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FOREWORD

BY DIEGO SEPULVEDA-ALLEN

The famed American jurist Oliver Wendell Holmes once remarked that the law is “a magic mirror [wherein] we see reflected not only our own lives, but the lives of all men that have been.” What Holmes recognized is that the law is more than black ink on parchment. Instead, it is the embodiment of society’s most pressing problems, its fears and anxieties, and the answers it gave to address them. The authors of the second volume of the *Texas A&M Undergraduate Journal of Law & Society* have peered into that magic mirror, and the pages that follow detail what they found staring back at them.

Perhaps no event tests a society, and thus its laws, more than war. Mason Krough, in his article “Establishing Balance: An Originalist Perspective on the Separation of Wartime Powers,” examines how the United States’s need to respond swiftly to military threats has challenged the separation of powers provided by the Constitution, especially as warfare becomes faster and more destructive than ever before. Vienne Abrahamian, in “Defense Capture in East-Central Europe: Implications for Democratic Norms and Regional Security,” demonstrates that the U.S.’s system is not the only one being strained by modern warfighting. Through an analysis of two European countries, Abrahamian brings our attention to the problem of “defense capture,” or when a government offloads so much responsibility for defense to private companies that these companies are able to commandeer a nation’s defense policy for their own profit.

Yet, Dara Hawkins recognizes in her article “A Modern Review and Critique of *Island Trees v. Pico*” that sometimes wars are fought on the bookshelf rather than the battlefield. As “book banning” has recently reemerged in several states, Hawkins analyzes how this nation’s courts have previously sought to navigate the difficult question of whether the practice is within the proper purview of school officials or whether it is a cudgel being wielded by them to suppress viewpoints they find unsavory, and thus dismantle the marketplace of ideas guaranteed by the First Amendment.

While Hawkins uses the magic mirror to glean past debates over access to information, Lefkie Germanides and Hannah Shoaff each cast their gaze to those currently happening. As society is increasingly data-driven, information has become a commodity that can be bought and sold, presenting our existing privacy laws with unforeseen problems. In her article “Rethinking Privacy in Digital Healthcare,” Germanides considers how the modern landscape of digital healthcare has rendered existing federal privacy protections obsolete, and suggests a new framework to keep our private medical information truly private. But this is not an issue exclusive to healthcare. Shoaff shows in her article “Data Brokers and the Decline of Privacy Rights” that data brokers give anyone, including the federal government, almost complete access to information about our entire

lives. Shoaff warns that federal agencies have been using data brokers to circumvent Fourth Amendment protections, and ponders what measures Congress can take to close this loophole.

If the law truly reflects the lives of generations past and present, it is only because the law, like any other mirror, captures only that which is put in front of it. Thus, as the authors of this issue demonstrate, that we see so much in that reflection is indicative of the fact that society has continually looked to the law to respond to its greatest concerns, whether it be over national security, the free exchange of ideas, or safeguarding of the most intimate details about our lives.

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Diego Sepulveda-Allen '25
Founding Editor-in-Chief (Inaugural),
Texas A&M Undergraduate Journal of Law & Society

LETTER FROM THE EDITOR

BY HAILEY LUENSMANN

One word to encompass the second year of the *Texas A&M Undergraduate Journal of Law and Society (TAMUJLS)* is collaboration. This formative year of the journal has brought the editorial board together, through diligent effort and intentionality, to establish strong organizational systems to support undergraduate research across law, government, and public policy. We spent the past year creating and advancing a shared vision for a journal that collectively selects the highest-quality undergraduate scholarship while highlighting a broad range of timely issues at the intersection of law and society. Welcome to Issue II.

TAMUJLS was founded to highlight compelling legal scholarship produced by undergraduate students at Texas A&M and present it to a professional audience, creating a unique opportunity for students across academic disciplines. Engaging in legal research at the undergraduate level prepares students, both authors and editors, to think critically about pressing legal matters and to contribute their thoughts to ongoing conversations about law and public policy. Our goal throughout the journal's sophomore year has been to raise awareness of this exciting opportunity and to elevate the standard of excellence the publication upholds.

Over the past year, the journal has experienced meaningful growth. We received a larger and more diverse pool of submissions representing a broader range of disciplines and worked to create a robust review process that ensures each manuscript is fully considered by every editorial board member. The board deliberated on each submission, evaluating structure and format, the strength of the author's critical thinking, and the piece's fit with the journal's mission, before ultimately selecting five articles that represent the exceptional work undergraduate students at Texas A&M are producing. The breadth of subject matter in Issue II is a testament to the journal's relevance across campus, demonstrating that students from any major can engage meaningfully in conversations about the law, government, and public policy.

On behalf of the editorial board, I offer my sincerest gratitude to everyone who played a role in making this publication possible. Thank you to the authors who trusted us to help prepare their work for broader dissemination, and to the faculty advisors and reviewers who invested their time in advancing student legal research and guiding both authors and editors. Thank you to Dr. Katherine Unterman for her steadfast support in promoting the journal and creating new opportunities for students. To the Office of Undergraduate Research, Annabelle Aymond and Catherine McCarthy: the growth of this organization and the publication of this issue would not have been possible without your ongoing support, guidance, and wisdom. Thank you for helping develop the editorial board and for providing exceptional opportunities to undergraduate students, equipping

us to engage confidently in professional conversations. Finally, thank you to the editorial board for dedicating your time and energy to *TAMUJLS* and for helping us live out the mission we set for this journal.

Having experienced overwhelming support from the aforementioned groups and witnessed the enthusiasm for what this journal is striving to achieve, I am incredibly excited about the future of *TAMUJLS* and the undergraduate scholars who will continue to shape it.

—

Hailey Luensmann '26
Editor-in-Chief,
Texas A&M Undergraduate Journal of Law & Society

A MODERN REVIEW AND CRITIQUE OF ISLAND TREES V. PICO

BY DARA HAWKINS

Island Trees School District v. Pico is often hailed as the landmark Supreme Court decision that ended the banning of books in public school libraries, a perceived affirmation of the First Amendment's enduring protection of intellectual freedom. To this day, it is regularly invoked in debates over censorship, framed as a case that put a constitutional stop to the ideological purging of school shelves. Yet, if *Pico* indeed "ended" book bans, why have they not only persisted, but surged in recent years? From Florida to Texas, school districts continue to remove books deemed controversial, with the number of titles challenged or banned skyrocketing in the past few years.¹

This apparent contradiction reveals a critical misunderstanding of the *Pico* decision. Rather than establishing robust First Amendment protections for student access to ideas, *Pico* issued a narrow procedural ruling, declining to articulate clear constitutional limits on school board discretion and holding only that the board's actions warranted a trial rather than summary judgment. This limited scope has left the legal landscape murky and has enabled continued censorship efforts. As a result, this ambiguity regarding the *Pico* ruling underscores the need to revisit its legacy with sharper scrutiny.

The origins of the *Pico* controversy began in September 1975, when three members of the Island Trees School Board attended a conference held by the Parents of New York United (PONYU), a Conservative organization, and obtained a list of objectionable books by the standards of PONYU. These titles included well-known books such as *Slaughterhouse-Five* by Kurt Vonnegut, *Soul on Ice* by Eldridge Cleaver, and *The Naked Ape* by Desmond Morris in response to their controversial content. For example, *The Naked Ape*, as described by Dawn B. Sova in her book, *Literature Suppressed on Social Grounds*, examined "humans in much the same terms and contexts that other mammals have been studied by zoologists for many decades," including discussions of sexual "aberrations" like celibacy and homosexuality, without discussions of morality.² It was content like this, which did not condemn the controversial homosexuality of the time, that led to the board banning eleven books from their junior high and high school libraries, labeling them as "anti-American, anti-Christian, anti-Semitic, and just plain filthy."³ The board further asserted that they "had a duty to protect school children from

1 "PEN America Index of School Book Bans – 2024-2025," *PEN America*, accessed 2026, <https://pen.org/book-bans/pen-america-index-of-school-book-bans-2024-2025>.

2 Dawn B. Sova, *Literature Suppressed on Social Grounds* (Facts on File, 2006).

3 Linda Greenhouse, "High Court Limits Banning of Books," *The New York Times* 131, no. 45,356 (1982): 1, 10, <https://www.nytimes.com/1982/06/26/us/high-court-limits-banning-of-books.html>.

‘this moral danger.’”⁴

President Ford was in office in 1975 when the controversy over the *Pico* case originated. The case then went through the lower courts during President Carter’s administration from 1977 to 1981 and reached the Supreme Court in 1982, during President Reagan’s administration. As the *Pico* case took place across three presidencies, the possible impact national politics had is worth analyzing. All three Presidents had some involvement in education policy, but they were largely focused on desegregation, funding, or, in President Carter’s case, the creation of the Department of Education. Of note, President Ford’s 1976 platform did say that “[r]esponsibility for education, particularly on the elementary and secondary levels, belongs to local communities and parents. Intrusion by the federal government must be avoided,” suggesting the conservative base may have carried pro-censorship ideals at the time, just not as the forefront of their platform.⁵ Supporting this partisan position, President Reagan in a televised address told the country that education “is the principal responsibility of local school systems, teachers, parents, citizen boards and state governments,” rather than the federal government, and as such, he sought to reduce federal regulations as much as he could.⁶ This led to the administration seeking to avoid conflict with “academic administrators in enforcing civil rights and other laws,” as described by *The New York Times* in 1982.⁷

President Reagan’s popularization of conservative ideologies with his 1980 election win is associated with the rapid growth of the New Right, a populist conservative movement that rose to prominence in the late ’70s and early ’80s.⁸ According to a journal published in anticipation of *Pico* going to the Supreme Court, “The American Library Association [reported] a fivefold increase in complaints about books in public libraries since Reagan’s election to Presidency.”⁹ Another journal published two years after *Pico* specifically accredited the rise in censorship to society “moving away from the melting pot theory and becoming more culturally pluralistic” as a result of the increased diversity and civil rights by which some felt threatened.¹⁰

4 Greenhouse, “High Court Limits Banning of Books.”

5 “1976 Republican Platform,” *Gerald R. Ford Presidential Library and Museum*, <https://www.fordlibrarymuseum.gov/1976-republican-platform>.

6 Edward B. Fiske, “Reagan Record in Education: Mixed Results,” *The New York Times* 132, no. 45,497 (1982): Section 12, 1, <https://www.nytimes.com/1982/11/14/education/reagan-record-in-education-mixed-results.html>.

7 Fiske, “Reagan Record in Education: Mixed Results.”

8 “The 1980s,” *History*, May 28, 2025, <https://www.history.com/articles/1980s>.

9 Frank R. Kemerer and Stephanie Abraham Hirsh, “School Library Censorship Comes Before the Supreme Court,” *The Phi Delta Kappan* 63, no. 7 (1982): 444–448, <https://www.jstor.org/stable/20386393>.

10 Larry L. Kraus, “Censorship: What *Island Trees v. Pico* Means to Schools,” *The Clearing House* 57, no. 8 (1984): 343–345, <https://www.jstor.org/stable/30186282>.

On June 25, 2013, the National Coalition Against Censorship interviewed Steven Pico, the respondent in *Pico*. When asked about his opinion on the same books he defended being banned thirty-one years later, Pico said he was not surprised, comparing the issue to how racism did not end just because of *Brown v. Board of Education*.¹¹

Let me ask you and your readers a question. Do you think racism was a factor in the books removed in Island Trees? I do. Of the 11 books banned in Island Trees, more than half were written by prominent African American and Puerto Rican American writers. Why? The bottom line is that no one in the Island Trees community ever complained about any of these books. Members of the Island Trees Board of Education “found” a list of “objectionable” books on a table at a conference that was being held in another part of the state. Then they returned to our community and searched our public school system for those titles. Why were so many books discussing the experiences of minority groups in the U.S. on that original list?¹²

In this context, the Supreme Court’s caution is telling. *Pico* exemplifies the Supreme Court’s hesitancy to confront the deeper cultural and ideological battles shaping education policy. The decision avoided setting a transformative precedent that would restrain school boards’ power across the country, and instead implemented a minimalist ruling. This result is, intentionally or not, a response to the influence of popular national political attitudes, marking *Pico* as a product of its time, and raising the question of if the same ruling would have been made in the modern day.

In response to the school board’s initial actions regarding the book bans, Superintendent Richard Morrow tried to object, both in memorandum and at public meetings, urging the board to follow the established procedure they already had in place.¹³ A temporary compromise was made with the creation of an eight-member committee, consisting of four parents and four staff, but when the committee recommended against banning the books, the board ignored their recommendations.¹⁴ Notably, these events coincided with the school board elections, in which two incumbent members were reelected. Since the banning controversy received a “considerable amount of news coverage,” it is possible that the book bans were used as a stepping stool for reelection.¹⁵ When *Pico*’s original lawsuit was filed, the attorneys of the defendant school district conducted a mail-in survey of the district’s parents,

11 Debra Lau Whelan, “NCAC Talks to the Man Behind *Pico v. Board of Ed.*,” *National Coalition Against Censorship*, July 9, 2013, <https://ncac.org/news/blog/ncac-talks-to-the-man-behind-pico-v-board-of-ed>.

12 Whelan, “NCAC Talks to the Man Behind *Pico v. Board of Ed.*”

13 Kemerer and Hirsh, “School Library Censorship Comes Before the Supreme Court.”

14 Kemerer and Hirsh, “School Library Censorship Comes Before the Supreme Court.”

15 Kemerer and Hirsh, “School Library Censorship Comes Before the Supreme Court.”

which revealed that “59% favored the board’s actions and 41% opposed them,” supporting the idea that the push for book bans was as much a publicity stunt for re-election as it was a genuine concern of the board, and a reflection of growing populist conservatism at a local level.¹⁶

This political backdrop underscores why a clear and principled ruling in *Island Trees v. Pico* was, and still is, needed. When elected officials can plausibly leverage censorship disputes for electoral gain or publicity, the judiciary’s role in articulating firm constitutional limits becomes paramount. By failing to squarely address the political incentives underlying such censorship campaigns and declining to establish a robust substantive standard, *Pico* became emblematic of how ambiguity at the Supreme Court can foster enduring discourse about the scope of First Amendment protections, thereby weakening its deterrent force against future book bans, a consequence we are seeing today as it is predominantly conservative states pursuing book bans, rather than a national trend.¹⁷

After the books were successfully removed from the libraries, five high school students filed a lawsuit under 42 U.S.C. § 1983, arguing that their First Amendment rights were violated.¹⁸ However, the Federal District Court ruled in favor of the school board in a summary judgement, claiming that “no facts were in dispute and that as a matter of law the school board had not infringed upon the students’ First Amendment rights,” citing the Second Circuit’s 1972 *Presidents Council Dist. No. 25 v. Community School Board* refusal to review a similar book ban.¹⁹ The plaintiffs then brought the case to the United States Court of Appeals in 1980, where the Second Circuit reversed the ruling, claiming that summary judgment was inappropriate because “the school board’s motives might have been impermissible under the First Amendment, and the students were entitled to a trial to determine, as a question of fact, what those motives were.”²⁰ In the Court of Appeals’ opinion, Judge Charles B. Sifton found the board’s actions to have been “erratic, arbitrary, and free-wheeling,” with Judge John O. Newman hosting similar doubts of the motives of the board, and supported returning the matter to trial to be decided.²¹ Circuit Judge Walter R. Mansfield, however, dissented, believing the judicial system should keep its hands off the matter

16 Kemerer and Hirsh, “School Library Censorship Comes Before the Supreme Court.”

17 PEN America, “Index of School Book Bans – 2024-2025.”

18 *Island Trees School District v. Pico by Pico*, 457 U.S. 853 (1982), <https://supreme.justia.com/cases/federal/us/457/853>.

