# UNDERGRADUATE LAW REVIEW

at Florida State University

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# UNDERGRADUATE LAW REVIEW
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# VOL. VIII MASTHEAD

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Dear reader,

It is with great pleasure and enthusiasm that I share with you the first ever summer publication of the Undergraduate Law Review at Florida State University, Volume VIII. It has been an honor to oversee the production of this volume and witness the continued growth of this organization, and I am indebted to the alumni of this organization who came before me and helped the Undergraduate Law Review reach new heights of success.

Volume VIII features articles that cover a range of topics from space law to intellectual property law and more. Each article is of the utmost novel legal import and intellectual rigor, and they remind us that the law is a powerful force that shapes every facet of society. Thank you, reader, for engaging in this discourse with us, and I hope that the articles below leave you inspired and eager to continue taking part in legal dialogue.

Most importantly, the success of Volume VIII would not have been possible without the diligence and tenacity of our writers, editors, and the Executive Board. Each member of our summer publication played an essential role in ensuring that this organization remains a platform for meaningful legal discourse. I am privileged to work with such a talented, supportive team.

Sincerely,

Madelyn Luther

President & Editor-in-Chief
Undergraduate Law Review at Florida State University

# UNDERGRADUATE LAW REVIEW

## at Florida State University

Founded in 1996 and re-established in 2020, the mission of the Undergraduate Law Review at Florida State University is to provide an outlet for students who are interested in engaging in legal research and discourse. We aim to foster academic collaboration across campus and provide a platform for students to delve deep into current legal events. Our organization is entirely student-run, edited, and published.

We also engage in cross-campus legal dialogue by frequently publishing guest writers from other universities and through collaboration with partner organizations. Beginning this summer, we are thrilled to launch a partnership with the Florida Undergraduate Law Review of the University of Florida. We look forward to a continued collaborative, innovative relationship with the FULR and we value our ongoing organizational relationship with them.

We are committed to peer learning and uplifting undergraduate voices. We believe that the writers of today will become the leaders, lawyers, and judges of tomorrow, and our organization seeks to cultivate mentorship and scholarly discussion amongst students.

Please note that all opinions expressed in Vol. VIII represent those of individual writers and are not a reflection of our organization or its values. The Undergraduate Law Review at Florida State University is a student-run organization and does not represent the views of Florida State University. While we have made an exerted effort to ensure the accuracy and completeness of the information below, our editors do not assume responsibility for any errors contained herein. Any inquiries can be referred to ulr.fsu@gmail.com.

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## at Florida State University

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# The Constitutional Crisis of COVID-Era Content Moderation

*Written by Bashir Ba*

*Edited by Geetika Kosuri and Elizabeth Cortina*

**Abstract:**

Since the COVID-19 pandemic, the public's distrust of the government has increased. While the vaccine mandates and COVID treatments were rooted in science and trusted by experts, many Americans sought to present alternative medical theories on various social media platforms. Consequently, many platforms created content moderation policies and suppressed COVID-19 skepticism, often without government interference. However, this paper argues that, in some instances, the Biden administration did attempt to coerce social media platforms into suppressing COVID-19 skepticism—and that this was a dangerous violation of the First Amendment.

## I. Introduction

The Biden administration took office during a global pandemic that halted the national economy and disrupted normal life. The coronavirus disease (COVID-19), or coronavirus, was declared a pandemic by the World Health Organization in March 2020, and the months that followed led to international economic uncertainty and inequality as well as widespread feelings of loneliness, depression, and isolation.[1] In September of 2021, President Biden announced broad vaccine mandates for approximately one hundred million Americans.[2] Despite the availability of multiple vaccines and their proven safety and efficacy, many Americans were either hesitant about taking the vaccine or opposed to taking it entirely. Vaccine hesitancy resulted largely from a rise in safety and efficacy concerns shared on social media.[3] While most left-leaning mainstream news platforms relayed the administration's message that the vaccine is safe and necessary to get the country back to pre-quarantine conditions, concerns about expedited clinical trials and potential side effects worried many Americans. Influential podcaster Joe Rogan significantly contributed to opposition to Biden's mandates. In a three hour episode of his podcast, The Joe Rogan Experience, Rogan interviewed Dr. Robert Malone, a physician and biochemist known for spreading misinformation about the COVID-19 vaccine on conservative media platforms.[4] During the interview, which took place in December 2021, Dr. Malone alleged that the COVID-19 vaccines were dangerous for people who have already had COVID-19, claimed that mRNA[5] vaccines are inherently dangerous, and downplayed the risks of the disease.

[1] Pouya Hosseinzadeh et al., *Social Consequences of the COVID-19 Pandemic: A Systematic Review*, 40 Nursing Rsch. Educ. 1 (2022); World Bank, *Finance for an Equitable Recovery* 1–6 (2022).
[2] Zeke Miller, *Sweeping New Vaccine Mandates for 100 Million Americans*, AP News (July 2021), www.apnews.com/article/joe-biden-business-health-coronavirus-pandemic-executive-branch-18fb12993f05be13bf760946a6fb89be.
[3] Tom Sorell & Jethro Butler, *The Politics of Covid Vaccine Hesitancy and Opposition*, 93 Pol. Q. 347–51 (2022).
[4] The Joe Rogan Experience, *Episode 1717: Elon Musk* (May 2022) (downloaded using Spotify).
[5] The U.S. Centers for Disease Control & Prevention defines mRNA vaccines as vaccines that "use mRNA created in a laboratory to teach our cells how to make a protein—or even just a piece of a protein—that triggers an immune response inside our bodies." *See generally* Ctrs. for Disease Control & Prevention, *COVID-19 Vaccine Basics* (Sept.

Anti-vaccine posts spread to millions of people on social media during the pandemic, which hindered the success of the Biden administration's vaccine rollout.[6] This content was deemed harmful as it contradicted the information put forth by the U.S. Centers for Disease Control and Prevention (CDC), and many social media sites, including YouTube, Facebook, and Twitter, either removed the content or provided fact checks.[7] Some alleged that the President demanded this censorship.[8]

On August 24, 2024, Meta CEO Mark Zuckerberg wrote a letter to Chairman Jim Jordan of the Committee on the Judiciary in the House of Representatives. Zuckerberg made serious allegations about political censorship in his letter. Zuckerberg alleged that officials of the Biden administration "repeatedly pressured our teams for months to censor certain COVID-19 content."[9] Furthermore, in an appearance on the Joe Rogan Experience, Zuckerberg claimed that members of the Biden administration demanded that Meta take down memes that implied the vaccines were dangerous.[10] Zuckerberg's letter and podcast appearance suggested that, to influence Americans to take COVID-19 vaccines, the Administration attempted to suppress any dissenting opinions on the vaccine.[11] This could ostensibly be seen as a suppression of First Amendment rights.

These conspiracies made their way into the legal system. In the case of *Murthy v. Missouri*, various departments and government officials were sued for forcing social media

2024), www.cdc.gov/covid/vaccines/how-they-work.htm (providing background information on how mRNA vaccines function in the context of the COVID-19 vaccines created by Pfizer-BioNTech and Moderna).
[6] Janice T. Blane et al., *Social-Cyber Maneuvers During the COVID-19 Vaccine Initial Rollout: Content Analysis of Tweets*, 24 J. Med. Internet Res. 1 (2022).
[7] Craig Timberg, Tony Romm & Jay Greene, *Facebook, YouTube, Twitter Remove Coronavirus Misinformation. So Why Not Other Types of Lies?* Wash. Post (Feb. 2020), www.washingtonpost.com/technology/2020/02/28/facebook-twitter-amazon-misinformation-coronavirus/.
[8] *See* Murthy v. Missouri, 603 U.S. 43 (2024).
[9] Letter from Mark Zuckerberg, Founder, Chairman, and Chief Exec. Officer of Meta Platforms, Inc., to the Hon. Jim Jordan, Chairman, House Judiciary Comm. (2024) (on file with American Rhetoric).
[10] The Joe Rogan Experience, *Episode 2255: Mark Zuckerberg* (Jan. 2025) (downloaded using Spotify).
[11] *See id.*; *see also supra* note 9.

companies to censor free speech, which the plaintiffs alleged was a violation of the First Amendment. While lower courts agreed with the plaintiffs, the decision was reversed and remanded by the U.S. Supreme Court.[12] It found that the plaintiff did not have legal standing and could not prove a direct link between government coercion and social media moderation efforts. While the courts have largely settled the issue of COVID-era censorship of vaccine skepticism, the debate on how the First Amendment should be interpreted in the social media age rages on. It is clear that the First Amendment protects citizens' speech against the government; however, protections regarding speech against private entities are more complicated. Social media companies like Facebook, Twitter, and YouTube have the right and the responsibility to moderate content that is dangerous. However, the government should not influence private platforms' moderation policies. Efforts to coerce private social media platforms to censor certain speech violate the First Amendment right to free speech. Although there is a long history of attempted First Amendment violations by the American government, the COVID-19 pandemic has proved that the current age of social media, coupled with jawboning efforts from federal officials, has made these violations much more dangerous.[13]

## II. The First Amendment and the Government's Historical Attempts to Censor Speech

In the eighteenth century, the Alien and Sedition Acts were the first test of the First Amendment in the American print media sector. In 1798, while the young nation was on the brink of war with France, the Federalists controlled Congress passed a series of acts criminalizing printed criticism of the government. While the Sedition Act made it illegal for all citizens to "print, utter, or publish…any false, scandalous, and malicious writing" about the

[12] *Murthy*, 603 U.S. 43, 76 (2024).
[13] Jawboning is the use of official speech to inappropriately compel another's actions, particularly those of businesses. *See generally* Merriam Webster, *Jawboning*, www.merriam-webster.com/dictionary/jawboning (last visited July 2025) (providing a general definition of the term).

government, in practice, only Democratic-Republican newspaper editors were prosecuted.[14] Although the Sedition Acts were never tested by the Supreme Court, they are generally considered by legal scholars to be unconstitutional.[15] President Jefferson later pardoned those convicted of the acts.[16] The Federalists justified their infringement on the First Amendment with the imminent threat of war.[17] The unconstitutionality of these Acts serves as a precedent that, regardless of the justification—whether it is war or a pandemic—Congress shall never abridge the freedom of speech.

Nearly two centuries later, amid the Cold War, the U.S. government attempted to suppress The New York Times and The Washington Post from releasing the Pentagon Papers, which exposed U.S. operations during the Vietnam War, including decades of manipulation and lies as the United States waged war against the National Liberation Front of South Vietnam.[18] Despite claims that the war would be swift and was essential to stopping the expansion of communism around the globe, these papers revealed that the government covered up the carnage and resources required for success.[19] When the press obtained evidence of the government's lies, the Nixon administration attempted to block the publication of the Pentagon Papers, claiming they threatened national security.[20]

[14] Sedition Act, ch. 74, 1 Stat. 596 § 2 (1798). The Democratic-Republican party was the first opposition political party in the United States. It was founded on Jeffersonian principles of states' rights and a strict interpretation of the Constitution. The party favored liberal political philosophies and stood in contrast to the Federalist party. *See generally* Encyc. Britannica, *Democratic-Republican Party*, www.britannica.com/topic/democratic-republican-party (last visited July 2025) (providing a general definition of the political party).
[15] United States v. Strandlof, 667 F.3d 1146, 1156 (10th Cir. 2012).
[16] Arthur Scherr, *Thomas Jefferson, the "Libertarian" Jeffersonians of 1799, and Leonard W. Levy's Freedom of the Press*, 42 Journalism Hist. 58–69, 61 (2019).
[17] The Federalist Party was an early U.S. national political party that favored a strong central government. Alexander Hamilton, John Jay, and James Madison are infamous for writing the Federalist Papers, which advanced Federalist ideologies and promoted the necessity of a national Constitution. *See generally* Encyc. Britannica, *Federalist Party*, www.britannica.com/topic/federalist-party (last visited July 2025) (providing a general definition of the political party).
[18] New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (also known as the Pentagon Papers Case).
[19] Gabriel Schoenfeld, *Rethinking the Pentagon Papers*, 64 Nat'l Aff. 77–95 (2010).
[20] *See* Ralph Engelman & Carey Shenkman, *A Century of Repression: The Espionage Act and Freedom of the Press* 127 (2022).

The controversy with the Pentagon Papers evolved into the 1971 Supreme Court case *New York Times Co. v. United States*. In a six-to-three vote, the Supreme Court voted against the Nixon administration, deciding its attempt to prevent publication constituted an unconstitutional prior restraint in violation of the First Amendment's protection of freedom of the press.[21] In concurrence, Justice Black wrote that "[P]aramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell."[22] The court affirmed that the Pentagon Papers should be released because the government cannot stop the press from publishing information to the American public. This ruling affirmed that even during crises like war—or by extension, a pandemic—the government cannot suppress criticism or restrict the public's access to information. This Supreme Court case strengthened the protections of the First Amendment to stand strong even during a national crisis.

Understanding the true scope of the First Amendment is essential, particularly in an era when misinformation and censorship debates dominate public discourse. The First Amendment only protects one's speech from government retribution, not from private companies or other people.[23] While government censorship is largely illegal, private companies reserve the right to censor any content they deem dangerous or contradictory to their values.[24] The following sections will explore content moderation during the COVID-19 global pandemic imposed by the

[21] *New York Times Co.*, 403 U.S. at 714.
[22] *Id*. at 717 (Black, J., concurring).
[23] Certain types of speech are deemed illegal under the First Amendment. These less protected areas of speech include defamation and libel, advocacy of illegal action, fighting words, commercial speech, and obscenity. The level of protection for free speech depends on the forum and context in which the speech took place. *See* U.S. Const. amend. I.; Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Miller v. California, 413 U.S. 15 (1973); Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); United States v. Stevens, 559 U.S. 460 (2010); *see also* Legal Info. Inst., *First Amendment*, Cornell L. Sch., www.law.cor
nell.edu/wex/first_amendment (last visited July 2025); *and* Valerie C. Brannon, *False Speech and the First Amendment: Constitutional Limits on Regulating Misinformation*, Cong. Rsch. Serv. (2022).
[24] Am. Libr. Ass'n, *Intellectual Freedom and Censorship*, www.ala.org/advocacy/intfreedom/censorship (last updated Oct. 2021).

Biden administration and analyze relevant case law, including *Murthy v. Missouri*. The First Amendment has its limitations, and U.S. courts must draw the line between ensuring public safety and health and supression of free speech more clearly.

## III. COVID-Era Content Moderation and Government Jawboning

In 2024, the issue of government suppression of anti-mask and anti-vaccine mandates reached the Supreme Court. What would eventually be called *Murthy V. Missouri*, the case where States and citizens joined together to sue "dozens of Executive Branch officials and agencies, alleging that they pressured the platforms to suppress protected speech in violation of the First Amendment."[25] The plaintiffs consisted of the states of Missouri and Louisiana, in part, who alleged that various platforms at the behest of the federal government had suppressed the speech of states, government officials, and citizens.[26] In addition to these two states, the plaintiffs included five individual social media users, including three doctors, a healthcare activist, and a website owner, whose social media posts concerning COVID-19 or the 2020 election were demoted or removed by platforms.[27]

After the district court ruled in favor of the plaintiffs, this case was appealed to the Fifth Circuit of Appeals. The Fifth Circuit affirmed the lower court's ruling and applied a sweeping preliminary injunction on the notion that the plaintiffs require relief because the federal government is likely to suppress their speech again. The Supreme Court, in a six-to-three decision, reversed and remanded the Fifth Circuit's decision, ruling that the plaintiffs did not have standing to seek a preliminary injunction.[28]

[25] Murthy v. Missouri, 603 U.S. 43, 49; Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).
[26] *Murthy*, 603 U.S. at 76.
[27] *Id*.
[28] *Id*.

The Supreme Court, in its examination of the plaintiff's standing, first ruled that the Fifth Circuit erred in its analysis of the plaintiffs as a "unified whole."[29] The Court stated that the "neither the individual nor the state plaintiffs have established standing to seek an injunction against any defendant," and that the plaintiffs must demonstrate standing for each individual claim that they make against each defendant.[30] This set a higher bar for the plaintiff's standing, which they did not meet. The court determined that the plaintiffs largely relied on alleged past social media censorship to claim that the government would censor their future speech. The plaintiffs' argument collapsed when they failed to prove a link between the government's communication with the platforms and the platforms' subsequent censorship of their past speech.[31]

Some of the standing arguments were more persuasive than others. Jill Hines, a healthcare activist and co-director of Health Freedom Louisiana, an anti-vaccine organization, claimed to have experienced multiple instances of censorship from Facebook.[32] In April 2023, Facebook warned Hines after she reposted content from Robert F. Kennedy, a figure the White House had pushed to be de-platformed as part of the "disinformation dozen."[33] However, this argument was insufficient to establish standing, as there was no evidence that the White House demanded censorship of every user who reposts a member of the disinformation dozen nor that Facebook complied.[34]

Justice Alito wrote a striking dissent to the majority opinion. He opined that the government's "power to inflict potentially fatal damage to social media platforms" is inherently

[29] *Id*. at 61.
[30] *Id* at 56.
[31] *Id*.
[32] Jason Hancock, *SCOTUS to Hear Case Alleging Federal Government Bullied Social Media into Censoring Content*, Pa. Cap. Star (Mar. 2024), www.penncapital-star.com/justice-the-courts/scotus-to-hear-case-alleging-federal-government-bullied-social-media-into-censoring-content/.
[33] *Murthy*, 603 U.S. at 63–64.
[34] *Id*.

coercive.[35] The government claimed it was utilizing the President's "bully pulpit to inform, persuade, and protect the public" in its communications to social media platforms, but as Justice Alito asserts, it engaged in a "covert scheme of censorship" that only came to light after discovery.[36] The Biden Administration attempted to use its executive powers to coerce social media platforms to censor posts concerning COVID-19 that contradicted its narrative. The administration's most egregious attempt at coercion was when they called on social media platforms to do more to address COVID-19 misinformation with the incentive of potential changes to the antitrust laws and Section 230 of the Communications Decency Act of 1996.[37] Facebook CEO Mark Zuckerberg called antitrust suits an "existential threat to his company" and spoke to their reliance on the federal government's diplomatic relations for its overseas operations.[38] This executive power over social media platforms exemplifies how suggestions on platforms' fact-checking policies can feel like demands with repercussions for defiance.

In their defense, the federal government provided several legal instances where the President used the bully pulpit to censor private speech. They cited Reagan's push for tough reporting on drugs, Theodore Roosevelt's censorship of and George W. Bush's denunciation of pornography.[39] In all these instances, while calling the media to action, there were no First Amendment violations because they were a public expression of the President's viewpoints.[40] President Biden legally used his bully pulpit when he claimed Facebook was "killing people" by

[35] *Id*.
[36] *Id*. A bully pulpit is defined as a prominent public position, like a political office, that provides an opportunity for expounding one's views. *See* Doris Kearns Goodwin, *The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism* (2013).
[37] Richard W. Painter, *The Question Not Presented: Government and Social Media Corruption After* Murthy v. Missouri, 129 Penn St. L. Rev. 427–80, 440 (2025).
[38] Rebecca Haw Allensworth, *Why Facebook Antitrust Case Relies So Heavily on Mark Zuckerberg's Emails*, Iowa Cap. Dispatch (Dec. 2020), https://iowacapitaldispatch.com/2020/12/20/why-facebook-antitrust-case-relies-so-heavily-on-mark-zuckerbergs-emails/.
[39] *See* Goodwin, *supra* note 36; *see also Missouri*, 603 U.S. (Alito, J., dissenting).
[40] *Id*. (majority opinion).

allowing misinformation to spread on its platform.[41] This was a public expression of the President's thoughts, contrary to private conversations that members of the executive branch held with the platforms.[42] As such, the distinction between private and public communication is crucial to the issue of media censorship. The government has the right to express its views publicly. However, it stretched that power beyond the breaking point when it sent private demands to social media platforms that they censor speech unfavorable to the administration's agenda, which falls outside the bounds of protected presidential persuasion and constitutes a violation of the First Amendment.[43]

The attempts of the Biden Administration to censor COVID misinformation mirror government actions with the Alien and Sedition Acts and the Pentagon Papers. In all three situations during a national crisis, the government attempted to censor speech that hurt their agenda. While in the past the government only attempted censorship during wars, COVID-19 was also a critical and dangerous time in this nation. But the Biden Administration's actions were different and more dangerous because they relied on its executive influence. Rather than criminalizing criticism of the government like with the Alien and Sedition Acts, or applying prior restraints on the release of documents, the Biden Administration relied on more covert tactics. The tactics the Biden Administration utilized in its suppression campaign are harder to identify; hence, it was very difficult for the plaintiffs in the *Murthy v. Missouri* case to establish legal standing. It was not until the courts allowed for discovery that many of their tactics were uncovered, making it extremely dangerous to free speech.[44] This makes strong efforts to

[41] Nandita Bose & Elizabeth Culliford, *Biden says Facebook, Others 'Killing People' by Carrying COVID Misinformation*, Reuters (July 2021), www.reuters.com/business/healthcare-pharmaceuticals/white-house-says-facebooks-steps-stop-vaccine-misinformation-are-inadequate-2021-07-16/.
[42] *Murthy*, 603 U.S. (Alito, J., dissenting).
[43] *Id*.
[44] *Id*. at 77 (majority opinion).

strengthen First Amendment protections on social media and increase transparency of government communication with platforms imperative.

## IV. *Murthy v. Missouri* and the Legal Limits of the First Amendment

Though government suppression of anti-vaccine sentiment constitutes a violation of the First Amendment, it should not be forgotten that COVID-19 is a deadly disease. The United States was in unprecedented times amid this global pandemic, and many people were getting dangerously wrong information about the disease and available treatments. Misinformation was running rampant on social media platforms during the pandemic. In an era where many Americans received their information about COVID-19 from social media, this type of misinformation is particularly dangerous.[45] However, the First Amendment exists to protect all speech from the government, including false speech.[46] False speech should not be allowed to run rampant through social media, but giving the government the power to decide what speech is true and what speech is false and therefore suppress speech that they do not like gives the government the power to engage in unconstitutional propaganda and control the opinions of Americans. Even though the administration was attempting to save lives, this does not justify the broad and unjust use of executive powers. Misinformation on COVID-19 and the vaccine ran rampant on social media sites post-2020, and many people believed in unproven and unfounded medical treatments for COVID-19. But in the Biden Administration's effort to curb this misinformation, they infringed on the First Amendment.

In times of national emergency, such as the COVID-19 pandemic, misinformation must be suppressed. But that suppression should never come from the behest of the government. It is the social media platforms' right and responsibility to moderate content on those platforms.

[45] Darie Cristea et al., *Acceptance, Hesitancy, and Refusal in Anti-COVID-19 Vaccination: A Cluster Analysis Aiming at the Typology behind These Three Concepts*, 10 Vaccines 1496–1507 (2022).
[46] Brannon, *supra* note 23.

Especially as more Americans use social media for news, it is ever more crucial that the information they are getting is correct and backed up with evidence, especially medical information.

In line with their responsibility to protect user safety, social media platforms proved they are capable of censoring dangerous content without government coercion. A significant reason the court did not find that Jill Hines established standing was that Facebook began to reduce the reach of this content before the bulk of the White House pressure to censor this content. This proves that social media platforms can effectively censor dangerous misinformation without government coercion by the president. Furthermore, a free and fair market of social media platforms must be ensured through strict antitrust enforcement. If users want to use social media platforms with less strict moderation policies, they deserve that opportunity as an extension of their right to free speech. By enforcing antitrust laws, larger social media corporations will not be able to dominate the market through anti-competitive strategies.

The Supreme Court was correct in its decisions against the plaintiff in *Murthy V. Missouri*; however, the plaintiffs' inability to establish standing does not mean the government did not attempt to coerce the platforms. The current era of jawboning by the federal government in the social media industry is a significant reason that the plaintiffs could not establish legal standing against the Biden Administration. In the past, the government would censor the speaker or use prior restraint, for example, in the cases of the Sedition Acts and the Pentagon Papers. With the Sedition Acts, President John Adams signed a law prohibiting government criticism, and with the Pentagon Papers, President Nixon attempted to block the press from publishing the papers.[47] These are outright and obvious examples of government censorship. During COVID-19, instead of directly stopping people from posting COVID-19 dissent, they privately

[47] Sedition Act § 2; *New York Times*, 403 U.S. 718 (Black, J., concurring).

and publicly jawboned the platforms to do it for them.[48] By having the platforms censor dissent, which is legal, the government avoids direct responsibility. This makes it harder to establish standing and prove that the government influenced the alleged censorship.

## V. Policy Recommendations: Preventing Coercion of the Press Without Placing Public Health at Risk

Social media is crucial in the free transfer of information and ideas, and the federal government does not have the right to infringe on this type of speech. But misinformation is dangerous, especially concerning matters of public health and science. Hence, platforms should keep the safety of their users in mind and protect global public health, but they should do this independently of government coercion and establish their own content moderation policies. To ensure the government does not violate free speech protection, a congressional independent oversight committee should be established, coupled with a requirement that the government disclose all communication with the media. This allows the White House to communicate its misinformation concerns with social media platforms, while keeping all communication open to public scrutiny. The oversight committee should consist of First Amendment legal scholars, technology professionals, and experts in the field of communication and content moderation.

## VII. Conclusion: Rebuilding Guardrails Around the First Amendment

The Founders of the United States understood that free speech was the backbone of America and a fundamental human right. The right to speak freely facilitates the free flow of ideas that push society forward. Thomas Paine's *Common Sense* galvanized colonial support for independence from the British Empire.[49] In the 1850s, Harriet Beecher Stowe's *Uncle Tom's Cabin* spread throughout the nation, building momentum for abolition.[50] In the twentieth century,

[48] *Murthy*, 603 U.S. at 64.
[49] Thomas Paine, *Common Sense*, in *Thomas Paine: Collected Writings* (Eric Foner ed., 1995).
[50] Harriet Beecher Stowe, *Uncle Tom's Cabin* (John P. Jewett & Co. 1852).

