THE CONSTITUTIONALITY OF VICARIOUS DISCRIMINATION CLAIMS UNDER TITLE VII

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Should the law allow a plaintiff to bring a lawsuit under Title VII of the Civil Right Act of 1964 for racial or gender discrimination that he or she observed? This issue—which I refer to as vicarious standing—is an unresolved question in federal courts. Title VII provides that a person who “has been discriminated against based on his or her race [or] gender” may bring a lawsuit. Although this language suggests that one must be a victim of personal discrimination, many courts have allowed white and/or male litigants to sue based on alleged discrimination that was not directed toward them. Considering the case law on both sides of the issue, I conclude that vicarious discrimination suits violate the standing requirements imposed by Article III of the Constitution. Furthermore, I argue that the existing exception to the no-standing rule—an exception for those denied the “benefits of interracial association”—should be replaced with a test that focuses on personal harm. This test, unlike the existing one, satisfies Article III by requiring that a plaintiff allege and prove a personal injury, such as refusing to be a part of an employer’s discriminatory mission or agenda.

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I. INTRODUCTION

White and/or male litigants have brought, and continue to bring, lawsuits under Title VII for discrimination not directed at them.¹ These

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¹ Commentator Laura M. Jordan labels this character the “empathetic white male.” See Laura M. Jordan, The Empathetic White Male: An Aggrieved Person Under Title VII?, 55 Wash. U. J. Urb. & Contemp. L. 135 (1999). Vicarious discrimination lawsuits, however, are not the exclusive domain of white males: white women have also brought lawsuits for observed racial discrimination. See, e.g., Bermudez v. TRC Holdings, Inc., 138 F.3d 1176 (7th Cir. 1998); EEOC
vicarious discrimination claims\(^2\) have been entertained by some courts and rejected by others. Whether these claims are permissible or not revolves around the language of Title VII, which provides that a person who “has been discriminated against based on his or her race [or] gender” may bring a lawsuit.\(^3\) Further adding to the confusion is the U.S. Supreme Court’s opinion in *Trafficante v. Metropolitan Life Ins. Co.*, a case brought under a 1968 civil rights law that suggests that one need not be a victim of discrimination in order to bring a Title VII lawsuit.\(^4\)

I argue that allowing observers to bring lawsuits based on witnessed discrimination violates the standing requirements of Article III of the Constitution. Some courts agree on this point. However, these courts also recognize an exception for individuals who have been deprived of the “benefits of interracial association.” I argue that this exception has no basis in the text of Title VII and should be replaced with a test that focuses on personal harm. This test requires that a person alleging discrimination prove a personal injury, such as demotion or termination for refusing to participate in an employer’s discriminatory practices.

In Part II I provide a brief outline of Title VII and its statutory framework. In Part III I examine the U.S. Supreme Court’s opinion in *Trafficante*. Part IV discusses the cases that have applied the rationale of *Trafficante* to the Title VII context. Part V analyzes the cases that have rejected vicarious standing in Title VII actions. Part VI closely examines the U.S. Supreme Court’s recent opinion in *Thompson v. North American Stainless*,\(^5\) and analyzes its impact on this line of cases. Part VII analyzes the current state of the law and argues that, with an exception for cases of personal injury, vicarious discrimination claim should not be permitted. Finally, Part VIII is devoted to a brief conclusion.

II. THE CIVIL RIGHTS ACT OF 1964

Title VII, the federal law permitting private citizens to sue based on racial and sexual discrimination, is part of a larger bill, the Civil Rights Act of 1964. The Civil Rights Act provides a panoply of public and private

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\(^3\) I use the term “vicarious standing” since the definition of vicarious – “experienced or realized through imaginative or sympathetic participation in the experience of another” – more appropriately describes the scenario of such employment discrimination than the term “third-party.” See Merriam-Webster Entry for “vicarious”;


measures to eradicate, and bring legal challenges to, discrimination based on race or gender. The Bill was first proposed by President John F. Kennedy in June of 1963 and later championed by President Lyndon B. Johnson.

President Johnson encountered significant resistance from the South. Southern Republicans employed every strategy imaginable to defeat the Civil Rights Act. The Senate engaged in a 54 day filibuster of the legislation, and the House offered over 100 amendments designed specially to cause the bill’s demise. Ironically, one such amendment offered by Representative Howard Smith of Virginia prohibited employment discrimination against women. Smith figured that this would divide the Civil Rights coalition enough to thwart the Bill’s passage. Instead, the amendment became a permanent part of the bill. After months of political wrangling and acrimonious debate, President Johnson signed the Act into law on July 7, 1964.

The Civil Rights Act is divided into various Titles that establish government programs to prevent and punish unlawful discrimination. For example, Title I prohibits unequal application of voting requirements, Title II prohibits discrimination in the use of public facilities, and Title III prevents unlawful discrimination by state and municipal officials. Title VII made it illegal to discriminate against any individual in employment “because of” his or her race or gender. It also indicated that “a person claiming to be aggrieved” by discrimination could, after filing an administrative charge with the EEOC, bring a private lawsuit.

Perhaps due to a combination of Southern obstinacy and Johnson’s aggressive lobbying, the legislative history for Title VII of the Civil Rights Act is sparse. Specifically, the legislative history does not define what it

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7 Id. at 150.
8 Id. at 151.
10 Id.
11 Id.
12 Id.
13 Id. Lytle notes, however, that the fact that gender was an afterthought to Title VII is reflected in the EEOC’s failure to investigate claims filed by women during the first few years following the Act’s enactment. See Lytle, supra note 6, at 151.
16 Id.
means to be discriminated against “because of” one’s race or gender. Assuming that Congress did not intend those words to have an idiomatic meaning, the phrase “because of” should be afforded its ordinary meaning: “by reason of; on account of.” Under this definition, one may only bring a lawsuit under Title VII if he or she was treated differently based on his or her gender or race.

Despite this, many courts have taken a broad view of the “because of” language and allowed persons who were not targeted based on their race or gender to bring lawsuits. This broad interpretation raises two issues. The first is whether the words “because of” permit such an expansive interpretation. The second issue is whether vicarious standing violates the Constitutional doctrine of standing. This doctrine states, in order to bring a lawsuit in a federal court, a litigant must show that he or she is complaining of a “case or controversy” under Article III of the Constitution. This mandates a showing of three things: (1) an “injury in fact” (an injury recognized by the law as legitimate); (2) redressability (allegations showing that a judicial decision would resolve the problem alleged); and (3) causation (facts proving that the defendant’s activity caused the alleged injury). Courts permitting vicarious standing under Title VII have not seriously addressed these requirements.

No matter where courts stand on the issue, all courts’ analyses of Title VII vicarious standing start with the U.S. Supreme Court’s opinion in Trafficante v. Metropolitan Life Ins. Co.

III. TRAFFICANTE V. METROPOLITAN LIFE INS. CO.

Just eight years after the enactment of Title VII, the U.S. Supreme Court held that vicarious victims of discrimination could bring private lawsuits in Trafficante v. Metropolitan Life Ins. Co. The case was brought under Title VIII of the Fair Housing Act of 1968; however, given the similarities between the language of Title VIII of the Fair Housing Act of

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19 The doctrine of standing has also been adopted in most State courts, although this is derived from each State’s Constitution rather than the U.S. Constitution. See, e.g., Bowen v. Mollis 945 A.2d 314 (R.I. 2008).
23 The Fair Housing Act is commonly used to refer to Title VIII of the Civil Rights Act of 1968. Given the similarities between the names of the Civil Rights Acts of 1964 and 1968, I will use “Fair Housing Act” to refer to Title VIII of the 1968 Act.
1968 and Title VII of the Civil Rights Act of 1964, the Court’s analysis could easily apply to Title VII. Indeed, as detailed below, this is exactly what several courts have done.

Paul Trafficante, a white male, and Dorothy Carr, an African-American woman, sued the Parkmerced apartment complex in San Francisco for discriminating against minorities in its leasing practices. Specifically, the plaintiffs alleged that Parkmerced “made it known to [minorities] that they would not be welcome at Parkmerced, manipulate[d] the waiting list for apartments, delay[ed] action on [minorities’] applications, [and] us[ed] discriminatory acceptance standards.”

The Parkmerced complex, built during the 1940s, was and remains one of the largest apartment complexes in America. Mr. Trafficante and Ms. Carr alleged that the owner of Parkmerced, Metropolitan Life Insurance Company of America, engaged in a holistic conspiracy to keep non-whites out of the complex. Neither Mr. Trafficante nor Ms. Carr claimed that they were victims of personal discrimination.

The plaintiffs sued under Title VIII and two other older civil rights laws. The District Court dismissed the Title VIII action, holding that both Plaintiffs lacked standing. The Ninth Circuit Court of Appeals agreed, stating that a review of Title VIII “as a whole” made it “clear that it was the intent of Congress to [only] provide . . . methods of redress for persons who are the objects of discriminatory housing practices.” Furthermore, the Court found “nothing in the Congressional discussion or debate to suggest that Congress intended to grant standing to sue to any private persons other than the direct victims of discriminatory housing practices proscribed by the Act.”

On appeal, the U.S. Supreme Court reversed the Ninth Circuit, holding that “the loss of important benefits from interracial associations” provided both tenants, including the white tenant, with standing. The Court did not dally long on the issue of standing – it held that both tenants had standing due to the “broad and inclusive” language of the opinion and the societal benefits of integrated housing. The opinion was authored by Justice William Douglas, an unabashed liberal and, as TIME magazine put

24 Id. at 208.
27 Trafficante v. Metropolitan Life Ins. Co., 446 F.2d 1158, 1162-63 (9th Cir. 1971).
28 Id. at 1163.
29 Id. at 209.
30 Id.
31 Id.
32 Id. at 211.
it, an “uncompromising libertarian.” It endorsed an extremely generous interpretation of standing that contemporary commentators generally supported. Justice Douglas offered three arguments in favor of standing. First, as noted above, Justice Douglas pointed to Title VIII’s “broad and inclusive” language, allowing any “person aggrieved” by discrimination to bring a civil suit. Second, he noted that the Assistant Regional Administrator for the Department of Housing and Urban Development felt that both plaintiffs had standing, a determination “entitled to great weight.” Finally, Justice Douglas argued that the Fair Housing Act of 1968 endorsed the concept of “private attorneys general”, the idea that private lawsuits further the public goal of eliminating employment discrimination.

Justice Douglas did not grapple with the more difficult question of whether the plaintiffs had standing under Article III. He dismissed this question by saying that: “[i]njury is alleged with particularity, so there is no [] . . . problem [ ] under Art. III of the Constitution.” This argument was bolstered with aspirational language from Title VIII’s legislative history: “[t]he person on the landlord’s blacklist is not the only victim of discriminatory housing practices [but rather] ’the whole community’.”

Three Justices concurred separately to note that they only agreed with this broad interpretation of standing because of the broad aims of the Fair Housing Act. Were the case simply subject to Article III, Justices White, Blackmun, and Powell stated that they would have “great difficulty” finding standing. This statement was curious since the Justices implied that Congress could alter the constitutional mandate of standing.

Although the issue of whether Mr. Trafficante could bring suit is a question of legal standing, it is also a question with profound societal implications. Do white persons suffer an “injury” when they observe discrimination? If so, is it the kind of injury that society should allow to be

35 Id. at 209.
36 Id. at 210. Although this opinion was decided prior to Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), this is not the kind of administrative determination formally entitled to judicial deference under the Chevron doctrine. The Regional Administrator’s opinion, however, might be subject to so-called “Skidmore deference”, an unspecified amount of deference afforded non-binding agency pronouncements. See Skidmore v. Swift & Co., 323 U.S. 134 (1944).
37 Id. at 211.
38 Id. Justice Douglas also included a Senator’s comment that the reach of the proposed law was to replace the ghettos “by truly integrated and balanced living patterns.”
39 Id. at 212.
40 Id.
vindicated through a private lawsuit? The Trafficante Court answered both of these questions in the affirmative, but did not elaborate on the details. Other important questions remained: Did the opinion apply to other civil rights laws, such as the Civil Rights Act of 1964? Were there any limitations on which “affected” persons could bring suit? How did the court’s “important benefits from interracial associations” standard apply to gender discrimination suits?

These questions have not been answered by the Supreme Court. Without any direction, federal courts have dealt with the issue with only the minimal guidance of Trafficante. These courts have split on the issue of whether white persons may bring vicarious racial or sexual discrimination claims under Title VII. Some, like Trafficante, take a broad view and allow such claims. Others reject this kind of standing as incompatible with both Title VII and Article III. These opinions and their reasoning are discussed below.

IV. CASES ALLOWING VICARIOUS STANDING

Several cases have extended Trafficante to the Title VII context. These opinions stressed the similarities between the language of Title VII and Title VIII and insisted that a person who observes discrimination suffers real harm that can be addressed through a private lawsuit.

For example, in EEOC v. Mississippi College, Dr. Patricia Summers alleged that Mississippi College engaged in sexual discrimination by refusing to consider her for a full-time position, and racial discrimination in recruiting and hiring. Dr. Summers applied for a full-time position in the Psychology department at Mississippi College. The College did not interview her for the position. When Dr. Summers asked why she was not interviewed, she was told that she did not have a sufficient background in experimental psychology. Dr. Summers soon after filed an EEOC charge alleging that she had experimental psychology experience and the College’s rationale was a pretext for discrimination. She also alleged that the College generally engaged in racial discrimination against African-Americans in hiring and recruiting.

Because Dr. Summers was a white woman, the Fifth Circuit first addressed whether Dr. Summers had standing to bring a racial discrimination claim. The Court noted the similarities between the

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41 626 F.2d 477 (5th Cir. 1980).
42 Id. at 497.
43 Id.
44 Id.
45 Id.
46 Id. at 497-98.
language of Title VII and Title VIII – “a person claiming to be aggrieved” versus “aggrieved person.” The Court also noted Trafficante’s broad interpretation of standing, which extended the reach of Title VIII “to the fullest extent permitted by Article III of the United States Constitution.”

Combining these rationales, the Court held that Trafficante’s permissive approach to standing should apply to Title VII as well. Thus, Dr. Summers was allowed to assert a racial discrimination claim.

The Court claimed that its holding “did not allow Summers to assert the rights of others”, but only allowed her to seek redress for “her own personal right to work in an environment unaffected by racial discrimination.” This is a razor-thin distinction, since allowing a white woman to complain about discrimination against African-Americans, by definition, involves an assertion of the rights of others. Perhaps the Court included this statement to limit any damages Dr. Summers might recover.

The Seventh Circuit panel offered a substantially similar legal analysis in the case of Stewart v. Hannon. Seven members of the Chicago High School Assistant Principals’ Association sued city officials alleging racial discrimination in the selection of principals. Six of the plaintiffs were racial minorities, but one – the named plaintiff Ruth Stewart – was white. Thus, the Court had to decide whether Ms. Stewart had standing to sue.

Like the Fifth Circuit in Mississippi College, the Seventh Circuit noted the structural similarities and similar goals of Title VII and Title VIII of the Fair Housing Act. The Court also reiterated the argument endorsed in Mississippi College that Title VII’s standing provision should reach as far as the Constitution permits. Finally, echoing Trafficante, the Stewart Court argued that the EEOC’s endorsement of vicarious standing was entitled to judicial deference.

The Ninth Circuit also endorsed vicarious standing in Waters v.

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47 Id. at 482.
48 Id.
49 Id.
50 Although the Fifth Circuit found that Dr. Summers had standing, her racial discrimination charge was rejected on the merits. The Court held that Dr. Summers failed to identify how she was affected by the alleged discrimination. Additionally, the Court noted that Dr. Summers’ petition was most likely untimely. Id. at 483-84.
51 Id. at 483.
52 The Court might also have been attempting to avoid a problem of double liability for Mississippi College, since both Ms. Summers and African-Americans could seek damages for the same discrimination.
53 675 F.2d 846 (7th Cir. 1982).
54 Plaintiffs also sued members of the Board of Examiners of the Chicago Public School System, members of the Chicago Board of Education, and the Education Testing Service. Id. at 847.
55 Id. at 847.
56 Id. at 849.
57 Id.
58 Id.
Laurel Waters alleged that she and other women employed by Heublein, Inc. were given less pay and less prestigious positions. She also added a general allegation that the company similarly discriminated against minorities. The Ninth Circuit allowed Waters to bring her claim, offering the following rationale for extending Trafficante to Title VII actions:

[Interpersonal contacts between members of the same or different races are no less a part of the work environment than of the home environment. Indeed, in modern America, a person is as likely, and often more likely to know his fellow workers than the tenants next door or down the hall.]

Further driving the point home, the Court added: “[t]he distinction between laws aimed at desegregation and laws aimed at equal opportunity is illusory.” The Waters Court envisioned Title VII as a tool to combat illegal discrimination, and it did not let notions of standing interfere with this noble goal.

V. CASES DENYING VICARIOUS STANDING

Other opinions have refused to apply Trafficante’s broad holding to the Title VII context. These opinions hold that a literal application of Trafficante in the Title VII context would eliminate all notions of Article III standing. This position was most forcefully made by Judge Frank Easterbrook of the Seventh Circuit Court of Appeals in Bermudez v. TRC Holdings, Inc. In Bermudez, three plaintiffs sued their former employer, TRC Holdings, for sexual harassment, racial harassment, and retaliatory discharge. Among the plaintiffs was one Linda Schlichting, who complained about comments made and overheard during her “short and unhappy stint” at Trinity Employment Services.

59 547 F.2d 466 (9th Cir. 1976).
60 Id. at 467.
61 See id. (“I think the same is true of Negroes they are discriminated against in the same way, as are other minority groups.”).
62 Id. at 469.
63 Id.
64 In addition to the cases below, see also Kortan v. State of Cal., 5 F. Supp.2d 843, 850 (C.D. Cal. 1998) (white female plaintiff could not recover for comments that “were directed solely at African–American bystanders” and “were not made because the plaintiff [was] Caucasian”).
65 Bermudez v. TRC Holdings, Inc., 138 F.3d 1176 (7th Cir. 1998).
66 TRC Holdings was an umbrella corporation including two entities involved in the lawsuit, Trinity Employment Service and Supplemental Staffing Services. Id at 1177.
67 Id. at 1179.
Ms. Schlichting, a white woman, claimed that her supervisor made disparaging comments about racial minorities, including a request that Ms. Schlichting look through applicants’ resumes in search of “whitesounding” names.\textsuperscript{68} None of the alleged comments were made about Ms. Schlichting’s own race or gender. Thus, as Judge Easterbrook put it, Ms. Schlichting’s injury amounted to a complaint “that persons of any race or sex who were opposed to discrimination felt uncomfortable.”\textsuperscript{69} This, according to the Court, was not enough to confer standing under Title VII. Judge Easterbrook observed that Ms. Schlichting’s complaint could not be “reconciled with the proposition that laws must be enforced by the victims . . rather than by third parties.”\textsuperscript{70} He noted that third party standing is rejected in many other legal contexts, including the Federal Employers Liability Act and state tort law.\textsuperscript{71} These restrictions exist for good reasons. As Judge Easterbrook put it, “[i]f unease on observing wrongs perpetrated against others were enough to support litigation, all doctrines of standing and justiciability would be out the window.”\textsuperscript{72}

Despite Judge Easterbrook’s declaration that Ms. Schlichting did not qualify for vicarious standing, he held open the possibility that others might.\textsuperscript{73} This was surely influenced by the fact that a previous Seventh Circuit case,\textit{Stewart v. Hannon}, applied\textit{Trafficante} to the Title VII context.\textsuperscript{74} Judge Easterbrook distinguished\textit{Bermudez} from\textit{Stewart} by arguing that Ms. Schlichting merely experienced an “adverse reaction to observing someone else’s injury”, not the personal loss alleged in\textit{Stewart}.

The line Judge Easterbrook drew was this: If an employee deprives a plaintiff of meaningful opportunities to engage in “intraracial association”, she can sue, but if she merely observes or overhears offensive conduct, she may not. This is a blurry line, since racial discrimination inevitably has some negative effect on one’s opportunities to engage in interracial association. It also, as noted above, does not address the issue of vicarious gender discrimination claims.

Other courts have endorsed Judge Easterbrook’s subtle distinction between permissible and impermissible vicarious discrimination claims. For example, in\textit{International Woodworkers of America v. Chesapeake Bay Plywood Corp.}, several plaintiffs sued the owner of a plywood manufacturing facility and alleged that it discriminated against women and

\begin{itemize}
  \item \textsuperscript{68} Id. at 1180.
  \item \textsuperscript{69} Id.
  \item \textsuperscript{70} Id.
  \item \textsuperscript{71} Id.
  \item \textsuperscript{72} Id.
  \item \textsuperscript{73} Id. at 1180-81.
  \item \textsuperscript{74} Stewart v. Hannon, 675 F.2d 846 (7th Cir. 1982).
  \item \textsuperscript{75} It is not clear that there was a meaningful difference between the facts of the two cases. See discussion of\textit{Stewart v. Hannon}, 675 F.2d 846 (7th Cir. 1982) above in part IV.
\end{itemize}
One of the plaintiffs, Richard Truitt, was a white male. The Fourth Circuit summarily dismissed his claim: “[the plaintiff], a white male . . . could not conceivably have suffered personally the injuries [directed towards blacks and women] alleged in the complaint.”77 The Court also suggested that it would adhere to the same division as the Bermudez court, since it noted that “There is nothing to suggest a possible claim that [Truitt was] denied the benefits of interracial associations.”78

Similarly, in Patee v. Pacific Northwest Bell Telephone Co., several men brought a Title VII gender discrimination claim to protest their transfer to a lower-paying division.79 Pacific Northwest decided to transfer the plaintiffs from a higher-paying, predominantly male division to a lower-paying predominantly female division.80 The plaintiffs then sued, alleging that the company paid the predominantly female division less because of anti-female bias.81 Even though they were not women, argued the plaintiffs, they were victims of their employer’s discrimination against women because they received less pay.82 The Ninth Circuit did not buy this argument, repeating an admonition from an earlier case that men cannot “bootstrap their job grievances ... into an employment discrimination claim rooted in federal law.”83 The Court suggested, as the Bermudez and Chesapeake Bay courts did, that a Title VII claim could lie in the Ninth Circuit if the male plaintiffs were prohibited from associating with their female colleagues.84 All other courts to consider the issue of whether men may bring claims for discrimination directed at women have denied standing.85

Finally, in Childress v. City of Richmond, the Fourth Circuit Court of Appeals affirmed a District Court’s order dismissing seven white male plaintiffs’ racial and sexual harassment claims.86 The plaintiffs alleged that one Lieutenant Arthur Carroll was prone to extreme fits of anger.87 These

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76 659 F.2d 1259 (4th Cir. 1981).
77 Id. at 1270.
78 Id. at 1270-71.
79 803 F.2d 476 (9th Cir. 1986).
80 Id. at 476-77
81 Id. at 477.
82 Id.
83 Id. at 478.
84 “These decisions [Trafficante and Waters v. Hublein] address the harmful impact on the plaintiff because of the denial of association with members of other groups [and] have no application here.” Id.
86 Childress v. City of Richmond, Va., 134 F.3d 1205 (4th Cir. 1998). The plaintiffs’ appeal was first heard by a panel that allowed the Title VII claims to proceed. Childress v. City of Richmond, Va., 120 F.3d 476 (4th Cir. 1997). This, however, was reversed by the full Fourth Circuit. Childress, 134 F.3d 1205.
moods were so extreme that sixteen officers signed a petition to have Lt. Carroll undergo a psychiatric examination.\textsuperscript{88} Lt. Carroll also made regular use of racial and sexual epithets. When several officers complained about Lt. Carroll’s conduct to his superior, the plaintiffs were allegedly subjected to retaliation including “transfers and negative evaluations.”\textsuperscript{89} The District Court dismissed the male plaintiffs\textsuperscript{90} racial and sexual harassment claims. It cited \textit{McDonnell Douglas Corp. v. Green}, a U.S. Supreme Court opinion stating that membership in a “protected class” is a prerequisite to bringing a Title VII action.\textsuperscript{91} Since the plaintiffs and the alleged discriminator were all white males, the plaintiffs could not be “said to be within a protected class with respect to the supervisor.”\textsuperscript{92} In sum, the District Court concluded: “[a]ny way their complaints are viewed, the male officers are attempting to recover for violations of other people's civil rights, which they have no standing to do.”\textsuperscript{93}

This portion of the opinion was overturned by a panel of the Fourth Circuit. The panel argued that the reasoning of \textit{Trafficante} should apply to Title VII, citing \textit{Stewart} and \textit{Waters}.\textsuperscript{94} The panel also argued that if Congress didn’t agree with opinions such as \textit{Stewart} and \textit{Waters}, it would have indicated its disagreement in the 1991 amendments to Title VII.\textsuperscript{95} The full Fourth Circuit reheard the case and evenly divided on the issue. Thus, according to the Court’s rules, the District Court’s opinion was affirmed. Although the Court offered little in the way of reasoning,\textsuperscript{96} the \textit{per curiam} opinion generated significant scholarly attention.\textsuperscript{97}

\textsuperscript{88} Id.
\textsuperscript{89} Id. at 938.
\textsuperscript{90} White female officers also sued, and the District Court for the Eastern District of Virginia allowed these plaintiffs to pursue their gender discrimination claims. \textit{Id.} at 940.
\textsuperscript{91} Id. at 939. While this pronouncement might seem to settle the issue of vicarious discrimination, the plaintiff in \textit{McDonnell Douglas} was an African-American who alleged racial discrimination. Thus, the above statement must be read in that context, and the issue of vicarious discrimination was neither addressed nor decided.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 940.
\textsuperscript{94} See discussion below.
\textsuperscript{95} While this explanation makes sense, Congressional disagreement and/or inertia provide equally likely explanations.
\textsuperscript{96} 134 F.3d at 1207 (“Having reheard the appeal en banc, we affirm the district court's judgment in its entirety.”). On the other hand, Judge Luttig offered an impassioned defense of the panel’s decision. \textit{See id.} at 1208-11 (Luttig, J., dissenting).
VI. THOMPSON V. NORTH AMERICAN STAINLESS

After 35 years of uncertainty, the U.S. Supreme Court weighed in on Trafficante in Thompson v. North American Stainless.98 The Thompson Court explicitly rejected Trafficante’s claim that Title VII standing is coextensive with Article III standing. Aside from this, however, Thompson offered mixed messages on the continued validity of vicarious Title VII discrimination claims.