19 Greenhouse, “High Court Limits Banning of Books.”

20 Greenhouse, “High Court Limits Banning of Books.”

21 Kemerer and Hirsh, “School Library Censorship Comes Before the Supreme Court.”

and leave it up to the board.²² Nonetheless, with trial back on the table, the Island Trees School Board appealed to the Supreme Court, arguing that “it was entitled to summary judgment because the First Amendment was inapplicable to decisions of the contents of school libraries,” in the case that would be known as *Board of Education, Island Trees Union Free School District No. 26 v. Pico by Pico* (1982).²³

Prior to *Pico*, the Supreme Court had not dealt with a case regarding book bans, but the lower courts had reached a wide variety of decisions. For example, a New Hampshire federal court in *Salvail v. Nashua Board of Education* (1979) struck down a school board’s attempt at removing *Ms.* magazine from a school library, stating that “it is the ‘political’ context of *Ms.* magazine more than its sexual overtones that led to its arbitrary displacement. Such a basis for removal of the publication is ‘constitutionally impermissible,’” and comparing *Ms.* to two non-banned magazines in the library, *Redbook* and *Family Health*, which had similar content.²⁴ Additionally, the Federal District Court for the District of Massachusetts ruled in *Right to Read Defense Committee v. School Committee of Chelsea* (1978) that while the school board can control the purchasing of books for the library, that does not equate to the power to remove books.²⁵ Lastly, in a case closest to *Pico*, in *Minarcini v. Strongsville City School District* (1976), the Sixth Circuit Court of Appeals struck down a school board’s removal of books like *Catch-22* by Joseph Heller, stating that the library was “a mighty resource in the free marketplace of ideas” and that once a school establishes a library, it cannot create conditions on use solely as the result of the political and social preferences of the school board.²⁶

However, not all courts have held these anti-censorship opinions. As previously mentioned, in 1972, the Second Circuit Court of Appeals ruled in *Presidents Council Dist. No. 25 v. Community School Board* “that school boards have an unfettered right to remove books from the library,” and argued that since the board had the authority to select materials to integrate, and the upkeep of libraries involved regular selection and retiring, then there was no

22 Kemerer and Hirsh, “School Library Censorship Comes Before the Supreme Court.”

23 Greenhouse, “High Court Limits Banning of Books.”

24 Kemerer and Hirsh, “School Library Censorship Comes Before the Supreme Court.”

25 Wanda Brooks, “Obscene Language in Literature in the Public Schools As a Legal Issue,” *Education Resources Information Center Institute of Education Sciences*, June 27, 1996, https://www.academia.edu/55737768/Obscene_Language_in_Literature_in_the_Public_Schools_As_a_Legal_Issue.

26 Peter E. Hutchins, “The First Amendment in the Classroom: Library Book Removals and the Right of Access to Information,” *Boston College Law Review* 23, no. 5 (1982): 1471-1527, <https://bclawreview.bc.edu/articles/1679>.

merit in assuming that books, once shelved, have some sort of protection.²⁷ Although previously the Second Circuit Court of Appeals decided in *Eisner v. Stamford Board of Education* (1971) that a school must establish screening criteria and reviewing procedures before it can censor materials distributed on campus.²⁸

In 1980, the Court of Appeals for the Seventh Circuit ruled in *Zykan v. Warsaw Community School Corporation* that “even though students may have some interest in freedom in the classroom, the traditional control of school boards over-balances the constitutional argument,” but there can’t be a systematic effort to exclude certain types of thought, as summarized by Kemerer and Hirsh in their journal “School Library Censorship Comes Before the Supreme Court.”²⁹ Additionally, there are cases that set precedent for regulating “obscene” or “indecent” content, such as *Miller v. California* (1973), which “held that obscene materials did not enjoy First Amendment protection,” and set new basic guidelines for determination.³⁰ *Ginsberg v. New York* (1968) also reiterated that “obscenity was not within the area of protected speech or press,” especially in regard to minors who could be policed more heavily than adults.³¹

Although the Supreme Court had not previously dealt with book banning specifically, it had already established a solid foundational jurisprudence for interpreting First Amendment rights to free expression. In the context of the *Pico* case, two categories of rulings stand out: the first regarding freedoms found in schools, and the second being the freedom of privacy to own, interact with, or distribute controversial materials. Regarding schools, earlier rulings like *Tinker v. Des Moines* (1968) declared that “schools may not be enclaves of totalitarianism,” and neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”³² The *Tinker v. Des Moines* decision emphasized that students retain certain constitutional protections, even, if not especially, within the school environment. *Keyishian v. Board of Regents* (1967) also acted as a First Amendment protection as it struck down anti-communist oaths for teachers, saying, “The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to

27 Kemerer and Hirsh, “School Library Censorship Comes Before the Supreme Court.”

28 Kemerer and Hirsh, “School Library Censorship Comes Before the Supreme Court.”

29 Kemerer and Hirsh, “School Library Censorship Comes Before the Supreme Court.”

30 *Miller v. California*, 413 U.S. 15 (1973), <https://supreme.justia.com/cases/federal/us/413/15>.

31 *Ginsberg v. New York*, 390 U.S. 629 (1968), <https://supreme.justia.com/cases/federal/us/390/629>.

32 *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), <https://supreme.justia.com/cases/federal/us/393/503>.

that robust exchange of ideas.”³³ The term “marketplace of ideas” originates in another famous free-speech case, *Abrams v. United States* (1919). Although *Abrams* upheld the conviction of the defendants who had been charged with sedition after dispersing pamphlets criticizing the American government, Justice Holmes’ dissenting opinion gained notoriety in its own way. Holmes declared that unless there is an immediate danger caused by the words being said, the freedom of speech should not be curtailed, highlighting the necessity of competition of ideas to further healthy intellectual and societal discourse and development.³⁴

Outside the classroom, the Supreme Court developed strong precedents defending free speech and privacy in handling controversial ideas and materials. The Supreme Court’s majority opinion in *Terminiello v. Chicago* (1949) defended provocative speech unless it posed a clear and present danger, the same defense Holmes used in his 1919 *Abrams* dissent, with *Terminiello* stating that the “vitality of civil and political institutions in our society depends on free discussion,” and that “a function of free speech under our system is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”³⁵

The concept of “clear and present danger” originated in *Schenck v. United States*, illustrating how First Amendment doctrine evolved incrementally, each decision refining and strengthening the principles articulated before it.³⁶ This lineage of the growth, from *Schenck* to *Abrams* to *Terminiello*, demonstrates the Supreme Court’s frequent method of constitutional development: building upon prior reasoning to clarify, limit, or expand protections in response to new contexts. By the time *Pico* reached the Supreme Court, that same evolutionary logic could have very well continued as the Justices had at their disposal a well-developed framework protecting controversial expression when demonstrable harm was absent, as well as a philosophy that valued intellectual discourse as a democratic virtue rather than a vice. However, *Pico* failed to meaningfully extend this trajectory.

In a jurisprudential system that depends on an incremental but cumulative precedent, such restraint carried consequences. Because of *Pico*’s prominence as the Supreme Court’s only direct engagement with school library book removals, it assumed an outsized symbolic importance, creating the impression that the constitutional question had been settled, potentially discouraging further litigation aimed at securing a more definitive rule. *Pico*

33 *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), <https://supreme.justia.com/cases/federal/us/385/589>.

34 *Abrams v. United States*, 250 U.S. 616 (1919), <https://supreme.justia.com/cases/federal/us/250/616>.

35 *Terminiello v. Chicago*, 337 U.S. 1 (1949), <https://supreme.justia.com/cases/federal/us/337/1>.

36 *Schenck v. United States*, 249 U.S. 47 (1919), <https://supreme.justia.com/cases/federal/us/249/47>.

neither continued the sequence of First Amendment protections building upon each other as other cases had, nor did it welcome a successor case that could have played such a role.

This landscape of precedent reveals that by the time *Pico* reached the Supreme Court, both conflict and clarity coexisted within First Amendment jurisprudence. Lower courts were divided, with some having recognized viewpoint-based removals as unconstitutional, while others deferred broadly to school board discretion. Simultaneously, Supreme Court precedent had already articulated robust protections for intellectual freedom in schools and broader society, while also crafting exceptions for obscenity, especially when in regard to the safety of children. Therefore, the Court in *Pico* faced a pivotal opportunity to reconcile these conflicting stances into a definitive rule and instead found itself failing to resolve the existing circuit split or clearly situate school library removals within the established framework of student speech rights and the marketplace-of-ideas doctrine.

The Supreme Court's decision in *Pico* stands out not for what it resolved, but for what it left unresolved. Unlike most landmark decisions, *Pico* was never the product of a trial; instead, it presented the Supreme Court with an abstract and procedural question: "[W]as there a First Amendment right at stake at all, or was the school board's action one of unreviewable discussion?"³⁷ At the heart of *Pico* were two narrow legal inquiries regarding constitutional limits on school board authority and whether the lower court was incorrect in dismissing the case without trial. Rather than settling substantive constitutional questions, the Supreme Court focused on the procedural missteps, holding only that summary judgment had been inappropriate because a factual dispute existed regarding the board's motivation. In doing so, the Supreme Court passed up the opportunity to articulate a clear doctrinal framework governing when, and under what standard, book removals violate the First Amendment.

The ruling of the Supreme Court's *Pico* case was divided, a five-to-four decision, with Justices Brennan, Marshall, Stevens, Blackmun, and White in the majority; and Chief Justice Burger, and Justices Powell, Rehnquist, and O'Connor in the dissent. Justice Brennan authored the majority opinion, emphasizing that the First Amendment indeed limited the school board's power to remove books and that the decision to remove books should not be driven by ideological disapproval, but only by educational suitability.

Justice White joined the majority but wrote in a concurring opinion that he found a re-trial to be necessary but abstained from agreeing with the scope of the First Amendment at the time. The remainder of the Supreme Court wrote separate dissents, largely related to concerns about judicial overreach into education policy. For example, Justice Powell, who had once served as a school board president, described his reaction as one of "genuine dismay," believing exposing board members to liability of litigation would

37 Greenhouse, "High Court Limits Banning of Books."

“corrode the school board’s authority and effectiveness.”³⁸ As summarized by a 1983 Minnesota Law Review article, other arguments from the dissenting included the idea that “[b]y choosing not to retain certain books, the Board was simply making a permissible decision not to disperse certain information,” and that there should not be any “affirmative obligation upon the state to aid speakers in reaching potential recipients.”³⁹

These diverse perspectives and narrow margins of agreement have thus fractured the public’s perception of the *Pico* decision. Because Justice White’s concurrence supplied the decisive fifth vote on narrow procedural grounds rather than on the substantive First Amendment reasoning, no clear majority actually endorsed Brennan’s opinion. Nonetheless, with it being the official majority opinion, the ruling and majority opinion perpetuates a narrative of what *Pico*’s decision was based on.

Interpretive division allowed *Pico* to acquire symbolic authority disproportionate to its true precedential power, while at the same time, the absence of a united rationale weakened its strength in the eyes of the lower courts. Through this act, *Pico* failed to articulate a standard for distinguishing between what was permissible curricular discretion and what was impermissible ideological suppression. These narrow margins and divergent reasoning left the courts without a controlling test or true procedure, rendering *Pico* as something easy to cite rhetorically, but difficult to apply consistently, and whose ambiguity has diluted its effectiveness as a safeguard of the First Amendment.

The procedural nature of the ruling created a structural loophole that modern school boards and advocating interest groups have learned to navigate. Because the Supreme Court framed the constitutional problem in terms of ideological motive rather than the effects of removal, when challenged in courts the legality of a book ban is often based on how a board justifies its actions. A board that openly declares that it seeks to suppress “anti-American” or “immoral” ideas might risk falling within Brennan’s plurality reasoning if put before an unsympathetic judge, but a board that bases its decision in neutral, bureaucratic language like curriculum changes, or in compliance with state or national laws like the more recent Diversity, Equity, and Inclusion (DEI) bans, can therefore argue that their actions fall within educational discretion or resource allocation. So long as school officials articulate facially legitimate educational rationales, courts are left to probe subjective intent, an inherently difficult and often speculative inquiry, rather than apply a clear content-based or viewpoint-discrimination standard. By embedding removals within established procedures and invoking pedagogical concerns, boards could avoid or have an easier method of fighting any accusations of biased behavior that might result in the issue

38 “Island Trees Sch. Dist. V. Pico.”

39 Martin D. Munic, “Education or Indoctrination—Removal of Books from Public School Libraries: Board of Education, Island Trees Union Free School District No. 26 v. Pico,” *Minnesota Law Review* 68, no. 2 (1983): 213, <https://scholarship.law.umn.edu/mlr/1905>.

being brought to trial.

Despite the long-term issues, at the time, the Supreme Court had decided to affirm the Appellate Court's decision that *Pico* deserved a legitimate trial to decide the validity of removing the books, rather than brushing it off. On the broader question of whether school boards can remove books, it was decided that decisions could not be influenced in a "narrowly partisan or political manner," with the motivation of removal being key to its constitutionality, therefore backing the decision to get *Pico* a re-trial.⁴⁰ *Pico* was a case of a school board acting "highly irregular and ad hoc," clearly based on "personal values, morals and tastes," with the petitioners rejecting their own committee's recommendations, without reason.⁴¹ Despite *Pico*'s success in getting their case returned to trial, it mattered not in the end, as the Island Trees School District unbanned and returned the books to the libraries in an effort to avoid a new trial.⁴²

The legacy of *Pico* remains complex and contested, reflecting the deep tensions at the heart of public education in a democratic society, balancing two fundamental values: intellectual freedom and the authority of schools to guide students' moral and educational development. PEN America reported the number of banned books for 2023–2024 was up 200% since the previous year, with Florida and Iowa's work consisting of nearly half of all banned books.⁴³ Despite *Pico* being colloquially known as the case that stopped book bans, it was far from it, focusing predominantly on the procedural aspect. By holding that school boards may not remove books simply to suppress unfavorable ideas, the Supreme Court acknowledged a foundational First Amendment principle that freedom of inquiry must extend to students, especially within the school library. But there is still a "tension between free inquiry and acculturation," and finding the balance can be difficult.⁴⁴

There are many arguments for opposing book bans; open inquiry is essential for all students, and because every library book would have been pre-approved to be shelved, it becomes suspect when it is removed. Additionally, the mere presence of a book "does not imply state approval," and libraries do not have to endorse the ideas contained in their books.⁴⁵ But while it is acknowledged that "indecent language may be pretexts for hostility to unpopular ideas," there were no protections declared, arguably

40 "Island Trees Sch. Dist. V. Pico."

41 "Island Trees Sch. Dist. V. Pico."

42 Kraus, "Censorship: What Island Trees v. Pico Means to Schools."

43 "Nearly 200 Percent Surge in School Book Bans During 2023-2024 School Year," *PEN America*, November 1, 2024, <https://pen.org/press-release/nearly-200-percent-surge-in-school-book-bans-during-2023-2024-school-year>.

44 Munic, "Education or Indoctrination."

45 Munic, "Education or Indoctrination."

opening a door for censorship to be masked by neutral-sounding policies.⁴⁶ In addition, Chief Justice Burger pointed out that “a student’s right to receive information does not place an affirmative obligation on the school to provide particular books in the library,” which *Pico* does not address beyond the conceptual.⁴⁷ Despite its faults, *Pico* still left a lasting impression, as a 1982 *New York Times* article said: “[W]hile the ruling today did not place the Supreme Court firmly on either side of the debate, an opposite ruling would have removed the debate entirely from the realm of constitutional law.”⁴⁸

Decades later, the questions raised by *Pico* remain relevant. With unimaginable access to information outside the classroom, students today are more capable and more connected than ever, emphasizing the need for educational environments that foster healthy curiosity rather than suppress it, which risks students learning from unsafe and unmonitored sources. At the same time, a rising trend of book bans throughout the country shows that the debate over educational authority and censorship is far from settled. As society revisits the extent to which acceptable discourse in schools should be allowed, *Pico* should not be forgotten. The case serves as a critical, yet imperfect, reminder that the constitutional right to receive information is not extinguished at the schoolhouse gate, and that any effort to curtail expression must be carefully scrutinized.

46 Muncie, “Education or Indoctrination.”

47 Muncie, “Education or Indoctrination.”

48 Greenhouse, “High Court Limits Banning of Books.”

RETHINKING PRIVACY IN DIGITAL HEALTHCARE

BY LEFKIE GERMANIDES

The digitization of healthcare has transformed how patient information is created, stored, and exchanged, heightening the risk of patient privacy violations that federal laws like HIPAA were designed to regulate.¹ The Health Insurance Portability and Accountability Act (HIPAA) of 1996 sets federal standards for the use and disclosure of personal health information (PHI) by “covered entities” and grants individuals certain rights over how their information is accessed and disclosed.