Dr. Martin Luther King's *Letter from Birmingham Jail* disrupted narratives around the civil rights movement and brought about significant change for minorities in America.[51] If the governments these documents criticized had effectively suppressed them, the critical progress they ushered in might never have materialized. Prior to the Civil War, southern states banned *Uncle Tom's Cabin*. Despite the government's attempts to suffocate the influence of the novel, the illustration of immense "suffering experienced by enslaved people" persisted in spreading throughout the entire nation. Individuals like Jill Hines, who reproached the response to COVID-19, are not on the same moral standing as activists like Harriet Beecher Stowe and Dr. King, but their speech should be protected with the same vigour because all speech has the potential to create important progress, and the government can not have the ability to stop that.

In the case of COVID-19, U.S. citizens' ability to propose and test alternative treatments and theories advanced our understanding of the disease, how to fight it, and what policy measures were most effective to protect public health.[52] During Biden's and Trump's administrations, particularly since Trump won a second term and assumed office earlier this year, the Supreme Court has given the presidency increased power.[53] The Biden Administration mishandled that power during the COVID-19 pandemic; in the process of trying to fight the pandemic, they attempted to violate Americans' right to free speech. This trend is continuing under the Trump Administration, as they address student anti-war protests with threats to cut federal funding.[54] For example, the Trump administration is litigating its ability to strip Harvard

[51] Martin Luther King, Jr., *Letter from a Birmingham Jail* in *Why We Can't Wait* (1964).
[52] Trine Stub et al., *The Impact of COVID-19 on Complementary and Alternative Medicine Providers: A Cross-Sectional Survey in Norway*, 8 Advances Integrative Med. 247–55 (2021).
[53] Devin Dwyer, *Supreme Court's Expansive View of Presidential Power Is 'Solidly' Pro-Trump*, ABC News (July 2025), www.abcnews.go.com/politics/supreme-courts-expansive-view-presidential-power-solidly-pro/story?id=123454459.
[54] Claire Shipman, *Columbia University Protests Trump Crackdown*, NBC News (July 2025), www.nbcnews.com/news/us-news/columbia-university-protests-trump-crackdown-rcna198016.

of their federal grant money.[55] While this administration is using different tactics, they share the Biden administration's goal of coercing private institutions into suppressing viewpoints the administration dislikes. This is a clear example of how giving one administration greater powers because you agree with their ideology means giving the next administration the same power to carry out their agenda. Thus, First Amendment cases can not be decided based on the speech being suppressed, but on the right for that speech to be spoken.

In conclusion, whether it is the Vietnam War or a global pandemic, the government may use national emergencies to infringe on the public's rights; there must be adequate structural and judicial guardrails to protect the liberty of Americans. Increased public health and safety measures can come at the expense of personal liberty. During the unprecedented times of the pandemic, it is easy to support government overreach. Yet in the pursuit of order and safety, concessions must be made in freedom. Some concessions are worth it; masks and vaccine mandates saved countless lives.[56] As Benjamin Franklin once said, "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."[57] While extreme, the freedom of speech is an essential liberty that must not be infringed on unless in the most dire of circumstances.[58] Not only were the Biden administration's attempts to coerce social media platforms into suppressing COVID-19 skepticism a violation of the First Amendment, but the nature of social media and jawboning made their coercion increasingly dangerous and harder to prove.

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[55] Betsy Klein**,** *Harvard University Challenges Trump Administration Funding Cuts in Court,* CNN (July 2025), www.cnn.com/2025/07/21/politics/harvard-trump-administration-court.
[56] Niels-Jakob H. Hansen & Rui C. Mano, *Mask Mandates Save Lives*, 88 J. Health Econ. (2023); Craig Mellis, *Lives Saved by COVID‐19 Vaccines*, 58 J. Paediatrics Child Health 2129 (2022).
[57] All Things Considered, *Ben Franklin's Famous 'Liberty, Safety' Quote Lost Its Context In 21st Century*, NPR (2015), www.npr.org/2015/03/02/390245038/ben-franklins-famous-liberty-safety-quote-lost-its-context-in-21st-century.
[58] *Stevens*, 559 U.S. at 468.

# Terrorists or Freedom Fighters? Exploring the Relationship Between Identity, Policy and the Kurdistan Workers' Party Conflict in Türkiye

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**Abstract:**

An interesting relationship between identity and policy presents itself through analysis into the origins of Kurdish terror groups in Türkiye, specifically the Kurdistan Workers' Party (PKK) and its offshoots. As of May 12th 2025, the PKK has announced plans to dissolve, but there is still a need for caution surrounding Kurdish revolutionary groups. The Kurds remain a minority, stateless nation in Türkiye, and multiple ceasefires have failed in the past. Following Situational Identity Theory (SIT), there are certain psychological and social factors that may correlate to terror risk and play a role in PKK recruitment. Historical weaknesses in Turkish policy contributed to some of these factors and consequently hindered the state's counterterrorist goals. If the end of PKK terror is to be sustained, Türkiye must be wary of these factors.

## I. History of Terrorism in Türkiye

Once part of the diverse Ottoman Empire, modern Türkiye is a relatively new state, founded in 1923.[1] Its formation marked a change in the treatment of some ethnic groups, as the Ottoman Empire was primarily Turkish, but was so widespread that to maintain its power with minimal uprisings, it governed with a large degree of tolerance for other ethnic groups.[2] Türkiye was established in the aftermath of the Ottoman downfall, with the intent of being a more unified Turkish nation-state. The Sykes-Picot agreement, while not a formal treaty, was signed between Great Britain and France in 1916, preemptively dividing former Ottoman territory into regional Arab states.[3] This treaty significantly reduced the size of the former empire and the Turks may have perceived the historical toleration of diverse identities as no longer necessary to maintain rule. This regime change isolated those of Kurdish descent, also known as Kurds, a minority ethnic group concentrated in southeastern Türkiye, northern Syria, Iraq, and Iran. Within Türkiye's border, the Kurds make up approximately nineteen percent of the population, as opposed to the seventy to seventy-five percent Turkish majority.[4] Under Ottoman rule, the Kurds possessed a degree of local autonomy, and during the Turkish War for Independence, Mustafa Kemal, the Turkish nationalist leader, made empty promises for Kurdish autonomy in exchange for support.[5] Yet these promises proved to be empty as Türkiye formed its government, they promoted assimilation into the Turkish identity, banning the Kurdish language and other aspects of Kurdish culture.[6]

[1] U.S. Cent. Intel. Agency, Turkey (Turkiye) Country Summary (2020).
[2] Maya Arakon, *Kurds at the Transition from the Ottoman Empire to the Turkish Republic*, 13 Turkish Pol'y Q. 139, 140 (2014).
[3] The Sykes-Picot Agreement is colloquially referred to as an agreement, but it does not conform to a conventional international treaty format. Instead, the agreement was reached over a series of letters between British and French diplomats Mark Sykes and François Georges-Picot. *See* Letters between Mark Sykes, 6th Baronet, and François Georges-Picot (1916) (on file with Her Majesty's Stationery Off., U.K. Off. Pub. Sector Info.).
[4] U.S. Cent. Intel. Agency, *supra* note 1.
[5] Arakon, *supra* note 2, at 147.
[6] *Id*.

The discrimination that the Kurds faced under a new government created significant tensions that led to the birth of a Kurdish nationalist movement. Throughout the 1920s, there were a few Kurdish revolts that were largely unsuccessful and pushed Türkiye to escalate their assimilation practices, deporting thousands of Kurds to other regions of Türkiye and implementing martial law.[7] These early Kurdish rebellions struggled largely because of their fragmented, grassroots origins, which allowed Türkiye to frame the issue as a matter of the so-called "tribe" versus the modern state, instead of as an ethnic one.[8] This framing ultimately led to policy responses that treated the Kurds as a group that could be subdued, rather than culturally respected. In 1978, Abdullah Öcalan, sometimes referred to as Apo, founded the Kurdistan Workers' Party (PKK) to rectify the organizational problems that afflicted earlier decentralized movements, kickstarting a unified Kurdish movement against Turkish nationalism and the government-imposed erasure of Kurdish identity.[9] In the 1970s, other Kurdish groups with similar ideologies were trying to form, but Öcalan's unwavering commitment to an armed rebellion earned his group the most traction.[10] The establishment of the PKK was not an isolated event confined within Türkiye's borders, since Kurdish struggles in neighboring states, such as Iraq and Syria, inevitably influenced Kurds within Türkiye, in spite of government efforts to assimilate Kurds into the Turkish nation-state.[11] Additionally, Kurdish regional successes in the Iran-Iraq war reinvigorated Kurdish national sentiments in Türkiye in the late eighties, which provided the PKK with a stronger base of support.[12]

[7] *Id*.
[8] *Id*.
[9] Murat Yeşiltaş, *The Kurdistan Worker's Party (PKK): Origins, History, and Strategic Transformation*, in *Handbook of Terrorist and Insurgent Groups: A Global Survey of Threats, Tactics, and Characteristics* 417–30, 417 (Scott N. Romaniuk et al., eds., 2024).
[10] Aliza Marcus, *Blood and Belief: The PKK and the Kurdish Fight for Independence* 48–49 (2007).
[11] *Id*.
[12] Robert Olsen, *The Kurdish Question in the Aftermath of the Gulf War: Geopolitical and Geostrategic Changes in the Middle East*, 13 Third World Q. 475, 477 (1992).

Throughout its existence, the PKK has periodically modified its political goals. Developing alongside socialist movements in the 1920s, the PKK was founded on a Marxist-Leninist ideology aimed at establishing an independent Kurdish communist state.[13] More recently, however, their exact vision for the Kurdish state has become less clear, and their goals range from seeking a Kurdish nation-state to merely wanting more Kurdish political rights within Türkiye.[14] As is typical for rural and asymmetric conflicts, the PKK adopted a combined guerrilla and anarchist approach to revolutionary violence in the early 1980s. The group officially launched an armed struggle against the state in 1984 through the establishment of a military arm.[15] Internal conflicts within the organization led to schisms and the creation of other Kurdish revolutionary groups, but the PKK remained the main one.[16] While the United Nations does not, Türkiye, the United States, the European Union, Australia, and Japan all designate the PKK as a terrorist organization.[17]

In contrast with most asymmetric terror conflicts in other states, this struggle saw significantly more armed participant fatalities than civilian fatalities, which indicates some level of caution in target selection. Out of an approximated forty thousand PKK-related deaths, Türkiye reported that 10,374 were civilians.[18] Most fatalities occurred between 1984 and 2000, during the group's main conflict against the Turkish military and government. While some of the civilian deaths were Turks, the PKK has also targeted other Kurds due to fears that village teachers and guards undermined the Turkish administrative legitimacy.[19] In fact, Kurdish village

[13] Aliza Marcus, *supra* note 10.
[14] Murat Yeşiltaş, *supra* note 9.
[15] Nur Bilge Criss, *The Nature of PKK Terrorism in Turkey*, 18 Stud. Conflict Terrorism 17, 18–19 (1995).
[16] *Id*.
[17] Murat Haner et al., *Women and the PKK: Ideology, Gender, and Terrorism*, 30, Int'l Crim. Just. R., 279, 282 (2019).
[18] Juan Masullo & Francis O'Connor, *PKK Violence against Civilians: Beyond the Individual, Understanding Collective Targeting*, 32 Terrorism Pol. Violence 77, 77 (2017).
[19] *Id*.

guards have been heavily targeted in the attacks. While some guards collaborated with the PKK, others were directly employed and armed by the Turkish government. Many of these guards and their families have been killed at the hands of the PKK.[20] Türkiye's Ministry of Foreign Affairs reported that the group's exact terror methods have been diverse, "ranging from attacking infrastructure, various facilities, schools and ambulances, kidnapping nurses, customs officials to using cyanide to poison drinking water supplies; and engaging in unconventional tactics, assassination to drive-by shootings, executing uncooperative civilians, ambushes, kidnapping etc."[21]

Carrying out such attacks is expensive, and the PKK has a long history of utilizing criminal activity to finance their attacks, including drug trafficking, taxation of other drug traffickers, money laundering, and extortion.[22] Türkiye's location makes it central to land trade routes, bridging Europe to Asia and the Middle East. A Turkish investigation that took place during the initial phase of conflict reported that over a four year period there were 181 cases of drug trafficking that could be linked to the PKK.[23] While this is the most comprehensive report on Turkish drug trafficking, it is inherently biased. This data is politicized and Türkiye would be able to justify harsher policy through inflating statistics on the PKK. In one of his trials, Öcalan revealed that at the time, the PKK acquired about two hundred million dollars from certain families and businessmen through taxation of trafficking along Türkiye's borders. The 2003 report from the Turkish Department of Anti-Smuggling and Organized Crime included details from an interview of an imprisoned PKK member, Şemdin Sakık, who stated that, "[t]he resource of our money was drug trafficking. The PKK and Apo have always gotten a big share

[20] Criss, *supra* note 15.
[21] Türkiye Ministry Foreign Aff., *PKK*, https://www.mfa.gov.tr/pkk.en.mfa (last visited July 2025).
[22] Mitchel P. Roth & Murat Sever, *The Kurdish Workers Party (PKK) as Criminal Syndicate: Funding Terrorism through Organized Crime, A Case Study*, 30 Stud. Conflict Terrorism 901, 902 (2007).
[23] Turkish Dep't Anti-Smuggling Organized Crime, *Turkish Drug Report '98* (1998).

from the drug trafficking on the Turkey-Middle East Route. We bought arms with the money gained from there."[24] Most of the data on the PKK's profit comes from law enforcement reports or trials, which means that the numbers are possibly inaccurate because highly organized criminal activity is generally concealed. Organized crime and crimes motivated by profit do not count as terrorism, however, the PKK's underlying motive in all of their illegal financial operations is to generate funding for their attacks.[2526] These operations would undermine the PKK's status as a terrorist group if their motive were to merely make a profit and dominate a market, like the case of cartels, which are not terrorist groups. As of 2025, the PKK is still listed as a designated Foreign Terrorist Organization (FTO) by the United States, who has kept the title since 1997.[27]

In the wake of coordinated terrorist attacks in various American cities on September 11, 2001, the United Nations Security Council adopted Resolution 1373 to condemn international terror groups, explicitly calling states to freeze funding to anyone linked to terror groups.[28] The resolution did not specifically mention any groups, but the European Council's designation of the PKK as a terror group allowed them to, under this Resolution and other European Union (EU) law, freeze their assets.[29] This authority ultimately presented significant challenges to the PKK's ability to move funds and maintain logistical costs. However, the group's reliance on criminal financing helped them overcome this barrier, making the resolution have a weaker effect than intended.

[24] Turkish Dep't Anti-Smuggling Organized Crime, *Turkish Drug Report '03* (2003).
[25] Audrey Heffron Casserleigh & David Merrick, *Terrorism: WTF? Weapons, Tactics, and the Future* (2013).
[26] Roth & Sever, *supra* note 22.
[27] U.S. Dep't of State, *The Foreign Terrorist Organization (FTO) List* 2 (2025).
[28] S.C. Res. 1373 (2001).
[29] Case T-316/14, Kurdistan Workers' Party (PKK) v. Council Eur. Union, ECLI:EU:T:2022:807 ¶¶ 209–13 (2022).

Due to the group's ethnically-linked motivations, the PKK has drawn the most support in the region of Türkiye where most of the state's Kurds live, unofficially known as Kurdistan.[30] Kurdistan spans into other neighboring countries and the PKK has taken refuge in northeastern Syria when it was less safe to operate in Türkiye due to a military coup in 1980 and the Turkish right-wing's staunch nationalist opposition to Kurdish independence movements.[31] Additionally, the PKK has utilized training camps in Lebanon and maintained headquarters in Damascus.[32] Syria most likely provided the PKK with support, both in refuge and arms, to indirectly weaken Türkiye, potentially due to disputes over the flow of the Euphrates River, which both states share.[33] Syria ignored Türkiye's pressure to withdraw support from the PKK until Türkiye finally threatened to invade. At that time, Abdullah Öcalan was forced to leave, fleeing to Kenya, where he was later caught in 1999 by the Turkish National Intelligence Organization and imprisoned, where he remains as of 2025.[34] Originally, Öcalan was sentenced to the death penalty, but in an effort to address human rights concerns and demonstrate commitment towards steps to joining the European Union, Türkiye abolished the death penalty. Öcalan's sentence was changed to life in prison.[35]

Even though Öcalan was imprisoned and therefore it was logistically difficult for him to lead the PKK, the PKK continued to operate under his leadership for over another decade. In spite of his imprisonment, no one else replaced his charismatic leadership. His imprisonment had little effect on diminishing the levels of terror attacks, which, despite multiple ceasefires, continued into the 2010s. More recently, jailed Öcalan released a statement on February 27, 2025

[30] Türkiye Ministry Foreign Aff., *supra* note 21.
[31] Olsen, *supra* note 12.
[32] *Id*.
[33] *Id*.
[34] Roth & Sever, *supra* note 22.
[35] Mirja Trilsch & Alexandra Rüth, *International Decisions: Öcalan v. Turkey. App. no. 46221/99* 100 Am. J. Int'l L. 180, 180 (Daniel Bodansky ed., 2006).

calling for all PKK-affiliated organizations to dissolve due to a change in historical context.[36] While the PKK is one of the larger terror groups in Türkiye and its dissolution may lead to decreased levels of violence, it is still too early to tell if this reduction in conflict will hold. While there has never been a complete dissolution of the PKK before, ceasefires between the group and Türkiye have failed in the past. Furthermore, there are PKK splinter groups, such as the Kurdistan Freedom Hawks (TAK), that could attract embittered PKK members and fuel further conflict. This might be unlikely if the Kurds in Türkiye can be satisfied with the current status, or an increase in status, of their rights and recognition. By U.S. standards, the dissolution of the PKK would mean that there are no legally designated Kurdish FTOs in the region. However, Türkiye's consideration and treatment of affiliated groups as terrorist organizations alongside their role in the expansion of the Kurdish autonomous region poses a risk of further instability.

## II. Situational Identity Theory and PKK Recruitment Tactics

To develop effective counter-terrorist policies, it is important to understand how terrorist groups typically draw support and recruit members: By using indoctrination methods and propaganda to make new members sympathetic to their cause. One theory that could help explain the PKK's influence in Türkiye is Situational Identity Theory (SIT), an individual-level theory developed by social psychologists in the 1970s to explain how identity can affect actions, which describes the formation of intergroup relations out of a desire for community and belonging.[37] These social psychologists found that, "identifications are to a very large extent relational and comparative: they define the individual as similar to or different from, as 'better' or 'worse' than, members of other groups."[38] SIT works in explaining how heightened nationalism can contribute

[36] Özgür Ünlühisarcıklı, *A Turning Point of Türkiye and the Region? Öcalan Calls for the PKK's Dissolution*, Ger. Marshall Fund U.S. (Feb. 2025), gmfus.org/news/turning-point-turkiye-and-region-ocalan-calls-pkks-dissolution.
[37] Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict* in *The Social Psychology of Intergroup Relations* 33–37 (W. G. Austin, & S. Worchel eds., 1979).
[38] *Id*.

to increased levels of violence. The Kurdish identity is a minority in-group that the Kurdish peoples can belong to, and is oppressed by the Turkish majority identity, which they would see as an out-group. Turkish nationalism and government policies, most notably Turkish Law No. 2932, created increased social pressure for Kurds to culturally assimilate and deprived them of their sense of belonging, after they were used to a larger degree of cultural acceptance and respect of their human rights from the Ottomans.[39] The ban on the use of the Kurdish language and other forced assimilation practices were significant causes of friction that made the Kurds feel victimized by the Turks. There was no way for the Kurds to feel a complete sense of belonging within Türkiye at the time, which may have pushed people who were not ordinarily violent into identifying with the PKK's cause, where they felt their culture and identity was not only accepted, but fought for.

SIT is not directly mentioned in reviews done on the PKK's recruitment tactics, but it aligns with some researchers' theories. A 2014 study prefaced that:

> The identity construction process of militants in terrorist organizations indeed is shaped by individual life stories at the micro level, rather than on a macro scale. Moreover, in order to fully comprehend the issue of terrorism, the sociopsychological conditions of individuals who are at the stage of joining terrorist organizations must be analyzed carefully.[40]

They clarify that a complete assessment of terrorist recruitment also requires macro-level analysis. However, this study aimed to statistically break down individual PKK members' life details and the motives that drove them into joining the organization to synthesize a complete picture of the average PKK recruit. Analysis of 2,270 individual records revealed that the average member joined between the ages of fifteen and twenty-one, was unmarried at the time,

[39] Arakon, *supra* note 2.
[40] Süleyman Özeren et al., *Whom Do They Recruit?: Profiling and Recruitment in the PKK/KCK*, 37 Stud. Conflict Terrorism, 322, 323 (2014).

uneducated beyond primary school, and unemployed.[41] Additionally, personal interviews revealed that Turkish cultural practices, like forced marriages and bride exchanges, created familial frictions that drove some away, perceiving a life in the mountains with the PKK as a better option.[42] In all of these cases, it appears that the average recruited member perceived a lack of belonging in a social in-group which pushed them to find acceptance from a chosen family, the PKK. On a macro-level, individually motivated recruitment may be less effective in cases where the person already has a sense of community, whether that was from a career or a successful marriage.[43] The most common factors reported in the survey were family issues, party propaganda in the form of anti-governmental discourse directed towards the youth, ethnic nationalism, and kidnapping.[44]

However, kidnapping and other coercive tactics may not be explained as well through SIT. From the Özeren survey, approximately 11.2% of recruits joined because they were kidnapped by lower-level PKK members. These cases make up a smaller demographic of the PKK's recruits but are still worth mentioning because of how much forced recruitment varies from the typical recruitment processes. Kidnappings generally result in individuals either being indoctrinated to become soldiers or forced into the drug trade.[45]

## III. The Turkish Response

The Turkish response to the PKK is complex, mainly due to an unwillingness to collaborate early on in the conflict. By the time the conflict was taken seriously by Türkiye, many fatalities had already occurred. The harsher that Türkiye implemented anti-Kurdish policies, the stronger the Kurdish resistance and desire to cling to their identity. Following SIT, it

[41] *Id*. at 328.
[42] *Id*. at 331–38.
[43] *Id*.
[44] *Id*.
[45] Roth & Sever, *supra* note 22.

is likely that the oppressive government did more to drive recruitment than any PKK propaganda did. One analysis highlights the failures of Turkish leadership in the 1990s: "Between 1983 and 1989, Prime Minister Turgut Özal's evaluation of the PKK was that they were only a bunch of bandits. Underestimating the PKK caused a loss of valuable time. Resources and proper equipment and training were not provided to fight against guerrilla warfare."[46] This has been to Türkiye's own detriment, costing them tens of thousands of lives, decades of conflict, and an estimated loss of $400 billion.[47] The PKK's 2025 call for dissolution should be viewed cautiously, as all attempts at reconciliation and ceasefires, even one that lasted four years, thus far have failed.

During the beginning span of conflict from 1983 to 1988, Türkiye retaliated with various military strategies against the PKK. They allied with Iraq to launch troops in northern Iraq to curb the Kurdish nationalist movement across borders.[48] Within Türkiye, the nation implemented martial law in Kurdish regions, which allowed the Turkish Armed Forces (TAF) to operate with ease and efficiency.[49] It was during this era of the conflict, in 1985, that Türkiye implemented their village guard system to not only protect locals from attacks and kidnappings, but also to exercise a greater degree of control over rural areas.[50] While the PKK was able to bribe and use some of the village guards in drug trafficking, the overall combination of the rural village guard system and the national military was too strong of a match for PKK's approximated three hundred militants, who lacked organized military organization and international geopolitical legitimacy relative to the state of Türkiye.[51]

[46] Criss, *supra* note 15.
[47] Mustafa Coşar Ünal, *Is it Ripe Yet? Resolving Turkey's 30 Years of Conflict with the PKK*, 17 Turkish Stud. 91, 91, (2015).
[48] Olsen, *supra* note 12.
[49] Özlem Kayhan Pusane, *Turkey's Military Victory over the PKK and Its Failure to End the PKK Insurgency*, 51 Middle E. Stud., 727, 728–29 (2015).
[50] Criss, *supra* note 15.
[51] Pusane, *supra* note 49.

Turkish prime minister and later president, Turgut Özal, began to modify the government's approach to the conflict. In 1987, he overturned martial law and replaced it with a much weaker state of emergency.[52] Since this move weakened government control, there was an effort to strengthen communications between the military and regional governors.[53] However, this change in legal organization only hurt Turkish efforts. According to a 2015 study on Turkish military tactics:

> The removal of the martial law regime created a lot of opposition among the military officers because of the uncertain chain of command in the state of emergency. In this new system, the fight against the PKK was conducted mainly under the command of the police and gendarmerie forces. Thus, the TAF was not in direct control of the counterinsurgency campaign. This uncertainty created serious obstacles in Turkey's struggle with the PKK and decreased its effectiveness. This transition also coincided with the PKK's emergence as a more professional insurgent organization from 1987 onwards."[54]

Other tactics employed during this state of emergency include arson and mass deforestation, both vehemently denied by the Turkish government, despite village witnesses and objective geospatial analysis providing evidence that the TAF burned down Kurdish forests and villages.[55] This strategy was theorized to contain the spread of the PKK's influence by destroying rural areas where civilian support was the strongest.

The first unilateral ceasefire was called by the PKK on March 17, 1993, around the same time that Türkiye began to entertain peace negotiations.[56] Turgut Özal's increased efforts to initiate peace with the PKK, however, were met with disapproval from other government figures. Not all Turkish leadership was supportive of the ceasefire talks, even though the conflict had already cost Türkiye significant lives, money, and international reputation over human rights

[52] *Id*.
[53] *Id*.
[54] *Id*. at 729.
[55] Jacob van Etten et al., *Environmental Destruction as a Counterinsurgency Strategy in the Kurdistan Region of Turkey*, 39 Geoforum 1786, 1786 (2008).
[56] Cemal Ozkahraman, *Failure of Peace Talks between Turkey and the PKK: Victim of Traditional Turkish Policy or of Geopolitical Shifts in the Middle East*, 4 Contemp. Rvw. Middle E. 50, 56–57 (2017).

concerns. This first ceasefire was incredibly short-lived. President Özal attempted to significantly redefine the traditional Kemalist nationalism[57] of Türkiye's past by publicly denouncing the historical practices of assimilation and issuing some pardons for Kurds.[58] However, President Özal died just a month after the ceasefire call in April, allowing new leadership to reimplement Kemalist ideologies in the government. The following May, there was an unauthorized PKK attack on Turkish soldiers that demonstrated dismay for the new leadership and betrayed any hopes of the ceasefire succeeding.[59] This in turn angered the Turkish government and ended any hopes for bilateral reconciliation.