The Thompson case revolved around the issue of third-party standing to bring Title VII retaliation claims.99 Eric Thompson and his fiancée Miriam Regalado both worked for North American Stainless.100 In February 2003, Ms. Regalado filed an EEOC charge claiming that she was a victim of sexual discrimination.101 In a twist on the usual retaliation fact pattern, North American Stainless fired Mr. Thompson.102 Thompson then filed a lawsuit, claiming that he was terminated in retaliation for his wife’s filing of an EEOC charge.103 Both the District Court for the Eastern District of Kentucky and the Sixth Circuit dismissed Mr. Thompson’s claim because he did not “oppose” an unlawful employment practice.104

A unanimous Supreme Court reversed, holding that, under the alleged facts105, Thompson’s firing violated Title VII and he had standing to sue.106 The Court had “little difficulty” concluding that Thompson’s firing would be an improper employment practice since “a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.”107 The “more difficult question”, however, was whether Thompson could also sue.108

To answer this question, the Court considered the Trafficante Court’s broad conception of standing. Trafficante claimed that Title VII’s “because of” standard merely incorporated Article III’s standards of injury

99 Retaliation claims differ from discrimination claims. Retaliation claims involve situations where an employer fires, demotes, or alters an employee’s work environment in retaliation for the employee’s complaints about unlawful discrimination in the workplace. For more on third-party retaliation claims, see Matthew W. Green Jr., Family, Cubicle Mate, and Everyone Inbetween: A Novel Approach to Protecting Employees From Third-Party Retaliation Under Title VII and Kindred Statutes, 30 QUINNIPIAC L. REV. 249 (2012).
100 See Thompson, 562 U.S. at *1.
101 Id.
102 Id.
103 Id.
104 Id. at *1-2.
105 Since summary judgment was granted for North American Stainless, the Court was required to accept Mr. Thompson’s version of the facts. See id. at *1-2.
106 Id. at *2.
107 Id. at *2, 3.
108 Id. at *4. To put it another way, the Court first decided whether Ms. Regalado could sue for Mr. Thompson’s firing, and, second, whether Thompson could also do so.
in fact, causation, and redressability. In other words, the Trafficante Court argued that people can sue under Title VII if they meet the minimal requirements of Article III. The Thompson Court unequivocally rejected this argument.\(^{109}\) The Court observed that holding otherwise this would produce absurd results; for example, “a shareholder would be able to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he [or she] could show that the value of his [or her] stock decreased as a consequence.”\(^{110}\) The decrease in stock value would provide a concrete, financial injury and would be (allegedly) attributable to the employee’s firing.

Rejecting this approach, the Court concluded that the term “aggrieved” in Title VII implicates the test the Court utilizes for actions under the Administrative Procedures Act: whether the Plaintiff is within the “zone of interests” sought to be protected by Congress.\(^ {111}\) Applying this test to the facts, the Court concluded that Mr. Thompson was indeed within the zone of interests Congress intended to protect in Title VII. Indeed, “injuring [Thompson] was the employer’s intended means of harming Regalado.”\(^ {112}\) Thus, Mr. Thompson was “well within” Title VII’s zone of interests.\(^ {113}\)

While Thompson brought clarity to third-party retaliation lawsuits, it further obfuscated the law of third-party discrimination claims. Although the Court rejected Trafficante’s interpretation of standing, portions of the opinion suggest that Trafficante remains good law. For example, the Court’s newly enunciated test for Title VII standing – the “zone of interests” test that asks if a plaintiff has an “interest arguably [sought] to be protected” by Title VII – is not much different from asking whether a person is “aggrieved” by an employer’s actions.\(^ {114}\) Also, while the Court discussed Trafficante’s holding and reasoning, it did not indicate that it disapproved of Trafficante.

Other portions of the opinion suggest that Trafficante’s generous approach to standing is no longer favored. First, the opinion definitively settled the fact that Title VII does not reach as broadly as Article III permits. Second, although Trafficante provided a useful point of analysis, the Court indicated that it would not be bound by Trafficante since it was a Title VIII, and not a Title VII, lawsuit.\(^ {115}\)

\(^{109}\) Id. at *5. Although Trafficante was a Title VIII case, the Court noted that Trafficante cited a Title VII case with approval, and subsequent cases equated Title VIII standing with Title VII standing. Id. at *5-6.

\(^{110}\) Id. at *6.

\(^{111}\) Id. at *6-7.

\(^{112}\) Id. at *7.

\(^{113}\) Id.

\(^{114}\) Id. (internal quotations omitted).

\(^{115}\) See id. at *6 (“In any event, it is Title VII rather than Title VIII that is before us here.”).
In the end, Thompson raised more questions than it answered about the validity of third-party discrimination claims. While it is clear that the standing inquiry is governed by the “zone of interests” test, the question this test asks – is the plaintiff’s interest the kind Congress sought to protect? – is the same question courts asked prior to Thompson. It is, and remains, a question of social policy.

VII. THE FUTURE OF VICARIOUS STANDING

Four decades after Trafficante, Courts remain divided on the issue of vicarious discrimination. Courts that value civil rights above all else downplay the issue of legal standing, while those that take legal rules seriously are uncomfortable letting these claims proceed. I side with the latter group that values legal standing. If legal rules are ignored, law becomes a political arena where Judges can make decisions based on their personal beliefs. Therefore, I argue below that the standing requirements of the Constitution prohibit vicarious discrimination claims.

Furthermore, I argue that the exception carved out for vicarious racial discrimination claims – the “benefits of interracial association” exception – must be rejected because it has no basis in the text of Title VII. Courts derived this exception from the Supreme Court’s Trafficante opinion which, in turn, derived it from Trafficante’s attorneys’ appellate argument. It seems to have been invented to suit the facts of the case, and does not translate well to the realm of vicarious gender discrimination claims. After all, the remedy of integration flows from a history of legal and factual racial segregation. No such history exists between the sexes, thus, the “benefits of interracial association” makes little sense in the gender discrimination context. Additionally, the “benefits of interracial association” exception promotes the idea that racial discrimination is serious enough to warrant vicarious claims, while gender discrimination is not.

I propose a new exception to the bar against vicarious discrimination claims: a “personal injury” exception. This exception would apply when a person suffers a personal injury because he or she refuses to take part in an employer’s discriminatory mission or agenda, and is described in more detail below.

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116 Some commentators do not think the standing inquiry particularly germane. See, e.g., Camille Gear Rich, Marginal Whiteness, 98 CAL. L. REV. 1497 (2010) (Mentioning the issue of standing only briefly in the context of judicial opinions).

117 Of course, historically women were barred from male enclaves such as workplaces and social clubs. However, gender discrimination was not as systematic as racial discrimination, nor were its parameters as clearly delineated.

118 Or, for that matter, any other category protected under Title VII such as religion.

119 Some courts have phrased this exception as: “a specific benefit or opportunity [plaintiff] lost
A. Rejecting Vicarious Discrimination Claims

At first blush, third-party discrimination lawsuits seem like a good idea because they hold employers and managers responsible for unlawful discrimination. Additionally, the standing provisions of Title VII and Title VIII are almost identical, and the U.S. Supreme Court endorsed a broad reading of Title VIII in *Trafficante*. However, allowing observers to bring discrimination claims violates the standing requirements of the Constitution.

Courts and commentators disagree over whether an observer suffers an injury sufficient to confer standing when he or she witnesses unlawful discrimination. Most supporters of vicarious discrimination have treated the question moralistically and philosophically, asking whether an observer can be “harmed” by exposure to discrimination. Surely the answer is yes. But a moral injury is not a valid basis for recovery in a court of law. The injury must be a legal, and not a moral, question: should the law allow a plaintiff to obtain money from his employer or former employer for observed discrimination?

To answer this question, it is useful to consider an area of the law where limitation on observer liability is well established: the tort of negligent infliction of emotional distress. While approaches differ, most jurisdictions set substantial limitations on which observers may bring a lawsuit. The traditional rule was that observers simply could not recover for witnessed tortious conduct. This remains the rule in some jurisdictions. Most jurisdictions, however, have mitigated this rule by employing various tests that allow for others to recover under certain circumstances. For example, some employ a test whereby observer can recover if he or she was physically impacted by the tort giving rise to the claim. Another test allows plaintiffs to recover if they were within the (judicially defined) “zone of danger” of the tort in question. A third test asks if harm to the bystander was foreseeable – a close relative of the zone of danger test. All of these tests allow bystanders to bring tort actions, as a result of discrimination against others.” *Blanks v. Lockheed Martin Corp.*, 568 F.Supp.2d 740, 743 (S.D. Miss. 2007). I agree with these sentiments, but have rephrased the exception to include those situations where an employee is asked to participate in a discriminatory scheme.


122 Id. at 819.

123 Id. at 820-21.

124 See id. at 821-24.

125 See id. at 824-25.
but only if harm was particularly great and/or directed toward them.\textsuperscript{126}

Applying this policy to the employment discrimination context, most vicarious discrimination claims should be rejected, with an exception for unusually severe cases. Allowing any and all observers to bring discrimination lawsuits – the current policy endorsed by several courts – is untenable. Placing no limits on the class of potential plaintiffs means that an employer could face potentially unlimited liability for discrimination perpetuated against a single employee. Anyone who witnessed discriminatory acts could have a cause of action.

However, one can imagine – and point to – situations where an observer endures disparate treatment above and beyond witnessed discrimination. For example, a person who is treated differently due to his or her association with a protected group\textsuperscript{127} would suffer a personal injury beyond that of a mere observer. This exception is described more fully below.

\textbf{B. A Personal Injury Exception}

I contend that persons who have been discriminated against due to their association with a protected group (or groups) should have standing to sue under Title VII if they endure a personal injury. This is because such employees endure a concrete injury that satisfies constitutional standing requirements. The personal injury requirement can be met under one of two circumstances: (1) an employee is demoted, reassigned, or terminated due to his or her refusal to participate in an employer’s unlawful discrimination; or (2) an employee is required to violate federal civil rights laws (by being ordered to, for example, terminate an employee solely for discriminatory purposes).\textsuperscript{128}

Consider the deplorable facts of \textit{Richardson v. Restaurant Marketing Associates, Inc.}\textsuperscript{129} Plaintiffs Pamela Marie Richardson, a white woman, and Earl Simmons, a black man, had the misfortune of working at the Bank Exchange Restaurant in San Francisco during the mid-1970s.\textsuperscript{130} Bank Exchange’s President Bill Brooks made Ms. Richardson and Mr. Simmons’ work experience an unpleasant one. Brooks (admittedly) made

\begin{footnotesize}
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\item \textsuperscript{126} While these cases do not involve a Constitutional standing analysis, the common law requirement that tort victims sustain an injury sufficient to bring suit is, for all intents and purposes, the same inquiry.
\item \textsuperscript{127} “Protected group” meaning any group protected by law (and, further, a group that shares a characteristic that Congress has determined is an impermissible basis for disparate treatment).
\item \textsuperscript{128} This additional requirement would prevent plaintiffs such as Linda Schlichting (discussed above in Bermudez v. TRC Holdings, Inc., 138 F.3d 1176 (7th Cir. 1998)) from bringing suit, who merely overhear comments they find offensive.
\item \textsuperscript{129} 527 F. Supp. 690 (D.C. Cal. 1981).
\item \textsuperscript{130} Id. at 691.
\end{itemize}
\end{footnotesize}
frequent use of the word “nigger”, as did several of his co-workers in management. 131 Brooks also claimed that Mr. Simmons improperly flirted with white customers and “did not know his place.”132 Following several weeks of harassment, Brooks terminated Mr. Simmons for a two and a half day absence that did not occur.133

Ms. Richardson’s job duties were severely affected by Bank Exchange officials’ racial discrimination. An Assistant Manager predicted that Brooks “would not like it” if she hired black waitresses. In spite of this, Ms. Richardson selected a black woman as the most qualified applicant for a hostess position.134 Brooks refused to hire the applicant.135 Ms. Richardson was also told to fire a white waitress because the waitress spoke with a black man in the restaurant’s lobby.136 Finally, when Ms. Richardson asked which forms she should use to record applicants’ race and sex (as required by federal law), she was told by a Vice-President that “we don’t do those.”137 Ms. Richardson eventually told Bank Exchange that she planned to file a complaint with the EEOC. She was fired the next day for pretextual reasons.138

The District Court for the Eastern District of Pennsylvania had no difficulty finding that Mr. Simmons was a victim of discrimination, and that Ms. Richardson was fired in retaliation for exercising her right to complain to the EEOC. It also concluded that Ms. Richardson had standing to pursue a hostile work environment under Title VII.139 Specifically, the Court pointed out that “Richardson's job security required her to break equal employment laws.”140 Indeed, all of the conduct Ms. Richardson was asked to engage in – denying employment to a qualified applicant based on race, terminating an employee based on his race, and ignoring federally mandated paperwork – violated federal law.

This is the kind of injury for which one may seek redress under Title VII. Although Ms. Richardson was not discriminated against “because of” her race – the literal language of Title VII – she was asked to engage in racial discrimination as a condition of her employment. To that end, she was required to participate in her employer’s discriminatory mission. Refusal to participate, as Ms. Richardson learned, constituted

131 Id. at 692.
132 Id.
133 Id.
134 Id. at 693.
135 Id.
136 Id.
137 Id.
138 Id.
139 See id. at 695 (“Defendant deprived plaintiff Richardson of a work environment conducive to inter-racial harmony and association, and such deprivation constituted a violation of Title VII . . .”).
140 Id.
insubordination. Ms. Richardson thus suffered a redressable injury and was not, to quote Justice Scalia in *Thompson v. North American Stainless*, “collateral damage” of her employer’s unlawful discrimination.\(^{141}\) Justice Scalia’s “collateral damage” formulation provides a useful framework for distinguishing between actionable and non-actionable complaints. For example, in the *EEOC v. Mississippi College* case described above, Dr. Summers’ real gripe was that she was fired because of her gender.\(^{142}\) Nevertheless, she added a claim of racial discrimination that she claimed to have observed. Because no action was taken against her because of her race, this should not have been allowed. However, in the *Richardson* case, Ms. Richardson was required to participate in unlawful discrimination in order to keep her job.\(^{143}\) Thus, Bank Exchange’s discrimination directly affected Ms. Richardson’s employment, and she should be allowed to recover for it.

**VIII. CONCLUSION**

Title VII of the Civil Rights Act aims to eradicate employment discrimination based on race or gender. To that end, it permits victims of racial and sexual discrimination to file a complaint with the EEOC and, eventually, a private lawsuit. For decades, sympathetic courts have allowed parties who were not victims of discrimination to bring lawsuits. While this may accomplish an admirable goal, it violates the Constitutional mandate of standing, which requires an injury-in-fact that can be addressed by a judicial decision. This may be remedied by providing an exception for vicarious victims of discrimination who suffer a personal injury; namely, being required to participate in an employer’s discriminatory mission or losing one’s job as part of an atmosphere of unlawful discrimination. Courts cannot, however, simply toss aside the standing requirements of the Constitution no matter how noble their intentions may be.

\(^{142}\) See *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980).
DODD-FRANK'S INAPPROPRIATE TREATMENT OF INSURANCE COMPANIES: A 'SIFI' SITUATION

MARK MAHKAIL**

Following the 2008 financial collapse, a Congressional committee, led by U.S. Representative Barney Frank and U.S. Senator Chris Dodd, was formed in order to lead reform of U.S. financial markets. The committee identified systemic risk, the interconnectedness of financial institutions through various levels of investments in each other, as a major culprit in the demise of the financial markets, domestically and abroad. The Dodd-Frank statute imposed new restraints on financial firms as a method of curbing their systemic risk. However, several insurance companies were included in those financial institutions that are being newly regulated. While large insurance companies may become significant players in financial markets, their business models and capital structures differ greatly from a traditional investment bank. Dodd-Frank fails to clearly delineate the difference between the different institutions, placing very similar restrictions on both institutions. A better solution would be to create different criteria for insurance companies and develop industry tailored regulations to limit insurance companies' systemic risk without crippling their business model.

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I. INTRODUCTION

When discussing financial institutions, one rarely thinks of including insurance companies in the conversation. The Dodd-Frank Act, commonly referred to as the “financial overhaul bill,” may have changed this notion. Under Dodd-Frank certain “non-bank” institutions may be designated as “systemically important financial institutions” (SIFIs). Large insurance companies are the most susceptible firms that may be subjected to this designation, since these nonbank firms participate in the financial markets and a significant amount of capital.

This paper will discuss the implications of the SIFI designation on insurance companies by briefly looking at the hypothetical effects the designation will have on AllState Insurance Company (“AllState”), one of the world’s largest insurance companies. The 2 will begin with by looking at how either banks or non-banks, such as AllState, may become labeled a SIFI. Part two will examine what changes a SIFI firm has to make to their business structure. Finally, this paper will conclude by considering the fiscal and economic effects the classification will have on the firm versus the potential benefits the entire financial system may receive from characterizing a nonbank as a SIFI. The last portion of the paper will be accomplished by cursorily inspecting AllState’s financial statements and analyzing what portions of their business will be effected and how much capital will be extracted from the financial system versus how much systemic risk will actually be removed from the financial system by regulating AllState’s activities and investments.

One final word before beginning the analysis: The goal of this study is to evaluate the effectiveness of Dodd-Frank’s SIFI designation as a method of regulation over the financial markets and system. Effective regulatory architecture can be understood as having four objectives: (i) promoting innovation and efficiency; (ii) promoting safety and soundness; (iii) allowing domestic corporations to be competitive in global markets; (iv) promoting transparency and consistency. As the analysis progresses, one should keep these four prongs in mind.

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1 The complete name of the statute is the Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Different sections of Dodd-Frank have been codified in various titles of the United States Code.
II. THE SIFI DESIGNATION: A BRAVE NEW WORLD

Dodd-Frank intends on designating certain institutions as SIFIs, and upon designation the firms will have to abide by new regulations specifically designed to maintain the financial stability of the United States. Dodd-Frank fails to differentiate between banks and nonbanks with respect to the designation process and heightened regulations that become applicable upon being labeled a SIFI. The committee making the designation, the process the committee will use and the criteria used to make the designation are uniform regardless of if the firm is a bank or not. The problem is the firms are different in one very important: their business models.

A. The Financial Stability Oversight Council’s Power to Designate

Dodd-Frank’s objective is to identify trends, situations or circumstances in the financial markets that threaten the overall stability of those markets and the economy overall. One way Dodd-Frank seeks to accomplish its objective is by curbing systemic risks created by certain firms through restraints placed on these SIFI institutions. Systemic risk is defined as interconnectedness between financial firms where a localized economic shock could have an effect on the world economy. One method of limiting and mitigating systemic risk is by identifying which firms pose a great amount of such risk and regulating their actions and investments in a manner as to reduce the interconnectedness that creates systemic risk. This is the method Dodd-Frank has chosen to implement.

The drafters of Dodd-Frank devised a plan whereby certain firms which are systemically important financial institutions are heavily

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5 Dodd-Frank Act Preface, supra note 1.
8 John C. Coffee, Jr., Systemic Risk After Dodd-Frank: Contingent Capital And The Need For Regulatory Strategies Beyond Oversight, 111 Colum. L. Rev. 795, 797. (“systemic risk — … the risk that a localized economic shock can have worldwide repercussions because of the interconnections between financial institutions.”) Systemic risk is more than just simple interconnectivity. The interconnectedness of each firm coupled with the risk each one of them bears in its own investments and other business dealings further complicates, as well as exacerbates, the effects associated with the untimely default of any connected firm. Simply put, in a market with a large amount of systemic risk, when one firm cannot pay its bills the rest will follow.
regulated and chaperoned. The Act creates the Financial Stability Oversight Council ("FSOC" or the "Council")\(^9\), which, among other duties, has the responsibility of designating "financial market utilities"\(^11\) as SIFIs\(^12\) if they believe that such firms are "systemically important."\(^13\) Dodd-Frank treats all SIFIs alike, regardless of what type of institution they are.\(^14\)

B. FSOC’s SIFI Designation Process

The Act gives FSOC the power to evaluate certain firms, including nonbanks, and designate them as SIFIs.\(^15\) FSOC has the burden of creating a criterion for deciding which corporations will be labeled SIFIs.\(^16\) The council has announced the process that they plan on using to filter out firms that are not going to be classified as SIFIs from those who will be.\(^17\) With respect to nonbanks,\(^18\) FSOC may deem such firms a SIFI if (i) that nonbank poses a threat to the financial stability of the United States or (ii) the "nature, scope, size, concentration, interconnectedness, or mix of the activities of [that nonbank] could pose a threat to the financial stability of the United States."\(^19\)

The Council has created and proposed a framework where they have grouped all of the statutory requirements as well as the relevant risk factors and considerations into six categories or elements.\(^20\) The elements

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11 Dodd-Frank Act § 803(6)(A) (codified at 12 U.S.C. § 5462(6)(A)) (2010) (Dodd-Frank defines a "financial market utility" as "any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person.").


13 Dodd-Frank Act § 803(9) (codified at 12 U.S.C. § 5462(9)) (2010) ("'systemically important' ... mean[s] a situation where the failure of or a disruption to the functioning of a financial market utility or the conduct of a payment, clearing, or settlement activity could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States.").

14 Id.


16 Id.


18 Nonbank firms are the primary focus of this paper.

19 Id.

20 Id.; United States Department of the Treasury, Authority to Require Supervision and
the FSOC will use to decide if any given company is a SIFI are the following: (i) size; (ii) interconnectedness; (iii) substitutability; (iv) leverage; (v) liquidity risk and maturity mismatch; (vi) existing regulatory scrutiny. The first three categories assess the possible impact on the economy as a whole should that nonbank experience financial hardship. The last three factors of the assessment focus on how vulnerable that nonbank is to financial affliction.

FSOC will use these categories in a three step (referred to as stages) process to conclude which firms will be designated as SIFIs. The first evaluation is simple and based on size. A corporation meets the threshold test in stage one if they have $50 billion dollars in assets and also have:

1. a total of $30 billion in notional credit default swaps outstanding for which the nonbank is the reference entity;
2. a total of $3.5 billion in derivative liabilities;
3. a total of $20 billion of outstanding debt;
4. a leverage ratio of 15 to 1 or higher, as measured by total assets to total equity;
5. a short-term debt ratio of 10% to total consolidated assets.

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22 Id.
23 Id.; Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, supra note 20, at 18 - 23. The three stage process is applicable to all firms, whether that firm is a bank or not. This “cookie-cutter,” one-size-fits-all process is another example of how Dodd-Frank deals with nonbanks, which have completely different business models than banks do, improperly.
24 A “reference entity” is the corporation or government entity that has issued the bond which underlies the credit default swap transaction. See Reference Entity Definition, Investopedia.com, http://www.investopedia.com/terms/r/reference-entity.asp#axzz1q1tK4qG.
25 “Derivative liabilities” are financial instruments under contracts that have one or more underlying (the security that must be delivered when a derivative contract, such as a call option, is exercised) and one or more notional amounts. See Derivative Definition, Investopedia.com, http://www.Investopedia.com.com/terms/d/derivative.asp#axzz1pOdNUYyz.
26 Outstanding debt includes loans taken and bonds issued.
27 Short-term debt includes any bonds issued that will mature in less than 12 months or other debts due in that same time frame. See Short-Term Debt Definition, Investopedia.com, http://www.investopedia.com/terms/s/shorttermdebt.asp#axzz1qi1tK4qG.
29 The FSOC unanimously approved this criterion on April 3, 2012. See generally Arthur D.
Those firms who make it passed stage one, not that any firms do, proceed onto stage two. Stage two of the analysis looks at the risks and characteristics of each firm individually. The examination at this stage considers publically available data including industry and company-specific factors. Stage two also takes into account the level of regulation the firm is already subjected to.

Stage three takes the firms that have made it through stages one and two and scrutinizes them more closely. FSOC will send out the stage three examinees a “Notice of Consideration,” which will advise them that they are going to be further evaluated. This stage may require the firms to provide FSOC with additional, non-public data. If the council believes that any of the specific firms being evaluated greatly exposes the financial market to a significant amount of systemic risk then that firm will be designated a SIFI.

C. What Happens When You Are A SIFI?

The Federal Reserve Board (“FRB” or “Fed”) is responsible for determining the “enhanced prudential standards” that SIFIs will be subjected to. The most significant standards are the new reporting requirements, the capital requirements and leverage limitations. Each one of these standards may marginally benefit the overall financial system, but a high cost to the firm.

1. Reporting Requirements

No one can contest that an industry which is heavily regulated is a safer industry. Reporting is one of the most powerful methods of assuring that regulated firms are in compliance. A designated SIFI will be required

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Footnotes:
32 Id.
33 Id.
34 Id.
35 Id.
36 Enhanced prudential standards refer to the heightened reporting standards, higher capital requirements, tighter leveraging limitations, and overall risk management rules and requirements. Orderly Liquidation Authority, infra note 35, at 4.
37 For example, the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7201), enacted after the Enron scandal, requires that all corporations registered with the Securities and Exchange Commission (“SEC”) make certain reports to the SEC to assure compliance. This increased transparency is designed to increase accuracy and reliability in corporate disclosure. The SEC has all the
to submit an increased amount of information to the different regulators they report to as well as make public disclosures. The goal behind making SIFIs report more information is simple: the regulators will be able to see how much systemic risk is present across the entire system as well as assuring that certain firms are not too systemically risky.

Corporations are already subjected to different reporting requirements in general. All public corporations have to adhere to the Sarbanes-Oxley Act of 2002. All insurance companies have to comply with the different regulations set forth by the states they are in. Banks have to abide by the regulations set forth by the Federal Deposit Insurance Corporation. The list goes on. However, it is clear that these firms who partake in the financial markets are subject to many regulators, who all have different reporting requirements.

