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INTRODUCTION

In this edition of the Creighton International and Comparative Law Journal, we are bringing our readers three articles focused on various International Topics. These topics are ones that are always prominent and always changing.

This Issue starts with an article that compares industry oversight in the United States to that of the oversight in the European countries. The second article, a Featured Note from William A. Wilcox Jr. & Matthew S. Tilghmane, discusses real estate interests for military projects in overseas contingency environments and the difficulties that come with securing such real estate. The article then shifts focus to the importance of voting and discusses whether Federal oversight is still needed.

We hope our readers will find these articles interesting and educational. We attribute the success of this Journal to the hard work and dedication of its writers, staff, and faculty at Creighton University School of Law. I hope you enjoy this issue of the Creighton International and Comparative Law Journal.

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The Cosmetic Industry: Comparing The Industry Oversight In The European Union And The United States

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I. INTRODUCTION

The United States Food and Drug Administration ("FDA") oversees the regulation of food, drugs, cosmetics, biologics, medical products, and tobacco in the United States ("U.S."), while in the European Union ("EU") the European Commission ("EC"), executive branch of the EU, is responsible for proposing legislation and implementing decisions related to the cosmetic industry.[1] The FDA was given authority to control cosmetics in 1938 through the passage of the Federal Food, Drug, and Cosmetic Act ("FDC Act") and the EC was given authority to control finished cosmetic products under the Council Directive 76/768/EEC of July 1976 ("Council Directive of 1976").[2] Since 1938 the FDC Act has been amended many times, however, no such amendments have changed the FDA's regulatory power over cosmetics.[3] On the other hand, the Council Directive of 1976 is no longer valid law today and was repealed by Regulation (EC) No. 1223/2009 ("EC Regulation").[4]

Despite the FDA's failure to the bring the FDC Act up-to-date, the EC Regulation attempts to take into consideration the latest technological developments (e.g., nanomaterials) and continues to reinforce product safety.[5] The EU continues to monitor harmful toxins to protect consumers, while the U.S. continues to ignore these harmful toxins and cause harm to the U.S. consumers.[6]

1 Peter Barton Hutt, et al., Food and Drug Law Case and Materials, 4th Ed., 77 (2014); *see also* Cosmetics Info, U.*S. and EU Cosmetic Regulation*, (September 5, 2019), https://cosmeticsinfo.org/cosmetics-regulation.
2 *Id.*
3 *See* Commission Regulation 1223/2009, 2009 O.J.L (342) 59; *see generally* 21 U.S.C §§ 361-364.
4 *Id.*
5 European Commission, *Legislation*, (September 5, 2019), https://ec.europa.eu/growth/sectors/cosmetics/legislation_en.
6 Alyssa Katzenelson, et al., *On Cosmetics Safety, U.S. Trails More than 40 Nations*, (September 5, 2019), https://www.ewg.org/news-and-analysis/2019/03/cosmetics-safety-us-trails-more-40-nations.

This paper will compare the FDA's regulatory power over cosmetics, or lack thereof, with the EC's regulatory power. For example, the FDA has minimal authority over labeling, ingredients, and manufacturer facilities, while the EC has more authority over such measures.

II. Legal Authority Over The Cosmetic Industry

A. U.S. LEGAL AUTHORITY

The FDC Act was enacted in 1938 which gave the FDA power to regulate the cosmetic industry and no such amendments have been passed since 1938 that affect their power over cosmetics.[7] Prior to the enactment of the 1938 FDC, the FDA did not have the authority to regulate cosmetics.[8] The FDC Act defines a "cosmetic" as:

> (1) articles intended to be rubbed, poured, sprinkled, sprayed on, introduced into, or otherwise applied to the human body … for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such articles; except the term shall not include soap.[9]

Examples of cosmetics includes, but is not limited to, skin moisturizers, perfumes, lipsticks, fingernail polish, eye and facial makeup, cleansing shampoos, hair dye, and deodorants.[10] Products that fit within this definition are treated as cosmetics and are subject to the FDA's cosmetic regulations, specifically the FDC Act.[11] However, products can be dual-classified as both drugs and cosmetics when the product has more than one intended use and fits within the definition of both a drug and cosmetic.[12] Examples of dual-classified products include anti-dandruff shampoo, antiperspirant deodorant, hair growth products, wrinkle remover, and moisturizer.[13] In the event that a product is dual-classified as both a drug and cosmetic, the product is subject to the

7 *See generally* 21 U.S.C §§ 361-364, *supra* note 3.
8 *Id.*
9 *See generally* 21 U.S.C § 321(i).
10 *Id.*
11 *See* Hutt, *supra* note 1 at 78.
12 *Id.* at 110-113.
13 *Id.* at 117.

requirements of both categories (e.g., labeling, ingredients, and other approval process requirements).[14]

Cosmetics are the least intensively regulated class of products under the FDA's authority.[15] Unlike drugs, the FDA does not require cosmetics to go through pre-market approval before entering interstate commerce.[16] The FDA employs minimal requirements over the labeling of cosmetic products and the ingredients which can be contained within such products.[17] Despite the FDA's lack of oversight over cosmetics, the cosmetic industry is a $70 billion per year industry.[18]

B. EU LEGAL AUTHORITY

Cosmetics in the EU are discussed in the EC Regulation, which was enacted in 2009.[19] Such Regulation governs cosmetic products made available on the market, which is much broader than the FDA's definition of cosmetics.[20] "Cosmetic products" means:

> any substance or mixture intended to be placed in contact with the external parts of the human body (epi- dermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance, protecting them, keeping them in good condition or correcting body odours.[21]

Examples of cosmetics include, but is not limited to, lotions, skin products, soaps, facemasks, bath products, toiletries, deodorant, sunscreen, and the like.[22] The EU does not classify products as

14 *Id.* at 110.
15 *Id.*
16 *Id.* at 109.
17 FDA, *Cosmetic Labeling Regulations,* (April 10, 2019), https://www.fda.gov/Cosmetics/Labeling/Regulations/default.htm.
18 Statista, *Revenue of the leading 20 beauty manufacturers worldwide in 2018 (in billion U.S. dollars)*, (April 10, 2019), https://www.statista.com/statistics/243871/revenue-of-the-leading-10-beauty-manufacturers-worldwide/.
19 *See generally* EC Regulation, *supra* note 3
20Research Gate, *Better Safe Than Sorry the Impact of the EU-US Negotiations Under TTIP on the Regulation of Cosmetic Products,* (September 5, 2019), https://www.researchgate.net/publication/292355411_Better_Safe_Than_Sorry_The_Impact_of_the_EU-US_Negotiations_under_TTIP_on_the_Regulation_of_Cosmetic_Products.
21 EC Regulation, *supra* note 3 at art. 2 (1)(a).
22 Export.gov, *The EU Cosmetics Regulation*, (September 9, 2019), https://www.export.gov/article?id=The-EU-Cosmetics-Regulation.

being dual-classified, as the U.S. does.[23] For example, sunscreen containing bug repellant is either a cosmetic or biocide in the EU.[24] By way of another example, anti-cavity toothpaste is considered a cosmetic in the EU, however, in the U.S. it is regulated as an over the counter ("OTC") drug.[25] It is the responsibility of the U.S. exporters to correctly classify the product according to the laws of the EU Member States. Exports may consider: (i) purpose and use of the product; (ii) marketing of the product; and (iii) ingredients used to manufacturing the product.[26] The difference in definitions creates obstacles for companies who market their products in both the U.S. and EU.[27]

The EC Regulation is binding on all Member States and is enforced at a national level.[28] Each Member State of the EU has a competent authority that is responsible for upholding compliance with the EC Regulation.[29] However, the EC Regulation is much more comprehensive and up-to-date with today's technological advancements compared to the FDC Act.[30] For example, more than 1300 ingredients are banned in the EU, while only eleven are banned in the U.S.[31] By way of another example, the EC Regulation requires all products marketed in the EU to be registered before being placed on the market, unlike the U.S.'s voluntary registration protocol.[32] Further, the EU has a General Product Safety Directive ("GPSD") that regulates RAPEX, an EU rapid alert system for facilitating the exchange of information between the Member States and the EC with regard to product recall.[33] Overall, the EC Regulation attempts to

[23] *See generally Id.*
[24] *See generally* Export.gov, *supra* note 22.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] Commission Regulation 1223/2009, art. 14, 2009 O.J.L (342) 59, *supra* note 3 at p. 1.
[29] *Id.*
[30] *See generally id.*
[31] Oliver Milman, *The US allows 1,300 chemicals banned by Europe to be used in cosmetics. Why?,* (September 10, 2019), https://www.msn.com/en-us/news/us/the-us-allows-1300-chemicals-banned-by-europe-to-be-used-in-cosmetics-why/ar-AABJ9mt.
[32] European Commission, *Cosmetics*, (September 9, 2019), https://ec.europa.eu/growth/sectors/cosmetics_en.
[33] Cosmetics Europe, *Compliance with Regulation 1223/2009 on Cosmetic Products_Roles and Responsibilities Along the Supply Chain,* May 4, 2019), Compliance_with_regulation_1223-2009_new.pdf.

protect consumer safety and is consistently monitoring the state of the cosmetic industry to bring the laws up-to-date.