After this first failed attempt, Öcalan was forced to acknowledge the weaknesses of the PKK's size and strength. Despite his initial zeal for settling the Kurdish matter as an armed conflict, he began to entertain more political tools as well, not through legislation, but through exercising de facto authority over Kurdish regions.[60] According to some reports, the PKK began to collect some taxes and administer pseudo-law enforcement in Kurdish villages.[61] The insurgent militia, weakened by ten years of conflict, was able to gain some strength from a power vacuum in neighboring Iraq.[62] However, instead of continuing with direct guerrilla warfare, the PKK shifted their terror methods to include more bombings and other, larger attacks in western Türkiye.[63] The use of more asymmetric terror in this phase of the contact was part of a tactical strategy aimed at switching from targeting the Turkish fighting capability, to attacking their will to continue the conflict.[64] To counter this, the TAF used cordon and search methods to ultimately

[57] Kemalist nationalism aimed to create a secular Turkish national identity, notably through the suppression of minority identities.
[58] Pusane, *supra* note 49.
[59] Ozkahraman, *supra* note 56.
[60] *Id*.
[61] Pusane, *supra* note 49.
[62] *Id*.
[63] Mustafa Coşar Ünal, *Counterinsurgency and Military Strategy: An Analysis of the Turkish Army's COIN Strategies/Doctrines*, 21 Mil. Operations Rsch. 55, 57 (2016).
[64] Ünal, *supra* note 47.

increase the fragility of the PKK's military capabilities.[65] While trying to effectively deal with the terror problem, Türkiye faced external pressure to handle their accused human rights violations as they actively sought EU membership. As Türkiye struggled to balance the conflicting internal and external pressures regarding the Kurds, they attempted to increase tolerance of Kurdish culture, alongside encouraging Kurdish village initiatives, leading to the development of Kurdish arts, literature, and music.[66] Despite this, the Kurdish conflict is a large reason that Türkiye is still not part of the EU, which has prevented Türkiye from strengthening their economy by keeping them closed off from stronger trade partnerships.

Conflict in the 1990s continued until another brief ceasefire occurred from December 1995 to August 1996. Eventually, Türkiye's pressure on Syria to stop providing a safe haven for the PKK led to Öcalan's arrest in 1999. Öcalan called for a ceasefire that lasted until 2003, which was the longest ceasefire between the PKK and Türkiye, and as such the aggregate level of violence significantly subsided, but not due to any significant victory on Türkiye's behalf.[67] Just as the PKK's declaration of the series of ceasefires was unilateral, the PKK's attempts to reorganize as a more legitimate political entity were unilateral and met with resistance from Türkiye. This reorganization included the foundation of the Kurdistan Freedom and Democracy Congress (KADEK) and the PKK's attempt to reformulate as Kurdistan People's Congress (KONGRA-GEL). Türkiye was not fully receptive to recognizing these groups as legitimate political entities and was also accused of continuing forced assimilation practices, having established Child Development Centers in the Kurdish region focused on educating less developed Kurdish regions in Turkish-style education.[68] The confirmed existence of these centers

[65] Yeşiltaş, *supra* note 9.
[66] Ozakahraman, *supra* note 56.
[67] Ünal, *supra* note 47.
[68] Ozkahraman, *supra* note 56.

demonstrates that Türkiye was not fully committed nor effective in their alleged effort to mitigate tensions with the Kurdish identity.

While Öcalan was imprisoned on the island of Imrali, the Turkish government conducted a series of talks with him.[69] The Turkish government tried a new method by taking a more serious approach to evaluating the matter from a more holistic counterinsurgency stance rather than a counterterrorist one.[70] As defined in a guide by the U.S. Department of State, "Counterinsurgency (COIN) is the blend of comprehensive civilian and military efforts designed to simultaneously contain insurgency and address its root causes."[71] In this case, the root causes included the relative deprivation of the Kurds in relation to ethnically Turkish citizens. In 2009, the Turkish government launched an initiative that they referred to as the Kurdish Opening, to improve economic conditions and run a Kurdish language broadcast.[72] While the Kurdish Opening was the main reform that targeted the roots of the ethnic conflict, the government implemented nine sets of reforms overall.[73] As put by one researcher, "This can be considered Turkey's switch from seeking unilateral solutions to reconciliation in the context of conflict management and resolution."[74] These policies can be described as responsive and accommodating as opposed to detersive and oppressive.

According to a statistical analysis, "[T]here was a positive and statistically significant relationship between the defiance based governmental policies and the level of violence initiated by the ethnically motivated terrorist groups."[75] One potential theory for this is that the PKK perceived their violence as leading to political successes in the form of government policies,

[69] Imrali is an island in the Sea of Marmara and a part of Türkiye.
[70] Ünal, *supra* note 47.
[71] U.S. Dep't of State, *U.S. Government Counterinsurgency Guide* 2 (2009).
[72] Ünal, *supra* note 47.
[73] Irfan Ciftci & Sedat Kula, *The Evaluation of the Effectiveness of Counterterrorism Policies on the PKK-inflicted Violence during the Democratization Process of Turkey*, 6 J. Terrorism Rsch. 27–28 (2015).
[74] Ünal, *supra* note 47.
[75] Ciftci & Kula, *supra* note 73, at 39.

which reinforced their idea that terror was successful. Other analyses concluded that the increased violence was due to "the PKK's perception of decreasing popular support in easing tensions without getting anything in return."[76] Another potential reason that the Kurdish Opening was unsuccessful may be because it was poorly managed and too unilateral.[77] Despite the failure and inconclusive results of Türkiye's attempts at democratization, comparative studies on other countries indicate that continued attempts at expanding democracy is the best way to resolve ethnic conflicts and may be Türkiye's most promising strategy for resolving the conflict with the PKK.[78]

Resolution attempts continued throughout the 2000s. By 2010, the PKK called another ceasefire, waiting for the outcome of Turkish amendments and parliamentary elections, hoping for the Democratic Society Party's success and support.[79] This ceasefire, once again, was unsuccessful. Part of the problem stemmed from Türkiye's inconsistent treatment of the issue. The Kurdish Opening was a step towards increased tolerance of the Kurdish population, while the government continued to arrest civilian Kurds on the basis of alleged connections to the PKK, but without due process.[80] The divergence between the proposed actions of the Turkish government and their actual actions demonstrates an aspect of performativity which may have only fueled increased Kurdish dissent.

Current foreign policy decisions on the PKK are further complicated by its relationship to other Kurdish entities outside of Türkiye. The Kurdish Democratic Union Party (PYD) is a political entity that has won seats in Syria. Also in Syria is the Kurdish People's Protection Units (YPG), which is a militant affiliate of the PYD. Both the PYD's and the YPG's formation were

[76] Ünal, *supra* note 49.
[77] *Id*.
[78] Ciftci & Kula, *supra* note 73.
[79] Ünal, *supra* note 49.
[80] *Id*.

influenced by the presence of PKK members taking refuge in Syria and by Öcalan's ideology as a whole. The United States and Europe do not classify the YPG or the PYD as terrorist organizations.[81] In fact, the United States has provided logistical support, including airstrikes and ammunition, to the YPG, to aid in the conflict with the Islamic State of Iraq and al-Sham (also known as ISIL, ISIS, and Daesh) in the region.[82] However, Türkiye, unhappy with this expansion of YPG territory even though they are also opposed to ISIL, firmly maintains that PYD/YPG and the PKK are all terrorist organizations. The Turkish Ministry of Foreign Affairs website states that, "PYD/YPG was set up under the control of the PKK terrorist organization in 2003. They share the same leadership cadres, organizational structure, strategies and tactics, military structure, propaganda tools, financial resources and training camps."[83]

## IV. Recommendations for Turkish Policy

The failure of peaceful interventions in the past is indicative that the underlying causes of the conflict have not been resolved. Türkiye must address its past practices and take responsibility for its treatment of the Kurds. A sufficient acknowledgment of past mistakes would be only a start and unlikely to do much to control the damage that has been done. Failures of Türkiye's unilateral attempts at resolutions and the PKK's unilateral ceasefires make it clear that a successful management of the conflict must involve cooperation from both sides, which means Türkiye's actions must actually match their proposals.[84] In leaked peace talks, it was made abundantly clear that "no unilateral effort from either side would be sufficient for victory, and a two-sided compromise for a sustainable and durable peace is inevitable."[85]

[81] U.S. Dep't of State, *supra* note 27.
[82] Soner Cagaptay & Andrew J. Tabler, *The U.S.-PYD-Turkey Puzzle*, Wash. Inst. (2015); *see also* Jonathan Hogeback, *Is It ISIS or ISIL?* Enyc. Britannica (June 2025), www.britannica.com/story/is-it-isis-or-isil.
[83] Türkiye Ministry Foreign Aff., *supra* note 21.
[84] Cifti & Kula, *supra* note 73.
[85] Ünal, *supra* note 47.

In the case that the dissolution of the PKK does not last or a different affiliate group rises in its place, Türkiye should not resort solely to military strategies to contain violence. The Kurds' commitment to over forty years of conflict has made it clear that they will not be subdued without proper protection of their rights. Significant research has shown that "democratic improvements have great importance to find long-term solutions to solve ethnic conflicts and to prevent public support for terrorist groups."[86] Using Social Identity Theory as a framework for understanding the PKK's recruitment strategy, it appears that the best way to undermine the organization's support is to target the identity of the average recruited member. To do this, Türkiye should adopt a more comprehensive approach and emphasize a sincere promise to uphold humanitarian principles. In addition to maintaining the acceptance of Kurdish cultural practices that were implemented in the Kurdish Opening, the government should make a greater effort to improve education in the southeast region of the country, where many Kurdish individuals have historically resided. Article 42 of the Turkish Constitution enshrines the duty of the state to provide such education, which is lacking in that region.[87] This part of the Constitution mandates free, compulsory education. As part of the Türkiye Country Partnership Framework (CPF), World Bank Group assists Türkiye specifically with reducing poverty and targeting vulnerable groups.[88] Some funding is going to aid in reconstruction after devastating earthquakes in February 2023, but some funds could gradually be redirected to Kurdish regions, which are already the regions in need of poverty assistance. This would improve the conflict in a few key ways. First, it would put action and money behind a verbal commitment, which would improve trust between the Kurdish and the government. Additionally, higher levels of education and

[86] Ciftci & Kula, *supra* note 73.
[87] Constitution of the Republic of Türkiye 1982, art. 42
[88] World Bank Group, *The World Bank in Türkiye*, https://www.worldbank.org/en/country/turkey/overview (last visited July 2025).

employment in the region would improve the living conditions that drive certain youth to join the PKK.

In addition to helping populations that are vulnerable to recruitment, the Turkish government should focus on targeting sources of income for potential terror events. Military resources that Türkiye has historically used to fight the PKK directly should instead be diverted to the Turkish Department of Anti-Smuggling and Organized Crime. Arrests of PKK-linked individuals have caused grievances, but this would reframe such arrests as a target on smuggling, not on the PKK itself, which would ease Kurdish perceptions of the government.

Additionally, Türkiye should change its stance on the Democratic Society Party, the PYD, and the YPG. Allowing the Democratic Society Party to operate would not only boost democratic sentiment but enable the Kurds to peacefully express grievances. After all, Öcalan's call for dissolution stemmed from his perception that the historical context has changed enough that violence is no longer necessary to make a point, but that Türkiye risks fueling further violence if they do not allow the Kurds to have a political voice. Furthermore, the PYD and the YPG, while they branched from the PKK, are primarily Syrian groups. The acquisition of Kurdish autonomous territory from ISIS outside Turkish borders may threaten Türkiye indirectly, but does not warrant direct action against Turkish affiliates.

## V. Conclusion

In conclusion, the longevity of the conflict and the failures of numerous ceasefires indicate that although the PKK announced their intent to dissolve in May of 2025, the situation is still fragile. Türkiye has made some efforts to increase its tolerance for the Kurdish population. However, their military actions, harsh treatment of nonviolent PKK-affiliated groups, and arrest of pro-PKK politicians are still a source of resentment for the Kurds and a violation of their

alleged stance on human rights. The more that Türkiye resists communication and cooperation with the Kurds, the stronger Kurdish dissent will grow. If the Turkish government wants to succeed in establishing long-lasting peace among the Kurds, they must take the first step and be willing to give them both political recognition and acceptance. Overall, the conflict serves as a blatant example of how suppression of minority identities can often inflame hatred and conflict. Forced assimilation is inherently wrong and a violation of human rights, and this practice also may have costly social consequences for states that impose such practices.

# The Demise of the Special Counsel: How Jack Smith's Tenure Undid Trump's Prosecutions

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**Abstract:**

This article examines the constitutional unraveling underlying Jack Smith's appointment as Special Counsel and its devastating effect on the dual prosecutions of former President Donald J. Trump. Although Smith brought two sweeping federal indictments, his authority to do so lacked a statutory foundation. Instead, the Department of Justice relied solely on internal regulations and generic statutes, bypassing the explicit requirements of the Appointments and Appropriations Clauses. That choice rendered Smith's powers constitutionally void. This analysis traces how this structural defect unraveled both the classified documents case and the election obstruction case. It examines key rulings by Judge Aileen Cannon, Justice Clarence Thomas, and the Supreme Court, all of which converged on the same conclusion: A federal office cannot exist unless Congress creates it by law. It argues that, in sum, the Special Counsel must be either abolished or formally established through legislation. Anything less defies the separation of powers.

## I. Introduction

Seventy-one weeks after rioters stormed the United States Capitol and 102 days after agents from the U.S. Federal Bureau of Investigation (FBI) retrieved over three hundred classified documents from President Donald Trump's residence at Mar-a-Lago,[1] Attorney General Merrick Garland named prosecutor Jack Smith as Special Counsel to oversee the Department of Justice (DOJ)'s dual investigation into Trump's handling of classified documents and his alleged role in the January 6 attack on the U.S. Capitol building.[2] Garland's appointment order, issued on November 18, 2022, under the purported authority of 28 United States Code (U.S.C.) §§ 509, 510, 515, and 533, vested Smith with sweeping discretion to prosecute any federal crimes arising from the investigation.[3] What followed was forty-four felony charges across two indictments. But beneath the surface of these prosecutions lies a deeper constitutional fracture: the legality of Smith's appointment itself.

Because the Office of Special Counsel lacks a foundation established by law, Smith's appointment violated both the Appointments and Appropriations Clauses of the Constitution, rendering his authority and the prosecutions it launched constitutionally void. Had the charges

[1] Mar-a-Lago is an estate owned by President Donald Trump in Palm Beach, Florida. Forbes estimated its value to be $350 million in 2022, and it was raided by the Federal Bureau of Investigation in 2022. The property was placed in the U.S. National Register of Historic Places in 1972 and it was designated a national historic landmark in 1980. It was sold to Trump in 1985, and he turned it into a private club ten years later. Many of its members are among his biggest supporters. *See* Dan Alexander, *How Much Has Trump Made From Mar-A-Lago, His Palm Beach Estate Under Siege?* Forbes (Aug. 2022), www.forbes.com/sites/danalexander/2022/08/09/how-much-has-trump-made-from-mar-a-lago-his-palm-beach-estate-under-siege/; *see, e.g.*, René Ostberg, *Mar-a-Lago*, Encyc. Britannica, www.britannica.com/topic/Mar-a-Lago (last visited June 2025).

[2] The January 6th insurrection took place January 6, 2021 when a mob of Trump supporters stormed the U.S. Capitol building in Washington, D.C. to protest the results of the 2020 election. A bipartisan Senate report found that seven fatalities were connected to the Capitol attack, but two more deaths occurred in the months to follow. The mob was encouraged by then-defeated candidate Donald Trump, who had stated that marching on the Capitol was the last chance to stop the presidency from being stolen. The mob was armed with Molotov cocktails, firearms, crowbars, and more, and it consisted of various Trump supporters, many from right-wing extremist groups such as QAnon and Proud Boys. *See* By Dan Barry et al., *'Our President Wants Us Here': The Mob That Stormed the Capitol*, N.Y. Times (Nov. 2021), https://www.nytimes.com/2021/01/09/us/capitol-rioters.html; *see also* Comm. Homeland Sec. Gov't Aff.s, 117th Cong, *Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6* (2021) (providing an in-depth legislative review of the events that transpired on January 6, 2021).

[3] U.S. Att'y Gen., Order No. 5559-2022, Appointment of John L. Smith as Special Counsel (2022).

succeeded, Trump may not have returned to the presidency. Whether one supports or opposes him, the use of unlawful power to reach that outcome should concern all.

## II. The Classified Documents Case

To understand how Special Counsel Smith's actions affected the prosecutions of President Trump, it is essential to start with the case in the United States District Court for the Southern District of Florida. Judge Aileen Cannon presided over the proceedings, with Smith and his team of prosecutors on one side and President Trump's defense attorneys on the other. In his original indictment,[4] returned by a grand jury on June 8, 2023, President Trump faced thirty-seven felony counts of conspiracy, obstruction of justice, false statements, and willful retention of national defense information. Trump's personal aide and valet at Mar-a-Lago, Waltine Nauta, faced eight counts related to similar offenses.[5] On July 27, 2023, a superseding indictment charging three additional felonies and adding another co-conspirator—Mar-a-Lago's maintenance chief, Carlos De Oliveira—brought the total charges against Trump to forty. Between June and August of 2023, all three men entered a plea of not guilty before Judge Cannon in federal court.[6]

The accusations in the superseding indictment were staggering: a former President had been accused of surreptitiously hoarding national defense information, all while lying to federal investigators and conspiring with his staff and associates at Mar-a-Lago to conceal any wrongdoing. After several months of delays in pretrial scheduling, many exchanges of discovery materials, and lengthy in-camera review of sensitive evidence under the Classified Information Procedures Act, President Trump's defense counsel filed a motion to dismiss before Judge Cannon. Alongside a series of three other dispositive motions, President Trump sought the

[4] United States v. Trump, 23-80101 (S.D. Fla. June 8, 2023) (indictment).
[5] *Id*.
[6] United States v. Trump, 23-80101 (S.D. Fla. July 27, 2023) (superseding indictment).

dismissal of the superseding indictment based on the unlawful appointment and funding of Smith as Special Counsel:

> The Appointments Clause does not permit the Attorney General to appoint, without Senate confirmation, a private citizen and like-minded political ally to wield the prosecutorial power of the United States. As such, Jack Smith lacks the authority to prosecute this action. That is a serious problem for the rule of law—whatever one may think of former President Trump or the conduct Smith challenges in the underlying case. This is an issue of first impression in the Eleventh Circuit, and it requires that the Superseding Indictment be dismissed.[7]

President Trump argued that because the appointment of Smith lacked constitutional or statutory authority, the entire prosecution was also unlawful.

But why was this important? More specifically, why should a seemingly minor issue, an alleged defect in Smith's appointment as Special Counsel, threaten to upend the entire prosecution? After all, the Department of Justice's Office of Special Counsel had been around for twenty-three years by Smith's appointment;[8] President Trump's own administration utilized the office between 2017 and 2019, and then again in 2020 to initiate a counter-investigation into the origins of the FBI's Crossfire Hurricane probe.[9] At its core, however, the question was not about Jack Smith, or even about the merits of this particular case—it was about whether the Attorney General could unilaterally appoint a Special Counsel under a regulatory framework not established by Congress. Of latter, yet equal, importance was whether the Department of Justice

[7] United States v. Trump, 23-80101 (S.D. Fla. Feb. 22, 2024) (motion to dismiss) (based on the unlawful appointment and funding of Special Counsel Jack Smith).
[8] The Department of Justice's Office of Special Counsel should not be confused with its temporary predecessor, the Independent Counsel. The Independent Counsel was an independent prosecutor separate from the Attorney General whose authority was governed by the Ethics in Government Act of 1978 (EIGA). When Congress let the EIGA expire on June 30, 1999, Attorney General Janet Reno issued a series of regulations providing the framework for the appointment, jurisdiction, and powers of the Special Counsel. 28 C.F.R. §§ 600.1–600.10; Off. Spec. Couns., 64 Fed. Reg. 37,038 (1999).
[9] Crossfire Hurricane was the FBI's counterintelligence investigation, conducted from 2017 to 2019, into potential coordination between the Trump campaign and Russian efforts to interfere in the 2016 Presidential election, later overseen by Special Counsel Robert Mueller. In December 2020, former Attorney General William Barr appointed John Durham as Special Counsel to investigate the origins of that investigation.

could fund and sustain such an appointment using appropriations not explicitly authorized by law.

Yet, none of the cited statutes—28 U.S.C. §§ 509, 510, 515, or 533—explicitly authorize the creation of the Office of Special Counsel. Instead, Smith's authority relies on 28 Code of Federal Regulations (C.F.R.) section 600, a set of internal DOJ regulations not enacted by Congress. Put plainly, the Department of Justice created the office through its own rulemaking, not through legislation. This raises a more fundamental question: What does the Constitution itself require for the creation and appointment of federal officers? The answer lies in Article II, Section 2, Clause 2—the Appointments Clause. The first half of the clause governs the appointment of "principal officers" and provides:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.[10]

The second half addresses "inferior officers" and states that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[11] In plain English, the Appointments Clause sets forth two distinct tracks for the appointment of federal officers. The first governs principal officers, who must first be nominated by the President, second receive the "Advice and Consent of the Senate," and third hold an office that is "established by Law." The second track allows Congress to delegate the appointment of inferior officers to the President, the judiciary, or the heads of departments, provided that the delegation be explicitly authorized by law. The common denominator for both tracks is that the creation and appointment of federal officers must be

[10] U.S. Const. art. II, § 2, cl. 2.
[11] *Id*.

rooted in statutory authority; without such grounding, the office itself—and any actions taken by its occupant—wholly lack constitutional legitimacy. Jack Smith would be no exception.

The Appointments Clause conundrum trickles into the Appropriations Clause, the latter subject of President Trump's dispositive motion. If Smith was appointed to the Office of Special Counsel unlawfully, then his funding was unlawful as well. Article I, Section 9, Clause 7 of the United States Constitution, the Appropriations Clause, provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[12] This "straightforward and explicit command…means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[13] Clearly, neither appointments nor appropriations may occur without Congress giving its blessing "by Law."[14]

This was no longer a trial about President Trump's alleged mishandling of classified documents or obstruction of justice—it had become a trial not on the law, but of the law itself. President Trump's team alleged that the Office of Special Counsel did not even exist under the law. If the court agreed and found that the office had no legal foundation, then every action taken by Smith, from issuing subpoenas to filing indictments, would be rendered void from the start. They contended that "Because neither the Constitution nor Congress have created the office of the 'Special Counsel,' Smith's appointment [and funding] is invalid and any prosecutorial power he seeks to wield is ultra vires."[15]

No case would proceed against President Trump without a resolute answer to the legality of Smith's appointment and funding as Special Counsel, at least not in the Southern District of

[12] U.S. Const. art. I, § 9, cl. 7.
[13] Office Pers. Mgmt. v. Richmond, 496 U.S. 414, 424 (1990).
[14] U.S. Const. art. I, § 9, cl. 7.
[15] United States v. Trump, 23-80101, at 5 (S.D. Fla. Feb. 22, 2024) (motion to dismiss) (based on the unlawful appointment and funding of Special Counsel Jack Smith).

Florida. However, alongside the Florida prosecution, parallel proceedings unfolded in the United States District Court for the District of Columbia. It is there, through the lens of President Trump's immunity challenge, that the limits of Smith's authority came into focus and the unraveling of the Florida documents case began to take shape.

## III. The Election Case

Two months following President Trump's initial indictment in the Southern District of Florida, a District of Columbia grand jury, also at the behest of Special Counsel Smith, returned a new set of charges—this time accusing him of attempting to obstruct the certification of the 2020 presidential election.[16] President Trump pleaded not guilty before Judge Tanya S. Chutkan on August 3, 2023 to four counts: conspiracy to defraud the United States, conspiracy to obstruct an official proceeding, obstruction of and attempting to obstruct an official proceeding, and conspiracy to violate civil rights.[17]

Less than sixty-five days into the proceedings, President Trump's defense unleashed a fifty-two-page dispositive motion before Judge Chutkan, asserting absolute presidential immunity—a doctrine tested in civil law, but not yet as it pertained to the indictment of a former President for acts committed while still in office:[18]

> The President of the United States sits at the heart of our system of government. He is our Nation's leader, our head of state, and our head of government. As such, the founders tasked the President—and the President alone—with the sacred obligation of taking care that the laws be faithfully executed. To ensure the President may serve unhesitatingly, without fear that his political opponents may one day prosecute him for decisions they

[16] Following the Supreme Court's decision in Fischer v. United States, a superseding indictment was returned on August 27, 2024 to comport with the Court's narrowed interpretation of 18 U.S. Code § 1512(c)(2)—to which President Trump faced one count of. The allegations remained analogous in substance. United States v. Trump, 23-00257 (D.D.C. Aug. 1, 2023) (indictment); United States v. Trump, 23-00257 (D.D.C. Aug. 27, 2024) (superseding indictment); Fischer v. United States, 144 S. Ct. 2176 (2024).

[17] *United States v. Trump*, 23-00257 (D.D.C. Aug. 3, 2023) (arraignment).

[18] "No court has addressed whether such Presidential immunity includes immunity from criminal prosecution for the President's official act." United States v. Trump, 23-00257 at 14 (D.D.C. Oct. 5, 2023) (motion to dismiss) (based on presidential immunity).