Today, electronic health record systems, health information exchanges, and third-party health applications routinely transmit and store sensitive information outside of the “covered entities” governed by HIPAA. Electronic patient records challenge traditional expectations of privacy and confidentiality by expanding the scope of information flow and enabling new forms of data exploitation. As modern health information operates without clear federal oversight, patients are more vulnerable to data misuse, unauthorized access, and large-scale breaches. While some policymakers and scholars argue that HIPAA is an adaptable and adequate framework, critics contend that HIPAA is structurally incapable of regulating the decentralized and commercially driven digital health environment that has emerged decades since its enactment. Current federal protections are insufficient and outdated in safeguarding patient privacy in an era where health information flows far beyond the entities HIPAA was designed to regulate.

The HIPAA Privacy Rule establishes national standards to protect “individually identifiable health information” held by covered entities, governing “the use and disclosure of protected health information (PHI)” and granting individuals rights over access to and disclosure of their information.² Under the Privacy Rule, covered entities can only use or disclose PHI for payment, treatment, or healthcare operations without individual authorization. As P.F. Edemekong discusses in “Health Insurance Portability and Accountability Act (HIPAA) Compliance,” the statute is designed to protect the privacy of PHI, create systems of confidentiality, limit the use and disclosure of patient information, and impose penalties for noncompliance. The goal of these regulations is to foster trust between individuals and the healthcare system. In practice, this means that electronic health record systems like Epic and patient-facing portals like MyChart should fall under HIPAA’s Privacy Rule and Security Rule, which requires

1 Peter F. Edemekong, Pavan Annamaraju, and Micelle J. Haydel. “Health Insurance Portability and Accountability Act.” *StatPearls*, (2018), <https://www.ncbi.nlm.nih.gov/books/NBK500019>.

2 U.S. Department of Health and Human Services. *Standards for Privacy of Individually Identifiable Health Information*, 65 Fed. Reg. 82,462 (Dec. 28, 2000), <https://aspe.hhs.gov/standards-privacy-individually-identifiable-health-information>.

covered entities to implement “appropriate administrative, physical, and technical safeguards” for the confidentiality and integrity of e-PHI.³

However, systems like Epic and MyChart are generally not covered entities under HIPAA even though they store large amounts of sensitive and personal health information. Epic is generally not a covered entity but may be a business associate subject to BAAs; MyChart is a portal through which covered entities provide access. In many cases, hospitals and other covered entities sign Business Associate Agreements (BAAs) with Epic, which obligates Epic to comply with certain HIPAA requirements and report breaches to protect health records. HIPAA regulates specific types of entities, not health data itself, which means that once information flows into consumer health apps or advertising technologies, it falls outside of HIPAA’s protections. Although HIPAA requires covered entities to implement “minimum necessary” access standards, many EHR platforms grant broad permissions to staff who do not have a legitimate medical need to view certain records. Internal “snooping” within EHR systems is a well-documented issue that occurs when platforms grant access far beyond what HIPAA’s minimum necessary standard lays out. This issue became prominent in the 2005 and 2008 incidents at UCLA Medical Center, where employees accessed Britney Spears’s psychiatric records without any authorization or legitimate medical purpose.⁴ This violation of Spears’s health record privacy shows HIPAA’s failure to prevent internal misuse of electronic health records. HIPAA’s minimum necessary standard is intended to be flexible, but the statute does not provide concrete guidance for how covered entities should determine what access is actually necessary. This vagueness allows hospitals to define necessary access, often resulting in expansive permission structures. HIPAA does not directly address the technical reality of EHR technology, where access is often much more permissive than the law can foresee. While HIPAA lays the essential groundwork for health privacy protections, it does not adequately address the technological realities of modern EHR systems, where large-scale access and commercially operated data infrastructures create risks beyond what the statute was designed to regulate.

As a 1990s regulatory product, HIPAA laid the foundation for health information privacy, but today’s digital data environment has become quite advanced and complex, creating risks that HIPAA could not have anticipated when it was created. Its reliance on patient authorization and informed consent is criticized as inadequate since the law assumes that patients meaningfully understand what they agree to when signing disclosures. This idea of informed consent (what HIPAA calls “authorizations”) is often coercive because patients perceive disclosures as mandatory conditions of receiving care, and these disclosures are often vague in what they authorize. HIPAA’s consent model is structurally outdated because it treats consent

3 U.S. Department of Health and Human Services, Office for Civil Rights. “Summary of the HIPAA Security Rule.” *HHS.gov*, (August 13, 2025). <https://www.hhs.gov/hipaa/for-professionals/security/laws-regulations/index.html>.

4 Jesse C. Vivian, “HIPAA Breach Notification Rule.” *U.S. Pharmacist*, (October 21, 2009). <https://www.uspharmacist.com/article/hipaa-breach-notification-rule>.

as a one-time transaction, even though modern health data flows involve continuous and commercial transfers of information.⁵

The *Dinerstein v. Google* (2023) class action lawsuit arose from a research partnership between the University of Chicago Medical Center and Google.⁶ The Medical Center shared millions of patient records with Google to develop predictive algorithms and healthcare software, but the patients were never told that their data would be used for commercial research. The plaintiff, Matt Dinerstein, claimed violations of privacy and breach of contract allegations stemming from the unauthorized disclosure of his information. Dinerstein had signed an Admission and Outpatient Agreement and Authorization form upon admission to receive treatment at the hospital. His signature affirmed that he understood his medical information might be shared for approved research purposes and that he was not entitled to any compensation. Dinerstein argued that the University never obtained his consent for the specific third-party disclosure to Google. The Seventh Circuit held that Dinerstein lacked Article III standing to proceed in a federal court because he failed to allege a concrete and particularized injury. Without any tangible or financial harm, the court reasoned, a privacy breach based on broad hospital consent forms is insufficient to confer standing. By requiring demonstrable injury beyond the unauthorized sharing of information, the court adopted a narrow view of what constitutes harm in informational privacy cases. As a result, even if a patient did not meaningfully understand the scope of disclosure, compliance with HIPAA's authorization framework significantly limits the viability of federal claims. The decision reinforces a conception of privacy protection centered on technical authorization and external disclosure, rather than on substantive patient understanding or control over personal data. By defining informational harm so narrowly at the standing stage, the court effectively restricts access to federal courts for plaintiffs alleging misuse of medical data absent economic or tangible injury. This narrow, injury-focused conception of privacy highlights a deeper mismatch between how courts define legally cognizable harm and how privacy theorists understand violations of informational norms.

Theorist Helen Nissenbaum argues instead for contextual integrity, which ties protection of privacy to the appropriate flow of information, not just on consent forms.⁷ While many privacy scholars define a right to privacy as the "right to control information about oneself," Nissenbaum believes this conception is "deeply flawed, whereas contextual integrity shifts the focus from the individual's absolute control to the contextual

5 Deven McGraw, James X. Dempsey, Leslie Harris, and Janlori Goldman. "Privacy as an Enabler, Not an Impediment: Building Trust into Health Information Exchange." *Health Affairs* 28, no. 2 (March–April 2009): 416–427. <https://doi.org/10.1377/hlthaff.28.2.416>.

6 *Dinerstein v. Google, LLC*, 73 F.4th 502 (7th Cir. 2023).

7 Helen Nissenbaum. "Privacy as Contextual Integrity." *Washington Law Review* 79, no. 1 (2004): 101–139. <https://digitalcommons.law.uw.edu/wlr/vol79/iss1/10>.

integrity of the information flow.”⁸ Contextual integrity argues that privacy is not just about whether information is disclosed, but whether information flows in ways that match the social expectations of a particular context. In healthcare, patients reasonably expect that their personal information will be used for care, treatment, and diagnoses, not for commercialization, algorithmic development, or marketing. HIPAA’s authorization system treats any signed disclosure form as permission for a variety of uses, so as long as the disclosure fits within HIPAA’s parameters, the flow is lawful even if it violates the purpose for which the patient shared the information. The contextual integrity approach views informed consent as a crucial, societal norm that, when violated, constitutes a breach of privacy rights. Nissenbaum views informed consent as a gatekeeper for maintaining the trust and professionalism of healthcare systems. According to the contextual integrity principle, HIPAA fails because it allows data to flow in ways that violate contextual norms.

Legal scholar Deven McGraw similarly argues that HIPAA’s authorization model is not suited for today’s health information environment, particularly because data flows increasingly involve entities that fall outside of the traditional “covered entity” structure.⁹ He argues, “Baseline regulatory standards should specify particular uses or disclosures for which independent consent must be obtained. For example, it might be required that consent to disclose data for marketing or commercial purposes must be obtained independently of other consent. Special consent might also be required for research uses of data, even if the data are deidentified or aggregated.”¹⁰ McGraw’s proposal for baseline regulatory standards highlights the structural flaw in HIPAA: it treats all patient authorizations as interchangeable, even though modern data usage varies in sensitivity, risk, and expectations. Independent consent for commercial, marketing, or research uses is necessary because these activities fall outside of the expectations of a clinical relationship. McGraw emphasizes that certain types of data flows fundamentally alter the nature of the patient-provider relationship. Patients expect their information to be used for treatment and care, not to generate commercial value. Under HIPAA, however, a general authorization form is all that is necessary to qualify as consent for a variety of data uses, since the law does not require separate forms of consent. This creates a regulatory blind spot as data can move outward from health systems to technology companies and research partners based on a single, broad consent form. By advocating for independent consent, privacy rules must explicitly distinguish between the uses that are intrinsic to patient care and those that are outside of the expectation of the clinical context. Without these distinct and special consent requirements, HIPAA fails to protect patients from health data uses that diverge from the purpose that the information was entrusted to healthcare providers.

8 Nissenbaum, “Privacy as Contextual Integrity.”

9 McGraw et al., “Privacy as an Enabler.”

10 McGraw et al., “Privacy as an Enabler.”

McGraw's idea for independent consent demonstrates how HIPAA's structure fails in the modern commercial market for health information. Modern health information routinely flows through commercial networks for advertising purposes, algorithm development, and analytic systems. HIPAA does not regulate these systems mostly because they fall outside of the definition of "covered entities" or "business associates." Today, covered entities share data with third parties like EHR companies, insurers, and AI developers, which may repurpose it for analytics that have nothing to do with patient care. HIPAA assumes that deidentified data erases privacy risk, but deidentified data can often be reidentified, and even non-identifiable data carries commercial or reputational harm.¹¹ The commercial value of health data creates incentives for uses that undermine patient trust; therefore, independent consent mechanisms are necessary to preserve the integrity of healthcare and patient privacy. Independent consent requirements would force regulators to require separate, meaningful permissions for commercial, research, or marketing uses. This reinforces Nissenbaum's contextual integrity framework, since both scholars argue that privacy is not only violated when information is shared but also when the purpose of the data disclosure is not what patients reasonably expect. The commercial market for health information reveals HIPAA's insufficiencies, as it treats authorization as a formality rather than a protection of data flow. As a result of this lack of protection, hospitals and companies use general admissions forms as permission to monetize or repurpose medical information. However, the legal system has been slow to recognize this as true harm, and courts tend to evaluate privacy injuries through a narrow lens of tangible loss rather than the lens of contextual norms and loss of control.

The *Hannant v. Culbertson Memorial Hospital Foundation (2025)* litigation further demonstrates the narrowness of legally recognized privacy injuries.¹² In *Hannant*, the plaintiff alleged that the hospital used online tracking technologies that transmitted patient information to third-party advertisers which violated the patient's expectations of confidentiality. The court dismissed most of the claims but allowed two negligence claims to proceed because the plaintiff argued they suffered emotional distress. The court decided that the alleged disclosure did not create a viable HIPAA claim or federal privacy cause of action, so the plaintiff could only pursue relief through negligence law. This distinction demonstrates the legal difficulty in classifying a specific HIPAA violation, highlighting HIPAA's limitations that leave victims of health data misuse to solely rely on state tort theories that rarely succeed. This case exemplifies the high bar for establishing a HIPAA violation even in the context of metadata disclosure, making it extremely difficult for victims of health data breaches to advance viable privacy claims. The outdated conception of harm and HIPAA's narrow enforcement structure leave patients unprotected in modern digital data environments, which the statute was never designed to regulate.

11 McGraw et al., "Privacy as an Enabler."

12 *Hannant v. Sarah D. Culbertson Memorial Hospital*, 2025 WL 2413894 (C.D. Ill. Aug. 20, 2025).

Courts are skeptical of informational privacy harms, particularly when those harms do not involve measurable financial losses. This judicial skepticism weakens HIPAA's effectiveness because the statute does not provide a private right of action, leaving patients reliant on common law claims outside of HIPAA that courts rarely recognize as sufficient. Instead, courts tend to require "concrete injuries" for standing, which often excludes dignity, autonomy, or loss of control over personal information as harms. The 2016 Supreme Court case *Spokeo, Inc. v. Robins* held that Article III standing requires not just a statutory violation but a "concrete and particularized" injury.¹³ The court did acknowledge that some intangible harms can be concrete, but it offered very little guidance on when and what qualifies as concrete. Lower courts have interpreted *Spokeo* narrowly, often dismissing cases where plaintiffs allege a loss of control over their own information, which increases their risk of harm and dignity injury. In *Spokeo*, the plaintiff, Robins, argued that the defendant published inaccurate personal data about him, harming his employment prospects and privacy. However, the court concluded that a statutory violation alone is not enough and that there must be a demonstrable injury linked to the data disclosure. This ruling created uncertainty since the courts recognize the possibility of intangible harms but frequently decline to address those harms as concrete in practice. Health data plaintiffs are disproportionately affected by this understanding of harm because privacy harms involving medical information usually do not involve financial loss. Patients whose data become shared, sold, or monetized without informed consent often cannot make a standing claim in court. This judicial reluctance to treat informational harm as legally cognizable creates a gap in U.S. health-privacy law. As a result, patients experience privacy violations but have no viable path to recovery. This doctrinal gap strengthens the position of large, commercial actors in the health data sphere. When courts insist on identifying a financial injury, this requirement enables companies to defeat suits by arguing that there was no economic loss, even when the company profited from the data. Combined with HIPAA's limitations, *Spokeo* reinforces a system where institutions face minimal accountability, and individuals bear the consequences of privacy violations.

The limitations revealed in litigation are not just gaps in enforcement; rather, they reflect a deeper philosophical flaw in how HIPAA conceptualizes privacy. HIPAA assumes that information is protected as long as it remains within regulated entities or it is disclosed with authorization.¹⁴ This narrow view treats privacy as a matter of secrecy, or controlled disclosure, which fails to reflect how modern health data is generated, shared, and exploited. An alternative, autonomy-based privacy model would help to better address privacy violations and focus on preserving an individual's authority over their personal decisions and boundaries. Autonomy-based privacy emphasizes a patient's moral and legal right to decide who may access their medical data, under which conditions, and for what purposes. As scholar Salvador Soria discusses, "digital health innovations must be compatible with and respectful

13 *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

14 Edemekong et al., "Health Insurance Portability and Accountability Act."

of the right to privacy, data protection, right to information and freedom of choice- in short, with the autonomy of the human being in healthcare.¹⁵ This means autonomy cannot be reduced to informed consent or rational decision-making; rather, it requires the structural protection of privacy that ensures patients have meaningful control over their data. However, courts continue to undermine this principle by requiring economic or reputational injury to establish standing. This ignores the autonomy-based injury that occurs at the moment when sensitive data is shared or monetized without meaningful control. Without a privacy right of action or the legal recognition of loss of control as a cognizable harm, the existing regulatory system treats privacy as a transactional commodity rather than an enabling condition of human agency. Legally, the current system acknowledges autonomy in theory but renders it irrelevant in practice, leaving patients with no meaningful way to challenge the loss of control over their own health information.