The SIFI designation only adds to the already complex and hefty reporting requirements that any financial institution or insurance company has. Compliance with reporting requirements comes at a premium. Compliance with Dodd-Frank is estimated to require over 10.2 million man-hours annually. Assuming that each of these compliance officers works a traditional forty-hour work-week, the American financial system would need approximately 255,000 employees working solely on Dodd-Frank compliance. The average salary for an entry-level compliance officer in New York, NY is $51,032. Therefore, the compliance budget of the financial system would increase by over a staggering 13 billion dollars annually in order to meet the Dodd-Frank requirements and standards.

What is more shocking is that the aforementioned figures are just for Dodd-Frank compliance in general. One can only imagine that SIFIs will have a

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41 McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015) (giving states the exclusive authority to regulate the insurance industries).
42 Banking Act of 1933 (Pub.L. 73-66, 48 Stat. 162) (establishing the FDIC and giving it the power to oversee and regulate depositary financial institutions).
43 Craig Bannister, Compliance With Dodd-Frank Regs Costs Businesses 10.2 Million Man-Hours Every Year, CNN (October 27, 2011), http://cnsnews.com/blog/craig-bannister/compliance-dodd-frank-regs-costs-businesses-102-million-man-hours-every-year. Compare this high amount of man-hours to the 5.5 million man-hours required to make the 146 million iPhones in the world. This is clearly a high amount of man-hours required to comply with a statute that will also require a large increase in a firm’s budget for payroll.
44 This number is derived by dividing 10.2 million man-hours by a forty-hour work week.
46 The budgetary increase is calculated by multiplying the annual salary of a compliance officer ($51,032) by the numbers of employees required (see calculation supra note 44).
greater compliance cost since those entities will have more to adhere to than the average firm.

While the SIFI designation will reduce some systemic risk\(^{47}\) the benefit comes with a high price tag. Additionally, the level of systemic risk each entity has will vary, but the cost will be similar.\(^{48}\) Bank SIFIs will be able to recoup some of this added cost by adjusting interest rates and reducing certain returns. Nonbank insurance SIFIs will be forced to translate this cost to their policy holders by raising premiums, since the majority of their income comes from insurance policy premiums. Although it seems that Dodd-Frank had good intentions with the heightened compliance it requires of these systemically important financial institutions, it has failed to differentiate between the banks and insurance companies. These different companies have different business anatomies. Dodd-Frank’s similar treatment of these incomparable institutions will likely wreck the insurance SIFIs, while being a mere inconvenience for the bank SIFIs.

Recall that good regulation should promote innovation and efficiency, promote safety and soundness, facilitate the competitiveness of domestic firms in global markets, and promote transparency and consistency. When looking at the elevated and further complex reporting requirements, it does not seem that Dodd-Frank has accomplished these goals well, if at all. Transparency and consistency may be the only goal that is partially met by these new reporting requirements. Under the Act the financial system and regulators will be more aware, due the increased amount of information the system will have.

However, SIFI reporting requirements seem to stunt competitiveness in the global markets in several ways. First, the exorbitant increase in compliance cost will only lead to a firm being less competitive. This capital that could have been used for innovating and maintaining a presence in the global markets is not going into complying with Dodd-Frank’s immense reporting scheme. Also, the reporting by the firms will be public to some extent, further reducing the competition of the domestic firms with the foreign firms. The public aspect of the reports submitted by the domestic firms, will allow other intra-industry-foreign firms an opportunity to see the domestic firm’s information and use it to their benefit.\(^{49}\) Finally, the information overload created by the expanded

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\(^{47}\) It is unknown how much systemic risk will actually be removed from the financial system when certain firms’ actions and transactions are restricted through the SIFI designation.

\(^{48}\) Banks involved in an abundance of investing, which leads to systemic risk, will have a much higher level of systemic risk than an insurance company. However, both forms of SIFIs (banks and insurance companies) will expend nearly the same amount on complying with Dodd-Frank and the added SIFI compliance.

\(^{49}\) This would be a disadvantage only on the global level since all SIFI firms domestically will have to report the same information to the same agencies. The foreign firms will not be subjected
reporting requirements may actually be counterproductive to the transparency accomplished, since there may be so much information that no one can decipher it in an efficient manner.

Additionally, the reporting requirements that come with the SIFI tag may promote safety and soundness since the regulators will be able to chaperone those firms and stop, or reduce, any catastrophe that may occur from the actions of that firm. Nevertheless, the SIFI designation will almost surely hinder innovation and efficiency. Clearly the time and money spent on compliance will take away from the time and money available to create new products or more efficient business methods.

2. Capital Requirements

Aside from the heightened reporting requirements that SIFIs will be subjected to, SIFIs will also have to maintain higher capital requirements. Capital requirements are standardized requirements for banks and other depository institutions, which determine how much liquidity is required to be held. 50 Commercial banks 51 are provided with a formula which tells them how much capital they currently have based on the riskiness of the asset. A percentage of the capital amount is then required to be held by the firm. 52 These funds cannot be used for any purpose other than being held in reserve. 53

The Federal Reserve has yet to announce how much more will be required to be held in reserve under the new capital requirements for the systemically important financial institutions. Dodd-Frank provides little clarity regarding this topic as well. 54 However, clarity regarding the new capital requirements for SIFIs can be accurately approximated by looking at what the requirements were before the crisis and what they are now, post-crisis, for all financial institutions. From here one can only assume that firms which the FSOC will want to have higher capital requirements for SIFIs, since these are the firms FSOC believes pose the greatest systemic danger and need harsher regulation.

The Basel Committee on Banking Supervision, a global committee, has created Basel III. 55 In December 2011 the Federal Reserve announced

51 Commercial banks are those institutions where one does their personal banking. Checking accounts and personal savings accounts are examples of personal banking.
52 Capital Requirement Definition, supra note 50.
53 Id.
55 Basel III Definition, Investopedia.com,
that it planned on implementing Basel III in the United States. Under Basel III, banks will be required to hold 4.5% of common equity in reserve, which is an increase from 2% under Basel II. Furthermore, banks will be mandated to carry an extra 2.5% of common equity to absorb shock in the financial market, bringing the total amount of common equity required to be held in reserve up to 7%. Additionally, banks will be required to hold 6% of Tier 1 Capital under Basel III, up from 4% under Basel II.

Dodd-Frank plans to go beyond the Basel III requirements for SIFIs. Some have opined that the Act will require SIFIs to hold somewhere between 20 to 100% more in common equity reserves. This enhanced capital requirement will mean that SIFIs may end up holding anywhere between 8.4 to 14% of common equity in reserve. This is a substantial jump from what these corporations were holding prior to the crisis; a mere 2% under Basel II. The increase in reserves bolsters a firm’s liquidity should a financial crisis present itself.

With substantially more money held in reserve a firm will be more safe and sound since there will be more cash available to liquidate and pay its creditors, should the circumstance arise. However, the increased capital requirements will hurt competitiveness in the global markets, as well as the ability to innovate and be efficient. By holding more cash in reserve the firm will have less to spend on innovation and efficiency. The lack of funds available for innovation and efficiency will mean that the firm will slow

http://www.investopedia.com/terms/b/basell-III.asp#axzz1qi1tK4qG.


59 Id.

60 “Tier 1 Capital is core capital, [which] includes equity capital and disclosed reserves.” See Tier 1 Capital Definition, Investopedia.com, http://www.investopedia.com/terms/t/tier1capital.asp#axzz1qi1tK4qG.

61 Basel III New Capital and Liquidity Standards-FAQs, supra note 58.


63 Id.

64 Id.

65 Id.
down in creating better ways to create profit. Global firms will not be subjected to these heightened cash reserve requirements and will have more to spend on innovation and efficiency. Therefore, the heightened capital requirements will not only reduce innovation and efficiency but also negatively impact the competitiveness of domestic firms in the global markets.

3. Leverage Limitations

The Act gives FSOC the authority to develop stricter leverage rules. Again, there is no clarity provided in the Act regarding how or what these new leverage standards are going to be. Nonetheless, certain aspects of the new leverage limits are apparent. For example, based on the aforementioned capital requirements, a firm will not be able to leverage themselves more than fifteen times their capital. New restrictions on the ability to leverage can cripple stop a financial institution dead in its tracks, since firms use leverage trying to increase profitability in the short run. With a tight cap on leveraging, firms will have to search for other sources of profit. One last point, the Federal Reserve and FSOC can impose tighter leveraging limits beyond the fifteen-to-one limit already set by Dodd-Frank; meaning the cap might get tighter.

Tighter leverage limits will almost assuredly guarantee a safer and sounder financial system. Leverage simply means taking on debt to improve a firm’s profits. Should that firm suffer a severe financial shock, being over-leveraged will lead to a quick demise. The reason for the sudden death of a highly leveraged corporation is that such firms will face a rapid loss of capital because of the financial shock and therefore unable to pay for the upcoming due debt with which it leveraged with. Thus, leverage limits are most probably guaranteed to promote safety and soundness.

67 Dodd-Frank Act § 115(b)(a)(B) (codified at 12 U.S.C. § 5325(b)(1)(B)) (2010). (Stating that FSOC has the ability to delineate prudential standards, including leverage limits, for SIFIs).
68 See generally Id.
69 Erza Klein, Explaining Financial Regulation: Leverage and Capital Requirements, The Washington Post (April 19, 2010), http://voices.washingtonpost.com/ezra-klein/2010/04/explaining_financial_regulation.html. (“The financial regulation bill that passed the House of Representatives includes an amendment that Moss helped craft and that Rep. Jackie Speier sponsored that forces the financial sector to do a lot of hand-washing: It sets a 15:1 gross leverage limit and then gives regulators the ability to clamp down further if they so chose.”)
70 Coffee, supra note 8, at 799.
71 Id.
72 Supra note 69.
Additionally, since the limits on leverage will be the same across all SIFIs, there will be a uniform standard that leads to more transparency as to how leveraged each firm is as well as consistency throughout the financial system with respect to leveraging.

Nonetheless, imposing tighter restrictions on leveraging will almost surely lead to domestic firms losing their global competitive edge and falling behind the competitive global markets in general. Recall, Dodd-Frank is an act specific to the United States of America; meaning only domestic financial institutions will be subjected to the heightened leverage standards. The United States’ firms will be prohibited from using a very lucrative method of profit-making that global firms will continue to use, thereby subordinating the American financial firms to the rest of the world’s corporations involved in the same type of business. Additionally, the corporations’ reduced ability to leverage will reduce how much useable capital they have to work with and thereby reducing the capability to innovate and strive for efficiency.

III. INSURANCE SIFIS

So where do insurance companies fit into all of this? As mentioned above, the FSOC can designate any corporation that it believes to be systemically important, not just banks. This broad power affirmatively permits, and wants, the Council to pick out certain nonbank insurance companies and call them SIFIs. A designated nonbank, insurance company would thereby be subjected to multiple regulating agencies, heightened and more complex reporting requirements, higher capital

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73 Dodd-Frank Act § 804(a)(1), supra note 12.
74 Id. While the act does not specifically single out nonbank insurance companies, it has become clear by the criterion proposed to designate SIFIs that only banks and nonbank insurance companies will qualify for the designation.
75 Skadden, Arps, Slate, Meagher & Flom, LLP, Orderly Liquidation Authority, available at http://www.skadden.com/newsletters/FSR_Orderly_Liquidation_Authority.pdf. Designated firms will be subject to regulation by the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Financial Stability Board, and the Orderly Liquidation Authority. If they are an insurance company they are subjected to all these regulators as well as their state regulators. Also, if the firm is a publicly traded corporation they will be subject to federal securities laws and regulations.
76 Dodd-Frank Act § 115 (a)(1) (codified at 12 U.S.C. § 5325) (2010). Upon designation, SIFI firms have six months to register with the Federal Reserve System whereby the Federal Reserve Board will establish “prudential standards” that the nonbank SIFI must abide by. Furthermore, an insurance, nonbank SIFI will still have to comply with the already in place regulations of the states where they do business, since states have the exclusive authority to regulate the insurance industry under the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015). The Financial Stability Oversight Council will also be able to maintain a supervisory role over the designated nonbank SIFIs. These nonbank SIFIs will also have new reporting requirements that will ask them to open their books up to the federal government, something insurance companies never had to do under
requirements, and more stringent liquidity and leveraging standards.  

The process for designating a nonbank insurance company as a SIFI is the same as a bank.  

This similar process, which is described above, is a grouping or association of two completely different companies, with different business strategies and methods, based on a standard rubric. In essence, a SIFI nonbank and a SIFI bank will be treated the same once designate as such.

However, banks and insurance companies are not the same. Banks, by definition, make their income through investing.  

Bank institutions profit from lending their depositors’ money at a higher interest rate than what they pay that depositor or invest their clients’ money and make commission and charge transactional fees.  

On the other side of the spectrum, insurance companies make their primary income from charging insuring different things and charging a premium. The goal of the insurance company business model is to collect more premium than they have to pay out on policies requiring payment.  

The added burdens on SIFIs will have a marginal effect on banks, while the effect of insurance SIFIs will be increasingly significant. Banking institutions will be able to adjust their investment strategies and business models to deal with the cost associated with the new reporting requirements, the tighter capital requirements and more stringent leveraging rules. The banks can do this through the dynamic business structure associated with being a bank. As mentioned above, banks make profits by investing and earning interest on loans they make. Such a business structure allows the banks to make minor adjustments to interest rates as method of recouping some of the added cost associated with being McCarran-Ferguson.


What Does SIFI Status Mean for Banks?, Knowledge @ Whaton (January 10, 2012), http://kw.wharton.upenn.edu/ey-global-banking/2012/01/10/what-does-sifi-status-mean-for-banks/.


Id.

Insurance companies insure cars, homes, lives (life insurance), mortgage backed securities, etc. There is a myriad of insurance products providing policy holders with protections for a spectrum of assets and other items of value.


Id.

Supra note 79.
a SIFI. For example, a $300,000.00, 30 year home mortgage with an interest rate of 4.0% will yield the lending institution $215,608.52 in interest payments over the life of the loan.\textsuperscript{85} The larger banks can adjust their rate by one-twentieth of a percentage point without losing their competitive edge, since most people would prefer using a reputable bank rather than a smaller financial institution.\textsuperscript{86} If the SIFI big banks adjust their interest rate to 4.05 the borrower will pay $218,726.54 in interest over the life of the loan; approximately $3,000.00 more than the 4.0% loan.\textsuperscript{87} Intuitively, larger banks have more accounts and give out more loans. Such minor increases in interest rates over many loans will allow the bank to earn marginally more profit over many transactions while allowing them to recoup some of the added costs associated with being a SIFI while maintaining some competitive edge over the small banks.

Also, banks charge fees on investment transactions.\textsuperscript{88} Savvy investors tend to flock to the largest investment banks, since they have a track record of producing better returns on investments. Therefore, these larger investment banks will be able to adjust their transaction fees and commissions earned when designated as SIFIs as another method of recouping cost associated with being a SIFI as well as profits lost from being tagged as SIFI.

Insurance companies simply do not have this business option. Recall, insurance companies make most of their money through insurance premiums.\textsuperscript{89} For example, AllState Insurance Company made 28.18 billion

\textsuperscript{85} This number is derived through several calculations. First, one must calculate the monthly payment. The formula to calculate the monthly payment is: \[ P \] $\frac{\text{principal amount}}{\text{rate}} \times \frac{\text{number of monthly payments}}{12} \] In this case it is $300,000.00. \[ r \] is the monthly interest rate of .03333333; here calculate by taking 4\% dividing it by 12 months of the year and then by 100 to make it a decimal representation of a percentage. \[ N \] is the number of monthly payments, which is 360. Monthly payments is calculated by taking the number of years in the loan (30) and multiplying same by 12, representing the months in a year. When this formula is calculated using the numbers given in the example the monthly payment calculates to $1,432.25. Taking this monthly payment and multiplying it by the total number of payments, which is 360, will yield the total that this mortgagee will pay in interest and principal over the life of the loan; which is $515,608.52. Now, simply subtract the principal from this total to get the amount of interest paid on this loan. Here, it is $215,608.52; calculated by subtracting $300,000.00 (principal) from $515,608.52 (total value of the loan). See Kohn, Robert, \textit{A Capital Budgeting Model Of The Supply And Demand Of Loanable Funds}, Journal of Macroeconomics 12, Summer 1990, pp. 427-436 (specifically p. 430); \textit{see also generally William J. Carney, Corporate Finance: Principles and Practices} (2nd ed. 2010) 98-100 (valuation of amortized loans).

\textsuperscript{86} Larger banks offer convenient services that most smaller banks cannot, such as online banking, more branches and ATMs, more efficient banking, and better customer service.

\textsuperscript{87} This is calculated using the same methods as in supra note 85.


\textsuperscript{89} Supra note 82.
dollars in premiums in 2011, while only making 3.971 billion in investment revenue.\textsuperscript{90} One may ask why the insurance companies just charge higher insurance premiums. The simple answer is that insurance premiums is based on the risk associated with each policy the insurance company issues.\textsuperscript{91} Should an insurance company choose to increase their premium rates based on something outside the usual underwriting criteria they will see a dramatic drop in business. Consumers are likely to move to the non-SIFI insurance companies which offer premiums based on traditional underwriting criterion. Quotes are readily available to the consumer allowing them to shop for better rates.

Another point to consider, only a small subset of insurance companies will be subjected to the SIFI designation while many more banks are likely to be subjected to SIFI.\textsuperscript{92} Since more banks will be subject to SIFI, it is less likely to affect their business. This conclusion assumes that so many of the large banks will be SIFIs, and that all of them will respond similarly to the designation, that most big banks will have similar interest rates, fees and business models whereby such will become the norm. In contrast, only very few insurance companies will be SIFIs thus eviscerating their ability to make their premiums the industry norm. It seems clear that the SIFI designation will become a greater hardship on insurance companies in comparison to banking institutions.

\section*{IV. SIFI’S EFFECT ON ALLSTATE}

What will happen to AllState if they were to be deemed a SIFI? Looking at the company’s financial statements will provide great insight. First, begin by looking effect of the heightened capital requirements. Recall that Tier 1 capital is essentially cash and cash equivalents.\textsuperscript{93} Looking at AllState’s financial statements,\textsuperscript{94} the firm has 5.139 billion dollars in cash and cash equivalents.\textsuperscript{95} Under the capital requirements in place at the time of the collapse\textsuperscript{96} AllState would be required to hold 2\% of 5.139 billion dollars in reserve. Therefore, AllState should be holding 102.78 million


\textsuperscript{91} Id.

\textsuperscript{92} This assumption is derived by understanding the SIFI criteria targets big banks, but happens to include a few insurance companies in passing.

\textsuperscript{93} Supra note 60.

\textsuperscript{94} Financial statements include the balance sheet and income statements.

\textsuperscript{95} This number is derived by adding cash and equity securities the firm is holding, since they are easily liquidated. See AllState Insurance Company Annual Financial Statements Filing (form 10-K), supra note 90, at 112.

\textsuperscript{96} See supra note 58.
dollars in capital reserve. Should AllState be designated a SIFI they will be required to hold somewhere between 8.4-14% in reserve, meaning they will have to hold between 431.676 million dollars and 719.46 million dollars in capital reserves. Clearly AllState’s cash position will be severely, adversely affected.

Next, one can hypothesize as to the effect of the reporting requirements on AllState. AllState is already subject to the reporting requirements of the SEC, FRB, the Office of the Comptroller of Currency (“OCC”), and the FDIC. Should AllState become a SIFI they will also be regulated by FSOC and the Orderly Liquidation Authority (“OLA”). AllState’s compliance with just SEC reporting requirements was approximately 4.25 million in 2005. Other reporting and compliance requirements are most likely comparable. Granted, a firm can use some of the work required to comply with one regulation to comply with another, it is clear that when an institution is subject to multiple regulatory agencies the cost of compliance can increase at a near-exponential rate. Such an increase in compliance cost can only have a negative effect on AllState, by forcing them to spend more on rigid reporting requirements.

Finally, the leverage limit will also have a negative effect on AllState. Using the Liquidity Ratio, as the Act requires, one can quickly calculate how leverage AllState was at the end of the 2011 year. At the end of 2011, AllState’s total assets equaled 125.563 billion dollars and their total liabilities equal 106.861 billion dollars. Dividing the total assets by the total liabilities, AllState leverage ratio was 1.175:1 at the conclusion of the 2011 year. AllState was, and probably still is, substantially under the leverage limitation that will be imposed on those unfortunate enough to be designated as SIFIs. However, should AllState decide to take on more leverage they may find themselves in a tough

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97 See supra note 64.
98 Calculated by multiplying by 5.139 billion dollars (Tier 1 capital for AllState) by 8.4% and 14%.
100 See AllState Insurance Company Annual Financial Statements Filing (form 10-K), supra note 90, at 21.
101 See supra note 76.
103 The Liquidity Ratio is total assets divided by total liabilities. See Carney, supra note 84, at 54-5.
104 2011 is the most recent financial statement available at this time on the EDGAR system.
105 See AllState Insurance Company Annual Financial Statements Filing (form 10-K), supra note 90, at 112.
106 Id.
position due to the leverage cap. The effects of the limits on leverage may not seem substantial as AllState stands now, but what the future holds for AllState is unknown and thus the limits may play a significant role in AllState’s ability to remain competitive in the global markets and be innovative and efficient.

Additionally, while the effects of SIFI on a firm, such as AllState, are specific to that firm, other effects ripple throughout the entire financial system every time a firm is designated as a SIFI. As mentioned above, the reporting requirements and capital requirements will cost the firms more money and require holding more Tier 1 capital in reserve, respectively. While one firm spending less money in the entire financial system will have a small impact, if any, when compounded the effects of multiple SIFI designation are taken into account the aggregate effect could be colossal. Also, recall that AllState is not a financial institution in the traditional sense of the word, since it is an insurance company and therefore the repercussions on the financial system by designating it as a SIFI may seem quite small. Moreover, the leverage limitations will be significant as such limits will lead to less lending, which, in turn, will lead to less interest being earned and an overall contraction of the United States’ financial system.

V. IS DODD-FRANK A WASTE WITH RESPECT TO REALLY LARGE INSURANCE COMPANIES?

Some may argue that Dodd-Frank’s methods are exactly what the United States needs in order to prevent another collapse similar to 2007/2008. Such an argument is premised on the fact that one of the most significant contributors to the financial collapse of 2007/2008 was American International Group, Inc. (“AIG”). However, AIG did not fail as an insurance company, rather that portion of AIG’s business was one of the very few thriving during the beginning of the recession. At the time of the collapse, AIG insurance was thriving and growing. The insurance subsidiary of AIG was structured and regulated in such a manner that the

107 Supra note 97, 98 & 102.
108 Peter G. Gosselin and Maura Reynolds, Fed Rescues Giant Insurer AIG, The Los Angeles Times (September 17, 2008), http://articles.latimes.com/2008/sep/17/business/fi-econ17. (“[T]he chief reason behind the Fed action was fear that [AIG]'s failure could weaken or destroy nearly a half-trillion dollars' worth of financial protection that AIG provides Wall Street firms.”) (emphasis added).
109 Matthew Karnitschnig, Deborah Solomon, Liam Pleven and Jon E. Hilsenrath, U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up, The Wall Street Journal (September 16, 2008), http://online.wsj.com/article/SB1222156561931242905.html. (“The loan is secured by AIG's assets, including its profitable insurance businesses”) (emphasis added).
110 Id.
insurance side of AIG was not at risk.\textsuperscript{111} AIG insurance was absolutely able to meet its obligations to its policy holders.\textsuperscript{112}

So if AIG was thriving, what caused its collapse? AIG was heavily involved in the credit-default swaps\textsuperscript{113} such that when different loans began to default AIG was left with the liability. However, it was not the AIG insurance subsidiary that was involved in these risky credit-default swaps; instead it was other AIG entities engaging in these transactions.\textsuperscript{114} Essentially, AIG’s failure can primarily be attributed to its risky credit-default swap practices.\textsuperscript{115} Additionally, AIG’s insurance company had nothing to do with its failure. Finally, while Dodd-Frank classifies SIFIs by the amount of liability it is subjected to through its credit-default swaps, the Act does practically nothing to regulate SIFIs, or any other financial institution, regarding the maximum level of credit-default swap exposure a firm may take on. As a matter of fact, the only mention of credit-default swaps in the entire 879 page act is the “Prohibition Against Federal Government Bailouts of Swap Entities.”\textsuperscript{116} Thus, Dodd-Frank classifies SIFIs based on an important systemic transaction (credit-default swaps), but does not address the issue and risk associated with such transactions.

Furthermore, AIG partook in such transactions based on credit-worthiness ratings of the different lenders seeking risk shelter from AIG. When a credit protection seller, such as AIG, is about to engage in a credit-default swap they inquire as to the credit-worthiness of the original lender.\textsuperscript{117} Credit rating agencies, such as Moody’s and Standard and Poor’s, develop different formulas and methods to ascertain the credit-worthiness of different firms, loans and debts. Therefore, AIG relied heavily on these credit reporting agencies in deciding whether they should engage in certain

\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} See Robert F. Schwartz, Risk Distribution in the Capital Markets: Credit Default Swaps, Insurance and A Theory of Demarcation, 12 Fordham J. Corp. & Fin. L. 167, 175 (2007). (Credit-default swaps are transactions that are used to “insure” lenders who invest in certain risky instruments. This is accomplished after the initial lender makes a loan to a borrower. The lender then finds a credit protection seller (someone who sells protection for investments; AIG was a credit protection seller during the financial crisis of 2008). The lender and credit protection seller then into a contract for the notional amount of the note that the lender is holding for the loan he gave to the borrower. The lender will then pay a small percentage of the notional amount annually to the credit protection seller until the credit-default swap matures or the underlying note defaults. Should the note default the credit protection seller has two options: (1) pay the lender the face value of the note and assume it, or (2) the credit protection seller can directly settle the note. In essence, the credit protection seller is insuring the lender that should the underlying note default the lender will not be forced to carry the liability associated with the default.)
\textsuperscript{114} Karnitschnig, supra note 109.
\textsuperscript{115} Id.
credit-default swap transactions. These credit rating agencies assured AIG that the transactions they were partaking in had very little risk associated with them, even though the credit rating agencies knew the flaws and high level of risk associated with the transactions.\textsuperscript{118} AIG merely relied on these misrepresentations made by the credit rating agencies, and when the market collapsed AIG paid for trusting the agencies. In essence, AIG’s collapse was due to crediting rating agencies that were supposed to provide investors with accurate depictions of the investments those investors were about to partake in.