> dislike, the law provides absolute immunity for acts within the outer perimeter of the President's official responsibility.[19]

While tacit in its far-reaching implications, Judge Chutkan was not swayed, nor was a three-judge panel of the D.C. Circuit on interlocutory appeal. Writing unanimously, the Court of Appeals offered a decisive repudiation of President Trump's novel theory of absolute presidential immunity from criminal prosecution: "We have considered his contention that he is entitled to categorical immunity from criminal liability for any assertedly 'official' action that he took as President—a contention that is unsupported by precedent, history or the text and structure of the Constitution."[20] There was one bridge, however, that the Appeals Court was not willing to cross: the lawfulness of Special Counsel Smith's appointment and whether it could be made under existing law. President Trump's counsel in Washington was not willing to argue the issue either. Even then, in spite of an amicus brief[21] by former Attorney General Edwin Meese III and several legal scholars, the three-judge panel declined to address the Appointments Clause issue, noting that it "was neither presented to nor decided by the district court" and that "the exercise of pendent jurisdiction [to decide the issue without it being directly brought on appeal] would be improper."[22]

## IV. The Beginning of the End

At a crossroads between going to trial, risking federal conviction, and facing the potential upheaval of his presidential campaign, President Trump turned to the Supreme Court. His legal team anchored their arguments on a single question: Does the Constitution shield a former

[19] *Id*. at 2–3 (internal quotations and citations omitted).
[20] United States v. Trump, 91 F.4th 1173, 1208 (D.C. Cir. 2024).
[21] On President Trump's interlocutory appeal to the D.C. Circuit from the order of Judge Chutkan denying his Presidential immunity motion, former Attorney General Edwin Meese III and others filed an amicus brief arguing "that the appointment of Special Counsel Smith [was] invalid because (1) no statute authorizes the position Smith occupies and (2) the Special Counsel is a principal officer who must be nominated by the President and confirmed by the Senate." *Trump*, 91 F.4th at 1208 n.16 (D.C. Cir. 2024).
[22] *Id*.

president with absolute immunity from criminal prosecution for official acts taken during his time in office?[23] On July 1, 2024, the Supreme Court delivered its answer: Yes, but only for official acts firmly within the scope of the President's core constitutional authority.[24]

Interestingly, Justice Clarence Thomas, who typically remains silent, spoke during the Supreme Court's oral arguments.[25] He asked a single question to Dean John Sauer, President Trump's attorney: "Did you, in this litigation, challenge the appointment of special counsel?"[26] Sauer responded that the issue had not been raised in the D.C. case but was central to the Florida proceedings. Justice Thomas said nothing further. Still, his question flagged an unmistakable interest, one that would soon take shape in his written opinion:

> I write separately to highlight another way in which this prosecution may violate our constitutional structure. In this case, the Attorney General purported to appoint a private citizen as Special Counsel to prosecute a former President on behalf of the United States. But, I am not sure that any office for the Special Counsel has been "established by Law," as the Constitution requires. By requiring that Congress create federal offices "by Law," the Constitution imposes an important check against the President—he cannot create offices at his pleasure. If there is no law establishing the office that the Special Counsel occupies, then he cannot proceed with this prosecution. A private citizen cannot criminally prosecute anyone, let alone a former President.[27]
>
> Before the President or a Department Head can appoint any officer, however, the Constitution requires that the underlying office be "established by Law" . . . Although the Constitution contemplates that there will be "other Officers of the United States, whose

[23] Brief of Petitioner at 10, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-939).
[24] While the Court acknowledged that no President stands above the law, it drew a resolute line protecting the exercise of core constitutional powers from criminal prosecution. Writing for the majority, Chief Justice John Roberts articulated the principle at the core of this balance: "Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority." Trump v. United States, 144 S. Ct. 2312, 2328 (2024). He summarized this framework near the opinion's conclusion: "The President enjoys no immunity for his unofficial acts, and not everything the President does is official. The President is not above the law. But Congress may not criminalize the President's conduct in carrying out the responsibilities of the Executive Branch under the Constitution. And the system of separated powers designed by the Framers has always demanded an energetic, independent Executive. The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts. That immunity applies equally to all occupants of the Oval Office, regardless of politics, policy, or party." *Id*. at 2347. President Trump's election obstruction case was remanded to the D.C. District Court for proceedings consistent with the opinion.
[25] U.S. News & World Rep., *Why Clarence Thomas Rarely Speaks from the Supreme Court Bench* (Mar. 2016), www .usnews.com/news/articles/2016-03-30/why-clarence-thomas-rarely-speaks-from-the-supreme-court-bench.
[26] Transcript of Oral Argument at 33, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-939).
[27] *Trump*, 144 S. Ct. at 2347–48 (2024) (citations omitted).

> Appointments are not herein otherwise provided for," it clearly requires that those offices "shall be established by Law." And, "established by law" refers to an office that Congress creates "by statute."[28]

Justice Thomas, continuing his analysis, recognized the distinction in the Appointments Clause between the appointment of principal and inferior officers. However, this distinction was secondary to the more fundamental observation that Congress had never explicitly established an Office of Special Counsel "by Law." There was no basis to even determine whether the Special Counsel was a principal or inferior officer; the absence of law left nothing to draw such a division from. And even then, if the Special Counsel was not an officer at all, then "the constitutional problems with this prosecution would only be more serious."[29] "For now," Thomas wrote, "I assume without deciding that the Special Counsel is an officer."[30]

Justice Thomas's censorious review was not rooted in modern controversies, but in the constitutional fears that animated the founding generation. The colonists had expressed a similar injustice in their Declaration of Independence, condemning King George II of England for having "erected a multitude of New Offices, and sent hither swarms of Officers to harass our people and eat out their substance."[31] It was that same continental grievance Justice Thomas alluded to:

> The limitation on the President's power to create offices grew out of the Founders' experience with the English monarchy. The King could wield significant power by both creating and filling offices as he saw fit. He was emphatically and truly styled the fountain of honor. He not only appointed to all offices, but could create offices. That ability to create offices raised many concerns about the King's ability to amass too much power; the King could both create a multitude of offices and then fill them with his supporters. The Founders thus drafted the Constitution with evidently a great inferiority in the power of the President, in this particular, to that of the British king.[32]

[28] *Id*. at 2348–49 (citations omitted).
[29] *Id*. at 2349 n.4.
[30] *Id*.
[31] *The Declaration of Independence* para. 12 (U.S. 1776).
[32] Trump v. United States, 144 S. Ct. 2312, 2349 (2024) (No. 23-939) (citations omitted).

The Constitution, Thomas reminded, assigns particularized importance to who may create a federal office. To guard against tyranny, the Founders stipulated that a federal office must be "established by Law." As James Madison once warned, "If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with greater caution, it is that which relates to officers and offices." Without Congress reaching a consensus that a particular office should exist, the Executive cannot unilaterally create and fill one.[33]

Justice Thomas's words echo the problematic statutes that were referenced in President Trump's motion in the Southern District of Florida: 28 U.S.C. §§ 509, 510, 515, and 533, which were the broad statutory provisions cited by Attorney General Garland in Smith's appointment order as the basis for his authority and tenure:[34]

> It is difficult to see how the Special Counsel has an office "established by Law," as required by the Constitution. When the Attorney General appointed the Special Counsel, he did not identify any statute that clearly creates such an office. Nor did he rely on a statute granting him the authority to appoint officers as he deems fit, as the heads of some other agencies have. Instead, the Attorney General relied upon several statutes of a general nature. None of the statutes cited by the Attorney General appears to create an office for the Special Counsel, and especially not with the clarity typical of past statutes used for that purpose.[35]

As for 28 U.S.C. sections 509 and 510: "Sections 509 and 510 are generic provisions concerning the functions of the Attorney General and his ability to delegate authority to "any other officer, employee, or agency."[36] And 28 U.S.C. section 515: "Section 515 contemplates an 'attorney specially appointed by the Attorney General under law,' thereby suggesting that such an

[33] *Id*. at 2350 (citations omitted).
[34] It is worth noting that, in subsequent filings, Attorney General Garland referenced additional but equally broad statutes (5 U.S.C. § 1301) to justify the authority underlying the Special Counsel's appointment. *E.g.*, United States v. Trump, No. 23-80101 (S.D. Fla. Mar. 7, 2024) (government's opposition to Donald J. Trump's motion to dismiss based on the appointment and funding of Jack Smith).
[35] *Trump*, 144 S. Ct. at 2350.
[36] *Id*.

attorney's office must have already been created by some other law [despite no other law establishing it].[37] And finally, 28 U.S.C. section 533:

> The Attorney General may appoint officials… to detect and prosecute crimes against the United States…Regardless, this provision would be a curious place for Congress to hide the creation of an office for a Special Counsel. It is placed in a chapter concerning the Federal Bureau of Investigation (§§ 531-540d), not the separate chapters concerning U.S. Attorneys (§§ 541-550) or the now-lapsed Independent Counsel (§§ 591-599).[38]

Uncertainty and ambiguities aside, Justice Thomas held his query: "Even if the Special Counsel has a valid office, questions remain as to whether the Attorney General filled that office in compliance with the Appointments Clause."[39] If the Special Counsel has a "valid office," then "his appointment is invalid because the Special Counsel was not nominated by the President and confirmed by the Senate, as principal officers must be," or, if he is an inferior officer, then "the Special Counsel's appointment is invalid unless a statute created the Special Counsel's office and gave the Attorney General the power to fill it "by Law."[40] And with a final word, Justice Thomas concluded: "If this unprecedented prosecution is to proceed, it must be conducted by someone duly authorized to do so by the American people. The lower courts should thus answer these essential questions concerning the Special Counsel's appointment before proceeding."[41] In due course, his position would prevail.

## V. The Demise of the Special Counsel

Fifty-seven weeks after President Trump's initial indictment in Florida and just fourteen days after the Supreme Court delivered its mandate on presidential immunity, Judge Cannon threw out the indictment against Trump in a searing ninety-three-page order. She declared that

[37] *Id*.
[38] *Id*. at 2351.
[39] *Id*.
[40] *Id*.
[41] *Id*. at 2348.

Smith's appointment had, from its inception, undermined the constitutional constraints it was meant to honor:

> The bottom line is this: The Appointments Clause is a critical constitutional restriction stemming from the separation of powers, and it gives to Congress a considered role in determining the propriety of vesting appointment power for inferior officers. The Special Counsel's position effectively usurps that important legislative authority, transferring it to a Head of Department, and in the process threatening the structural liberty inherent in the separation of powers.[42]

She elaborated further:

> If the political branches wish to grant the Attorney General power to appoint Special Counsel Smith to investigate and prosecute this action with the full powers of a United States Attorney, there is a valid means by which to do so. He can be appointed and confirmed through the default method prescribed in the Appointments Clause, as Congress has directed for United States Attorneys throughout American history, see 28 U.S.C. § 541, or Congress can authorize his appointment through enactment of positive statutory law consistent with the Appointments Clause.[43]

Among Judge Cannon's grievances with the Appointments Clause issue, she too waved the red flag on appropriations: "For more than 18 months, Special Counsel Smith's investigation and prosecution [have] been financed by substantial funds drawn from the Treasury without statutory authorization, and to try to rewrite history at this point seems near impossible." But in reprieve, Judge Cannon left "the matter of funding remedy for any applicable future review."[44]

If Judge Cannon's flaying of the Office of Special Counsel—and any authority that Jack Smith still sought to wield—was not enough, one question still remained: Is the Special Counsel a principal officer, an inferior officer, an employee, or nothing of legal import? In his concurrence, Justice Thomas deferred the question, "assuming without deciding,"[45] while Judge Cannon partially addressed it by summarily "reject[ing] the principal-officer submission."[46]

[42] United States v. Trump, 23-80101 at 3 (S.D. Fla. Jul. 15, 2024) (opinion and order granting motion to dismiss).
[43] *Id*.
[44] *Id*. at 91.
[45] *Id*. at 56.
[46] *Id*. at 67–68.

However, she did so, leaving "the matter for review by higher courts."[47] If two jurists could not definitively determine whether Smith functioned as a principal officer, an inferior officer, an employee, or even something else entirely, then perhaps the true issue was not with their rulings but with the law itself. It is clear that an office without origin in law leaves everyone, from judges to scholars, questioning whether it exists at all:

> Upon careful study of the foundational challenges raised in the Motion, the Court is convinced that Special Counsel Smith's prosecution of this action breaches two structural cornerstones of our constitutional scheme—the role of Congress in the appointment of constitutional officers, and the role of Congress in authorizing expenditures by law.[48]

In sum, power without law is no power at all. And Jack Smith would be no exception—not in Florida, not in the nation's capital, not anywhere.[49]

## VI. Reflection

As the litany of issues surrounding Smith's prerogative came to a resounding abatement, that his appointment violated both the Appointments and Appropriations Clauses, he sounded the retreat. With an analogous motion challenging his authority as Special Counsel pending in D.C., filed two months after Judge Cannon's decision, and with the presidential election results decisively favoring President Trump, to call the collapse a domino effect would understate its constitutional magnitude. On November 8, 2024, Smith requested that Judge Chutkan vacate the briefing schedule, and by November 25, he formally moved to dismiss all charges against President Trump: free of the law, but not from the law.[50]

[47] *Id*. at 68.
[48] *Id*. at 91.
[49] On July 17, 2024, Special Counsel Smith filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit from Judge Cannon's dismissal order. *See* United States v. Trump, 23-80101 (S.D. Fla. Jul. 17, 2024) (notice of appeal). On November 26, 2024—twenty-one days after President Trump's re-election—the Eleventh Circuit dismissed the appeal as to President Trump but allowed it to proceed against the two co-defendants. *See* Order, United States v. Trump, No. 24-12311 (11th Cir. 2024).
[50] United States v. Trump, 23-00257 (D.D.C. filed 2023).

"It is the proud boast of our democracy that we have 'a government of laws and not of men.'"[51] Those were the words echoed by the late Justice Antonin Scalia as he closed the Supreme Court's 1987 term in *Morrison v. Olson*, speaking against the powers of the Independent Counsel—the progeny from which the Special Counsel was derived.[52] He stated further that this "is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish."[53] His warning, penned thirty-six years earlier, now bore a prophetic weight:

> Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.[54]

But as Justice Scalia reminded, this new Trojan horse of "accountability" was met with careful and perceptive analysis, and ultimately consigned to the constitutional graveyard.

As the sun sets on President Trump's trials, the nation is left in a state of disorientation. Since the expiration of the Independent Counsel in 1999, there have been several high-profile Special Counsel investigations, three of which ran concurrently during Jack Smith's tenure.[55] In the face of Trump's trials, the only certain truth is that power without law cannot stand. This reality leaves Congress with a binary choice: eliminate the Office of Special Counsel, or

[51] Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, A., dissenting).
[52] *Morrison* upheld the constitutionality of the Independent Counsel provision of the Ethics in Government Act of 1978 (EIGA), reasoning that the appointment of the Independent Counsel as an "inferior officer" did not violate the Appointments Clause or separation of powers principles. *See Morrison*, 487 U.S. at 655. Justice Antonin Scalia, however, dissented alone, warning that the Independent Counsel posed an unconstitutional threat to the balance of power among the branches. *See id*. In 1999, Congress allowed the EIGA to expire, widely acknowledging Scalia's dissent as prescient. Justice Thomas referenced *Morrison* in his concurrence in Trump v. United States, 144 S. Ct. 2312, 2328 (2024), but Judge Cannon did not rely on it in her dismissal, noting that the EIGA had expired and its statutory framework was irrelevant.
[53] *Morrison*, 487 U.S. at 699.
[54] *Id*.
[55] U.S. Att'y Gen., Order No. 5559-2022, Appointment of John L. Smith as Special Counsel (2022); U.S. Att'y Gen. Order No. 5588-2023, Appointment of Robert K. Hur as Special Counsel (2023); U.S. Att'y Gen. Order No. 5730-2023, Appointment of David C. Weiss as Special Counsel (2023).

legitimize it through explicit statutory enactment.[56]

[56] At the end of his concurrence, Justice Thomas made passing reference to United States v. Nixon, 418 U.S. 683 (1974), which provided brief acknowledgment of 28 U.S.C. §§ 509, 510, 515, and 533 in supporting the appointment of Archibald Cox—the Special Prosecutor tasked with investigating the Watergate scandal. However, Justice Thomas dismissed its utility in the present context, noting its lack of textual analysis: "To be sure, the Court gave passing reference to the cited statutes as supporting the appointment of the Special Prosecutor in United States v. Nixon, 418 U.S. 683, 694, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), but it provided no analysis of those provisions' text." Trump v. United States, 144 S. Ct. 2312, 2351 (2024) (Thomas, J., concurring). Judge Cannon, in her subsequent order, noted *Nixon* as non-precedential dicta.

# A Legal Perspective of The Trump Administration's Feud with International Students, Student Activists, and the Courts

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**Abstract:**

United States President Donald Trump has taken various measures to suppress the presence of noncitizen students and opposition-led political demonstration on university campuses. Pushback from those affected has created major tension in discourse involving immigration, genocide, and constitutional protections. The following analysis contextualizes this ongoing clash, delineates its relevant influences, and offers insight into its future, describing what a possible resolution could and should look like.

## I. Introduction

As the United States nears a year under a second Trump administration, it is clear that the President has been met with ample criticism and counteraction over policy involving visa holding students and political organizers on college campuses. The hubs of the nation's higher education have become points of tension as students speak out against U.S. involvement in the ongoing genocide of Palestinians, increasing immigration restrictions, and federal defunding of university research and programs. Condemning pro-Palestine activism has been routine for President Trump, whose statements on the matter have included labelling these individuals as "antisemitic" and "terrorist sympathizers" on his social media platform, Truth Social.[1] More substantial government action has included arrests,[2] restrictions on international students,[3] and withholding funding from schools such as Columbia and Harvard unless policy changes are made.[4] Proponents of the current administration's approach claim it to be prioritizing current citizens[5] and domestic interests. However, in the face of mixed court rulings, time will tell if these perceived attacks on diversity, dissenting voices, and academia will remain in place or prove effective. It is increasingly clear that federal courts must resolve the current conflict between the Trump administration and higher education to preserve the reputation of leading universities, preserve free speech for universities and their students, and protect international students from the xenophobia of the current administration.

[1] Reuters, *Trump Says Arrest of Pro-Palestinian Columbia Student is First of Many to Come* (Mar. 2025), www.reuters.com/world/us/trump-says-arrest-pro-palestinian-columbia-student-is-first-many-come-2025-03-10/.
[2] Leila Fadel et. al.,*"Citizenship Won't Save You": Free Speech Advocates Say Student Arrests Should Worry All*, NPR (Apr. 2025) www.npr.org/2025/04/08/nx-s1-5349472/students-protest-trump-free-speech-arrests-deportation-gaza.
[3] Michael S. Schmidt & Michael C. Bender, *Trump Administration Says It Is Halting Harvard's Ability to Enroll International Students,* N.Y. Times (May 2025), www.nytimes.com/2025/05/22/us/politics/trump-harvard-international-students.html; Jeff Tollefson, *Can Harvard Survive Trump?*, 643 Nature 26–27 (2025).
[4] Jessica Blake, *What To Know About Trump's Strategy Targeting Colleges' Grants and Contracts,* Inside Higher Ed. (Apr. 2025), www.insidehighered.com/news/government/politics-elections/2025/04/18/what-know-about-trumps-funding-threats-colleges.
[5] U.S. Dep't of Homeland Sec., *100 Days of Making America Safe Again* (Apr. 2025), www.dhs.gov/news/2025/04/29/100-days-making-america-safe-again

## II. Context and Scope

This analysis relies on important definitional distinctions that the following section aims to clarify. Because certain words carry heavy implications and are used by different actors with varying meanings and motives, the following clarification seeks to provide clarity and mitigate ambiguity or confusion, particularly with regard to the terms "genocide," "Zionism," and "antisemitism." It is important to acknowledge that while many of the key terms used in this analysis are multifaceted and nuanced, the preliminary definitions offered here allow for this paper to be feasible in its scope.

While war and conflict have also been used as descriptors, this analysis will refer to Israel's endeavors since October 7, 2023 as a "genocide" based on the findings of international humanitarian organizations including Amnesty International, Human Rights Watch, B'Tselem, and others that conclude the state's actions meet the criteria under international law for such an act.[6] Such criteria include killing members of a group, causing them serious harm, inflicting on them conditions calculated to bring about their destruction, preventing births within the group, and forceful transfer of their children to another group.[7] Additionally, following the scholarship of Palestinian human rights lawyer Rabea Eghbariah, I assert that Israel has acted as an apartheid state long before October 7, 2023, and the "Nakba" of 1948 was the beginning of decades-long occupation of Palestinian territories and genocide of the Palestinian people.[8] Eghbariah and others argue that the Nakba is an ongoing process, and the actions of Israel in the past two years are a continuation of this process of dispossession.[9] In the context of this analysis, "Zionism"

[6] Amnesty Int'l, *Israel/Occupied Palestinian Territory: "You Feel Like You Are Subhuman": Israel's Genocide Against Palestinians in Gaza*, MDE 15/8668/2024 (2024); Hum. Rts. Watch, *Extermination and Acts of Genocide: Israel Deliberately Depriving Palestinians in Gaza of Water* (2024); B'Tselem, *Our Genocide* (2025), Physicians Hum Rts. Isr., *Destruction of Conditions of Life: A Health Analysis of the Gaza Genocide* (2025).
[7] Amnesty Int'l, *supra* note 6.
[8] Rabea Eghbariah, *Toward Nakba as a Legal Concept* 124 Colum. L. Rev. 887 (2024).
[9] *See* Rosemary Sayigh, *On the Burial of the Palestinian Nakba* in *Routledge International Handbook of Ignorance Studies* 279–289, 285, 288 n.12 (Matthias Gross & Linsey McGoey eds., 2nd ed 2022) ("the Nakba was not limited

will refer to the idea that the Jewish people have the right to create, uphold, and defend their own national state in the historical region of Palestine,[10] and the word "antisemitism" will refer to discrimination against Jewish people.[11] In accordance with my understanding of global human rights doctrine and of abuses historically intertwined with the concept of Zionism, I will not be considering criticisms of Zionism or opposition to the aforementioned genocide as inherently antisemitic.[12] Finally, "Hamas" refers to the militant group that currently controls the Gaza Strip and has done so since elections in 2006.[13]

## III. International Students

At the forefront of vulnerability to the repercussions of xenophobic immigration policies lie international students, specifically those of Muslim and Middle Eastern background who organize publicly against American involvement in the genocide. Often denounced as pro-Hamas or pro-terrorism by the current government, the names Mahmoud Khalil, Rümeysa Öztürk, and Mohsen Mahdawi have become widely known in recent months due to their encounters with U.S. Immigration and Customs Enforcement (ICE) and subsequent court battles amidst the current legal climate of heightened xenophobia and Islamophobia.

to 1948"); *and* Ilan Pappé, *Everyday Evil in Palestine: The View from Lucifer's Hill*, 1 Janus Unbound 70–82 ("The Palestinians refer to their current situation quite often as *al-Nakba al-Mustamera*, the ongoing Nakba. The original Nakba or catastrophe occurred in 1948, when Israel ethnically cleansed half of the Palestinian population and demolished half of their villages and most of their towns…[s]ince then, the settler-colonial state of Israel has attempted to complete the ethnic cleansing of 1948"); *see also* Ilan Pappé, *The Ethnic Cleansing of Palestine* (2007).

[10] Edward W. Said, *Zionism from the Standpoint of its Victims* 1 Soc. Text 7–58 (1979).

[11] *Id.*

[12] Global human rights doctrine that supports this understanding of genocide include the Universal Declaration of Human Rights and the Genocide Convention. These documents delienate what constitutes a genocide and serve to verify various basic rights ascribed to all people, and they were passed by the United Nations General Assembly in 1948 in light of the atrocities that took place during the Holocaust. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (1948); U.N. Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 U.N.T.S. 277.

[13] Kali Robinson*, What is Hamas?* Council on Foreign Rels. (Oct. 2024), www.cfr.org/backgrounder/what-hamas.

Khalil, a Palestinian activist at Columbia University and a figurehead of protests on campus, was taken into custody when ICE agents entered his apartment on March 8, 2025.[14] He was released in late June from the Central Louisiana ICE Processing Center and faces deportation despite not being formally charged with a crime.[15] The Department of Homeland Security spokesperson, Tricia McLaughlin, defended this move, describing it as a contribution to President Trump's push in combating antisemitism.[16] In a similar situation to that of Mr. Khalil, Mohsen Mahdawi, a student at Columbia, was taken into custody by immigration officers at the site of a naturalization interview he had scheduled. He was released after sixteen days in a Vermont prison and recently graduated from the university; during the ceremony, Mahdawi wore a keffiyeh and received a standing ovation.[17] Shortly after graduating, he participated in a gathering outside the university's campus, holding up a picture of his detained classmate. Rümeysa Öztürk, a Turkish doctoral student at Tufts University, was released from a separate Louisiana detention center in early May under a Vermont judge's orders.[18] She had been detained for six weeks after being taken off the street in Massachusetts by masked plainclothes agents.