The debate over whether HIPAA remains an adequate framework for protecting patient privacy in the digital age is determined by how privacy is conceptualized. Defenders argue that HIPAA's flexibility is a deliberate strength that allows it to adapt to new technologies. Critics assert that its structure that is reliant on covered entities, broad authorizations, and a secrecy-based model of privacy is misaligned with today's decentralized and commercial health data environment. In the expansion of electronic health records, the rise of third-party commercial actors, and the inadequacy of broad, one-time consent, HIPAA's protections are weak. The legal system's reluctance to recognize loss of control over personal data as a concrete harm demonstrates that patients have no meaningful recourse when their data is misused. Current federal protections fail to preserve autonomy and privacy norms that define control over one's health information. Safeguarding patient privacy today requires a new federal framework grounded in autonomy, contextual integrity, and enforceable rights over how health information is used. Such reform should include a private right to action allowing patients to seek redress when their data is improperly disclosed. An expanded definition of covered entities that includes third-party data brokers and digital health platforms as well as consent requirements that are specific, informed, and limited to clearly defined purposes are necessary to sufficiently protect patients from privacy breaches. Until the federal law reflects these principles, patients will remain vulnerable in a system that gives institutions expansive power over personal health data.

15 Salvador Tarodo Soria. "Patient Autonomy in the Context of Digital Health." *Bioethics* 39, no. 5 (June 2025): 404–413. <https://doi.org/10.1111/bioe.13410>.

***(RE)ESTABLISHING BALANCE: HISTORICAL
PERSPECTIVES ON THE SEPARATION OF WARTIME
POWERS***

BY MASON J. KROGH

INTRODUCTION

The United States executive branch faces far greater scrutiny than any other branch of the American government. This statement proves to be especially true during periods of heightened tensions, such as war. In the summer of 2025, tensions began to escalate between Iran and Israel, an ally of the United States. This conflict reached a boiling point when President Donald Trump decided to bomb three of Iran's nuclear facilities to defend both America and its allies. Following this incident, the President's decision has faced intense support and criticism. Although this event is significant, it is far from the first time that presidential powers have been put into question regarding the defense of the nation's security.

The powers of the executive branch have consistently expanded, through application in unique situations, when national security has been threatened, leading many Americans to question the extent of presidential war powers. Many debates arose as a result of the Constitution's inability to address the dynamism of modern warfare. Moreover, technological advancements render the Framers' understanding of warfare irrelevant to the modern world. This disconnect is especially evident when analyzing the delegation of war powers in Articles I & II of the Constitution.

Article I, Section 8 enumerates the various powers held by the nation's legislative branch and grants Congress the power to "declare war" in the 11th Clause.¹ On the other hand, Article II, Section 1, Clause 1 bestows the title of "Commander in Chief of the Army and Navy of the United States" upon the president.² Furthermore, U.S. Const. art. II, § 2, cl. 1 continues to specify that the title of Commander in Chief is applicable "when called into the actual Service of the United States."³ The clause indicates that in the case of a Congressional declaration of war, the president is to assume the powers of Commander in Chief. The Constitution grants the Commander in Chief all powers not allotted to Congress. Therefore, it is the legislative branch's responsibility to exercise restraints on presidential authority, specifically during times of war when decisions made by the executive branch have the potential to significantly affect Americans.

1 U.S. Const. art. I, § 8, cl. 11.

2 U.S. Const. art. II, § 2, cl. 1.

3 U.S. Const. art. II, § 2, cl. 1.

Before the drafting of the Constitution, American statesmen recognized the necessity for a more powerful federal government. Despite this necessity, the Framers' fear of tyranny materialized in the Constitution lacking the specificities that could help to avoid future conflicts regarding the nation's separation of powers. During the early national period, the Antebellum period, and the 20th century, presidents, fulfilling their role as Commander in Chief, have exercised expansive powers to promote national security. This expansion of presidential power has continued to challenge the limits of executive authority without a declaration of war or specific Congressional approval.

An Originalist understanding of the Constitution serves to clarify the true nature of events featuring the executive's use of force throughout American history. In two instances, early in the nation's history, executive use of force should not be considered as precedent due to their unique nature and the President's intent. Some scholars have recognized that President Washington sought to assert the supremacy of the federal government when dispelling the Whiskey Rebellion, rather than attempting to expand executive power over the military.⁴ Other scholars have acknowledged the expansion of executive powers, under Lincoln, that took place throughout the Civil War.⁵ Scholars have criticized Presidents in the twentieth century for disturbing the nation's balance of power by encroaching upon legislative wartime powers.⁶ Historian Richard M. Pious noted that the predominant issue with previous evaluations of executive war power is that these historical accounts revolve around the ability of the President to reach favorable terms, reflecting periods of intense support for the nation's executive branch, while others focus on the office's failures.⁷

This article expands upon existing scholarship by demonstrating that the Whiskey Rebellion and the Prize Cases that took place throughout the Civil War ought to be treated as a series of anomalies, rather than as precedent. Then, the article showcases that the expansion of executive power throughout the Korean and Vietnam represent a clear breach of the Framers' intent.

4 See for example Jerry A. Clouse, *The Whiskey Rebellion: Southwestern Pennsylvania's Frontier People Test the American Constitution* (Pennsylvania Historical and Museum Commission, 1994); Thomas P. Slaughter, "The Friends of Liberty, the Friends of Order, and the Whiskey Rebellion: A Historiographical Essay," in *The Whiskey Rebellion: Past and Present Perspectives*, edited by Steven R. Boyd (Greenwood Press, 1985).

5 See for example Allen C. Guelzo, *Abraham Lincoln and the Development of the War Powers of the Presidency* (Federal Lawyer, November/December 2007, Vol. 54 Issue 10, p42 8 p Item: 502584705).

6 See for example Edward Keynes, *Undeclared War: Twilight Zone of Constitutional Power* (Pennsylvania State University Press, 1982); Lawrence R. Velvel, *Undeclared War and Civil Disobedience: The American System in Crisis* (University Press of Cambridge Massachusetts, 1970).

7 See for example Richard M. Pious, "Presidential War Powers, the War Powers Resolution, and the Persian Gulf," in *The Constitution and the American Presidency*, edited by Martin L. Fausold and Alan Shank (State University of New York Press, 1991).

The expansive powers seized by the executive branch during times of war demand that action be taken by Congress to restore legislative power, regardless of presidential success. Through analysis of the use of force in the early republic, throughout the 19th and 20th centuries, and attempts to regain Congressional authority, it becomes clear that the executive branch has violated the Constitution by waging major offensive wars while lacking a formal declaration of war.

THE FRAMING OF THE CONSTITUTION

The Framers' vision for the American government conceptualized an ideal balance between three separate branches of government that deviated significantly from the British monarchical system of government. In fact, this transition from unilateral executive power during times of war to legislative control over declarations of war began in England and can be observed in the remarks of leading political commentators. This is evident in Montesquieu's *Spirit of the Laws* (1748), in which he would comment on the importance of independent branches in government tasked with unique responsibilities.⁸ Additionally, each branch of government would be granted the power to monitor the actions taken by another branch. Montesquieu's work promoting checks and balances as well as separation of powers would influence the Constitution's treatment of war powers by ensuring that multiple branches of government would have to cooperate to carry out a large-scale war.

Before the drafting and adoption of the Constitution, British political trends indicate a deviation away from an all-powerful executive, specifically during times of war. Beginning with the Confirmation of the Charters in 1297, the British Crown affirmed that the king would be subject to the nation's laws.⁹ Not only did the Confirmation of the Charters humanize the monarchy, but it also restricted the king's ability to wage war. The reissued limitations on the king, brought about by the Magna Carta, limited his ability to raise funds to support a war effort.¹⁰ Centuries later, the Framers would include these ideals in the Constitution by granting Congress the power to declare war. By delegating the power to declare to a representative assembly, the nation would avoid a tyrannical executive. The danger of the power to wage war lying in the executive branch cannot be understated, for the control of an entire nation cannot lie in the hands of one individual. The Framers recognized that the power to declare war could and would be

⁸ Charles De Secondat, Baron De Montesquieu, *Spirit of the Laws*, (1748), <https://constitutioncenter.org/the-constitution/historic-document-library/detail/montesquieuthespiritofthelaws-1748>.

⁹ "Edward I's Confirmation of Magna Carta, 1297," The National Archives, accessed July 10, 2025, <https://www.nationalarchives.gov.uk/education/resources/magna-carta/edward-confirmation-magna-carta-1297/#:~:text=King%20Edward%20was%20not%20prepared,agreement%20of%20all%20the%20realm>.

¹⁰ "Magna Carta, 1215," The National Archives, accessed July 10, 2025, <https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede>.

abused to achieve wealth and glory.

Records from the early Republic showcase the numerous concerns held by the Framers. It is important to note the Framers' intent to shift away from the weak federal government established by the Articles of Confederation, while avoiding an all-powerful branch of government that could assume a tyrannical role. Records from the Federal Convention, as recorded by James Madison, elaborate on the specific concerns of the Framers regarding vesting the power to declare war with the president. George Mason opposed the delegation of war powers to an executive because he felt that no individual could be "trusted" with the power.¹¹ Mason's remarks provide insight into the Framers' fear of executive tyranny. Additionally, prominent figures, such as James Wilson and Madison, advocated for the power to declare war to be granted to Congress to ensure that the separate branches remain equal in power.¹² Many statesmen believed that withholding the power to declare war from the executive would prevent arbitrary wars and the encroachment of personal liberties. To err on the side of legislative supremacy provided a reassuring norm for a group of Framers fearful of executive tyranny.

Although a firm supporter of Congressional declarations of war, Madison recognized the importance of swift action in response to sudden attacks. In fact, Madison proposed to alter the draft of the Constitution by replacing "make war" with "declare war."¹³ Madison believed that this change would allow for the executive to "repel sudden attacks." This fundamental change to the diction employed in the Constitution showcases the Framers' intent when delegating war powers. The Framers agreed with Madison, given that the proposed alteration succeeded. The Framers envisioned a system of government that required a Congressional declaration of war to wage long-term, costly wars, yet permitted the use of force by the executive to respond to sudden attacks. However, the Framers failed to address the limitations of the president's defensive powers. By not specifying limits, for example casualties, time, or expenses, the Framers opened the door for future debates regarding the extent of executive powers without a Congressional declaration of war. It is important to recognize the explicit alteration made by the Framers to Article I, Section 8, Clause 11 of the Constitution because it reveals their intention to allow defensive action while conferring the power to declare war to Congress.

Pierce Butler and Charles Pinckney stood in opposition to supporters of granting Congress the power to declare war. Both men believed that the legislative branch could not act in a decisive manner to repel sudden attacks. Their sentiments and influence shaped the nation's understanding of

11 Max Farrand, *The Records of the Federal Convention of 1787* (Yale University Press, 1911), 325, <https://www.loc.gov/item/11005506>.

12 Richard M. Pious, "Presidential War Powers, the War Powers Resolution, and the Persian Gulf," in *The Constitution and the American Presidency*, edited by Martin L. Fausold and Alan Shank (State University of New York Press, 1991), 196.

13 Farrand, *The Records of the Federal Convention of 1787*.

declarations of war by discussing the necessity for decisive action. Pinckney believed that the House of Representatives' "proceedings were too slow" to respond to the demands of foreign affairs.¹⁴ Instead, he proposed that the power to make war and peace be vested in the Senate. Butler, who expressed more radical beliefs for the time, advocated that the president be granted unrestricted war powers, including the authority to initiate and declare wars, as well as to make peace.¹⁵ Although Pinckney and Butler's visions would not be realized in the Constitution, their arguments and unique perspectives would contribute to public perceptions of presidential war powers. Their arguments resulted in many Americans recognizing the necessity for the president to exercise military authority to act in a defensive manner without a Congressional declaration of war. In this way, the Framers intended for many unique circumstances to be handled in practice rather than in principle.

Following the conclusion of the Constitutional Convention, Madison, John Jay, and Alexander Hamilton wrote the Federalist Papers to persuade Americans and statesmen alike to support the enactment of the Constitution. These documents, specifically Federalist 69 and 74, authored by Hamilton, provide unique insight into the Framers' intentions. This is important because it reveals the public understanding of the Constitution at the time it was enacted. In Federalist 69, Hamilton explicitly confirms that the power to declare war lies with the legislative branch.¹⁶ He does so in comparison of presidential war powers and the king of England. Hamilton intended to showcase the limitations placed upon presidential power that contrasted with the monarchy. He wrote that

it would amount to nothing more than the supreme command and direction of the military and naval forces...while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.¹⁷

Thus, Hamilton's work highlights the limited nature of the executive branch's power by pointing out the powers granted to the legislative branch under the Constitution. In an attempt to persuade Americans to support the Constitution, Hamilton recognized the necessity to address presidential war powers. Federalist 69 reveals that the widespread understanding of the Constitution, at the time of its enactment, included limitations on executive power.

14 Farrand, *The Records of the Federal Convention of 1787*.

15 Pious, "Presidential War Powers, the War Powers Resolution, and the Persian Gulf," 196.

16 "The Federalist No. 69, [14 March 1788]," Founders Online, National Archives, <https://founders.archives.gov/documents/Hamilton/01-04-02-0220>. [Original source: *The Papers of Alexander Hamilton*, vol. 4, *January 1787–May 1788*, ed. Harold C. Syrett. Columbia University Press, (1962): 591–598.]

17 National Archives, "Federalist No. 69."

In contrast, Federalist 74 illustrates the importance of the president's power to act decisively in his capacity as Commander in Chief.¹⁸ Hamilton advocated for the application of the Constitution to permit the use of defensive military action in practice. Similar to the arguments of Pinckney and Butler in support of changing the diction within the Constitution, Hamilton focused on the necessity for decisive action to respond to national security threats. He wrote that "the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."¹⁹ Thus, Hamilton showcases the benefits of entrusting the direction of war to a single executive. Federalist 74 excellently displays the importance of the president's role as Commander in Chief. The legislative branch must entrust the president to execute the policies of war decided on by the nation's representatives and in the best interest of the nation. Hamilton's work presents the necessity for the president to exercise defensive measures when provoked, while upholding the important role of the legislative branch in times of war.

The Articles of Confederation rendered the federal government weak and inept, prompting the Founding Fathers to draft a constitution that enhanced federal power. The diction employed in the Constitution of the United States of America, the Federalist Papers, and records of proceedings from the Constitutional Convention of 1787 demonstrate that the Framers understood executive power during times of armed conflict with a hostile force to be decisive, yet limited. The employment of an originalist understanding of the Constitution reveals the defensive nature of the president's role as Commander in Chief because the Framers understood executive power to be responsive to immediate danger but accountable to legislation dictating the nation's policy and intentions in war.

PRESIDENTIAL USE OF FORCE

WHISKEY REBELLION

Presidential use of force in the absence of a Congressional declaration of war can be traced back to the years of the early Republic, immediately following the Constitution's enactment. The nation's legendary military leader and first president, George Washington, exercised the powers of the Commander in Chief by calling men to arms in opposition to the Whiskey Rebellion. Washington's actions significantly expanded the power of the executive branch by exercising military force through swift and decisive action to address what many statesmen deemed to be a national security threat in the form of an uprising. The Whiskey Rebellion began in 1794 as many distillers were opposed to a federal whiskey tax issued by Hamilton. Although the Whiskey Rebellion featured nonviolent protests in the

18 "The Federalist No. 74, [25 March 1788]," Founders Online, National Archives, <https://founders.archives.gov/documents/Hamilton/01-04-02-0226>. [Original source: *The Papers of Alexander Hamilton*, vol. 4, *January 1787–May 1788*, ed. Harold C. Syrett. Columbia University Press, (1962): 625–627.]

19 National Archives, "Federalist No. 74."

beginning, the movement escalated, featuring violent acts against federal officials, tax collectors, and their property. For example, a group of rebels burned a Pennsylvania tax collector's home after he refused to resign from his post.²⁰ At this point, Hamilton, a staunch federalist, began to advise Washington to take decisive action to put down the rebellion. In a letter to the president, Hamilton forewarned Washington that if he did not act, "the well disposed [sic] part of the community will begin to think the Executive wanting in decision and vigour."²¹ Thus, prompting Washington to call for the assembly of the Pennsylvania militia on September 9 and to even lead a column of troops against the rebels.²² Upon observation of the federal troops, the rebels dissipated. Despite not firing a single shot of ammunition, Washington's leadership and action through the display of military force proved to be enough to quell the insurrection. Washington summoned federal forces without a Congressional declaration of war to suppress the uprising and eliminate the threat to national safety.