SIFI does not remedy the credit rating agency problem. Dodd-Frank makes some modifications with regards to how credit rating agencies may function, but the changes are not material, rather they provide more clarity as to how the agencies must function under their current schemes.\textsuperscript{119} However, the argument that Dodd-Frank has remedied the issues that faced the market due to AIG’s credit-default swap transactions, and its sheer size, merely cannot succeed. Dodd-Frank does not address credit-default swaps at all and does not regulate or change the credit rating industry. The effects of SIFI on AIG would be similar, if not exactly the same as, the effects on AllState. As this paper indicates, the SIFI designation does more harm than help with respect to insurance companies. As just explained, AIG as an insurance company would suffer the same harm as AllState. With respect to the rest of AIG, Dodd-Frank does little to address the cause of the distress they faced. Thus, the argument that Dodd-Frank and SIFI remedy the weaknesses that led to the financial crises is misplaced.

VI. CONCLUSION AND RECOMMENDATIONS

Recall, that the goal of any regulation should be to promote innovation and efficiency, promote safety and soundness, allow domestic corporations to be competitive in global markets, and promote transparency and consistency.\textsuperscript{120} Dodd-Frank has made a valiant effort in trying to achieve these goals with the SIFI designation. In the meantime, it seems that the Act falls flat on its face in attempting to be “good” regulation. The goal of Dodd-Frank is to maintain financial stability in the American financial systems.\textsuperscript{121} When analyzing Dodd-Frank under the 4 prong criteria of good regulation, it is clear that the Act is far from good in the regulation sense with respect to insurance companies. It may promote some safety and soundness as well as consistency and transparency, but the Act


\textsuperscript{119} See generally Dodd-Frank Act § 932 (amending 15 U.S.C. § 78o-7).

\textsuperscript{120} Cooley, supra note 4.

\textsuperscript{121} Dodd-Frank Act Preface, supra note 1.
sends financial innovation and efficiency back to the Stone Age and transforms domestic firms into second-class citizens in the global financial markets.

Dodd-Frank’s greatest flaw is that it plans to treat large insurance companies the same as large banking institutions. However, it is clear that these businesses are different in many ways. Also, Dodd-Frank has failed to create a different method for classifying these very different businesses as systemically important financial institutions. While it seems obvious that huge insurance companies do play a significant role in the United States’ financial system, their role is quite different than banking institutions. Classifying both types of firms as SIFIs under the same criteria seems to be lazy and ineffective. The way the firms operate, generate revenue and function are completely different and therefore the firms should be classified as systemically important under different rubrics. The one-size-fits-all methodology of Dodd-Frank will only engulf insurance companies into SIFI-land when perhaps they should not be treated as such.

Additionally, assuming arguendo, that the classification criterion is proper, the treatment of the institutions after being called SIFIs should not be the same. As discussed above, the business strategies involved with each form of company is a completely different one. The banking companies will be able to make adjustments that the insurance companies will never be able to do.

One can concede that the reporting requirements will allow for a safer and sounder financial market. The reporting requirements will also dramatically increase consistency and transparency. In contrast, these requirements will also handicap the American firms, especially the insurance ones, in the global markets. These same requirements will also lead to nearly no innovation or efficiency by all SIFIs, specifically the insurance SIFIs. Dodd-Frank has essentially decided that the “Too Big to Fail” problem is best solved by slamming the breaks on all large firms. While it is true that there are some quite large insurance corporations that need to be regulated more than others, placing them in the same category as the large banks just seems counterintuitive. The Act places large domestic insurance companies at a much greater disadvantage in both the local and global markets. The effect is not as magnified when discussing banking SIFIs.

Also, the leverage limits and capital requirements are flawed for the same reasons as the reporting requirements. Mandating new leverage limits and capital reserves on both insurance companies and banking institutions, again, seems to do more damage than it helps. Once more, banks have at their disposal methods of adjusting to a SIFI designation that do not exist for insurance companies. Banking firms will make such adjustments and continue business as if nothing happened. Insurance
companies will not be able to make the same adjustments and thus be
forced to contract their business and increase rates just to survive. Such
business moves by insurance companies will cause the insurance SIFIs to
become less innovative, efficient, and competitive in the global market.
Did Dodd-Frank really want domestic insurance firms to become worse
businesses all in the name of safety, soundness, transparency and
consistency in the financial system? Surely, there must be other ways to
achieve these goals without dismembering a hand full of large insurance
companies. First, assuming the SIFI designation is really what the financial
institution needs to reduce and control systemic risk, there should
absolutely be two different criteria used to designate bank SIFIs and
insurance SIFIs. One could imagine a classification process of insurance
companies that looks beyond assets, leveraging and credit default swaps
which could effectively pinpoint insurance companies that pose a great deal
of systemic risk to the financial system. Such a criterion could investigate
what the insurance firms are actually investing in, or how often they are
making extremely risky investment or business decisions. Additionally, the
criteria could look into how systemic that individual firm is, rather than
assuming, based on superficial numbers, that large equals systemic.
Moreover, even if the method-of-choice to designate insurance SIFIs was
based on assets, those designating insurance companies should be required
to look beyond all assets and focus on assets which are used for investment.
The reason for this is, unlike banks, insurance companies’ assets are not
used mainly for investments in securities and bonds. While most banks use
a significant amount of their assets strictly for investments in equities,
bonds, and other financial instruments, insurance companies use most of
their assets to provide insurance products to customers. Insurance products
have calculated risks and expected returns. On the other hand, stocks and
bonds are at the will of the market making them much more risky from an
investor’s point of view.
Furthermore, assuming that two separate designation processes will
become too cumbersome and thus maintaining the one-size-fits-all method
is the only way to designate firms as SIFIs, once a firm becomes a SIFI it
should be treated differently based on its business purpose. It is undisputed
that insurance companies go about their day-to-day business in a
completely different manner than banks do, so why should they be treated
the same. Slapping on the same capital handcuffs which are placed on
banks through SIFI onto insurance companies is a complete blunder from a
regulatory aspect. Insurance companies need to have looser capital
requirements in order for them to be able to pay out claims on policies they
have written and still continue to create new products for their customers.
Between the reserves such companies hold for potential claims and the
heightened capital reserves swallowing up a large portion of their Tier I
capital, it becomes quite hard to fathom insurance SIFIs innovating new products let alone being competitive in the global markets.

Not only does Dodd-Frank restrain how SIFIs may use their capital, the Act also closes the primary alternative avenue large corporations involved in the financial system use to capitalize themselves – leveraging. The easiest way for a large reputable firm to increase their cash position almost instantly is through leveraging. Leveraging is just taking on debt and using the cash received to expand the business, through innovation and efficiency as well as expansion in global markets. Placing a limit on leverage will harm SIFIs, especially insurance SIFIs, in their ability to capitalize and thereby stall their efforts to innovate, become more efficient, and survive in global markets. The toxic combination of heightened capital requirements and limits on leveraging will only prove to have to disastrous consequences on the SIFIs, specifically the insurance SIFIs.

It is not hard to recognize that large insurance companies were contributors to the catastrophic financial crisis of 2008; the drafters of Dodd-Frank got at least one thing correct. Yet, as aforementioned, the Act deals with insurance firms in a completely irrational and improper manner. Dodd-Frank seems to be a “knee-jerk” reaction, with little thought behind it. Another suggestion would be the repeal of the McCarran-Ferguson Act.\footnote{McCarran-Ferguson Act, supra note 41.}

McCarran-Ferguson left insurance regulation to the states, creating a fragmented sea of insurance regulation. The fragmentation of regulation is due to the fact that each of the fifty states in the United States of America has their own set of insurance regulations. While some, if not most, of the regulations mirror each other, large insurance companies who do business in several states have to take this into account. Also, large insurance companies, that do business in multiple states, are reporting to many different state regulators. Repealing the McCarran-Ferguson Act and placing insurance regulation in the hands of the federal government would create a uniform set of laws and a sole regulator. While Dodd-Frank did create the Federal Insurance Office (“FIO”), the Act did not give that regulator any power and only further complicated insurance regulation; now there are fifty-one potential insurance regulators in the United States. However, if McCarran-Ferguson was repealed the FIO could have more power to monitor and regulate the entire insurance industry. If the FIO had this authority and responsibility the SIFI designation on insurance companies would seem completely useless and obsolete. The FIO could make industry specific regulations focusing on reducing systemic risk.

One could even imagine a world where SIFI existed but McCarran-Ferguson Act, supra note 41.
Ferguson was repealed and the FIO was the sole regulator of the insurance industry, working in conjunction with the other regulators of the financial system to reach the common goals that all regulators should be trying to reach, a safer but still powerful, thriving and growing financial system with a strong presence in the global markets for whatever those products might be. Thus, another suggestion is to have the SIFI designation for both banks and insurance companies, but with several modifications. First, the criterion for being classified a SIFI should surely be specific to the different forms of business. Next, after becoming a SIFI the rules, restrictions and regulations should also be industry specific. Finally, the McCarran-Ferguson Act should be repealed placing insurance regulation in the hands of the federal government. If all those modifications were made to the current legislation regulators would be able to promote safety and transparency in the financial system without stunting innovation, efficiency, and competitiveness in global markets.

One last suggestion is recognizing that credit-default swaps and credit rating agencies were at the root the problems that lead to the financial crisis of 2008 and dealing with them directly. Rather than attempting to treat insurance companies and banks in exactly the same manner, Congress should deal with one of the primary causes of systemic risk. First, restrictions should be placed on the amount of credit-default swap transactions any institution, especially insurance companies, is allowed to partake in. Such confinement will significantly reduce the amount of systemic risk in the financial system, since there will be less interconnectedness between the firms. The reduced amount of interconnectedness will also prevent, or at least mitigate, system-wide defaults should one firm fall into financial distress. The reason for this reduced ripple-effect is that when firms are less involved in credit-default swaps, thus being less interconnected, their financial health is more independent. Therefore, a failure of one firm will have little to no affect on other firms. Also, the credit rating agencies should be more regulated. Allowing these agencies to rate arbitrarily, without any mandated criteria as to what is credit-worthy, will only lead to the demise of the financial system again. If a more applicable and standardized credit rating system is implemented, firms involved in credit-default swaps can safely rely on the agencies’ ratings. Additionally, the ratings will be accurate with respect to the risk associated with the transaction these firms are about to participate in.

In conclusion, with respect to the insurance industry, it is clear that SIFI does not accomplish the goals Dodd-Frank purports to achieve, nor does it meet the standards of “good regulation.” The Act merely places

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123 This is strictly the opinion of this author.
random restrictions and imposes random rules on insurance companies; rules and restrictions that seem more appropriate for banking institutions. The insurance industry does require new regulations; however, those regulations need to be industry-specific. Additionally, the regulations need to focus on primary causes of systemic financial distress, which Dodd-Frank does not address.
PHARMACIST MALPRACTICE LIABILITY:
SCOPE AND OUTCOMES

Walter Gardipee, PharmD, MBA, RPh**

As part of the allied health team, pharmacists perform many functions that may expose
them to the risks of civil and criminal liability. No longer responsible for merely
dispensing medications, pharmacists practice the duties of prescription consultation,
medication therapy management, immunization administration, blood pressure
screening, cholesterol checks, drug compounding, drug interaction safeguarding, and
anticoagulation therapy oversight, among others. As the field progresses, increased
awareness and understanding of legal responsibilities must run parallel to educational
and employment objectives. Undertaking the practices noted above increases the scope
of liability that pharmacists are subject to. Viewing the pharmacist as a "learned
intermediary" is eroding in the courts as the profession simultaneously evolves.

I. INTRODUCTION

Pharmacists are subject to both criminal and civil liability actions.
Criminally, pharmacists may be prosecuted for involvement in the illegal
distribution or consumption of drugs (especially controlled substances) and
for gross negligence up to and including involuntary manslaughter.
Overreacting to being robbed has likewise resulted in serious criminal
charges and career consequences, including first degree murder conviction
and employment termination. Civilly, pharmacists are most commonly

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charged with the same negligence actions that ring under tort law for many professionals. Pharmacists are held to a standard of care that must be met. This standard is commonly defined as a reasonable pharmacist with customary skill and knowledge under same or similar circumstances. Pharmacists may find themselves liable for injuries resulting from a breach of said standard if causation and damage elements are also present. Pharmacist employers are also often subject to liability under the doctrine of respondeat superior. This doctrine holds that employers are responsible for the actions of their employees when employees are acting within the normal course of employment.

In addition, pharmacist errors are commonly reported to the appropriate State Board of Pharmacy for punitive action that is separate from any court processes. State Boards of Pharmacy carry the authority to suspend, revoke, or place on probation the license of any pharmacist registered with the respective Board. Consequently, pursuit of a pharmacist for criminal or civil wrongs commonly results in simultaneous Board detriments originating from the same complainant. These penalties may include professional probation, suspension from practice, fines, mandatory continuing education stipulations, and revocation of a license to practice pharmacy.

II. CRIMINAL LIABILITY

Criminal liability is found where the defendant is responsible for acts forbidden by the corresponding municipal, state, or federal code. One may draw obvious conclusions for some situations in which pharmacists encounter criminal charges, such as consuming or distributing drugs without a prescription\(^1\) and converting money or inventory. What may not be so conspicuous, however, is that pharmacists have been culpable for committing filing errors without intent\(^2\), excessive use of force in response to a robbery\(^3\), and the diluting of critical medication in order to increase profit\(^4\).

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A. Filling Errors – Involuntary Manslaughter

Filling errors initially appear to be an obvious source of criminal action. When the term “filling error” is mentioned, the general impression is that the pharmacist filled the prescription/order with the wrong medication. But, what if we alter the facts from that which is first presumed? What if the pharmacist purchased a product that was adulterated when delivered or altered unbeknownst to him/her while in stock? What if the pharmacist was supervising the compounding of an intravenous medication bag and did not actually commit the error in question? Should these changes of fact affect the ability to prosecute a pharmacist?

Errors in filling a prescription have likely occurred since the practice has existed. It logically follows that the pharmacist of record who participates in an error, even negligently, is subject to criminal action if the error or its consequences are egregious enough. Manslaughter of various degrees has often been charged when death is the result of the error. The Eighth Edition of Black’s Law Dictionary defines involuntary manslaughter as “Homicide in which there is no intention to kill or do grievous bodily harm, but that is committed with criminal negligence or during the commission of a crime not included within the felony-murder rule.” Importantly, the actual definition of involuntary manslaughter within the controlling jurisdiction will rule and may vary slightly.

In one of the earliest noteworthy cases concerning a pharmacist charged with manslaughter, People v. Stuart, the pharmacist compounded an injury-causing suspension by retrieving the proper bottles. The error occurred because one of the ingredients in question was adulterated either prior to purchase or while in inventory at the pharmacy. Regardless, even chemical experts could not differentiate between the two substances, one offending and one intended, contained therein without the help of microanalysis. Even so, the pharmacist’s criminal charge had to proceed to appeal before it was overturned and he was exonerated. The Court of Appeal in Stuart noted that laws were not intended “to impose criminal liability without fault for accidents having no relation to a failure to use the knowledge and skill required for the dispensing of drugs.” Such culpability has been found, however, under other circumstances.

In 2009, then-Ohio pharmacist Eric Cropp was found guilty of manslaughter in a case that gained much national attention. The unfortunate victim was a young child who was undergoing chemotherapy.

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5 People v. Stuart, 47 Cal.2d 167 (Cal. Sup. Ct. 1956).
6 Cohen, supra note 2.
8 People v. Stuart, supra note 5.
9 Cohen, supra note 2.
treatment as an inpatient. As part of her therapy, the child was to receive a saline solution intravenously. The pharmacy technician on duty compounded the saline solution at a concentration greater than twenty times that intended. Cropp, the only pharmacist on a day with noted volume concerns and staff call-outs, failed to catch the error committed by the technician. The court found that it was the pharmacist’s duty to catch the error and the pharmacist served jail time, underwent probation, and paid a fine for his crime. Notably, the pharmacy technician who actually compounded the solution was not charged with a crime and even testified against Cropp at his hearing. Pharmacy technician certification is not required in all states and, in those which it is, the standards vary considerably. At that time, Ohio was a jurisdiction in which the State Board of Pharmacy does not “license, register, or certify pharmacy technicians.”

It is this last fact that has many inside and outside the field of pharmacy concerned and calling for required pharmacy technician training and a national standard of education and registration.

B. Intentional Adulteration and Murder

Adulteration of a drug occurs when the ingredients are detrimentally altered from their original form. Murder is often defined as the killing of another with malice aforethought. Pharmacists may be the default perpetrator image when adulteration is mentioned. Pharmacists are not, however, the stereotypical example of a murderer. Nonetheless, pharmacists have been accurately charged with each while performing duties within the scope of their practice.

Pharmacist Robert Courtney was found to have adulterated the contents of chemotherapy drugs while practicing to the detriment, and possibly death, of his patients. Specifically, Courtney diluted the contents of approximately 98,000 chemotherapy prescriptions in order to fraudulently extend his inventory and thereby increase his profits. Over 4,200 patients were affected by Courtney’s actions. Following the DEA investigation of Courtney’s pharmacy, he was charged and found guilty of 20 federal counts of adulterating. Courtney, at least partially due to his criminal practices, had an accumulated wealth of $20 million at the time of his arrest. He is now serving thirty years in federal prison for the intentional adulteration of drugs that he dispensed. Money is not always the motive, however, when pharmacists commit acts worthy of serious criminal

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10 Ohio State Board of Pharmacy, Pharmacy Technicians in Ohio, (June 2009), http://www.pharmacy.ohio.gov/Pharmacy_Technicians_060109.pdf.
12 Draper, supra note 4.
As the most easily-accessible holders of controlled substance inventory, pharmacies are common targets for robberies. Though rarely killed during attempts, pharmacists and their staff are frequently held at gunpoint during such crimes and threatened with their lives. In 2009, an Oklahoma pharmacist found himself being robbed in such a manner by three armed men. Instead of complying with the assailants’ requests and filing an insurance claim for the loss, however, then-pharmacist Jerome Ersland chose to fire back with his own handgun. Two of the perpetrators fled in response and one was actually hit by Ersland’s return fire. After returning from pursuit of the two fleeing robbers, Ersland proceeded to shoot the already downed criminal an additional five times and ensured his demise. Although victims do have a right to self-defense in the face of grave danger, their response must include a reasonable amount of force under the circumstances. Ersland was probably within his rights until he converted his defense into an excessively aggressive action against a person already disarmed and disabled by the initial response. Due to his excessive use of force, Ersland was found guilty of first degree murder and is currently serving that sentence. Even in situations where pharmacists use deadly force reasonably as allowed by law, they may face employment penalties for using such force in self-defense.

In 2011, a Walgreens pharmacist was being robbed at gunpoint when the attacker, as shown by video, clearly tried to shoot the pharmacist at point-blank range. The assailant’s gun, however, malfunctioned and no bullets ever emanated from the weapon. The pharmacist drew his own legally carried and concealed handgun in response and fired back. The perpetrator and his colleague, who was holding up the store manager, fled the scene without any injuries occurring. Although it was decided that the pharmacist acted legally under the circumstances, Walgreens terminated him for responding with a weapon that violated the company code of conduct simply by being on the premises and for allegedly “escalating” the situation. Walgreens requires an evasive, as opposed to confrontational, response to active shooter situations. Hence, pharmacists may still experience significant penalties outside of the law even when acting within their legal rights in a hostile situation.

III. CIVIL LIABILITY

Pharmacists most often encounter civil liability under the tort of negligence. Negligence may be found where the pharmacist owes a duty to
the plaintiff, this duty is breached, the pharmacist is the actual and proximate cause of said breach, and damage to the plaintiff results. Duty is often generically referred to as acting like a reasonable pharmacist under same or similar circumstances. Naturally, this definition is subject to fluctuation over time and jurisdiction. No different than other professionals, when pharmacists fail to meet their duty it is often called malpractice.

A. Traditionally

While there have been many good papers and cases dealing with common acts of negligence\(^\text{15,16,17,18,19}\), our focus will be on the evolution to less apparent suits. A good starting point would be the case of Jones v. Walgreens in 1932.\(^\text{20}\) Here, a pharmacist was presented with an unclear prescription for strontium salicylate. Strontium salicylate was used as a salicylate salt to treat inflammation, pain, and fever at therapeutic doses. An overdose, however, could cause gastrointestinal distress and internal bleeding, among other injuries. Instead of calling the prescriber for clarification, the pharmacist selected the most similar available product and dispensed it. The patient received a product ten to twelve times more potent than the one intended for her and she suffered harm as a result. Importantly, as used by Walgreens’ defense, it was common at that time for a pharmacist’s responsibility to the patient not to exceed accurately dispensing what was written on the prescription. Hence, no professional judgment was required to be exercised on the part of the pharmacist, and any errors on the prescription that led to patient harm were the fault of the prescriber. Pharmacists were essentially viewed as professional vending machines. The court in Jones, however, held that a pharmacist might know when a prescription had been written in error and understand that filling an erroneous prescription could result in harm. The court was partially swayed by the plaintiff’s expert, who testified that “when a doctor has prescribed an overdose it is the duty of the pharmacist to refuse to fill the prescription.”\(^\text{21}\) Other courts have also held that a pharmacist owes a duty of care to recognize an inappropriate prescription and obtain clarification prior to dispensing it or simply refuse to fill it.\(^\text{22}\) Although these types of

\(^{15}\) James O'Donnell, Pharmacist Practice and Liability. 10 J. NURS. L. 201, 201 (2005).
\(^{19}\) Nesci v. Angelo, 249 Mass. 508 (Mass. 1924).
\(^{21}\) Id.
cases started a trend of recognizing the professional responsibility and role of a pharmacist long ago, the legal evolution that parallels that trend continues today.

B. Modern Trends

The role of a pharmacist is developing as fast, if not faster, than any other discipline. What used to be, and is sometimes still thought of as filling prescriptions accurately has evolved to prescription consultation, medication therapy management, immunization administration, blood pressure screening, cholesterol checks, drug compounding, drug interaction safeguarding, and anticoagulation therapy oversight, among others. Pharmacists currently practice all of these roles and often do so even in your local retail location, unbeknownst to the unaware patient. The expansion of their scope of practice, however, inevitably exposes them to previously unseen liability. Failure to meet the standard of care in any of the aforementioned roles may result in a negligence claim for actions not performed by pharmacists thirty years ago. Many of these recent roles are also performed by other health care professionals, including nurses, physicians, physician assistants, nurse practitioners, and naturopaths. One result is that pharmacists may be held to at least the capabilities and/or competence of any of the other noted professionals when performing new practices within their expanded scope. And yet, in the midst of growth and change, some courts have refused to recognize pharmacists as the experts in drug knowledge, despite the fact that they have more medication-related schooling than any other professional. A Doctor of Pharmacy degree carries 130 pharmacy, and thus drug-related, professional credits alone, in addition to two years of required pre-professional schooling.

As recently as 2008, the Alabama Supreme Court held that the pharmacist was a “learned intermediary” who was not adjunct to a physician in terms of drug dosing. The learned-intermediary doctrine, when and where applicable, bars that there is any duty of care owed by said intermediary to a patient. The doctrine seems to defy current allied health team approaches to patient care, and supports the decades-passed practice of placing sole responsibility and liability on the physicians in care.

23 Milenkovich N. Patient Harm and Pharmacist Liability, 155 Drug Topics 60, 60 (2011).
27 Professional Program Curriculum, University of Montana Skaggs School of Pharmacy, http://www.health.umontana.edu/schools/pharmacy/professionalprogram.htm#curriculum.
Ironically, and more in tune with current practice, it was the physician in the \textit{Larrimore} case who solicited the pharmacist for advice on colchicine dosing. Even though it was the pharmacist alone who supplied the wrong total daily dose information, no malpractice on the part of the pharmacist was found. Hence, even though the natural response of the pharmacy profession may be to contest the learned-intermediary label, they may want to allow it begrudgingly for liability reasons. A fortiori, it could be argued that other courts have long recognized pharmacists as owing more than what is expected of a learned-intermediary.

Indeed, in a series of cases focusing on a pharmacist’s duty to warn, pharmacists have been held to a duty of counseling patients on the interactions and addiction potential of controlled substances and found liable for continuing to fill such substances on a regular basis without a counseling intervention of some form.\textsuperscript{29} Pharmacists have also been found to owe a duty not to fill a prescription that is contraindicated by the patient’s allergies,\textsuperscript{30} and have been deemed negligent when continuing to dispense legitimately prescribed opiates to a known alcoholic due to known increased liver damage.\textsuperscript{31} Similarly, malpractice exists when a pharmacist undertakes a duty to warn of side effects and fails to counsel on an important, though rare, side effect,\textsuperscript{32} and negligence is found where pharmacists undertake counseling a patient on drug allergies and fail to give correct information.\textsuperscript{33} In such cases, pharmacists undertaking a duty to counsel, warn, or provide information on a topic may create a duty of accuracy in performing that action. Consequently, pharmacists who practice in mandatory counseling states (states which legally require a pharmacist to counsel on some, usually new, prescriptions) may encounter more liability than those practicing in a non-mandatory counseling state due to the increased obligation to provide warnings and information. It is also important to note that pharmacists, like other professionals, may incur detrimental action outside the realms of traditional law in addition to any civil and criminal penalties they may incur.