III. Labeling Requirements

A. U.S. LABELING REQUIREMENTS

The FDA requires cosmetics to abide by minimal labeling requirements, however, the labeling does not need to be approved before the product enters the market.[34] The FDA prohibits the marketing of adulterated or misbranded cosmetics in interstate commerce.[35] The labeling must be truthful such that consumers are not misled.[36] A cosmetic is considered misbranded if the label is false or misleading, the label fails to provide the required information, or if the label information is not properly displayed.[37] It is the responsibility of the manufacturer and/or distributor to ensure the cosmetic products are properly labeled, rather than the cosmetic company itself.[38] Including the label "FDA APPROVED" on cosmetics is false and/or misleading and is prohibited.[39] The FDA does not approve products, so such label is misleading to the consumers.[40]

The FDA distinguishes between a principle display panel and an information panel when outlining the labeling requirements.[41] A principle display panel ("PDP) is the part of the label that is most likely displayed or examined under customary conditions of display for sale.[42] On the other hand, an information panel is a panel that can accommodate label information where the consumers are likely to see it.[43] The PDP must include an identity statement that indicates the nature and use

[34] 21 U.S.C §§ 321-392.
[35] *Id.*
[36] *Id.*
[37] *See* FDA, *supra* note 17.
[38] *Id.*
[39] *See generally* 21 CFR 710.8.
[40] *Id.*
[41] *Id.*
[42] *See generally* 21 CFR 701.10.
[43] *Id.*

of the product and an accurate statement of the net quantity of contents.[44] The identity statement must indicate the nature and use of the product in terms of the name commonly understood by the public or may include an illustration.[45] The net quantity of contents must be in terms of weight, measurement, numerical count, or a combination of such.[46] The information panel must include the following: (i) name and place of business, (ii) distributor statement, (iii) material facts, (iv) warning and caution statements, and (v) ingredients.[47] The warning and caution statements must be prominent and conspicuous.[48] If the cosmetic product may be hazardous to consumers the product must bear appropriate label warnings.[49] For example, if the product is flammable the product must bear the appropriate flammable product warning label required by law.[50] The ingredients must appear in descending order of predominance.[51] The ingredients must be listed in font that is no less than 1/16 inches in height and without obscuring design, vignettes, or crowding.[52] The use of established labeling names (also known as specific ingredients) is permissible if not misleading to consumers, for example, trichlorofluoromethane may be labeled as Chlorofluorocarbon 11.[53] All labeling information required above must be in English and the only exception to this is for products distributed solely in the United States ("U.S.") territory where the predominant language is different than English.[54]

[44] *Id.*
[45] *Id.* at § 701.11.
[46] *Id*. at § 701.13.
[47] *See generally* 21 CFR 700-740.
[48] 21 CFR 700.
[49] 21 CFR 740.1.
[50] *Id.*
[51] *Id.* at § 701.3.
[52] *Id.*
[53] *Id.*
[54] *Id.* at § 701.2(b).

Often cosmetic companies include labels such as "alcohol free" or "organic" to enhance the marketability of the product.[55] Such labels can be misleading to consumers because the industry definition and consumer understood definition differs.[56] "Alcohol free" means that the product does not contain ethyl alcohol, however, as a chemical family alcohol does not just refer to only ethyl alcohol.[57] The cosmetic product may still contain other alcohols such as cetyl, stearyl, or the like.[58] "Organic" has no legal definition and is thought to be safer by consumers.[59] Products that are labeled "organic" are subject to the laws of the United States Department of Agriculture ("USDA") and FDA.[60] The USDA regulates the organic claim, while the FDA regulates the cosmetic portion (e.g., labeling and safety requirements).[61]

The FDA does not require cosmetic companies or manufacturers to print expiration dates on the labels of cosmetic products.[62] It is the responsibility of the manufacturer to determine the shelf life for products as part of their responsibility to substantiate product safety.[63] A cosmetic's shelf life generally means the length of time you can expect a product to look and act as expected and to be safe for use.[64] Cosmetics begin to degrade over time and often consumer's behavior aids in the degradation process. For example, dipping a finger in the product introduces microorganisms like bacteria and fungi into the product, which affects the preservatives in the products.[65]

55 *See generally* FDA, *"Alcohol Free"*, (April 11, 2019), https://www.fda.gov/cosmetics/cosmetics-labeling-claims/alcohol-free.; *see also* FDA, "Organic" Cosmetics, (April 11, 2019), https://www.fda.gov/cosmetics/cosmetics-labeling-claims/organic-cosmetics.
56 *Id.*
57 FDA, *"Alcohol Free"*, (April 11, 2019), https://www.fda.gov/cosmetics/cosmetics-labeling-claims/alcohol-free.
58 *Id.*
59 FDA, "Organic" Cosmetics, (April 11, 2019), https://www.fda.gov/cosmetics/cosmetics-labeling-claims/organic-cosmetics.
60 *Id.*
61 *Id.*
62 FDA, *Shelf Life and Expiration Dating of Cosmetics*, (April 10, 2019), https://www.fda.gov/cosmetics/labeling/expirationdating/default.htm.
63 *Id.*
64 *Id.*
65 *Id.*

Temperature and exposure to sunlight and heat can cause changes in the color, texture, and smell of the product.[66] All of these external sources negatively impact the product and reduce the shelf life of the product.[67]

B. EU LABELING REQUIREMENTS

Chapter VI (titled "Consumer Information") governs the requirements for cosmetic containers and packaging.[68] The label of the product must include:

> (i) the name or registered name and address of the responsible person; (ii) the nominal content at the time of packaging, given by weight or volume; (iii) date of minimum durability; (iv) precautions observed in use and listed in Annex III through VI, as well as, precautions for professional use products; (v) batch number of manufacture; (vi) function of the product; (vii) ingredient list; (viii) impurities in the raw materials used; and (ix) subsidiary technical materials used but not present in the final product.[69]

The aforementioned information must be indelible, easily legible, and in visible lettering, similar to the U.S.[70] With respect to (iii), products with a lifespan longer than thirty months must show a period after opening time.[71] If the lifespan is shorter than thirty months then the product must show a "best before the end of" date.[72]

Article 20 prohibits product claims which are false or misleading to the consumers.[73] Like the U.S., the EU does not want consumers being deceived as to the function of the cosmetic products or characteristics therein.[74] The Article tasks the EC with adopting a list of common criteria for claims to be used in cosmetic products, in cooperation with the Scientific Committee

66 FDA, *Shelf Life and Expiration Dating of Cosmetics*, (April 10, 2019), https://www.fda.gov/cosmetics/labeling/expirationdating/default.htm.
67 *Id.*
68 *See generally* Chapter VI of EC Regulation.
69 Commission Regulation 1223/2009, art.19, 2009 O.J. L (342) 59.
70 *Id.*
71 *See* FDA, *supra* note 17.
72 *Id.*
73Commission Regulation 1223/2009, art. 20, 2009 O.J. L (342) 59.
74 *Id.*

on Consumer Safety (SCCS).[75] Claims which are not in conformity with the common criteria will require the EC to ensure compliance with the Member States.[76]

Unique to the EU, the EC Regulation requires the responsible person, a natural or legal person within the EU who shall ensure compliance with the relevant obligations set out in the EC Regulation, to keep a product information file ("PIF") for the product.[77] The PIF is required for each product that is placed on the EU market and its purpose is to gather relevant information on the product.[78] The PIF helps Member States to ensure that products entering the market are in compliance with the EC Regulation.[79] The PIF must be kept for 10 years after the last batch was placed on the market.[80] There are five information requirements for the PIF.[81] The PIF must include:

> (a) description of the cosmetic product to enable the PIF to be attributable to the product; (b) cosmetic product safety report; (c) description of the method of manufacturing and statement on compliance with GMPs; (d) where justified by the nature or the effect of the cosmetic, proof of the effect claimed on the product; and (e) data on any animal testing performed by the manufacturer.[82]

The responsible person must make the PIF readily available and be in a language understood by the Member States.[83] The responsible person shall make the product information file readily accessible in electronic or other format at his address indicated on the label to the competent authority of the Member State in which the file is kept.[84]

[75] *Id.*
[76] *Id.*
[77] *See generally,* Commission Regulation 1223/2009, art.11, 2009 O.J. L (342) 59.
[78] Ecomundo., *How to Create Your Cosmetic Product Information File?,* (September 9, 2019), https://www.ecomundo.eu/en/blog/product-information-file-cosmetics-guide.
[79] *Id.*
[80] Commission Regulation 1223/2009, art. 11, 2009 O.J. L (342) 59.
[81] Ecomundo, *supra* note 78.
[82] Commission Regulation 1223/2009, art. 11, 2009 O.J.L (342) 59.
[83] *Id.*
[84] *Id.*

IV. Ingredients

A. U.S. INGREDIENT REQUIREMENTS

Cosmetic products cannot contain ingredients that make the product harmful to the consumers when used according to the directions on the label.[85] Cosmetics may include any ingredient provided that:

> (i) the ingredient and the finished cosmetic product are safe under labeled or customary condition;
> (ii) properly labeled; and
> (iii) use of the ingredient does not otherwise cause the cosmetic to be adulterated or misbranded under the laws that FDA enforces.[86]

However, the FDA does not require cosmetic products and ingredients to go through an "approval process" before hitting the shelves.[87] If a product is dual-classified it must meet the pre-market approval requirements for drugs.[88] The FDA has regulations that prohibit or restrict the use of a number of ingredients for use in cosmetics.[89] For example, the FDA prohibits the use of Bithionol, Chlorofluorocarbon propellants, Chloroform, Halogenated salicylanilides, Hexachlorophene, Mercury, Methylene chloride, cattle materials, and the like.[90] However, the FDA does not have the authority to require cosmetic manufacturers to reveal their safety data to the FDA.[91] The burden is on the FDA to prove that a particular product or ingredient is harmful when used according to the label directions.[92]

85 FDA, *Prohibited & Restricted Ingredients in Cosmetics*, (April 9, 2019), https://www.fda.gov/cosmetics/cosmetics-laws-regulations/prohibited-restricted-ingredients-cosmetics.
86 FDA, *Guidance Regulation of* Cosmetics, (April 9, 2019), https://www.fda.gov/Cosmetics/GuidanceRegulation/LawsRegulations/ucm127406.htm.
87 *Id.*
88 FDA, *Premarket Approval (PMA),* (April 9, 2019), https://www.fda.gov/medical-devices/premarket-submissions/premarket-approval-pma.
89 FDA, *Guidance Regulation of* Cosmetics, (April 9, 2019), https://www.fda.gov/Cosmetics/GuidanceRegulation/LawsRegulations/ucm127406.htm.
90 *Id.*
91 *See* FDA, *supra* note 85.
92 *Id.*

A cosmetic that includes a "Fragrance" and/or "Flavor" ingredient can simply list the ingredients as "Fragrance" and/or "Flavor" on the label.[93] The FDA does not require the cosmetic company to disclose the fragrance and/or flavor formulas because those formulas may be "trade secrets."[94] Often individuals may be allergic or sensitive to certain components of the fragrance formula, however, the FDA does not have the legal authority to require allergen labeling for cosmetics.[95] A commonly used chemical found in fragrance products is diethyl phthalate ("DEP").[96] The health effects of DEP in cosmetics is not clear, however, at high levels the chemical may have a negative impact on reproductive health.[97] Due to these health concerns, the FDA has been closely monitoring the levels of DEP in cosmetics and has developed an analytical method for determining the levels of DEP in products.[98] The FDA advises consumers that if they are worried about chemicals like DEP in products they should avoid products with the label "Fragrance" in the ingredient list.[99]

B. EU INGREDIENT REQUIREMENTS

Chapter IV of the EC Regulation (titled "Restrictions for Certain Substances") puts a number of restrictions on substances used in cosmetics.[100] For example, Article 14 prohibits the use of colorants, substances listed in Annex II, preservatives, ultraviolet ("UV") filters, and substances that are not in accordance with Annex III.[101] Annex II lists over 1300 substances that are prohibited, for example, phenol, nickel, asbestos, and crude and refined coal tars.[102] The U.S.