Letters from the Whiskey Rebellion indicate that the motivation for Washington to exercise arms revolved around federalist debates, rather than the separation of powers. In doing so, they demonstrate that his handling of the uprising is nearly inconsequential to modern debates about the separation of powers during times of conflict. At the beginning of the rebellion, the Washington Administration sought a peaceful resolution to the conflict. However, once prompted by Hamilton, "the Washington administration [sic] reversed its policy and began immediate plans for military actions".²³ Many historians and Washington's own biographer, Washington Irving, believed that the first American president understood that the rebellion presented an "opportunity to display the ability of the [federal] government to enforce its laws."²⁴ Rather than focusing on the role of the Commander in Chief in calling the military to arms, Washington and his contemporaries recognized the significance of enforcing federal laws. Thus, the president's first use of force without a Congressional declaration of war proves to be insignificant when analyzing the separation of war powers, further demonstrating the flawed nature of previous originalist thinking regarding the role of the Commander in Chief. Therefore, President Washington's employment of federal force to quell the Whiskey Rebellion should not be

20 Jerry A. Clouse, *The Whiskey Rebellion: Southwestern Pennsylvania's Frontier People Test the American Constitution* (Pennsylvania Historical and Museum Commission, 1994), 25.

21 "To George Washington from Alexander Hamilton, 1 September 1792," Founders Online, National Archives, <https://founders.archives.gov/documents/Washington/05-11-02-0030>. [Original source: *The Papers of George Washington*, Presidential Series, vol. 11, *16 August 1792–15 January 1793*, ed. Christine Sternberg Patrick. Charlottesville: University of Virginia Press, 2002, pp. 59–62.]

22 Clouse, *The Whiskey Rebellion*, 34.

23 Clouse, *The Whiskey Rebellion*, 33.

24 Thomas P. Slaughter, "The Friends of Liberty, the Friends of Order, and the Whiskey Rebellion: A Historiographical Essay," in *The Whiskey Rebellion: Past and Present Perspectives*, edited by Steven R. Boyd (Greenwood Press, 1985), 18.

cited as a justification for future presidents to unilaterally exercise wartime powers. Washington sought to establish a balance between state and federal authority; whereas presidents throughout the 20th century have attempted to utilize this instance in history as a means of encroaching upon legislative authority. President Washington's actions expanded upon executive power, but not in conflict with the legislative branch.

In contrast with Hamilton's request for decisive action during the Whiskey Rebellion, John Jay, coauthor of the Federalist Papers and the first Supreme Court Justice, cautioned Washington against the use of force. Jay believed that the Washington Administration's actions could be perceived as tyrannical by the American public. Jay focused on the suppression of personal liberties resulting from the president's use of force by highlighting the dangers of denying peaceful protest. Jay feared that some Americans would interpret the "presidential proclamation as proof of the executive's dictatorial power and design to rob the citizenry of their liberty through military violence and legal oppression," demonstrating the dangers of presidential use of force in the void of a Congressional declaration of war.²⁵ Although Jay failed to recognize the dangers of violent protests during the Whiskey Rebellion, the principles that he advocated for remain true. The Constitution was designed for the necessity of force to be determined by the nation's legislative branch, composed of representatives of the people, to prevent tyranny and the encroachment of liberties. Jay's commentary on Washington's use of force to quell the rebellion provides illuminating evidence regarding modern debates on presidential war powers by cautioning against an all-powerful executive.

PRIZE CASES

During the Civil War, presidential war powers would be questioned once again in a series of Supreme Court cases labelled the "Prize Cases." The case arose because, rather than requesting Congress declare war on the Confederacy, President Abraham Lincoln exercised his authority over the United States' Navy to form a blockade. The Supreme Court recognized the Civil War as an undeclared war against aggressive belligerents. Thus, through a technicality, the United States effectively allowed for a war to be carried out without a Congressional declaration. In his majority opinion, Supreme Court Justice Grier recognized that a state of war may exist in the void of a declaration and even supports the president taking military action "without waiting for Congress to baptize it with a name."²⁶ Grier's opinion introduced the acceptance of undeclared war to the nation's judicial precedent. This harmful precedent would allow the president to continue to encroach upon the powers of war allocated to Congress. Despite creating a precedent, the Prize Cases should be viewed as an exception rather than a rule because the reasoning was based solely on the principle that no state

25 "John Jay's Moderate Response to the Whiskey Rebellion: Editorial Note," Founders Online, National Archives, <https://founders.archives.gov/documents/Jay/01-05-02-0239>. [Original source: *The Selected Papers of John Jay*, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 447–449.]

26 Prize Cases, 67 U.S. 635 (1862).

could secede. The notion that the United States legislative branch could not declare war on another state was a technicality. The Prize Cases effectively blurred the line between offensive and defensive warfare by granting the president the authority to carry out decisive military action to reestablish the standing authority of the government in a state insurrection. Rather than merely allowing the president to defend against a threat to national security temporarily, Congress allowed President Lincoln to wage an entire war through presidential proclamations and orders. The expansion of executive power in the Civil War, and upheld in the Prize Cases, greatly disrupted the balance of power among the branches as laid out in the Constitution. This ruling adversely affected the nation's jurisprudence on presidential wartime powers because the judiciary interpreted Lincoln's role in the Civil War as the equivalent of dispelling a rebellion. However, the Civil War represents a prominent example of an extensive armed conflict with a hostile force.

KOREAN WAR

The next major undeclared war to be carried out by the Commander in Chief would be the Korean War. The conflict presented, yet again, an anomaly to the constitutional standard. In this case, the president recognized the necessity to use force in Korea to defend against the spread of Communism as a part of the United States' so-called "containment" policy. To justify these measures, the president declared that the American military would act in accordance with the United Nation Security Council's consensus.

On July 27, 1950, President Truman announced that the UN's Security Council "called upon all members of the United Nations to render every assistance to the United Nations," in the execution of the resolution that called for repelling North Korean military forces from South Korea.²⁷ Thus, the United States' obligation to the United Nations Charter permitted the president to take "police action" in Korea to promote international peace.²⁸ The president's role as chief diplomat and Commander in Chief allowed Truman to enter the Korean War without consulting the United States Congress. Congress debated Truman's entrance to the Korean War without approval in the "Great Debate," where congressmen led by Senator Robert A. Taft discussed the implications of allowing the president to exercise unfettered power over United States military forces without a declaration of war.²⁹ Ultimately, the Senate deferred to Truman's Administration by allowing the Commander in Chief to move troops at his discretion. Although the president continued to exercise significant war powers during

27 Press Release, Statement by the President; 6/27/1950; June 1950; White House Press Releases, 4/1945 - 1/1953; Collection HST-WHPRF: White House Press Release Files (Truman Administration); Harry S. Truman Library, Independence, MO. <https://www.docsteach.org/documents/document/truman-statement-korea>.

28 "The United Nations in Korea," National Archives: Harry S. Truman Library, accessed June 12, 2025, <https://www.trumanlibrary.gov/education/presidential-inquiries/united-nations-korea>.

29 Congressional Record, 97 Cong. Rec. 3090 (1951). <https://www.congress.gov/82/crecb/1951/04/02/GPO-CRECB-1951-pt3-5-1.pdf#page=29>.

the nation's time in Korea, Congress vied for influence on policy.

VIETNAM WAR

The most prominent example of the executive branch employing force without a Congressional declaration of war is the Vietnam War. The Southeast Asia Treaty Organization (SEATO) and the so-called Domino Theory are crucial to understanding the United States' executive's justification for involvement in the war.

Following the conclusion of World War II, the United States competed with its once ally, the Soviet Union, for the spread of influence around the globe. Many leading statesmen feared that the fall of South Vietnam to the Communist North would result in a domino effect of Communist domination throughout Southeast Asia. This concern prompted the United States to devise a planned military alliance in opposition to the threat of Communist expansion. In 1954, the United States, along with Australia, France, New Zealand, Pakistan, the Philippines, Thailand, and the United Kingdom, formed the SEATO, loosely vowing to cooperate to defend against a shared Communist enemy. Although the organization failed to fend off Communist forces of influence and power, the treaty permitted the large-scale involvement of the United States of America in the Vietnam War.³⁰ It is crucial to understand that before the United States' military involvement in the war, Congress apportioned money to fund the South Vietnamese military. Additionally, the country sent troops to train South Vietnamese forces, showcasing the United States' indirect role early on, despite never declaring war against North Vietnam. The SEATO Treaty granted the United States a foothold in South Vietnam, allowing the nation to intervene and provide support, setting the stage for future escalation.

In 1964, President Johnson eagerly seized the opportunity to escalate the United States' military operations in the Vietnam War by presenting framed information to Congress. The Gulf of Tonkin incident and the accusations of misinformation that followed threaten the legitimacy of the executive office. The incident presented a major flaw in the Constitution, designating the president as chief diplomat and Commander in Chief. The president was granted exclusive access to information regarding the military and foreign affairs, serving as a gatekeeper of information. This proved to be extremely problematic because many believe that the president and his Department of Defense provided Congress with inaccurate information. In the incident, the American destroyer, the *Maddox*, intercepted North Vietnamese intelligence indicating that their forces planned to attack the ship. Later that day, three hostile North Vietnamese boats approached the *Maddox* and exchanged fire with the destroyer. At that point, the *Maddox* had called for aerial support. Following their retreat, the "four F8 Crusaders that the *Maddox* had called in from the USS *Ticonderoga*" arrived on the scene to "attack and destroy" the boats, leaving two heavily damaged and

30 "Southeast Asia Treaty Organization (SEATO), 1954," Office of the Historian, accessed July 10, 2025, <https://history.state.gov/milestones/1953-1960/seato>.

the third sunk.³¹ The next day, President Johnson “ordered the USS *Turner Joy*” to join the *Maddox* in the Gulf of Tonkin.³² On the morning of August 4, 1964, a series of what can best be described as phantom attacks occurred. Both destroyers reported sonar readings indicating boats and missiles, but nothing happened to either ship. In fact, the reports of an attack on the USS *Turner Joy* have been attributed to falsification of data and a ploy to justify the United States’ escalation of the war in Vietnam.

The falsified accounts of the incident provided to Congress by the president manipulated the legislature to grant him unprecedented war powers. The events prompted the Tonkin Gulf Resolution that “served as the ‘functional equivalent’ of a Congressional declaration of war.”³³ Ultimately, the justification for the Vietnam War relied upon faulty information that was presented by an executive branch eager for war.

The diction employed in the Tonkin Gulf resolution proves to be problematic and distressing because of the immense power it delegates to the nation’s executive. This wording would prove to permit the continuous escalation of the Vietnam War as conducted by multiple presidents. To begin, the document grants the authority, as supported by Congress, for the “Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.”³⁴ The document fails to address the limitations of the president’s authority. Although the document does determine that the Resolution will expire, it would do so when the “President shall determine that the peace and security of the area is reasonably assured.”³⁵ Congress essentially delegated its wartime powers to the Commander in Chief, resulting in a large shift of power in favor of the executive branch. This decision would harm the American government and public by allowing the executive branch to wage a nearly autonomous war. The events that would transpire throughout the Vietnam War highlight the necessity for the separation of powers and the dangers presented by the Tonkin Gulf Resolution.

The Tonkin Gulf Resolution granted extraordinary amounts of power to the executive branch, challenging the limits of the constitutionality of the legislature’s delegation of war powers to the Commander in Chief. Congressional debates regarding the Resolution indicate that members of Congress recognized the significance of vesting the nation’s war effort in a single branch of government. On August 7, 1964, Senator Wayne Morse

31 Pat Peterson, “The Truth about Tonkin,” *Naval History* 22, no. 1 (2008), <https://www.usni.org/magazines/naval-history-magazine/2008/february/truth-about-tonkin>.

32 Peterson, “The Truth about Tonkin.”

33 Lawrence R. Velvel, *Undeclared War and Civil Disobedience: The American System in Crisis* (University Press of Cambridge Massachusetts, 1970), 47.

34 “Tonkin Gulf Resolution (1964),” National Archives, accessed July 10, 2025, <https://www.archives.gov/milestone-documents/tonkin-gulf-resolution>.

35 National Archives, “Tonkin Gulf Resolution (1964).”

expressed concern regarding the proposed joint resolution because the document served as an “open-ended declaration of war.”³⁶ Additionally, Morse feared that the Resolution would fundamentally disrupt the separation of powers. This is evident when Morse stated that “it is dangerous to the freedoms and liberties of the American people to vest in any President, at any time, under any circumstances, power that exceeds the constitutional concept of three coordinate and coequal branches of Government.”³⁷ Despite Morse’s warning, Congress chose to entrust the nation’s safety to the president. In his work, *Undeclared War and Civil Disobedience: The American System in Crisis*, Lawrence R. Velvel attributes the legislature’s blind support of the executive branch to peer pressure and the volatile cycle of national unity. He finds that many congressmen feared opposing the nation’s executive would prove to be political suicide. Additionally, he wrote that during times of hardship, the nation yearns for a leader whom they can trust to lead them. Similarly, the executive receives criticism when war efforts begin to fail. The legislative branch’s failure to check the executive rule resulted in the large-scale escalation of the Vietnam War without Congressional consultation. This, therefore, allowed for the nation’s principles to be violated, as the American people went unrepresented in what may be considered the president’s war.

Throughout the Vietnam War, the executive branch exercised unprecedented powers, allowing it to lead and carry out the war effort relatively unchecked. Increasing public opposition to the Vietnam War prompted the United States Congress to repeal the Tonkin Gulf Resolution. However, the consolidation of executive war powers accumulated throughout the Vietnam War had already become cemented in the nation’s wartime practices. Legislation sought to reclaim the Congressional authority to declare war by repealing the resolution. Additionally, the legislature sought to further restrict the president’s war-making abilities by introducing revolutionary checks on the president’s ability to utilize funds and deploy troops with the proposed Cooper-Church Amendment. The legislative branch’s attempt to quell presidential power through the revocation of the Tonkin Gulf Resolution failed as a result of the expansive wartime powers granted to the president in the years prior. In fact, President Nixon did not even oppose the Resolution’s repeal because at that point the executive office claimed that the president had every right to act “on the basis of his powers as Commander in Chief [and] to take steps to protect American troops as they are withdrawn from Vietnam.”³⁸ The dangers presented by this claim to executive power are numerous, for Nixon’s philosophy allowed for the president to exercise war powers with no regard to national representation as directed by Congress. Further attempts to restrain presidential authority

36 Edward Keynes, *Undeclared War: Twilight Zone of Constitutional Power* (Pennsylvania State University Press, 1982), 113.

37 Congressional Record, 110 Cong. Rec. 18443 (1964).
<https://www.congress.gov/88/crecb/1964/08/07/GPO-CRECB-1964-pt14-4-1.pdf>.

38 “Gulf of Tonkin Measure Voted In Haste and Confusion in 1964,” *New York Times*, June 25, 1970, <https://www.nytimes.com/1970/06/25/archives/gulf-of-tonkin-measure-voted-in-haste-and-confusion-in-1964.html>.

by restricting the Commander in Chief's control over federal funds failed to pass through Congress because the American government struggled to conclude its involvement in Vietnam. Furthermore, President Nixon threatened to veto entire pieces of legislation regarding the Vietnam War if restrictive measures were included. The inability of Congress to restrict the president's powers in the Vietnam War showcased the significant issues that had developed in precedent through the application of the United States Constitution during times of war, highlighting the necessity for action to be taken by the legislature.