With these instances in mind, it may be expected that a university dealing with a significant amount of unrest and the threat of deportation of multiple students would hold firm against actions that much of its community and the courts deem unconstitutional. However, Harvard and Columbia, two Ivy League[19] institutions and powerhouses in American academia,

[14] Jake Offenhartz*, Over Boos, Columbia University President Notes Mahmoud Khalil's Absence at Graduation*, AP News (May 2025), www.apnews.com/article/columbia-university-mahmoud-khalil-8a0939a9e41a89d2b389197459d1bdca.
[15] Victoria Albert, *Inside Columbia Student Mahmoud Khalil's ICE Detention Center*, Wall St. J. (Apr. 2025), www.wsj.com/us-news/law/mahmoud-khalil-columbia-student-ice-louisiana-f25a50af.
[16] Jake Offenhartz, *Immigration Agents Arrest Palestinian Activist Who Helped Lead Columbia University Protests*, AP News (Mar. 2025), www.apnews.com/article/columbia-university-mahmoud-khalil-ice-15014bcbb921f21a9f704d5acdcae7a8.
[17] Coral Murphy Marcos, *Mohsen Mahdawi, Released from ICE Custody, Graduates from Columbia*, The Guardian, (May 2025), www.theguardian.com/us-news/2025/may/19/mohsen-mahdawi-ice-columbia-graduation.
[18] Adrian Florido, *Tufts Student Rümeysa Öztürk Freed from Immigration Detention*, NPR (May 2025), www.npr.org/2025/05/09/nx-s1-5393055/tufts-student-rumeysa-ozturk-ordered-freed-from-immigration-detention.
[19] U.S. News, *Ivy League Schools* (Sept. 2024), www.usnews.com/education/best-colleges/ivy-league-schools.

have shown two distinct responses to the Trump administration's pressures, one of which has led to reputational harm. Harvard University is currently facing billions of dollars in funding cuts as well as the potential loss of all contracts and its tax-exempt status.[20] Despite this, the university's leadership has refused to comply with the administration's demands.[21] Led by Jewish president Alan Garber, Harvard rejects the notion that its campus has cultivated antisemitism.[22] The school awaits the outcomes of lawsuits determining its qualifications and funding, much of which is distributed to research involving pressing apolitical causes such as cancer and other diseases.[23]

While Harvard stands a cut above the rest in its wealth and resulting ability to resist, its peer Columbia has been under major scrutiny for its response to the Trump administration's pressure. In late March, Khalil and Mahdawi's university announced a lengthy agreement with the administration in the hope of regaining over four hundred million dollars in funds the government withheld.[24] Policy changes include appointing new leadership of its Middle Eastern, South Asian, and African Studies department and allowing security to make arrests more broadly.[25] The university also announced that it had suspended or even expelled multiple students who participated in prior protests, and had temporarily suspended the diplomas of some students who had graduated.[26] All the more significant is the possibility that this capitulation will not even prove effective, as the current Department of Education's Civil Rights Office stated Columbia

[20] Kayla Epstein, *Trump Administration Ends Harvard's Ability to Enroll International Students*, BBC News (May 2025), www.bbc.com/news/articles/c05768jmm11o.
[21] *Id*.
[22] Al Jazeera, *US Accuses Harvard of Anti-Semitic Harassment, Threatens to Cut All Funding* (July 2025), www.aljazeera.com/news/2025/7/1/trump-administration-accuses-harvard-of-anti-semitic-harassment-of-students.
[23] Zachary Schermele, *Trump-Harvard Clash Heats Up. Here's What to Know*, USA Today, (May 2025), www.usatoday.com/story/news/politics/2025/05/27/trump-harvard-feud-what-to-know/83875002007/.
[24] Colum. U., *Resolution Agreement Between the United States of America and Columbia University* (2025).
[25] Robert Mackey et al., *Columbia University Capitulates to Trump Demands to Restore $400m in Federal Funding —as it Happened*, The Guardian, (Mar. 2025), www.theguardian.com/us-news/2025/mar/21/columbia-university-funding-trump-demands.
[26] Anna Commander & Peter Aitken, *Columbia University Caves to Trump; Pro-Palestinian Students Fume*, Newsweek (Mar. 2025), www.newsweek.com/columbia-university-caves-trump-pro-palestinian-students-fume-2048932.

violated federal civil rights laws by showing indifference about Jewish harassment and therefore may risk losing accreditation,[27] which would in turn deal a major blow to their bankroll and breadth of programs.

Critics of Columbia's actions compare our current political climate to that of the McCarthyist era of the mid-1900s—that is, largely unsubstantiated claims being brought to the table to influence discourse and accomplish ulterior motives.[28] Students interviewed voiced their fears and resulting hesitance to continue organizing, describing recent affairs as having a suppressive effect.[29] While many young progressives on the pro-Palestinian front do not necessarily consider Columbia an enemy or the source of this suppression, it is believed that the school's compliance to appease its shareholders and the government largely contributes to this issue.

These broad measures have found themselves at odds with state courts and judges, who have been tasked with reviewing and accommodating the cases of many international students who have had their statuses and records altered, ultimately leaving them with the threat of deportation and the inability to attend school or work. Judge Allison Burroughs of Massachusetts had to issue a temporary injunction to allow international students to remain at Harvard during a lawsuit stemming from Homeland Security Secretary Kristi Noem's withdrawal of certification to have these students on campus.[30] Other instances of this include F-1 visa holders from India

[27] Sharon Otterman, *Trump Escalates Attack on Columbia University by Threatening Its Accreditation*, N.Y. Times, (June 2025), www.nytimes.com/2025/06/04/nyregion/columbia-trump-accreditation-civil-rights.html.
[28] Peter Hudis, *Challenging the New McCarthyism: Charges of Antisemitism Weaponized* 39 Against the Current 5–8 (2024); *see generally* Landon R. Y. Storrs, *McCarthyism and the Second Red Scare*, Oxford Rsch. Encyc. Am. His. (July 2015) (overview of McCarthyism as an ideology and the history of anti-left sentiment in the U.S. government).
[29] Elena Moore, *For Some Students who Protested War in Gaza, Fear and Silence is a New Campus Reality*, NPR (Apr. 2025), www.npr.org/2025/04/11/nx-s1-5343940/college-students-say-trump-administrations-crackdown-on-activism-incites-fear.
[30] Kayla Epstein, *Judge Blocks Trump's Effort to Restrict Foreign Students at Harvard—For Now*, BBC News (May 2025), www.bbc.com/news/articles/cx2jeg8zej8o.

and China studying at schools such as Marshall University[31] and the University of Wisconsin–Madison[32] receiving similar protection after seemingly unfounded terminations with minimal notification and time to respond.

## IV. Pro-Palestinian and Anti-Mass Deportation Activism

The current administration's battles have not only been fought with international, non-citizen students. Efforts to uproot dissenting student populations have involved those speaking out about the genocide of Palestinians and oversteps by ICE under the President's mass deportation agenda, issues that both allegedly stem from xenophobia.[33]

Major points of tension among student unrest about the United States' involvement in Israel's endeavors in the Gaza strip concern our country's funding of the Israeli Defense Force,[34] President Trump's proposals to colonize the Gaza strip, and the underlying human rights abuses of the situation, which entail food and aid deprivation,[35] bombings, and mass killings. This mainly stems from American contribution to Israel's military, which reached about 12.5 billion dollars in 2024 alone,[36] statements from Trump promoting a potential "Trump Gaza" resort and development of the area into "the Riviera of the Middle East,"[37] and International Criminal Court (ICC)-issued arrest warrants for Israeli Prime Minister Benjamin Netanyahu and former Minister

[31] Vyas v. Noem, No. 25-261 (S.D.W.V. filed 2025).
[32] Isserdasani v. Noem, No. 25-283 (W.D. Wis. filed 2025); Yang v. Noem, No. 25-292 (W.D. Wis. filed 2025).
[33] Press Release, General Assembly, United Nations, States Must Combat 'Deep-Rooted' Racism against Palestinians, Neo-Nazism, Hate Speech Targeting Minorities, Experts Tell Third Committee, U.N. Press Release GA/SHC/4425 (2024); Am. C.L. Union, *Trump On Immigration: Tearing Apart Immigrant Families, Communities, And The Fabric Of Our Nation* 5 (2024).
[34] Encyc. Britannica, *Israel Defense Forces* (July 2025), www.britannica.com/topic/Israel-Defense-Forces.
[35] Hum. Rts. Watch, *Israel/Palestine: An Abyss of Human Suffering in Gaza* (Jan. 2025), www.hrw.org/news/2025/01/16/israel/palestine-abyss-human-suffering-gaza.
[36] Jonathan Masters & Will Merrow, *U.S. Aid to Israel in Four Charts*, Council on Foreign Rels. (Nov. 2024), www.cfr.org/article/us-aid-israel-four-charts.
[37] Brian Bennett, *Trump Proposes U.S. Take Over Gaza, Level it and Build Resorts*, Time (Feb. 2025), www.time.com/7212848/trump-gaza-own/.

of Defense Yoav Gallant.[38] Seeking to maintain their seemingly strong diplomatic relationship, the current administration expressed support for Zionist and pro-Israel groups currently seeking change through the legal system in ongoing cases such as *Students Against Antisemitism, Inc. v. The Trustees of Columbia University in the City of New York*.[39] Giving these activist groups a national platform unfortunately has the repercussion of blurring the lines between displays of support for the Palestinian population and displays of antisemitism and threats toward Jewish and Israeli people. Additionally, various right-wing groups appear to be aiding ICE in light of division on college campuses. The most prominent example of this is Betar, a Zionist youth movement who claim to submit the identities of activists to the government for possible deportation.[40] Eliyahu Hawila, an Israeli student and software engineer, created a facial recognition program called NesherAI that was able to identify a masked female protester in New York solely from footage of her eyes.[41] The woman was ultimately fired from her job and appeared on a list of individuals the Trump administration was urged to deport by private organizations.[42] Instances such as this have caused major lawsuits concerning privacy rights and the role of constitutional and common law in analyzing the relationship between private digital intelligence firms, the public, and the bureaucracy.[43] The action of directly reporting dissenting individuals to the executive branch for punishment bypasses the courts and, in turn, weaponizes the administrative state for personal political benefit, as long as the state shares one's opinion. The use of this type of technology in such a way is also effectively encouraged when the

[38] Prosecutor v. Netanyahu, ICC-01/18-374, Decision on Israel's Challenge to the Jurisdiction of the Court Pursuant to Article 19(2) of the Rome Statute 7 (2024) (background of the arrest warrants for Benjamin Netanyahu and Yoav Gallant issued by the Prosecutor Mr. Karim A.A. Khan KC of the International Criminal Court).
[39] Students Against Antisemitism, Inc. v. Columbia U., No. 24-1306 (S.D.N.Y filed 2025).
[40] Adam Geller, *Private Groups Work to Identify and Report Student Protesters for Possible Deportation*, AP News (Mar. 2025), www.apnews.com/article/trump-foreign-students-campus-gaza-protests-deportation-9e2d4abc1c15845 4da1f68c01062c9ef.
[41] *Id*.
[42] *Id*.
[43] Renderos v. Clearview AI, Inc., No. 21-02567 (N.D. Cal. 2022).

government holds a contract with the software's creators, compromising other possibly altruistic motives for creating such a product.

Another facet of unrest among higher education students and student activists involves their strong dissent for the Trump administration's immigration policies, which are responsible for the arrest and deportation of hundreds of thousands of people, many of whom have no criminal charge.[44] Critics of such policies conflate them with blatant xenophobia and the scapegoating of migrants for societal issues such as crime, job insecurity, and poverty.[45] Most notable of these arrests is that of Kilmar Abrego Garcia, a Salvadoran man mistakenly deported from Maryland to El Salvador's Terrorism Confinement Center (CECOT) despite having protected legal status.[46] Now back in the United States and facing two smuggling charges, Abrego Garcia remains detained while his lawyers argue for greater protection under Magistrate Judge Barbara Holmes's order for his release. The order sets criteria for him to live with his brother, but attorneys assert that release in this way will likely lead to him being detained and possibly deported to CECOT once more. Holmes responded with doubts on whether she has the authority to do anything more than direct prosecutors to attempt to have ICE cooperate.[47] Other actions by the current government that are facing large-scale scrutiny are proposals by Chief of Staff Stephen Miller to suspend habeas corpus under the claimed threat of invasion of public safety,[48] termination of a parole program that granted legal protection to work for more than half

[44] Ted Hesson, *Trump's Immigration Enforcement Record So Far, by the Numbers,* Reuters*,* (Jul. 2025), www.reuters.com/world/us/trumps-early-immigration-enforcement-record-by-numbers-2025-03-04/.
[45] Kica Matos, *Trump's Attacks on Immigrants are an Attack on us All*, Time (May 2025), www.time.com/7280107/trumps-attacks-on-immigrants/.
[46] Ben Finley, *An "Administrative Error" Sent a Maryland Man to an El Salvador Prison, ICE Says*, AP News (Apr. 2025), www.apnews.com/article/el-salvador-deportation-maryland-man-trump-error-818a0fa1218de714448edcb5belf7347.
[47] Travis Loller et. al., *Kilmar Abrego Garcia to Remain in Jail While Attorneys Spar Whether He'll Be Swiftly Deported*, AP News (June 2025), www.apnews.com/article/kilmar-abrego-garcia-deportation-smuggling-27c3a6f7a1a0700d9a33209e852c06a6.
[48] Amanda Holpuch, *What is Habeas Corpus, the Basic Right That Trump Officials are Talking About Suspending?*, N.Y. Times*,* (May 2025), www.nytimes.com/2025/05/20/us/politics/what-is-habeas-corpus-trump-kristi-noem.html.

a million Cubans, Haitians, Nicaraguans, and Venezuelans,[49] and the deployment of the national guard to Los Angeles in response to protests against ICE presence and detainings in the area.[50]

University protest is both protected under the First Amendment rights to freedom of speech and assembly and restricted by current legislation, creating a dynamic where the right to protest is no longer guaranteed, but instead dependent on the administration's discretion. Lawmakers who seek to limit this type of organization typically do so by labeling it a form of violence or riot, allowing law enforcement and state governments large amounts of leeway in the way they address situations. Proposed bills also seek visa revocations and deportations for offending noncitizens,[51] blocking of financial aid to offending students,[52] and monitoring and punishment of universities' responses to these demonstrations.[53] While such legislation is not inherently unconstitutional, it is intentionally harmful because of its vague language, and operates on the assumption that these routine examples of freedom of speech and assembly are hateful towards Jewish students or a threat to general safety. The White House has also referred to this same safety as under attack in proposals invoking the Alien Enemies Act against a claimed invasion of gang members and affiliates from Venezuela and Mexico. However, courts have disagreed on the legitimacy of this invocation because the United States is not in a declared state of war with either of these nations, and the mentioned groups are non-governmental.[54] The Act's criteria can be altered by Congress, however, to either match the current immigration

[49] Melissa Quinn, *Supreme Court Will Let Trump Administration End Program Protecting 500k Cubans, Nicaraguans, Haitians and Venezuelans*, CBS News (May 2025), www.cbsnews.com/news/supreme-court-lets-trump-end-program-500k-cubans-nicaraguans-haitians-venezuelans/.
[50] Sandra Stojanovic & Omar Younis, *Trump Deploys National Guard as Los Angeles Protests Against Immigration Agents Continue*, Reuters, (June 2025), www.reuters.com/world/us/white-house-aide-calls-los-angeles-anti-ice-protests-an-insurrection-2025-06-07/.
[51] UPRISERs Act, H.R. 2273, 119th Cong. (2025).
[52] FAFSA Act of 2025, H.R. 2272, 119th Cong. (2025).
[53] No Tax Dollars for College Encampments Act of 2025, S. 982, 119th Cong. (2025).
[54] Jennifer K. Elsea, Cong. Rsch. Serv., LSB11269, *The Alien Enemy Act: History and Potential Use to Remove Members of International Criminal Cartels* (2025).

conversation or become further restricted and only apply during official intergovernmental war. The latter option would mean that a declared war with a non-state actor would not be grounds for invocation, and neither would a non-war military or political conflict with Mexico or Venezuela's government.

## V. Crucial Factors Moving Forward

Looking ahead, the Trump administration does not seem to show signs of softening its stances on both international students and student dissent of any kind. However, there are multiple forces that play a hand in future action on the matter. Recently, in Trump v. CASA, Inc., the United States Supreme Court issued a six-to-three ruling limiting the power of federal district courts to impose nationwide injunctions.[55] Such injunctions are presently being utilized to stop potentially unconstitutional legislation, the most prominent recent examples of which being executive orders involving immigration. Courts seeking to provide relief from law they believe to be oppressive must do so now only on a case-by-case basis, as Justice Amy Coney Barrett declared what she called "universal injunctions" an overreach of authority under the Judicial Act of 1789.[56] This type of ruling hamstrings the judiciary (and consequently the law) into only being able to work for those who have the time, money, and effort to file a lawsuit. In her dissenting opinion, Justice Ketanji Brown Jackson touches on this, describing a dynamic where the executive is free to encroach upon whomever they please until that person takes legal action.[57] Speaking broadly, it seems counterintuitive and frankly hypocritical to allow legislation to operate in broad strokes unless the system that keeps it in check can do the same. On top of meeting requirements to retain their status and worrying about their university being under fire

[55] Trump v. CASA, Inc., No. 24A884 (U.S. 2025).
[56] Marcia Coyle, *Supreme Court's Injunction Decision a Major Blow to Efforts to Block Executive Policies but Not the End*, Nat'l Const. Ctr. (June 2025), www.constitutioncenter.org/blog/supreme-courts-injunction-decision-a-major-blow-to-efforts-to-block-executive-policies-but-not-the-end.
[57] *CASA*, No. 24A884 at 2 (Jackson, J., dissenting).

by the Trump administration, international students now could be tasked with needing to engage in a personal legal undertaking for their rights. One major alternative, however, could be the certification of nationwide classes, something that CASA's attorneys pursued immediately after the SCOTUS ruling.[58] Should class action lawsuits seeking protection for those affected around the country become common practice in this case, the effects of nullifying nationwide injunctions could be majorly accounted for.

As far as legislation regarding pro-Palestinian student activists, it seems unlikely Congress will loosen its grip on university discourse because of the presence of pro-Israel lobbies in federal politics. Most notably, the American Israel Public Affairs Committee (AIPAC), an organization with over five million members, contributed over fifty-three million dollars to openly pro-Israel candidates in the 2024 election cycle,[59] making it one of the largest interest groups involved. Supported elected officials are highly unlikely to alienate themselves and decline to continue receiving large sums of money in order to push back against attacks on student activists and the colleges that accommodate them. With this in mind, responsibility falls on the university to do what it can to continue to foster an environment of healthy conversation, dissent, and demonstration as large populations of students refuse to cease their advocacy against human rights abuses and Islamophobia. What becomes a normalized response from the nation's elite schools in the near future will be important in creating a collective pushback.

## VI. Conclusion

In a claimed effort to uphold American interests, the Trump administration has repeatedly attempted to impose its will upon university protestors as well as F-1 and J-1 visa holders. Its actions have provoked substantial backlash and have varied from pulling funds and ending

[58] Crowell, *Trump v. Casa: Nationwide Injunctions And The Class Action Loophole* (July 2025), www.crowell.com/en/insights/client-alerts/trump-v-casa-nationwide-injunctions-and-the-class-action-loophole.
[59] AIPAC Pol. Action Comm., www.aipacpac.org/ (last visited July 2025).

programs to arresting dissenters on campus. Such an agenda has pitted individuals and institutions alike against our government, attempted to cripple its opposition criminally and financially, and inadvertently cultivated large-scale support for persecuted activists and obstinate schools. Underlying influences on the current government in this context include xenophobia, pro-Israel lobbies, and bureaucratic as well as private interests. The Trump administration's policy and the sheer number of students affected leave the judicial system overwhelmed and weakened in its ability to adequately respond, which resultantly furthers the relative power of the executive branch. It is crucial that the proper steps are taken to ensure the protection of free and dissenting speech, the strength of American higher education, and the accommodation of foreign and immigrant populations.

# Rights of Nature as An Alternative to Anthropocentric Jurisprudence: Lessons from Ecuador

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**Abstract:**

The 2008 Constitution of Ecuador is the only constitution in the world to explicitly recognize Rights of Nature (RoN). This text is seminal to the RoN movement and to earth jurisprudence broadly, and it offers a model of what RoN can look like in national legal systems. This analysis argues that the global North bears the moral responsibility of climate mitigation efforts and environmental justice initiatives, and it purports that RoN offers a viable legal framework in which ecocentric legislation can be pursued. This analysis offers an exploration of RoN in Ecuador, evaluates relevant case law, and advances the implementation of international environmental justice initiatives to counter anthropocentric legal frameworks and reject human biotic hubris.

## I. Introduction

In 2008, Ecuador became the first nation to recognize Rights of Nature (RoN) in its constitution. Rights of Nature is an ideology and movement that posits that nature, natural entities, and natural processes can and should be recognized by law as rights holders and taken into consideration in our actions as human beings.[1] To date, Ecuador is the only nation with explicit constitutional protections for Rights of Nature.[2] There have been various jurisdictions at the local, regional, and federal levels around the world that have successfully passed RoN legislation; these include but are not limited to the Bangladesh Supreme Court,[3] the Bolivian federal government,[4] the Canadian municipality of Minganie,[5] various Colombian courts,[6] and over sixty U.S. jurisdictions,[7] including Orange County, Florida[8] and a small town in Pennsylvania.[9] The international movement of legal initiatives aimed at protecting Rights of

[1] J. Michael Angstadt et al., *Rights of Nature: A Re-Examination* (Daniel Corrigan & Markku Oksanen eds., 2021).
[2] Some sources state that Bolivia also has constitutional protections for Rights of Nature. While Bolivia does have federal protections for rights of nature under Law 071 and Law 300, these laws are distinct from their national constitution and passed by a different governing body. Rights of Nature are not explicitly enshrined in Bolivia's constitution; instead, the above laws were passed by the Plurinational Legislative Assembly of Bolivia. Whereas Bolivian constitutional referendums are approved by voters, Laws 071 and 300 were passed by its primary legislative body, the Plurinational Legislative Assembly. As such, Bolivia does have federal protections for Rights of Nature that are pursuant with their constitution, but these laws exist as distinct texts from the national constitution of Bolivia. *See* Ley de Derechos de la Madre Tierra, L. 071 (2010) (Bol.); Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien, L. 300 (2012) (Bol.). Some Rights of Nature research attributes these legal protections to Bolivia's constitution, but for the purposes of my analysis, I will be considering laws passed by the Plurinational Legislative Assembly of Bolivia as distinct from Bolivia's 2009 constitution. *Compare* Ctr. Democratic Env't Rts., *Rights of Nature Law Library* (last visited June 2025), https://www.centerforenvironmentalrights.org/rights-of-nature-law-library, *and* Lorna Muñoz, *Bolivia's Mother Earth Laws: Is the Ecocentric Legislation Misleading?* 22 ReVista: Har. Rev. Latin Am. (2023), *with* Daniel Bonilla Maldonado, *Environmental Radical Constitutionalism and Cultural Diversity in Latin America: The Rights of Nature and Buen Vivir and Buen Vivir in Ecuador and Bolivia*, 42 Revista Derecho del Estado 3–23 (2019).
[3] Bangl. Ministry Foreign Aff., *Rights of Rivers: A Legal Narrative for Safeguarding Our Environment* (2023), www .mofa.gov.bd/site/press_release/6e41dfaa-0bdb-46ba-ac1f-6b2c92f25072.
[4] Ley de Derechos de la Madre Tierra [Law of the Rights of Mother Earth], Ley 071 (2010) (Bol.).
[5] The Identification of the Mutehekau Shipu/Magpie River, Innu Council Ekuanitshit 2021 (Resol. 919-082) (Can.); Recognition of the Legal Personhood and Rights of the Magpie River/Mutehekau Shipu, Reg'l Mun. Cnty. Minganie 2021 (Resol. 025-21) (Can.).
[6] Craig M. Kauffman, *Global Patterns and Trends in Rights of Nature Legal Provisions: Insights from the Eco Jurisprudence Monitor* 2–4 (2022).
[7] *Id*.
[8] Orange Cnty., Fla., Charter Amend. § 704.1.
[9] Justin Nobel, *Nature Scores a Big Win against Fracking in a Small Pennsylvania Town*, Rolling Stone (Apr. 2020), www.rollingstone.com/politics/politics-news/rights-of-nature-beats-fracking-in-small-pennsylvania-town-976159;

Nature through law has grown exponentially since the 2000s. In 2002, there were merely three international RoN initiatives, and by 2022, this increased to 325 global initiatives.[10]

Rights of Nature is a broad, interdisciplinary, and constantly evolving movement and concept; it has been examined in various ways across disciplines such as international law, political philosophy, environmental humanities, and the social sciences. Its proponents argue that while rights in the legal sense are a product of Western judicial systems and cultural emphasis on individualism, RoN still poses a viable solution to environmental conflict, as evidenced by numerous international laws that draw on this ideology.[11] The movement is a way for non-human actors to gain respect under existing rights-centered international legal systems. RoN advocates wish to hold space in broader discourses about rights, which typically center human rights, and bring the rights of non-human actors of Earth systems into the conversation. As such, despite its opposition to anthropocentrism,[12] RoN is a product of human-centric legal systems. Importantly, RoN is often influenced by Indigenous worldviews; this is particularly true in the Andes region of Latin America, where many Quechua and other Indigenous people believe in a powerful, capricious force embodied in the earth called *Pachamama*, or Earth Mother.[13] Consequently, the RoN movement in Ecuador is inextricably tied to Indigenous epistemologies and the rights of the nation's Indigenous people. Ecuador has played a crucial role in paving the way for RoN to gain global legitimacy as a legal philosophy. This is largely due to its 2008 constitution.

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Craig M. Kauffman et al., *Eco Jurisprudence Tracker: V1*, Eco Juris. Monitor (2022), https://ecojurisprudence.org; Kauffman, *supra* note 6.

[10] Kauffman, *supra* note 6.

[11] *Id.*

[12] Anthropocentrism is defined by scholars Kopnina et al. as a human-centric worldview (as opposed to biocentric or ecocentric), and they note that within the environmental humanities, the term is often used with a negative connotation of human chauvinism to the detriment of the natural environment. They state that anthropocentrism is a "significant driver of ecocide and the environmental crisis" of modernity. Kopnina et al., *Anthropocentrism: More than Just a Misunderstood Problem*, 31 J. Agric. Env't Ethics 109–27, 123.

[13] Miriam Tola, *Pachamama* in *An Ecotopian Lexicon*, 194–203 (Matthew Schneider-Mayerson & Brent Ryan Bellamy eds., 2019).

On September 28, 2008, under the guidance of newly elected President Rafael Vicente Correa Delgado (Rafael Correa), voters in Ecuador approved a new constitution that intended to secure Rights of Nature in Ecuadorian law. This was Ecuador's twentieth constitution,[14] and it is still in effect as of 2025.[15] The constitution is opposed to neoliberalism and corporate interests, and it embodies the important social, cultural, political, economic, and environmental progress that took place in Ecuador in the 2000s.[16] It includes explicit provisions for Rights of Nature. This constitution, unprecedented in international law, resulted in what some have called a "legal paradigm shift."[17] Since the approval of Ecuador's 2008 constitution, the RoN movement has grown significantly across Latin America and around the world, and parallel to this growth, the ideology has gained credibility within the sphere of legal discourse. However, some critics point to the perceptible gap between the constitutional protections for Rights of Nature and their enforcement in Ecuadorian courts. Some, such as Latin American historian Marc Becker of Truman State University, claim that RoN as legal frameworks are unable to disrupt existing power dynamics in various sectors, such as water development and mining.[18]

Since 2008, Rights of Nature have not been consistently and unconditionally protected in Ecuador. The nation has made significant strides in advancing Rights of Nature through its courts in the years following 2019, but Ecuador should take an even stronger stance against extractivist interests in order to preserve its diverse natural resources and protect Indigenous rights. However, the Western world holds primary moral responsibility for effectively implementing

[14] Marc Becker, *Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador*, 38 Latin Am. Persp. 47–62.
[15] *Constitución de la República del Ecuador* [Constitution] 2008, translated in *World Constitutions Illustrated* (HeinOnline, Jefri Jay Ruchti & Anna DeRosa, eds., Maria Del Carmen Gress & J.J. Ruchti, trans., 2024).
[16] Becker, *supra* note 14.
[17] Kiana Herold, *The Rights of Nature: Indigenous Philosophies Reframing Law*, Intercontinental Cry Mag. (Apr. 2025), www.icmagazine.org/rights-nature-indigenous-philosophies-reframing-law/.
[18] Mihnea Tănăsescu et al., *Rights of Nature and Rivers in Ecuador's Constitutional Court*, 24 Int'l J. Hum. Rts. 1–23; Becker, *supra* note 14.

