014 report) but also applied their new criteria to their original 51 filings from the 2013 reporting period in order to make comparisons over time. The 155 corporations are comprised of the top eight corporations by market capitalization over 17 industries with the highest exposure to conflict minerals, and then the top 20 corporations by market capitalization that were not already included in the original 17 industries.<sup>150</sup> The following are some of the key findings from these reports.

*Number of filings stayed consistent (as well as the split between form SD-only filers and conflict mineral report filers)*

Ropes and Gray note that the number of filings stayed relatively con-

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146 Bayer, Dodd-Frank Section 1502 – RY2014 Filing Evaluation at \*2 (cited in note 73).

147 KPMG, Conflict Minerals Filing Research Analysis at 3 (cited in note 129).

148 Bayer, Dodd-Frank Section 1502 – RY2014 Filing Evaluation at \*22 (cited in note 73).

149 Littenberg, Alert: Conflict Minerals and Supply Chain Compliance at 1 (cited in note 12).

150 Andrew Arriaga, Patricia Jurewicz, and Kathleen Brophy, Mining the Disclosures 2015: An Investor Guide to Conflict Mineral Reporting in Year Two (Responsible Sourcing Network, Dec 14, 2015), archived at <https://perma.cc/7Z4H-HZYX>.

sistent over both years. There were 1,315 filings in the first year and 1,271 in the second year (with projections predicting a similar turn-out for the reporting year of 2015).<sup>151</sup> The small drop, they say, can be explained by typical corporate events like IPOs and mergers and acquisitions.<sup>152</sup> They also note that the split between form-SD only filers and conflict mineral report files stayed roughly consistent, with the 23 percent filing only form SDs in the first reporting year reducing to 20 percent in the second reporting year.<sup>153</sup>

*Quality and quantity of disclosures increased*

Both Ropes and Gray and the Responsible Sourcing Network found that the overall quality and quantity of the disclosures improved in the second year of filing. Ropes and Gray states that more of the 2014 filings went beyond the literal requirements of the rule than the 2013 filings, with more corporations focused on receiving credit for all the work they had done in this area rather than taking a minimalist approach.<sup>154</sup> The Responsible Sourcing Network also noticed an improvement. While the average score for their sample was 46.4/100 in the first year of reporting, the average in the second year rose to 49/100.<sup>155</sup> In particular, the original 51 corporations achieved higher scores by industry in the second year, with certain industries (like electrical equipment, healthcare equipment and energy services) dramatically improving.<sup>156</sup> This improvement in disclosure practices occurred even while only 1 percent of corporations in the Responsible Sourcing Network's sample stated that they were "DRC Conflict Free."<sup>157</sup>

*There is continued difficulty facing corporations in getting reliable supplier responses*

Ropes and Gray note that over both years, corporations have consistently reported difficulty in obtaining quality information from their suppliers.<sup>158</sup> They reaffirm the findings of the Tulane Study in which the average response rate from suppliers was 81 percent, but with some response rates as low as 13 percent.<sup>159</sup>

*There was improvement in OECD compliance*

Both reports note that there is greater reference to, and compliance with, the OECD due diligence framework. Ropes and Gray have reported that, in a number

151 Littenberg, Alert: Conflict Minerals and Supply Chain Compliance at 1 (cited in note 12).

152 Id.

153 Id at 2.

154 Littenberg, Alert: Conflict Minerals and Supply Chain Compliance at 2 (cited in note 12).

155 Arriaga, Jurewicz, and Brophy, Mining the Disclosures 2015 at 8 (cited in note 150).

156 Id at 5.

157 Id at 17.

158 Littenberg, Alert: Conflict Minerals and Supply Chain Compliance at 3 (cited in note 12).

159 Id.

of ways, corporations have advanced in the implementation of their OECD guidance framework.<sup>160</sup> For example, they reference how many more filers discuss grievance mechanisms and also reference the use of contractual terms and conditions to enforce these standards.<sup>161</sup> Likewise, the Responsible Sourcing Network noticed improved performance for every step of the five-step OECD framework. In particular, there was a dramatic increase in compliance with the fourth step (third party audits of supply chain due diligence), which rose from 53 percent to 76 percent of the sample.<sup>162</sup>

*There was improvement in providing the country of origin and facilities list*

There was a notable improvement in the disclosure of the country of origin of the conflict minerals and also of the smelters and refiners in the supply chain. The Responsible Sourcing Network found that 46 percent of their sample shared a full country of origin list in the reporting year of 2014 while only 20 percent did in the first year of reporting.<sup>163</sup> This is an over 100 percent increase. They also noticed that the disclosure of suppliers and facilities within the supply chain greatly improved.<sup>164</sup> Similarly, Ropes and Gray found that conflict mineral reports contained more smelter and refiner disclosures as well as more information regarding the country of origin in the second year of reporting.<sup>165</sup> Ropes and Gray attribute this improvement to greater supply chain transparency that comes with having more responsive suppliers.<sup>166</sup>

*Specific corporations are identified as improving*

There are noticeably more individual corporations that the Responsible Sourcing Network singled out as high performers in the second year. Corporations that were previously identified in the reporting year of 2013 remain leaders (like Intel, Qualcomm, and Apple), while others have clearly begun to make a similar effort (namely Hewlett-Packard, Philips, General Electric, Microsoft, IBM, EMC, and Alcatel-Lucent).<sup>167</sup>

*Reports That Examine the Filings of Specific Industries*

PricewaterhouseCoopers produced a series of analyses of the filings of ten corporations in five specific industries for the reporting year of 2013 (first reporting year) – “aerospace and defense,” “auto,” “industrial products,” “retail,”

160 Id at 2.

161 Id.

162 Arriaga, Jurewicz, and Brophy, *Mining the Disclosures 2015* at 14 (cited in note 150).

163 Id at 13.

164 Arriaga, Jurewicz, and Brophy, *Mining the Disclosures 2015* at 19 (cited in note 150).

165 Littenberg, *Alert: Conflict Minerals and Supply Chain Compliance* at 2 (cited in note 12).

166 Id.

167 Arriaga, Jurewicz, and Brophy, *Mining the Disclosures 2015* at 23 (cited in note 150).

and “technology.” The following are some of the key findings from these reports.

*The technology sector out-performed all other sectors in terms of country of origin disclosures and smelter/refiner disclosures*

The technology sector was found to be outperforming all other sectors in two crucial areas. Firstly, 7 out of the 10 the technology filers in the sample disclosed the county of origin of their conflict minerals (with five disclosing all countries of origins rather than just the covered countries).<sup>168</sup> This compares with next highest performing sector – the aerospace and defense sector – where only 4 out of the 10 filers revealed the country of origin of their conflict minerals (with none disclosing a full list).<sup>169</sup> Secondly, 9 out of the 10 technology filers in the sample disclosed information regarding the smelters in their supply chain.<sup>170</sup> The auto sector was the next highest performing sector in the study, yet only 5 out of the 10 filers disclosed such information.<sup>171</sup>

Industries performed similarly on conflict status disclosures

Although the technology sector was found to be outperforming other industries in a number of ways, it still was no better than most of the other filers at disclosing the status of their conflict minerals. Like most industries in the sample, half of the technology filers disclosed (either explicitly or implicitly) their conflict status.<sup>172</sup> Interestingly, the industrial products sector was the best at disclosing their conflict status (explicitly or implicitly), with only one corporation failing to do so.<sup>173</sup> The aerospace and defense sector performed the most poorly with only two filers implicitly disclosing their conflict status.<sup>174</sup> It is worth noting that in the entire sample only one filer claimed to be conflict-free, and they were

168 PricewaterhouseCoopers, 2014 Conflict minerals filing review: Early insights from some of the largest companies (Technology sector) (PricewaterhouseCoopers LLP, 2014). Online at <http://www.pwc.com/us/en/cfodirect/assets/pdf/technology-conflict-minerals-benchmarking.pdf>.

169 PricewaterhouseCoopers, 2014 Conflict minerals filing review: Early insights from some of the largest companies (Aerospace and Defense sector) (PricewaterhouseCoopers LLP, 2014), online at <http://www.pwc.com/us/en/cfodirect/assets/pdf/aerospace-conflict-minerals-benchmarking.pdf>.

170 PricewaterhouseCoopers, 2014 Conflict minerals filing review (Technology sector) at 1 (cited in note 168).

171 PricewaterhouseCoopers, 2014 Conflict minerals filing review: Early insights from some of the largest companies (Auto sector) (PricewaterhouseCoopers LLP, 2014). Online at <http://www.pwc.com/us/en/cfodirect/assets/pdf/automotive-conflict-minerals-benchmarking.pdf>.

172 PricewaterhouseCoopers, 2014 Conflict minerals filing review (Technology sector) at 1 (cited in note 168).

173 PricewaterhouseCoopers, 2014 Conflict minerals filing review: Early insights from some of the largest companies (Industrial products sector) (PricewaterhouseCoopers LLP, 2014). Online at [http://www.pwc.com/us/en/cfodirect/assets/pdf/industrial-conflict\\_minerals\\_benchmarking.pdf](http://www.pwc.com/us/en/cfodirect/assets/pdf/industrial-conflict_minerals_benchmarking.pdf).

174 PricewaterhouseCoopers, 2014 Conflict minerals filing review: Early insights from some of the largest companies (Aerospace and Defense sector) at 2 (cited in note 169).

within the technology sector.<sup>175</sup>

## IMPLICATIONS FOR FUTURE LEGISLATIVE EFFORTS

The broader scope of this paper is to explore the future potential (based on the lessons from section 1502 and its related SEC rule) for non-traditional disclosure legislation to be used to address a range of corporate social responsibility issues. This section will identify key lessons from my research, focusing on the features of Section 1502 that have potential for future legislative effort, the areas that would need to be re-thought, and tentative thoughts on how these problems might be addressed. This analysis will focus on the legislation from a general perspective and will not focus on the technical issues and challenges associated with the specific requirements of Section 1502. In other words, even if Section 1502 is a “failed experiment” (as one interviewee called it), what general principles and lessons can be drawn from the failures and successes?

### *The use of disclosure regulation to address the issue of conflict minerals*

My research reveals that “non-traditional” disclosure legislation, in relying on disclosure requirements, has potential for tackling future corporate social responsibility issues for three main reasons.

First, enacting disclosure-based laws is a more politically feasible way of addressing future corporate social responsibility concerns than “direct” or prescriptive legislation. The views of the SEC official interviewed, who felt there was no political appetite in Congress or the SEC for future expansion of non-traditional disclosure legislation, should be considered within the context of the political backlash and difficulty that the SEC faced in developing Section 1502, with its inherent weaknesses. It is notable that a significant number of interviewees, even some that objected to Section 1502, acknowledged that one of its strengths is its relative political acceptability. As a disclosure-based law, it places no substantive requirements on corporations (which might threaten their competitive position in a global market), and politicians seem less inclined to object to an ostensibly benign effort to address social issues.

Second, non-traditional disclosure legislation, such as Section 1502, has the potential to achieve tangible gains for social causes with relatively little enforcement costs for the state. In other words, the legislation does not need to be accompanied by heavy punitive threats and substantive requirements in order to be effective. By requiring public disclosures of information, Section 1502 effectively relies on civil society to enforce the substantive “norms” underlying it – namely that corporations should endeavour to source conflict minerals

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<sup>175</sup> PricewaterhouseCoopers, 2014 Conflict minerals filing review (Technology sector) at 1 (cited in note 168).

responsibly. Congress's act of passing Section 1502 – as well as the disclosure of information required by the law – brings attention to the problems surrounding conflict minerals in the corporate supply chain, and provides a basis on which consumers can, if they wish, begin to make the choice to favour products that are conflict-free. This social expectation that corporations should endeavour to source conflict minerals responsibly changes how corporations make decisions about their supply chain, and many now factor a desire to avoid social backlash into their calculations of how to source their conflict minerals. The incentives are changed, and what was previously a purely financial calculation for corporations now factors in risks to reputation. For consumer-facing corporations, the value of their reputation is much higher and, therefore, their efforts to avoid consumer backlash are likely to be substantial. Consumer-facing corporations not only face the risk of damage to their customer base, but also (as one interviewee identified) their ability to recruit and hold on to talent when compared with other brand-conscious competitors. This view is also supported by the statistical data contained in the Section 1502 compliance reports reviewed, which showed consistently higher performances in both compliance and “best practices” from consumer-facing corporations and industries.

One argument against the effectiveness of non-traditional disclosure legislation is the claim that consumers are unable to use confusing and convoluted disclosures to hold corporations accountable and determine which brands are more ethical than others. However, the reports of NGOs and academics that work through the filings and “rank and spank” corporations in a way that can be easily understood by consumers (such as those that I have analyzed in this paper) appear to have a significant impact on corporate behaviour. Such comparative reports are made more viable and effective by the legal requirement that every corporation disclose the same information in the same way. Furthermore, the free market can potentially fulfill a similar function. For example, new technologies (such as apps that can scan bar codes) might someday help consumers identify quickly which products are the most socially responsible and, with a vast supply of data arising from non-traditional disclosure requirements, corporations can now be compared in a meaningful way on a range of issues (this possibility was identified by one interviewee). Finally, the media can review such disclosures and, where appropriate, comment on the social impact and/or behaviour of individual corporations or industries without fear of legal action based on inaccurate information or damage to corporate reputation.

Third, disclosure-based legislation that requires corporations to report on their supply chain (such as Section 1502 and its resulting SEC rule) has the potential to change the behaviour of even non-consumer-facing corporations through the “trickle-down effect.” The “trickle-down effect” was verified by in-house counsel of a non-consumer-facing corporation who, when interviewed, acknowledged that their corporation saw a commercial benefit in becoming more



socially responsible and felt that, in doing so, it would be more attractive to its consumer-facing clients who were looking to “clean up” their supply chain.

*The use of the securities laws to address social issues*

Through Section 1502, lobbyists and legislators appear to have identified an appropriate and effective way to address the social problem of conflict minerals in the corporate supply chain. In my view, this approach holds significant potential for efforts to effect wider social reforms. My research revealed two main complaints against the use of securities laws to address the social concern over conflict minerals: 1) requiring the SEC to make rules in this area is an inappropriate use of securities laws because it has no basis in investor protection, and 2) using securities law is an ineffective way to address this issue because the SEC has no ability to enforce its own rule.

Drawing on my research, I offer three main reasons why this legislative strategy is not only legitimate, but also effective. First, there is at least some suggestion that corporate social responsibility is an issue that investors take seriously as a potential source of risk. This is particularly true for brand-conscious corporations and industries where there is serious risk that consumer purchasing choices will be affected by negative publicity. While a full analysis of the legal validity of section 1502 goes beyond the scope of this thesis, I found it important to address the chief complaint against the validity of section 1502 raised by the interviewees – namely that it asks the SEC to go beyond its mandate of investor protection. I, however, argue there is a case to be made that this rule has a basis in investor protection that needs to be considered before dismissing section 1502 as legally invalid.

Second, the use of securities law is particularly effective exactly because of its ability to buttress its rule with legal enforcement. While interviewees have rightly identified that the SEC currently lacks the expertise to adequately review corporate disclosure forms on conflict minerals and has yet to effectively enforce its own rule, they have not identified a systemic failing of this legislative strategy. Instead, they are referring to enforcement issues that exist now in the nascent stages of section 1502 and its related rule. It is quite possible that the SEC is making a calculated decision to take a softer approach to enforcement in the early years of an already highly contentious rule while it finds its equilibrium. Where the SEC really does lack the expertise to enforce this rule, this need not be the case for long. The SEC official identified a number of ways in which their expertise is likely to improve over time on the issue of conflict minerals and perhaps, as non-traditional disclosure laws became more prevalent, such expertise would exist within on a range of social issues. A systemic feature of the SEC is its ability to enforce its rules with legal sanctions if it so chooses. Furthermore, any corporate filing with the SEC is potentially subject to costly third party legal action if the disclosures misrepresent anything to investors or simply fail to comply with

the requirements of the law. The risk of litigation for non-compliance is always threatening those corporations that file with the SEC and will likely ensure that corporations take seriously the requirements of the rule, making it much more effective than many (often-suggested) voluntary initiatives.