93 FDA, *Fragrances in Cosmetics*, (May 1, 2019), https://www.fda.gov/cosmetics/cosmetic-ingredients/fragrances-cosmetics#labeling.
94 *Id.*
95 *Id.*
96 *Id.*
97 FDA, *Phthalates*, (May 1, 2019), https://www.fda.gov/cosmetics/cosmetic-ingredients/phthalates.
98 *Id.*
99 *Id.*
100 *See generally* Commission Regulation 1223/2009, ch. IV, 2009 O.J.L (342) 59.
101 Commission Regulation 1223/2009, art. 14, 2009 O.J.L (342) 59.
102 Commission Regulation 1223/2009, annex II, 2009 O.J.L (342) 59.

has banned only a handful of ingredients, including but not limited to, bithionol, chlorofluorocarbon propellants, chloroform, hexachlorophene, mercury compounds, methylene chloride, and vinyl chloride.[103] Despite the dangers of asbestos, U.S. had not banned such ingredient in cosmetics.[104] There have been a number of lawsuits involving asbestos in cosmetics, including, the Johnson & Johnson baby power case and the Claire's case.[105]

The EC Regulation also outlines the requirements for including ingredients on cosmetic labels.[106] Ingredients must be titled "INGREDIENTS" and follow a number of other requirements.[107] For example, the ingredients must be listed in order of weight in the product. This is important for those who have allergies to ingredients. The names used in the ingredients list must be from the INCI name system, which ensures that there is consistency between all cosmetic products in the EU. Perfume mixtures must be labeled as "parfume", except for certain specified perfume ingredients, and flavors may be listed as "aroma" Colors must be labeled using the Color Index ("CI") Number, which is an international naming system. For example, a CI number may include CI 15580, which is used for red.[108]

The Scientific Committee on Consumer Safety (SCCS) provides opinions on health and safety risks of non-food consumer products, including cosmetics.[109] Often the SCCS generates reports in response to a specific request.[110] The SCCS is responsible for reviewing all ingredients

[103] FDA, *Prohibited & Restricted Ingredients in Cosmetics*, (April 9, 2019), https://www.fda.gov/cosmetics/cosmetics-laws-regulations/prohibited-restricted-ingredients-cosmetics.
[104] *Id.*
[105].Alyse Shorland, *Episode: 'v. Johnson & Johnson*, (April 9, 2019), https://www.nytimes.com/2019/10/04/the-weekly/johnson-johnson-baby-powder-cancer-lawsuits.html.
[106] Commission Regulation 1223/2009, 2009 O.J.L (342) 59.
[107] Commission Regulation 1223/2009, art. 19, 2009 O.J.L (342) 59.
[108]EU Open Data Portal, *Cosmetic Ingredient Database—List of Colorants Allowed in Cosmetic Products*, (May 1, 2019), https://data.europa.eu/euodp/en/data/dataset/cosing-list-of-colorants-allowed-in-cosmetic-products/resource/8245f050-761a-49f3-829a-d878f3b17b63.
[109] European Commission, *Scientific on Consumer Safety (SCS),* (May 1, 2019), https://ec.europa.eu/health/scientific_committees/consumer_safety_en.
[110] *Id.*

forward to them by the EU for consideration and determination of safety usage.[111] For example, category 2 CMR substances (e.g., UV filters) may only be used in cosmetics if approved by the SCCS.[112] The SCCS ensures that the ingredients used are safe and works to promote the safety of consumers, unlike in the U.S.

V. Recall and Inspection Power

A. U.S. RECALL AND INSPECTION POWER

The FDA does not have recall power, instead cosmetic companies may voluntarily recall their products if them deem necessary.[113] The FDA can request that a product be recalled if the company is not willing to voluntarily recall such product.[114] However, the FDA does have an active role in recalls.[115] For example, the FDA monitors the progress of a recall and conducts their own audit checks to verify the recall's effectiveness.[116] The FDA evaluates the health hazard presented by the recalled product and assigns a classification (e.g., Class I-III) to indicate the level of danger posed to consumers.[117] Class I classifications are assigned to products that will cause serious adverse health consequences, or even death.[118] Class II products are those which may cause temporary or medically reversible adverse health consequences.[119] Class III products are those in which the product is likely to cause adverse health consequences.[120] In the event that the FDA requests a recall, the FDA develops a recommended strategy for the cosmetic company which

111 Commission Regulation 1223/2009, annex VI, 2009 O.J.L (342) 59; see also Commission Regulation 1223/2009, art. 15, 2009 O.J.L (342) 59.
112 *Id.*
113 FDA, *FDA Recall Policy for Cosmetics*, (April 12, 2019), https://www.fda.gov/cosmetics/cosmetics-recalls-alerts/fda-recall-policy-cosmetics.
114 *Id.*
115 *Id.*
116 21 CFR 7.53.
117 *See* 21 CFR 7.3(m); *see also* 21 CFR 7.41.
118 21 CFR 7.3(m).
119 *Id.*
120 *Id.*

includes how the FDA expects the recall to be carried out and the necessity for a press release.[121] If the company develops a recall strategy on their own, the FDA reviews and comments on such strategy.[122]

The cosmetic company does have their own responsibilities when it comes to recalls.[123] The company is expected to notify the customers and the notification should include the hazard presented by the product and the recall strategy developed for the product.[124] When initiating a recall, the company should notify the appropriate FDA district so that the FDA is able to ensure that recall protocols are being followed.[125] The company should submit periodic recall status reports to the appropriate FDA district to assess the progress of the recall.[126] The company is responsible for the disposition of the recalled product, whether that means the product is destroyed or the product is brought into compliance with the FDA regulations.[127]

The FDA does have inspection power over manufacturing facilities to ensure cosmetic product safety.[128] Often the FDA uses their inspection power to determine whether products are adulterated or misbranded.[129] The manufacturing facilities do not have to follow any Good Manufacturing Procedures ("GMP") because there are no such GMP guidelines for cosmetic manufacturers.[130] The FDA has issued guidance documents to suggest GMP guidelines, but such documents are not binding on the manufacturers.[131]

121 *See* FDA, *supra* note 113.
122 21 CFR 7.42(a)(2).
123 *See generally* 21 CFR Part 7.
124 *Id.* at § 7.49.
125 *Id.* at § 7.46(d).
126 *Id.* at § 7.53.
127 *Id.* at § 7.55.
128 FDA, *Inspection of Cosmetics,* (April 9, 2019), https://www.fda.gov/cosmetics/cosmetics-compliance-enforcement/inspection-cosmetics.
129 *Id.*
130 *Id.*
131 *Id.*

Cosmetics that are imported into the U.S. are often not inspected or sampled upon entry into the U.S.[132] The FDA inspects less than 1% of the three million products that come into the U.S.[133] Of those products inspected, about 15% are found to be contaminated or contain dangerous ingredients.[134] The U.S. Customs and Border Protection ("CBP") works closely with the FDA to ensure that adulterated or misbranded products are not let into the country.[135] The CBP monitors the imported product requirements and destroys products that might be a danger to U.S. consumers.[136] A list of "Import Refusals" are listed on the FDA's website as well as "Import Alerts" to advise inspectors about the current trends in violations.[137]

B. EU RECALL AND INSPECTION POWER

The EC Regulation has an enhanced focus on product safety and has had an impact on the amount of recalls.[138] Unlike the FDC Act, Article 27 of the EC Regulation gives competent authorities the ability to withdraw, recall, or restrict availability of products that present or could present a serious risk to human health.[139] The competent authorities are required to immediately notify the EC and competent authorities of other Member States.[140] The EC will determine whether the provisional measures were justified and consult interested parties and the SCCS if needed.[141]

[132] NCBI, *Appendix E, The U.S. Food and Drug Administration and Imported Food Safety*, (May 1, 2019), https://www.ncbi.nlm.nih.gov/books/NBK220404/.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] CBP, *Importing into the United States A Guide for Commercial Importers*, (May 1, 2019), https://www.cbp.gov/sites/default/files/documents/Importing%20into%20the%20U.S.pdf.
[137] *Id.*
[138] SGS, *Insight into Cosmetics Recalls Since EU Cosmetic Regulation Implementation*, (May 1, 2019), https://www.sgs.com/en/news/2014/12/insight-into-cosmetics-recalls-since-eu-cosmetic-regulation-implementation.
[139] Commission Regulation 1223/2009, art. 27, 2009 O.J. L (342) 59.
[140] *Id.*
[141] *Id.*