\textbf{IV. PROFESSIONAL DISCIPLINE}

Pharmacists must accumulate certain qualifications (i.e. college degrees, licensing exams, legal exams, etc.) and present them to the State Board in the jurisdiction they wish to practice in for the granting of a

\begin{itemize}
\item \textsuperscript{30} Happel v. Wal-Mart, 766 N.E.2d 1118, 199 Ill.2d 179 (Ill. Sup. Ct. 2002).
\item \textsuperscript{31} Hand v. Krakowski, 89 A.D.2d 650 (N.Y. App. Ct. 1982).
\item \textsuperscript{32} Cottam v. CVS, 436 Mass. 316 (Mass. Sup. Ct. 2002).
\item \textsuperscript{33} Ferguson v. Williams, 101 N.C. App. 265 (N.C. App. 1991).
\end{itemize}
license. The Board of Pharmacy endorses the professional as fit for practice, while holding them accountable for practicing their profession. Accordingly, the failure to practice competently, ethically, or legally may result in professional discipline from that State Board that has licensed the pharmacist. Penalties commonly include fines, probation, suspension, assignment of continuing education, and possibly being barred from future practice. It is common for a State Board of Pharmacy to monitor pharmacists practicing in multiple jurisdictions and require self-reporting of any penalties received in other states. Thus, pharmacists prosecuted with any of the criminal or civil actions noted supra are also simultaneously disciplined by the State Board of Pharmacy in that jurisdiction and possibly any other that they are licensed in.

State Boards of Pharmacy are generally charged with regulating the practice of pharmacy in order to protect the people within their jurisdiction. Some State Boards of Pharmacy have been aggressive in upholding their oath by preventing employers from overloading pharmacists in the face of obvious indicators, such as an aging “baby boomers” population, retail chain pharmacy growth, and increased prescribing.34 North Carolina’s Board of Pharmacy, for example, requires that employers cannot make pharmacists work more than 12 continuous hours per day. In addition, a 30-minute meal break and an additional 15-minute break must be offered to pharmacists during shifts of eight hours or more. North Carolina pharmacists are also capped at dispensing 150 prescriptions per pharmacist per day.35 Employers who violate these mandates are subject to penalties including fines and suspension of license to operate a pharmacy. These actions are not soft suggestions to employers, but rather firm requirements that seek to uphold the Board’s duty. The majority of pharmacists agree that employers will not voluntarily enact such limitations and that state or federal laws will have to intervene for relief to be granted.36 This is a profession that carries a very narrow margin for mistakes. Even the most rarely occurring oversight can produce dire consequences. If we can agree that employing simple steps similar to those noted would rest intensely focused minds, allow time for stress decompression, and result in error reduction, what could a State Board gain by not requiring such basic rights when employers are reluctant to?

It is a fact that pharmacist workload is increasing while business incentives are simultaneously decreasing budgets and subsequent

34 Gianutsos, supra note 17.
pharmacist help in an age of “do more with less.” In the year 2000 alone, retail pharmacies filled 2.9 billion prescriptions in the U.S.\(^{37}\) This reflects an increase of 62% from the previous ten year period. Many pharmacists feel that increased obligations have detrimentally impacted their error rate.\(^{38}\) While entire papers and studies have addressed the issue of what errors occur and how often\(^{39}\), it is a logical conclusion within any field that errors will increase as workload does. This is not a novel discovery. Other fields that produce fatal outcomes when reasonable work limits are exceeded have required federal and state regulation before safety standards became reality. The Department of Transportation, for example, limits the amount of time truck drivers are able to work and imposes mandatory rest breaks in recognition of the dangers that result when drivers become fatigued.\(^{40}\) Likewise, the Federal Aviation Administration restricts the overworking of pilots to prevent obvious fatalities that occur when the person in charge of an aircraft is not fully alert.\(^{41}\) Yet, pharmacists have a higher error rate than either of the two aforementioned occupations and death has often been the result of pharmacist mistakes. Why, then, are similar regulatory mandates not imposed upon the practice of pharmacy?

In addition to increasing demands, pharmacists are often not given relief of any kind during their shift. While other healthcare professionals are granted multiple breaks, a lunch, and the ability to sit down for at least a portion of their shift, no such gratuities are mandated for pharmacists in almost any state. Although other states have found the courage to challenge employers in some of these regards, none has put forth the combination of patient protection safety regulations that North Carolina’s Board has. It is a logical conclusion that until more State Boards of Pharmacy codify rules mandating breaks, workload caps, and/or mandatory assistance (i.e. minimum technicians per pharmacist), error percentages, total errors, and preventable patient deaths may not decrease in the foreseeable future.

V. CONCLUSION

Modern pharmacists find themselves employed during a time of unprecedented evolution within their field. This metamorphosis carries


\(^{38}\) Growing Prescription Workload is Worrying Pharmacists, Pharmacy Times, May 1, 2006.

\(^{39}\) Gianutsos, supra note 34.


fresh legal consequences within the realms of civil liability, criminal law, and professional discipline. The expansion in scope of practice may parallel an increase in claims for negligence, sometimes egregious enough to qualify for manslaughter. Regardless of the categorical semantics, any legal action brought against a pharmacist may result in professional consequences via the respective State Board of Pharmacy.

An escalating workload filled with new responsibilities will likely multiply errors and subsequent detriments unless regulatory action is taken.
ALTERNATIVE FUTURE FOR TRADE-ORIENTED COUNTRIES: LESSONS FROM THE KOREA-U.S. FTA

KIE YOON KIM**

On October 2011, The U.S. Congress finally passed the long-hauled implementing bill of Korea-U.S. FTA. This trade accord was the second largest trade deal in the U.S. since NAFTA. In Korea, it was a leading case of opening domestic market to major trade partner. Indeed, the U.S. is the second largest importing and the third largest exporting partner in Korea.

During five years of negotiations from 2006 to 2011, both countries went through three phases of negotiations. The U.S. Congress urged another negotiation raising automobile and beef import issues representing the automobile and the farming industry.

In contrast, Korea’s few key executives controlled the whole negotiation process without a framework concerning who can check trade power of the president representing the public. Thus, people were not given an opportunity to discuss pros and cons of the deal, and to make strategy for the trade-damaged group, and to incorporate their voices to negotiation process.

As a result, as an argument of “Occupy Wall Street” protesters, Koreans were not able to find a legitimate entity representing their interests. They had no choice but to occupy the street.

The fundamental fear behind Korea-U.S. FTA is bipolarization and foreseeable trade damage. With the large scale of Korea-U.S. FTA, this tension and anxiety has become aggravated. To make matters worse, Korea has high trade-GDP ratio so that the impact of a trade policy is even stronger.

By analyzing this negotiation process and its consequence, this paper argues trade-oriented countries need more procedural democracy rather than efficiency in trade policy. A legal framework should include the way to promote public understanding and reflect stakeholders’ interest. In detail, the executive should notice the legislature in a timely manner when it enters negotiation. There should be a liaison group to communicate between the negotiators and the legislature. Meaningful consultation must be conducted in the committees having jurisdiction on trade issue. The executive must conduct an objective research for the effect of future trade deals. The government should provide a strategy for trade-damaged group. One time aid or compensation for damaged group is not ultimate solution. Rather, the strategy should focus on the structural reform. Facing foreign competition, trade-damaged sector should switch the direction towards more profitable industry. The government should support this process by providing benefits, such as tax benefit or deregulation when they attempt to explore new markets. Most importantly, the direct participation of citizens will contribute to the democracy in the trade policy.

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I. Introduction

On the first of July 2011, the Korea-EU free trade pact (Free Trade Agreement between the Republic of Korea and the European Union and Its Member States) became effective with the condition that domestic laws be adjusted for the FTA.1 Three months following this free trade establishment, the U.S. Congress finally ended a 5-year standoff on a trade deal with Korea, and within a few days, President Obama signed the implementing bill of the Korea-U.S. FTA (Free Trade Agreement between the Republic of Korea and the United States of America)2. In 2012, the Korean government announced its plan to launch a series of trade pacts with China, Mexico, and Colombia.3

Clearly, this shows that the Korean government has begun to employ bilateral trade deals with its major trade partners. Indeed, a trade policy based on bilateral trade deals was a radical change for Korea that began with the Korea-U.S. FTA, while the U.S. has a long history of a bilateral approach. Yet, Korea’s current trade policy had not been executed as smoothly as planned. Of all the trade accords, the Korea-U.S. FTA was by far the most controversial in Korea.

For the U.S., the Korea-U.S. FTA was the second largest trade deal since NAFTA (North American Free Trade Agreement). Accordingly, the U.S. government went through a systematic examination and oversight. On the contrary, even though this trade deal was a turning point in Korea’s trade policy, Korea neglected procedural democracy due to a lack of governing law on this matter. In addition, from 2007 to 2009, Korea’s

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1 Korea MOFAT, http://www.mofat.go.kr/eng/policy/fta/status/overview/index.jsp?menu=m_20_80_10
2 Id.
3 Id.
trade-to-GDP ratio amounted to 98.7%\(^4\), while that of the U.S. was only 27.6%\(^5\). In light of its impact, a trade policy needs to be crafted more delicately in trade-oriented Korea. Thus, the negotiation process revealed problems.

This paper looks through the Korea-U.S. FTA’s development process, pointing out the consequences that each action brought upon both participating countries. By analyzing the controversy around the Korea-U.S. FTA and evaluating the Korean and U.S. strategies, this paper suggests a new trade policy model designed for trade-oriented countries.

II. THE BOOM OF FTAS

A. U.S. Initiative of FTAs from the 1980s

Today, bilateral and regional free trade deals are accepted worldwide. The main reason for this phenomenon is general frustration towards the WTO (World Trade Organization) system due to its nature of multilateralism. For instance, the GATT (General Agreement Tariffs and Trade) ministerial meeting of November 1982 led the U.S. to pursue bilateral options with Israel, and, in 1987, with Canada.\(^6\) Again, after the GATT ministerial in Brussels failed to conclude the Uruguay Round in December 1990, the NAFTA negotiations started in 1991.\(^7\) Due to difficulty in reaching agreements at the WTO, the George W. Bush Administration affirmed the strategy of pursuing U.S. trade goals through a multilateral trade system but gave strong emphasis on bilateral and regional trade pacts through FTAs.\(^8\) The Obama administration followed through, pursuing FTAs with Korea, Colombia, and Panama. So far, the U.S. has concluded FTAs with those three countries just listed and: Australia, Bahrain, Canada, Chile, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Mexico, Jordan, Morocco, Nicaragua, Oman, Singapore, and Peru.\(^9\)

The U.S. has gained enormous advantage from its trade policy. The total benefit of FTAs to the U.S. economy is estimated to be approximately


\(^5\) Id.


\(^7\) Id.

\(^8\) WILLIAM H. COOPER, FREE TRADE AGREEMENTS: IMPACT ON U.S TRADE AND IMPLICATIONS FOR U.S TRADE POLICY, CRS No. RL31356, at 8 (2007).

1 trillion dollars, representing around 10% of GDP per year.\textsuperscript{10}

\textbf{B. The Political and Economic Debate on FTAs}

Today’s proliferation of FTAs is unprecedented in the U.S., let alone the rest of the world.\textsuperscript{11} This rapid increase has led to a debate on whether or not FTAs genuinely promote global welfare and economic growth at large.\textsuperscript{12} One group of scholars claimed that FTAs are inherently preferential to its members and discriminatory towards others. For example, trade barriers are lowered for members of FTAs, while trade barriers are raised relatively higher for non-members.\textsuperscript{13} Therefore, the import of inputs is diverted from efficient producers outside FTAs to less efficient producers inside the FTAs. Such imbalance imposes the risk of a trade diversion.

Another group of scholars argues that, while it may be preferable to liberalize trade multilaterally, countries should take any available tool, including bilateral or regional FTAs, even if they lead to trade diversion.\textsuperscript{14} These scholars assert that FTAs could be more efficient vehicles for addressing difficult trade barriers than is the WTO, since it is often viewed that some negotiators stall the progress at the WTO. Currently, the U.S. pursues a bilateral and multilateral approach, arguing that trade liberalization via FTAs and the WTO are compatible. In this regard, the U.S. must pursue FTAs aggressively, because its firms might face discrimination in foreign markets where the U.S. is not a participant of FTAs.\textsuperscript{15}

On the other hand, some scholars criticized trade liberalization – or rather, globalization in general. They asserted that trade liberalization unfairly reduces the opportunities for developing or underdeveloped countries to become mature enough to cope with industrialization.\textsuperscript{16}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{11} The WTO has reported that more than 500 notifications of regional trade agreements as of 15 January 2012. WTO, \url{http://www.wto.org/english/tratop_e/region_e/region_e.htm}.
\item\textsuperscript{12} WILLIAM H. COOPER, \textit{supra} note 8 at 12
\item\textsuperscript{13} JAGdish BHAGWATI, \textit{The Wind of the Hundred Days: How Washington Mismanaged Globalization} at 240-245 (The MIT Press 2000).
\item\textsuperscript{14} Free Trade Agreements: \textit{The Cost of U.S. Nonparticipation: Testimony before the Subcommittee on Trade House Committee on Ways and Means, }co11m., 107\textsuperscript{th} Cong. (2001) (statement of Jeffrey J. Schott, Peterson Institute for International Economics), available at \url{http://www.iie.com/publications/testimony/testimony.cfm?ResearchID=405}.
\item\textsuperscript{15} WILLIAM H. COOPER, \textit{supra} note 8 at 7 (2011).
\item\textsuperscript{16} HA-JOON CHANG, \textit{The Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism}, Chapter at 137-159 (Bloomsbury Press, 2007).
\end{itemize}
\end{footnotesize}
used to employ protectionism in order to guard their nascent domestic industry in their initial development stage.17

C. U.S. Strategy of Trade Policy and Korea-U.S. FTA

The U.S. has demonstrated two major strategies towards globalization. First, it tried to raise worldwide liberalization of barriers to the industries where the U.S. has a comparative advantage. Liberalization in those industries such as finance service sector is expected to create domestic jobs. As the importance of exports increased in the U.S. economy, liberalization through bilateralism, which is easier and speedier than through multilateralism, gained more support.18

Second, the U.S. has employed a “competitive liberalization strategy,”19 meaning that trade benefits from the original FTAs would be diminished by a subsequent one. Since FTAs necessarily discriminate against non-members, negotiating a trade pact creates new incentives and pressure for non-participating countries to join the pact or develop another pact.20 The U.S. has utilized this strategy when choosing trade partners. For example, the U.S. FTA with Central American and the Andean countries places South American countries at a disadvantage, which eventually led them to agree to the FTAA (Free Trade Area of the Americas).21 Similarly, when the U.S. learned of the EU’s free trade accord with Korea in April 2010, it began to vigorously pursue the FTA. President Obama urged Congress to ratify this long-stalled deal with Korea in order to avoid losing trade benefits.22

To advance this competitive liberation strategy, the U.S. decided to enter into negotiations with Korea to secure economic gains in comparatively advantageous industries. In 2001, the U.S. ITC (International Trade Commission), at the request of the U.S. Senate, estimated the economic impact of a Korea-U.S. FTA would increase U.S. exports to Korea by 54 percent, while U.S. imports from Korea would increase only by 21 percent.23 The U.S. ITC reported that the largest gain

17 Id.
19 Id. at 362. (Stating that Bergsten developed the concept of competitive liberalization, and USTR Robert Zoellick adopted it as the core strategy in US trade policy.)
20 Id. at 362.
21 Id. at 372.
for the U.S. would be in the agricultural sector, in which the U.S. has comparative advantage. According to the study, after four years of implementation, total U.S. exports would be 0.8 percent ($7 billion) higher than if the Korea-U.S. FTA had not been implemented. Accordingly, the U.S. did not move towards negotiating a FTA until the Korean government unexpectedly agreed to open its agricultural sector in 2005.

III. KOREA’S RADICAL SHIFT TO FTAS

A. Trade Policy Prior to The Korea-U.S. FTA

As outlined above, American trade policy has been remained relatively consistent over time. Korea, however, switched its trade policy from a multilateral to a bilateral method in the 2000s. Until the it began negotiations with Chile in February 2002, the Korea government, reluctant to risk sensitive industries, had not pursued any bilateral trade negotiations. In a multilateral process, market liberalization in sensitive sectors such as agriculture may be less radical, while in a bilateral setting, it is much more difficult to resist pressure to liberalize sensitive industries.

A number of factors contributed to Korea’s shift in trade policy. In the late 1990s, Korea began to face more competition in exporting markets due to cheap products from China. In addition, Korea also needed to cope with the universal proliferation of FTAs. As a result, Korea decided to secure its own trade deals. The Korean government started a preliminary study with Chile on the possibility of establishing a FTA in 1999. Chile was an ideal trade partner because of its relatively small-scale economy and stable growth rate. More importantly, Chile had the comparative advantage in different sectors from Korea, significantly reducing potential trade damages to Korea’s domestic industries. The Korea-Chile FTA came into force in 2004 and was successful because it did not adversely affect sensitive industries. Correspondingly, the Korea-U.S. FTA has been

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24 Id. at 10.
25 Id. at 10.
26 Jeffrey J. Schott, supra note 18, at 378.
29 Chan Jin Kim, Economic Development and Law in Korea, at 200 (Catholic University of Korea Press 2009)
controversial because it could potentially harm these sensitive industries.\textsuperscript{30}

A Korea-U.S. FTA was unanticipated until President Roh declared his intention to enter the negotiation. The farming industry, which was a major American interest, used to be the most fundamental element of the Korean economy and still carries emotional and cultural significance. As a result, FTA-induced reforms impacting agriculture could provoke opposition. Even President Roh, who later agreed to include agricultural industry in the Korea-U.S. FTA, once declared in May 2003 that he would not pursue FTAs if potential trade partners would require a reform of agricultural industry.

There was, however, a sudden change in February 2005, as President Roh appointed Hyun Chong, Kim for the new Trade Minister in MOFAT (Ministry of Foreign Affairs and Trade).\textsuperscript{31} Since then, Korean government has secured the possibility of a FTA with the U.S. Competition from Japan’s high technology and China’s low-cost export may have led the Korea government to move toward a FTA with the U.S. as a way to cope with this pressure from neighboring countries.\textsuperscript{32} Additionally, the Korean government expected this FTA would promote the competitiveness of Korean economy, particularly that FTA disciplines would result in more transparent corporate governance and encourage foreign direct investment.\textsuperscript{33}

The FTA with the U.S. is the first deal with a major trade partner in Korean history. This deal was a turning point, after which Korea entered the new time phrase of FTAs. Since the agreement with the U.S., Korea has begun FTA negotiations with EU, Mexico, China, and Japan.\textsuperscript{34} This decision to start negotiations for a Korea-U.S. FTA was thus highly influential, but was made by President Roh and key personnel in the MOFAT in a short period time.\textsuperscript{35}

\textbf{B. Korea-U.S. FTA}

\begin{itemize}
\item \textsuperscript{30} Id., at 201
\item \textsuperscript{32} Kim Chan Jin, supra note 28, at 200, (stating that Korea’s market share in the US had fallen from 3.3% of total US imports in 2000, to 2.8% in 2009)
\item \textsuperscript{33} Korea MOFAT, http://www.fta.go.kr/korus/main/index.asp
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id.
\item \textsuperscript{33} Hyun Chong Kim, HAN MIFTA RUL. MAL HADA, at 89 (2010) (stating that “I believed the negotiation should start at least before early 2006 considering the expiration date of TPA. I suggested a FTA with U.S to the President Roh in September 2005, and he approved it right away and submitted this policy to the “Foreign Trade and Economic Ministers’ Meeting” according to the law”).
\end{itemize}
Originally, the plan of both countries was to finish the negotiations before the TPA (Trade Promotion Authority) of the U.S. President expired in June 2007. As initially planned, the negotiation concluded in April 2007. However, the process became stalled following objection from the U.S. Congress. Ultimately, the FTA talks continued through 2011. Between 2006 and 2011, there were three rounds of negotiations. After the first round of settlements, both countries engaged in two additional rounds of negotiation at the request of the U.S. Congress. The proceeding part of this paper separates each round of negotiation and examines the facts by analyzing the causes and effects.

1. The First Round of Negotiations

Even though the Korea-U.S. FTA was the first major bilateral deal between the two countries, the negotiation process was hastened. Negotiations began in January 2006 when the planning of a Korea-U.S. FTA was formally announced, during the fourth year of President Roh’s six year term, while, in the U.S., the TPA of President George W. Bush would expire on June 30th, 2007. The Democrat-controlled U.S. Congress was hesitant to renew the President’s authority under the 2002 Trade Act due to concerns regarding displaced American workers and other domestic issues. Fearing the loss of this limited window of opportunity, Korea expedited negotiations.

First, in order to initiate negotiations, the Korean government had to outline certain issues the U.S. Trade Representative (USTR) requested clarification on concerning the reduction of screen quota, beef imports, the automobile tax rates, and the regulated price of medicines under Korea’s medical insurance system. The Korean government’s opinions on these issues were delivered to the USTR in early 2006. Receiving a positive response from U.S., the Korean government started domestic procedure. While the U.S. even delved into secondary issues such as child labor rights and environmental review, Korea held just one meeting and a single hearing (see Table 1) due to a law stipulating only two requirements for enactment of the trade policy: 1) the resolution of the Trade and Economy Ministers’ meeting; and 2) an administrative hearing with 14 days notice. On February 2nd 2006, opponents of a Korea-U.S. FTA blocked the hearing from approving the Korean government’s plan.

36 See, Id. at the chapter IV-C-1.
38 Hyun Chong Kim, supra note 35, at 248-272.
39 Id. at 248-272.
The Korean National Assembly did not initiate any development process until shortly before the third FTA talk was to occur. On June 30th 2006, the Korean National Assembly set up a temporary “Special Committee” that was scheduled to expire simultaneously with the U.S. TPA. However, the committee was formed too late for any meaningful involvement, especially considering that the U.S. Congress intervened in the trade deal even before the negotiations started. Although some reports were produced, this committee, lacking expertise and information concerning the FTA deal, did not conduct a substantial review. When this deal was finalized on April 2nd 2007, the signed draft of the FTA was open to the Special Committee and the “Foreign Affairs, Trade, and Unification Committee,” a subcommittee having jurisdiction over trade deals. However, it was open only with the condition that members were not allowed to keep any record. As a result, meaningful discussion never occurred on the floor.

<table>
<thead>
<tr>
<th>Korea</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan. 2006</td>
<td>Korea agreed to include agriculture in trade. Korea took steps for importing U.S. beef and for mitigating screen quotas.</td>
</tr>
<tr>
<td>Jan. 2006</td>
<td>President Roh announced that Korea would enter into negotiations for a FTA with the U.S.</td>
</tr>
<tr>
<td>Feb. 2006</td>
<td>An administrative hearing was convened.</td>
</tr>
<tr>
<td>Feb. 2006</td>
<td>The Foreign Trade and Economic Ministers Meeting made a resolution of the Korea-U.S FTA.</td>
</tr>
<tr>
<td>Feb. 2006</td>
<td>MOFAT announced the intention to negotiate the Korea-U.S. FTA.</td>
</tr>
<tr>
<td>Feb. 2006</td>
<td>The USTR formally notified Congress of the administration’s intent to initiate negotiations.</td>
</tr>
<tr>
<td>Feb. 2006</td>
<td>The Trade Policy Staff Committee announced that it would convene a public hearing and</td>
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<tr>
<td>Korea</td>
<td>United States</td>
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<tr>
<td></td>
<td>seek public comments under the Trade Act.</td>
</tr>
<tr>
<td>Feb. 2006</td>
<td>The ITC announced that it would institute an investigation of the probable economic effect and would conduct a hearing under the Trade Act.</td>
</tr>
<tr>
<td>Mar. 2006</td>
<td>The Secretary of Labor, the USTR and the Secretary of State announced that the President had assigned the function of preparing reports regarding labor rights and child labor. Secretary of Labor would request comments from the public under the Trade Act.</td>
</tr>
<tr>
<td>Mar. 2006</td>
<td>Pursuant to the Trade Act, the USTR initiated an environmental review of the Korea-U.S. FTA.</td>
</tr>
<tr>
<td>Jun. 2006</td>
<td>FTA talks took place between USTR and MOFAT.</td>
</tr>
<tr>
<td>Jun 2006</td>
<td>Korean National Assembly launched a temporary committee.</td>
</tr>
<tr>
<td>Jun 2006- Mar. 2007</td>
<td>FTA talks took place between USTR and MOFAT.</td>
</tr>
<tr>
<td>Mar. 2007</td>
<td>The Trade Subcommittee, Committee on Ways and Means of the House of Representatives held a hearing on the major outstanding issues - Korea's automotive market &amp; agricultural market</td>
</tr>
<tr>
<td>Apr. 2007</td>
<td>The U.S. and Korea concluded the negotiations. MOFAT provided the draft to the Special Committee and the &quot;Foreign Affairs, Trade, and Unification Committee&quot; under the condition of nondisclosure.</td>
</tr>
<tr>
<td>Apr. 2007</td>
<td>The President notified the Congress of his intention to enter into a FTA with Korea under the Trade Act.</td>
</tr>
<tr>
<td>Apr. 2007</td>
<td>The implementing bill was transmitted to Congress for consideration.</td>
</tr>
</tbody>
</table>
The draft was finally opened to the Korean public on May 15th 2007, and immediately followed by backlash larger than expected. The strongest reaction naturally came from the industry that faced the greatest threat – agriculture. Despite the fact that rice, the most sensitive item in Korea, was opted out of the agreement, demonstrators filled central Seoul to protest because they were not given a chance to express their thoughts. In response, the Korean government promised to aid farms, fisheries and other industries that could potentially be harmed by American imports.\textsuperscript{41} As Table 1 shows, the U.S. thoroughly proceeded through the Trade Act of 2002, which included legislative involvements and administrative reviews, whereas the Korean government only went through an administrative resolution followed by a single hearing.

2. The Second Round of Negotiation

The second round of negotiation was ignited by the Democrat-controlled Congress in response to the opposing voices of American farmers and unions, which expressed objections to the Korea-U.S. FTA concerning automobiles and beef exports. In 2007, when the first round was closed and was waiting for the legislative approval, a financial crisis swept over the U.S. economy, triggering the U.S. to request a renegotiation. Table 2 narrates the chain of events that led to the second round of improve negotiation.