Finally, the use of securities laws enables legislation to have extra-territorial affect in a way that other types of legislation would not. The SEC has control over large multi-national corporations that, while based and publicly listed in America, conduct business in other jurisdictions (often in a socially irresponsible way). Section 1502, through US law, compels these corporations to change the way that they operate in foreign territories without relying on enforcement at a local-level. Section 1502 also affects any foreign corporations that are looking to have access to highly valuable US markets through the SEC (and would otherwise not be affected by US law).

*“Non-traditional” disclosure legislation should, where possible, avoid ambiguity*

Future non-traditional disclosure legislation efforts should be specific and avoid ambiguity where possible. My research shows that, in general, corporate compliance with the legal requirements of section 1502 (and “best practices”) improved over time. Although the data does not span over many years, there are certainly indications of improvement and (in some areas) dramatic improvement by corporations. My research identifies some reasons for the poor levels of compliance in the first year of the SEC rule’s existence (and, in some cases, the year after). In some respects, the poor performances can be attributed to factors that were outside of the control of the legislators, such as lack of existing corporate infrastructure to adequately comply with all of the rule’s requirements. Should more non-traditional disclosure legislation be developed to address other social concerns, such infrastructure would hopefully start to anticipate these new concerns as corporations begin to view corporate social responsibility as an important part of risk mitigation.

However, the ambiguous drafting of certain requirements of the disclosure has contributed to this initial poor performance as well. As interviewees noted, corporations were cautious not to “over-disclose” on matters that were not explicitly explained or required in the rule and erred on the side of minimal disclosure until they could see how their competitors were responding to the rule. Industry associations and corporate firms can be helpful in developing their own interpretations of securities legislation and disseminating those definitions to the relevant corporations, but this leaves a great deal of authority with these associations and corporate firms, all of whom have their own agendas. Additionally, the SEC representative noted that over time, the SEC will take note of ambiguities in the rule that repeatedly come up and eventually publish official guidance that clarifies these aspects. However, more specific legislation that clearly outlines what and how corporations need to disclose their information can mitigate poor

performances in the first years of the legislation. Furthermore, specificity in legislation reduces the likelihood of symbolic compliance – something that is already a concern with section 1502.

### *Burden and costs on corporations*

One of the most significant limitations of section 1502 and its related rule is the massive burden and cost that it imposes on corporations, even if one assumes that this cost will decrease over time. These large costs are exacerbated by the poor flow of information between corporations and industries, which leads to the duplication of effort that has been identified in this paper. Interviewees identified one solution to this problem: remove the legislative burden from corporations and, instead, focus on the relevant parts of the supply chain where the law can be most effective – namely, the smelters and refiners. However, most smelters and refiners exist outside of America, and it is not clear how US law could target them effectively.

Yet the basic concept of focusing attention and effort where it can be most effective certainly holds the promise of reducing the burden and costs faced by corporations from “non-traditional” disclosure legislation. Such a narrowing of focus may not necessarily come from a narrower legislative focus, but rather, from civil society. I would envision the use of third party certification schemes that identify the proverbial “choke point” and conduct specialized audits on behalf of industries. Such a certification scheme would need to be entirely independent (unlike the CFSP and CMRT, which were the brainchild of the electronics industry) and conducted by either existing independent audit firms (that would need to branch out their areas of expertise) or from entirely new business entities that would be experts in conducting corporate social responsibility audits and certifications. In other words, the certification schemes must offer corporations an avenue through which to meaningfully, as opposed to symbolically, comply with the law.

The SEC official noted that the SEC is extremely open to looking for ways to make this rule less costly and burdensome, and to using third party certification schemes to do so, so long as these schemes are independent and adequately reflect the intent of the legislation. This will obviously take time as infrastructure needs to develop. Not only do compliance standards created by industry associations, international agencies, and/or some other entity need to emerge, but auditing infrastructure needs to grow, either within already existing institutions or as new experts in monitoring compliance against those standards.

## CONCLUSION

In conclusion, section 1502 provides an excellent example of what I have termed “non-traditional” disclosure legislation. Through conducting inter-

views and a meta-analysis, I have assessed its effectiveness – including where it has been successful and where there is room for improvement – in altering and hopefully improving corporate behavior. From these conclusions, I have sought to offer the implications of and possibilities for similar “non-traditional” disclosure legislation in the future that addresses a range of other corporate social responsibility issues. Ultimately, I have concluded that section 1502 and the resulting SEC rule, while far from perfect, suggest that there is strong potential for “non-traditional” disclosure legislation.

## ARTICLE

# DISTRIBUTIVE JUSTICE: ATTITUDES TOWARD ACCESS TO FEDERAL COURTS IN ENVIRONMENTAL CITIZEN SUITS

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### ABSTRACT

This study examines how attitudes toward access to federal courts for environmental citizen suits and institutional characteristics relate to access decisions made in the past four decades. Using a qualitative analysis, the study explains how the impact of ideological attitudes toward environmental policy was most likely subsumed by institutional attributes in producing the steady expansion of environmental litigation access, despite a growing ideological divide over environmental policy. In the federal courts section, linear regression models demonstrate that ideology has an impact on decisions in circuit courts but not in district courts. Overall, the study provides insight into the link between public policy goals and institutional choice. Since 1970, the effectiveness of environmental citizen suits in broadening the coverage of federal environmental statutes has been directly related to the institutional attributes of Congress and federal courts, as well as their relationships with the decision-making processes of their members. As a result, they have helped shape the way in which the nation regulates its natural resources.

### INTRODUCTION

The Clean Air Act (CAA),<sup>1</sup> Clean Water Act (CWA),<sup>2</sup> and Resource Conservation and Recovery Act (RCRA)<sup>3</sup> share a common purpose of protecting the natural environment through a common method of achieving their goals.<sup>4,5,6</sup> When Congress amended the CAA in 1970, it created a citizen suit provision that allowed for public participation in the enforcement of its air pollution standards. Today, nearly every major environmental statute contains a modified version of

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1 Clean Air Act, 42 USC § 7401 et seq (1963).

2 Clean Water Act, 33 USC § 1251 et seq (1972).

3 Resource Conservation and Recovery Act, 42 USC § 6901 et seq (1976).

4 42 USC § 7671(q).

5 33 USC § 1388.

6 42 USC § 6992(k).

that provision.<sup>7,8</sup> The Environmental Protection Agency (EPA) is responsible for the preponderance of enforcement measures under federal environmental statutes, but the citizen suit provision provides for situations in which the public may supplement and enhance the coverage maintained by the EPA administrator. The EPA delineates the parties that are permitted to bring suits in federal courts and against whom and under what circumstances they may bring them. In this way, Congress sets a range of access that is available under the statutes, and judges who hear the cases determine the aggregate level of access available across the judicial system.

For the purposes of this study, access is defined as the distribution of justice available to the population that seeks to enforce specific statutory duties, compel agency action, prevent pollution, or recover damages in federal courts. It is a measure of the ability of and incentives for those parties to bring environmental claims under the statutes. Its value relates to the statutes and their specific language and design, and it is the product of decisions made by members of Congress and federal judges.

The process of defining the value begins when Congress writes the statute and sets lower and upper bounds on the distribution of access. It does this by establishing the parameters that determine who is permitted and incentivized to bring claims, and against whom and under what circumstances they may bring them. Once the statute is enacted, judges interpret the statutory framework and make decisions that produce a specific value of access in each case and an aggregate level across the judicial system.

The design of this study reflects both a theoretical approach to the study of attitudes toward access and the practical limitations in its scope and coverage. Although nearly every environmental statute contains a citizen suit provision, this study limits itself to the CAA, CWA, and RCRA. This was due largely to resource constraints, but it is not expected to diminish the significance of the results. While attitudes toward access may be tied to specific statutes, the CAA, CWA, and RCRA provide a good basis for the study of access decisions.

Furthermore, analysis of the three statutes is restricted to the type of citizen suit provision first established in the CAA and later adopted in the CWA and RCRA. In effect, the analysis is limited to one type of access claim: that which seeks to increase access for the enforcement of the statutes. Other access claims, such as those that arise from 42 U.S.C. § 7607, 33 U.S.C. § 1369, and 42 U.S.C. § 6974, involve judicial review of the administrator's discretionary duties and can be used to restrict access, and therefore might relate differently to ideological and institutional factors. While in one sense this is a limitation, it is also a natural control. It allows the study to hold constant the types of claims across three statutes and four decades of litigation in order to examine the relationships between

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7 42 USC §§ 6972(a), 7604(a), 9659(a).

8 Endangered Species Act, 16 USC § 1540(a) (1973).

congressional and judicial behaviors and hypothesized variables.

This study will examine the congressional chronology of the drafting and amending of both the citizen suit provision and its adoption across three statutes, as well as analyze the relationships between factors that influence judicial decisions on access and outcomes in federal district courts and courts of appeals. It hypothesizes that the ideological preferences of opinion-writing judges are positively related to decisions on access claims and examines how the relationship is affected by the identity of the petitioner and the year of decision. Through the examination of these relationships, this study demonstrates the effects that institutions and ideological actors have on realizing environmental policy in the United States.

## OVERVIEW

This study determines how the level of access to federal courts for environmental citizen suits relates to the institutional characteristics of Congress and federal courts, as well as the decision-making processes of their members. It situates these two elements within a theoretical framework that holds: (i) members of Congress and federal judges are ideological actors who view access in terms of its policy implications, and (ii) institutional characteristics affect the decisions of their members and therefore relate to the outcomes of those decisions. In the sections that follow, this framework is used to posit and test relationships between a number of factors and the decisions that determine levels of access for environmental citizen suits.

Mayhew and others who study congressional behavior take the position that members of Congress seek reelection through broadcasting their policy positions.<sup>9</sup> They are expected to take positions that reflect the policy preferences of their constituents. This is manifested in behavior that seeks to establish a level of access that leads to substantive outcomes favored by constituents.<sup>10</sup> For example, a member whose district is dependent upon the fossil fuel industry would be expected to favor lower levels of access that correspond to a reduced likelihood of the industry's involvement in costly litigation. Therefore, decisions made by members of Congress can be understood as the products of the policy preferences of their constituents.

However, when constituents are removed from the relationship, there is a more direct link between policy preferences and decisions. With lifetime appointments and no constituencies, federal judges are able to make decisions based on their own ideological attitudes and beliefs.<sup>11</sup> In the attitudinal model of judicial

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9 David R. Mayhew, *Congress: The Electoral Connection* 49 (Yale 1974).

10 Joseph L. Smith, *Judicial Procedures as Instruments of Political Control: Congress's Strategic Use of Citizen Suits*, *Legis Stud Q* 283, 288 (2006).

11 Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* 64 (Cambridge 2002).

behavior, this is represented using a continuum along which both a measure of the judge's ideological position and the two outcomes in a case can be placed.<sup>12</sup> The judge is expected to vote for the outcome closest to his or her own position. If judges' views of access claims are related to their underlying policy preferences, then there should be an observable relationship between decisions on access claims and ideological attitudes.

There are a number of other differences between Congress and federal courts that affect environmental citizen suits, resulting from the different roles the two institutions play in access policymaking. In the broadest terms, Congress is responsible for enacting statutes that set the range of access to federal courts available under them,<sup>13</sup> and federal judges interpret the statutes and define the level of access in terms of individual cases.<sup>14</sup> The outcomes of these processes are therefore related to the institutions themselves because "it is institutional choice that connects goals with their legal or public policy results."<sup>15</sup> This fact is used to understand what motivated Congress to enact environmental citizen suit provisions, why it modifies them over time, and how its characteristics led to the structures of the provisions.

Similarly, statistical models are used to examine relationships between judicial decisions and the institutional characteristics of federal courts. The decisions are divided between those reached in district courts and those in circuit courts. In environmental citizen suits, district court judges are often tasked with determining facts that are dispositive in the outcomes of their cases. This affords them little discretion to make decisions that correspond to their ideological preferences. In circuit courts, however, judges have more discretion. Because the district court has already established the facts in most cases, circuit court judges primarily evaluate the law itself and thus are better able to make decisions that are in line with their ideological preferences. Through these differences, this study hypothesizes that the relationships among decisions on access claims and judicial ideology, the identity of the petitioner, and the date of the litigation are stronger at the circuit court level than at the district court level.

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12 Glendon A. Schubert, *The Judicial Mind Revisited: Psychometric Analysis of Supreme Court Ideology* 18 (Oxford 1974).

13 Dawn M. Chutkow, *Jurisdiction Stripping: Litigation, Ideology, and Congressional Control of the Courts*, 70 *J Polit* 1053, 1058 (2008).

14 Gregory J. Rathjen and Harold J. Spaeth, *Denial of Access and Ideological Preferences: An Analysis of the Voting Behavior of the Burger Court Justices, 1969-1976*, 36 *W Polit Q* 71, 73 (1983).

15 Neil K. Komisar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 5 (Chicago 1994).



## CONGRESS

### Design

The citizen suit provisions that establish access to enforce the CAA, CWA, and RCRA tell the story of how congressional and constituent attitudes toward federal environmental regulation have changed over time. They were enacted at a time when there was a broad consensus surrounding the need for federal intervention in the environmental movement<sup>16</sup> and have remained operative despite growth in the ideological divide that exists between the modern Republican<sup>17</sup> and Democratic<sup>18</sup> environmental policy platforms. In this historical context, the environmental citizen suit provisions provide the means by which this study will examine attitudes toward access in environmental citizen suits that litigate the CAA, CWA, and RCRA.

### Legislative History

In the 1970s, now known as the environmental decade in the United States,<sup>19</sup> Congress enacted legislation to protect and conserve the natural environment and its resources. The CAA, CWA, RCRA are among the signature pieces of legislation written or amended during the period. Each statute contains a citizen suit provision, which reflects the belief held at the time by members of Congress that citizen suits were an effective policy tool to achieve more comprehensive enforcement of and compliance with environmental statutes' standards and limits.

#### *Clean Air Act (CAA)*

The Air Pollution Control Act of 1955 was the first federal statute to address national air pollution.<sup>20</sup> It provided funds for research but no means of setting or enforcing pollution standards or limits. Congress first granted positive authority to the government to regulate pollution in the CAA of 1963.<sup>21</sup> It broadened this authority to include private citizens in 1970, when it amended the Act to include the first citizen suit provision in an environmental statute. Section 304 granted

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16 Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U Pa L Rev 85, 94–99 (2001).

17 See Gerhard Peters and John T. Woolley, *Political Party Platforms: 2012 Republican Platform: America's Natural Resources: Energy, Agriculture and the Environment* (The American Presidency Project, Aug 27, 2012), archived at <https://perma.cc/2AQW-PGGG>.

18 See Gerhard Peters and John T. Woolley, *Political Party Platforms: 2012 Democratic National Platform: Environment* (The American Presidency Project, Sept 3, 2012), archived at <https://perma.cc/2DYM-7P8P>.