RAPEX is the EU's rapid system for identifying dangerous products that may pose serious health and/or safety risks to consumers.[142] In 2018 alone, the system had 2257 alerts across the EU and 4050 follow-up actions.[143] The system allows Member States to monitor the products and identify recall categories that pose a threat.[144] For example, the system had identified 9 recall categories that posed a threat to consumers, including, heavy metals, preservatives, microbiological content, prohibited substances, hydroquinone, methyl methacrylate, hydroxide/monomers/acid, phthalates, and hydrogen peroxide.[145]

The EC Regulations requires that all cosmetic products placed on the EU market comply with GMPs, unlike the FDC Act.[146] The GMPs are set by the ISO 22716 standard ("ISO 22716"), which defines that quality and reproducibility of cosmetics.[147] The purpose of the ISO 22716 GMPs is to ensure access to the EU market and validate the compliance of the EC Regulation.[148] An added declaration of compliance associated with the manufacturing facility to required as part of the PIF.[149]

VI. Registration

A. U.S. REGISTRATION REQUIREMENTS

Although the FDA does not require cosmetic companies to submit safety data and other information to the FDA, the companies may voluntarily register their products through the FDA's

[142] HSA, *EU Weekly RAPEX Alerts,* (May 1, 2019), https://www.hsa.ie/eng/Safety_Alerts/EU_Weekly_RAPEX_Alerts/.
[143] European Commission, *Rapid Alert System Statistics*, (May 1, 2019), http://81.247.254.96/QvAJAXZfc/opendoc.htm?document=Rapid_Alert_System_statistics.qvw&host=QVS%40vsrv1463&anonymous=true.
[144] SGS, *Insight into Cosmetics Recalls Since EU Cosmetic Regulation Implementation*, (May 1, 2019), https://www.sgs.com/en/news/2014/12/insight-into-cosmetics-recalls-since-eu-cosmetic-regulation-implementation.
[145] *Id.*
[146] Ecomundo, *Good Manufacturing Practice (GMP) for Cosmetic Products: ISO 22716,* (May 1, 2019), https://www.ecomundo.eu/en/blog/gmp-cosmetics-good-manufacturing-practice
[147] *Id.*
[148] *Id.*
[149] *Id.*

Cosmetic Registration Program ("VCRP").[150] The VCRP only applies to cosmetic products being sold to consumers in the U.S. and does not apply to those products sold "for professional use only."[151] It also does not apply to products that are not for sale, which includes samples, free gifts, and the like.[152]

The VCRP helps the FDA by carrying out its responsibility to regulate the cosmetic industry, because the FDA is not granted authority to do so under the current FDC Act.[153] The voluntary nature of the program provides the FDA with the best information available about the products and ingredients, frequency of use, and businesses engaged in their manufacturing and distribution.[154] This information allows the FDA to evaluate the products on the market and ensure that consumers are not harmed.[155] Furthermore, the information has been used by the Cosmetic Ingredient Review ("CIR") to assist the CIR Expert Panel in establishing their priority for assessing ingredient safety.[156]

B. EU REGISTRATION REQUIREMENTS

The Cosmetics Product Notification Portal ("CPNP") is the centralized system of notification in the EU.[157] The purpose of the CPNP is to provide a tool for competent authorities to monitor products on the EU market.[158] Specifically, the CPNP provides easy access to the contact details of the responsible person and the address where the PIF is accessible.[159]

150 FDA, *Cosmetics & U.S. Laws*, (May 2, 2019), https://www.fda.gov/cosmetics/cosmetics-laws-regulations/cosmetics-us-law#Cosmetic_Registration.
151 *See generally Id.* at § 710; *see also Id.* at § 720.
152 *Id.*
153 *Id.*
154 Federal Register, vol. 73, 76360; see also Federal Register vol. 69, 9339.
155 *See* FDA, *supra* note xcvii.
156 Federal Register, vol. 73, 76360.
157 Cosmetics Europe, *Compliance with Regulation 1223/2009 on Cosmetic Products_Roles and Responsibilities Along the Supply Chain,* May 4, 2019), Compliance_with_regulation_1223-2009_new.pdf.
158 *Id.*
159 *Id.*

The EU has a mandatory registration protocol, while the U.S. has a voluntary protocol.[160] The EU requires that all products that are to be marketed in the Member States of the EU to be registered before being placed on the market.[161] This allows the EU to monitor the products being placed on the market before potentially harming consumers.[162] The retroactive system of the U.S. waits until consumers are harmed before monitoring the products.[163] The responsible person must submit the following information to the EC:

> (a) category of the product and its name(s); (b) name and address of the responsible person where the PIF is accessible; (c) country of origin in the case of import; (d) Member State in which the product is to be placed on the market; (e) contact details of a physical person to contact; (f) presence of substances in the form of nanomaterials; (g) name and Chemicals Abstract Service ("CAS") or EC number of substances classified as carcinogenic, mutagenic or toxic for reproduction (CMR); and (h) frame formulation allowing for prompt and appropriate medical treatment in the event of difficulties.[164]

These requirements make Member States of the EU responsible for market surveillance at a national level.[165]

VII. Conclusion

The FDC Act of 1938 should have been amended many years ago to cure the shortfalls of the outdated legislation and align more closely with the EC Regulation. The FDA does not have the power they need over the cosmetic industry to protect consumers from the hazardous chemicals put inside these cosmetics. Cosmetics should not be the least intensively regulated class of products under the FDC Act because of the harm that the products may have on consumer's bodies. The EC Regulation has been amended numerous times as technology advances to protect consumer health and safety, however, the EC Regulation has its shortfalls as well. There is no perfect

160 NHP Consulting, *Product Review and Registration-EU (CPSR/CPNP),* (September 9, 2019), https://www.nhpconsulting.ca/cosmetics/eu-cpsrcpnp/.
161 *Id.*
162 *Id.*
163 *Id.*
164 Commission Regulation 1223/2009, art. 13, 2009 O.J. L (342) 59.
165 *Id.*

cosmetic legislation, however, both legislations should protect consumers and aim to ensure that the products being sold in the respective markets be safe to use.

Special Considerations in Overseas Military Contingency Real Estate Transactions*

William A. Wilcox, Jr.** and Matthew S. Tilghman***

I. Introduction

Securing real estate interests for military projects in a dynamic, overseas contingency environment can pose significant challenges for military commands. The web of potential pitfalls for real estate in contingency settings includes the potential for fraud, waste and abuse, for claims or challenges from third parties if property rights are not carefully secured and costs logically calculated, and even for the commission of crimes by unwitting federal employees under certain circumstances. Commands responsible for acquiring property interests for military projects must ensure legal reviews are provided prior to securing property rights and moving forward with projects in overseas contingency locations. And the military attorneys advising real estate contracting officers must be cognizant of the shifting legal landscape – including operational changes and an evolving mission – that governs the actions they are taking.

II. The Army Corps of Engineers Real Estate Program

Although Congress does not provide authority for federal agencies to purchase land absent specific authority,[1] the military services have broad statutory authority to acquire property interests when necessary to carry out their missions.[2] The Department of Defense has

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* The views expressed herein are those of the authors and do not necessarily reflect the official position of the United States Department of Defense, the Department of the Army, or the U.S. Army Corps of Engineers.

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1 41 U.S.C. § 6301(c).

2 *See, e.g.,* 10 U.S.C. § 2663, which provides limited general authority to each military department to acquire real estate using various methods, including condemnation and acquisition. The statutory limits are refined by DoD

established policies with respect to how and when land can be acquired in fee simple, leased, or withdrawn for military purposes from public domain.[3] In foreign countries, the military services are authorized to obtain leases for up to 10 years "relating to structures that are needed for military purposes other than for military family housing."[4] The Department of Defense has divided the responsibility for engineering services, including real estate services, by global region among the service military construction activities including the Army Corps of Engineers (USACE), the Naval Facilities Engineering Command (NAVFAC), and the Air Force Civil Engineer Center (AFCEC).[5] Under the division of responsibilities, USACE is responsible for real estate activities in contingency or potential contingency areas such as Afghanistan, Iraq and the Middle East, South and Central America, and Sub-Sahara Africa while NAVFAC is responsible for such areas as Somalia and North Africa, Southeast Asia, and areas of the Pacific Ocean.[6]

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policy, which requires that acquisitions of land of more than 1,000 acres, or which has an estimated purchase price or annual lease value of $1 million or more, be approved by the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)). *Dep't of Defense, DoD Instruction 4165.71, Real Property Acquisition*, para. 6.1 (Jan. 6, 2005) [hereinafter DoDI 4165.71]. With respect to military construction activities in some circumstances, the services may also enter into agreements with private contractors for the "lease-purchase" of facilities for a term not to exceed 32 years, with title vesting in the United States at the end of the term. 10 U.S.C. § 2812.

[3] See DoDI 4165.71, para. 6.6. For a discussion of authorities pertaining to withdrawn public lands, which is beyond the scope of this article, *see* William A. Wilcox, Jr. & Andrew J. Vliet III, *The Engle Act and Military Land Withdrawals: A Blueprint for Inter-Agency Cooperation*, 32 Land & Water L. Rev. 461 (1997).

[4] 10 U.S.C. § 2675. The time period may be for up to 15 years in Korea. For Army activities the lease term is limited to five years. *Dep't of Army, Army Regulation 405-10, Acquisition of Real Property and Interests Therein*, para. 3-3 (1970) [hereinafter AR 405-10]. By contrast, if construction, alteration, or improvement of facilities is proposed, Air Force policy requires the lease term be for "the maximum term allowed" under the statute. *Dep't of Air Force, Air Force Instruction 32-9001, Acquisition of Real Property*, para 6.12 (Sept. 28, 2017) [hereinafter AFI 32-9001]. For authority respecting military housing, see 10 U.S.C. § 2828.

[5] *See*, *Dep't of Defense, Joint Publication 3-34, Joint Engineer Operations*, ch. I, para. 5.h and Appendix D (Jan. 6, 2016) [hereinafter Joint Pub. 3-34].

[6] *Id*., at App. D, Figure D-1.