Rights of Nature and passing similar radical environmental legislation. The West should follow the lead of non-Western states such as Ecuador and Bolivia that have passed Rights of Nature legislation. They should implement ecocentric policies that reject anthropocentric legal norms and center Indigenous voices in environmental discourse. While it is beyond the scope of this paper to analyze Rights of Nature globally and assign specific moral criteria to former colonial states, broader lessons about interspecies empathy, Indigenous epistemologies, and environmental policy can be learned from Ecuador and applied to the West. Rights of Nature can be examined within the context of Ecuadorian law, and moral lessons about the West's culpability for environmental wrongdoings can be inferred from Rights of Nature discourse through a decolonial lens.

## II. Historical, Cultural, and Social Contexts in Ecuador

To understand the social and political conditions of Ecuador during the early 2000s, it is essential to consider the context of prior political instability and economic hardship in the late twentieth century, as well as the centuries-long struggle that followed Ecuador's independence from Spain in 1822. During the twentieth century, Ecuador experienced only three periods of political stability,[19] each of which correlated with growth in its export economy.[20] For instance, oil was found in the Amazon region of Ecuador in 1967, and in the 1970s, Ecuador began exporting oil in vast quantities when global demand for crude oil went up.[21] The expansion of the oil industry was met with Indigenous resistance, and this period also marked a transition away

[19] Political stability is defined here as "civilian control of government with peaceful and constitutional changes of power." Many of the leadership changes in Ecuador during this century were extra constitutional if not plainly unconstitutional. *See generally* Marc Becker, *Ecuador's Social Movements, Electoral Politics, and Military Coups*, Oxford Rsch. Encyc. Pol. (2019) (general understanding of political stability in the context of Ecuador).
[20] *Id*.
[21] Beth Williford, *Buen Vivir as Policy: Challenging Neoliberalism Or Consolidating State Power in Ecuador*, 24 J. World Sys. Rsch. 96–122.

from military dictatorship.[22] In 1979, Jaime Roldós Aguilera was the first democratically elected President after nearly a decade of civilian and military dictatorships,[23] but two years later, he died in a plane crash with some suspecting U.S. involvement.[24] Despite his untimely death, Aguilera's leadership marked the beginning of "the longest period of uninterrupted constitutional rule and peaceful changes of power in Ecuador," which lasted until 1997.[25] The political leadership of Ecuador during this time was characteristically centrist and neoliberal. Following this relative stability, Ecuador experienced a great deal of political turmoil, and the nation had seven presidents from 1996 to 2006.[26] The country declared bankruptcy in 1998, and its economy suffered during the twentieth century and beyond due to its near exclusive reliance on natural resource extractivism.[27] It is from this context of economic and political instability that Rafael Correa assumed power in 2007.

Correa was a stark contrast from his neoliberal predecessors. His election was emblematic of a larger turn to the left in Latin America during the latter half of the twentieth century, a phenomenon that has been called a "pink tide" by some. Along with Correa, presidents Hugo Chávez of Venezuela and Evo Morales of Bolivia were political leaders associated with this pink tide who opposed neoliberalism, capitalism, and Western hegemony.[28] Correa declared that under his leadership, a "citizens' revolution" was underway, which consisted of deep-seated

[22] The discovery of oil in Ecuador and the growth of the extractivist industry has led to vast social inequality, particularly among Ecuador's Indigenous inhabitants near the Amazon river basin. While some defend the oil industry in Ecuador and "hold to the idea that oil produces growth and development," Indigenous groups have been most affected by the expansion of the oil industry, and they are often at the frontlines of environmental conflict. By the late 1980s, "relations between the oil sector and affected communities in the Amazon became increasingly contentious and volatile…one community after another began fighting the oil-industrial system." See Patricia Widener, *Oil Injustice: Resisting and Conceding a Pipeline in Ecuador* 22 (2011) for a discussion of environmental justice and Indigenous resistance to extractivism in Ecuador.
[23] Warren Hoge, *For Ecuador, Populist Chief*, N.Y. Times, May 1979, at A9.
[24] Williford, *supra* note 21.
[25] Becker, *supra* note 19, at 9.
[26] Williford, *supra* note 21.
[27] Tănăsescu et al., *supra* note 18.
[28] Williford, *supra* note 21.

change across the government, anti-corruption measures, opposition to neoliberal economic policies, and more.[29] He was sympathetic to left-wing political views and anticapitalist movements, such as those espoused by environmentalists, and he adopted the philosophy of *buen vivir* to challenge the neoliberal agenda and gain sympathy from Indigenous Ecuadorians.[30] *Buen vivir* is a worldview that has its roots in Indigenous epistemologies, which emphasize "community well-being, reciprocity, solidarity, and harmony with *Pachamama*."[31] This philosophy is decolonial in nature and has value in anticapitalist rhetoric due to its implicit critique of the West and former colonial powers. As such, Correa capitalized on this discourse as he utilized it to push for a new national constitution.

The ideology of *buen vivir* is eminently influential to the Rights of Nature movement in Ecuador. *Buen vivir*, called *sumak kawsay* in Quechuan languages, is defined by Paola Lozada and María Belén Garrido as a relational ontology[32] that is embedded in "three epistemic communities: a philosophy based on ancestral knowledge and practices; a post-developmentalist version of degrowth; and a political project."[33] As such, *buen vivir* has broad conceptualizations; it has been used as a political proposal by Correa, Morales, and others, but it is also an Andean and Amazonian Indigenous worldview that rejects Western notions of development, such as

[29] Becker, *supra* note 19.
[30] *See* Williford, *supra* note 21.
[31] Williford, *supra* note 21, at 97; *see also* Miriam Tola, *Between Pachamama and Mother Earth*, 118 Feminist Review 25–40, 31 (description of Correa's "citizen's revolution").
[32] Relational ontology, for the purposes of this paper, is defined as a relational concept of self and being that disallows the independent existence of entities. It posits that mutual relation is what distinguishes entities from one another, rather than substance. Entities cannot exist in a vacuum; they are defined by their relations to and differences from other entities. Relational ontology is "giving up on Cartesian 'I think' and 'I am,' not to mention the 'therefore.'" Alexander M. Sidorkin, *Ontology, Anthropology, and Epistemology of Relation*, 173 Counterpoints 91–102, 91 (2002). As relational ontology concerns *buen vivir*, proponents of the Quechuan epistemology acknowledge that Earth beings do not and cannot exist independently from one another. Nature is communal, and we are defined by our relationships with other inhabitants of the planet, human and nonhuman. All life depends on relations between biotic and abiotic components of the Earth system. Paola Lozada & María Belén Garrido, *Sumak Kawsay: A Decolonial Perspective on Nonviolent Resistance* 1–8 (trans. Jenny Paola Lis-Gutiérrez, Virtual Encyc.: Rewriting Peace and Conflict 2025).
[33] Lozada & Garrido, *supra* note 32, at 3.

modernization theory.[34] This theory of development had many negative environmental, economic, and social impacts in Latin America, and *buen vivir* offered an alternative perspective on development from a decolonial perspective.[35] *Buen vivir* suggests that following the Indigenous principles of reciprocity and solidarity with the human and non-human world will lead to a fulfilled life, and advocates for "fundamental changes towards a solidarity-based economy and Rights of Nature."[36] It is enshrined in Ecuador's constitution, primarily as a result of pressure from Indigenous, left-wing, and environmental movements and organisations preceding the approval of the 2008 constitutional revisions.[37]

The implementation of *buen vivir* in Ecuadorian law following its 2008 constitution was significant. According to Beth Williford, this marked a political change in Ecuador and was influential for three key reasons: first, social development became explicitly crucial to policy and development initiatives; second, *buen vivir* represented a tangible way that a non-capitalist Indigenous political philosophy could be codified into law, and third, it challenged Western notions of progress.[38] With roots in Indigenous Andean cosmologies and epistemology, *buen vivir* represented an alternative worldview that Correa could harness as a political and social philosophy during his presidency. The philosophy implies material and spiritual well-being; it advocates for a life of fullness in harmony with the natural world.[39] *Buen vivir* is "a principle of equity for daily living that transcends all else," and it is integral to the Rights of Nature

[34] Eduardo Gudynas, *Buen Vivir: Today's Tomorrow*, 54 Dev. 441–47 (2011). During the 1950s and 60s onwards, modernization theory has predominated Western social scientific thought; subsequently, the theory pervades the ideological justification of many international development initiatives. The theory is universalizing and reductionist in nature, and it suggests "a common and essential pattern of 'development,' defined by progress in technology, military and bureaucratic institutions," and Western political structures. Nils Gilman, *Mandarins of the Future: Modernization Theory in Cold War America* 3 (2004).
[35] Lozada & Garrido, *supra* note 32, at 2.
[36] Katharina Richter, *Cosmological Limits to Growth, Affective Abundance, and Rights of Nature: Insights from Buen Vivir/Sumak Kawsay for the Cultural Politics of Degrowth*, 228 Ecological Econ. 4 (2025).
[37] *Id*.
[38] Williford, *supra* note 21, at 97.
[39] *See* Sara Caria & Rafael Domínguez, *Ecuador's 'Buen Vivir': A New Ideology for Development*, 43 Latin Am. Persp. 18–33, 19 (2016).

movement in Ecuador, which emphasizes reciprocity with and respect for the natural world.[40] Under Ecuador's new constitution, *buen vivir* became "the fundamental purpose of policy and the guiding principle of national planning."[41]

## III. The 2008 Constitution of Ecuador

Constitutional reforms had been taking place across various Latin American countries in the latter half of the twentieth century and beyond. These reforms signal a broader movement of growing constituent power[42] in the region that uplifted Indigenous perspectives and recognized them as legitimate actors in the state political system.[43] In April 2007, over eighty percent of the Ecuadorian electorate agreed to a referendum to convoke a constituent assembly, due in large part to the support of Indigenous groups, which marked the beginning of the process of drafting a new constitution for Ecuador.[44] Rafael Correa established the party *Alianza País* to support candidates for the assembly, and in September of that year, Correa succeeded in consolidating his political power by winning a majority of the seats in the assembly.[45] As noted by Becker, this left some activists and Correa's opponents "feeling marginalized from the political changes sweeping the country."[46] Regardless of these divisions, with this advantage in the constituent assembly, the

[40] Williford, *supra* note 21, at 103.
[41] Caria & Domínguez, *supra* note 39, at 19.
[42] Constituent power is "a specific kind of a power to make a new constitution or to alter the current one." It is a supralegal power that can be brute (*de facto*) or normative (*de jure*). Mikolaj Barczentewicz, *Constituent Power and Constituent Authority*, 52 Conn. L. Rev. 1317–33, 1318–19 (2021).
[43] A wave of constitutional reforms took place in the following nation-states during this time, including Colombia, Bolivia, Ecuador, Venezuela, and others. Some call this political phenomenon neo-constitutionalism or new constitutionalism. Many neo-constitutionalist endeavors in Latin America during the latter half of the twentieth century and the beginning of the twenty-first century highlighted the importance of Indigenous rights, incorporated concepts like the "multiethnic nation," and followed a model of legal equalitarian pluralism. *See* Joaquim Shiraishi Neto & Rosirene Martins Lima, *Rights of Nature: The Biocentric Spin in the 2008 Constitution of Ecuador*, 13 Veredas do Direito 111–131, 111-12 (2016); *see also* Rubén Martínez Dalmau & Victoria J. Furio, *Democratic Constitutionalism and Constitutional Innovation in Ecuador: The 2008 Constitution*, 43 Latin Am. Persp. 158–74 (2016).
[44] Becker, *supra* note 14, at 49.
[45] *Id*. at 49–50; Williford, *supra* note 21, at 103.
[46] Becker, *supra* note 14, at 50.

young new president of Ecuador set the stage for the advancement of his political agenda: fervent opposition to neoliberalism and Western imperialism.

The 2008 Constitution of Ecuador sought to "establish the direct relation between popular sovereignty and the constitution that had been lost" after neoliberal political reform in Ecuador in the century prior, and it was a move toward "a new phase of democracy" in Ecuador.[47] The Constitution signified the country as a plurinational state, or "one that respects and affirms the sovereignty of the diverse Indigenous and Afro-descendent groups within it;" officially acknowledged the nation's Indigenous roots; signaled the state's commitment to *buen vivir*; forbid discrimination based on gender identity; and recognized Rights of Nature as legally enforceable ecosystem rights.[48] In all, Ecuador's new constitution was a remarkable show of progressive change in the country and signified decolonialism at play in its national politics. It made significant strides in advancing Indigenous rights, Rights of Nature, and gender equality. However, critics view the 2008 Constitution as a mixed bag—they saw it as a jump forward for certain rights but not others. Moreover, its provisions for Rights of Nature have not been uniformly enforced since its ratification, and many environmentalists point to Ecuador's continued extractivist industry as a point of hypocrisy for the Correa administration.

Importantly, its axiological basis lies in the ideology of *buen vivir*.[49] The philosophy is based on community and reciprocity, on harmony with the natural world and the mutual benefit of human and nonhuman agents of *Pachamama*. It upholds a community-based understanding of life and Ecuadorian society that rejects individualism and instead believes that "the goal of living

[47] Dalmau & Furio, *supra* note 43.
[48] Christine Keating & Amy Lind, *Plural Sovereignty and la Familia Diversa in Ecuador's 2008 Constitution*, 43 Feminist Stud. 291–313, 291 (2017); *see also* Williford, *supra* note 21, at 104.
[49] Axiology is the study of value, particularly in philosophy. This study is considered to encompass two areas: aesthetics and ethics, and for the purposes of this paper, ethics is the more relevant of the two. The term brings together the findings of various fields concerned with value including but not limited to religion, politics, law, anthropology, and more. *See generally* Nicholas J. Crowe, *Axiology*, EBSCO Rsch. Starters (2024), www.ebsco.com /research-starters/religion-and-philosophy/axiology (general definition of the term).

is not to have more than one's neighbor but for everyone to have enough."[50] The principle of *buen vivir* is not defined in the constitution. Still, the phrase, which is translated in English as "the good way of living," appears over twenty times, including in the preamble, Title II, Section 2 (Rights to Buen Vivir), and Title VII (The Buen Vivir System).[51] For example, the following is an excerpted translation from its preamble: "We women and men, the sovereign people of Ecuador…Hereby decide to build [a] new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living, the sumak kawsay."[52] Through various references to the Quechuan name *sumak kawsay* in addition to *buen vivir*, the Constitution appeals to the cultural values of Indigenous Ecuadorians and establishes that Quechuan worldviews are the framework of this political text.[53] Moreover, the Constitution reasserts at various points that the Ecuadorian state must foster science and innovation, respect the environment, promote multiculturalism, and contribute to the achievement of *buen vivir*.[54] The following is translated from Title VII, Chapter One, Section 8, Article 385:

> The national system of science, technology, innovation and ancestral wisdom, in the framework of respect for the environment, nature, life, cultures and sovereignty, shall have as its end purpose the following…to restore, strengthen and upgrade ancestral wisdom…[and] to develop technologies and innovations that promote national production, raise efficiency and productivity, improve the quality of life and [contribute] to the achievement of the good way of living.[55]

Thus, *buen vivir* is the epistemology that undergirds the 2008 Constitution of Ecuador. It is not only the philosophy from which a new state is constructed, as evident in the preamble, but also the state's responsibility to uphold, as evident in Article 385 above. *Buen vivir* is foundational to Rights of Nature in the Constitution—another ideology that is explicitly present in the document.

[50] Williford, *supra* note 21, at 103.
[51] *Constitución de la República del Ecuador* [Constitution] 2008, translated in *World Constitutions Illustrated* (HeinOnline, Jefri Jay Ruchti & Anna DeRosa, eds., Maria Del Carmen Gress & J.J. Ruchti, trans., 2024).
[52] *Id.* at 4–5.
[53] The Ecuadorian Constitution includes the phrase *sumak kawsay* five times. *See id*. at 5, 9, 77, 83, and 111.
[54] *Id*.
[55] *Id*. at art. 385.

The 2008 Constitution of Ecuador has an entire chapter dedicated to Rights of Nature. It is referenced at various points throughout the document, both explicitly and implicitly, and RoN in Ecuador is established as inextricably tied to the philosophy of *buen vivir*. Within RoN thought, this constitution is considered a seminal text that helped raise awareness for RoN and legitimize the theory within broader, global legal discourse.[56] The Constitution was the first, and to this day, only, text of its kind—no other constitution in the world has a specific provision for RoN.[57] Title II, Chapter Seven of the Constitution is titled "Rights of Nature," and Article Seventy-One of this chapter is translated below:

> Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.
> All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.
> The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.[58]

Articles Seventy-Two to Seventy-Four further clarify the Rights of Nature in Ecuador, including the right to be restored and the right of "persons, communities, peoples, and nations" to benefit from the environment.[59] Interestingly, Article Seventy-Three declares that "The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles."[60] In the face of continued extractivist projects in Ecuador, it appears that this right and responsibility of

[56] *See* Kristen Stilt, *Rights of Nature, Rights of Animals*, 134 Harv. L. Rev. 276–85, 279–81 (2021); *see also* Angstadt et al., *supra* note 1; Gudynas, *supra* note 34, at 442; *and* Richter, *supra* note 36 (establishing the legal significance of the 2008 Ecuadorian Constitution within the RoN movement and legal discourse broadly).
[57] Ctr. Democratic Env't Rts., *supra* note 2.
[58] Constitución de la República del Ecuador [Constitution] 2008, art. 71, translated in World Constitutions Illustrated (HeinOnline, Jefri Jay Ruchti & Anna DeRosa, eds., Maria Del Carmen Gress & J.J. Ruchti, trans., 2024).
[59] *Id*. at art. 72–74.
[60] *Id*. at art. 73.

Ecuadorian state officials has not been upheld to its full extent.[61] The relative success of the 2008 Constitution of Ecuador in upholding RoN throughout the nation is doubtful. If its ratification was not followed by radical, impartial applications of the law, this could suggest that its significance is merely symbolic. While the articles above have provided foundational language for the defense of RoN within Ecuador's legal system, these clauses do not guarantee the sustained protection of Ecuador's environment.[62] An assessment of case law following the ratification of the 2008 Constitution can help shed insight into the specific outcomes of this political development in Ecuador.

## IV. Outcomes in Ecuador

While the passage of the 2008 Ecuadorian Constitution set the stage for the legal defense of Rights of Nature, the courts gave form and force to RoN in Ecuador. Unlike the United States, Ecuador's judiciary branch is unitary, meaning that the only court system besides the federal courts is at the provincial level.[63] According to legal librarian Juan Andres Fuentes, judges at both the federal and provincial levels "administer justice according to the Constitution, international human rights instruments, and the law."[64] Ecuador's legal system is based on civil law, which relies on binding, written laws rather than judicial precedents.[65] Even though the courts do not rely on judicial precedent, Ecuadorian judges play a key role in constructing legal and cultural norms or *doxa*.[66] As noted by RoN scholars Craig Kauffman and Pamela Martin, the

[61] Hugo Goeury, *Rafael Correa's Decade in Power (2007–2017): Citizens' Revolution, Sumak Kawsay, and Neo-Extractivism in Ecuador*, 48 Latin Am. Persp 206–26 (2021).
[62] Audrey Carbonell, *The Legal Protection of Pachamama: The Implications of Environmental Personhood in Ecuador*, Colum. Undergrad. L. Rev. Online (May 2024), www.culawreview.org/journal/the-legal-protection-of-pachamama-the-implications-of-environmental-personhood-in-ecuador.
[63] C. Neal Tate et al., *Unitary and Federal Systems*, Encyc. Britannica (June 2025), www.britannica.com/topic/constitutional-law/unitary-and-federal-systems.
[64] Juan Andres Fuentes, *The Basic Structure of the Ecuadorian Legal System and Legal Research*, N.Y.U. L. GlobaLex (2021), www.nyulawglobal.org/globalex/ecuador1.html.
[65] *Id*.
[66] In the rhetorical sense, *doxa* means popularly held beliefs, common knowledge, or prevailing "starting places that can hold communities together." As such, *doxa* is socially constructed and interwoven with cultural norms. It comes

norm construction that takes place through Ecuadorian courts has global relevance because it contributes to "the diffusion of new global environmental norms."[67] As such, the decisions of Ecuadorian courts not only impact the way RoN is perceived domestically; these decisions also have global impacts. Since 2008, RoN has been invoked more than fifty times in case law, and half of these RoN lawsuits occurred between 2019 and early 2022.[68] The Ecuadorian court system, legislature, and executive branch treated RoN as largely ad hoc[69] before 2019, and as such, Kauffman and Martin argue that RoN lacked sufficient binding jurisprudence until recent years.[70]

The *Sala de la Corte Provincial*, a provincial court in Ecuador, became the first court in history to vindicate the newly constitutionalized Rights of Nature in the 2011 case *Wheeler c. Director de la Procuraduría General del Estado de Loja*.[71] The Provincial Government of Loja sought to construct and expand a road in the mountains of southern Ecuador, but the construction project had adverse effects on the nearby Vilcabamba River. The court decided in favor of the Vilcabamba River against the Provincial Government; however, even though the decision carried legal significance, the success of its enforcement is debated.[72] In the years that followed, RoN appeared to be protected situationally rather than as a foundational Ecuadorian right, as the Constitution would suggest.[73] Moreover, human rights civil society organizations in Ecuador

from ancient Greek philosophy and is contrasted with knowledge (epistēmē). *See* Caddie Alford, *Doxa* in *A New Handbook of Rhetoric: Inverting the Classical Vocabulary* 135–55, 136–37 (ed. Michelle Kennerly, 2021).

[67] Craig M. Kauffman & Pamela L. Martin, *How Ecuador's Courts Are Giving Form and Force to Rights of Nature Norms*, 12 Transnat'l Env't L. 366–95, 374 (2023).

[68] *Id*. at 366.

[69] "Ad hoc" in this context is defined as law that is used for a specific end. It means something that is to be used for a specific purpose rather than a wider application. *See generally* Merriam-Webster Dictionary, *Ad Hoc* (June 2025), www.merriam-webster.com/dictionary/ad%20hoc (general definition of the term).

[70] Kauffman & Martin, *supra* note 67, at 367.

[71] Erin Daly, *The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature*, 21 Rvw. Eur. Cmty. & Int'l Env't L. 63–66 (2012). In legal documents of Ecuador and other Spanish-speaking countries, "contra" is used instead of "versus," abbreviated here as "c."

[72] *Id*. at 64; *cf*. Norie Huddle, *World's First Successful 'Rights of Nature' Lawsuit*, Kosmos (2013), www.kosmosjournal.org/article/worlds-first-successful-rights-of-nature-lawsuit-2/.

[73] Kauffman & Martin, *supra* note 67.

faced suppression from the federal government. Executive Decree Sixteen, which was approved in 2013, granted the President significant powers to monitor and dissolve non-governmental organizations (NGOs). In December of that year, the Decree was applied against the *Fundación Pachamama*, which was dissolved arbitrarily in less than three days without due process, which is a protected right in Ecuador.[74] The organization worked to defend the rights of Indigenous people and environmental rights.[75] This Decree was an act of blatant hypocrisy on the part of former president Rafael Correa and his administration, considering that these two issues—Indigenous and environmental rights—were supposedly central to his leadership and protected in the 2008 Constitution that he played a key role in advancing.

Despite some setbacks, the Rights of Nature movement has made significant advances in Ecuador, particularly in the years following 2019. One notable case decided by the Constitutional Court of Ecuador is the 2021 case *Municipio de Cotacachi c. Ministerio del Ambiente*, which concerned a mining project with plans to explore and develop in the Los Cedros tropical cloud forest of northern Ecuador.[76] Tropical cloud forests are among the most biodiverse ecosystems in the world, and their habitats are often threatened by climate change and human interaction, like the proposed mining project in the Protected Forest of Los Cedros.[77] They are characterized by consistent humidity from clouds or mist, and they are located at high elevations of tropical mountain systems worldwide.[78] These forests are akin to coral reefs in their rich biodiversity and

[74] Susana Borràs, *New Transitions from Human Rights to the Environment to the Rights of Nature*, 5 Transnat'l Env't L. 113–43, 137 (2016); Hum. Rts. Watch, *Ecuador: Rights Group Shut Down* (Dec. 2013), www.hrw.org/news/2013/12/06/ecuador-rights-group-shut-down.
[75] Amnesty Int'l, *Americas: Defending Human Rights in the Americas: Necessary, Legitimate and Dangerous* 8 (2014).
[76] Corte Constitucional [C.C.] [Constitutional Court], nov. 2021, Municipio de Cotacachi c. Ministerio del Ambiente [Municipality of Cotacachi v. Ministry of the Environment] No. 1149-19-JP/20 (Ecuador) [hereinafter Los Cedros Case]. The Constitutional Court is the highest court in Ecuador's judicial system.
[77] Dirk Nikolaus Karger et al., *Limited Protection and Ongoing Loss of Tropical Cloud Forest Biodiversity and Ecosystems Worldwide*, 5 Nature Ecology & Evolution 854–862 (2021).
[78] *Id*.

the wealth of species that their microhabitats support.[79] In the Los Cedros case, a protective action was presented in 2019 to stop the initial exploration stage of the Río Magdalena mining project in the Los Cedros Protected Forest.[80] The plaintiffs claimed that the Ministry of the Environment violated Rights of Nature by allowing mining to occur in the forest, which was home to endangered species like the spider monkey.[81] The action was initially dismissed by lower courts, but the decision was appealed, and the Constitutional Court decided to hear the case.[82] The Court reversed the lower court's decision in a significant victory for Rights of Nature in Ecuador.[83] José DeCoux, an environmentalist who lived near the Los Cedros forest for over thirty years and worked alongside the plaintiffs in this case, stated to BBC news that "the litigation was successful beyond our wildest dreams."[84] The Los Cedros case presented an opportunity for the Court to look at RoN in a tangible way beyond the theoretical framework of Ecuador's Constitution, and the Court's decision established binding jurisprudence that represented how RoN can apply to endangered species and ecosystems.