19 Lettie M. Wenner, *The Environmental Decade in Court* 1–211 (Indiana 1982).

20 Air Pollution Control Act, Pub L No 84-159, 69 Stat 322 (1955), codified at 42 USC § 7401 et seq.

21 Clean Air Act, Pub L No 88-206, 77 Stat 392 (1963), codified at 42 USC § 7401 et seq.

the right to bring suits against parties who failed to comply with the statute's air pollution standards and to compel the EPA administrator to perform his or her non-discretionary duties:

SEC. 304. (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.<sup>22</sup>

The grant of access was not without limits. Section 304(b) limited suits brought under the provision to original jurisdiction in federal district courts and established prerequisites that included a 60-day notice requirement and a diligent prosecution exemption.<sup>23</sup> The notice requirement precluded suits from being filed “prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order...”<sup>24</sup> It allows inadvertent violators of the Act to come into compliance with the statute without being subjected to costly litigation. Similarly, the diligent prosecution exemption prevents citizen suits from being filed when the administrator or state is already engaged in prosecuting a violator.

In 1977 and again in 1990, Congress revisited the CAA to broaden the definition of person to include federal entities and give citizen enforcers the power to prevent the construction or operation of certain facilities without a permit.<sup>25</sup> The 1990 Amendments included five major changes to the citizen suit provision.

Section 304(a) was amended to include civil penalties, past violations, suits to compel Agency action that is unreasonably delayed, and a penalty fund

<sup>22</sup> An Act to Amend the Clean Air Act to Provide for a More Effective Program to Improve the Quality of the Nation's Air, Pub L No 91-604, 84 Stat 1676 (1970), codified at 42 USC § 7604(a).

<sup>23</sup> 42 USC § 7604(b).

<sup>24</sup> *Id.*

<sup>25</sup> An Act to Amend the Clean Air Act, and for Other Purposes, Pub L No 95-95, 91 Stat 685 (1977), codified at 42 USC 7401 § et seq.

maintained by the Treasury that collects and uses fees to further the goals of the Act.<sup>26</sup> These changes affected two interrelated parts that underlie the citizen suit provision and led to an overall expansion of access to federal courts under the CAA. First, they broadened the authority of private individuals to bring suits. Second, they increased the incentives for individuals to bring suits. With these changes put in place, Congress left further modifications of the level of access to federal courts.

### *Clean Water Act (CWA)*

However, Congress did not limit its regulatory reach to the air. In 1972, it enacted the Clean Water Act<sup>27</sup> to maintain and restore the chemical, physical, and biological integrity of America's waters.<sup>28</sup> Section 505 of the Act is a modified version of section 304 of the CAA that contains the same grant to bring suit against violators of the act and the administrator when there is an alleged failure to perform non-discretionary duties. It also included the same notice requirement and diligent prosecution exemption:

SEC. 505. (a) Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.<sup>29</sup>

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26 An Act to Amend the Clean Air Act to Provide for Attainment and Maintenance of Health Protective National Ambient Air Quality Standards, and for Other Purposes, Pub L No 101-549, 104 Stat 2399 (1990), codified at 42 USC 7401 § 304(a).

27 An Act to Amend the Clean Water Act, Pub L 92-500, 86 Stat 816 (1972), codified at 33 USC §§ 1251-1387 et seq.

28 33 USC §§ 1251-1387 et seq.

29 An Act to Amend the Federal Water Pollution Control Act, Pub L 92-500, 86 Stat 816 (1972), codified at 33 USC § 505(a).

Although the provisions share the same purpose, they differed in one important aspect: whether or not civil penalties were permitted in their first iterations.<sup>30</sup> The inclusion of civil penalties is not explained by the legislative history,<sup>31</sup> but it may account for the larger volume of litigation under the statute relative to the CAA and RCRA.<sup>32</sup> It may also be a reason why the provision was not amended at the same rate as it was in the CAA. While Congress worked in 1977 and 1990 to address the limitations of the CAA's citizen suit provision, it avoided having to do the same for the CWA by establishing a process for awarding civil penalties.

Congress amended the CWA in 1977<sup>33</sup> and 1981,<sup>34</sup> but it was not until the CWA Amendments of 1987 that it amended section 505. For the first time since it was enacted in 1972, the citizen suit provision was updated to include a savings clause that preserved the rights of private individuals as provided to them by state common law and other statutes, and that provided for the awarding of attorney fees to prevailing or substantially prevailing parties.<sup>35</sup> The adjustments made through these amendments are minor relative to those of the CAA; they do not create new rights or substantially affect the statute's access framework.

#### *Resource Conservation and Recovery Act (RCRA)*

The Resource Conservation and Recovery Act was enacted in 1976 to regulate the disposal and recycling of hazardous waste.<sup>36</sup> At the time of the RCRA's enactment, Congress had included citizen suit provisions in both the Clean Air Act and Clean Water Act. It continued this trend in section 7002 of the RCRA:

SEC. 7002. (a) Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in

30 33 USC §§ 1251–1387 et seq.

31 Jeffrey G. Miller, Private Enforcement of Federal Pollution Control Laws Part I, 13 *Envir L Rptr* 10309, 10313 (1983).

32 Stephen Fotis, Private Enforcement of the Clean Air Act and the Clean Water Act, 35 *Am U L Rev* 1, 155–59 (1985).

33 An Act to Amend the Federal Water Pollution Control Act to Provide for Additional Authorizations, and Other Purposes, Pub L No 95-217, 91 Stat 1566 (1977), codified at 33 USC §§ 1251–1387 et seq.

34 An Act to Amend the Federal Water Pollution Control Act to Authorize Funds for Fiscal Year 1982, and for Other Purposes, Pub L No 97-117, 95 Stat 1623 (1981), codified at 33 USC §§ 1251–1387 et seq.

35 An Act to Amend the Federal Water Pollution Control Act to Provide for the Renewal of the Quality of the Nation's Waters, and for Other Purposes, Pub L No 100-4, 95 Stat 1623 (1987), codified at 33 USC § 505.

36 An Act to Provide Technical and Financial Assistance for the Development of Management Plans and Facilities for the Recovery of Energy and Other Resources from Discarded Materials and for the Safe Disposal of Discarded Materials, and to Regulate the Management of Hazardous Waste, Pub L No 95-580, 90 Stat 2795 (1976), codified at 42 USC § 6902(a).

violation of any permit, standard, regulation, condition, requirement, or order which has become effective pursuant to this Act; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator. Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred.

Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be.<sup>37</sup>

The initial provision is nearly an exact copy of section 304 of the CAA. It includes the same right to bring suits against violators and the administrator for failure to perform non-discretionary duties. It also does not provide an avenue for courts to award civil penalties. The two provisions differ primarily in their specific language, which is largely a function of the resources or action they regulate. In the CAA, Congress set standards and limitations with respect to levels of air pollution. It follows, therefore, that the language of its citizen suit provision focuses on the right of private individuals to enforce these standards and limitations. The RCRA does not regulate levels of pollution and instead grants private individuals the right to enforce permits and other regulations.

Congress amended the RCRA in 1984. It made a substantive revision to the bill's access framework, which had the overall effect of expanding access. This revision came in the form of paragraph (1)(B):

(B) [any person may commence a civil action on his own behalf] against any person, including the United States and any other governmental Instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment...<sup>38</sup>

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<sup>37</sup> 42 USC § 7002(a).

<sup>38</sup> An Act to Amend the Solid Waste Disposal Act to Authorize Appropriations for the Fiscal Years 1985 through 1988, and for Other Purposes, Pub L No 98-616, 98 Stat 3221 (1984), codified at 42 USC § 6972(1)(B).

It allowed suits to be filed against any person who was involved at any point with regulated substances that are currently alleged to be in violation of the Act. In effect, it broadened who could be held liable for violations. But in establishing a new right, Congress looked to moderate the effect it had on the overall level of access. To do this, it added a notice requirement unique to suits brought under (1) (B) that increased the required number of days between when notice is given to the administrator, the state, and the violator, as well as when the suit can be filed from the standard 60 to 90 days.

This is a clear example of how Congress works to strike a balance when creating access provisions. In the same amendment, it established a new category of parties who are potentially liable under the Act while it simultaneously erected procedural bars that would allow parties to defend themselves against overly burdensome litigation. In addition to these modifications, changes were made to update the language so that the district courts had jurisdiction over the new components of access claims. Since 1984, Congress has not amended the statute's access framework.

### Establishing Access

#### *Access Framework*

When Congress decided to involve private parties in the enforcement of the CAA, it did so because it believed that the federal government was unable to enforce an adequate level of compliance with the statute. Senator Edmund Muskie of Maine stated at the time of adoption that those who supported the citizen suit provision believed that “it would be impossible to do the total job of air pollution cleanup relying wholly upon the Federal bureaucracy.”<sup>39</sup> Operating under the idea that a broader level of access leads to an enhanced level of enforcement, Congress looked to ensure compliance with its environmental statutes by adjusting the level of access to federal courts.

If access is defined as a value that exists on a continuum, then each statute and citizen suit provision binds the value between two extremes. Between the extremes, Congress sets a more exact value using both explicit rights and procedural requirements and implicit incentives. Before the inclusion of citizen suits in environmental statutes, the level of enforcement of environmental standards was a function of the willingness of the EPA, and by extension the whole executive branch, to commit resources to litigation. With access so restricted, an administrator or president could unilaterally determine whether the nation's environmental laws were enforced. However, with the enactment of the CAA Amendments of

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<sup>39</sup> Clean Air Act Amendments of 1970, Hearing on Implementation of the Clean Air Act Amendments of 1970 – Part 1 before the United States Cong. Senate Committee on Public Works, 91st Cong, 2d Sess (1972) (statement of Edmund Muskie, Senator, Maine).

1970, Congress linked the public's interest in compliance with the statutes to the level of enforcement.

The language of the statutes and provisions is itself the clearest example of how Congress explicitly defines a level of access. Each provision started with who can file a suit and against whom they may file it, and then granted jurisdiction to federal district courts to hear the claims. These are examples of explicit rights, which establish the parties, claims, and jurisdictions that participate in citizen suits, but the procedural requirements are equally explicit. These include the 60-day notice requirement and diligent prosecution exemption, both of which are procedural bars that ensure litigation is used as the final means to enforce statutory standards. It is important to note that neither of these directly addresses any substantive aspect of environmental litigation; the limits apply equally to every party and claim.

In addition to explicit grants or prohibitions, Congress also makes use of implicit incentives to reach a satisfactory level of access. Senator Muskie speaks to an example of this:

This [an overburdened judicial system] the Committee attempted to discourage by providing that the costs of litigation – including counsel fees – may be awarded by the courts to the defendants in such cases, so that the citizen who brings a harassing suit is subject not only to the loss of his own costs of litigation, but to the burden of bearing the costs of the parties against whom he has brought the suit in the first instance.<sup>40</sup>

Through attorney fees and other monetary awards and penalties that arise from litigation, the citizen suit provision creates a second dimension of access that is distinct from determinations of jurisdiction or standing. These awards and penalties function as incentives that do not place limits on access to enforcement procedures, but rather encourage suits of a quality consistent with the purposes of the Act.<sup>41,42</sup> To accomplish this, the incentives must work in both directions. Their purpose is not limited to encouraging private parties to file citizen suits; Congress also uses them as a tool to control for the quality of litigation, such that it advances the goals of the statutes. This is why attorney fees are not reserved to those who file citizen suits; they may also be granted to the defendants as a means of preventing frivolous or overly litigious citizen suits.<sup>43</sup>

Each time Congress enacted a statute or amended its access framework, it influenced substantive environmental decisions. There are a number of tools available to Congress that can alter the level of access for environmental citizen suits.

40 Clean Air Act Amendments of 1970: Senate Debate on S. 4358, 91st Cong, 2d Sess (1970).

41 Walter B. Russell III and Paul T. Gregory, Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the 'Appropriate Standard,' 18 Ga L Rev 310 (1984).

42 Citizens Association of Georgetown v. Washington: Awarding Attorneys' Fees in Citizen Suits to Enforce the Clean Air Act, 125 U Pa L Rev 1407 (1977).

43 Village of Kaktovik v Watt, 689 F2d 222 (DDC 1982).

Without restricting an explicit right to file a citizen suit, Congress can modify the incentives to increase or decrease the number of suits filed.

However, how do members of Congress choose between these tools, the factors that drive their decisions, and the inevitable expansion, but never restriction, of access?

### Motivations

#### *Ideological*

A number of questions arise from consideration of the historical context of environmental citizen suit provisions. First, Congress could have left the enforcement of the statutes to the federal government instead of private parties. Second, Congress could have structured access provisions in an infinite number of ways. Third, with each amendment, Congress has not attempted to restrict access frameworks, but rather expand it. This study began by hypothesizing that these decisions are products of policy preferences and institutional characteristics. It will now look at how these factors led to the creation and modification of citizen suit provisions in the CAA, CWA, and RCRA.

The decisions of Senator Muskie and others to create and amend environmental citizen suit provisions are linked to the circumstances in which they were made. However, they may not be products of larger institutional and ideological forces. Federal environmental policies and regulations affect a diverse set of industries, individuals, and interests. Baumol and Oates find that high-income people are more likely than lower-income individuals to support environmental regulations,<sup>44</sup> while Yandle finds that environmental regulations impose higher costs on smaller firms.<sup>45</sup> McChesney shows how political actors profit from regulations,<sup>46</sup> and Becker examines how they are influenced by cooperating political coalitions.<sup>47</sup> This study accepts the common premises of these claims that constituents hold a diverse set of views toward environmental policy and that these views influence the decisions of members of Congress in the area.

Rather than account for the individual sources of attitudes toward environmental policy, and by extension, their ultimate impact on access in environmental citizen suits, this study focuses on the views that members of Congress hold toward access. It divides their views into two categories: those that favor the

44 William J. Baumol and Wallace E. Oates, *The Theory of Environmental Policy* 235 (Cambridge 1988).

45 Bruce Yandle, *The Political Limits of Environmental Regulation: Tracking the Unicorn* 87 (Quorum Books 1989).

46 Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 *J Legal Stud* 1, 106 (1987).

47 Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 *J Econ Q* 1, 391 (1983).



restriction of access and those that favor its expansion. It posits that after the initial period of bipartisan support for federal environmental policies, Democrats continued to favor the expansion of access for environmental citizen suits, while Republicans worked to limit or restrict it.

As the issue became increasingly partisan, members of Congress are expected to adjust their voting behavior to respond to the interests of their core constituencies. Table 1 demonstrates the absence of a historical relationship between congressional decisions on access and the party in control of the executive and legislative branches.

**Table 1: Access Amendments and Party Control of Presidency and Congress**

Statute	Year of Amendment	Overall Effect on Access	Party of the President	Majority Party of House of Representatives	Majority Part of Senate
Clean Air Act	1970	Expanded	Republican	Democratic	Democratic
	1977	Expanded	Democrat	Democratic	Democratic
	1990	Expanded	Republican	Republican	Republican
Clean Water Act	1987	Expanded	Republican	Democratic	Democratic
Resource Conservation and Recovery Act	1984	Expanded	Republican	Democratic	Republican

Each statute was enacted at a time when each party controlled one of two branches of the federal government and was often amended under similar circumstances. It does not appear that either party opposed the enactment because each amendment, irrespective of the statute, led to the expansion of access. Therefore, it appears that both parties may favor the expansion of access or do not have a position on it.