Within the Army, the Chief of Engineers has staff responsibility over real estate matters overseas.[7] USACE is charged with initiating and maintaining records necessary to administer the real estate program, providing technical advice and assistance to overseas commanders, ensuring that overseas real estate activities are conducted in compliance with established rules, and tracking overseas real estate information.[8] USACE real estate activities are divided into geographic regions, with USACE major subordinate commands holding responsibility for real estate activities within those regions.[9] Under USACE regulations, real estate instruments must be "documented and signed by persons having statutory or actual delegated authority to bind the Government for the action being made."[10] If a Status of Forces Agreement (SOFA), treaty or use agreement has been established with a host nation, terms for land acquired under the USACE real estate program must not conflict with such SOFA, or other binding international agreement.[11] In implementing the real estate program on behalf of another agency, such as the Air Force, USACE generally relies on the process authorities of the agency requesting the real estate work.[12] Under USACE guidance, "[a]s a general matter, USACE will defer to the other agency's interpretation or implementation of its legal authorities so long as the reviewing USACE counsel agrees such an interpretation is reasonable. However, this does not prevent respective counsels from discussing issues or elevating the issue to its chain of command."[13] If

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7 AR 405-10, para. 3-2. *See, also, Dep't of Army, Army Regulation 10-87, Army Commands, Army Service Component Commands, and Direct Reporting Units,* ch.18.
8 *Id.*
9 USACE Transatlantic Division, for instance, is responsible for real estate activities within the United States Central Command (CENTCOM) Area of Responsibility (AOR). *See Dep't of Army, U.S. Army Corps of Engineers, Operations Order 2009-07 (Establish Transatlantic Division (TAD)),* Annex K, Jan. 26, 2008.
10 *U.S. Army Corps of Engineers, Engineer Regulation 405-3-10, Real Estate Planning – Military*, para. 1-3.a (Oct. 31, 2013) [hereinafter ER 405-3-10].
11 *Id.,* at para. 1-2.
12 For Air Force policy regarding real estate acquisitions, see AFI 32-9001. Note, USACE performs the real estate function on a reimbursable basis in accordance with the Economy Act, 38 U.S.C. § 701, and must have independent authority to take any action.
13 ER 405-3-10*,* at para 1-4.

another agency requesting real estate work has no policy or procedure to acquire real estate, then USACE real estate contracting officers may rely on USACE regulations "to fill in a void where the other agency has no policy or procedure that covers the particular issue, unless contrary to the other agency's enabling authority."[14]

To carry out its land acquisition mission, USACE must comply with any clearances, or approvals, required by the Department of Defense.[15] Requirements must be validated through appropriate command channels.[16] For Army projects, USACE may not proceed to acquire real estate interests until legislative authorization is identified, appropriations are available, requirements have been validated by the appropriate approving official, and any necessary Congressional clearances have been obtained.[17] Real estate acquisition projects for the benefit of other departments or agencies must follow their policies and requirements.[18] Prior to soliciting offers and negotiating with landholders, real estate work may entail research of tract ownership data, legal descriptions and mapping, title evidence, and individual tract appraisals.[19]

III. Potential for Fraud, Waste and Abuse

As with many activities in contingency environments, there is a heightened potential for fraud, waste, and abuse with respect to land acquisitions. Acquisitions of real estate interests have been identified as a challenge during contingency deployments.[20] Issues identified in past deployments have included rapid turnover of real estate officers in contingency areas, which can

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[14] *Id.*
[15] *Id*, at para. 2-19.
[16] *Id*., at para. 2-19.b.
[17] *Id*., at para. 2-20.
[18] *Id.*
[19] *Id*., at para. 2-24.
[20] *See, e.g*., *Int'l & Operational Law Dep't, U.S. Army Judge Advoc. Gen. Sch.*, *Operational Law Handbook*, 16, para. IV.g, 263 (2017) [hereinafter *OPLAW Handbook*].

make building relationships in a hostile theater challenging.[21] Army legal commentators have suggested that "[c]oordination and regular communication between JAs and Corps of Engineers (COE) officers after deployment is essential."[22] Under time pressures inherent in contingency operations, there may be a tendency to short circuit established processes with respect to lease valuation or avoid required clearances, including legal review.

The Army claims policy assigns responsibility for real estate claims to USACE.[23] USACE Transatlantic Division has addressed claims arising from Army activities as long as a decade before they were formally raised. In reviewing claims based on historical activities, we have observed that thorough real estate documentation is key to addressing these challenging cases. The veracity of such claims must be carefully scrutinized. Going forward, it is important that real estate officers proceed according to established USACE procedures, including accurate identification of property owners, accurate valuation of properties, close coordination with requesting agencies and their counsel, and a legal review by USACE real estate attorneys.[24] The USACE real estate claims regulation emphasizes that, "[w]here feasible, efforts should be made to minimize the number of requests for money present."[25] The drive to limit claims for use and occupancy by entering into leases with purported landowners, however, can lead to the execution of leases with, and payment of substantial sums of money to, people whose land ownership is legally questionable. Legal review by USACE real estate attorneys is key to ensure that executed instruments comport with established USACE and U.S. government laws and policies and that the government's potential liability is limited to the extent practicable.

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[21] *Id.*, at 20, para. J, 315-16.
[22] *Id.*
[23] *Dep't of Army, Army Reg*. 27-20, Claims, para. 2-15.m (Feb. 8, 2008) [hereinafter AR 27-20].
[24] *See, e.g*., ER 405-3-10, para 1-4.
[25] *U.S. Army Corps of Engineers, Engineer Reg. 405-1-21, Real Estate Claims and Damages*, para 2-1.a (Aug. 14, 2017) [hereinafter ER 405-1-21]. As an example, the regulation suggests that "prompt negotiation of a lease will often avoid the subsequent submission of a claim for use and occupancy of real property." *Id.*

The Army claims regulation notes that in contingency operations "there is a large potential for overlap between contractual property damage claims and noncombatant activity/maneuver claims."[26] Addressing claims arising from real estate issues, Army legal commentators confirm that the claims are normally based in contract. However, they note that not all claims for damage or use of real estate are based on contract.[27] Some claims may be based on tort law and can be considered under the authority of the Foreign Claims Act (FCA).[28] Under the FCA, meritorious claims for property losses, injury, or death caused by U.S. forces may be settled in an amount not more than $100,000, "[t]o promote and maintain friendly relations" with a host nation.[29] Such claims are not compensable if they arose from several scenerios such as: "action by an enemy or … from an act of armed forces of the United States in combat,"[30] contractual matters, certain domestic obligations, and claims that are not in the best interest of the United States to pay or the payment of which would be against public policy.[31]

IV. Potential Fiscal Law Issues

Failure to secure real estate properly for a military project in a contingency environment could arguably run afoul of fiscal law constraints under certain circumstances. Generally, appropriated funds should not be used to make permanent improvements to property not owned by the Government. However, exceptions to this general tenet can be justified under appropriate circumstances. Though it is arguable whether the test would apply to projects in contingency environments overseas, the Comptroller General's decision in *Demolition of the Existing*

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26 AR 27-20, para. 2-15.m. See also, ER 405-1-21, para. 2-1.c.
27 OPLAW Handbook, at 20, para. J.1, 315.
28 *Id.*
29 10 U.S.C. § 2734.
30 10 U.S.C. § 2734(b)(3).
31 *Dep't of Army, Army Reg. 27-20, Claims*, para 10-4 (Feb. 8, 2008).

LaGuardia Air Traffic Control Tower,[32] may be instructive. There, the Comptroller General outlined a four-part test to determine when certain appropriated funds may be expended for permanent alterations to property not owned by the government: (1) the improvements are incidental to and essential for the accomplishment of the purpose of the appropriation; (2) the cost of the improvement is in reasonable proportion to the overall cost of the contract price; (3) the improvements are used for the principal benefit of the government; and (4) the interests of the government in the improvements are protected.[33]

If the government fails to secure real property that addresses the fourth prong of the *LaGuardia* test (i.e., the improvements the government builds are *legally* protected by the proper acquisition of property), then there may be an argument that the government's expenditure on military improvements (i.e., construction) is improper. However, in contingency situations, where the United States military's hold on property interests in a foreign nation may be precarious depending on the United States' overall relationship with the host nation, it is questionable whether this test would apply directly to a real estate acquisition. The Comptroller General, for instance, noting that the concept of 'operational control' necessary to support military construction has not been clearly defined, also opined that the term "should not be construed so narrowly as to exclude overseas facilities over which the U.S. military may, by formal or informal agreement with a foreign government, exercise a large measure of control."[34] However, legal advisors should ensure that the United States is put in the best position possible to protect the government's investment under any given circumstances. This may include taking

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[32] B-286457 (Jan. 28, 2001).

[33] The principle was first cited in *To the Secretary of Health, Education and Welfare*, a case concerning expenditure of funds by the Public Health Service for research at the San Diego Zoo, B-141839 (March 12, 1963). *See also*, *Matter of: Federal Aviation Administration – Permanent Improvements to a Leasehold*, B-239520, 69 Comp. Gen. 163 (Aug. 16, 1990); and *Matter of: Department of the Air Force – Purchase of Decals for Installation on Public Utility Water Tower*, B-301367, 2003 U.S. Comp. Gen. LEXIS 230 (Oct. 23, 2003).

[34] *The Honorable Bill Alexander*, B-213137, 63 Comp. Gen. 422 (June 22, 1984).

appropriate actions to ensure property interests are secured to the greatest extent possible, which could include using a combination of international agreements and land use agreements.[35] USACE counsel and real estate officials have developed a template for real estate documents that can be used, as appropriate, to secure real estate interests under such circumstances.