<table>
<thead>
<tr>
<th>Korea</th>
<th>United States</th>
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<tbody>
<tr>
<td>May 2007</td>
<td>The ITC instituted an investigation, the “U.S Free Trade Agreement: Potential Economy-wide and Selected Sectoral effects” under the Trade Act.</td>
</tr>
<tr>
<td>Jun. 2007</td>
<td>Congress expressed objections to the FTA concerning automobiles and beef exports.</td>
</tr>
<tr>
<td>Jun. 2007</td>
<td>The FTA was signed.</td>
</tr>
<tr>
<td>Jul. 2007</td>
<td>The Korea-U.S. FTA was signed.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Korea</th>
<th>United States</th>
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</thead>
<tbody>
<tr>
<td>2007</td>
<td>submitted to the Korean National Assembly for the consent to ratification.</td>
</tr>
<tr>
<td>Feb. 2008</td>
<td>Myung-Bak Lee was elected as President.</td>
</tr>
<tr>
<td>Apr. 2008</td>
<td>Korea agreed to phase out the prohibition of beef imports.</td>
</tr>
<tr>
<td>Oct. 2008</td>
<td>Korean government resubmitted the FTA to the National Assembly for consent to ratify.</td>
</tr>
<tr>
<td>Sep. 2008</td>
<td>The FTA was passed by the subcommittee in National Assembly.</td>
</tr>
</tbody>
</table>

Source: Federal Register, Westlaw database LH, UTESTIMONY, CONGTMY, USPOLTRANS

Figure 2: Development of the 2nd Round of Negotiation

Regarding the two biggest objections by the U.S., beef and automobiles, Korea promised to set up two stages to transition towards U.S. beef imports, which had been completely banned since 2003 because of reported Bovine Spongiform Encephalopathy (BSE, a.k.a. mad cow disease). Although this agreement of beef imports was a separate and independent executive agreement from the Korea-U.S. FTA, the beef issue had been correlated with the FTA from the beginning of negotiations. Korea agreed to resume beef imports in 2006 deal (The first round of negotiation). However, the 2008 deal was more generous towards the U.S. than the 2006 deal, eliminating the limitations of “less than thirty-month-old cow[s],” “without bones” and “without [specified risky material].”

Again, the Korean public was left in the dark until this agreement was signed and formally announced. Another public uproar took place, and this time, protesters encompassed a broad spectrum of society, including students, union members and office workers. The police estimated the

42 Sang-Hyun Choe, Huge Protest In Seoul Threatens To Topple Government, N. Y. TIMES (June

43  

44
crowd to be 100,000, while the protest organizers claimed it to be 700,000.\textsuperscript{44}

This demonstration reflects two interesting points. While the U.S. Congress urged renegotiation to reflect demands of its farming and automobile industry, the Korean National Assembly apparently failed to acknowledge the various views. With no institution to represent their opinions, the desperate Korean people took to the streets and called for a more procedural and participatory democracy.

Second, this protest showed the importance of timely notification to the public or the legislature as an institution representing the public. The 2006 deal did not become open to Korean public until U.S. Congressional Research Service reported it. Some opponents called this deal “four pre-conditions of negotiations” and accused the Korean government of capitulating to US demands in order to rush into negotiations.\textsuperscript{45} The Korean government denied this accusation, claiming that Korea did not accept U.S. pre-conditions and both countries did not explicitly use the phrase, ‘four pre-conditions.’\textsuperscript{46} Afterwards, President Roh admitted that those four pre-conditions were officially discussed in the government, bringing unnecessary attacks and losing credibility. When the 2008 deal was made, the same problem was revealed; the Korean government neglected informing and persuading the Korean public in a timely manner, although this deal was believed to be a health issue.

In the legislature, the FTA was submitted and placed on the “Foreign Affairs, Trade, and Unification Committee” for deliberation.\textsuperscript{47} However, the legislature did not provide the platform where proponents and opponents can discuss this matter and reach a mutual agreement. For example, in the plenary session of the Foreign, Trade, and Unification Committee, assemblymen of the ruling Grand National Party blocked the conference room against the main opposition, the Democratic Party, in order to obstruct the voting process. Accordingly, a petition was filed to the Constitutional Court of Korea in order to nullify this voting process.\textsuperscript{48} To
cope with problem, the Korean government had to ask the U.S. to retract the 2008 beef deal by making a subsequent agreement with the U.S., surely diminishing Korea’s negotiation power. As a result, this trouble illuminated the need of a system in order to embrace various interests, compromise, and transparency in trade policy.

3. The Third Round of Negotiation

Due to the objection of the U.S. Congress, the Korea-U.S. FTA had been stalled until President Obama pressured Congress to proceed with its implementation. Following a 3-year dormancy, Obama’s plan to negotiation re-started based upon Congressional judgment that this trade pact would lower the high unemployment rate of around 10 percent. On condition of breaking this dormancy, the U.S. requested that Korea addressed the automobile issue in a supplemental agreement. Instead, Korea extended certain L visas for Korean workers and delay the date to eliminate its tariffs on certain pork products. Table 3 illustrates that process.

<table>
<thead>
<tr>
<th>Korea</th>
<th>United States</th>
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<tbody>
<tr>
<td></td>
<td>Jun. 2010</td>
</tr>
<tr>
<td></td>
<td>President Obama announced his intention to secure a revised agreement on automobiles before his visit to Seoul for the G-20.</td>
</tr>
<tr>
<td>Nov. 2010</td>
<td>The members of the Committee on Ways and Means traveled to Seoul to provide guidance to the USTR on congressional views.</td>
</tr>
</tbody>
</table>

49 Import Health Requirements for U.S. Beef and Beef Products & Agreed Minutes of the Korea-United States Consultation on Beef & Subsequent letters written on 19th of May, and 26th of May 2008.

50 The 2007 agreement would have immediately eliminated U.S. tariffs on Korean passenger cars while the 2010 supplemental agreement keeps the 2.5 percent U.S. tariff in place until the fifth year. The 2007 agreement would have required the U.S. to start reducing its tariff on Korean trucks immediately and phase it out by the agreement’s tenth year. However, the 2010 supplemental agreement allows the U.S. to maintain its 25 percent truck tariff until the eighth year and then phase it out by the tenth year. In addition, the 2010 supplemental agreement allows for 25,000 cars per U.S. automaker almost four times the number allowed in the 2007 agreement to be imported into Korea that meet U.S. federal safety standards but not Korean standards. In the 2007 agreement, general safeguard protections for the U.S. economy against harmful product surges from Korean imports ended in the agreement’s tenth year. Under the 2010 supplemental agreement, a special auto safeguard is available for 10 years beyond the full elimination of tariffs for each Korean auto product. available at http://www.fta.go.kr/korus/main/index.asp
Korea | United States
---|---
Dec. 2010 | The supplementary agreement was concluded.
| Jan. 2011 | The implementing bill was submitted to the Committee on Finance.
| Mar. 2011 | House of Representatives Committee on Ways and Means, Subcommittee on Trade Committee hearing occurred.
| Apr. 2011 | The ITC released its report on its assessment of the likely impact.
| Oct. 2011 | Congress passed the implementing bill and the President signed.
| Nov. 2011 | The National Assembly passed the Korea-U.S. FTA and the President signed.

Source: Federal Register, Westlaw database LH, USTESTIMONY, CONGTMY, USPOLTRANS

*Figure 3: Development of the 3rd Round of Negotiation*

Other issues have emerged on the Korean political scene since the trade pact was signed and went in effect, despite the unexpectedly long negotiations. Some argue that the Korean government should renegotiate the agreement to fix certain clauses, while others claim that Korea must repeal the entire trade deal. The origin of this debate is the lack of procedural democracy at the time of negotiation. While the U.S. guaranteed the procedural democracy employing the Trade Act, Korea did not have a legal framework to embrace the public’s view.

**IV. The Future of the Trade Policy in Trade-Oriented Countries**

**A. The Analysis of Korea’s Trade Policy**


52 The United Progressive Party argued that the Korea-U.S. FTA should be repealed. However, it earned minor approval.
In trade-oriented countries, a trade policy affects the nation’s future rate of economic growth and welfare. Trade policies also inevitably produce winners and losers, because a trade deal will produce trade benefit and trade damage. Thus, it is important for governments to consider not only expertise but also procedural democracy in formulating trade policies. In this vein, Korea’s case offers a significant example of an alternate future in other trade-oriented countries. As depicted above, Korea experienced a chaotic period, and contemplating the lessons from this period, the Korean National Assembly passed the Korea Trade Act in 2011 suggesting that trade policies should be executed under the legislative oversight in trade-oriented countries considering its depth of impact.

B. Why Legislative Power?

Each country has different legal frameworks to structure its trade policy, but despite these differences, a legal framework should allow stakeholders’ interest and public opinion to be incorporated. For instance, the Mexican president received significant criticism after entering into NAFTA with the US, and many believed the government did not thoroughly examine the agreement’s advantages and disadvantages. Furthermore, critics argued that the Mexican government and business interests worked together to pass NAFTA and the Mexican people were excluded from the process.

There are two processes by which a nation’s people can be involved in formulating trade policies and ensure their interests are represented. One is to involve the legislature in developing of the trade policy. The other is direct popular involvement in the process. For instance, Switzerland has a unique treaty-making process in which certain types of treaties must be approved by both the legislature and a referendum before going into effect. The referendum, which originated from Switzerland’s semi-direct democracy, may be the most direct way to reflect citizens. It would be costly, however, to hold a referendum for every treaty a government considers, and referendums may be incompatible in countries without a constitutional tradition of direct democracy. This is my opinion. At the same time, as demonstrated by the Korea-U.S. FTA development process, not every country has a stable and established parliamentary

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55 Id.
democracy, where each party represents supporters without distortion. Furthermore, in modern societies, the internet has enhanced the flow of information, and it is easy for individuals to express their opinions through social media. Accordingly, in nations around the world, people have increasingly demonstrated for increased popular participation in policymaking. People have a new tool – social media- to express a political view and collect power. For example, the “Arab Spring” and “Occupy Wall Street” movements show that direct participation is no longer as ineffective and inefficient as it was previously. As a result, the element of direct democracy can be supplementary in case of malfunction of legislature.

This paper develops a model employing not only legislative participation but also adding a supplementary method for more widespread participation. In the following sections, this paper will review the U.S. trade law that stipulates powerful legislative involvement.

C. U.S. Constitutional Structure on Trade Policy

1. The Trade Act

In the U.S., trade agreements and WTO agreements have been pursued in the form of executive agreements rather than treaties. The distinction between the two is vague, but the major difference is Congressional role. The Constitution divides treaty power between the Senate and the President. Yes, I want to show US trade policy as a good example of strong legislative involvement. The President should make treaties “by and with the advice and consent of the Senate”, and that treaties should receive the support of “two thirds of the Senates present”. However, the process of drafting and negotiating a treaty is regarded as a “president monopoly”.

On the contrary, executive agreements, by definition, do not require any advice and consent of the Senate. However, agreements that impose significant impact may need the legislative advice while they are in the process of negotiation. More importantly, Congress has constitutional power to impose duties and tariffs and to regulate foreign commerce.

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57 U.S. Const. art. II § 2.
58 Louis Fisher, Constitutional Conflicts between Congress and the President 254 (1985). (stating “the Constitution does not divide treaty-making procedure into two distinct stages which means negotiation by the President and approval by the Senate. Looking into the language of the Constitution, two branches are interlinked. In contrast, the Constitution makes it clear that the President has the sole power for the nomination and appointment of the ambassadors. This interpretation is supported by the Philadelphia debates and the precedents established by the Washington administration which emphasized on the oral debates and active role of the Senate”)
59 Id. at 273.
60 U.S. Const. art. I §8 cls. 1, 3.
Thus, the President may not impose, reduce, or affect any other change in existing duty rates through the executive agreement unless the President has been delegated the authority to do so by Congress.61

For those reasons, the Trade Act of 1974 conferred the TPA (Trade Promotion Authority) to the President for a limited period of time. The Trade Act of 1974 was renewed or revised in the Trade Agreement Act of 1979, the Trade and Tariff Act of 1984, the Omnibus Trade and Competitiveness Act of 1988, Uruguay Round of Multilateral Trade Negotiations in 1993, and the Bipartisan Trade Promotion Authority of 2002 (hereinafter, the Trade Act), as the TPA of the President was reauthorized.62 Instead of granting TPA, this law requires implementing legislation for trade agreements, which led to the majority vote in both houses.63

These trade agreements go through more distinguishable processes than do domestic laws. The Trade Act attempted to expedite the implementing process for efficiency through a fast track.64 It allowed up-and-down votes limiting debates on the floor in a timely manner. Another unique feature is the extent of congressional oversight during the negotiations.65

The specific provisions related to this congressional involvement have been selected and analyzed in the following sub-sections. These provisions are divided into three sectors – notice, consultation, and withdrawal to the fast track – to show how congressional power can be involved in the trade negotiation and how significant of a role it plays.

2. Congressional Oversight Provisions

i. Notice

The President must notify the Senate and the House of

63 H.R. 3009 § 2105.
64 In 1967, the Kennedy Round of General Agreement on Tariffs and Trade (GATT) negotiation was executed under the Trade Act of 1962. However, the Kennedy Round went beyond the Tariffs reduction including an anti-dumping clause. The inclusion of the clause sparked the debate over international agreements of non-tariffs and whether the President has overstepped his authority by entering into a non-tariff agreement without specific authorization or approval from Congress. Thus, Congress decided to compromise its power over international agreements by enacting the Trade Act of 1974. It is the first trade act regulating non-tariff agreements. Hal Shapiro &and Lael Brainard, Trade Promotion Authority Formerly Know as Fast Track: Building Common Ground on Trade Demands More Than a Name Change, 35 GEO. WASH. INT’L L. REV. 1, at 4 (2003).
65 Hal S. Shapiro, Fast Track: A Legal, Historical, and Political Analysis, at 19-28 (Transnational Pub. 2006).
Representative of his or her intent to commence negotiation 90 days before initiating negotiations. The President shall set forth the date of initiating such negotiations and the specific U.S. objectives for the negotiations. When the President fails to comply with the notice requirement, the international agreement cannot come into force under the fast track procedure. This notice requirement allows Congress to be informed of the commencement of negotiation, a trade partner, and objectives of a FTA. Thus, Congress can execute the preparation work for the discussion and analysis of the said FTA.

ii. Consultation

Before entering into a FTA, the President shall consult with the House Ways and Means Committee and the Senate Finance Committee, which have jurisdiction over the subject matter of the agreement, and the Congressional Oversight Group. Such consultations must cover the nature of the agreement, how and to what extent the agreement will achieve the applicable purpose, and the implementation of the agreement including general effects on existing laws.

To make the consultation effective, the Trade Act invented the Congressional Oversight Group, which is upgraded from Congressional Advisors in the Trade Act of 1974. The Congressional Oversight Group is comprised of a chairman, ranking member, and 3 additional members of the House Ways and Means Committee and the Senate Finance Committee, as well as other committees that have jurisdiction on the matter. No more than 2 members are to be from the same political party in the group.

The USTR shall develop guidelines and schedule for this group, providing access to information including classified materials, and practical coordination during the negotiations. Further, the group members can request the meeting with the President on trade policy. This consultation provisions guarantee the communication and information, which is a prerequisite to the substantial legislative involvement. Another important point is the limitation of members based upon the parties, which allows the diversity in consultation process.

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66 H.R. 3009 § 2104(a)(1)). Trade Act of 2002, Division B, Bipartisan Trade Promotion Authority
67 Id.
68 Id. § 2105(b)(1).
69 Id. § 2104(d)(1).
70 Id. § 2104(d)(2).
71 Id. § 2107(b)(1), (2).
72 Id. §2107(a)(2), (3).
73 Id. §2107(b)(2)(B)-(C).
74 Id. §2107(c).
iii. Withdrawal of the Fast Track

The Congress permits the TPA for a limited time so that the President ought to secure Congress’ renewal every several years. Thus, the President should cooperate with Congress expecting another renewal. At the same time, if Congress determines that the President or USTR, as his delegate, has not adequately consulted nor notified Congress with respect to a given agreement, it can withdraw the fast track option through “a procedural disapproval resolution” by both houses. Both houses of Congress need to pass such a resolution within 60 days of each other. By doing so, the Congressional oversight provisions become not only practical but also powerful.

D. Efficiency or Democracy?

During the negotiation of the Korea-U.S. FTA, these events of congressional oversight were observable. The Congress had been involved in the trade policy before negotiations even started by addressing specific issues and concerns (See Table 1). Furthermore, the Congress attempted to revise or develop original negotiation after the conclusion of negotiation by pressuring the President to pursue another round of negotiation. Of course, stakeholders such as farming industry, automobile industry, and labor unions prompted this Congressional involvement (See Tables 2 and 3).

Reviewing Korea’s trade authority, the Korean Constitution provides that the power "to conclude and ratify treaties" resides in the President. This article further provides that the President shall "conclude and ratify treaties with the consent of the National Assembly in concluding certain types of treaties, including treaties pertaining to trade and navigation; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.” Additionally, the National Assembly does not have the power to amend the provisions of the treaty that is submitted to it for approval. If the National Assembly gives its approval on the condition that certain provisions are to be amended, such action on the part of the National Assembly is considered,

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75 Id. §2103(a).
76 Id §2105(b)(1)(A).
77 Id. §2105(b)(1)(B).
78 Hal S. Shapiro, supra note 65, at 158, n 85 (stating that “however this power - withdrawal to the fast track treatment - has rarely been used, because before the Congress actually withdraws the fast track treatment, the President made concessions. For example, the Senate Finance Committee threatened to disapprove the negotiation of a U.S-Canada Free Trade Agreement, urging the President to withdraw his request for fast-track treatment of any such agreement under the Trade Act of 1984.)
79 Constitution [HUNBEOB] art. 73 (S. Kor).
in effect, disapproval of the conclusion of the treaty itself.

However, there was no institution under which the government conducts official consultations with the National Assembly, either prior to or during the course of treaty negotiations. Furthermore, there is no established practice of consulting with the public. The Ministry that has domestic jurisdiction over such matters as may be covered by a proposed agreement usually consults with any interested group or groups at an appropriate time, but the holding of a hearing or consultation is left to the discretion of the Ministry in question.\(^{80}\)

To summarize, the Korean Constitution and laws weighed efficiency of the trade policy more than those of the U.S., which focused on procedural democracy. As a result, the Korean government was confronted by enormous social side effects. Such social backlashes are inevitable for trade-oriented countries when they neglect procedural democracy, because trade so heavily influences the economy. To those countries, a procedural democracy is not an option – it is a must.\(^{81}\) They must have procedures that allow the parties involved to compromise and converge on an agreement, allowing for a sustainable trade policy with no costly consequences. For the modern countries with representative democracy, the legislature is the appropriate institution for collecting public opinion and representing diverse voices. The problem remaining is the depth of legislative involvement in a trade policy.

To discuss the depth of such involvement, the nature of trade deals must be considered. First, trade deals need to be expedited in order to keep its trade benefit. Otherwise, this benefit may be swiped out by subsequent trade deals. In addition, foreign governments might be unwilling to invest considerable time and resources in negotiations.\(^{82}\)

Second, trade deals are opened to conclusion. If a party requests certain issues, such as opting out a specific item in the trade deal, the other party would demand other unrelated issues at the cost of accepting those requests. This dynamic process may lead to an unexpected result. In light with the nature, it is impossible for the legislature to address detailed guidelines in pre-negotiation stage. Due to this fluid nature of negotiations, the executive needs broad discretionary power during the negotiations. Further, negotiating parties are required to keep confidential information for strategy. With those reasons, the depth of the legislative involvement should have limits.

\(^{80}\) The Presidential Decree for the Free Trade Agreements [JAYUMUYUKE GWANHAN JULCHA GYUJUNG](In effect on Jun 8, 2004), art. 12. It has amended twice so far.

\(^{81}\) In July 2012, finally the Korean Trade Act was in effect. It provides the civil consultation group, periodic reports to the legislature, and economic evaluation before negotiation, etc.

Meanwhile, a trade deal creates rights and imposes the State or people with important obligations as domestic laws do. For example, Korea-U.S. FTA expended the limits on the governments to regulate or interfere with private profit seeking investment, and it regulates the foreign corporations protection from expropriation, which was broadened from Korea’s previous laws and precedents.83 Furthermore, unlike domestic laws, once a trade negotiation is in effect, it is hard to be amended or repealed because trade deals are interweaved with complicated foreign policies. Considering those aspects, the legislative involvement must be obtained. If a party has a deeper interest about a trade deal, the depth of legislative involvement should increase. If a party has high trade volume with its trade partner, if a trade deal covers sensitive industries, and if a country has a high trade-GDP ratio, this interest will be stronger.

Therefore, we need to find an equilibrium point compromising the legislative involvement and the executive power. Legislative involvement stands for the procedural democracy, while the executive power represents the efficiency. The following graph depicts the general equilibrium point, between democracy and efficiency, represented by “E.” For trade-oriented countries, this balance is broken. As the impact of trade deals is much greater for these countries, the need of procedural democracy should weigh larger. Hence, the vertical line representing legislative power is shifted to the right, bringing the new equilibrium point to “E’.”

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83 Korea-U.S. FTA, Annex 11-B
In the Korea-U.S. FTA, Korea did not reach the equilibrium; it was too inclined for efficiency. Considering its high dependence on trade, this was destined to cause problems. Internally, it brought huge social spending to cope with domestic turbulence. Externally, it diminished negotiation power and credibility. If a country loses its credibility due to the unstable domestic approving procedure, other potential trade partners would be reluctant to enter another trade deals. The following section suggests a trade policy model for trade-oriented countries that reaches the equilibrium.

E. A Model for Trade-Oriented Countries

1. Legislative Involvement-Timely Notice and Consultation

For meaningful involvement, the legislature should be kept informed of entering negotiations. The President or the executive should notify the intention of a trade agreement to the legislature at least several months before starting FTA talks. This advance timeframe must set in place so that the legislature can have enough preparation for oversight. In this pre-negotiation stage, the trade partner, negotiation schedule, and main issues, such as major requests of the trade partner as well as key conditions to the trade deal, should be delivered to the legislature. Once the negotiations begin, there should be periodic reporting on the updated results, along with special reports on any issue for which the legislature requests details.

In the legislature, there are committees with jurisdiction on trade issues. In order to create meaningful oversight of the legislature, a law
concerning the process of making trade agreements should stipulate the formation of a small liaison group comprised of legislative members that ensures communication between these committees and the executive. This liaison group should be allowed to participate in the negotiation process, even at the site of negotiation, and should be able to access confidential information during negotiations. In addition, the law should include a consultation process with these committees. The extent, frequency, and timing of the consultation should be specified in the law.

2. Non-Legislative Involvement—Transparency and Open Information

As exemplified by Korea’s street demonstration (depicted above), if the legislature fails to represent diverse opinions or is not equipped with expertise in conducting trade policy, the public is unlikely to find a legitimate way of expressing their thoughts. Trade-oriented countries in particular have a greater need to gather public opinion due to the strength of the impact of trade on the economy. In this vein, an option could be the addition of direct democracy, such as the participation of non-legislative groups, such as scholars and NGOs, in the consultation or hearing process.84

There is a prerequisite to this participation: the access to information. Information, such as statistics and databases, should be shared with the public. This transparency will contribute to public understanding.

3. Strategy for the Damaged Group; Industry Reform

The fundamental fear behind FTA is bipolarization and trade damage. Although trade benefit is diffusive due to the largest number of beneficiaries—consumers, trade damage is fatal to the less skilled or less competitive group of people. Without strategic support for this group, trade policy will inevitably cause friction.

One time aid or compensation for the damaged group is not the ultimate solution.85 The strategy for the losers of this game should focus on structural reform. Facing foreign competition, the trade-damaged sector should switch directions towards a more profitable industry. The government should support this process by providing benefits, such as tax benefit or deregulation, for attempts to explore new markets. This strategy will reduce friction and anxiety while contributing to a sustainable trade policy.

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84 In Korea, in area of corporate governance, meaningful improvement has been made by NGOs under the catchphrase of 'shareholders activism'. Similarly, through debates and protests over Korea-U.S. FTA, NGO expanded their ability.
85 The U.S. and Korea have compensation program for trade-damaged firms and workers.
4. The Executive Renovation: Research and Hearing

In trade-oriented countries, the government must allocate sufficient time and resources for public discourse, due to the fact that trade policy affects the interests of all citizens in these countries. The government must retain the process of persuading the public and reducing friction among those who gain and those who lose as a result of the policy. In order to have productive public discourse, the pros and cons of a trade policy should be thoroughly analyzed.

Thus, the executive-driven research should be conducted prior to entering the negotiation process. Based on objective research and analysis, the government’s arguments can become compelling. The government should go through a hearing process not only to consult with any interested group or stakeholder, but also to persuade them. This process is indispensable in establishing accountability of the trade policy.

V. CONCLUSION

The U.S. has aggressively expanded its number of trade partners through bilateral agreements. One of the bilateral agreements concluded under the Obama administration is the Korea-U.S. FTA - estimated to be the largest trade deal since NAFTA. The U.S. expected that this trade deal would promote domestic industries’ market access to Korea and provide job opportunities. Meanwhile, Korea anticipated that an FTA with the U.S. would be beneficial in the same respects by promoting market efficiency in Korea and securing stronger accessibility to the U.S. market than those of their East Asian competitors. On the political front, the Korean government hoped an FTA with the U.S. would improve its relations with the country, while the U.S. expected that the FTA would be helpful in coping with China.

For Korea, this FTA is its first trade agreement with a major market since it started to be active in FTAs. Korea had no FTAs before the Korea-Chile FTA in 2003. Thus, it was not until the negotiation and ratification process of the Korea-U.S. FTA that the problems associated with designing and implementing a trade policy were revealed.