In the broader context of federal environmental policy, attitudes do divide ideologically. For example, in the decade before Congress expanded access through the CAA Amendments of 1990, the Reagan administration sought to systematically diminish the ability of the federal government to enforce environ-

mental regulations.<sup>48</sup> Through budget cuts and the appointment of Ann Gorsuch to lead the EPA, President Reagan and other leading Republicans undercut the goals of environmental acts. In the absence of adequate federal enforcement, it again fell to private individuals to maintain federal environmental standards.<sup>49</sup>

Tietenberg and Naysnerski find that reductions to the EPA's budget led to "an increase in private enforcement activity during this period."<sup>50</sup> It is hard to imagine that Republicans did not know that the citizen suit provisions would act as a safety net for environmental regulatory enforcement. If they indeed knew this, then why did they support—or, not obstruct—the expansion of access in the CAA? While it could be that conservatives' distaste for federal intervention in the environmental movement carried over into all aspects of governance, it is also possible that they were willing to support environmental statutes so long as they were enforced by private citizens rather than by federal administrative agencies.<sup>51</sup> Even if this were true, it does not directly address the decisions made by members of Congress not to oppose expansion of access that resulted from their amendments to the statutes.

The reason that members of Congress have not undertaken efforts to limit access may be related to the underlying relationship between the policy preferences of constituents and decisions made by members of Congress. If members of Congress adopt policy positions that are based on the policy preferences of their constituents, then it may be that the link between access and substantive environmental outcomes is too indirect for constituents to form opinions. If this is true, then it is possible that the decisions made by members of Congress do not correspond to their ideological positions. However, to the degree that members of Congress recognize that their decisions on access affect other substantive outcomes, they are expected to make decisions that are in line with their constituents' views of those other policies. It is more probable that institutional factors modified congressional ideologies noted here.

### *Institutions*

Consideration of how the institutional characteristics of Congress affect decisions on access is most informative when done in a comparative context. Komesar insists that this is because "[institutional choice] is always a choice among highly imperfect alternatives. The strengths and weaknesses of one institution versus

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48 Michael E. Kraft and Norman J. Vig, *Environmental Policy in the Reagan Presidency*, 99 *Polit Science Q* 1, 426–33 (1984).

49 Barry Boyer and Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 *Buffalo L Rev* 1, 870 (1985).

50 Tom Tietenberg and Wendy Naysnerski, *Private Enforcement of Federal Environmental Law*, 68 *Land Economics* 1, 28–48 (1992).

51 Beverly M. Smith, *The Viability of Citizens' Suits under the Clean Water Act after Gwaltney of Smithfield v Chesapeake Bay Foundation*, 40 *Case W Reserve L Rev* 1, 41–45 (1989).

another vary from one set of circumstances to another.”<sup>52</sup> This study will now use the three questions posed at the start of this passage as starting points for its comparative institutional analysis. It will examine to what degree the decisions made by Congress can be understood as products of the institutional characteristics of Congress, federal courts, and private parties.

Beginning with the decision to involve private parties in the enforcement of the statutes, Congress may have viewed this method as an optimal response to the situation in which it found itself. Rather than tailor the level of access to the level of enforcement desired, Congress adopted what McCubbins and Schwartz call “fire-alarm oversight,” in that it turned to private individuals to ensure the realization of its environmental legislative goals through their supplementary enforcement of the statutes.<sup>53</sup> The diffusion of enforcement capabilities in the private population allows Congress to achieve a more efficient distribution of resources while furthering its policy goals.<sup>54</sup> To involve private parties, it only needed to provide the necessary rights and incentives. Senator Muskie’s discussion of these incentives was referenced earlier; they included attorney fees and civil penalties—neither of which requires funds from Congress. However, this does not account for the fact that private parties are not accountable to Congress. Even with incentives in place, Congress has less control over the advancement of its environmental goals than it would have if it tasked the executive branch with the enforcement of the statutes.

It may be that some members of Congress saw citizen suits as tools of executive branch enforcement. By including the notice requirement, which requires litigants to notify the administrator of their intent to sue, Congress ensured that the EPA would have an opportunity to step in and litigate the claim itself should it choose to do so.<sup>55</sup> In other words, Congress may have used incentives to involve private parties as watchdogs who amplify the coverage of the executive branch at little to no cost to the federal government. To secure this relationship, Congress established a procedure that allows the federal government to maintain control over the enforcement process. Overall, the employment of both private parties and the executive branch allows Congress to make use of the relative strengths of both institutions, and thereby reduces or avoids the opportunity costs that arise from the inefficient allocation of resources. In this case, the prerogative is to enforce environmental statutes.

The next two questions accept the fact that private parties are involved in the enforcement of the statutes and ask what factors determined their final forms

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52 Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 5 (Chicago 1994).

53 Matthew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 *Am J Polit Science* 1, 166 (1984).

54 *Id.* at 53.

55 Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws* 1, 10304 (1983).

and what led to their modification over time. In particular, it is not clear why Congress did not return to and limit the access provisions in response to shifts in ideological views toward the environment. One explanation could be that Congress decided that the courts are best able to serve as their own gatekeepers.

If Congress took on the responsibility of determining who is permitted to bring what types of claims to federal court, it would face a large number of transaction costs and collective action problems. In terms of its balance between no access and unlimited access, it would require Congress to set aside broad determinations and focus on identifying and defining every claim that can be brought as an environmental citizen suit. This would require far more work, as Congress would be forced to navigate the competing interests represented by its members. This is why it is less costly for Congress to be vague when it defines access—especially as views toward environmental law grew more ideologically divisive at the federal level. For federal courts, there are fewer costs associated with determinations of access because it is defined on a case-by-case basis. Whereas Congress defines access in terms of statutes that apply broadly, federal courts determine it within the context of cases and their facts. It may be that Congress recognized this and decided to let the courts bear most of the responsibility in this area.

If Congress preferred to leave the majority of individual access determinations to the courts, it could be that the inclusion of the 60-day notice requirement<sup>56</sup> and diligent prosecution exception, coupled with the investment of first hearing in district courts, assured members of both parties that access would not endanger their broader environmental interests, irrespective of the judge. With this assurance, they chose to focus their efforts and resources on the substantive environmental policies that more directly drive their constituents' voting behavior. If this holds, the amendments that affected access under the statutes may be best understood as congressional responses to judicial decisions. This would mean that once the statutes were enacted and the federal judiciary began hearing citizen suits, Congress would move to amend the statutes only when it was dissatisfied with the level of access maintained by the courts.<sup>57</sup> In response, Congress would alter the incentives embedded in the access frameworks and make other modifications that signal the courts to interpret access more broadly.

This study does not claim that any one of these factors was dispositive in congressional decisions that determined access to the CAA, CWA, and RCRA. However, it does take the position that they are elements of broader ideological and institutional forces that shape the direction of environmental policy in Congress and the decisions its members make in the context of access policymaking. In particular, the institutional considerations outlined above help explain the

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56 As well as the 90-day requirement included in section 7002 of the RCRA.

57 Roger A. Greenbaum and Anne. S. Peterson, *The Clean Air Act Amendments of 1990: Citizen Suits and How They Work*, 2 *Fordham Env L Rev* 1, 88 (2011).

continued expansion of access for environmental citizen suits over time, despite a growing ideological split in attitudes toward it. This study now turns to the quantitative analysis of federal court decisions to determine how judges have interpreted the statutes and applied the law in citizen suits over the past four decades.

## FEDERAL COURTS

### Determinants of Access

#### *Judges as Policymakers*

Like members of Congress, federal judges make decisions on access claims that are the products of their ideologies and the characteristics of their institution. The idea that judges make ideological decisions is formalized in the attitudinal model of judicial decision-making, which holds that Supreme Court justices vote to advance their ideological attitudes and beliefs.<sup>58</sup> Scholars have extended the model's framework to the federal courts analyzed in this study.<sup>59</sup> When applied to the historical context of citizen suit provisions, the model provides a basis to infer that conservative judges are less likely to vote in favor of parties who seek to expand access than are liberal judges. Over time, this relationship may depend on a number of factors. In this study, those include the identities of litigants, time period, and court level. The litigant variable is hypothesized to have a direct relationship on access decisions and the time period. Court level variables are hypothesized to have directional effects on the relationship between the ideologies of judges and their access decisions. In addition to these hypothesized variables, a statute control variable was added to control for variations in ideological positions across statutes.

In contrast to Congress, federal courts are structured such that the ability of judges to make ideological decisions depends in part on the level of their court within the judicial branch. Zorn and Bowie find evidence that the hierarchical arrangement of district and circuit courts constrains district court judges' abilities to make decisions that reflect their individual views relative to circuit court judges and Supreme Court justices.<sup>60</sup> Because of the intra-institutional variations between the courts, the analysis section is split between district and circuit courts. The separate analyses will demonstrate how the relationship between ideologies and judicial decisions varies with respect to the institutional differences between federal courts.

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58 Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* 64 (Cambridge 2002).

59 Robert A. Carp and Ronald Stidham, *The Federal Courts* 1–283 (CQ 2001).

60 Christopher Zorn and Jennifer Barnes Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 *J Polit* 1, 1213 (2010).

### *Mechanics of Judicial Policymaking*

Litigation of CAA § 304, CWA § 505, and RCRA § 7002 begins in federal district courts. Any number of private citizens or groups, including environmental organizations, private businesses, and individuals, may initiate cases. Plaintiffs share a common desire to enforce one or more provisions of the three statutes and often litigate multiple statutes in a single case. There may also be multiple issues involved in a given case, and although access is not always one of them, every case discussed or analyzed in this study led to a decision by one or more judges on an access claim.

Once a judge issues a ruling at the district court level, litigants may file an appeal to the courts of appeals and later a petition for a writ of certiorari to the U.S. Supreme Court. When measured by volume, the majority of litigation occurs at the district court level, and it decreases at each subsequent level. Because the Supreme Court has issued few decisions on access in environmental citizen suits, its decisions are not included in this study's analysis or discussion.

At each court level, decisions produce outcomes that depend on institutional characteristics, ideological attitudes, and legal considerations.<sup>61</sup> In suits that litigate access claims, these factors are realized within two distinct contexts that relate to the claims themselves. The first situation arises when there is both a substantive and an access claim before the court. The court must first address access before reaching the substantive claim. These decisions are not explicitly linked to any substantive environmental issue, but they do produce noteworthy outcomes. For example, a decision that bars the litigant from pursuing a CAA citizen suit will prevent a potential enforcement measure of the Act's standards or limitations. In the second situation, which occurs when access is the only issue before the court, the decision can contribute to the same kind of outcome in other cases; it can limit or expand access in a way that affects how other parties are able to enforce environmental statutes. Therefore, when making these determinations, judges may be revealing their underlying policy preferences toward environmental policy.

### Hypotheses

The analytical portion of this study examines how judicial decisions on access claims relate to the underlying ideological preferences of judges. It begins by hypothesizing a positive relationship between judges' ideological positions and their decisions. It then tests additional hypotheses to determine how the identity of the litigants relates to decisions and how the relationship between ideology and decisions is impacted by the court level and time period of litigation.

H1: The more liberal the judge, the more likely he or she is to favor the

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61 Michael A. Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* 4–13 (Princeton 2011).

expansion of access to federal courts for environmental litigation. If judges vote for outcomes based on their ideological preferences, then their decisions in citizen suits should reflect their overall positions on environmental issues. The citizen suits analyzed in this study inherently seek to expand access to enforce the CAA, CWA, or RCRA. There is a direct link between decisions in these cases and substantive environmental outcomes. Decisions that restrict access to one of these statutes limit the enforcement of that statute, and vice versa. Therefore, those that seek to limit the enforcement of environmental statutes will vote to restrict access for citizen suits. This is consistent with Rathjen and Spaeth's work on the Burger Court, which found that "the liberal Justices, headed by Douglas, vote to open access; the moderates occupy the middle positions, while the conservatives vote to close access..."<sup>62</sup> The courts section of the study begins with this hypothesis, then introduces three additional hypotheses that will examine how the impact of ideology on decisions is affected by other ideological considerations and institutional characteristics.

H2: As environmental regulation became more ideologically divisive, the relationship between the ideological views of judges and those judges' decisions grew stronger. Whereas the litigant variable relates to individual decisions, the year of litigation may capture the broader effect of the environmental movement on access decisions. As the consensus of the 1970s eroded, the ideological divide sharpened between proponents and opponents of the citizen suit provisions. If decisions made by federal judges reflects this, then the relationship between ideology and decisions on access is expected to become more significant over time. In particular, the significance is expected to increase starting around the 1980s. This is captured by conservatively dividing the time periods between 1970 to 1977 and 1978 to 2016.

H3: Circuit court judges' decisions are more strongly positively related to their ideological preferences than are those of district court judges. At the district court level, judges are constrained by precedents set by the courts of appeals and the Supreme Court, which may limit the prerogative of district court judges to make decisions that fully reflect their ideological positions.<sup>63</sup> Conversely, circuit court judges may enjoy a greater opportunity to make decisions that further their policy goals. To understand how this distinction affects access decisions, the analysis is divided between the two court levels.

H4: Litigants who have developed expertise in making access claims are more likely to prevail, and thus the identity of the litigant may relate to the decision of the court. Under Galanter's "repeat players" and "one-shotters" frame-

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62 Gregory J. Rathjen and Harold J. Spaeth, *Access to the Federal Courts: An Analysis of Burger Court Policy Making*, 23 *Am J Polit Science* 1, 380 (1979).

63 Christopher Zorn and Bowie Jennifer Barnes, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 *J Polit* 1, 1213 (2010).

work, the two classes of litigants face different cost-benefit analyses when deciding whether to litigate their claims.<sup>64</sup> These differences result in legal strategies that may correspond to certain levels of quality and rates of success. For example, environmental organizations can only litigate claims believed to present favorable odds of success, whereas individuals may be likely to litigate all claims that affect them, regardless of whether they are likely to prevail. In addition to the differences in the quality of their cases, these two parties also possess different capabilities and resources. The funding and expertise of environmental organizations such as the Sierra Club and Natural Resources Defense Council are difficult for individuals to match. As a result, the parties involved in a citizen suit claim may affect the degree to which the ideology of the judge determines the case outcome.

C1: On average, judges may be more favorable to access claims under some such statutes than others, irrespective of the impact of their ideological preferences. Each statute regulates different aspects of the natural environment, implicates different economic interests, and entails distinct costs to consumers and producers. When judges hear cases, they may be using different cost-benefit analyses depending on the statute. Hence, their decisions should be understood within the context of the statutes themselves. In the analysis, statute control variables were included to isolate these effects and determine to what degree statutes are related to decisions on access.

## Methodology

### *Sample*

A sample of 535 federal court cases was collected from the Environmental Law Reporter (ELR).<sup>65</sup> The ELR is a periodical published by the Environmental Law Institute that includes data on congressional and judicial environmental decisions and articles, as well as analyses written by legal and environmental scholars. Its judicial section contains every federal environmental case heard in federal court from 1970 to the present. This study included all cases decided between 1970 and Spring 2016 that litigated one or more of the CAA, CWA, or RCRA and contained a decision that was reached on an access claim made within the context of a citizen suit provision.

Of the 535 selected cases, 95 were brought under the CAA, 266 under the CWA, and 174 under the RCRA. All CAA and RCRA cases returned by the ELR that met this study's criteria were included in its analysis. The number of CWA cases returned by the ELR required this study to limit its analysis to a sample of

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64 Marc Galanter, *Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change*, 19 L & Soc Rev 1, 95–150 (1974).

65 Environmental Law Reporter (Env L Institute, Aug 6, 2016), archived at <https://perma.cc/3G83-M7YK>.



them.

The CWA sample was gathered using the ELR advanced search feature, which returned federal district, circuit, and Supreme Court cases that were ordered according to their relevance to the entered search terms.<sup>66</sup> As was mentioned earlier, Supreme Court cases were not included. The remaining cases were reviewed in the order in which they were returned by the ELR to determine whether they met the established criteria. Those that did were added to an SPSS Statistics dataset until a sufficiently large sample was collected. Despite the fact that the sample is not strictly random, there is no reason to believe it is systematically biased in a way that would affect the analysis of this study. Once all of the cases for each statute were added to the dataset, variables were created and used to evaluate the hypotheses.