The legislative branch's failure to restrain the president's wartime powers at the end of the Vietnam War foreshadowed the tragedies revolving around the United States' involvement in the Cambodian offensive. Through a reliance on his authority as the nation's Commander in Chief, President Nixon orchestrated the expansion of the Vietnam War into neighboring Cambodia by citing the security interests of U.S. troops. Furthermore, the nation's Congress indirectly permitted the war's expansion by allocating federal funds to the president's war effort. In 1970, amidst debates over the Cooper-Church Amendment, President Nixon requested that Congress apportion "\$155 million" to support military actions in Cambodia.³⁹ Through presidential initiatives, President Nixon managed to access funds to wage an offensive war in Southeast Asia without a declaration of war or the authority of the Tonkin Gulf Resolution.⁴⁰ This period of time's significance cannot be understated, for the president enjoyed unilateral authority over the United States military while exercising significant control over the nation's budget by citing troop safety and security. However, the United States' lingering involvement in Southeast Asia would continue to demand that money be used to bolster military forces. The president's unchecked authority over the military, in this case, demonstrates the issues posed by a refusal to act in accordance with Congressional wishes.

THE WAR POWERS RESOLUTION & BEYOND

The War Powers Resolution, enacted in 1973, represents a significant step toward reclaiming Congressional authority during times of war, contributing to an improved balance between executive and legislative powers. The document's purpose to "fulfill the intent of the Framers of the Constitution" may be understood as the most sincere attempt to restore balance to the nation's distribution of wartime powers.⁴¹ Although the document recognizes the Commander in Chief's authority to act defensively, the War Powers Resolution sought to derail any future attempts of offensive warfare conducted by the president by stating that the "president shall in every possible instance consult with Congress before introducing United States

39 Andrew Glass, "Nixon asks Congress to fund aid for Cambodia, Nov. 18, 1970," *Politico*, November 18, 2015, <https://www.politico.com/story/2015/11/nixon-asks-congress-to-fund-aid-for-cambodia-nov-18-1970-215912>.

40 Keynes, *Undeclared War: Twilight Zone of Constitutional Power*, 110.

41 War Powers Resolution. Public Law 93-148, 87 Stat. 555. 1973.

Armed Forces into hostilities.”⁴² Thus, the powerful diction employed in the legislation forbids the president from entering into or expanding conflict. By restricting the expansion of warfare, Congress effectively restricted the war-making ability of the president. By confining the president’s war powers to defensive efforts in hostile locations, the Commander in Chief’s authority becomes limited. Next, the document employs specific diction and fixed time periods to further restrict the executive’s previously unilateral authority over military operations, specifically in defensive situations. The document states that any use of the “Armed Forces of the United States” must be

*reported within 48 hours in writing by the President to the Speaker of the House of Representatives and the President pro tempore of the Senate, together with a full account of the circumstances under which such hostilities were initiated, the estimated scope and duration of such hostilities, and the constitutional and legislative authority under which the introduction of hostilities took place.*⁴³

In theory, the War Powers Resolution of 1973 would restore balance to the roles of the executive and legislative branches in times of war. This legislation served to effectively combat the expansive powers seized by the executive during the Vietnam War.

Campbell v. Clinton (2000) highlighted the necessity for the legislative branch to enforce the War Powers Resolution.⁴⁴ In this case, the Court ruled that members of Congress may not sue the president for alleged violations of the War Powers Resolution or Article I, Section 8 of the Constitution. Furthermore, the Court acknowledged that unclear directives issued by Congress were not adequate cause to claim that President Clinton violated the Resolution. Despite lacking a declaration of war, Congress continuously apportioned federal funds to support the United States military’s involvement in Yugoslavia as directed by President Clinton, therefore, permitting him to act in his role as Commander in Chief. This instance showcases the necessity for Congress to enforce the War Powers Resolution consistently and explicitly to maintain an active role in wartime decisions. Additionally, the case highlights the limitations of judicial review in matters relating to the separation of powers. On numerous occasions, the judicial branch has deferred cases regarding war powers, citing its limited enforcement power, the political nature of wartime matters, and deference to executive authority.⁴⁵ The limitations of the judicial branch demand that Congressional authority be employed as a well-needed constitutional check on executive power. The Constitution designates the legislative branch as the representative body of the American people, as well as the body controlling declarations of war and

42 War Powers Resolution. Public Law 93-148, 87 Stat. 555. 1973.

43 War Powers Resolution. Public Law 93-148, 87 Stat. 555. 1973.

44 *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999).

45 See Edward Keynes, “Undeclared War: Twilight Zone of Constitutional Power” and Ann Van Wynen Thomas and A. J. Thomas, “The War-making Powers of the President: Constitutional and International Law Aspects.”

the standing army.

Once again, in the years following the attacks of 9/11, Congress allowed for the president to control the nation's military with unilateral authority by producing the Authorized Use of Force Doctrine. The document's open-ended, indefinite nature introduced further issues to debates regarding the president's authority over the military in the absence of a declaration of war. The joint resolution allowed for the president of the United States to use, what he deems, "necessary and appropriate" force against all parties involved in the attacks of September 11th.⁴⁶ This legislation effectively limited the role of Congress by granting the president exclusive authority over the nation's military efforts. Similar to past allowances for unilateral presidential authority, the resolution followed a national tragedy that served to unite Americans in a wave of patriotic fervor. Although the resolution granted the president power to exercise his authority over the military, the Authorized Use of Force Doctrine holds that the Commander in Chief must adhere to the guidelines of the War Powers Resolution. The document reconciles many areas of misinterpretation found in previous Congressional allowances for undeclared wars, such as the Tonkin Gulf Resolution. The document united the nation under the leadership of the executive branch, while maintaining the executive's accountability to Congress and, therefore, the nation. This represents a significant shift away from delegating war powers to the Commander in Chief with blind trust. Rather, cooperation between the legislative and executive branches serves to conduct foreign affairs in a manner that reflects the will and interests of the United States of America as a whole.

Throughout the history of the United States, it is evident that Congressional policy in times of war has mirrored the ebb and flow of public approval, rather than relying upon principles of constitutional balance. This proves to be an extremely problematic issue that continues to plague the nation's troubles in determining the proper balance of powers during times of war. Following attacks upon the United States itself or tragedies occurring in other parts of the world, Americans desire a leader to guide them through the difficulties. In these times, national fervor swells as the nation's executive prepares to, metaphorically, lead the nation into battle. As a result of popular support, it is "extremely unlikely" that the nation's legislature would "oppose the presidential decision."⁴⁷ Thus, the United States Congress has promoted national unity over the constitutional system of checks and balances. As wars wage on and become more costly, popular support decreases and the nation's Congress begins to desire more authority in the war effort's direction. To ensure that Americans are well represented during war and that the nation's best interest is prioritized, Congress must maintain an active role in the war effort. Rather than desperately attempting to reclaim power in the midst of

46 H.J.Res.114 - 107th Congress (2001-2002): Authorization for Use of Military Force Against Iraq Resolution of 2002, H.J.Res.114, 107th Cong. (2002), <https://www.congress.gov/bill/107th-congress/house-joint-resolution/114>.

47 Pious, "Presidential War Powers," 202.

a war, Congress must maintain its authority.

CONCLUSION

As shown above, the Whiskey Rebellion and the Prize Cases prove to be unrelated to 20th century and modern debates regarding Originalist intent of wartime powers. Additionally, the Korean War and Vietnam War represent violations of the Framers' intent because the executive disrupted the balance of power between the legislative and executive branches. Over time, this disruption has interfered with legislative power which is unacceptable. Rather, the document should serve as the fundamental guideline of our nation's wartime affairs, similar to the way Americans apply the document to other areas of life. Adherence to the nation's separation of powers should not be determined by a leader's success in action but through a historical understanding of the Constitution. Otherwise, the nation dangerously approaches the very tyranny that the Framers sought to escape. Beginning with the diction employed in the Constitution, the Framers intended for the power to make and declare war to reside with Congress. The employment of wartime powers has proven to be both dynamic and ever evolving, presenting numerous examples of breaches to the Constitution. Since the adoption of the Constitution, there have been "more than two hundred minor conflicts where the president dispatched U.S. troops without a Congressional declaration of war."⁴⁸ American policymakers vaguely employ one of these historical examples that do not necessarily pertain to modern warfare or the specificity of wartime affairs. The modern application of precedent as a means of justification for executive authority relies upon fundamentally weak examples ranging from the suppression of the Whiskey Rebellion to the American Civil War.

In addition to the importance of accurately understanding the original application of the Constitution and the Framers' intent, there remains the consistency and courage of American politicians. Congressmen must be willing to avoid granting universal deference to the executive branch to ensure that the voices of their constituents remain heard. The Framers intended for the legislative branch to serve as the bulwark to executive authority, and this remains true during times of war. Wartime decisions should be characterized by cooperation and open lines of communication as much as possible. The executive office continues to exercise nearly unilateral authority in both foreign affairs and national security. The legislative branch ought to reclaim the authority granted to it by the nation's Constitution. The separation of powers remains one of the most prominent of all American values. To maintain appropriate representation, it is of the utmost importance that the nation enters a new dawn of balancing wartime power. All Americans must live with the consequences of executive action during both times of war and peace; therefore, proper representation should be issued in both cases. The extent of executive power is clearly defined in the Constitution through the allocation of fundamental rights and powers granted to the American Congress.

48 Pious, "Presidential War Powers," 195.

DATA BROKERS AND THE DECLINE OF PRIVACY RIGHTS

BY HANNAH SHOAFF

The data generated by every action people take is collected and aggregated to create a clear, identifiable image of who they are. People purchase, consume, scroll, like, and swipe their way through life. These actions make up their very sense of self, making up the title personal data. While one would assume this information is personal and deserving of the utmost privacy, historically, this has rarely been the case. For decades, personal data has been collected, sold, and used against individuals by private companies and even government agencies.¹ Numerous laws have attempted to limit government access to personal data.² However, federal agencies have repeatedly found ways around these safeguards, including purchasing such data from private data brokers. This paper argues that the federal government should ban federal agencies from obtaining citizens' consumer data from data brokers without a warrant. Analyzing court cases and laws regulating government surveillance provides significant insight when weighing the privacy and national security interests at stake in these decisions.

It is important to define privacy to evaluate the balance between national security and individual privacy rights. The United States Constitution does not explicitly mention a right to privacy, making the concept difficult to define in legal terms. Although the right to privacy is never explicitly mentioned, the Supreme Court established a "zone of privacy" in *Griswold v. Connecticut* through the penumbras of the Bill of Rights.³ The Supreme Court used the personal protections written into the First, Third, Fourth, Fifth, and Ninth Amendments to have been interpreted to recognize an implied right to privacy. The First Amendment entails freedom of association; the Third Amendment creates a private sphere, such as one's home; the Fourth Amendment establishes protection against invasion of privacy; the Fifth Amendment implies the right to keep a secret; the Ninth Amendment presupposes that just because a right is not listed does not mean that it does not exist. The combination of these rights creates the so-called "zone of privacy." Based on the penumbral argument, this paper defines privacy as the ability of individuals to control others' access to themselves and information about themselves.

After defining privacy, it is important to define data brokers and

1 Emile Ayoub and Elizabeth Goitein. "Closing the Data Broker Loophole." *Brennan Center for Justice*, January 4, 2024, <https://www.brennancenter.org/our-work/research-reports/bclosing-data-broker-loophole>.

2 Ayoub and Goitein, "Closing the Data Broker Loophole."

3 "Penumbra," *Legal Information Institute*, <https://www.law.cornell.edu/wex/penumbra>.

what they do. In simple terms, data brokers compile information about individuals from numerous sources, creating detailed portraits of consumers which they sell across different marketplaces.⁴ With access to more than 10,000 data points on any given person, data brokers often know more about a person than even their own family and friends.⁵ Data brokers have access to purchases, political beliefs, religious affiliations, income, hobbies, life events, friends, family members, sexual orientation, health conditions, biometric information, and much more.⁶ They take this information and extract data from it, reshaping it into packaged data that is organized into different categories and sold on unique marketplaces.⁷ Data brokers have a variety of customers, though the most common of which are government agencies, marketing firms and advertising agencies.

The use of this information by governments has serious implications, positive and negative. On the negative side, government use of data broker information can infringe upon individuals' privacy interests. However, it can also serve numerous beneficial purposes, such as significantly improving national security and public safety. Purchasing data from data brokers allows government agencies to access information they otherwise could not obtain, aiding government agencies and law enforcement in identifying potential threats against the United States.⁸ This also allows them to quickly and efficiently respond to threats without having to navigate the slow process of obtaining a warrant. Additionally, the information gained aims to put the United States at equal footing with countries that have vast amounts of data on their citizens and foreigners, such as China.⁹ There are two key arguments the government uses to defend its surveillance practices for national security.

The first argument supporting government purchase of data from data brokers is the Commercially Available Information (CAI) argument. Government agencies justify purchasing data from data brokers by arguing that the information is commercially available and that any individual or entity could buy it.¹⁰ If the information is available to the public for purchase on the open market, then government agencies argue they should not be required to obtain a warrant.

4 Ashley Kuempel, "The Invisible Middlemen: A Critique and Call for Reform of the Data Broker Industry," *Northwestern Journal of International Law & Business* 36, no. 1 (2016): 207.

5 Barry Friedman and Danielle Keats Citron, "Indiscriminate Data Surveillance," *Virginia Law Review* 110, no. 6 (2024): 1364.

6 Friedman and Citron, "Indiscriminate Data Surveillance," 209.

7 Kuempel, "The Invisible Middlemen," 210.

8 Steven Joseph Arango, "Data Brokers: A Benefit or Peril to U.S. National Security?" *Ohio State Technology Law Journal* 20, no. 1 (2023): 122.

9 Arango, "Data Brokers: A Benefit or Peril to U.S. National Security," 122

10 Friedman and Citron, "Indiscriminate Data Surveillance," 1368.

The second argument supporting this practice is the third-party doctrine. This doctrine asserts that what a person voluntarily gives up to a third party assumes the risk that the holder of their information can disclose it to whomever they choose, including the government.¹¹ Applied to data broker practices, the doctrine holds that the information the government receives from data brokers is voluntarily shared with private companies and therefore does not require a warrant. While later cases have modified some aspects of this argument, it has historically been used to defend government purchases of data without a warrant. The legal reasoning behind the third-party doctrine is established in *United States v. Miller* and *Smith v. Maryland*. To examine these cases, one must understand the interpretation of a search stated in the Fourth Amendment. The Supreme Court has interpreted a Fourth Amendment search to mean it occurs when the government violates a person's "reasonable expectation of privacy" and therefore requires a warrant.¹² However, if a government action is not considered a search, then the Fourth Amendment does not apply, and no warrant or probable cause is necessary.

In the case *United States v. Miller*, Miller was charged with possessing alcohol and equipment to distill alcohol, for which he did not pay the liquor tax.¹³ The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued subpoenas to acquire Miller's bank records from two of his banks. The banks complied, and the records were then used in court to convict Miller.¹⁴ Miller appealed his conviction, stating that his Fourth Amendment rights had been violated. The Court disagreed with this claim, stating that his Fourth Amendment rights were not violated because he had voluntarily given up that information and no longer had a right to privacy within it.¹⁵ The subpoena for information from Miller's banks was therefore not considered a search because he did not have a reasonable expectation that this information would remain private.¹⁶ Three years later, the Court followed Miller's reasoning in *Smith v. Maryland*. In this case, the collection of Smith's phone records by law enforcement did not constitute a violation of his privacy under the Fourth Amendment because the information is commercially available to phone companies.¹⁷

In the *Miller* and *Smith* cases, the third party was defined as the entity that directly received the individual's information in exchange for services. However, data brokers do not provide individuals with a direct service;

11 Matthew Tockson, "Government Purchases of Private Data," *Wake Forest Law Review* 59, no. 1 (2024): 280.

12 Tockson, "Government Purchases of Private Data," 279.

13 *United States v. Miller*, 425 U.S. 435 (1976).

14 *Miller*, 425 U.S. 435.

15 *Miller*, 425 U.S. 435.

16 *Miller*, 425 U.S. 435.

17 *Smith v. Maryland*, 442 U.S. 735 (1979).

therefore, individuals do not provide their information directly to them. Rather, data brokers act as intermediaries by purchasing individuals' data from numerous third parties, such as mobile service providers, security companies, and payment services, then aggregating and selling that information to the government.