V. Potential Criminal Implications

Under some circumstances in overseas contingency environments, host nation personnel may attempt to exploit the U.S. government's requirement for use of real estate for personal benefit. In several recent overseas transactions, for instance, it became apparent that the property interest the United States was looking to acquire, which had been promised by the host nation, was subsequently leased by the host nation security forces to a third party corporation, which was controlled by senior officers of the nation's security forces, who may have had a financial interest in the corporation's activities. In essence, senior officers appeared to be contracting with themselves to profit from leases of properties their government had already promised to the United States. Initially, the host nation security forces were looking to USACE to lease directly with the third party, in contravention of agreements made with the host nation's central government. Recognizing the lease transaction to a third party contractor as a way of undercutting the host nation's agreements with the United States, and in light of representations by U.S. government personnel as to the host nation security forces' potentially corrupt reasons for the third-party corporation's involvement, USACE real estate counsel became concerned that USACE civilian employees could potentially face criminal liability if they were to further the objectives of the foreign national officers.

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[35] The Army Corps' Transatlantic Division Real Estate Directorate has employed no cost Land Use Agreements to complement international agreements that apply at certain CENTCOM locations.

In the above scenario, the United States was contemplating entering into leases and procurement contracts on behalf of the United States, which would have been executed by USACE employees with appropriate warrants. The Foreign Corrupt Practices Act,[36] prohibits, in pertinent part, any individual who is a citizen, national, or resident of the United States from making use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to "(1) any foreign official for purposes of: (A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such [individuals] in obtaining or retaining business for or with, or directing business to, any person …."[37] The statute goes on to prohibit "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official … for the purposes of … influencing any act or decision of such foreign official" from influencing such official to obtain or retain business or direct business to a particular individual.[38]

However unlikely in a scenario involving U.S. government employees carrying out their duties in good faith to secure access to military facilities, successful prosecutions under the

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[36] 15 U.S.C. § 78dd-2.
[37] 15 U.S.C. § 78dd-2(a)(1).
[38] 15 U.S.C. § 78dd-2(a)(3).

FCPA have been based upon payments made or benefits conferred through agents and other intermediaries.[39] Thus, the fact that in the contemplated dealings, USACE would make payments to the third party shell company, and not to the host nation officials believed to have financial interests in the subject property, would not shield USACE employees from criminal responsibility for such payments in the event that they knew that any portion of the payments were to be offered, given, or promised to host nation officials illegally. Moreover, the *knowledge of the intended use of money or a thing of value* element of the FCPA can be satisfied by conscious avoidance, or failure to conduct due diligence when on notice of likelihood of corruption in a transaction, as opposed to actual knowledge.[40] Thus, a U.S. government employee who is on notice that payments to a business entity may be part of a corrupt scheme involving officials of a foreign nation, who fails to ascertain whether that is case, may be found to be "knowing" for purposes of satisfying the knowledge element of the FCPA's criminal prohibition of indirect payments.

The Travel Act[41] is another potential criminal trap that might apply under certain circumstances. Under the Act, anyone who travels in interstate or foreign commerce, or uses the mail or any facility in interstate or foreign commerce, with "intent to distribute the proceeds of any unlawful activity or otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform such act, shall be fined, imprisoned not more than five years, or

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[39] *See, e.g.*, Criminal Indictment, *United States v. Tesler, et al.*, No. 09-CR-098 (S.D. Tex. Feb. 17, 2009); Judgment, *United States v. Tesler, et al.*, No. 09-CR-098 (S.D. Tex. Feb. 28, 2012); *see generally A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Department of Justice and Securities and Exchange Commission, Nov. 4, 2012, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.
[40] *United States v. Kozeny*, 667 F. 3d 122, 132-33 (2nd Cir. 2011), cert. denied, 569 U.S. 917.
[41] 18 U.S.C. § 1952.

both."[42] For purposes of the Travel Act, "unlawful activity" is defined to include bribery in violation of the laws of the State in which committed or of the United States. In practice, this can mean that participation in the use of a facility of interstate commerce, such as a bank transfer or telephone line, in furtherance of an act of bribery that would be illegal under any state law if committed within the state where such facility of interstate commerce was used or any state that such facility passes through, is a federal crime.[43] This expands the scope of corrupt conduct that is prohibited by federal law, for example, to include bribery of employees of private organizations because the laws of many U.S. states, including important states in finance, information technology, and corporate registration (e.g., New York, California, and Delaware) prohibit purely commercial bribery.[44] Virginia's bribery statute (applicable to those departing the United States through Dulles International Airport), for instance, provides: "A person shall be guilty of bribery … [i]f he offers, confers or agrees to confer upon another … any pecuniary benefit as consideration for or to obtain or influence the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant …."[45]

Various foreign countries have joined the U.S. in enforcing laws against bribery of foreign public officials. Consistent with the direction of the several multilateral treaties, the U.S. and other countries have successfully prosecuted numerous cases of foreign bribery following cooperative multinational criminal investigations, generally with American leadership.[46] By

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[42] *Id.*
[43] *See* Criminal Indictment, *United States v. Jeffrey Webb, et al.*, 15-CR-0252, (E.D.N.Y. May 20, 2015) (alleged conspirators in schemes to bribe Fédération Internationale de Football Association (FIFA) officials, and the bribed officials of that private organization, were charged with violations of the Travel Act because of acts involving the use of New York Bank Accounts, as well as communications and travel from the State of New York, whose law prohibits payment and receipt of commercial bribes).
[44] *See, e.g.*, *id.*
[45] Va. Code Ann. § 18.2-447(1).
[46] *See* Doreen Edelman and Matthew Tilghman, *Increasing Coordination and More Widespread Prosecution under Anti-Bribery Laws*, Bloomberg L.R.—Corporate Counsel, Sept. 12, 2011, at 3.

statute, treaty, and the practice of the Department of Justice and the Securities and Exchange Commission, the prohibition on bribery of foreign government officials and action to enforce that prohibition are elements of U.S. foreign policy.[47]

There does not appear to be any rule of law that would immunize a U.S. government employee otherwise acting within his or her lawful authority from criminal responsibility, as opposed to civil liability, for acts in violation of the FCPA or the Travel Act. Indeed, with regard to compliance with criminal laws, federal employees face an additional burden that accompanies their federal employment—the obligation to "endeavor to avoid any actions creating the appearance that they are violating the law…"[48] The FCPA was enacted in the 1970s in response to revelations of large-scale bribery of foreign officials by U.S. companies seeking business opportunities abroad.[49] Some of those revelations were associated with the Watergate investigation.[50] Although foreign bribery by American businesses was the principal target of the Congressional investigations that gave rise to the FCPA, the participation of the U.S. government in foreign bribery—even the perception that the government backed foreign bribery financially or tacitly approved of it—was among the evils that Congress targeted.[51] While there is no apparent history of prosecution of U.S. Government employees for corrupt acts undertaken on behalf of the U.S. Government and not for any personal gain, there is also no reason to believe that their status shields them from prosecution. In addition, payments by the U.S. Government to

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47 While there have been news reports that the current President is interested in limiting enforcement of the FCPA because he believes that it will enhance the competitiveness of American businesses abroad, there is no indication from any branch of Government that public policy has changed with regard to foreign bribery. *See, e.g.*, Kenneth A. Blanco, Remarks prepared for delivery to the American Bar Association Institute on White Collar Crime, Mar. 10, 2017, https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national.

48 5 C.F.R. § 2635.101(b)(14).

49 *See* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 Ohio St. L.J. 930 (2012).

50 *Id.* at 932-34.

51 See *id.* at 935.

businesses as conduits to foreign officials formed part of the basis for the Congressional concerns that gave rise to the FCPA.[52] In any event, there is clear public policy that payments may not be made to foreign government officials, whether directly or indirectly, to influence their official acts, and there is no apparent reason why this policy would not apply to the U.S. Government itself.

Ultimately, USACE attorneys recommended a comprehensive set of due diligence measures to address and avoid any possible violation of the FCPA by USACE employees. Moreover, USACE avoided any financial participation with the third party corporation that was created and controlled by senior host nation military officials.

VI. Conclusion

As with the conduct of many activities in an overseas contingency environment, properly acquiring and maintaining records of real property can pose challenges. Among other things, there is a heightened potential for fraud, waste and abuse, and complex claims that may result if property rights are not carefully secured and costs logically calculated. There may also be a potential for fiscal law issues if real estate is not properly secured. Finally, in some of the circumstances that may arise in overseas contingency situations, U.S. government personnel must be diligent in researching property and project facts to become aware of potential schemes that might result in real estate instruments that are inconsistent with public policy or even raise the specter of potential criminal liability. Commands must ensure that their real estate requirements are followed and clearances received, real estate professionals must carefully review, evaluate, and maintain records that adhere to proper procedures for entering into real

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[52] *Id.*

estate instruments, and real estate attorneys must ensure that every real estate instrument complies with applicable law and policy.

Protect the Vote:
Is Federal Oversight Still Needed?

By: Connor Flinders[1]

I. Introduction

"*Give us the ballot and we will no longer have to worry the federal government about our basic rights ...Give us the ballot and we will no longer plead to the federal government for passage of an anti-lynching law ...Give us the ballot and we will fill our legislative halls with men of good will ...Give us the ballot and we will place judges on the benches of the South who will do justly and love mercy ...*"[2]

Despite the passage of time in the strides forward, Dr. King's word on the importance of the right to vote still ring true on the modern day. This Note explores the historical voting rights starting with the Fifteenth Amendment. After the Fifteenth Amendment passed, case law permitted individual states to determine what citizens could attain voting rights, as long as the decision was not based on racial discrimination. Almost a century later, the United States Supreme Court ruled in *Smith v. Allwright* that a private organization acted as a state actor when it controlled the state's election process and violated a person's civil rights by restraining the right to vote in primary elections solely upon that person's race. In 1965, Congress enacted the Voting Rights Act of 1965 ("VRA") to establish federal oversight of state election processes where a given state met the requirements under the formula created. The VRA survived many challenges and congressional extensions over the years following its enactment. Finally, the Court in *Shelby County v. Holder* found the VRA formula was outdated and no longer constitutional.[3] This Note's discussion looks

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[2] Martin Luther King Jr., "Give Us the Ballot," Address Delivered at the Prayer Pilgrimage for Freedom in Washington, D.C. (May 17, 1957).