### *Variables*

One dependent variable and four independent variables were created. The dependent variable measures federal judges' decisions on access claims. All district and circuit court cases are coded for the dependent variable: decisions that expanded access were coded 1, those that had a mixed effect were coded 2, and those that restricted access were coded 3.

The first independent variable is a measure of the ideological preferences of federal judges. It is based on the work of Giles, Hettinger, and Peppers (GHP), who created scores for courts of appeals judges.<sup>67</sup> To do this, they used Poole and Rosenthal common space scores for presidents and members of Congress.<sup>68</sup> The common space scores are based on congressional voting behavior and presidential positions on issues in Congress, and they range from -1 (most liberal) to +1 (most conservative). GHP then applied these scores to courts of appeals judges using two rules, both of which reflect the fact that presidents typically defer to senators from the affected state who are members of their party. First, when there is no senator of the president's party from the state in which a district court judge will serve or from which a circuit court judge comes, the president's common-space score is assigned to the judge. Second, when there is at least one senator from the president's party from the state, the score of that senator is assigned to the judge. If there are two senators from the president's party, then the average of their scores is used. Their work was later extended by Christina Boyd to create scores for district court judges.<sup>69</sup> The GHP and Boyd scores provide this study with an equivalent measure

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66 "Federal Water Pollution Control Act" and "citizen suits."

67 Michael W. Giles, Virginia A. Hettinger, and Todd Peppers, Picking Federal Judges: A Note on Policy and Partisan Selection Agendas, 54 *Polit Rsrch Q* 1, 623–41 (2001).

68 Keith T. Poole and Howard Rosenthal, *Congress: A Political-Economic History of Roll Call Voting 1–232* (Oxford).

69 Christina L. Boyd, Federal District Court Judge Ideology Data (Aug 9, 2016), archived at <https://perma.cc/8LUB-L5SS>.

of judicial ideological preferences that is used to evaluate the relationship between the ideologies of judges and their decisions on access in both district and circuit courts.

The number of judges who vote in circuit court cases, which is almost always three, requires the creation of additional ideological score variables. Whereas the decisions of district courts are regressed against the ideological score of the judge, the decisions of courts of appeals are regressed against both the ideological score of the opinion-writing judge and the mean of the ideological scores of all judges who voted in the case. This is done to account for the finding of Lax and Rader, among others, that the opinion-writing judge wields a disproportionate influence over the outcome of a case.<sup>70</sup> By using both the ideological score of the opinion-writing judge and the average ideological score of the court, the analysis will be able to account for either situation to determine decisions at the circuit court level.

The litigant variable accounts for five categories of parties: federal government, state government, business, environmental groups, and private individuals. The variable was then converted into dummy variables, which were created for both petitioners and defendants. Three dummy variables were created for petitioners: business, environmental groups, and individuals.<sup>71</sup> Four were created for defendants: federal government, state government, business, and individuals. The federal government was least likely to be the petitioner in a case, so it was used as the base value for the petitioner dummy variables. Environmental organizations were least likely to be the defendant, so they were used as the base value for the defendant dummy variables. Stata was not always able to include every dummy variable in the analysis due to the number of observations and covariance of the variables. In the tables and analyses below, dummy variables were included when possible and only discussed when Stata produced estimates for them.

An interaction term was created to measure the strength of the relationship between decisions and GHP ideological scores in two time periods: 1970 to 1977 and 1978 to 2016. To do this, a variable is added to the model that multiplies the time period and ideological variables. In this model, the relationship between the decision and ideological variables can be interpreted at different times, which allows it to test the hypothesis that the sharpening of the ideological divide over environmental issues over time corresponded to a strengthened relationship between judges' ideologies and their votes.

The court level variable takes two values, which were used to divide the dataset between district and circuit court cases. Each case was coded for the

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70 Jeffrey R. Lax and Kelly Rader, *Bargaining Power in the Supreme Court: Evidence from Opinion Assignment and Vote Switching*, 77 *J Polit* 1, 660 (2015).

71 Federal and state governments do not initiate citizen suits and therefore are not used as petitioner variables.

variable, but it is not explicitly included in the models below. Its impact can be observed in how the strength of the relationship between decisions and ideology differs with the court level.

The statute variable takes three values, each of which corresponds to one of the statutes. Once every case in the sample was coded for the statute variable, those values were used to create dummy variables. Of the three statutes, the CAA had the fewest cases in the dataset, so it was used as the base value. The base value is used to compare the effect of the statutes on decisions, which serves as a control for differences that may exist in how judges view access across different statutes.

In the analysis section, Stata models are used to examine relationships between the dependent and independent variables. The names of the variables in the statistical software differ from how they are expressed in this study. Table 2 presents the Stata variables with their corresponding meanings.

**Table 2: Stata Variable Meanings**

<b>Stata Variable</b>	<b>Value</b>
<i>judgeOneScore</i>	GHP Score
<i>cwa</i>	CWA Dummy Variable
<i>rcra</i>	RCRA Dummy Variable
<i>probusiness</i>	Business Petitioners Dummy Variable
<i>proindivid</i>	Individual Petitioners Dummy Variable
<i>oppbusiness</i>	Business Defendants Dummy Variable
<i>Year7077</i>	Time Period Variable used to create Interaction Term
<i>interact70~C</i>	Interaction Term Based on Ideological and Time Period
<i>MeanIdeology</i>	Mean GHP Score of Circuit Court Judges

### Analysis

#### *Procedure*

The dataset was split between 367 district court cases and 146 circuit court cases, and separate analyses were used for each dataset to evaluate the relationships of the independent variables with decisions on access. An ordered logit

model was used to account for the unknown distances between values taken by the decision variable.

### *District Courts*

Are judges' ideological positions and litigant identities significantly related to decisions? If so, how do the time period and court level affect these relationships? This study expects the coefficient of the ideological score variable to be positive, meaning that as ideological scores increase, the likelihood of a decision to restrict access increases. In Table 3, the model found no significant relationship between judges' ideological positions and their decisions across the period. The lack of a relationship is valuable evidence for evaluating the theoretical claim that district court judges are less able to make ideological decisions than are their circuit court counterparts. This will be discussed in further detail after the circuit court analysis is presented.

Of the litigant identity dummy variables, only petitioner environmental groups had a significant relationship with decisions. In the context of Galanter's framework, this could be evidence that environmental groups are better able and equipped to litigate access claims. It could be that environmental groups possess expertise advantages over business petitioners and resource advantages over individuals. The insignificant relationships of the remaining dummy variables and decisions may indicate that decisions are more closely related to the type of access claim rather than the characteristics of the party that brings it. To test whether this is true, cases in which access is used to challenge environmental regulation would have to be included.

There is no indication that the statute under which an access claim falls affects the relationship of ideological positions with decisions. It seems that the impact of ideology on decisions under each statute is the same. In the next model, the interaction term will be added to evaluate the effect of time on the variables.

**Table 3: Estimated Relationships of Variables in District Court Cases**

Variable	Coefficient	Std. Err.	z	P> z	95% Conf. Interval
judgeOneScore	-.020	.129	-0.15	0.877	-.273 .233
cwa	-.356	.306	-1.16	0.244	-.955 .243
rcra	-.111	.334	-0.33	0.740	-.755 .544
probusiness	-.092	.445	-0.21	0.835	-.965 .780

Variable (cont)	Coefficient (cont)	Std. Err. (cont)	z (cont)	P >   z   (cont)	95% Conf. Interval (cont)
proenv	-.906	.408	-2.22	0.026	-1.705...-.107
proindivd	.302	.428	0.71	0.480	-.536...1.141
oppbusiness	-.785	.227	-3.45	0.001	-1.23 -.339

The interaction term is hypothesized to have a significant negative relationship, which would indicate that the relationship between decisions and ideological scores strengthened over time. Using a one-tailed test, the model finds a statistically significant positive relationship at the 5% significance level. The coefficient value of the interaction term indicates that there was a stronger positive relationship between ideologies and decisions from 1970 to 1977 than there was in the years after 1977.

**Table 4: District Court Cases with Interaction Term**

Variable	Coefficient	Std. Err.	z	P> z	95% Conf. Interval
judgeOneScore	-.040	.131	-0.31	0.759	-.298 .217
cwa	-.297	.318	-0.93	0.350	-.921 .326
rcra	-.041	.350	-0.12	0.907	-.728 .646
probusiness	-.125	.451	-0.28	0.782	-1.009 .759
proenv	-.931	.416	-2.24	0.025	-1.747 -.116
proindivd	.280	.434	0.65	0.518	-.569 1.130
oppbusiness	-.786	.230	-3.41	0.001	-1.237 -.335
Year7077	.404	.532	0.76	0.448	-.639.....1.447
Interact70-C	2.615	1.566	1.67	0.095	-.454 5.684

Because of the significance of the interaction term in the previous model, the impact of ideology on decisions is estimated for both periods. The model is used to produce estimated probabilities of each type of decision. In Tables 5 and 6, the model first sets the ideological score to one standard deviation more liberal than the mean score, then one deviation more conservative than the mean score, while holding all other variables at their median values to produce estimated probabilities for each time period.<sup>72</sup> The model is expected to find a stron-

ger relationship between ideology and decisions in the first period than it does in the second based on the direction of the interaction term in Table 4.

It is important to note that although the interaction term is statistically significant, this does not mean that the underlying relationship between ideology and decisions is as well. In fact, an analysis of the relationship between 1970 and 1977 finds a significance level of .064. This falls short of the standard .05 criterion, so it is not certain that the differences in means below exist. Statistical significance notwithstanding, the models that follow will be used to evaluate the hypotheses that the time period and court level affect the relationship between ideology and decisions.

**Table 5: Estimated Probability of Decisions When Judge's Ideological Score is One Standard Deviation More Conservative and More Liberal than the Mean, 1970-1977**

Quality of Interest	Mean Probability of Decision to Expand Access (95% Conf. Interval)	Mean Probability of Mixed Decision on Access (95% Conf. Interval)	Mean Probability of Decision to Restrict Access (95% Conf. Interval)
One Standard Deviation More Liberal than the Mean	.723 (.446, .908)	.074 (.028, .123)	.203 (.603, .446)
One Standard Deviation More Conservative than the Mean	.420 (.133, .753)	.097 (.051, .135)	.483 (.173, .801)
Difference Between the Means	.303	-.023	-.28

**Table 6: Estimated Probability of Decisions When Judge's Ideological Score is One Standard Deviation More Conservative and More Liberal than the Mean, 1977-2016**

<b>Quality of Interest</b>	<b>Mean Probability of Decision to Expand Access (95% Conf. Interval)</b>	<b>Mean Probability of Mixed Decision on Access (95% Conf. Interval)</b>	<b>Mean Probability of Decision to Restrict Access (95% Conf. Interval)</b>
One Standard Deviation More Liberal than the Mean	.677 (.525, .80)	.086 (.053, .122)	.237 (.134, .368)
One Standard Deviation More Conservative than the Mean	.673 (.519, .800)	.087 (.053, .124)	.241 (.141, .376)
Difference Between the Means	.004	-.001	-.004

The data in the tables above show that the estimated impact of ideological preferences on decisions was larger from 1970 to 1977 than it was from 1977 to 2016. In the first period, the value of the ideological scores had a large impact on the probabilities of decisions. In the second period, there was almost no observable difference. With all other variables held at their median values, these probabilities provide a good estimate of the impact of ideology on decisions. However, this study posited the opposite—that the divide over environmental policy would correspond to ideological behavior in the courts.

One possibility why the relationship between ideology and decisions is stronger in the first period than in the second is because district court judges were not as constrained by precedent. Once the citizen suit provisions were created, judges were unable to look at past decisions to inform their interpretations of the claims before them. This could have led district court judges to make decisions based on their ideologies rather than the interpretations of appellate courts. As circuit courts reviewed the district courts' decisions and began to develop a body of law, district court judges were less able to make decisions that reflected their own interpretations of the citizen suit provisions. Rather, they simply applied the law as understood in their circuit. To the degree that this is a plausible explanation, the same procedure will be used to analyze circuit court decisions. If circuit court judges were able to maintain their ability to make ideological decisions in access cases, then it would underscore how differences in the court levels affect the realization of environmental policy.

### *Courts of Appeals*

The methodologies and models used to analyze district court decisions are now used for courts of appeals decisions. In Table 7, the coefficient of the ideological variable is positive for both the opinion-writing judge and the mean ideological score of judges who voted in the case. This is in line with the hypothesis that liberal judges vote to expand access and conservative judges vote to restrict it. However, the relationship between the ideological score of the opinion-writing judge and the court's decision is not statistically significant at .05. Instead, it is the mean ideological score of the judges who voted in a case that is significantly related to their decision. It could be that these access decisions are viewed as too important to let one judge decide the outcome. Instead of delegating a substantial portion of the decision-making authority to the opinion writer, judges seem protective of their ability to use access cases to advance policy interests. As a result, the outcomes of these cases are dependent in part upon the average of the ideological positions of the judges who hear them.

The dummy variables are largely insignificant at the circuit court level. With 146 circuit court cases included in the sample, it is difficult to interpret the magnitudes of the variables. Even without statistical certainty, a few thoughts can still be offered. If resource and strategic differences between litigants were responsible for the success of environmental organizations at the district court level, then it is difficult to imagine why the same would not hold here. Indeed, with a bigger sample, this might be shown to be true. However, if it is true that the type of claim, not the identity of the litigant, is related to decisions, then these findings hold. Whether this is true over time will be tested next with the use of the interaction term.

**Table 7: Estimated Relationships of Variables in Courts of Appeals Cases**

Variable	Coefficient	Std. Err.	z	P> z	95% Interval	Conf.
judgeOneScore	.159	.158	1.00	0.315	-.151	.469
meanIdeology	3.497	1.099	3.18	.001	1.344	5.651
cwa	-.638	.504	-1.27	0.206	-1.625	.350
rcra	.255	.596	-0.43	0.669	-.913	1.422
probusiness	-1.692	.963	-1.76	0.079	-3.580	.197
proenv	-1.394	.835	-1.67	0.095	-3.031	.243
proindivd	-1.818	.902	-2.02	0.044	-3.586	-.051
oppbusiness	-.439	.397	-1.11	0.268	-1.217	-.339

With the interaction term added to the model, the data in Table 8 show that the interaction term is not significant at the circuit court level. This is reiter-



ated by the near-to-no changes in the coefficient on the ideological score of the opinion-writing judge and the litigant identity. Unlike at the district court level, the impact of judges' ideological positions on their decisions is constant across the two periods.

**Table 8: Courts of Appeals Cases with Interaction Term**

Variable	Coefficient	Std. Err.	z	P> z	95% Interval	Conf.
judgeOneScore	.158	.158	0.99	0.320	-.153	.468
meanIdeology	3.535	1.138	3.11	0.002	1.306	5.765
cwa	-.695	.522	-1.33	0.183	-1.719	.329
rcra	.171	.617	0.28	0.781	-1.038	1.380
probusiness	-1.681	.974	-1.73	0.084	-3.589	.228
proenv	-1.37	.845	-1.62	0.105	-3.028	.284
proindivd	-1.781	.913	-1.95	0.051	-3.570	.007
oppbusiness	-.453	.399	-1.13	0.256	-1.236	.330
Year7077	-.765	.945	-0.81	0.418	-2.616	1.087
Interact70-A	-2.645	4.891	-0.54	0.589	-12.231	6.941

Next, the ideological scores were again set one standard deviation below and above their means while holding all other variables at their median values to produce estimated probabilities. It should be noted that the simulations are based on Table 7, not Table 8, due to the insignificance of the interaction term. The data are in line with this study's hypothesis: liberal judges are more likely to expand access and conservatives are more likely to restrict it at the circuit court level.