The problem is in the lack of legal framework enabling oversight on the trade authority of the President and incorporating diverse interests into negotiations. The stakeholders and the public were not properly informed of the aim and necessity of the trade deal before entering negotiations. As the negotiation process developed, the public was unable to find an institutional or legitimate way to raise its voice. When this deal was finally submitted, the Korean National Assembly was incapable of
reaching a compromise between proponents and opponents. Consequently, Korea experienced social friction, weakening Korea’s negotiation power and accordingly brought huge costs. However, the 19th legislative election conducted in April 2012 showed that the majority of Korean people were, surprisingly, in favor of Korea-U.S. FTA itself.\(^86\) It was estimated that this deal would bring economic growth in both countries by boosting trade and, subsequently, job creation. The problem is that this trade deal was born without proper public discourse and thorough examination even though it caused revision of 23 domestic laws ranging from intellectual property to foreign attorney registration.\(^87\)

While Korea struggled domestically, the U.S. systematically moved towards the FTA for its best interest. How was it possible? The answer is a system. The U.S. has long history of the Trade Act, which provided many devices that empower congressional oversight and communication between the President and the Congress while establishing the expedited process of a trade deal. Through this legal system, the executive, USTR, obtained legislative agreement on the sensitive issues while negotiations. Once the trade deal was concluded and submitted to the Congress, voting process can be expedited, because the Congress already participated in the developing process and reached on common grounds. Thus, this system contributes to sustainability of trade policy. This development process of Korea-U.S. FTA implies that procedural democracy is as important as the contents of trade deal. The more trade-oriented, the more procedural democracy is required considering impact of trade.

By analyzing this experience from legal point of view, this paper suggests a model for crafting a trade policy in a country with high dependence on trade. The trade-oriented countries ought to enhance reflection of public opinion and public understanding in despite of the need of efficiency and expertise in a trade policy. Those countries should equip a legal framework including the legislative oversight and timely notice in order to have chances to reflect many interests. This legal framework should provide how and who will conduct objective and independent research concerning pros and cons of a specific trade deal. It should shape a strategy for losers of this game.

Lastly, as Korea experienced the desire of participatory democracy, this legal framework should open the door for Non-legislative involvement. The government must open factual information, which is a premise to shape the public opinion.

\(^86\) The ruling party, the New Frontier Party, a successor to the Grand National Party earned 152 seats out of 300 seats. One of the policies of the ruling party was to sustain the Korea-U.S. FTA.

\(^87\) The U.S. has changed 8 domestic laws according to the Korea-U.S. FTA.
POLICE CELL PHONE SEARCHES:
WHERE’S THE PRIVACY?

JOHN O. HAYWARD**

Legal academicians are in a dither that law enforcement, using the exception of a search incident to a lawful arrest, are conducting warrantless searches of cell phones found on the person of those they take into custody. They regard such searches as violating the arrestees’ expectation of privacy, although courts that have considered the matter, by an overwhelming majority, have found lawful arrest trumps any expectation of privacy. This paper examines the legal precedent for searches incident to a lawful arrest being an exception to the Fourth Amendment’s prohibition against unreasonable searches and seizures, inquires into the expectation of privacy and exactly how, and if, cell phones fall under its umbrella, and analyzes two leading cases in this area to determine which is more consistent with U.S. Supreme Court opinions and the better rule of law.

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IV. CONCLUSION

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I. INTRODUCTION

In the Canadian film Chloe (2009), a wife casually picks up her husband’s cell phone and accesses it, only to discover a surprising message from a young woman with whom he had spent the previous night.1 While some people may be concerned that their cell phones contain incriminating evidence of their moral peccadilloes, legal academicians are greatly concerned that law enforcement, using the exception of a search incident to a lawful arrest,2 have been conducting warrantless searches of cell phones found on the person of those they take into custody.3 These academicians regard such searches as violating the arrestees’ expectation of privacy,4 although courts that have considered the matter have, by an overwhelming majority, found lawful arrest trumps any expectation of privacy.5 This

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1 The film is an adaptation of the French film Nathalie (2003), where the betrayed wife also learns of her husband’s infidelity by accessing his cell phone messages.
4 Engel, supra note 3, at 237; Gershowitz, supra note 3, at 1149 & 37; Knott, supra note 3, at 471; O’Connor, supra note 3 at 688; Orso, supra note 3, at 188; Oxton, supra note 3 at 1214; Stillwagon, supra note 3 at 1176; Swingle, supra note 3 at 37; Warfield, supra note 3, at 175; Wolcott, supra note 3, at 857.
5 Stearns, D. J., in United States v. Wurie, 612 F. Supp. 2d 104 (D. Mass. 2009) typifies this viewpoint when he says: “I see no principled basis for distinguishing a warrantless search of a cell phone from the search of other types of personal containers found on a defendant’s person.” Id. at 110. See Gershowitz, supra note 3 at 1137, fn. 66. Federal Appellate Circuits where searches have been allowed are the Fourth, Fifth, Seventh, Tenth and Eleventh. The states of Arizona, California, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, and Virginia have also permitted searches as well as the Virgin Islands. The cases are warranted: United States v. Pineda-Areola, 372 F. App’x 661, 663 (7th Cir. 2010) (explaining that dialing the phone number associated with an arrestee is not a search, but that even if it were, it would be permissible to search the phone of an arrestee incident to arrest); United States v. Fuentes, 368 F. App’x 95, 99 (11th Cir. 2010) (per curiam) approving search incident to arrest of cell phone, though not conducting thorough analysis of the issue); Silvan W. v. Briggs, 309 F. App’x 216, 225 (10th Cir. 2009) (“The permissible scope of a search incident to

Swingle, supra note 3, at 36, fn. 6 lists cases prohibiting a search. They are: United States v.
paper examines the legal precedent for searches incident to a lawful arrest as an exception to the Fourth Amendment’s prohibition against unreasonable searches and seizures, inquires into the expectation of privacy and exactly how, and if, cell phones fall under its umbrella, and analyzes two leading cases in this area to determine which is more consistent with U.S. Supreme Court opinions and the better rule of law. At the outset it should be noted that the Supreme Court has ruled that any expectation of privacy in one’s cell phone can be sharply limited, if not eliminated, by workplace policies and procedures.

II. ORIGIN OF SEARCH INCIDENT TO ARREST EXCEPTION

A. Search of the Person

The seminal case allowing a search of the person incident to a lawful arrest is Chimel v. California. In Chimel, police officers armed with an arrest warrant but not a search warrant, were admitted to petitioner's home by his wife, where they awaited petitioner's arrival. When he entered, he was served with the warrant. Although he denied the officers' request to "look around," they conducted a search of the entire house "on the basis of the lawful arrest." At petitioner's trial on burglary charges, items taken from his home were admitted over objection that they had been unconstitutionally seized. His conviction was affirmed by the California appellate courts, which held, despite their acceptance of petitioner's contention that the arrest warrant was invalid, that, since the arresting officers had procured the warrant "in good faith," and since, in any event, they had had sufficient information to constitute probable cause for the arrest, the arrest was lawful. The U. S. Supreme Court held that an arresting


City of Ontario v. Quon, 560 U.S. 1, 130 S. Ct. 2619 (2010) (held unanimously that audit of text messages of city employees was work related and thus permissible under Fourth Amendment even though many messages were personal in nature and sexually explicit). This case is discussed in Marissa A. Lalli, Spicy Little Conversations: Technology In The Workplace And A Call For A New Cross-Doctrinal Jurisprudence, 48 AM. CRIM. L. REV. 243 (2011). The battle to unlock a suspect’s cellphone extends beyond a search incident to an arrest. See Julia Angwin, The Fight To Unlock A Suspect’s Cellphone, WALL ST. J., Sept. 7, 2012, at B1 (describing Google’s tussles with the FBI over suspects’ cellphone passwords).

See Chimel, supra note 2.
officer may search the arrestee’s person to discover and remove weapons and to seize evidence to prevent its concealment or destruction, and may search the area “within the immediate control “of the person arrested, meaning the area from which he might gain possession of a weapon or destructible evidence. The Court also held that although the reasonableness of a search incident to arrest depends upon "the facts and circumstances -- the total atmosphere of the case," those facts and circumstances must be viewed in the light of established Fourth Amendment principles, and the only reasoned distinction is one between (1) a search of the person arrested and the area within his reach, and (2) more extensive searches. Thus the legal principle was established that the search of a person incident to a lawful arrest did not require a warrant to comport with the Fourth Amendment.

B. Search of Closed Containers on the Person

In 1973, the question arose whether the police could search closed containers on the person of the arrestee. The high court answered in the affirmative in the case of United States v. Robinson. In that case, as a result of a previous check of Robinson’s operator’s permit, a police officer had probable cause to arrest him for driving while his license was revoked. The officer then made a full custody arrest for the offense. Following prescribed procedures, the officer searched Robinson’s person and in the course of the search found in a coat pocket a cigarette package that contained heroin. At trial the heroin was admitted into evidence and Robinson was convicted of a drug offense. On appeal, his conviction was reversed on the ground that the heroin was obtained as a result of a search in violation of the Fourth Amendment. The state appealed to the U. S. Supreme Court, which reversed the Court of Appeals, holding that in the case of a lawful arrest, a full search of the person is not only an exception to the Fourth Amendment’s warrant requirement, but is also a “reasonable” search under that Amendment. The Court further held that a search incident to a valid arrest is not limited to a frisk of the suspect’s outer clothing and removal of such weapons as the arresting officer may, as a result of such frisk, reasonably believe that the suspect has in his possession. Furthermore, the absence of probable fruits or further evidence of the particular crime for which the arrest is made does not narrow the
standards applicable to such a search. The Justices went on to rule that a custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment and, a search incident to the arrest requires no additional justification, such as the probability in a particular arrest situation that weapons or evidence would, in fact, be found upon the suspect’s person. Further, the Court reasoned, it does not matter that the arresting officer did not have any fear of the defendant or that he himself did not suspect that the defendant was armed. Having in the course of a lawful search come upon the crumpled package of cigarettes, the arresting officer was entitled to inspect it, and when his inspection revealed the heroin capsules, he was entitled to seize them as "fruits, instrumentalities, or contraband" probative of criminal conduct. Therefore, Robinson lays the legal foundation for searches of containers found upon persons lawfully arrested.

In 2004, Thornton v. United States established the proposition that containers found on an arrestee’s person are known as “containers immediately associated with the person of the arrestee.” Although the issue the Court was asked to decide in Thornton was whether the search of the passenger compartment required a warrant (the Court decided it did not), the legality of the officer’s search of defendant’s person was never questioned. Thornton is legally significant because it expanded the permissible areas of warrantless searches from people themselves to containers they have on their person or containers “immediately associated with their person.”

15 Id. at 227, citing Terry v. Ohio, 392 U.S. 1 (1968).
16 Id. at 235.
17 Id. at 236.
20 Courts have wrestled with “containers” of all sizes and shapes. In addition to the “crumpled up cigarette package” of Robinson, supra note 13, warrantless searches of a wallet (U.S. v. Molinaro, 877 F.2d 1341, 1346 (7th Cir. 1989)) and an address book (U.S. v. Rodriguez, 995 F.2d 776, 778 (7th Cir. 1993)) found on the person of an arrestee have been held to be valid as incident to a lawful arrest, whereas similar searches of a footlocker near the person of the arrestee (U.S. v. Chadwick, 433 U.S. 1, 3-4 (1977)) and a suitcase in the trunk of an automobile (Arkansas v. Sanders, 442 U.S. 753 (1979)) (both cases overruled in part by California v. Acevedo, 500 U.S. 565 (1991)) were found to be unreasonable because of a heightened expectation of privacy.
21 See WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §5.5(a) 176 (3d ed. 1996) (“However, the Robinson search-incident-to-arrest authority was deemed to extend to containers on the person and containers such as a person which are ‘immediately associated’ with the person.” (footnotes omitted)).
22 Thornton, supra note 19, at 623-624. In so deciding, the Court relied on New York v. Belton, 453 U.S. 454 (1981) (search of vehicle passenger compartment allowed even though arrestee was not in vehicle at the time of the search). Belton has been limited by Arizona v. Gant, 556 U.S. 332 (2009), where the Court ruled that the case did not authorize a vehicle search incident to a lawful arrest after the arrestee had been secured and could not access the interior of the vehicle.
C. Cell Phones as Closed Containers

Some courts have analogized cell and smart phones to containers found on the person. In *United States v. Finley*, the United States Court of Appeals for the Fifth Circuit upheld a district court's denial of the defendant's motion to suppress call records and text messages retrieved from his cell phone. In reaching its decision, the court reasoned that a cell phone or pager is personal property “immediately associated” with the arrestee, and should thus be treated in a manner similar to wallets or address books.

On the other hand, in *United States v. Park*, the United States District Court for the Northern District of California allowed a defendant's motion to suppress a warrantless search of his cell phone. In reaching its decision, the court applied the reasoning in *United States v. Chadwick*, where federal drug agents arrested suspected drug traffickers, seized their double-locked footlocker from the trunk of their car, transported it to their office, and ninety minutes later searched it without a warrant. The U.S. Supreme Court upheld the district court’s determination that the search violated the Fourth Amendment. The Park court compared laptops to modern cell phones because, like laptops, “modern cellular phones have the capacity for storing immense amounts of private information.” The court stated that persons have lesser privacy interests in address books or pagers found on their persons, which contain less personal information. Because the search of the cell phone's contents was not based on exigent circumstances, the court held that the search did not qualify under the search incident to arrest exception and stated that the officers should have obtained a warrant before conducting a search.

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23 *U.S. v. Finley*, 477 F.3d 250 (5th Cir. 2007).
24 *Id. at* 260.
25 *Id. at* 260, fn. 7 (*Chadwick*, infra note 29, at 15); see also *United States v. Brookes*, No. CRIM 2004-0154, 2005 WL 1940124, at 3 (D.V.I. June 16, 2005) (upholding a search of a cell phone and comparing a pager and cell phone to a wallet or address book); *U.S. v. Cote*, No. 03CR271, 2005 WL 323343, at 6 (N.D. Ill. May 26, 2005) (citing *United States v. Rodriguez*, 995 F.2d 776, 778 (7th Cir. 1993)) (upholding search of cell phone and analogizing it to a wallet or address book as items immediately associated with the person of the arrestee), cited in *Wolcott*, supra note 3, at 856, fn. 132.
26 *U.S. v. Lynch*, 908 F. Supp. 284, 287-88 (D. V.I. 1995) (citing *Robinson* and holding that searches of pagers are like searches of wallets and address books and so should be governed by *Robinson*, not *Chadwick*).
28 *Id. at* 5, 12.
30 *Id. at* 8.
31 *Id. at* 9.
32 *Id. at* 8.
D. Pagers - Search Incident to Arrest Trumps Expectation of Privacy

Even in cases where the courts have found a reasonable expectation of privacy in the information stored in personal electronic devices, they have ruled that a search incident to a lawful arrest overcomes the expectation of privacy. For example, in United States v. Chan, a federal district court compared a pager to a personal address book, holding that people have a “reasonable expectation of privacy in the contents of [a] pager's memory.” The defendant urged the court to follow Chadwick, but the court refused to recognize it as controlling. The Court reasoned that the search of the pager in Chan was close in time and space to the arrest and that the pager was seized when it was on Chan’s person, whereas in Chadwick, the footlocker was seized from the trunk of a car, and its search was remote in time and space. As a result, the court held that the warrantless search of the pager was permitted under the search incident to arrest doctrine.

Similarly, in United States v. Ortiz, the United States Court of Appeals for the Seventh Circuit justified a warrantless search of a pager. The court found that incoming calls could destroy stored phone numbers. Accordingly, when early pagers are compared to address books, they fit comfortably within the original Chimel rationale, i.e. a warrantless search is permitted to preserve evidence or protect the arresting officer. Thus we see that the Chan and Ortiz decisions stand for the propositions that 1) the search incident to arrest doctrine trumps an expectation of privacy in older electronic “containers,” and 2) early electronic “containers” should be treated no differently than any other container.

E. Are “Smart Phones” Too Smart for the Search Incident to Arrest Exception?

The overwhelming majority of courts have agreed with the above propositions but some have not. Those in disagreement have based their

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34 Id. at 534-535.
35 Id. at 535-536 (citing Chadwick, supra note 29, at 12-15.
36 Id.
37 Id. at 536.
38 U.S. v. Ortiz, 84 F. 3d 977 (7th Cir. 1996).
39 Id. at 983-984
40 Id. at 984 (“Because of the finite nature of a pager's electronic memory, incoming pages may destroy currently stored telephone numbers in a pager's memory. The contents of some pagers also can be destroyed merely by turning off the power or touching a button.”).
41 Chimel, supra note 2, at 763.
42 Chan, supra note 33, at 534-536; Ortiz, supra note 38, at 984.
43 See supra note 5.
opposition on the increased functionality of certain cell phones (i.e. “smart phones,” with Internet connectivity, ability to store documents, and e-mail capability) and the heightened expectation of privacy derived from their improved utility.\textsuperscript{44} While early cell phones were similar to address books or letters in an envelope, the text messaging capability of smart phones can be compared to sending and receiving hundreds of letters and reading the contents of each letter.\textsuperscript{45}

For example, in the \textit{Finley} case mentioned earlier,\textsuperscript{46} the Fifth Circuit regarded text messages similar to the contents of any other container\textsuperscript{47} because the cell phone was an item immediately associated with the arrestee's person.\textsuperscript{48} After Finley had made a controlled drug purchase, police searched him and found a cell phone. They searched the phone, and found text messages related to drug use and trafficking.\textsuperscript{49} Finley argued that the search of his cell phone was unlawful and that his cell phone could be seized but not searched.\textsuperscript{50} The court held that he had a reasonable expectation of privacy in the cell phone’s call records and text messages and so could challenge the search.\textsuperscript{51} However, the court decided that the search was lawful, giving as its justification the rationales put forth in \textit{Robinson}\textsuperscript{52} and \textit{Belton}\textsuperscript{53} and in effect holding that the text messages in the cell phone [the “electronic container”] are no different than the contents of any other container.\textsuperscript{54}

A similar result was reached in \textit{United States v. Wurie}.\textsuperscript{55} In that case, after observing a cocaine transaction in a parking lot, police arrested Wurie for distributing crack cocaine. When they searched him at the police station, they found two cell phones on his person.\textsuperscript{56} They examined the call logs of one of the phones, and when it rang, flipped it open and observed a

\begin{flushleft}
\textsuperscript{44} See Wolcott, supra note 3, at 857-858.
\textsuperscript{45} Id. Without doubt, some “smart phones” are very smart indeed. See Knott, supra note 3, at 455 (“Today, cell phones store everything from address books, calendars, voicemail, and text messages to photos, music, movies, e-mail accounts, Internet history, and social networking profiles. Additionally, some of today's smart phones even include word processing applications, GPS navigation, and built-in projectors. Even those cell phones not considered “smart phones” are capable of storing massive amounts of information and can be equipped with an address book, a call log, text messaging capabilities, a camera, e-mail, and Internet. Even the most basic types of cell phones now support voice and text messaging and contain address and date book functions.” (citations omitted)).
\textsuperscript{46} Finley, supra note 23.
\textsuperscript{47} Id. at 260.
\textsuperscript{48} Id. at fn. 7, citing Chadwick, supra note 29, at 15.
\textsuperscript{49} Id. at 253-254.
\textsuperscript{50} Id. at 260.
\textsuperscript{51} Id. at 259.
\textsuperscript{52} Robinson, supra note 12, at 223-224.
\textsuperscript{53} Belton, supra note 22, at 460-461.
\textsuperscript{54} Finley, supra note 23, at 259-260.
\textsuperscript{56} Id. at 106.
\end{flushleft}
“wallpaper” of a young woman and a baby. The officers then found the phone number associated with “‘my house’” in the call log. After tracing the number through a Web site, they had an address. They then secured a search warrant, and after searching the residence, discovered crack cocaine, a gun, drug paraphernalia, and cash. Appealing his conviction, Wurie sought to suppress the evidence acquired from the cell phone search. The U.S. District Court for the District of Massachusetts, citing Finley, commented that “It seems indisputable that a person has a subjective expectation of privacy in the contents of his or her cell phone.” The court noted with approval that other courts have held that the search incident to arrest exception applies to searches of the contents of cell phones. Stating that the search of Wurie’s cell phone was limited and citing cases where wallets were searched incident to arrest, the court held that the search was reasonable, noting that there was no difference between a warrantless search of a cell phone and a warrantless search of other containers. The court compared wallets and cell phones, holding that a limited and cursory search of a cell phone was reasonable and that the search incident to a lawful arrest exception could overcome the reasonable expectation of privacy.

Moreover, the courts have found that smart phones, despite their increased functionality over older phones, have no heightened expectation of privacy and are also subject to warrantless searches incident to lawful arrest. In United States v. Murphy, law enforcement officers searched a cell phone with text messaging functions similar to those of a smart phone. Murphy was convicted of narcotics and currency-related offenses after police stopped the vehicle he was riding in for speeding. He urged the court to distinguish between older and modern cell phones based on their storage capacity, and argued that the court should suppress evidence obtained from the warrantless phone search because evidence that the

57 Id.
58 Id.
59 Id. at 106-107.
60 Id. at 107.
61 Id. at 105.
62 Id. at 109.
64 Wurie, supra note 55, at 110.
65 Id. at 109-110.
66 U.S. v. Murphy, 552 F. 3d 405, 409-412 (4th Cir. 2009).
67 Id. at 407.
68 Id. at 411.
information on the phone was volatile in nature was lacking and, therefore, there was no threat that the evidence would be destroyed.\footnote{Id. at 409-411.} The United States Court of Appeals for the Fourth Circuit wasn’t persuaded, reasoning that the need to preserve evidence justifies the retrieval of call records and text messages without a warrant during a search incident to arrest.\footnote{Id. at 411.}

The court rejected as unworkable Murphy’s argument that officers should be able to conduct warrantless searches incident to arrest only of cell phones with small storage capacities\footnote{Id.} because it would not be possible for them to differentiate between a small and large capacity cell phones.\footnote{Id.} Moreover, the court declared that information on a large capacity cell phone could still be volatile because even those phones have limited storage space and an incoming call or message could destroy valuable evidence.\footnote{Id.}

In this commentator’s view, the court rightly rejected all arguments seeking to limit police cell phone searches incident to lawful arrests based on the capacity of the phone. Not only is such a distinction unworkable as the court correctly points out,\footnote{Id.} but who is to decide what constitutes “large” or “small” capacity, and furthermore, as smart phones become ever “smarter” (i.e. increased capacity, Internet connectivity, e-mail capability as well as ability to run software), will today’s “large” capacity phones become “small” by tomorrow’s standards? Do we really want law enforcement and the courts to enter into such a morass? I think not. Furthermore, as the boundaries between computers and cell phones become more blurred with cell phones doubling as computers and computers able to function as cell phones, it certainly would be valuable to establish legal standards that reflect this ever changing technology. However, courts are understandably very reluctant to do so fearing that any standard they develop will quickly be outdated by advancing technology.

\textbf{F. Are “Smart Phones” Like Laptop Computers and Luggage?}

In rejecting warrantless cell phone searches incident to arrest, some courts have declared “the line between cell phones and personal computers has grown increasingly blurry.”\footnote{Park, supra note 27, at 8. As technology advances, the differences between electronic devices will also become blurred. See Shira Ovide & Don Clark, \textit{Beneath Microsoft’s Surface}, \textit{WALL ST. J.}, June 20, 2012, at B1 (describing Microsoft’s Surface Tablet with a detachable keyboard that makes it rival a laptop computer).} They are also aware that smart phones are very different from early cell phones and hold greater amounts of personal
information. They have recognized that smart phones now resemble a mobile computer more than an early cell phone, and while courts have often applied the search incident to arrest doctrine to cell phones, they have not applied it to computers. Moreover, when comparing the type and volume of information contained on a smart phone to that stored on a computer and considering the heightened level of expectation of privacy in information stored on a computer, the similarities are obvious. Some legal analysts have compared the amount of personal information that can be contained in a laptop computer to the type of information often stored in luggage drawing the conclusion that smart phones are like laptops and luggage, and thus should be exempted from warrantless searches incident to lawful arrests. Several cases have addressed the situation where police have searched a laptop without a warrant or incident to arrest (excluding border search cases where law enforcement searched laptops without any reasonable suspicion under the border search doctrine). Typically in order to search a computer, police obtain a separate warrant, a blanket warrant or affix an affidavit to the warrant specifically including the computer or computer records. They may also secure consent of the computer's owner to search the computer (which must be more than general consent to search the home or premises). Nonetheless, comparing smart phones to computers has not prevented the vast bulk of courts from allowing cell phone searches incident to arrests. Perhaps a key difference that in some

76 Id., noting that smart phones are capable of sending and receiving e-mail and text message in addition to their photographic, video, instant messaging, and Internet capabilities. The court also noted that one’s most private thoughts and conversations can be recorded and stored on smart phones. However, the same can be said of a personal diary that many individuals routinely keep.

77 See supra note 5.


79 See Park, supra note 27, at 8.

80 Orso, supra note 78, at 213.

81 See Wolcott supra note 3, at 860 (“Implicit in this rationale is the fact that a laptop is more analogous to luggage than to a wallet, because searching a laptop may reveal the same type and volume of highly personal information that would be revealed by searching luggage. As a result, if a court analogizes a smart phone to a laptop, it is proper that the smart phone also be analyzed under the footlocker and luggage analysis.”)

82 See Orso, supra note 78, at 215.

83 U.S. v. Arnold, 523 F.3d 941 (9th Cir. 2008) (court does not distinguish between search of a laptop and its electronic contents and the suspicionless border searches of travelers’ luggage that the Supreme Court has allowed), amended by 533 F.3d 1003 (9th Cir. 2008). The border search doctrine allows law enforcement officers to search containers at the border without “particularized suspicion.” Id. at 945.


86 U.S. v. Carey, 172 F.3d 1268, 1274 (10th Cir. 1999) (holding that consent to search the apartment did not allow police to search the computer).

87 See supra note 5.
commentators’ minds justifies a different expectation of privacy in smartphones is their increased functionality, i.e. their Internet connectivity, ability to store documents, e-mail capability as well as their ability to run software. Obviously such functions and capabilities have the potential to reveal a great deal more about us than simply whom we phoned and who phoned us.