Another case that marked a significant advancement for Rights of Nature in Ecuador occurred in 2021. *Coordinadora Ecuatoriana de Organizaciones para la Defensa de la Naturaleza y Ambiente y otros c. Presidente de la República y otros* was a public action by three nonprofit organisations[85] that challenged the constitutionality of various articles of the *Código Orgánico del Ambiente* (Organic Environmental Code) and related regulations concerning

[79] *Id*.
[80] Eco Juris. Monitor, *Ecuador Court Case on Rights of Nature Violations from Mining in the Los Cedros Protected Forest*, https://ecojurisprudence.org/initiatives/los-cedros/ (last visited July 2025).
[81] *Id*.
[82] Los Cedros Case; *see also id*.
[83] Becca Warner, *This Ecuadorian Forest Thrived amid Deforestation after being Granted Legal Rights*, BBC (June 2024), www.bbc.com/future/article/20240614-how-los-cedros-forest-in-ecuador-was-granted-legal-personhood.
[84] *Id*.
[85] These nonprofit organizations included the Ecuadorian Coordinator of Organizations for the Defense of Nature and Environment, the Asociación Animalista Libera Ecuador and Acción Ecológica. *See* Eco Juris. Monitor, *Ecuador Court Case on the Constitutionality of the Environmental Code Regarding Mangroves*, www.ecojurisprudence.org/initiatives/unconstitutionality-environmental-code-mangroves/ (last visited July 2025).

permitted activities in mangrove ecosystems.[86] The Court found that the mangrove ecosystem is granted rights as protected by the Constitution, and the Organic Environmental Code was declared unconstitutional.[87] The Court argued that mangroves have multiple essential relationships within ecosystems and between human beings and other organisms. Therefore, they "require the protection of their integral existence, maintenance and regeneration of their vital cycles, structures, functions, and evolutionary processes."[88] One notable practice that the Court found unconstitutional that had been permitted under the Organic Environmental Code was monocultures.[89] This decision marked another step forward for RoN in Ecuador under the nation's highest court. This case, the Los Cedros Case, and numerous others in recent years have marked significant strides for the RoN movement and earth jurisprudence in Ecuador.[90] However, RoN are not enforced in a uniform manner, and the Correa administration has made decisions regarding environmental concerns that can be interpreted as hypocritical in the face of their supposed support for RoN. Moreover, some challenge the efficacy of RoN jurisprudence in the face of ongoing extractivism in Ecuador. While these concerns have discursive value, it is still important to contextualize environmental conflict in Ecuador in broader conversations about global hegemony, colonialism, and capitalism; these systems disenfranchise Ecuador and other nation-states in the global South.

## V. Environmental Equity and Decolonization

[86] Corte Constitucional [C.C.] [Constitutional Court], sept. 2021, Coordinadora Ecuatoriana de Organizaciones para la Defensa de la Naturaleza y Ambiente y otros c. Presidente de la República y otros [Ecuadorian Coordinator of Organizations for the Defense of Nature and the Environment et al. v. President of the Republic et al.] No. 22-18-IN (Ecuador) [hereinafter Mangroves Case].
[87] Tănăsescu et al., *supra* note 18.
[88] *Id*. at 4–5.
[89] *Id*. at 4. A monoculture is defined as the cultivation of a single crop or organism, particularly on agricultural or forest land. *See generally* Merriam-Webster, *Monoculture*, www.merriam-webster.com/dictionary/monoculture (last visited July 2025) (general definition of the term).
[90] Kauffman & Martin, *supra* note 67.

While it is helpful to examine Rights of Nature in Ecuador following 2008, it is important to recognize that Ecuador has been hegemonized by capitalism and the colonial matrix of power[91] that seeks to disenfranchise the global South.[92] Conversations about environmental progress and analyses of legal efficacy must be framed within the context of environmental justice and decolonization, as many current global environmental injustices can be traced to their colonial roots. Many challenges that Ecuador has faced in balancing Rights of Nature and Indigenous rights with the extractivist industry are linked to ongoing processes of colonialism and Western hegemony. Local resistance to oil drilling has been recurring in Ecuadorian environmental struggles for decades, and opposition to mining has grown since the global demand for copper and gold has risen in recent decades.[93] While RoN presents a powerful legal tool that environmental advocates can utilize to ensure environmental protections,[94] it often falters in the face of multinational companies that seek to extract natural resources from Ecuador for the benefit of the global North and a broader system of resource extractivism that the Correa administration has supported under the guise of national economic benefits.

[91] The colonial matrix of power is an idea in decolonial theory that has been developed by Peruvian sociologist Aníbal Quijano, Argentinian decolonial scholar Walter Mignolo, and others. Coloniality, one element of this matrix of power, imposes racial and ethnic classifications on groups of people and "operates in every level, field, and dimension, both material and subjective, of everyday life and at the social scale." Coloniality is inextricably linked to modernity, and both Quijano and Mignolo commonly refer to this in their use of the term "coloniality/modernity." Capitalism is inextricably linked to colonialism, and dispossession, disenfranchisement, and subjugation are commonly coupled with it. Capitalism is a mechanism by which the West imposes the colonial matrix of power onto disadvantaged nation-states in the world system. Aníbal Quijano, *Coloniality of Power and Social Classification* in *Aníbal Quijano: Foundational Essays on the Coloniality of Power* 95–131, 95 (eds. Walter D. Mignolo, Rita Segato & Catherine E. Walsh 2024); *see also* Walter Mignolo, *The Idea of Latin America* (2005).

[92] The global South is a geopolitical descriptor that refers to historically poor and former colonial nation-states, especially those in Asia, Latin America, Africa, and the Pacific. In a literal sense, many of these states are located in the Southern Hemisphere—however, many decolonial, anthropological, and sociological scholars would acknowledge that the global South is not a pure physical descriptor but rather a term that describes a state's relative position in global systems of hegemony. *See* Kevin Graya & Barry K. Gills, *South-South Cooperation and the Rise of the Global South*, 37 Third World Q. 557–74 (2016).

[93] Francesco Martone, *The Long March Against Extractivism in Ecuador: The Case of the Andean Chocó*, Transnational Inst. (Feb. 2025), www.tni.org/en/article/the-long-march-against-extractivism-in-ecuador.

[94] *Id*.

Resource extractivism has historically been a mechanism of colonial oppression and appropriation. The raw materials essential for industrial development and economic prosperity of the West—such as oil, gold, copper, and more—have and continue to be stolen from places like Ecuador.[95] There is a link between the world's poorest nation-states and abundant natural resources, and economies that are reliant on extractivism as their primary source of income are disproportionately located in the global South.[96] Such economies that are heavily reliant on extractivism are often "unable to benefit fully from the gains arising from global economic growth and technological progress."[97] Despite their support for Rights of Nature, the Correa administration simultaneously backed continued resource extractivism, which Correa claimed would benefit the national economy and promote societal development.[98] This proved to be true—rates of oil production in Ecuador remained stable between 2006 and 2013, and during that time, national oil revenues increased nearly fourfold.[99] Understandably, critics questioned how the Correa administration could claim to uphold the philosophy of *buen vivir* and seek to protect RoN but continue extractivist practices; after all, the exploitation of nature for human gain is incompatible with *buen vivir*.[100]

Ultimately, the moral burden of environmental mitigation efforts must lie with the global North. Colonial nations like the United States, the United Kingdom, and other European states hold an incredibly disproportionate share of historic carbon dioxide emissions.[101] These imperial nations have pillaged the global South through colonization since the age of Columbus, and these

[95] Alberto Acosta, *Extractivism and Neoextractivism: Two Sides of the Same Curse* in *Beyond Development: Alternative Visions from Latin America* 61–86, 63 (eds. Miriam Lang & Dunia Mokrani 2013).
[96] *Id.*
[97] *Id*. at 65.
[98] Goeury, *supra* note 61.
[99] *Id.* at 213.
[100] Williford, *supra* note 21, at 109.
[101] Hannah Ritchie, *Who Has Contributed the Most to Global $CO_2$ Emissions?* Our World in Data (Oct. 2019), www.ourworldindata.org/contributed-most-global-co2#article-citation.

exploitative practices have continued through neocolonial projects such as oil drilling and copper mining.[102] If Ecuador continues to use the extractivist industry to make a financial profit and obtain a degree of autonomy in the global capitalist system, those in the West may not be apt to judge the moral nature of this national policy decision. Western hegemonic powers actively work to disenfranchise Ecuador, and multinational corporations exploit its resources and labor.[103] Instead, Western legal institutions can follow Ecuador's lead and implement Rights of Nature in their national constitutions. International organizations such as the United Nations can implement legally binding legislation to protect RoN across the world for all signatories, with provisions that emphasize environmental justice and reallocate global assets so all nations are capable of promoting RoN in an effective and sustainable way. Ecuador's 2008 Constitution is an important model for how Rights of Nature can be implemented into national law and enforced through federal legal systems. The West can either listen to Ecuador and other nations in the global South and protect RoN in their own jurisdictions, or they can fail to adequately consider marginalized voices in the global hegemonic systems of capitalism and colonialism.

## VI. Conclusion

The 2008 Constitution of Ecuador represented a paradigm shift in the legal world toward Rights of Nature and Earth-centered jurisprudence. Its axiological basis lies in *buen vivir*, an Indigenous epistemology that emphasizes harmony with nature and community. It is a seminal text in international Rights of Nature discourse and presents a viable way in which earth jurisprudence can be advanced on the national level. While the Ecuadorian Constitution represents former President Rafael Correa's ambition to promote Rights of Nature in Ecuador and anti-capitalist attitudes toward the environment, some criticise his administration's

[102] Martone, *supra* note 93.
[103] The Curse of Copper (Jenny Sharman 2007).

simultaneous extractivist efforts that have clear negative side effects on local environments. In the end, this analysis only seeks to highlight the West's moral responsibility to mitigate ongoing global environmental issues and stress the importance of implementing Rights of Nature in Western legal systems. As the main drivers of the climate crisis and other environmental harms, the Western world should bear the burden of environmental mitigation efforts; Rights of Nature present one important solution to the environmental crisis, and an ecocentric approach to human-earth interactions can bring sustainability and inclusivity into global environmental discourse.

# Flags of Convenience in Orbit: Parallels Between Maritime Flags and Spacecraft Registries

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**Abstract:**

Flags of convenience (FOCs) are a practice in maritime space law whereby shipowners register vessels in countries other than their own in order to take advantage of regulatory loopholes. The expanding and insufficiently regulated commercial space industry presents another international jurisdiction in which FOCs could arise, and this practice could bring significant humanitarian and environmental risks such as space debris. This analysis addresses relevant international legislation regarding commercial space enterprises and furthers several policy recommendations, such implementing a "genuine link" requirement and creating a multilateral auditing body, which could oversee licensing compliance and regulate humanitarian and environmental concerns.

As the commercial space industry accelerates, many private companies in the space sector face challenges with protecting their intellectual property. Because intellectual property rights are limited to territory, a pressing legal question arises: How should private activity be regulated in a realm that no nation can claim? Article II of the Outer Space Treaty (OST) states that "outer space, including the Moon and other celestial bodies, is not subject to national appropriation," essentially creating an absence of legal authority to enforce and govern activities beyond Earth.[1] Adopted in 1967 and signed by over 110 countries, the OST is foundational for international space law and establishing space as a global commons. Much like the high seas, outer space exists beyond the territorial reach of any one nation-state. Historically, maritime law has employed the concept of "flags of convenience" (FOCs), which allow shipowners to register vessels in countries other than their own to take advantage of lenient regulations.[2] In the shipping industry, this often comes at the expense of safety, labor protections, and environmental oversight. A similar risk is possible within the governance of space, where states and companies exploit jurisdiction loopholes in international space law. If such practices take hold, they would undermine the pursuit of safe and equitable development of space activities. Ultimately, this could result in negative humanitarian and environmental outcomes, such as a lack of applicable legal protections in extraterrestrial environments or contributing to the rapidly expanding issue of space debris. Thus, it is important to ensure that the possible adoption of an FOC framework in space law does not render future governance frameworks ineffective, so that international cooperation and corporate accountability remain the center of space activity as it transitions into a commercially driven frontier. Further, instead of simply defaulting to liberal registration

[1] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty or OST].
[2] U.N. Conference on Trade and Development, *Review of Maritime Transport 2021*, U.N. Doc. UNCTAD/RMT/2021, at 33 (2021) ("A flag of convenience (FOC) is one that offers registration to shipowners in countries other than their own, often with lower regulatory or labor standards.").

practices like FOCs, the international community should aim to pursue proactive reforms to preserve transparency and equity in the evolving space economy.

The legal evolution of this maritime law concept is essential to distinguish it from the implications of its more colloquial use today and to assert its potential correlation in space law. The maritime industry has long struggled with the practice of FOCs. The concept itself stems from centuries-old maritime customs that gradually evolved into a modern trend.[3] Historically, ships were expected to sail under the flag of the nation to which they or their owners belonged.[4] Vessels without a flag were viewed as stateless and often treated as devoid of any legal jurisdiction.[5] Similarly, ships with multiple national flags were considered equally illegitimate. Eventually, the 1958 Geneva Convention on the High Seas formalized these customs, stating that "ships have the nationality of the State whose flag they are entitled to fly."[6] As a result, registering a ship with a particular state became synonymous with holding that state's nationality, which allowed the flag state to exercise jurisdiction over it as if it were an extension of its own territory. Although this jurisdiction was sometimes overridden when a ship entered the waters of another country, the flag state retained authority over many key issues, including licensing and labor conditions. Over time, this practice became exploited through the creation of open registries, which are systems that allowed foreign-owned vessels to register under FOCs for economic and regulatory advantages.[7]

Some of the strongest critiques of FOCs stem from their departure from the original philosophical ideas behind maritime freedom, which aimed to preserve public order at sea.

[3] Doris König & Tim René Salomon, *Flags of Convenience*, Max Planck Encyc. Pub. Int'l L. (May 2011).
[4] Boleslaw Adam Boczek, *Flags of Convenience: An International Legal Study* 6–7 (1962).
[5] *Id*.
[6] Convention on the High Seas, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11.
[7] Nautilus Shipping, *Flag of Convenience: Understanding Vessel Registration and the Flags Commonly Used in Shipping* (Nov. 2024), nautilusshipping.com/news-and-insights/flag-of-convenience-understanding-vessel-registration-and-the-flags-commonly-used-in-shipping.

Central to this philosophy is the work of Hugo Grotius, a seventeenth-century Dutch lawyer revered as "the father of international law."[8] Grotius argued that the sea was international territory and not something that could be claimed by a single sovereign power.[9] This principle was largely rooted in natural law,[10] emphasizing that the seas, much like the air, were common to all and could not be appropriated. Today, FOCs present one of the sharpest contradictions to that philosophy. Although early thinkers such as Grotius are often credited with laying the groundwork for international maritime law, their vision did not anticipate the economic complexities that have been introduced by modern-day global shipping, let alone the ways in which those same principles might be stretched into space law.

As stipulated in the United Nations Convention on the Law of the Sea (UNCLOS), today's critics of FOCs argue that they erode the "genuine link" between a vessel and its flag state, leading to a lack of accountability and oversight.[11] Article ninety-one of the UNCLOS refers to this genuine link as a meaningful connection between the ship and the state whose flag it flies.[12] This link is meant to ensure that the flag state can effectively exercise jurisdiction and control over the vessel in all matters administrative, technical, and social. In the case of FOCs, however, many of these ships are owned and operated entirely outside the country in which they were originally registered in. Without this genuine connection, the flag effectively becomes little more than a legal loophole that transforms maritime governance into a system susceptible to abuse and that weakens the broader framework of public order at sea.

[8] Walton J. McLeod, *The Flags-of-Convenience Problem*, 16 S. C. L. Rev. 48 (1964).
[9] *Id*.
[10] Natural law is a moral and legal theory. According to this natural law, the moral standards that govern human behavior are ultimately derived from the nature of human beings and the world itself. In the context of legal theory, natural law asserts that the authority of legal standards derives in whole or in part from the moral merit of those standards. *See generally* Kenneth Einar Himma, *Natural Law*, Internet Encyc. Phil. https://iep.utm.edu/natlaw/ (last visited July 2025) (general definition of the term).
[11] Serhii Kuznietsov, *The "Genuine Link" Concept: Is It Possible to Enhance the Strength?*, 7 Lex Portus 65, 66 (2021).
[12] United Nations Convention on the Law of the Sea art. 91, 1982, 1833 U.N.T.S. 397.

This dilemma is demonstrated in *St. Vincent and the Grenadines v. Guinea Motor Vehicle Saiga*, in which the International Tribunal for the Law of the Sea (ITLOS) addressed a dispute between the two nations over the seizure of the oil bunkering vessel Saiga (M/V Saiga).[13] It is important to note that such a vessel is used to transfer fuel and lubricating oils from one ship to another, or to a ship at port or offshore. The bunkering ship in the case, owned by a company registered in Saint Vincent[14] but flying the Panamanian flag, was detained by Guinea for allegedly violating its economic zone laws.[15] While this instance raised concerns over the lack of a genuine connection between the vessel and its flag state, ITLOS ultimately ruled that although a flag state is obligated to maintain jurisdiction, the absence of a genuine link does not, in itself, give another state the authority to challenge the validity of the vessel's registration.[16] In essence, this case established an example of how readily gaps in enforcement for FOCs can emerge.

One of the greatest challenges to the adaptation of an FOC framework into international space law today lies in conversation with the issue of satellite registration. Similar to how ships need to be registered and regulated by a flag state, the OST requires that satellites be registered by a launching state. Although current space law employs the concept of registration of space vehicles, otherwise known as machines designed for spaceflight (including satellites), there is no treaty or law that specifies the above genuine link requirement. In fact, as space law professor Frans G. von der Dunk points out, the clause in the OST that most closely outlines the potential safety concerns that would prompt the use of a genuine link is Article IX. The article states:

> In the exploration and use of outer space, including the Moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in outer space, including the Moon and

[13] M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, 1998, 2 ITLOS Rep. 4.
[14] Saint Vincent and the Grenadines is a nation-state that consists of an archipelago of islands in the Eastern Caribbean at the southern end of the Windward Islands chain. *See generally* Gov't S.V.G., *About Us* https://www.gov.vc/index.php/visitors/about-svg (last visited July 2025) (brief description of the nation-state).
[15] M/V Saiga, 2 ITLOS Rep. 4.
[16] *Id*.

> other celestial bodies, with due regard to the corresponding interest of all other States Parties to the Treaty.[17]

This provision is concerningly generic. Although it underscores the expectation that states will conduct their space activities responsibly, the absence of a defined genuine link principle raises concerns that nominal satellite registries could enable states to evade oversight. However, as M/V Saiga pointed out, the absence of a genuine link does not necessarily invalidate a vessel's registration, so long as the flag state formally claims jurisdiction. Within a space law context, even if a state registers a satellite without a meaningful connection to its operator, other states would have limited grounds under current legislation to challenge that registration. Thus, the risk of implementing an FOC framework into space law could evolve into an issue of liability.

Concerns over the safety and regulation of space activities are already viewed through the lens of liability, particularly regarding the activity and intellectual property of private enterprises. Article VII of the OST, along with the 1972 Liability Convention, outlines international space liability law as we know it today. These treaties are primarily concerned with the liability of states surrounding any potential damage caused by their space objects, even if they are operated by private actors. However, this liability is essentially unlimited, meaning states could face financial exposure for accidents they may not have directly caused. Thus, an inevitable policy dilemma arises from this current structure: If states begin to offer satellite registrations without oversight or financial safeguards, they may attract private companies looking to minimize regulation, but they will effectively expose themselves to tremendous liability risk.

One of the key ways national governments can attempt to either prevent or exacerbate the risks of an FOC system in space is through the design and enforcement of their domestic space

[17] Outer Space Treaty, *supra* note 1, at art. IX.

authorization and supervision regimes. Under Article VI of the OST, state parties are internationally responsible for their governmental and non-governmental space activities.[18] As such, they must authorize and continuously supervise such activities. However, the Treaty does not articulate or allude to any methods of enforcement for licensing, which has led to varying national practices, particularly regarding resource extraction. In September 2020, the National Aeronautics and Space Administration (NASA) announced that it would be signing contracts with private companies to purchase resources extracted from the Moon.[19] This decision reflects a growing interest in space mining, a field that some estimate could unlock over a quintillion[20] U.S. dollars in rare minerals from the asteroid belt alone.[21] Currently, four countries, including the U.S., have created legislation that specifically recognizes private property rights in extracted space resources. Each of these countries have taken their own distinct approach to both licensing and oversight, which carries implications of potential FOC-style behavior.

For instance, the U.S. passed the Commercial Space Launch Competitiveness Act, also known as the SPACE Act of 2015, and Title IV of the Act affirmed the rights of citizens to "possess, own, transport, use, and sell" any resources they extract from space as long as their activities comply with international obligations.[22] Although this Act does not authorize ownership over celestial bodies themselves, it clearly recognizes property claims over resources once extracted. Yet, it contains no express requirement for environmental sustainability or debris mitigation. This creates the potential incentive for private companies to operate under a liberal interpretation of the OST, especially if future registration systems grow more competitive. For

[18] *Id*. at art. VI.
[19] Morgan M. DePagter, Comment, *"Who Dares, Wins:" How Property Rights in Space Could be Dictated by the Countries Willing to Make the First Move*, 1 Chi. J. Int'l L. 116, 118 (2022).
[20] A quintillion is equal to ten to the power of eighteen, written numerically as 1,000,000,000,000,000,000. *See* Merriam-Webster Dictionary, *Quintillion*, www.merriam-webster.com/dictionary/quintillion (last visited July 2025).
[21] DePagter, *supra* note 19.
[22] U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90, § 402, 129 Stat. 704, 721 (2015).

instance, Article II of the OST prohibits "national appropriation" of celestial bodies, but the SPACE Act of 2015 assumes that appropriation of resources after extraction does not fall under this prohibition. In essence, it is sidestepping the ambiguity in international legislation by maintaining domestic legal recognition of private property rights without explicitly defining how those rights align with OST principles.

Comparatively, this dynamic reflects the very regulatory arbitrage that surrounds FOCs in maritime law. In the context of space, domestic laws like the SPACE Act of 2015 may invite companies to incorporate or register operations in states that offer favorable interpretations of international obligations. For example, Luxembourg is one nation that takes a similarly liberal approach with its Law of Use of Resources in Space Act, which makes clear that space resources can be appropriated by private companies and offers legal certainty over the ownership of those resources once extracted.[23] While the law stops short of permitting sovereignty over celestial bodies, it embraces the view that mining constitutes lawful "use" under Article I of the OST.[24] When considering moderate licensing fees, low tax rates, and minimal barriers to entry for foreign corporations, Luxembourg's framework may incentivize companies to base operations and register their spacecraft there, effectively enabling a space-based equivalent of FOC.

The disparity in these national systems is accentuated by the even broader failure of the international community as a whole to adopt a common framework for resource extraction. Adopted by the U.N. in 1979, The Moon Agreement provides the clearest multilateral language on space mining and emphasizes the "common heritage of mankind" principle. It has only been ratified by twenty-two state actors.[25] Notably, none of the Agreement's signatories are major

[23] Nicolas Boring, *Luxembourg: Law on Use of Resources in Space Adopted*, Libr. Cong. (2017), www.loc.gov/item/global-legal-monitor/2017-08-22/luxembourg-law-on-use-of-resources-in-space-adopted/.
[24] Outer Space Treaty, *supra* note 1, at art. I.
[25] Depagter, *supra* note 16.

space powers or among the four countries that have passed domestic space mining laws. It can be inferred that there have been deliberate moves by these actors to distance themselves from the Moon Agreement's redistributive mechanisms and its demand for an international governance regime. Consider the Artemis Accords, a set of nonbinding principles among the U.S. and fifty-five like-minded partners to establish a common vision and framework for international cooperation.[26] These principles aim to normalize the permissibility of extraction without sovereign appropriation, while signaling an emerging consensus outside the formal treaty system.[27] Despite this, these Accords remain legally nonbinding and carry no enforcement power whatsoever.[28] Clearly, the fragmentation of international space governance demonstrates the need for a unified, enforceable framework to manage space resource exploitation equitably.

Further, this issue of divided rule is particularly concerning in light of how the 1972 Liability Convention addresses third-party damages. The Convention draws a distinction between absolute liability and fault-based liability.[29] For instance, absolute liability refers to damage caused on Earth or to aircraft, meaning the launching state is held responsible regardless of fault. On the other hand, damage occurring in outer space itself is subject to fault-based liability, where responsibility would depend on proving fault or negligence. In both liability cases, the state that launches or procures the launch of a space object remains liable regardless of whether a private company operated the object or registered it under another flag.[30] Theoretically, the Convention imposes strong incentives for states to monitor their space actors closely. Despite this intention, in practice, liability alone may not be sufficient to prevent irresponsible behavior

[26] The Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes, 2020, 62 I.L.M. 5 [hereinafter Artemis Accords].
[27] *Id*.
[28] U.S. Dep't of State, *Artemis Accords*, www.state.gov/bureau-of-oceans-and-international-environmental-and-scientific-affairs/artemis-accords (last visited July 2025).
[29] G.A. Res. 2777 (XXVI), at arts. II–III (1972).
[30] *Id*.

in outer space technological development and exploration.

One additional challenge to the enforcement of the Liability Convention is that it does not cap liability nor mandate a mechanism for private compensation beyond diplomatic channels. Thus, if a space object causes damage, the state that launched the object is the one bearing all responsibility, even if the object was operated by a private entity. While this strict liability standard applies to damage on Earth or to aircraft whereas fault-based liability applies to damage in outer space, the Convention does not impose any sort of monetary ceiling on the damages that a state might be required to pay. Although some states require private companies to purchase insurance for these instances, this is not a universal practice. In an FOC scenario, a state could permit foreign operators to register and launch satellites without requiring insurance or technical oversight. If damage were to occur, such as the destruction of another satellite or the injury and loss of human life, the state may be unable or unwilling to provide financial means to alleviate the damages. This would effectively shift the cost to other parties or even to the international community. Moreover, the Convention lacks any direct means for individuals or corporations to bring claims against private actors. Instead, any injured parties must rely solely on their national governments to accept their claims through diplomatic channels. Not only would this be a slow process, but it would also be highly discretionary with the potential to leave victims without timely and sufficient compensation.