**Table 9: Estimated Probability of Decisions When Court's Ideological Score is One Standard Deviation More Conservative and More Liberal than the Mean**

<b>Quality of Interest</b>	<b>Mean Probability of Decision to Expand Access (95% Conf. Interval)</b>	<b>Mean Probability of Mixed Decision on Access (95% Conf. Interval)</b>	<b>Mean Probability of Decision to Restrict Access (95% Conf. Interval)</b>
One Standard Deviation More Liberal than the Mean	.541 (.308, .749)	.054 (.015, .096)	.404 (.206, .643)
One Standard Deviation More Conservative than the Mean	.157 (.056, .341)	.031 (.008, .073)	.811 (.610, .930)
Difference Between the Means	.384	-.023	-.407

It is now appropriate to ask why the mean ideological position of circuit court judges is related to their decisions when the ideological position of district court judges is not related to decisions after 1977. To answer the first part of the question, this study used the attitudinal model as a basis to hypothesize judges' decisions in access cases given their ideological positions on the environment. At the circuit court level, the study found that the mean ideological position of judges who hear an access case is significantly related to its outcome. However, it did not find the same for district court cases. One possibility is that the difference in the types of cases heard at either level affects the judges' decision-making abilities. District court judges make decisions in every citizen suit heard in federal court. They are often determining whether petitioners meet the prerequisite requirements or are precluded by the diligent prosecution exemption. When these are the dispositive issues in a case, the decision may not relate to ideological attitudes. For example, if a petitioner has failed to provide 60 days' notice to the administrator, then the judge's views may not affect his or her decision to restrict access to the petitioner. By the time these cases filter through the district courts to the circuit courts, it is less likely that these issues are the focus of litigation. Instead, the ambiguity of the issues allows circuit court judges to make decisions consistent with their ideological positions. As a result, the impact of

ideology on decisions differs with the court level.

## CONCLUSION

Judicial scholars have for some time posited that ideological attitudes and policy preferences drive judicial decisions, and the evidence produced in this study supports their position. However, the results of the study also speak to the realization of policy through institutional choices. When Congress committed federal resources to the conservation of the environment, it was forced to make choices that would determine its level of success. The CAA, CWA, and RCRA provide many examples of those choices but are particularly interesting because of their shared citizen suit provisions. In their structure and purpose, the provisions empower two institutions in the enforcement of environmental standards. Together, private parties and federal courts have determined the statutes' levels of enforcement. Over time, the involvement of these parties in the litigation of environmental citizen suits has led to a large number of decisions by federal judges on access claims, which relate differently to the institutional attributes of their courts and the year of litigation. Moving forward, private individuals will decide to take upon themselves the fight in federal court to advance the goals envisioned by the CAA, CWA, and RCRA. Their right to do so is the result of four decades of decisions made in Congress and federal courts, as well as a function of the ideologies of decision makers and the attributes of their institutions.



<b>ARTICLE</b>
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**PRIVATE MILITARY COMPANIES AND INTER-  
NATIONAL LAW:  
THE GOOD, THE BAD, AND THE UGLY**

Trevor Kehrer, The University of Southern California

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ABSTRACT

Demand for private military companies' services has increased in the 21st century. These corporations fill combat, service, and support roles for the militaries of several nations, especially the United States.<sup>1</sup> They are usually chosen to fill these gaps due to assumptions about their comparatively low cost<sup>2</sup> and their ability to act outside the constraints that would normally bind state armies.<sup>3</sup> These assumptions, however, are not wholly sound. In documented cases, fraud and overbilling erode the cost-effectiveness of private military companies, and obligations under international humanitarian law and customary human rights law do, in fact, apply to them. While private military companies have become deeply entrenched in a few necessary wartime operations of some states, organizations like these have also abused the absence of effective constraints by contributing to several human rights abuses in the 21st century. Private military companies have argued that they enjoy sovereign immunity when employed by a state, and so they cannot be held individually responsible for any violations of law.<sup>4</sup> However, recent American court cases show that the claim of shared sovereign immunity between contractors and countries is partially attenuated.<sup>5</sup> Private military companies and their client states are bound by applicable domestic laws, international humanitarian law, and customary law stemming from international human rights norms, otherwise known as *jus cogens*.<sup>6</sup> In spite of this, it has been difficult to ensure the accountability of private military companies and their employers under these forms of law. Examples of successful prosecutions of private military companies have been extremely rare and protracted in the American judiciary and unheard of in the international human rights enforcement apparatus. This is primarily due to the faulty definition of a mercenary in current international humanitarian law and states' unwillingness to proscribe what

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1 Sean McFate, *The Modern Mercenary* 16 (Oxford 2014).

2 *Id.* at 47.

3 *Id.* at 48.

4 *Koochi v United States*, 976 F2d 1328 (9th Cir 1992).

5 *Id.*

6 Andrew Clapman, *Human Rights Obligations of Non-State Actors* 82 (Oxford 2006).

they defend as necessary operations for national security. Thus, in the interest of safeguarding universal human rights, a new international instrument that allows for the prosecution of private military companies, their employers, and any entity that commits gross human rights violations must be adopted and applied by the United Nations.

## I. INTRODUCTION

Private military companies, speaking broadly, are private corporations that offer services to the national militaries of states that do not provide those services independently. These services include armed security, information services, and logistical support, among others. Private military companies have evolved to fill the vacancies left in the militaries of large nation-states which reduced the size of armed forces following the Cold War. While national militaries have declined in size, private military companies have, as analogues of the mercenaries of centuries past, experienced a resurgence due to the growing market for providers of comparatively cheap and on-demand assistance to national militaries.<sup>7</sup> They aim to quickly fill gaps in national militaries' capabilities.

Not all of private military companies' activities appear, at first glance, to be worthy of civil suit or criminal prosecution. After all, private military companies seem to be doing what national soldiers would be doing anyway, and neither the companies nor soldiers are usually the subjects of civil lawsuits or indictments for criminal wrongdoing. This perception is true most of the time, although there have been a number of documented incidents that demonstrate grave corporate misconduct.<sup>8</sup> Some of these cases are arguably war crimes, as defined by the Rome Statute of the International Criminal Court.<sup>9</sup> For example, the Nisour Square massacre in Baghdad, the result of a private military security operation, caused the deaths of 14 civilians and wounded 18 more.<sup>10</sup> Brutality against non-combatants in wartime was intended to be proscribed by the terms of the Geneva Conventions, especially by the Fourth Geneva Convention<sup>11</sup> and Common Article 3.<sup>12</sup>

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7 McFate, *Modern Mercenary* at 46 (cited in note 1).

8 Chia Lehnardt, *Individual Liability of Private Military Personnel under International Criminal Law*, 19 *Eur J of Intl L* 5, 1017-21 (2008).

9 Rome Statute of the International Criminal Court Art 8, International Criminal Court, (Jul 17, 1998), UN Doc A/CONF.183/9.

10 United States Department of Justice, *Four Former Blackwater Employees Found Guilty of Charges in Fatal Nisur Square Shooting in Iraq* (Oct 22, 2014), online at <https://www.justice.gov/opa/pr/four-former-blackwater-employees-found-guilty-charges-fatal-nisur-square-shooting-iraq>.

11 Jean Pictet, *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War – Commentary 3-5*, International Committee of the Red Cross (1958), online at [https://www.loc.gov/tr/frd/Military\\_Law/pdf/GC\\_1949-IV.pdf](https://www.loc.gov/tr/frd/Military_Law/pdf/GC_1949-IV.pdf).

12 *Id* at 14, 40.

In other cases that do not involve combat, human rights may be violated by indirect means, including negligence, aiding an agent involved in committing human rights abuses, or by failing to heed responsibilities.<sup>13</sup> These sorts of transgressions fall under the purview of international human rights norms, otherwise known as customary human rights law.<sup>14</sup> Historical precedent shows that in cases where human dignity and rights have been eschewed by corporate actors while representing or working on behalf of a state, the corporate actor is liable for engaging in violation of human rights, even if they were not employed by a state that recognized such responsibilities.<sup>15</sup> Regardless, the enforcement of the terms of customary human rights law, the Geneva Conventions (hereafter referred to as international humanitarian law), and even domestic law, has been lacking with respect to these corporate actors.

## II. FRAMING CONCERNS ABOUT THE USE OF PRIVATE MILITARY COMPANIES

The growing prevalence of and dependence on private military companies is distressing for multiple reasons. First, from an ethical standpoint, it is not sound to rely on private military companies to any substantial degree. Private military companies respond primarily to market forces, not the ethical and legal obligations that bind their clients. Even though those obligations have been shown to extend to the companies themselves when acting as a state's agent, private military companies do not make a profit because of how closely they follow the commands of ethics, law, or common sense.<sup>16</sup> State employment of free-market guns-for-hire is thus, as would be expected, not necessarily conducive to loyalty or maintenance of ethical conduct. As Colonel Thomas X. Hammes, a retired American Marine officer, said in a 2005 interview, "When you're a soldier or Marine, you sign an unlimited contract with the country. You're willing to give your life. A contractor's not saying that."<sup>17</sup> An army's soldier is pledged to his or her government and directly bound by the agreements that government has made. Private military companies, on the other hand, can act as if they are above the terms that constrain their employers. Without the strong relationship be-

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13 Rach Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* 71 (Oxford 2004).

14 *Id.* at 72.

15 Discussed in detail in Section V: Historical Precedent for the Use of Human Rights Norms and Law.

16 *Id.*

17 Public Broadcasting Service, Interviews – Marine Col. Thomas X. Hammes, (Mar 21, 2005), online at

<http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/hammes.html>.

tween citizen-soldier and state and the explicit agreement of the state to maintain certain human rights standards, the best way to keep private military companies from acting illegally and unethically is to introduce economic and legal mechanisms that produce disincentives for malfeasance. Civil suits for damages that result from violations of international humanitarian law and customary human rights law, for example, would serve as a legally enforceable economic incentive against engaging in such activities.

Second, there are unresolved legal concerns about the use of private military companies. Most prominently, the similarities between actors that have been traditionally understood as mercenaries and private military contractors are impossible to ignore. This brings the legality of some particularly violent private military services into question.<sup>18</sup> What especially complicates legal matters, regardless of the aforementioned similarities, is that when these companies make mistakes, they do not usually face justice. Private military companies attempt to dodge their obligations under domestic and human rights law by claiming, in response to the concept of civil suit as a potential remedy, that they enjoy sovereign immunity from civil suit when acting as the agent of a state.<sup>19</sup> As will be seen, this claim is a double-edged sword, but the historically prevailing conception was that private military companies did, indeed, enjoy sovereign immunity from civil suit when employed by a government and advancing a “uniquely federal interest.”<sup>20</sup> In addition, as private actors, private military companies are not compelled to reveal information to the public. As a result, legal scholar Martha Minow explains, “military contractors often evade the oversight intended to determine contract performance.”<sup>21</sup> In other words, many details about the activities of private military companies are not public knowledge, and without the dissemination of that information, guaranteeing their accountability for illegal activity is near-impossible.

Third, another, more problematic legal notion exists in addition to these two: according to Minow, there is a common conception that private military companies additionally “enjoy exclusions from other legal constraints that would attach to government actors engaged in the very same activities.”<sup>22</sup> If private military companies are state representatives in all relevant respects, they would enjoy full sovereign immunity from civil suit. On the other hand, if they truly are the direct representatives of their national government clients, they should also be

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18 See Section III: Unique Challenges Presented by Private Military Companies.

19 *Boyle v United Technologies Corp.*, 487 US 500 86 (1998).

20 Sean Watts, *Boyle v United Technologies Corp. and the Government Contractor Defense: An Analysis Based on the Current Circuit Split Regarding the Scope of the Defense*, 40 *Wm & Mary L Rev* 2, 690 (1999).

21 Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 *BC L Rev* 5, 995 (2005).

22 *Id.* at 995.



responsible for revealing the details of their activities as agents. They would also certainly be culpable for wrongdoing under domestic criminal law, customary human rights law, and international humanitarian law. By avoiding many legal repercussions of being involved in the representation of client states until recently, private military companies received substantial benefits from straddling the line between the public and private spheres.

Finally, from a practical standpoint, private military companies may not offer the significant advantages over national militaries. In addition to contemporaneous problems related to fraud and contract violation, the continued use of private military companies may threaten the very states that use them.<sup>23</sup> Currently, there is only one major purchaser of private military company services: the United States.<sup>24</sup> Adding a profit motive to warfare may be more injurious to the aims of nation-states than they are aware of. Colonel Hammes commented that a problem with private military companies is “this crossover of priorities where what the contractor’s doing in filling his contract may be having an adverse effect on your war effort.”<sup>25</sup> Contemporarily, it is not difficult to imagine a scenario where more than one state engages in hostilities and has the means to purchase the services of predominantly American private military companies. In such a case, the aims of American private military companies and the American government itself may be at odds. At that point, the American government may be more willing to prosecute private military companies under the terms of domestic law, international humanitarian law, or customary international human rights, as it did in historical cases. Presently, however, little progress has been made in this direction and application of these standards has been sparse.

### III. UNIQUE CHALLENGES PRESENTED BY PRIVATE MILITARY COMPANIES

The previous point about conflicting private and state objectives is speculative, but credible reports of corruption and abuse on a grand scale nonetheless exist. For example, in 2010, the United States government noted several egregious cases of contractor misconduct in Afghanistan. The most serious of these included the employment of “warlords and strongmen” with ties to the Taliban and personnel with “little to no training as security guards for US bases.”<sup>26</sup> This information was only revealed after a year-long government inquiry into contractor behavior in Afghanistan.<sup>27</sup> The traditional and effective counter to these trends

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23 See Section V: *nique Challenges Presented by Private Military Companies.*

24 *McFate, Modern Mercenary* at 12 (cited in note 1).

25 *Id.* at 12.

26 *Inquiry into the Role and Oversight of Private Security Contractors in Afghanistan*, S Rep No i-88, 111th Cong, 2d Sess ix-x (2010).

27 *Id.* at 2.

when present in democratic government is public dissemination of information and public oversight. However, as has been discussed, since private military companies are largely American private entities, they are exempt from American Freedom of Information Act disclosure requests. Despite enjoying limited sovereign immunity, private military companies need not disclose the same quality and quantity of information for which an equivalent government actor would be responsible. Thus, public information regarding their finances and activities is almost nonexistent.<sup>28</sup> This is a challenge for ensuring efficacy in the use of private military contractors. Even in a case where Halliburton Company, the prior owner of private military company Kellogg Brown and Root, Inc., was accused of overcharging the United States \$61 million for gasoline and \$186 million for meals not served, the company settled out of court and claimed that it would not reveal relevant information about the extent of their finances and activities to the public.<sup>29</sup> This is a challenge to ensuring that private military contractors are used effectively.

None of this is to say that private military companies are inherently oppositional to international or domestic law. In many cases, private military companies serve purposes that are far less controversial. Many will still contest that private military companies are not truly representatives of their client states, but the likelihood of the companies' culpability for violations of law and norms varies with the kinds of activities in which they engage. Companies such as Titan Corporation, Total Intelligence Solutions, and Lincoln Group conduct "operational coordination," "intelligence coordination," "information warfare," "cyber-warfare," and other non-lethal support services for national militaries.<sup>30</sup> These operators are referred to as "combat service companies."<sup>31</sup> Another group of private military companies, identified as "combat service support" organizations, are responsible for the comparatively tame tasks of supplying soldiers and civilians with provisions, maintaining equipment, and facilitating transportation.<sup>32</sup> While still capable of being in violation of humanitarian law, human rights norms, and domestic law, the combat support service entities are of lesser concern, since their activities are less likely to violate human rights law and norms than using lethal force for profit.