Therefore, according to Finley, Wurie, Murphy, and the many cases that agree with them, the increased functionality of smartphones with their heightened expectation of privacy was insufficient to trounce the Fourth Amendment’s search incident to lawful arrest exception. Before we examine more closely the rationales for and against the expectation of privacy and why it should or should not defeat the search incident to arrest exception, let us examine more closely the “expectation of privacy” upon which the argument is based.

III. JUST WHAT IS THE “EXPECTATION OF PRIVACY”?

A. Overview

The term “privacy” is among the most discussed subjects in American jurisprudence, but privacy appears nowhere in the U.S. Constitution, and its origin in the U.S. legal system can be attributed to a law review article published in 1890. Nearly forty years after this article’s publication, one of the authors of that influential article, Louis Brandeis, dissenting in Olmstead v. United States, described privacy as a result of

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88 Finley, supra note 23.
89 Wurie, supra note 55.
90 Murphy, supra note 66.
91 See supra note 5.
95 Olmstead v. U.S., 277 U.S. 438 (1928). In Olmstead, federal agents placed a listening device just above the ceiling of a room without it physically penetrating the space of the room. In a 5-4 decision, the Court held that the use of wiretapped private telephone conversations obtained by federal agents without a warrant and without the device physically intruding upon the wiretapped space (in violation of state law) did not constitute a violation of the defendant’s Fourth and Fifth Amendment rights. The so-called “trespassing” doctrine of Olmstead was held no longer controlling in Katz, infra note 105. Many commentators regard Olmstead as one of the Supreme Court decisions that hastened the repeal of the Eighteenth Amendment prohibiting the manufacture, transportation, and sale of alccoholic beverages. See David E. Kyvig, Repealing National Prohibition (1979) at 35 (arguing that Olmstead was one of the decisions that
the law’s recognition of man’s spiritual nature and as such it must prohibit every and all unjustifiable government intrusions his beliefs, thoughts, emotions and sensations.  

Today, legal scholars recognize three rights associated with privacy. The first is grounded in the Fourth Amendment’s guarantee of "freedom from government intrusion into an individual’s home or on to an individual’s person;" the second emanates from the "penumbras" of several amendments to the Constitution vis-a-vis the Fourteenth Amendment’s Due Process Clause, which concern the liberty and autonomy "to make certain crucial personal decisions"; and the third stems primarily from statutory enactments and the law of torts, which safeguard "the ability of a person to restrict dissemination of personal information." The social sciences and humanities (primarily philosophy) have defined even more meanings of privacy. Collectively, the multiplicity of meanings ascribed to privacy has caused it to become "a concept in disarray," one that not only defies simple explication, but also all-too-frequently provides a framework too vague "to guide adjudication and lawmakers."

B. Katz v. U.S. – Creation of Expectation of Privacy

Whatever the basis and reach of the nebulous "right to privacy" may be, the Fourth Amendment to the U.S. Constitution provides a clear substantive right designed to protect people's privacy in their persons, homes, papers, and effects. The U.S. Supreme Court clarified the Fourth Amendment’s recognition of man’s spiritual nature and as such it must prohibit every and all unjustifiable government intrusions his beliefs, thoughts, emotions and sensations.

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Amendment in *Katz v. United States*, holding that it protects “people, not places,” and presenting a two-pronged test for determining whether the Amendment’s protections applied in a given case. According to *Katz*, the person seeking the Fourth Amendment’s protection must first "have exhibited an actual (subjective) expectation of privacy." Second, that subjective expectation of privacy must "be one that society is prepared to recognize as reasonable." 

No doubt this is a lofty purpose, but as regards cell phones, it is clear from the volume of commentary that legal scholars regard them as subject to an “expectation of privacy” and a few courts agree. However, in the context of a search incident to a lawful arrest, the cases overwhelmingly demonstrate that whatever the expectation of privacy, it must give way to the search incident to a lawful arrest exception of the Fourth Amendment. We will compare one court’s opinion in which the “expectation of privacy” argument prevailed to another where it did not. Then we will weigh the strength of each side’s argument and decide what course of action should be taken if in fact smart phones are to be granted an exemption to the Fourth Amendment’s search incident to a lawful arrest exception.

C. *State v. Smith* – Cell Phone Not “Container” & Expectation of Privacy Trumps Search Incident to Arrest

In *State v. Smith*, police questioned a woman who was in a hospital because of a drug overdose. She agreed to call her drug dealer, whom she identified as the defendant, to arrange for the purchase of crack cocaine at her residence. The defendant was later arrested at the woman’s residence. During the arrest, police searched the defendant and found a

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105 *Katz v. United States*, 389 U.S. 347 (1967) (holding that conversations recorded with a listening device placed outside a telephone booth without first obtaining a warrant violated the search and seizure provisions of the Fourth Amendment).

106 *Id. at 351.*


108 See *supra* note 3.

109 See *Carroll*, supra note 23; *Warie*, supra note 55; and *Park*, supra note 27. See also *U.S. v. Carroll*, 537 F. Supp. 2d 1290 (N.D. Ga. 2008) (court determined expectation of privacy was relevant in determining whether search of defendant’s Blackberry which police found in his backpack at the time of his arrest was reasonable; held that because backpack was within defendant’s reach at the time of his arrest and search was contemporaneous with arrest, search was constitutional).

110 See *supra* note 5.


112 *Id. at 950.*
cell phone on his person. At some point the police officers searched the cell phone and discovered that the call records and phone numbers confirmed that the defendant’s cell phone had been used to speak with the woman.\textsuperscript{113} The police did not have either a warrant to search the cell phone or defendant’s consent to do so.\textsuperscript{114} This evidence was introduced at trial where the defendant was convicted of trafficking and possession of cocaine, partly on evidence obtained from the cell phone search.\textsuperscript{115} He appealed his conviction in part on the refusal of the trial court to suppress evidence obtained from the search of his cell phone.\textsuperscript{116} The Ohio Court of Appeals upheld his conviction and he then appealed to the Ohio Supreme Court.\textsuperscript{117}

In a 4-3 decision, the Ohio Supreme Court reversed,\textsuperscript{118} holding that a cell phone is not a “closed container” for purposes of a Fourth Amendment analysis\textsuperscript{119} because it is not an object falling under the “traditional” definition of the term, i.e., “physical objects capable of holding other physical objects.”\textsuperscript{120} The majority was then faced with the task of describing what it was, and so launched into a discussion of the varieties of cell phones. To quote:

Since cell phones are not closed containers, the question becomes how they should be classified. Given the continuing rapid advancements in cell phone technology, we acknowledge that there are legitimate concerns regarding the effect of allowing warrantless searches of cell phones, especially so-called smart phones, which allow for high-speed Internet access and are capable of storing tremendous amounts of private data. While it is apparent from the record that Smith's cell phone could not be called a smart phone with advanced technological capability, it is clear from the record that Smith's cell phone had phone, text messaging, and camera capabilities. While the dissent argues that Smith's phone is merely a "conventional one," we note that in today's advanced technological age many "standard" cell phones include a variety of features above and beyond the ability to place phone calls. Indeed, like Smith's phone, many

\textsuperscript{113} Id.
\textsuperscript{114} Id. at 950-951.
\textsuperscript{115} Id. at 951.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 950.
\textsuperscript{119} Id. at 954.
\textsuperscript{120} Id. at 954, citing New York v. Belton, 453 U.S. 454, 460 (1981) (holding that a "container" means "any object capable of holding another object."
cell phones give users the ability to send text messages and take pictures. Other modern "standard" cell phones can also store and transfer data and allow users to connect to the Internet.\footnote{121}

Stepping back from the precipice of having law enforcement engage in a technological assessment of each and every cell phone found on an arrestee’s person in order to determine whether it is subject to the search incident to lawful arrest exception of the Fourth Amendment,\footnote{122} the majority commented that

Because basic cell phones in today's world have a wide variety of possible functions, it would not be helpful to create a rule that requires officers to discern the capabilities of a cell phone before acting accordingly.\footnote{123}

The majority next discusses the “expectation of privacy” and its application to cell phones and concludes that: “Although cell phones cannot be equated with laptop computers, their ability to store large amounts of private data gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain.”\footnote{124}

Finally, the majority announces that because “a person has a high expectation of privacy in a cell phone's contents, police must then obtain a warrant before intruding into the phone's contents.”\footnote{125} They cite no authority to support this proposition, and the court’s argument begs the question as to what other objects having a “high expectation of privacy” would be immune in Ohio from the search incident to arrest exception of the Fourth Amendment. Following the majority’s reasoning to its logical conclusion would lead to the result that a user’s subjective determination that an item has a “reasonable and justifiable expectation” of a higher level of privacy would be enough to remove it from the search incident to lawful arrest exception of the Fourth Amendment established under Chimel, thus rendering it a nullity.

The dissent sharply disagreed with the majority’s reasoning, remarking that:

The majority needlessly embarks upon a review of cell phone capabilities in the abstract in order to announce a
sweeping new Fourth Amendment rule that is at odds with decisions of other courts that have addressed similar questions.\textsuperscript{126}

The dissent pointed out that the arrest was lawful and that the search of the defendant’s cell phone resembled police officers’ searches of traditional address books\textsuperscript{127} and thus found the search to be constitutional.\textsuperscript{128} Although the search of an address book would not reveal call logs, the difference between the two for purposes of warrantless searches incident to lawful arrest appears to this commentator to be without significance.

\textbf{D. People v. Diaz – Cell Phone as “Property” & Search Incident To Arrest Trumps Expectation of Privacy}

The majority’s arguments in \textit{People v. Diaz}\textsuperscript{129} seem to demonstrate persuasively that cell phones, no matter how smart, are included in the search incident to arrest exception of the Fourth Amendment, as the vast majority of courts have correctly agreed.\textsuperscript{130} In \textit{Diaz}, police observed the defendant participating in a drug deal and arrested him. On his person at the time of his arrest was a cell phone.\textsuperscript{131} About 90 minutes after his arrest, police searched the contents of the cell phone without a warrant and discovered information indicating that the defendant had participated in the sale of a controlled substance.\textsuperscript{132} Once shown this information, the defendant admitted he was a participant in the sale and was charged with selling a controlled substance.\textsuperscript{133} At trial, he moved to suppress the information from the cell phone search, but the motion was denied.\textsuperscript{134} He was convicted, his appeal was denied,\textsuperscript{135} and the California Supreme Court subsequently granted his petition for review.\textsuperscript{136}

After reviewing the relevant law concerning the search incident to lawful arrest exception to the Fourth Amendment,\textsuperscript{137} the court stated that the key question in the case was whether the defendant's cell phone was

\textsuperscript{126} \textit{Id}. at 956.
\textsuperscript{127} \textit{Id}. at 957.
\textsuperscript{128} \textit{Id}.\textsuperscript{129} People v. Diaz, 244 P.3d 501 (2011). The case was a 5-2 decision.
\textsuperscript{130} \textit{See supra note 5}.
\textsuperscript{131} \textit{Diaz} at 502.
\textsuperscript{132} \textit{Id}. at 502-503.
\textsuperscript{133} \textit{Id}. at 503.
\textsuperscript{134} \textit{Id}.\textsuperscript{135} Id.
\textsuperscript{136} \textit{Id}.\textsuperscript{137} \textit{Id}. at 503-505.
"personal property ... immediately associated with [his] person." The court held that it was, and consequently that the warrantless search of his cell phone was valid. The court compared the search to the warrantless searches of the cigarette package in Robinson and the clothing taken from the defendant in Edwards. The U.S. Supreme Court held both searches to be constitutional. The court then dealt with the defendant’s arguments to treat the cell phone differently from the cigarette package. Essentially, these arguments asserted that the validity of warrantless searches of items of personal property seized in a lawful arrest should depend on 1) the character of the item; 2) the expectation of privacy associated with the item; or 3) the quantity of information contained in the item. The court reviewed each of these arguments in turn.

1. Character of the Item

The court found that the validity of a warrantless search incident to a lawful arrest does not depend on the character of the item. As the court commented, “The relevant high court decisions do not support the view that whether police must get a warrant before searching an item they have properly seized from an arrestee's person incident to a lawful custodial arrest depends on the item's character, including its capacity for storing personal information.” The court remarked that a delayed warrantless search "of the person" which includes property "immediately associated with the person" at the time of arrest, but excludes property that is only "within an arrestee's immediate control," is valid because of "reduced expectations of privacy caused by the arrest." The court then cited Robinson for the proposition that if a “custodial arrest is lawful, then a ‘full’ search of the arrestee's person ‘requires no additional justification.’" Thus, Diaz confirmed what these U.S. Supreme Court cases have made quite clear: the validity of a warrantless search incident to a lawful arrest does not depend on the character of the item.

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138 Id. at 505, citing Chadwick, supra note 29, at 15 (holding that the search of footlocker near the arrestee required a warrant).
139 Id.
140 Robinson, supra note 12.
141 U.S. v. Edwards, 415 U.S. 800 (1974) (holding that search of defendant’s clothes without a warrant did not violate the Fourth Amendment as it was incident to a lawful arrest).
142 Robinson, supra note 12, at 235; Edwards at 808.
143 Diaz, supra note 129, at 506.
144 Id.
145 Id., citing Chadwick, supra note 29, at 16, fn. 10.
146 Chadwick, supra note 29, at 15.
147 Id. at 16, fn. 10.
148 Diaz, supra note 129, at 506.
149 Id., citing Robinson, supra note 12, at 235.
arrest does not depend on the character of the container.

2. Expectation of Privacy Associated with the Item

The court then dealt with the argument that the validity of the warrantless search depends on the expectation of privacy associated with the item.\(^{150}\) First, it remarked that the Supreme Court in Ross rejected the view of several lower court judges who had concluded that, based on differing expectations of privacy, the warrantless search of a brown paper bag in Ross's stopped car was valid, but the warrantless search of a zippered leather pouch was not.\(^ {151}\) It then pointed out that in New York v. Belton the U.S. Supreme Court rejected the proposition that whether a particular container may be searched without a warrant depends on the extent of the arrestee's reasonable expectation of privacy in that container, explaining: "[A]ny container[] ... [in] the passenger compartment ... may ... be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have."\(^ {152}\) The court commented further that in Arizona v. Gant, the high court limited Belton, by holding that police may not search containers in a vehicle's passenger compartment "incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle," unless "it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."\(^ {153}\) At the same time, the court reaffirmed Belton's holding that "whether a particular container may be searched does not depend on its character or the extent of the arrestee's expectation of privacy in it."\(^ {154}\)

3. Quantity of Information Contained in the Item

Addressing the argument that the sheer quantity of personal information should determine the legality of the search incident to arrest, the court announced that no persuasive explanation has been put forth justifying such a result.\(^ {155}\) Quoting Belton, the court reasoned that "if differing expectations of privacy based on whether a container is open or closed are irrelevant to the validity of a warrantless search incident to arrest, then differing expectations of privacy based on the amount of

\(^{150}\) Id.
\(^{151}\) Id. at 507, citing U.S. v. Ross, 456 U.S. 798, 802 (1982).
\(^{152}\) Id., citing Belton, supra note 22, at 460-461 (italics added by Diaz court).
\(^ {153}\) Id. at 507, citing Gant, supra note 22, at 335.
\(^ {154}\) Id., citing Gant at 345.
\(^ {155}\) Id. at 507.
information a particular item contains should also be irrelevant.” 156 Moreover, the court mentioned that an outcome based on the quantity of personal information determining the validity of a search would be inconsistent with Robinson, Edwards, and Chadwick157 and that the key point of the Supreme Court’s decisions is that a "lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have" in property immediately associated with his or her person at the time of arrest even if there is no reason to believe the property contains weapons or evidence." 158 Then under this rule, the court pointed out that “travelers who carry sophisticated cell phones have no greater right to conceal personal information from official inspection than travelers who carry such information in ‘small spatial container[s]’” because "a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [has] an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case”. 159 Therefore, the court reasoned that a warrantless search incident to a lawful arrest of a cell phone with limited storage capacity does not become constitutionally unreasonable simply because other cell phones may have a significantly greater storage capacity. 160 Finally, the court announced that “adopting the quantitative approach … would create difficult line-drawing problems for both courts and police officers in the field.” 161 To quote further:

How would a court faced with a similar argument as to another type of item determine whether the item's storage capacity is constitutionally significant? And how would an officer in the field determine this question upon arresting a suspect? Defendant and the dissent offer no guidance on these questions. Their approach would be "inherently subjective and highly fact specific, and would require precisely the sort of ad hoc determinations on the part of officers in the field and reviewing courts" that the high court has condemned. 162

Lastly, the court stated that seeking to distinguish between the cell

156 Id. at 508, citing Belton 461.
157 Id. at 508.
158 Id., citing Robinson, supra note 12, at 235.
159 Id., citing Ross, supra note 151, at 833.
160 Id. at 508.
161 Id.
162 Id. at 508-509, citing Thornton, supra note 19, at 623 (holding that when a police officer makes a valid custodial arrest of an automobile’s occupant, the officer may search the vehicle’s passenger compartment as a contemporaneous incident to a arrest) and Belton, supra note 22, at 458-459.
phone itself and its contents is inconsistent with Chadwick, Robinson, and Edwards and would lead to a situation where "no search or seizure incident to a lawful custodial arrest would ever be valid."\(^{166}\)

**E. Diaz More Consistent with U.S. Supreme Court Decisions & Better Law**

Accordingly, after reviewing the Diaz and Smith decisions, this commentator is of the opinion that Diaz is more consistent with U.S. Supreme Court decisions and, furthermore, is a better rule of law because it provides a "straightforward," "easily applied, and predictably enforced" rule.\(^{167}\) As the court pointed out, the quantity of information contained in a container and the expectation of privacy associated with it do not (and should not) determine whether an item is subject to warrantless searches incident to lawful arrest. To rule otherwise would be inject uncertainty and confusion into warrantless police searches incident to lawful arrest especially in light of rapidly advancing technology.

**IV. CONCLUSION**

A tabulation of the cases holding that search incident to lawful arrest trumps cell phone expectation of privacy and an examination of the rationale for this rule of law as presented in Diaz should lead many to conclude, as does this writer, that the police may legally search a cell phone on the person of someone they lawfully arrest unless the legislature steps in to alter the situation.\(^{168}\)\(^{169}\) So perhaps the best advice to those who yearn for

\(^{163}\) Id. at 509 ("Those decisions hold that the loss of privacy upon arrest extends beyond the arrestee's body to include 'personal property ... immediately associated with the person of the arrestee' at the time of arrest," citing Chadwick, supra note 29, at 15).

\(^{164}\) Id. ("...this loss of privacy entitles police not only to 'seize' anything of importance they find on the arrestee's body, but also to open and examine what they find." (italics in original), citing Robinson, supra note 12, at 236).

\(^{165}\) Id. ("the high court expressly refused to distinguish the contents of the seized item from either the seized item itself or 'the arrestee's actual person.'"). Edwards, supra note 141, at 802-809, held that "the police, despite seizing the defendant's clothes and reducing them to police control, did not need to obtain a warrant before subjecting those clothes to laboratory testing."

\(^{166}\) Id., citing Belton, 453 U.S. at 461-462, fn. 5.

\(^{167}\) Id. at 509, citing Thornton, supra note 19, at 623; Robinson, supra note 12, at 235; Belton, supra note 22, at 458-459; and Murphy, supra note 66, at 411 (upholding warrantless search incident to arrest and refusing to distinguish cell phones based on their "large" storage capacity because of difficulty quantifying that term in any meaningful way). The Diaz court itself recognized that Smith was inconsistent with U.S. Supreme Court decisions ("The Ohio court's focus on the extent of the arrestee's expectation of privacy is, as previously explained, inconsistent with the high court's decisions."). Id. at 511, fn.17.

\(^{168}\) See supra note 5.

\(^{169}\) In response to Diaz, the California legislature passed SB 914, a bill requiring police officers to obtain a warrant before searching through an arrested suspect's cell phone, but Gov. Jerry Brown
cell phone privacy in search incident to arrest circumstances is to realize that effective law enforcement would be seriously hampered if police were required to obtain a search warrant for cell phones on the person of arrested suspects. Those concerned about the invasion of the privacy of their cell phone, then, might do well to store any sensitive information somewhere else.

EISENHOWER: THE FORGOTTEN PRESIDENT
MARK HARTY”

In the midst of the last presidential campaign, the celebrated historian Ron Chernow noted that “…in the 19 Republican presidential debates held so far, the candidates have invoked their beau ideal, Ronald Reagan, 124 times. Abraham Lincoln, the Great Emancipator, has garnered nine mentions; Thomas Jefferson, the pen of the Revolution, five. George Washington, the first president, the father of his country – has received one…” Of course, Chernow (quite appropriately) goes on to bemoan this relative slight to the memory of our first – and one of our greatest presidents.

But what about our 34th president, Dwight David Eisenhower? Ike presided over peace and prosperity during eight of the most perilous years (1952 – 1960) in our nation’s history. With leadership tested by the firestorm of World War II, he kept us out of further international conflicts while our economy grew, creating millions of jobs and becoming the envy of the world. Yet, with the exception of recent publicity regarding a new Eisenhower memorial in Washington, his name and memory are rarely recalled. In the recent presidential campaign Ike’s extraordinary national service is almost never noted. Even Senator McCain, a war hero in his own right, was mute regarding Ike during his run for the White House in 2008. We heard a lot about Teddy Roosevelt and, of course, Reagan. Never Eisenhower. It was almost as if his extraordinary military and (Republican) political career had vaporized into the mist of time.

Well, as John Adams once famously remarked, “Facts are stubborn things.” Eisenhower’s record for waging peace while promoting economic growth grows taller every year. No other American of his era had the crucial combination of personal popularity and military reputation to have accomplished what Eisenhower did during his presidency. Other notable generals, like George Marshall and Omar Bradley, were not in the political arena. George Patton was dead. McArthur made his bid for the 1952 GOP nomination but was vanquished by his own vainglory. Ike stood alone as

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the only American with the standing to steward our nation through eight challenging years of Communist aggression and the Cold War. He was the indispensable man.

Today, it is often forgotten that prior to his presidency, Ike was already an international super-star. He was the hero of D-Day and the Supreme Allied Commander who led us to victory over Nazi Germany. After the war, he became President of Columbia University and in 1950 was appointed the first Supreme Commander of the newly formed North Atlantic Treaty Organization (NATO). He was one of the most famous men in the world.

When he was elected to the presidency in 1952, the Korean War was still in full flame. Never willing to just stay in Washington and listen to so-called “experts”, Ike flew to Korea – personally evaluated the military options – and quickly concluded that a continuation of that conflict was untenable. A truce followed and it has held for over 60 years. Only Eisenhower could have done it. Any other American president would have been bitterly attacked as “weak” or “soft on Communism” and probably driven from office. Those epitaphs would never stick when it came to a general by the name of Eisenhower. And he knew it.

Time and again during his administration – Indochina (Vietnam) in 1954, Hungary in 1956, the Suez in 1956 – Eisenhower was urgently beseeched to commit American forces to distant lands. Each time he had the fortitude to defy the political and diplomatic pressure and thereby avoided entangling America in messy military engagements. One only has to look at the cost and carnage of the post-Eisenhower wars in Vietnam, Iraq and Afghanistan to wonder at his wisdom.

As an internationalist, he successfully countered Senator Robert Taft and other right wing isolationists within his own party. He was the steadfast helmsman who safely navigated our country through the stormy seas of the McCarthy Era and some of the chilliest days of the Cold War. As Ross Douthat commented last year in the New York Times, “…his greatness was manifested in the crises he defused and the mistakes he did not make.”

On the domestic front, Ike also showed himself to be an effective leader. Year after year he balanced the federal budget. He promoted the building of our interstate highway system (which now bears his name) and the St. Lawrence Seaway, both of which stimulated economic development, encouraged greater tourism, interstate commercial transport, and created countless jobs. And with his decisive use of the 101st Airborne to effectuate the integration of a high school in Little Rock in 1957 and his crucial support of the 1957 federal voting rights bill, Ike made the first crucial steps towards what ultimately resulted in the landmark civil rights legislation of the 1960’s.
At the end of his presidency, Ike made an historic Farewell Address to the nation, warning with great prescience of the dangers of a growing military/industrial complex. His presidency complete, the nation prosperous and strong, Eisenhower retired to his farm at Gettysburg. No speaking tours or celebrity television appearances for Ike. Just a humble and dignified retirement for this man who spent his entire adult life in service to his country.

And so we return to the question of why Eisenhower – a titan of the 20th century – is an almost forgotten American in the 21st? Part of it may be because he was never entirely comfortable with the media. FDR was a gifted public speaker and his sonorous voice had perfect pitch on the radio. JFK was youthful, handsome, and charismatic – a media rock star. And Reagan was the “Great Communicator” – a master of television long before he was even elected President. Not Ike. His public speaking was mediocre, marred by his sometimes scrambled syntax. His head was bald, his suits were gray, and his wonderful wife was neither young nor glamorous. The camera was not always his friend.

But what emerges from any fair and balanced examination of Eisenhower’s presidency is that this man truly understood America, the fundamental aspirations of his fellow citizens, and the importance of steady, if understated, leadership in a world where nuclear war was always a threat but must never be an option. He instinctively knew that America required time to heal after three wars in 40 years. With uncanny foresight he saw that our economy had enormous potential for expansion, but that a new generation of Americans needed the time and space that only peace could give to re-build their lives, their careers, and their futures.

Eisenhower was a political centrist who understood that he needed to work with both political parties in order to move his agenda forward. He never publicly denigrated Democrats who sometimes opposed parts of his legislative agenda. Like any effective CEO, when there was a legislative deadlock, he brokered meetings that resolved the impasse. He believed in the integrity of compromise and, over time, the then Democratic Majority Leader, Lyndon Johnson, became one of his greatest admirers. His was an example of effective political leadership that should be studied by both parties in Washington today.

I have always liked Ike – – the warrior who waged peace. As more historians take a closer look at Eisenhower in retrospect, I believe that he will continue to rise in the ranks of American presidents. And that well deserved recognition will be far more important than any new monument or memorial in Washington.