To address these concerns, several policy solutions should be taken into consideration. First, international space jurisprudence could incorporate a “genuine link” requirement similar to Article Ninety-One of the UNCLOS. When considered within space law, a genuine link requirement would have the ability to compel launching states to demonstrate a substantial connection between themselves and the private entities operating various space objects under this

jurisdiction. This could, in essence, prevent the emergence of space flags of convenience, and would support greater accountability to help ensure that the state assuming international liability under the OST and the Liability Convention is in a position to actually regulate the activity in question.

Second, states could require operators to demonstrate proof of liability insurance before registration, perhaps through a kind of global registry that records insured launches. This registry would be most effectively maintained by the United Nations Office for Outer Space Affairs (UNOOSA). Establishing a uniform requirement for proof of insurance at the international level would help mitigate liability exposure for both launching states and third parties. In effect, before a launch is authorized or registered with the United Nations under the Registration Convention, the operator would need to prove evidence of sufficient insurance coverage for potential damage caused by their space objects. Such insurance would have the ability to cover third-party damage both on Earth and in space, including collisions, the generation of debris, or any harm to human life. A centralized registry similar to the current registry of launched space objects maintained by the UNOOSA[31], but explicitly focused on the additional requirement of insurance, could increase transparency by documenting which entities are covered, for how much, and under which regulatory framework. Further, a registry of this kind could serve as an effective mechanism of public accountability, with the potential to assist in expediting liability claims and settlement negotiations in the event of damage.

Moreover, the creation of a multilateral auditing body, similar to the International Maritime Organization (IMO), could oversee licensing compliance and regulate humanitarian and environmental concerns. The IMO is a specialized agency of the U.N. responsible for regulating and shipping. Established in 1948, the IMO exists to create a global standard for the

[31] U.N. Off. for Outer Space Affs., *About Us*, www.unoosa.org/oosa/en/aboutus/index.html (last visited July 2025).

safety, security, and environmental performance of international shipping.[32] Its primary functions include setting international standards, monitoring compliance, and facilitating cooperation among member states to prevent accidents and reduce pollution.[33] While the IMO does not directly enforce its regulations, it relies on a system of mandatory audits and peer pressure among its members.[34] Ultimately, this has proven to be an effective way of aligning national policies with global standards. Additionally, the IMO keeps a "White List," identifying countries that are properly implementing the STCW Convention, which sets the minimum standards for training, certification, and watchkeeping for seafarers.[35] Essentially, it is a list of the countries that comply with its standards for flag state control, which would appear to aid in the discouragement of the abuse of FOCs.

A comparable organization in space law could function similarly. The United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS), which was established in 1959 to oversee international cooperation in the peaceful exploration of outer space,[36] could assume this directive role, or a newly chartered independent body could take responsibility for setting regulatory standards. Like the IMO, it would not require direct enforcement power but instead serve as a forum for setting and updating all things related to the standards for licensing, safety, and environmental protections. Countries could be evaluated on their oversight of private entities, and this would help to address both the humanitarian and environmental concerns surrounding the risk of an implemented FOC framework.

Ultimately, when considering the possibility of any sort of implemented policy changes,

[32] *See* Int'l Mar. Org., *Introduction to IMO*, www.imo.org/en/about/pages/default.aspx (last visited July 2025).
[33] *Id*.
[34] *Id*.
[35] Int'l Mar. Org., U.N. Doc. Rep. on the Parties to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, MSC.1/Circ.1163/Rev.13 (2021) (this list of parties to the STCW is known colloquially as the "White List").
[36] G.A. Res. 78/72, at 5 (2023).

it is clear that the international community must act proactively to address the shortcomings of current international treaties. The commercial potential of outer space is undeniable, but without a coherent legal infrastructure, that potential may come at the cost of long-term global equity. Now is the time not just to consider, but to act upon building the necessary mechanisms that will aid in ensuring that outer space remains not just a new area for enterprise, but a shared domain for the benefit of all of humanity.

# The Implications of Crowdsourcing and Coworking on Intellectual Property

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**Abstract:**

Crowdsourcing and coworking spaces both present challenges to intellectual property law in the United States that require examination. Namely, inventors involved in crowdsourced competitions may be unable to defend their creations in litigation despite conforming to written agreements designed to protect their inventions from infringement. Additionally, users of coworking spaces may be unsafe in these settings due to information vulnerability or copying of secretive corporate work. Intellectual property protection in the U.S. needs revision to protect inventions created in crowdsourced ventures or coworking spaces, and this analysis also examines the potential for crowdsourcing to be used for further refinement of the patenting process.

## I. Introduction

Collaborative efforts to develop new products and services are not recent phenomena, but two forms of collective innovation have recently become more common and are beginning to prompt investigation into the nature of intellectual property (IP) law. IP is defined as the ownership of unique human inventions, such as writing, logos, artwork, and much more.[1] Namely, coworking spaces and crowdsourcing are two methods of collaboration that challenge current IP law. Coworking spaces are areas that allow users to collaborate on their career projects using shared facilities that include internet and furniture, and these spaces often host group events such as professional development events. The users of a coworking space abide by a coworking contract that typically explains the offerings of the space, rules of access, and billing details, alongside details like confidentiality, fiscal obligations of businesses that operate there, and more. Moreover, coworking contracts are innominate, meaning that they are not legally regulated.[2]

Crowdsourcing, on the other hand, is a method of collaboration open to the public that uses contributions pooled together by various users to complete tasks that are typically designated to a single individual. It can include crowd voting, crowd creation, and crowd wisdom. Crowd voting allows crowdsourcing users to publicly vote for the winners of a contest. One example of this would be crowdsourced online service ratings. In crowd creation, a collaborative group generates content, builds something, or produces goods or services, and in crowd wisdom, a group of crowdsourcing users provides advice to an individual or group that seeks a solution to a problem.[3] While crowdsourcing is a unique problem-solving technique, it

[1] Legal Info. Inst., *Intellectual Property*, Cornell L. Sch., www.law.cornell.edu/wex/intellectual_property (last visited July 2025).
[2] Carlos Almansa, *101 Legal Guide for Coworking Spaces (II)*, Nexudus (Apr. 2016), www.nexudus.com/blog/101-legal-guide-for-coworking-spaces-ii/.
[3] Marc A. Lieberstein et al., *Crowdsourcing: Understanding the Risks*, 30 N.Y. St. B.J. 34–38 (2012).

presents a challenge to intellectual property law, as seen in legal disputes regarding the development of crowdsourcing methods and the originality of user-submitted work.[4]

One form of crowdsourcing, hackathons, highlights the perceptible gaps in IP law for ideas created in public spaces. Hackathons are defined as a twenty-four to forty-eight-hour-long collaborative event in which specialists engage in rapid and collaborative engineering, and often during these events, teams attempt to invent prototypes of new technologies within a given time frame.[5] Hackathons have resulted in the development of online apps and programs like GroupMe, and they are hosted by universities such as the University of Pennsylvania.[6] These events also extend to crowdsourced scholastic solutions in the legal field. Companies such as Neota Logic have hosted hackathons to create legal educational materials, and these companies often collaborate with law firms and other organizations.[7] However, hackathons are one type of collaborative, crowdsourced event that challenges assumptions about intellectual property rights because they lack stringent regulations on the ownership of ideas presented at the event. This could also be said of other types of crowdsourced events and demonstrations where ideas are shared but not fully patented yet.

Due to their novelty and uniqueness, coworking spaces and crowdsourcing are two types of collaborative innovation that warrant reform to current intellectual property law to ensure that abstract innovation remains secure and that individual users have rights regarding their

[4] Jeremy de Beer et al., *Click Here To Agree: Managing Intellectual Property When Crowdsourcing Solutions*, 60 Bus. Horizons 207–17 (2017).
[5] Deb Hetherington, *What is a Legal Hackathon? And Why Should I Attend?* L. Tech. Leeds (Feb. 2023), www.legaltechinleeds.com/article/what-is-a-legal-hackathon-and-why-should-i-attend.
[6] Peyton Popp, *What is a Hackathon, Anyway?*, U. Wire: Carlsbad (Oct. 2017), www.proquest.com/wire-feeds/what-is-hackathon-anyway/docview/2590277957/se-2?accountid=4840; Dan Norton, *World's Largest Student Hackathon Descends on Wells Fargo Center*, Phila. Bus. J. (Sept. 2015), www.bizjournals.com/philadelphia/news/2015/09/03/student-hackathon-wells-fargo-penn-apps-upenn.html.
[7] *The Future of Law Made Here: Neota Continue to Bolster Legal Education Through Global Legal Hackathon*, PR Newswire (Feb. 2019), www.prweb.com/releases/the-future-of-law-made-here-neota-continue-to-bolster-legal-education-through-global-legal-hackathon-863020313.html.

intellectual property. This analysis will explore the current pitfalls of IP law for those who may have their creative work stolen through collaborative spaces such as a hackathon or coworking venue. It will also explore relevant case law and the potential for recent legal developments in crowdsourcing to enhance existing IP protections. Crowdsourcing and coworking both present challenges to individuals looking to secure intellectual property rights over their creative work since this work can easily be stolen or copied, even in the presence of informal written agreements. Intellectual property regulation in the United States must include provisions to allow for the protection of intellectual property derived from coworking spaces and crowdsourcing initiatives such as hackathons. Nondisclosure agreements present one solution to these intellectual property challenges so that individuals can secure their property rights prior to the creation of formal patents or trademarks.

## II. An Overview of Intellectual Property Challenges in Coworking and Crowdsourcing

Coworking spaces present intellectual property challenges because they welcome various individuals from different fields in a venue outside of their typical workspace, which may lead to privacy concerns for employees of large corporations with confidential operations, even though coworking spaces sometimes offer companies the option to lease out whole rooms or floors.[8] Coworking spaces present IP threats due to the possibility of coworking customers sharing trade secrets of their company, inadvertently breaching information to the coworking technologies, or leaking information about a customer of the coworking space.

In a different sphere, individuals who have begun working in coworking spaces face new challenges to protecting the privacy of their work. These public spaces have been requested to take measures such as soundproofing rooms and requiring their employees to sign nondisclosure

[8] Steve Hogarty, *What is Coworking?*, WeWork Ideas (July 2021), www.wework.com/ideas/workspace-solutions/flexible-products/what-is-coworking#what-is-coworking-space.

agreements regarding the work conducted there. As a solution, certain spaces have required consumers to sign membership agreements, stating the services provided and rules of using facilities, including internet restrictions, items banned in the space, pricing terms, and more. Still, technical protection is required for the coworking space, including enhanced internet security and insurance coverage against data breaches of communal internet devices, to insulate the space from any outside malicious activity.[9] However, the main concern regarding intellectual property lies with employees divulging ideas to each other, and this concerns not only the employees or space managers but also the companies that the customers work for, since there is a possibility that trade secrets may be divulged.[10] This may occur if employees leave the space after seeing a brilliant idea, if customers bring company devices to work, or if customers suggest ideas to other patrons.

Open-source competitions such as hackathons have led to legal disputes regarding the authorship of code. These crowdsourced events present intellectual property challenges when companies try to use hackathon ideas for their own purposes instead of those of the inventor, thereby denying individuals autonomy over their intellectual property. As a solution, crowdsourcing businesses may now require participants to sign a contract that enumerates the rights of participants and companies in the event of a property dispute; however, this type of contract does not provide adequate legal protections for individuals regarding the ownership of their invention or its development.[11] Some companies have modified their approach to coworking in response to these legal concerns. For example, Facebook hosts open hackathons, which allow participants to use their intellectual property while protecting the corporation from the threat of

[9] David Abraham, *Don't Get Sued! Legal Tips For Coworking Space*s, Spacebring (Feb. 2025), www.spacebring.com/blog/tips/legal-aspects#intellectual-property-concerns.
[10] Benjamin I. Fink, *Protecting Trade Secrets in a Coworking Space*, Am. Intell. Prop. L. Assoc., www.aipla.org/list/innovate-articles/protecting-trade-secrets-in-a-coworking-space (last visited July 2025).
[11] Scott Popma & Scott Allen, *Your Creative, Open Hackathon Is Ripe For Ownership Dispute*s, Wired (July 2013), www.wired.com/2013/07/your-friendly-neighborhood-hackathon-might-not-be-so-open-after-all/.

IP-related disputes. Participants of these events are dissuaded from pursuing legal action against such a powerful company. The individual corporation can also create guidelines prohibiting content redistribution and forbidding any outside usage of the code outside of the hackathon.[12]

## III. *Rubin v. New Jersey* and *Akin Gump v. Xcential*

Some of the intellectual property disputes regarding coworking and crowdsourcing have made their way to court. In the now-dropped *Rubin v. New Jersey* case, a Massachusetts college student named Jeremy Rubin invented a Bitcoin mining program, Tidbit, at the Node Knockout Hackathon in 2013. A month later, the New Jersey Attorney General subpoenaed Rubin and his program; in the subpoena, the court requested source code and technical documents on the functioning of the program.[13] The complaint noted that the source code was never fully functional after the hackathon, even though the team uploaded source code on a public website, and the court believed that the company violated the New Jersey Consumer Fraud Act.[14] This case brings into question how conceptual products can meet legal standards for IP law. Because Tidbit had only been a concept project that had not met functionality requirements, the court's request for Bitcoin mining code was void because no Bitcoins had been mined and the code itself had not been developed. The digital nature of hackathons also demands more thorough intellectual property regulation since invented programs can be accessed anywhere in the world, even if they were created at a competition in another state or country. The ownership of participant-generated ideas is unclear in other coworking initiatives because the idea may or may not already be patented.[15] Therefore, current IP protections are not adequate in the context of

[12] *Id*.
[13] Elec. Frontier Found., *Rubin v. New Jersey Tidbit*, www.eff.org/cases/rubin-v-new-jersey-tidbit (last visited June 2025).
[14] *Id*.
[15] Rubin v. New Jersey Division of Consumer Aff., No. ESX-L-567-14 (N.J. Super. Ct. 2014) (Elec. Frontier Found.).

recent crowdsourced projects. Whether hypothetical ideas proposed during hackathons require legal protection is a further concern.

In *Akin Gump v. Xcential*, a legal software company that is designed to draft bills, Xcential, was involved in a lawsuit regarding the invention of the program after seeing a software demonstration in 2019. Xcential[16] was sued in the D.C. Superior Court by law firm Akin Gump[17] when an attorney representing the firm, Louis Agnello, claimed to have invented the program.[18] The suit claimed that the Bill Synthesis program that Xcential patented was not invented by the company that patented it, involved a company that misappropriated the original end-user license agreement, trade secrets, and other information, and that this company breached an implied contract.[19] Xcential rebutted that they had demonstrated the code to Agnello at the demonstration.[20] Akin Gump, in a complaint for damages, claimed that their counsel had seen a demonstration of a bill "amending" software, not one that could generate bills—the idea he proposed—and that during the demonstration, Agnello commented on the Xcential software and stated that he would ideally revise the program to draft bills independently.[21] Akin entered into a nondisclosure agreement (NDA) with Xcential following the demonstration to protect their confidential discussions, since Xcential president Mark Stodder had engaged in phone calls with Agnello regarding his idea.[22] The NDA stated that Xcential could not file a patent for technology inspired by Agnello, and that any sharing of information between the two companies would

[16] Xcential Legislative Technologies provides governments with consulting and software to aid lawmaking. Each law proposal in the California legislature since 2004 was produced using Xcential software. *See* Xcential, *About Us*, www.xcential.com/about (last visited July 2025).
[17] Akin Gump is a law firm specializing in fields including but not limited to disputes and investigations, intellectual property, and regulatory law. *See* Akin, *Services*, www.akingump.com/en/services (last visited July 2025).
[18] Bob Ambrogi, *AkinGump Loses Bid To Dismiss Legal Tech Company's Counterclaims In Suit Over Ownership Of Bill-Drafting Software*, Lawsites (Feb. 2023), www.lawnext.com/2023/02/akin-gump-loses-bid-to-dismiss-legal-tech-companys-counterclaims-in-suit-over-ownership-of-bill-drafting-software.html.
[19] Akin Gump LLP. v. Xcential Corp., No. CA-004744-B, at 1–3 (Sup. Ct. D.C. 2022) (PatentlyO).
[20] *Id*. at 6.
[21] *Id*. at 8.
[22] *Id*. at 7.

damage either party irreparably.[23] This was broken when Xcential created a bill drafting software as an improvement to its bill amending program,[12] though Xcential won the lawsuit since the United States Patent and Trademark Office (USPTO) does not extend to a breach of contracts.[24]

This intellectual property dispute highlights the need for IP protection following public code demonstrations, since IP laws such as the USPTO require that individual parties make agreements to settle intellectual property disputes between themselves during sharing. Current IP law does not exist to protect creators of ideas in these situations.[25] Crowdsourcing events such as hackathons demonstrate an inadequacy of IP law to protect inventors from having their work stolen at a public event because IP laws currently do not protect hypothetical ideas, only patents that are approved for public usage. The agreements in both hackathons and in coworking spaces would not be able to protect individual inventions since the spaces operate on contracts similar to the one between Akin and Xcential, and further disputes on invention would be null even if each party had made clear their original intentions to preserve their idea.

Currently, patents are authorized under the 35 U.S. Code, which created the USPTO under the assumption that the agency would create patents and trademarks for original inventions.[26] This power is limited in disputes between companies with unpatented work. This is due in part to the Noerr-Pennington doctrine, which prohibits this form of intellectual property from litigation in private antitrust disputes, even when disputes are intended for non-competitive purposes. The doctrine provides an exception that prohibits businesses from using the law to compromise an agreement between competing businesses. It requires that corporate agreements demonstrate a degree of dissimilarity between productions, and reason to believe that calling

[23] *Id*. at 11.
[24] Elec. Frontier Found., *supra* note 13.
[25] Richard A. Epstein, *Intellectual Property and the Law of Contract: The Case Against "Efficient Breach"*, Eur. Soc'y on Cont. L. (2013).
[26] 35 U.S.C. § 1 (1952).

upon the doctrine is simply an attempt to interfere upon the joint industry between competitors.[27] It is this doctrine that prevents the USPTO from enforcing contract breaches regarding the originality of inventions. Xcential ultimately won their lawsuit since the D.C. Superior Court could not charge them with breach of implied contract.[28] Thus, the agreements used for demonstrations in hackathons and the NDAs used by coworking spaces do not hold up to judicial scrutiny in situations where an idea is copied even though both parties were aware of its originality.

## IV. Crowdsourcing Potential as a Legal Aid

Patexia[29] is an internet application that aims to mitigate IP risk using crowdsourcing by allowing a massive online audience to filter through patent knowledge to ensure the validity of patents and conduct other services.[30] The app demonstrates that crowdsourcing could be used to protect intellectual property. However, the app still comes with challenges because the public may not have sufficient knowledge of IP law to protect themselves and to examine patents. Still, this type of digital crowdsourced patent analysis could prove to be more timely than existing methods of patent analysis. The USPTO has over six hundred thousand unexamined patents and a typical patent can take over nineteen hours to read, so a massive collective effort to read patents could reduce the time required for inventions to come into fruition and enhance innovation. Other unique advantages of a crowdsourced patent verification system include its competitive nature, opportunities to train students and teachers on IP law through an interactive and beneficial activity, and usage as educational material.[31]

[27] Mitsoo K. Patel, *Free Markets and Free Speech: Understanding the Limits of the Noerr-Pennington Doctrine,* 3 U. Chi. Bus. L. Rev. 567 (2024).
[28] Elec. Frontier Found., *supra* note 13.
[29] Patexia provides solutions to patent reviewers, educators, and businesses who need crowdsourced input on IP law issues and creative projects. *See* Zoe Bollinger, *Crowdsourcing: Innovation and Intellectual Property*, Stan. L. Sch. Blogs: CodeX (2015), www.law.stanford.edu/2015/02/13/crowdsourcing-innovation-intellectual-property/.
[30] *Id*.
[31] *Id*.

One example of the potential of crowdsourcing to assist in an ongoing case regarding intellectual property rights was when the Salt Lake Comic Con in Salt Lake City, Utah used crowdsourcing via social media to collect evidence from fans and legal opinions from expert followers during a dispute with the San Diego Comic Con in 2014.[32] San Diego Comic Con prohibited the Salt Lake Comic Con via a cease and desist letter from using the term "comic con" in future events, logos, or websites, claiming that they owned all variations of the term.[33] The letter was accompanied by a lawsuit that accused Dan Farr Productions, the company that operated the Utah event, of infringing a trademark and false designation of origin.[34] The Utah convention claimed to have received many responses from legal experts using their social media platforms to provide opinions and advice regarding their situation.[35]

The lawsuit continued until 2020 and concluded with the San Diego Comic Con winning the right to use the term, as they had owned the term since they had first used it. The Utah event could not prove that they had initially used the term before the San Diego event started using the term, nor that the term had been generic in nature to all events, as the Utah event claimed.[36] This may remain relevant despite the unsuccessful use of crowdsourcing on behalf of the Salt Lake City Comic Con since future lawsuits may use crowdsourcing technologies to reinforce public evidence, gather information quickly, and provide statements in court.

For context, the Lanham Act allows for trademark registration on the federal level in the U.S., and defends trademark owners against infringement should it lead to public

[32] PR Newswire, *Salt Lake Comic Con Hires Maschoff Brennan For Fight With San Diego Comic-Con International* (Aug. 2014), www.proquest.com/docview/1554556401?accountid=4840&sourcetype=Wire%20Feeds.
[33] San Diego Comic Convention v. Dan Farr Productions, No. 14-1865 (S.D. Cal. 2014) [hereinafter San Diego Comic Con. v. Dan Farr].
[34] False designation of origin is a civil action when a person uses words or devices that mislead, misconstrue fact, or promote the nature of their product or that of another person. It can be applied to confusions in geographic origin. 15 U.S.C. § 1125 (1946).
[35] PR Newswire, *supra* note 32.
[36] San Diego Comic Con. v. Dan Farr, *supra* note 33.

misunderstanding or weakening of famous content.[37] In an appeal, Salt Lake City claimed that the Lanham Act applied to their case since they had more notoriety as an event despite San Diego Comic Con revoking their attempt to trademark their title, though the Lanham Act was specified in the court case to consider phrases abandoned only through disuse. This meant that the San Diego Comic Con still had implied ownership over the term 'Comic Con' since it had consistently been in their usage.[38]

Ultimately, this provided an example of social media crowdsourcing to advise a court dispute on intellectual property. Although unsuccessful, the attempt to use crowdsourced media to consider the implications of an event owning a term and provide legal advice shows potential for crowdsourcing to aid IP law implementation. Usage of crowdsourcing for patent review with programs like Patexia also demonstrates potential to expedite the IP creation process and aid companies in protecting their innovation. Crowdsourcing may necessitate revision to IP law, yet it also may enhance this field in the future.

## V. Crowdsourced Competitions Present Vulnerability and Illegal Sharing of Participant Information

Crowdsourcing presents additional IP law concerns when anonymous online competitions are used. Online competitors may initially fear that their identity becomes doxxed, and competitions are subject to law on gambling or sweepstakes, which may not detail this type of online interaction. Sweepstakes are entries that provide random participants a reward without necessitating payment to enroll in the competition, as federal law requires.[39] Still, these competitions provide pathways for companies to save money on project development and to

[37] Lanham Act, 15 U.S.C. §§ 1051–1141 (1946).
[38] San Diego Comic Con. v. Dan Farr, *supra* note 33.
[39] Olshan L., *Sweepstakes Law Basics*, www.olshanlaw.com/sweepstakes-law-basics (last visited July 2025).

interact with the public.[40] Crowdsourcing may engage in illegal usage of data or project design, as happened with the Netflix Prize competition that sought to reward a team of mathematicians to develop an algorithm for movie suggestions. This competition ended when Netflix users sued the company because they had not agreed to the analysis of their data. Hypothetically, a competitor could also submit work that infringes IP law, company protocol, or some other regulation, which would in turn entangle the company in a legal dispute and leave them liable rather than the competitor.[34]

One example of how crowdsourcing led to an intellectual property dispute includes the disagreement between mobile apps PhantomAlert and Waze,[41] where the former claimed that the latter uses points of interest that are patented, even though they both used crowdsourced information.[4] The case was closed in 2015 in favor of Waze, and the court said that it did not have prior knowledge of the data points that were used by PhantomAlert. PhantomAlert would have needed a more stringent patent, since a patent on the data algorithm being used would not protect from small deviations in the algorithm, but only from word-for-word copying. Regardless, the patent dispute acknowledged that Waze provided a creative addition to the algorithm, so the crowdsourcing component was free to use despite being implemented previously without the addition.[42]

## VI. Conclusion

In summary, due to the ability of crowdsourced events and coworking spaces to precipitate disputes on property ownership and stealing of information, IP protections in the United States must be revised to allow for greater recognition of contracts made between parties

[40] Lieberstein et al., *supra* note 3.
[41] PhantomAlert informs users of traffic conditions while driving through crowdsourced user input. Waze, owned by Google, crowdsources information using similar methods, which led to a lawsuit regarding the originality of the app. *See* Eric Goldman, *Google Defeats Copyright Lawsuit over Waze Data*, Forbes (Dec. 2024), www.forbes.com/sites/ericgoldman/2015/12/16/google-defeats-copyright-lawsuit-over-waze-data/.
[42] *Id*.

in competitions and in informal agreements during demonstrations. Crowdsourcing events such as hackathons also challenge the statewide regulation and originality of IP laws by inducing situations where the inventor of an idea or the jurisdiction to which it pertains to is unclear. Additionally, the modern coworking environment provides ample opportunity for ideas to be stolen, and is not entirely regulated by law. In total, IP law needs additions to allow for more stringent regulation of contracts between groups and between customers and coworking spaces, inventions that are proposed and demonstrated, and information that is breached through coworking spaces. Regardless, crowdsourcing and coworking offer benefits to innovation generally and these practices may be used in the future for purposes of enhancing innovation and intellectual property protections.