[3] *Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013).

at what States have done regarding voting rights within their jurisdictions after the Court's decision in *Shelby County*.[4]

II. Background

a. *Development of the Fifteenth Amendment*

Minor v. Happersett was one of the first cases before the United States Supreme Court on the right to vote following the passage of the Fifteenth Amendment.[5] The issue before the Court was whether a woman born in the United States could have her right to vote restricted by state law.[6] When *Minor* came before the Court, it was settled law that a person born within the United States was a citizen of the United States.[7] No provision of the Constitution required gender as an element of citizenship.[8] The Court recognized Minor as a citizen from her birth and thus deemed her entitled to all the protections of the Constitution given to citizens.[9] The Court characterized the Fifteenth Amendment as providing an additional layer of protection to those privileges already granted by the terms of the Constitution.[10] The Court observed that women's suffrage was an issue for individual states; not the federal government.[11] The passage of the Nineteenth Amendment in 1920 overturned the Court's decision in *Minor*.[12]

b. *Private Entities as State Actors*

4 *Id.*
5 *Minor v. Happersett*, 88 U.S. 162 (1874).
6 *Id*. at 165.
7 *Id*. at 168.
8 *Id*. at 171.
9 *Id*.
10 *Id*.
11 *Id*. at 176. The Court concluded "that the Constitution of the United States does not confer the right of suffrage upon anyone[] and . . . the constitutions and laws of several States which commit that important trust to men alone are not necessarily void." Id. at 178.
12 XIX Amendment

In the mid-1900s, the Democratic Party, which controlled most of the Texas government, instituted a policy excluding individuals from voting in primary elections on the basis of race, and that policy became the central issue for the Supreme Court in *Smith v. Allwright*.[13] Texas argued that the federal government should not be involved in local elections, but the Court rejected this argument and thereafter determined that the terms of the Fifteenth Amendment do not permit the denial of voting rights on the basis of race.[14] The Court found the Democratic Party tantamount to a state actor because whoever won the primary election won the general race.[15] Because the Fifteenth Amendment protects against denial of voting based on race, the Court ruled that the Democratic Party, and Texas by extension, violated that protected right.

c. South Carolina v. Katzenbach: The First Challenge to the VRA

In response to the racial discrimination taking place in the voting booth, Congress passed the Voting Rights Act of 1965 ("VRA").[16] Congress went to great extent to research what discrimination was taking place and how they could prevent further discrimination.[17] Congress found that non-white citizens would have to pass tests designed to be incredibly difficult with only the barest margins of errors allowed.[18] Courts were a slow vehicle in correcting racial discrimination, and even when litigants found success contesting one discriminatory law or policy,

13 *Smith v. Allwright*, 321 U.S. 649, 656 (1944) ("Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party and, as such, entitled to participate in its deliberations.").

14 *Id*. at 657. The Court remarked that "the terms of the Fifteenth Amendment that right may not be abridged by any state on account of race. Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color." *Id.* at 662.

15 *Id*. at 662-64 ("When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election.").

16 *South Carolina v. Katzenbach,* 383 U.S. 301, 308 (1966).

17 *Id*. at 308-09 (detailing the multiple days consumed by the congressional hearings where Congress heard testimony from over sixty witnesses concerning voter discrimination).

18 *Id*. at 312.

another would take its place.[19] In lieu of the slow process of correction through the court system, the VRA stemmed from Congress's desire to expedite the protection of American racial minorities.[20] The VRA attacked a common variant of discriminatory laws head-on when it outlawed literacy tests, and other test-based mechanisms, used to restrict minorities' voting rights.[21]

Subsection 2 of the Fifteenth Amendment gave Congress the power to enact laws to fight racial discrimination in the polls.[22]The VRA outlined a formula that identified which counties or States the VRA covered, which limited Congress's attention to areas it deemed necessary.[23] In response to South Carolina's argument that the VRA amounted to an overreach of Congress, the *Katzenbach* Court held the VRA to be a proper act of Congress that enforced the Fifteenth Amendment.[24] The Court determined that no provision of the Constitution or other tenet of American law prohibited Congress's exercise of power through the VRA in combatting racial discrimination at the voting booth.[25]

d. Civil Rights Claims Under VRA

The Court in *Thornburg v. Gingles* considered an updated version of § 2 of the VRA that required civil rights plaintiffs to demonstrate that voting practices or laws either have or would result in racial discrimination.[26] The Court identified North Carolina's history of racial

19 *Id*. at 314.
20 *Id*. at 315.
21 *Id*. at 319.
22 *Id*. at 325.
23 *Id*. at 328.
24 *Id*. at 337.
25 *Id.* at 326-28. In a further demonstration of the changing times and ideals, the Court opined that "[w]e may finally look forward to the day when truly '(t)he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.'" *Id.* at 337.
26 *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986).

discrimination in its voting laws and practices, noting that the lower court pointed out lower rates of black voter registration across the state traceable to patterns of historic racial discrimination by state entities and officials.[27] The Court also noted that white political candidates and officials encouraged racial animus in elections.[28] The difficulty of black political candidates finding success also became apparent to the Court as it noted disparities between the relative probability of success of black candidates and the percentage of the population composed of black Americans.[29]

In describing the requirements for a claimant to bring a claim through the VRA, the Court remarked that such claims are based on the totality of the circumstances revealing a lack of equal opportunity in participation in elections and other political processes by members of a protected class. [30] For a minority group to claim a state violation of § 2 of the VRA, the claimants must show (1) they are geographically large enough to have a single-member district; (2) the minority group votes the same way; (3) the white majority blocks a minority from running; and (4) the majority's success is predictable to the point that plaintiffs can distinguish the alleged systematic discrimination from the occasional benign electoral setback.[31] If the minority group can show the dilution of minority votes in a multimember district is the cause of minority loss over a period of time, the claim is proper under § 2 of the VRA.[32]

27 *Id*. at 38. The Court stated that "[t]he District Court found these statewide depressed levels of black voter registration to be present in all of the disputed districts and to be traceable, at least in part, to the historical pattern of statewide official discrimination." *Id.* at 39.

28 *Id*. at 40.

29 Because of the design of the voting district

30 *Id*. at 43.

31 *Id*. at 51-52.

32 *Id*. at 56.

e. Judicial Elections and the VRA

The Court addressed whether the VRA applied to judicial elections in *Chisom v. Roemer*, where the petitioners brought a claim arguing that the method of voting for Louisiana Supreme Court justices impermissibly diluted the voting strength of black Louisiana citizens. The justices of the Louisiana Supreme Court are elected with each judge representing a judicial district.[33] At the time, only half of the black population of voting age in the Orleans Parish was registered to vote in contrast to the more than three-quarters of the white population registered to vote.[34] At issue before the Court was the statutory construction of § 2 of the VRA after its amendment in 1982 as to the meaning attached to the word "representative" in the text of the VRA.[35] The Louisiana officials contested the suit by asserting the terms of the VRA did not apply to judges because "representative" applied to legislative and executive officers.[36] The Court rejected this construction, determining that Congress intended to include winners for all elected public offices under the umbrella of "representative," regardless of the branch of government.[37]

f. Shelby County v. Holder: The End of the VRA?

Congress continued to extend the expiration date of the VRA, with the most recent extension being in 2006 with review after fifteen years and ending in twenty-five years.[38] The extended VRA covered Shelby County, Alabama with essentially the same formula created in

33 *Chisom v. Roemer,* 501 U.S. 380, 383 (1991).
34 *Id*. at 384.
35 *Id*. at 390.
36 *Id.* at 399.
37 *Id*. at 400-01 ("Louisiana could . . . exclude its judiciary from the coverage of the [VRA] by changing to a system in which judges are appointed . . . [but] [t]he reasons why Louisiana has chosen otherwise are precisely the reasons why it is appropriate for . . . the [VRA] to continue to apply to its judicial elections.").
38 *Shelby County v. Holder*, 570 U.S. 529, 535 (2013).

1965 terms of the VRA.[39] The Court identified that data collected by the Census Bureau indicated a substantial increase in African-American voter turnout that had grown to eclipse the turnout of white voters in five states that were subject to terms of § 5 of the VRA.[40] The Court similarly noted that these jurisdictions had come close to parity with respect to including non-whites in elected positions of government.[41] In a repeat of arguments against the original terms of the VRA, Shelby County argued that the modern VRA was an overreach of the federal government.[42] The county asserted that the Constitution enabled the states to determine the conditions and qualifications needed for elected officials and corresponding processes, and Congress had exceeded its authority to meddle in the affairs of the states through the overbroad terms of the VRA.[43] The Court noted the unequal levels of restriction in place with respect to the treatment of sister states where one state or county subject to the VRA would have to wait for federal approval while another could enact a similar law with no need for federal approval.[44] The majority identified the VRA's relevance at the time of its passage, but the issues of 1965 were not the same issues present in 2013.[45]

In the decade after the VRA's passage, objections by the United States Attorney General had substantially decreased.[46] The Court highlighted the proposition that intrusions into the affairs

39 *Id*.
40 *Id*.
41 *Id*. at 547.
42 *Id*. at 543.
43 *Id*. at 543-44.
44 *Id*. at 544. ("[The VRA] suspends '*all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C.[,]' [a]nd despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties).").
45 *Id*. at 545. ("In 1966, we found these [intrusions into state voting processes] justified" by "'[t]he blight of racial discrimination in voting' . . . .").
46 *Id*. (noting that the percentage of proposed voting changes objected to by the Attorney General had decreased from 14.2 percent in the 1970s to .16 percent in the early 2000s).

of the states by the federal government must correspond with a contemporary need for that intrusion.[47] In furtherance of this proposition, the Court remarked that the data justifying the intrusion of the VRA was outdated and no longer applicable to the circumstances.[48] Where the states could originally be divided into two distinct groups based on their individual histories of voter discrimination, the Court determined that distinction could no longer govern in the modern era.[49] The Court noted that Congress continued to rely on the formula based on 1960s information and not the information available in 2006.[50] In doing so, the Court concluded that the coverage formula was invalid in light of the societal and political changes of the new millennium that Congress failed to account for.[51]

In contrast to the majority opinion, Justice Ginsburg's dissent in *Shelby County* asserted that a number of voting laws and regulations required the continued oversight provided by the VRA, despite the fact that said laws and regulations did not discriminate on their face.[52] Justice Ginsburg further argued that the reason discriminatory voting restrictions were not on the rise in recent years was because the VRA actively prevented them from passing and surviving.[53] The dissent continued to suggest that the VRA is needed to combat second generation voting discrimination.[54] Throughout Justice Ginsburg's dissent, the preventative nature of the VRA was

47 *Id*. at 550-51 ("As we explained, a statute's 'current burdens' must be justified by 'current needs,' and any 'disparate geographic coverage' must be 'sufficiently related to the problem that it targets.'").