On the other hand, the core activities of some private military companies

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28 The Freedom of Information Act, 5 USC § 552 as amended by Public Law No 104-231, 110 Stat 3048.

29 Julie Mason, Halliburton Back in the Fray, *Houston Chronicle* (Sept 18, 2004) and David Ivanovich, Army, Halliburton Talk Settlement, *Houston Chronicle* (Oct 23, 2004), in Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 *BC L Rev* 5, 995 (2005).

30 McFate, *Modern Mercenary* at 16 (cited in note 1).

31 *Id.*

32 *Id.*

can appear to clearly undermine the spirit of international humanitarian law, international human rights norms, and domestic law. The ramifications for the judicial applicability of universal human rights are gravely concerning if these illegal activities cannot be effectively and fairly adjudicated. For example, corporations like Blackwater, now known as Academi, specialize in the so-called “military enterprise” of “combat” and “generating foreign forces.”<sup>33</sup> These terms translate to offensive and defensive operations by employees and establishing or demobilizing foreign militaries, respectively.<sup>34</sup> Another private military company, CACI International, Inc, was responsible for interrogation services at institutions like the infamous American prison at Abu Ghraib.<sup>35</sup> Activities like these are the most compatible with the traditional understanding of a mercenary – a professional, stateless soldier who battles on behalf of a client nation for private profit. The spirit of this sort of activity is precisely what the United Nations’ International Convention against the Recruitment, Use, Financing, and Training of Mercenaries (hereafter referred to as the Mercenary Convention) aimed to legalize.<sup>36</sup>

Specific examples of the United States government using private military companies that are less than trustworthy are plentiful: Blackwater received over \$1 billion in contracts from the federal government for services in the Middle East from fiscal years 2001 to 2006.<sup>37</sup> The US House of Representatives estimated that Blackwater contracts in the Middle East ultimately cost the US six times what national soldiers would have cost in equivalent conditions.<sup>38</sup> Predictably, Blackwater operatives were the ones found criminally liable in the wake of the Nisour Square massacre.<sup>39</sup> While the guilty verdict for four Blackwater contractors in the related and drawn-out *United States v Slough*<sup>40</sup> case is welcome, it highlights the potential volatility involved in making use of modern-day mercenaries who are more than willing to use lethal force, even irresponsibly, if it means generating revenue. L-3 Communications Corporation, a large private military company tasked primarily with offering maintenance and logistic support, settled out of court with the federal government in 2008 when allegations of fraud, abuse, and blatant disregard for contractual requirements surfaced.<sup>41</sup> The

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33 Id.

34 McFate, *Modern Mercenary* at 16 (cited in note 1).

35 *Al Shimari v CACI et al*, 679 F3d 205 (4th Cir 2014).

36 Resolution 44/34, UN General Assembly, 72nd mtg (Dec 4, 1989).

37 Additional Information about Blackwater USA, House of Representatives Committee on Oversight and Government Reform (Oct 2007), online at <http://oversight.house.gov/documents/20071001121609.pdf>.

38 Id.

39 United States Department of Justice, *Four Former Blackwater* (cited in note 10).

40 *United States v Paul A. Slough, Evan S. Liberty, and Dustin L. Heard, Defendants; United States v Nicholas A. Slatten, Defendant*, 22 F Supp 3d 16 (DCC 2014).

41 United States Department of Justice, *L-3 Communications Corp. Pays US \$4 Million to Settle Overbilling Allegations in Iraq War Contract* (US Dept of Justice, 2008) online at <https://www>.

same company was later temporarily suspended from federal contracts in 2010 when it was discovered that its employees had used a federal computer network and resources to “collect business data” on its competitors “for its own purposes.”<sup>42</sup>

Another example of a private military company that engaged in unethical conduct is the aforementioned former Halliburton subsidiary Kellogg Brown and Root, the largest private military company, in terms of employed personnel, in the Middle East.<sup>43</sup> Kellogg Brown and Root provided general logistical support to American soldiers. However, their operations are also stained with controversy. In addition to the Halliburton lawsuit, a dozen Oregon National Guard soldiers filed a lawsuit against Kellogg Brown and Root for knowingly and carelessly exposing them to the carcinogen hexavalent chromium while providing security on behalf of the company for the Qarmat Ali water facility in Iraq.<sup>44</sup> Minow explains that private military companies “often bypass private market competition through sole-source bids and other waivers of marketplace practices.”<sup>45</sup> In this way, private military companies crowd out competition in specialized, necessary fields and resultantly become the sole provider of those services. Consequently, in addition to the legal avenues that private military companies have to insulate themselves from penalties, they also have relative immunity from market forces that would otherwise help ensure their efficacy and compliance with contracts. Evidently, private military companies do not always provide their services in a way that is economical, fair, or consistent with relevant law and norms.

#### IV. FOUNDATION FOR CORPORATE HUMAN RIGHTS RESPONSIBILITIES

The theory of corporate social responsibility, the belief that corporations serve a societal function and not just an economic one, developed over the course of the 20th century. While there is no universal definition of corporate social responsibility, a number of general descriptions are indicative of the concept as a whole; corporate social responsibility proclaims that corporations are expected to maintain certain social standards, goods, and services, in addition to generating revenue for private purposes. Corporations are generally believed to be responsible for, among other obligations, “contribution to a better society,” “contribution

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[justice.gov/archive/opa/pr/2008/December/08-civ-1069.html](http://justice.gov/archive/opa/pr/2008/December/08-civ-1069.html).

42 Nathan Hodge, *Spotlight on Private Firms at Pentagon*, (Wall Street J, June 12, 2010), online at <http://www.wsj.com/articles/SB10001424052748704463504575300821052126364>.

43 T. Christian Miller, *Contractors Outnumber Troops in Iraq* (LA Times, July 4, 2007), online at <http://articles.latimes.com/2007/jul/04/nation/na-private4>.

44 *Defense Contractor Ordered to Pay Millions to National Guard Soldiers* (CNN, Nov 3, 2012), online at <http://www.cnn.com/2012/11/02/justice/oregon-national-guard-lawsuit>.

45 Minow, 46 BC L Rev at 995 (cited in note 21).

to economic development,” “how [they] interact with their employees, suppliers, customers and communities,” and actions stemming from ethical commitments “beyond legal requirements.”<sup>46</sup> These aspects that describe corporate social responsibility may or may not be prescribed by law, depending on geography. Regardless of legal compulsion, the broad conceptualization of corporate social responsibility is so well-established and influential in defining the corporate role that corporate leaders often utilize it in order to guide the actions of their companies. Many, if not nearly all, corporations perceive the goals of corporate social responsibility as opportunities for innovation and growth.<sup>47</sup>

Over the course of the past two decades, there has been a shift towards integrating international humanitarian law and customary human rights norms into the theory of corporate social responsibility. This contemporary notion of corporate social responsibility is not an invention. Jesse Dillard and Alan Murray pointed out that, since the 1960s, “corporate responsibility was seen by some as a way of utilizing company resources for broad social ends rather than serving narrow private interests.”<sup>48</sup> As time went on and international human rights law developed, corporate social responsibility came to envelop human rights responsibilities as well, and became increasingly recognized. The belief that businesses have the responsibility to respect human rights has been a topic of discussion and debate “since the 1990s.”<sup>49</sup> Thus, the argument in favor of demanding due corporate regard for the dignity and rights of human beings has been well-established in the literature for at least two decades. It has also been demonstrated that similar beliefs about the role of corporate actors in respecting human rights and dignity have been used to guide judicial decisions regarding corporate actors since the mid-20th century.<sup>50</sup> The concepts of corporate social responsibility and international human rights are, in many cases, complementary. One cannot have a complete understanding of Carroll et al’s expectation of corporate “contribution to a better society”<sup>51</sup> without a complete understanding of the foundation of a good society. In the modern day, acceptance of human rights is so widespread that it is almost taken for granted that a good society upholds and protects them.<sup>52</sup>

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46 Archie Carroll, et al, *Corporate Social Responsibility: The American Experience* 7 (Cambridge 2012).

47 *Id.* at 4.

48 Kathryn Haynes, Alan Murray, and Jesse Dillard, *Corporate Social Responsibility: A Research Handbook* 19 (Routledge 2013).

49 Karin Buhmann, Lynn Roseberry, and Mette Morsing, *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* 3 (Macmillan 2011).

50 See Section V: Historical Precedent for the Use of Human Rights Norms and Law.

51 Carroll, *Corporate Social* at 7 (cited in note 45).

52 Office of the High Commissioner for Human Rights, *Good Governance and Human Rights*, online at <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx>.

## V. HISTORICAL PRECEDENT FOR THE USE OF HUMAN RIGHTS LAW AND NORMS

In addition to the ideological basis for the application of human rights norms to the activities of corporate actors, historical precedent for such a stance towards the leaders of corporations that act as agents of states already exists. This development can be traced to well before the establishment of the United Nations. The East India companies, some of the first examples of modern corporations from centuries ago, acted as agents of the Dutch, English, and French states. They were recognized by political treaties of the time, were given rights, and had responsibilities under international law.<sup>53</sup> The American Federal Judiciary Act of 1789<sup>54</sup> included the stipulation that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>55</sup> This statute became to be known as the Alien Torts Claims Act.<sup>56</sup> More recent international agreements including the United Nations Convention on the Law of the Sea and the United Nations Convention on Civil Liability for Oil Pollution Damage also have stipulations that recognize the duty of private actors to uphold human rights responsibilities and the duty of states to provide for civil remedies.<sup>57</sup>

Most importantly, though, are the series of criminal cases known as the subsequent Nuremberg proceedings. In post-Second World War Germany, a number of trials were arranged by the United States in order to prosecute conspicuous actors within prominent German corporations that were accused by the Allies of conspiring with the Nazi regime. These cases were significant for two primary reasons. First, these were criminal tribunals for private corporate misconduct, not civil cases. Second, the doctrine of universal jurisdiction, the ability of any nation to hold actors liable for human rights abuses, was affirmed by the decisions made in Germany by American authorities. The corporations accused, namely Krupp, I.G. Farben, and Flick, were found to have collaborated with the Nazi German government and assisted in the persecution of Jews and other groups.<sup>58</sup> The leaders of these corporations were indicted in part for committing war crimes, crimes against humanity, and murder; these are charges that could feasibly apply

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53 P.R. Kalidhass, *Determining the Status of Private Military Companies Under International Law: A Quest to Solve Accountability Issues in Armed Conflicts*, 6 *Amsterdam L F* 4, 17 (2014).

54 Judiciary Act, 1 Stat 73 (1787).

55 Alien’s Action for Tort, 28 USC § 1350 (1948) (This quote is drawn from the 1948 Judiciary Act revision).

56 Alien’s Action for Tort, 28 USC § 1350 (1948).

57 Kalidhaas, 6 *Amsterdam Law Forum* at 17 (cited in note 53).

58 United States Holocaust Memorial Museum, *Subsequent Nuremberg Proceedings (Holocaust Encyclopedia, n.d.)*, online at <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007074>.

to particularly violent private military companies today.<sup>59,60</sup> As a result of the trial, twelve death sentences, eight life sentences, and seventy-seven prison terms were imposed upon various Nazi German corporate actors. The proceedings were hallmarked by a belief that Nazi German corporations had obligations, regardless of whether or not their government enforced them. This use of American jurisdiction over human rights abuses in Europe was instrumental in punishing corporate actors that violated principles that would develop into the modern conceptualization of international human rights.

It is thus evident that neither the application of international law to corporate actors nor their responsibility for maintaining a certain standard of human dignity is a new invention. Even corporate actors that assisted the Nazi regime, a government that spurned human rights norms, were held criminally liable for their violation. Current corporate actors would do well to remember this history of application of human rights law and norms, especially through the mechanism of international humanitarian law, so that they may avoid any potential complications resulting from noncompliance in the future.

## VI. JUDICIAL RESPONSES TO CORPORATE LIABILITY FOR HUMAN RIGHTS VIOLATIONS

The increased privatization of warfare and the continued attachment of profit motive to military activities are chilling prospects. However, there have been judicial challenges to the ability of private military companies to act unethically or illegally. Private military companies have attempted to meet these challenges with invocations of sovereign immunity in several lawsuits alleging misconduct or criminal activity. The combination of several court cases has determined the extent of legal protections for private military companies. In one of these cases, *Alan Metzgar, et al v Kellogg Brown and Root, Inc, et al*,<sup>61</sup> the United States Fourth Circuit Court of Appeals held that “simply being the government’s common law agent does not entitle a contractor to derivative sovereign immunity” from lawsuit.<sup>62</sup> *Taylor v Kellogg Brown and Root*,<sup>63</sup> another case filed in the Fourth Circuit, determined that “acting under orders of the military does not, in and of itself, insulate [a] claim from judicial review.”<sup>64</sup> A third case, *Harris v*

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59 United States Holocaust Memorial Museum, *United States v Alfried Krupp, et al* (Holocaust Encyclopedia, n.d.), online at <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007081>.

60 United States Holocaust Memorial Museum, *United States v Friedrich Flick* (Holocaust Encyclopedia, n.d.), online at <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007076>.

61 *Alan Metzgar, et al v Kellogg Brown and Root, Inc, et al*. 13-1430 1 (4th Cir 2014).

62 *Id* at 38.

63 *Taylor v Kellogg Brown & Root Services, Inc* 10-1543 F4th 1 (US App).

64 *Id* at 16–17.

*Kellogg Brown and Root*,<sup>65</sup> explained that:

Where the military does not exercise control but merely provides the contractor with general guidelines that can be satisfied at the contractor's discretion, contractor actions taken within that discretion do not necessarily implicate unreviewable military decisions.<sup>66</sup>

Kellogg Brown and Root, despite its status as a "combat service support" organization, is the subject of all of these landmark civil cases. This lends more support to the claim that, although "combat service support" companies do not engage in battle directly, they may still violate the terms of domestic law. These recent court decisions have significantly stymied the ability of private military companies, no matter how large, to act unethically or illegally and claim sovereign immunity as a universal defense of their conduct. Taken together, these court cases establish that the United States federal judiciary reserves the right to review and punish incidences of private military company misconduct appropriately. If the companies do not enjoy universal sovereign immunity, then individual agents of the companies found to be liable for misconduct can, when applicable, be sued for civil damages and criminal activity. This development is extremely important. Although the cases do not reference them, it shows that the legacy of the subsequent Nuremberg proceedings is still relevant to the judiciary. This is a critical development for any future enforcement apparatus that seeks to apply international human rights standards to corporate actions in the United States and the world.

## VII. RELEVANT INTERNATIONAL AGREEMENTS AND THEIR FLAWS

If private military companies fail to uphold human rights and accept the principles of corporate social responsibility, their employees may run the risk of facing the same fate as the leaders of the Nazi German corporations that precede them. Inviolable *jus cogens* norms, "fundamental, overriding principles of international law," are the source of inspiration for international human rights.<sup>67</sup> Central to the concept of *jus cogens* is the preservation of human life and dignity<sup>68</sup> and the proscription of slavery, torture, and genocide.<sup>69</sup> While implicit at the time, *jus cogens* norms were nonetheless used to convict corporate actors of criminal activity during the subsequent Nuremberg proceedings. *Jus cogens* norms are

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65 *Harris v Kellogg Brown & Root Services, Inc* 12-3204 F3d 1 (US App).

66 *Id* at 15.

67 Cornell University Law School, *Jus Cogens*, Legal Information Institute (Legal Information Institute, n.d.) online at [https://www.law.cornell.edu/wex/jus\\_cogens](https://www.law.cornell.edu/wex/jus_cogens).