Together, the CAI argument and third-party doctrine have long framed the acceptability of purchasing data for national security interests. However, these national security interests are accompanied by immense privacy concerns, as individuals are no longer able to control information about themselves. To balance government surveillance practices while safeguarding privacy, the federal government has enacted laws to regulate government data purchases, aiming to limit and prevent excessive surveillance. These laws include the Privacy Act of 1974, the Foreign Intelligence Surveillance Act of 1978 (FISA), the Electronic Communications Privacy Act of 1986 (ECPA), and more current Fourth Amendment cases.

The Privacy Act of 1974 governs the collection, maintenance, use, and dissemination of information about individuals maintained by federal agencies. Under this act, agencies are required to post their systems of records to the public in the Federal Register, and individuals can seek access to and amend their records. The Privacy Act also prohibits the government from disclosing an individual's information.¹⁸

The Foreign Intelligence Surveillance Act of 1978 (FISA) was established to provide oversight of foreign intelligence surveillance activities while ensuring that the necessary secrecy is left intact to protect national security.¹⁹ FISA provides guidelines for authorization of physical and electronic surveillance. Its original purpose was solely to address electronic surveillance, but it has expanded to include trap-and-trace devices, physical searches, and business records. Under FISA, the Department of Justice must show that the target is a foreign agent in relation to a foreign power to obtain a FISC warrant to surveil them. They do not have to show that this individual has or will commit a crime, as the main focus of FISA is intelligence gathering.²⁰ However, if while gathering intelligence on a foreigner, they obtain domestic communications where both parties have a reasonable expectation of privacy, they must destroy those records unless the contents indicate a threat of bodily harm.²¹ FISA gives an exception for the president, allowing for authorization of intelligence gathering for a year without a warrant. FISA has also undergone numerous amendments after 9/11, with the Patriot Act easing many of the restrictions on domestic

¹⁸ U.S. Department of Justice, "Privacy Act of 1974, 5 U.S.C. § 552a.," <https://www.justice.gov/opcl/privacy-act-1974>.

¹⁹ "The Foreign Intelligence Surveillance Act of 1978 (FISA)." Bureau of Justice Assistance. <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1286>.

²⁰ FISA, 50 §§ 1801-1885c.

²¹ FISA, 50 §§ 1801-1885c.

foreign intelligence gathering.²²

The Electronic Communications Privacy Act of 1986 (ECPA) addresses government interception of conversations, including telephone lines, computer messages, and other digital communications. It prohibits the attempted or actual interception, use, disclosure, or procurement of written, oral, and electronic communications, as well as their use as evidence in courts. However, persons authorized to intercept these communications as defined in FISA, as well as operators and service providers who use this in the normal course of their work, are exceptions to this law.²³ There are additional exceptions for federal, state, and other government officials to obtain authorization with probable cause to intercept and record communications for up to 30 days.²⁴

Additionally, *Carpenter v. United States* further limits government surveillance in the digital age, attempting to close the third-party doctrine established in *United States v. Miller* and *Smith v. Maryland*. In *Carpenter v. United States*, the FBI obtained cell-site location information (CSLI) from a wireless carrier without a warrant. This CSLI placed Carpenter in the area of a bank robbery, and this information was used to charge him with numerous offenses, including aiding and abetting robbery.²⁵ Carpenter argued against its use based on the Fourth Amendment. The Supreme Court agreed, ruling that the third-party doctrine did not apply to cell phone location data stored by third-parties.²⁶ Chief Justice Roberts, writing for the majority, argued that cell phone location data is different in kind and degree from traditional business records considered in prior cases. Unlike other third-party records, CSLI provides a detailed, up-to-date portrait of an individual's movements, creating an identifiable image of that individual. Additionally, Roberts reasoned that the transfer of this information is not voluntary, as the use of cellphones is essential to participating in modern life, and retrospective searches are exceedingly problematic, going against the Fourth Amendment's aim of protecting individuals from burdensome police surveillance.²⁷ Ultimately, *Carpenter* has extended Fourth Amendment protections by restricting the government from tracking citizens by acquiring data from cell phone companies and requiring the government to obtain a warrant before acquiring this data.²⁸

22 Friedman and Citron, "Indiscriminate Data Surveillance," 1435.

23 "Electronic Communications Privacy Act of 1986 (ECPA)." Bureau of Justice Assistance. <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1285>.

24 The Electronic Communications Privacy Act of 1986.

25 "Carpenter v. United States." Oyez. Accessed March 25, 2026. <https://www.oyez.org/cases/2017/16-402>.

26 Tockson, "Government Purchases of Private Data," 269–324.

27 "*Carpenter v. United States*"

28 Tockson, "Government Purchases of Private Data," 282.

The Privacy Act of 1974, the Foreign Intelligence Surveillance Act of 1978 (FISA), and the Electronic Communications Privacy Act of 1986 (ECPA) provide statutory limits on government surveillance. However, each contains exceptions for activities conducted in the interest of national security. These exceptions show how the government has attempted to balance national security and privacy interests. Steven G. Bradbury, a lawyer and current deputy secretary of transportation, has evaluated this balance.²⁹ Bradbury believes that the current statutory law, along with the fundamental principles of the Fourth Amendment, have balanced national security and privacy rights almost perfectly.³⁰ He argues that National Security Agency telephone metadata collection is properly regulated by FISA oversight, with information used solely for counterterrorism investigations or when the NSA has reasonable suspicion the phone number is associated with a foreign terrorist group. He additionally notes that follow-up queries involving U.S. persons are among the most important for identifying national security threats.³¹ Bradbury argues that obtaining this data without a warrant is necessary to uncover information that can lead to more evidence, which can later establish the probable cause required to use wiretaps and make arrests.³² In his view, the term “search” in the Fourth Amendment is flexible and allows law enforcement and intelligence agencies to access data that helps them build cases, which can later lead to probable cause.³³ Ultimately, Bradbury emphasizes the necessity of effective national security, arguing that without it, individuals “would lose all of the other freedoms enshrined in the Constitution.”³⁴

These laws were created to limit government surveillance and promote constitutional transparency. Bradbury believes they have effectively balanced national security and privacy. However, Bradbury claims that the Fourth Amendment is flexible enough to allow government agencies to access data solely for building cases. This is not only an incorrect representation of the facts but also a blatantly unconstitutional practice. Broadly speaking, privacy implies one’s ability to control others’ access to information about oneself. Based on this definition, it is evident that these laws contain significant gaps and loopholes that allow the government to bypass constitutional limits on surveillance, including purchasing consumer data they could not otherwise collect. Ultimately, the current framework prioritizes national security interests over personal privacy.

When looking at each statute closely, the leaks begin to seep. While

29 Steven G Bradbury, “Balancing Privacy and Security.” *Harvard Journal of Law & Public Policy*: 5.

30 Bradbury, “Balancing Privacy and Security,” 7.

31 Bradbury, “Balancing Privacy and Security,” 9.

32 Bradbury, “Balancing Privacy and Security,” 11.

33 Bradbury, “Balancing Privacy and Security,” 10.

34 Bradbury, “Balancing Privacy and Security,” 5.

the Privacy Act of 1974 provides numerous regulations on how data is stored and used, it addresses data that the government already possesses, not the process by which it obtains that data. This act, therefore, does not prevent the government from collecting information unconstitutionally by allowing it to purchase data from data brokers without warrants. Additionally, this act left the flow of information between all levels of government agencies unregulated and susceptible to abuse.³⁵ The Foreign Intelligence Surveillance Act of 1978 applies only to collection done by government agencies, meaning it does not apply to other entities, such as data brokers. While government agencies may be prevented from collecting certain data, they are not prevented from purchasing it from companies that do not face the same restrictions, giving the government access to data that FISA intended to restrict. This directly counters Bradbury's claim that metadata collection is properly regulated by FISA oversight and used solely for counterterrorism investigations.

The Electronic Communications Privacy Act of 1986 (ECPA) is considered by scholars to be the best at regulating the direct purchase of data; however, the ECPA restricts the government, not other entities, from intercepting communications.³⁶ Additionally, it regulates obtaining data directly from phone companies, internet service providers, email and text messaging providers, and social media platforms, but not the purchasing of this data from a middleman, such as data brokers. The ECPA leaves open the intermediary loophole, allowing the government to gain access from secondary rather than primary sources.³⁷ Like the ECPA, current Fourth Amendment cases, such as *Carpenter v. United States*, regulate only the purchase or acquisition of data directly from third parties and do not regulate government agencies' purchase of this data from data brokers or other middlemen. Additionally, these rulings apply only to the specific types of data discussed in these cases, such as certain location data, leaving an abundance of other data available for use without a warrant.³⁸ Bradbury claims that the flexibility in applying the Fourth Amendment correctly balances national security interests with privacy interests. However, while current Fourth Amendment rulings increasingly scrutinize government surveillance, it is evident that national security is still disproportionately prioritized in relation to privacy. There are currently not enough restrictions and more must be done to close these loopholes.

Steve Bradbury's claim that the current framework perfectly balances national security and privacy interests is far from correct. Other scholars, such as Captain Steven Arango, recognize this failure and argue that current laws raise significant privacy concerns. Captain Arango fears that with the current loopholes, the U.S. government could pursue personal vendettas,

35 Friedman and Citron, "Indiscriminate Data Surveillance," 1381.

36 Ayoub and Goitein, "Closing the Data Broker Loophole."

37 Ayoub and Goitein, "Closing the Data Broker Loophole."

38 Ayoub and Goitein, "Closing the Data Broker Loophole."

target politically unpopular individuals, and suppress other civil liberties.³⁹ He additionally states that this constant tracking will make individuals think twice before every movement they take, severely hindering individual autonomy.⁴⁰

As previously defined, privacy concerns one's ability to control others' access to information about oneself, including the observation, use, and collection of it. Currently, government agencies' ability to purchase information about us from data brokers does not give individuals the autonomy, dignity, or freedom they should have regarding their personal information. Citizens deserve the right to decide who gets access to their information, as the information about us is what makes us who we are. Privacy ensures that individuals have the ability to make their own decisions regarding who has access to this unique information and what they do with it. If governments continue to track and monitor us without our explicit permission, there is a risk that individuals will start self-censoring, and we will slowly lose our freedom and autonomy. Privacy is essential to the very essence of democracy, as how can we participate in and shape the government when we cannot make our own decisions. To protect our privacy and secure democratic governance, the current loopholes and gaps in these laws must be fully closed. The federal government should ban federal agencies from obtaining consumer data from data brokers without a warrant. The creation of new laws is vital to protecting individuals' privacy.

Federal and State legislatures have begun to view privacy as essential and have introduced bills aimed at closing these gaps. For example, the Fourth Amendment Is Not For Sale Act was introduced to the U.S. House in July of 2023 to further prohibit disclosures of stored electronic communications under the Stored Communications Act.⁴¹ Originally, the Stored Communications Act prohibited technology providers, including electronic communications service providers (ECS) and remote computing service (RCS) providers from disclosing stored communications to anyone, including the government. The Fourth Amendment Is Not For Sale Act extends these prohibitions to include intermediary service providers such as data brokers, who store, deliver, and process communications for service providers. The bill also limits law enforcement and intelligence agencies from obtaining records of information from a third party in exchange for money. This bill was received in the Senate in April of 2024, yet there has been no movement since then.⁴² While this bill attempts to close the data broker loophole, it ultimately falls short because it only applies to stored electronic communications under ECS or RCS, leaving other locations, purchases, health, financial, biometric, and other sensitive data available for

39 Arango, "Data Brokers: A Benefit or Peril to U.S. National Security," 131.

40 Arango, "Data Brokers: A Benefit or Peril to U.S. National Security," 133.

41 H.R. 4639 - 118th Congress (2-23-2024).

42 H.R. 4639 - 118th Congress (2-23-2024).

government purchase.⁴³ Additionally, this bill only bans the government from receiving this data in exchange for anything of value, meaning they can receive information voluntarily disclosed by third parties.⁴⁴

State governments have also proposed new bills to curb these practices, such as the California Consumer Privacy Act and the Texas Data Privacy and Security Act. However, the most significant bill enacted to date is the Montana SB 282 of 2025. This bill imposes the most stringent restrictions on government purchases from data brokers, inspiring the previously mentioned Fourth Amendment Is Not For Sale Act. Montana SB 282 prohibits governmental entities from purchasing data from electronic communications, tracking devices, financial information stored in a communications system, customer proprietary network information, precise geolocation data, pseudonymous data, or any sensitive data. Sensitive data is defined in Montana Code as personal data “revealing racial or ethnic origin, religious beliefs, mental or physical health conditions or diagnosis, information about a person’s sex life, sexual orientation, or citizenship or immigration status; the processing of genetic or biometric data for uniquely identifying an individual; personal data collected from a known child; or precise geolocation data.”⁴⁵ The government cannot obtain this data without a court-issued warrant. However, there are a few exceptions, such as owner consent, judicial exceptions to warrants, government good-faith clauses, or responses to users’ calls for emergency services.⁴⁶ The Montana S.B. 282 significantly restricts government purchases of personal data, providing increased privacy rights for individuals.

The federal government should adopt the Montana S.B. 282 with modifications. Currently, the Senate is presented with the Fourth Amendment Is Not For Sale Act, which is not enough to fill the loopholes shown in previous cases. This bill applies only to stored electronic communications under ECS or RCS, leaving other sensitive data available for government purchase. However, the Montana SB 282 fixes this issue by expanding the list of data to include content from tracking devices, financial information stored in a communications system, customer proprietary network information, precise geolocation data, pseudonymous data, and any other forms of sensitive data. While this bill appropriately expands the list of data protected, it has other shortcomings, the Montana SB 282 only prohibits the purchase of this data. Nevertheless, there are other ways governments obtain this data besides monetary purchases. The federal government should change the Montana SB 282 bill from solely prohibiting the purchase of data from data brokers or third parties to prohibiting the government from obtaining data in any way, monetary or non-monetary, without a warrant. This would close the loopholes and block government agencies from

43 Ayoub and Goitein, “Closing the Data Broker Loophole.”

44 Ayoub and Goitein, “Closing the Data Broker Loophole.”

45 Mont. Code Ann. § 30-14-2802, (2023).

46 S.B. 282. 69th Leg., (Mont. 2025).

using workarounds such as favors, private-public partnerships, and other non-monetary values. Implementing this new law would further protect individual privacy and ensure the government uses democratic processes to achieve national security.

The government's purchase and use of consumer information from data brokers places national security and privacy interests at odds, as the potential national security benefits can also put one's privacy severely at risk. As this paper has shown, current statutes leave loopholes that give the government access to data it should not have, overriding individual control over personal data. Privacy is essential to humanity, as it provides individuals with autonomy, dignity, and freedom in their lives. Current statutory laws have not fully comprehended the significance of privacy and have failed to protect it. Privacy must be protected, and new laws are needed to ensure this happens. The federal government must ban federal agencies from obtaining citizens' consumer data from data brokers without a warrant. Protecting privacy is not just a legal reform, but a requirement for democracy and personal autonomy.

DEFENSE CAPTURE IN EAST-CENTRAL EUROPE: IMPLICATIONS FOR DEMOCRATIC NORMS AND REGIONAL SECURITY

BY VIENNE ABRAHAMIAN

INTRODUCTION

In a stable democracy, defense policy serves the public through transparent procurement methods, competitive markets, and strong civilian and institutional oversight, ensuring that defense policy reflects security needs rather than private interests. Defense autonomy ensures that the defense sector functions free of disproportionate political, economic, or personal influence. Yet across parts of East-Central Europe, these democratic norms are quickly becoming dismantled. As private defense firms deepen their influence over political entities, defense policy shifts away from public interest towards the interests of the elite, or disproportionately wealthy individuals and corporations. This process is known as “defense capture.”

This research introduces the concept of “defense capture,” placing it in the context of a geopolitically unstable region of East-Central Europe. This article uses Hungary and the Czech Republic, two East-Central European countries that institutionalize defense capture in unique ways, to exemplify the threat within the internal and external mechanisms of ethical governance and argues that disproportionate defense-industrial relationships disrupt the democratic integrity of this region and exacerbates the existential risks that Russian aggression has over Europe. Furthermore, this article defines “defense capture” as an alarming contemporary threat over Europe regarding democratic functionality and regional security motives.