48 *Id*.

49 *Id*.

50 *Id*. at 553.

51 *Id*. at 556 ("There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula.").

52 *Id.* at 563-64 (Ginsburg, J., dissenting).

53 *Id*. at 560.

54 *Id*. at 563-64 (listing second generation voting discrimination as "racial gerrymanding" and/or adoption of an "at-large voting in lieu of district-by-district voting.".

pushed to the forefront, highlighting the point that the great strides of progress the majority made note of were due, in large and substantial part, to the effect of the VRA and its corresponding oversight, and that such an extraordinary piece of legislation should be permitted to continue.[55]

III. Discussion

a. *Where do we go now that the VRA has been determined to be outdated?*

The United States federal government should allow states to govern their own voting laws before enacting another voting rights act or similar legislation because, as the Court noted in *Shelby County*, there is no comparable need for federal oversight as there was in 1965.[56] The Court decided *Shelby County* in 2013, nearly 50 years after the passage of the VRA.[57] Since *Shelby County*, states have had the opportunity to pass voting legislation without federal oversight.[58] Following the 2012 election, forty-six states introduced at least 237 bills expand access to the ballot[59] In contrast, thirty-three states entertained ninety-two bills seeking to restrict voting eligibility and other requirements.[60] Of those bills introduced, thirteen bills designed to expand voter access passed through ten state legislatures, and nine restrictive bills saw passage by eight state legislatures.[61] More specifically in 2013, Arkansas, North Carolina, North Dakota,

55 *See id.* at 592-93 ("Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment. . . . It was the judgment of Congress that '40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination . . . .").

56 *See Shelby County v. Holder*, 570 U.S. 529, 550-51 (2013) ("Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years.").

57 *Id.* at 556.

58 *Voting Laws Roundup 2013*, BRENNAN CENTER FOR JUSTICE (Dec. 19, 2013), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2013.

59 *Id.*

60 *Id.*

61 *Id.*

Tennessee, and Virginia all passed photo identification laws that limited voter access.[62] Colorado, Florida, Illinois, Maryland, New Mexico, Virginia, and West Virginia all passed legislation that allowed online or same day voter registration.[63]

The following year of 2014 saw thirteen jurisdictions enact nineteen bills expanding voter access while only two states restricted voter access through four individual bills.[64] The voting laws expanding voting rights include: California's streamlining of ballot requests for military personnel; Colorado's expanded language access for voters who speak a language other than English; Louisiana's permission of sixteen year old citizens to pre-register to vote when they apply for their driver's license; Nebraska's establishment of an electronic registration at the DMV; and Utah's permission of registered voters to update their registration information online without a DMV signature.[65] In 2014, Ohio legislation put a substantial number of voting restrictions in place, including conditioning the mailing determination by the Secretary of State with regards to unsolicited absentee ballot applications on the presence of available funds; preventing access to the ballot for individuals lacking identification or Social Security numbers even with a provisional ballot; and prohibiting same day voting registration and restricting the early voting period.[66] Similarly, Wisconsin reduced the early voting period and hours in 2014.[67]

62 *Id.*

63 *Id.*

64 *Voting Laws Roundup 2014*, BRENNAN CENTER FOR JUSTICE (Dec. 18, 2014), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2014.

65 *Id*.

66 *Id*.

67 *Id*.

In 2015, only North Dakota passed a law restricting voting rights.[68] The law only clarifies what voter identification is acceptable at the polls.[69] In 2015, sixteen states passed thirty-three laws expanding or enhancing voting rights.[70] The most common legislation passed was online registration.[71]

In 2016, twenty-eight states and the District of Columbia continued to expand automatic registration.[72] For the 2016 presidential election, fourteen states saw the first application of their passed voting restrictions in a presidential election.[73] The measures included restrictions such as strict photo identification requirements and early voting period cutbacks.[74]

There is little information about the 2018 election to determine how the laws affected voter turnout for that election.

In the wake of the Supreme Court's decision in *Shelby County*, states, in stark contrast to the asserted fears of the VRA's proponents, have passed more laws that expand or enhance the access to the polls rather than restrict.[75] Further, these restrictions do not, on their face, fall within the same purview of race-based voting restrictions the Court has knocked down through the

68 *Voting Laws Roundup 2015*, BRENNAN CENTER FOR JUSTICE (June 3, 2015), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2015.

69 *Id*.

70 *Id*.

71 *Id*.

72 *Voting Laws Roundup 2016*, BRENNAN CENTER FOR JUSTICE (Apr. 18, 2016), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2016.

73 *Id*.

74 *Id*.

75 *See Voting Laws Roundup 2013* (measuring the restrictive and expansive voting legislation proposed and enacted among the states); *Voting Laws Roundup 2014* (same); *Voting Laws Roundup 2015* (same); *Voting Laws Roundup 2016* (same).

lifespan of the VRA.[76] The Court noted that these pieces of legislation can be distinguished from the voting access laws that preceded the VRA which were discriminatory on their face, as the effects of these laws are incidental and equally applicable regardless of the race of an individual.[77] As a result, the needs that previously demanded the harsh intrusions of the VRA have effectively disappeared from contemporary American society.[78]

The provisions of the VRA amounted to an extraordinary solution to an extraordinary, but specific, issue that no longer manifests in the manner it did before.[79] As the Court identified, Congress tailored the VRA as a remedy to the particular and pervasive issues of polling taxes, literacy tests, and other restrictions imposed by the states that facially discriminated against non-white minorities in terms of access to the ballot.[80] Should Congress seek to find issue and remedy with respect to apparent disparate impacts facially non-racial voter restrictions, Congress's actions should be tempered to address the issues of the modern era and not those of the Civil Rights Movement.[81] To continue to maintain the VRA, or any legislation akin to the restrictions imposed

76 *Compare Smith v. Allwright*, 321 U.S. 649, 662-64 (determining racial based restrictions in primary voting by the Texas Democratic Party to be unconstitutional), *with Voting Laws Roundup 2013* (noting the passage of photo identification voter restrictions); *Voting Laws Roundup 2014* (identifying Ohio and Wisconsin legislation restricting same-day voting registration and imposing identification requirements); *Voting Laws Roundup 2015* (identifying North Dakota's restrictions on valid voter identification) ; *Voting Laws Roundup 2016* (noting photo identification voter requirements and cutbacks to the early voting period in particular states).

77 *See Shelby County v. Holder*, 570 U.S. 529, 554 (2013) (noting that the "second generation barriers" identified by the dissent are "electoral arrangements that affect the weight of minority votes" not akin to the racial restrictions intended to be addressed by the VRA).

78 *See id.* at 556 ("There is no reason to insulate the coverage formula [of the VRA] from review merely because it was previously enacted 40 years ago.").

79 *See id.* at 557-558 (Thomas, J., concurring) (identifying that the circumstances justifying the VRA no longer exist in the modern era).

80 *Id.* at 537 (majority opinion).

81 *See id.* at 549 (noting that the methodology, restrictions, and scope of the VRA had not been appropriately decreased as the evils its provisions were meant to address were dealt with).

by the VRA, as though time has not passed is to not give recognition where it is due.[82] Further, it acts to place a burden on the states for the sins of their predecessors, a weight that the Fifteenth Amendment was not meant to be.[83] Before Congress enacts a new VRA or similar legislation installing federal oversight to protect voting rights, the states should have the opportunity to demonstrate they can self-govern and enact voting laws that are not facially discriminatory or in practice discriminatory.[84]

IV. Conclusion

In the first year after the Supreme Court's decision in *Shelby County*, states introduced many laws dealing with voting rights. Many states expanded access to the ballot by extending early voting periods or making it easier and more convenient to register to vote, and in contrast, far fewer states sought to restrict access to the ballot.

At this time, states should be left to their own devices in crafting legislation concerning voter access and requirements. As the Court noted in *Shelby County*, the discriminatory restrictions in place prior to the passage of the VRA in 1965 are no longer in force, and American society has changed substantially over the decades since the VRA's passage. While Justice Ginsburg's dissent in *Shelby County* points to second generation discrimination as justification for continuing federal oversight, the VRA is not the proper mechanism to solve these issues. If states are not allowed to

82 *See id.* at 555-56 (identifying the "'dramatic' progress" made in eradicating racial discrimination that had previously been highlighted in numerous other cases before the Court).

83 *See id.* at 553 ("The [Fifteenth] Amendment is not designed to punish for the past; its purpose is to ensure a better future.").

84 *See Voting Laws Roundup 2013* (measuring the restrictive and expansive voting legislation proposed and enacted among the states and noting the predominance of voting expansive legislation passing); *Voting Laws Roundup 2014* (same); *Voting Laws Roundup 2015* (same); *Voting Laws Roundup 2016* (same).

craft their own voting legislation, there is no means to determine whether the discriminatory beliefs and practices of the era of Jim Crow and segregation remain and demand the protection of the federal government. We the People can ensure that voter discrimination remains the relic of a bygone era, not through the constant overwatch of the federal government, but through active participation in our political process. Keep voting to keep the polls open to everyone.