68 Ralf Nieto-Navia, *International Peremptory Norms (Jus Cogens) And International Humanitarian Law*, in Antonio Cassese and Lal Chand Vohrah, eds, *Man's inhumanity to man: essays on international law in honour of Antonio Cassese* at 595 (Kluwer 2003).

69 Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 *Euro J Intl L* 491, 495 (2008).



now largely codified in international humanitarian law, international human rights law, and theories of ethics. As such, they ought to be just as capable of being used to convict corporate actors of human rights abuses today as they were in the past.

The four Geneva Conventions of 1949, the seminal documents of international humanitarian law, were signed by all 196 commonly recognized countries and are concerned with dictating the rules of war, including those regarding the wounded and sick, prisoners of war, and the protection of civilians.<sup>70</sup> Additionally, Common Article 1 of the Geneva Conventions, a classic example of enumerated law that derives from *jus cogens* norms, commands that states “ensure respect” of international humanitarian law “in all circumstances.”<sup>71</sup> The obligations that states have as parties to the Geneva Conventions, of course, do not disappear upon enlisting an agent to perform a task.<sup>72</sup> So long as a state is represented by an agent, that agent must give due respect to international humanitarian law. If the agent does not do so, the state has a responsibility to put a stop to and seek justice for any activity that is repugnant to *jus cogens* norms and international humanitarian law.

The Mercenary Convention, which was drafted in 1989 and aimed at curbing the rising use of private military companies in conflict, explicitly forbids any state party from hiring mercenaries, as defined, for the purpose of “participat[ing] directly in hostilities,” “undermining the constitutional order of a State,” or “undermining the territorial integrity of a State.”<sup>73</sup> This instrument is of great value when considering common discontent in the international community about the use of mercenaries, but it is flawed in application. While the prohibition against the use of mercenaries would appear at first glance to be comprehensive, there are two primary barriers to the accomplishment of the convention’s objectives.

The first barrier is that the world’s preeminent user and likely users of private military contractors are not parties to the Mercenary Convention. Thirty-four countries have ratified the instrument, and the instrument’s terms are binding only to those countries.<sup>74</sup> The United States, the world’s primary employer of private military companies, has not signed or ratified the Convention and

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70 Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135, TIAS No 3364 (1949), archived at <https://perma.cc/9PSK-3L6P>.

71 Laurence Boisson de Chazournes and Luigi Condorelli, Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests, 82 Intl Red Cross Rev 67 (2000), archived at <https://perma.cc/7YX5-KJRF>.

72 Louise Doswald-Beck, Private Military Companies Under International Humanitarian Law, in Simon Chesterman and Chia Lehnardt, eds, *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* 115, 133 (Oxford 2007), archived at <https://perma.cc/A5GF-MRCA>.

73 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, UN General Assembly, 72nd mtg (Dec 4, 1989), UN Doc A/RES/44/34, archived at <https://perma.cc/VDK3-TLCF>.

74 Id.

is unlikely to do so. This is a serious challenge, since the majority of private military companies are based in the United States, and so long as they avoid operations in countries that have signed the Mercenary Convention, they may operate with apparent impunity, barring any relevant domestic law. Article 47 of the First Additional Protocol to the 1949 Geneva Conventions includes rules regarding the use of mercenaries that deny them the right to be a combatant or a prisoner of war, but it, too, is subject to the same constraints in application. However, the First Additional Protocol can claim to be rooted in *jus cogens* norms and can claim far more states that have acceded to its terms than the Mercenary Convention: an overwhelming majority of 174 states have signed the First Additional Protocol.<sup>75</sup> The United States, despite having signed all four Geneva Conventions, did not sign the First Additional Protocol. In spite of the United States' opposition, the sheer number of states that have expressed acceptance of the terms of international agreements that regulate mercenaries still supports the conception that "Protocol I and the mercenary-specific conventions deliver a firm message that mercenarism (or perhaps, more broadly, corporate combat) is at least discouraged under international law."<sup>76</sup>

The second barrier is the fact that, even in the countries that have signed the Mercenary Convention, the definition of a mercenary by the terms of the Convention is too problematic to be effectively utilized in a way that forbids their modern, corporate equivalents. The definition of a mercenary in the First Additional Protocol<sup>77</sup> is almost identical to the definition contained in the Mercenary Convention,<sup>78</sup> and so inherits the same difficulties. The definition of a mercenary used by these international agreements is plagued with loopholes and terms that are far too narrow to encapsulate what a mercenary really is in the modern day. McFate claimed that the definition of a mercenary put forth by the Mercenary Convention is "so restrictive yet imprecise that almost no one fits into the category."<sup>79</sup> Geoffrey Best in his book, *Humanity in Warfare*, explains the relative ease with which accusations of being a mercenary can be circumvented. In the book, he remarks with a twinge of ironic humor that "any mercenary who cannot exclude himself from this definition deserves to be shot – and his lawyer with him!"<sup>80</sup> An analyst contributing to the Red Cross's academic journal has further clarified that "not all corporate actors fall within the definition of a mercenary

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75 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3 (1977), archived at <https://ihl-databases.icrc.org/ihl/INTRO/470>.

76 Katherine Fallah, *Corporate Actors: The Legal Status of Mercenaries in Armed Conflict*, 88 *Intl Red Cross Rev* 599, 610 (2006).

77 UN Charter Art 1, archived at <https://perma.cc/ED23-G7CN>.

78 UN Charter Art 47, archived at <https://perma.cc/ED23-G7CN>.

79 McFate, *Modern Mercenary* at 38 (cited in note 1).

80 Geoffrey Best, *Humanity in Warfare* 375 (Columbia 1980).

under international law,” and may so still be entitled to protections under international humanitarian law.<sup>81</sup> Taken together, these developments mean that the line between corporate actors like Blackwater security contractors and true mercenaries as defined by the United Nations remains blurred.

The problematic definitions in these documents are capable of being amended in future agreements. However, as briefly mentioned, the documents themselves are explicitly binding only for states that have elected to ratify them, rather than for all states in general. Contrary to the notion of non-derogable *jus cogens* norms, states may voluntarily agree or disagree to the terms of international agreements, but may not be compelled to do either under the terms of the UN Charter.<sup>82</sup> As such, private military companies are allowed to originate, operate, and proliferate in the states that do not limit their use if those states do not accept and apply the terms of international agreements and make use of effective domestic enforcement mechanisms.

Finally, even if the problems of definition and acceptance of terms were not so prominent, the issue of potentially selective applicability by state parties to the treaties remains. State parties declare their intention to implement the terms of the instruments they ratify. However, without an entity that ensures compliance, they may apply the terms of the agreements selectively or not at all. This has especially been the case with the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (hereafter referred to as the Convention against Torture), which has been notably ratified by the United States.<sup>83</sup> Despite the United States’ acceptance of the terms of the Convention against Torture, it is common knowledge that the United States has been implicated in several controversies centering upon its use of “enhanced interrogation,” a euphemism for torture.<sup>84</sup> As it stands, only the United States executive and judiciary can arbitrate and enforce the terms of the Convention against Torture, because the United States is not a party to the Rome Statute and is thusly outside the jurisdiction of the International Criminal Court. However, it has chiefly been American executive departments, specifically the Central Intelligence Agency and the United States military, that have been implicated in engaging in torture. President Barack Obama signed Executive Order 13491, which restricted the use of interrogation and promised that Common Article 3 of the Geneva Conventions would act as a “minimum baseline.”<sup>85</sup> This includes, among other

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81 Fallah, 88 Intl Red Cross Rev at 610 (cited in note 76).

82 UN Charter Art 2, archived at <https://perma.cc/ED23-G7CN>.

83 Status of Ratification Interactive Dashboard (Office of the High Commissioner for Human Rights, 1996-2014), archived at <https://perma.cc/H3XT-95LE>.

84 Anne Daugherty Miles, Perspectives on Enhanced Interrogation Techniques \*8 (R43906 US Congressional Research Service, Jan 8, 2016), archived at <https://perma.cc/M5K5-SS59>.

85 President Barack H. Obama, Ensuring Lawful Interrogations, 200900007 Daily Comp Pres Doc 1 (2009), archived at <https://perma.cc/XNB3-2MTC>.

things, a prohibition against “cruel treatment and torture.”<sup>86</sup> Despite the Obama administration stopping enhanced interrogation as a matter of policy, it is not clear that any of the officials involved in using torture ever faced justice. Evidently, the executive branch of the federal government may not be relied on to punish conduct that flagrantly violates of the terms of the Convention against Torture.

### VIII. PRIVATE MILITARY COMPANY COMPLICITY IN VIOLATING INTERNATIONAL LAW

The Convention against Torture is especially important because it enumerates the *jus cogens* norm of freedom from cruel, unusual, or degrading treatment or punishment. Despite the fact that this is both a *jus cogens* norm and enumerated in the Convention against Torture and the Geneva Conventions, a state or its representatives may still violate the norm with impunity. Justice in cases of state-sponsored or facilitated torture from within the United States judicial branch has been slow to materialize. The Supreme Court of the United States has not yet ruled on any cases revolving specifically around the torture of detainees.<sup>87</sup> Despite this, one civil case currently being argued under the authority of the Alien Tort Claims Act in the Fourth Circuit Court of Appeals, *Al Shimari v CACI, et al*,<sup>88</sup> has promise to go to the Supreme Court. This case, currently being handled by the Center for Constitutional Rights, argues that CACI, as a private military company employed by the United States, “directed and participated in illegal conduct, including torture, at the Abu Ghraib prison in Iraq where it was hired by the US to provide interrogation services.”<sup>89</sup> To date, no private military company or employee has been held accountable for the torture that occurred at Abu Ghraib, despite the considerable media coverage and common knowledge of the events that transpired there, due in part to corporate complicity.<sup>90</sup> The outcome of *Al Shimari v CACI, et al* will be immensely important, since it will either demonstrate for the first time the American judiciary’s commitment to ensuring the application of the human right and *jus cogens* norm against torture, or continue the status quo of deference to the decisions of executive agencies and the protection of private military companies.

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86 Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135, TIAS No 3364 (1949), archived at <https://perma.cc/9PSK-3L6P>.

87 James Vicini, Supreme Court rejects Guantanamo torture case, Reuters (Reuters Dec 14, 2009), online at <http://www.reuters.com/article/us-guantanamo-torture-idUSTRE5BD31N20091214>.

88 *Al Shimari v CACI et al*, 679 F3d 205 (4th Cir 2014).

89 *Al Shimari v CACI et al* (Center for Constitutional Rights, updated Jan 18, 2017), online at <https://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al>; see *Al Shimari v CACI et al*, 679 F3d 205.

90 Accountability for Torture by Private Military Contractors (Center for Constitutional Rights, Sept 10, 2010), archived at <https://perma.cc/6KJC-V5W4>.

## IX. CONCLUSION – A POTENTIAL INTERNATIONAL SOLUTION

The current framework regarding state use of mercenaries is in desperate need of reevaluation if it is to be effective. The risks associated with the continued and prolific use of private military companies, mixed with the inapplicability of current law, demand that new measures be taken. As the use of private military companies becomes more common, the guidelines and norms that currently exist need to be respected and thoroughly applied to ensure that basic human rights to life, dignity, and freedom from torture and cruel treatment are not trampled by the interests of states or private guns-for-hire.

States that have ratified the UN Charter have accepted the Universal Declaration of Human Rights as an elaboration upon the UN Charter's call for a human rights program.<sup>91</sup> As such, they have also accepted the concept that there are fundamental, overriding rights that states have a duty to protect beyond what is convenient for their interests. Indeed, this is the very essence of universal human rights. Given that respect for the most basic human rights is already universally non-derogable by way of *jus cogens* norms, and given that the enumeration of these norms in the form of international humanitarian law and international human rights law has been woefully ineffective in ensuring their protection, it is clear that a new enforcement apparatus is required. Taking the foundation of the International Criminal Court as inspiration and precedent, it is evident that the United Nations can, in fact, be host to civil and criminal proceedings that involve derogation from basic human rights. However, the International Criminal Court needs to be built upon.

A new international body based on the International Criminal Court and dedicated to the enforcement of *jus cogens* norms in all countries that recognize the UN Charter is a viable solution that would help guarantee the applicability of universal human rights. This body would need to have the power to hear and make decisions about civil and criminal cases that involve derogation from *jus cogens* norms and the basic human rights that stem, at least, from the Universal Declaration of Human Rights. Additionally, the body would need to have the power to enforce its decisions through sanctions or other means, award damages to affected parties, and demand the extradition of indicted parties to stand trial. The scope of this body's power must extend beyond national governments to encompass all organized and individual actors who commit grave violations of basic human rights. Cases would originate or would be appealed to this body, which could then make decisions about which cases are ripe and demonstrate

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91 Draft International Declaration of Human Rights, UN General Assembly Third Committee, 178th mtg (Dec 10, 1948), UN Doc A/RES/217(III), online at <http://research.un.org/en/undhr/ga/thirdcommittee>.

flagrant violations of the fundamental underpinnings of human rights. Finally, the body would have to be truly international in character, and it would have to be subject to relevant checks and balances that stem from the UN Charter.<sup>92</sup> In this way, the body could operate with maximum effect, while still staying within the confines of the power granted to the United Nations by its charter.

Article 2 of the UN Charter explicitly forbids the United Nations from intervening “in matters which are essentially within the domestic jurisdiction of any state or [from requiring] the Members to submit such matters to settlement under the present Charter.”<sup>93</sup> However, the matter of universal human rights is not simply within the domestic jurisdiction of states. As established by the theories that influenced the Universal Declaration of Human Rights, the Declaration itself, and the human rights instruments that have flowed from it, protecting and ensuring human rights is a global undertaking. States play a significant role in the maintenance of rights, but where they fail to protect even basic rights, a separate, higher body must take charge to protect the rights of man that the nations of the world have already declared universal. While the International Criminal Court has jurisdiction that would enable it to make the sorts of decisions that the concept of universal human rights needs made in order to be guaranteed, it has only issued three guilty verdicts over the course of its fourteen years of existence.<sup>94</sup> These were all constrained to actors within the continent of Africa.<sup>95,96</sup> It is well known that violations of human rights occur worldwide, not just within the geography that the International Criminal Court has elected to focus on. This new body, then, must have and make use of universal jurisdiction. This universal jurisdiction, akin to that which was used by American authorities after the Second World War to enforce the very same norms that they now allow to be violated, would ensure that not just state parties to a covenant will be held accountable for human rights violations, but all states that allow derogation from the basic human rights principles that they have sworn to uphold.

Today, private military companies that kill and torture for profit evade human rights enforcement mechanisms and operate with a great deal of impunity from their primary client, the United States. This is not a sustainable or acceptable status quo. Corporate human rights violations were not tolerated in the theories that led to the formation of human rights, were not tolerated in the past, and ought not to be tolerated in the future. If it is true that universal human rights do exist as the United Nations proclaims, then action must be taken to ensure that their protection, and not just the rhetoric surrounding their existence, is universal.

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92 UN Charter Chap 5, archived at <https://perma.cc/ED23-G7CN>.

93 UN Charter Art 2, archived at <https://perma.cc/ED23-G7CN>.

94 *About* (International Criminal Court), archived at <https://www.icc-cpi.int/about>.

95 *Reparation/Compensation Stage* (International Criminal Court), archived at <https://www.icc-cpi.int/Pages/ReparationCompensation.aspx>.

96 *Trial Stage* (International Criminal Court), archived at <https://www.icc-cpi.int/Pages/trial.aspx>.

Nothing less than the future of universal human rights itself hangs in the balance.











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