DEFINING DEFENSE CAPTURE

At its core, “defense capture” is a form of state capture, where state capture alludes to an intentional collaboration between private and public entities, with private groups controlling or influencing spheres of public entities (i.e., government decision making).¹ Because of this privatized control, public policy is no longer focused on the interests of the public, rather the interests of the private entities who widely support and fund these policies. Although the concept of state capture assumes a disproportionate influence on state policy in a broad context, the general concept can be directly related to defense. Private defense firms can influence defense policymaking, arms procurement, and conflict planning, shaping national defense priorities to favor the interests of the elite rather than optimal

1 Elizabeth Dávid-Barrett, “State capture and development: a conceptual framework,” *Journal of International Relations and Development* 26 (2023): 224–244, <https://doi.org/10.1057/s41268-023-00290-6>.

national security. These “defense captors” often influence public policy due to close relationships with state officials, and they use their connections to effectively move between private and state sectors to gain the greatest advantage in defense-related decision making.² Therefore, “defense capture” is a structural entanglement of private and public entities within a mutually beneficial relationship: the state receives heavy backing in its defense sector from wealthy elites, the wealthy elites see policy that is focused on their self-interest in return.

Figure 1 visualizes “defense capture” as a loop, and exemplifies a cycle of influence and benefit.



Figure 1. Cycle of Defense Capture.

The concept of the “military industrial complex” (MIC) can be used as an analytical framework to firmly understand how state capture merges into the defense sector. In 1961, U.S. President Dwight D. Eisenhower gave a speech warning the world of the dangers of the MIC. To President Eisenhower, there was a real threat that came from political collaboration with the armed forces and the defense industry, and this triangular relationship influenced defense decisions that focused on profit rather than the security interests of the United States. At this time, the U.S. was actively fighting the Cold War against the Soviet Union, and interest in defense procurement increased to mirror the threat of communism. It was no surprise that, in 1958, thirty of the fifty companies on the Fortune 500 list were defense industries. Defense industries lobbied substantially to gain government contracts, politicians advocated for contracts to go towards industries in their own congressional districts to benefit the economy, and politicians realized that defense contracts were a safety net for their own re-election due to the necessity of defense developments at the time.³ The

² Dávid-Barrett, “State capture and development.”

³ Roland Alex, “Delta of Power: The Military Industrial Complex,” Johns Hopkins University Press (2021).

relationship between private industries and state entities formed a clear and self-reinforcing loop. The MIC effectively aids in militarizing all aspects of public institutions, and defense becomes a business model. It is important to note that the concept of the MIC should be differentiated from “defense capture”. The MIC describes a systemic structure linking industry, military, and the government; defense capture represents an outcome where that structure becomes dangerously unbalanced and in favor of industry or political elites. *Figure 2* explains that MICs have often manifested into acts of “defense capture,” allowing this systematic framework to more effectively interpret private-state entanglement within defense. Contextualizing the MIC serves as a conceptual scaffold to understand how capture becomes embedded in defense-related collaborations, and it is simply a lens for understanding the phenomenon deeper.

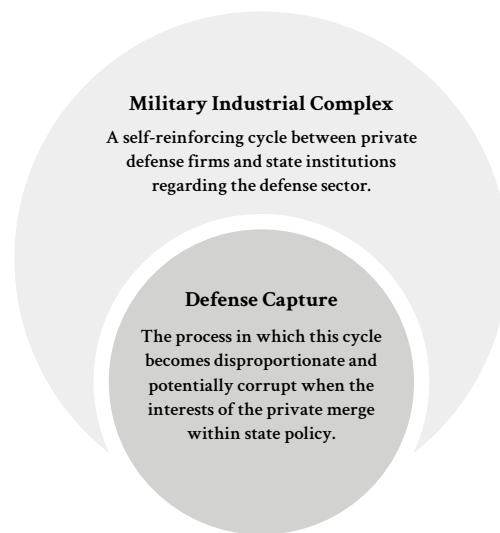


Figure 2. Relationship Between Defense Capture and the MIC

THE EMERGENCE OF DEFENSE CAPTURE

State capture within defense sectors does not emerge out of nowhere, and the formation of such relationships is complex and calculated. The process of developing “defense capture” is dependent on individual institutional mechanisms in a state, but there is a potential history of its emergence. In the early 1800s after a series of wars in Europe, countries such as France and Great Britain understood that enhanced weapon systems did benefit the outcomes of war.

Investments in defense programs heavily influenced their chances of wartime superiority, and industrial revolutions transitioned towards weapon development. Though the state had historically controlled the defense industries, private entities realized that they could create weapons at a much faster rate than the state with an added benefit of autonomy against

state regulations.⁴ With this new rate of production, private defense firms understood the role they could potentially play within defense governance. As producers of the most essential aspects of national security, a relationship was formed between the private and public sector that simultaneously fueled an increase of private interests in public spheres. These collaborations stimulated the contemporary occurrence of defense firms and political actors cooperating to enhance defense procurement.

Though it is unrealistic to universally define defense procurement due to the institutional differences present across states, three characteristics prevail within countries that maintain strong levels of disproportionate defense-industrial relationships. *Figure 3* explains the necessary supplements for defense capture.



Figure 3. The Characteristics of Defense Capture

The existence of a domestic defense industry implies that a state is able to rely on itself for weapon development initiatives. States with domestic firms often continue to receive weapon imports and pursue collaborations with foreign defense industries, but ultimately, they are able to conduct their own R&D and production. The existence of domestic firms is often the first step towards “defense capture,” but firms must also have the capacity to form relationships with the state. It is often the lack of oversight within a state that allows defense firms to negotiate disproportionate relationships, as well as a subsequent lack of transparency into these relationships allows “defense capture” to thrive unchecked.

DEFENSE CAPTURE IN POST-SOVIET STATES

East-Central Europe is subject to the same principle of defense procurement ambiguity, but the collapse of the Soviet Union and the shift towards individual market economies requires specific analysis over the development of defense structures in a post-Soviet world. During the Soviet Union, defense industrial bases (DIBs) were overseen by the Supreme Defense Council of the Union of Soviet Socialist Republics (USSR). The primary role a DIB was to exert authority over every defense entity, dictate production of weapons and R&D projects, and work closely with the Military-Industrial

⁴ DeVore Marc, “Military Industrial Complexes and their variations,” *Oxford Research Encyclopedia of Politics* (2016), <https://doi.org/10.1093/acrefore/9780190228637.013.1876>.

Commission of the Council for Mutual Economic Assistance.⁵

However, the fall of the Soviet Union in 1991 allowed East-Central European DIBs to fall into the hands of the sovereign states' authority. Post-Soviet countries had to learn how to revise the state's role in economic initiatives, and privatization was ultimately adopted to dictate how the state collaborates with firms.⁶

Because the economic transitions were new and often rushed, little attention was allocated towards understanding how firms could potentially influence the state. Consequently, levels of political underdevelopment and privatization efforts caused a rise in private owners of defense industries gaining substantial power and connection to public spheres.⁷ The conditions of the transition from Soviet economies formed the structural basis for "defense capture" in East-Central Europe. Though defense procurement was given a strong base to form in the early stages of independence in post-Soviet countries, recent European-wide surges in defense spending and production is just another exacerbator. Russia's full-scale invasion of Ukraine and the need for defense enhancements in Eastern Europe has given rise to extreme levels of spending on defense. In 2024, Europe spent \$693 billion on defense, and NATO members contributed 55% of global military expenditures. Eighteen of the thirty-two NATO members reached 2% of their GDP on defense, and Poland alone spent \$38 billion on defense to reach 4.2% of GDP on defense.⁸

Increases to defense budgets is necessary to deter and protect against Russian aggression; however, it is important to note that as defense spending increases, so does the political and economic value of controlling the defense sector. Large defense spending allows huge sums of public money to flow into defense sectors that often lack oversight mechanisms, accelerating the conditions that lead to defense capture. The need to increase defense developments in East-Central Europe causes the state to take any measurable route to do so, skewing national security efforts with a business model of self-interest.

5 Bohuslav Pernica, Jaroslav Dvorak, Zsolt Lazar, Balázs Taksás, and Alex Maskalik, "Defensive industrial bases (DIBs) in six small NATO post-communist countries," *The Economics of Peace and Security Journal* 18 no. 1 (2023). <https://www.epsjournal.org.uk/index.php/EPSJ/article/view/385>.

6 Joel S. Hellman, Geraint Jones, and Daniel Kaufmann, "Seize the State, seize the day: state capture, corruption, and influence in transition," *The World Bank* (2000). <https://documents1.worldbank.org/curated/en/537461468766474836/pdf/multi-page.pdf>.

7 Pernica et al., "Defense industrial bases (DIBs)."

8 "Unprecedented Rise in Global Military Expenditures as European and Middle East Spending Surges," Stockholm International Peace Research Institute, April 28, 2025, <https://www.sipri.org/media/press-release/2025/unprecedented-rise-global-military-expenditure-european-and-middle-east-spending-surges>.

THE IMPACT OF DEFENSE CAPTURE

Most governments do not have any formal legislation classifying the act of state capture as illegal, so state capture on defense sectors cannot be criminalized in a broad sense. State capture intersects with legal violations in practice, particularly in two ways: when legal and political spheres are captured, or when formally lawful mechanisms such as lobbying are pursued with unlawful means, such as bribes or conflict of interest. The first method, when legal and political spheres are captured, applies to instances where governance, legislation, or any institution in charge of upholding legal norms are compromised by outside influence. Private entities set their sights on disproportionately impacting spheres of governance, and in turn, laws and policies can be created to benefit their interests.⁹ The act of “capturing” the legislative bodies responsible for lawmaking signals a dangerous transition towards self-interest in governance. For instance, lawmaking can be exploited so certain interest groups benefit more from certain laws, and state capture can persist to greater levels when it is ensured that laws cannot eliminate collaboration between the state and private entities. Additionally, political leaders can manipulate the relation between policy and private interest through unchecked changes to constitutional frameworks, as seen predominantly in corrupt countries like Hungary.¹⁰ This corruption directly relates to defense capture, as law and policy over defense spending and procurement can be targeted by captors to influence certain political agendas. As stated, the relation between state capture and governance cannot formalize state capture as illegal, but it is an important reminder that legislative processes can be captured to ensure policy has disproportionate impacts on certain interest groups.

The second relationship between state capture and governance arises when illegal methods are used to carry out state capture. Defense sectors rely on incentives to gain influence on public policy, particularly through acts of bribery, favoritism, and unregulated support on behalf of the captors to increase collaborative efforts with state institutions.¹¹ Bribery, for example, entails gifting money and other forms of payment to public entities, and in turn, the public officials maintain an agenda aligned with the needs of those providing resources.¹² Using bribery as a method to enact capture is illegal in many states. The United States criminalizes bribery in the U.S. Code § 201, in which those who offer and receive bribes within the sphere of governance should be criminalized.¹³ Many countries also criminalize conflict of interest,

9 Dávid-Barrett, “State capture and development.”

10 Dávid-Barrett, “State capture and development.”

11 Cheryl Saunders, and Katrina Saunders, “State Capture: How to Recognize and React to it,” *Constitution Transformation Network International IDEA*, <https://www.idea.int/sites/default/files/2025-05/state-capture-how-to-recognize-and-react-to-it.pdf>.

12 Saunders and Malone, “State Capture: How to Recognize and React to it.”

13 Cornell Law School. U.S. Code 201, <https://www.law.cornell.edu/uscode/text/18/201>.

especially when there is a financial benefit associated with a public official and an external asset. Private defense industries and their wealthy elite associates navigate illegal routes to capture state entities, and state officials welcome the illegal methods when it benefits them simultaneously. State capture itself cannot be criminalized, but certain pathways towards capture can.

Dismantling collaborations between the state and private defense firms is unrealistic, as lobbying and interest groups are important for diverse participation in political spheres. The most effective pathway to minimize state capture lies in the ability to enforce punishments for bribery, conflict of interest, and other illegal routes. Allowing state capture on defense sectors to persist unchecked has adverse consequences for the functionality of democracy and security initiatives.

DEFENSE CAPTURE AND UPHOLDING DEMOCRATIC NORMS

“Defense capture” is undemocratic because it fosters a system that prioritizes the wants and needs of the wealthy elites, subverting public policy away from the interest of the people.¹⁴ Within democratic spheres, people are empowered to participate in elections and be a large influence on policy, allowing all interest groups to impact state decision making. “Defense capture” prohibits proportionate participation, primarily placing the private defense firms and their wealthy associates as the sole proprietor of state defense sectors. When discussing democratic norms in East-Central Europe, it is critical to situate the issue within a broader institutional environment in which Central Eastern European States (CEES) operate. Many CEES are members of the European Union (EU), an institution that fundamentally aims to uphold democratic norms within its member states and its own institutional framework. EU member states’ defense sectors do not exist in isolation, rather they are embedded in a political union that actively promotes democratic functionality, regulates defense procurement standards, and provides financial support for defense development. Therefore, the EU is a primary stakeholder that is directly affected by, and in some cases even contributes to, the evolution of defense capture in its CEES member states. Within the context of the EU, defense capture is important for two reasons:

1. **As the EU defines democratic norms, defense capture threatens the upholding of this.** The Treaty of the European Union contains the Copenhagen criteria for EU membership, stating that states must maintain democracy, the rule of law, and stability within the institutions that promote both of those principles.¹⁵ The sovereign structure of the European Union itself, a multi-dimensional configuration, aims to encourage fair policy making where multiple bodies have a role in decisions. “Defense capture,” which concentrates defense policy into the hands of the few,

14 Dávid-Barrett, “State capture and development.”

15 European Union, “Accession Criteria (Copenhagen Criteria),” *EUR-Lex*, <https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html>.

contradicts democratic stability and the ability of ethical decision-making distribution.

2. **Through different defense funding mechanisms, the European Union potentially plays a role in fueling defense capture.** The EU coordinates multiple programs that provide economic incentives for membership, ranging from the European Social Fund, the European Cohesion Fund, and the European Defense Fund. To highlight the advantages of funding mechanisms on CEES member states, the Czech Republic received 19% of its 2008 GDP from the EU Cohesion Fund between 2007 and 2013, Hungary received 26%, and Poland received 22%.¹⁶ The European Defense Fund (EDF), which aims to provide subsidies in the form of loans for defense R&D, has an average of €1 billion per year to allocate towards its member states. In 2024 alone, the EDF funded 62 EU-wide defense projects, and since its creation in 2021, it has funded a total of 226. The EDF also allocated €909 million to R&D and defense development in 2024.¹⁷ EU funding towards individual arms industries in CEES beginning in the early 1990s ultimately allowed the region to enter the EU-wide market regarding defense. Because the amount of money that the EU allocates specifically to defense, with the EDF alone spending over €5 billion since 2021, this funding incentivizes defense development. However, if these funds are directly being used to fuel corruption in defense, the EU is placing itself in a precarious position. If “defense capture” persists in the region, the EU can be characterized as a regulatory actor whose policies unintentionally reinforce disproportionate defense-industrial relationships.

“Defense capture” signifies domestic democratic fragility within defense decisions, and it also challenges the institutional framework of the EU. Maintaining democratic systems is important for upholding a functional world order, so noticing how defense capture threatens this is critical.

DEFENSE CAPTURE AND REGIONAL SECURITY EFFORTS

Compromised defense sectors also threaten regional security efforts. In an area where geopolitical instability is already rampant due to Russian aggression, CEES cannot afford to disregard their national security efforts to adhere to the self-interest of the wealthy. The security consequences of defense capture in CEES are concerning because national defense policy captured by economic or political elites implies that policy will be directed towards the needs of the elite rather than the welfare of the state. CEES are not simply political units within the EU—they are frontline states responsible for maintaining credible deterrence and coordinating defense

¹⁶ Nicolas Jean-Brehon, “Unsettling Shifts in European Defense Fund,” *Foundation Robert Schuman*, September 8, 2025, <https://www.robert-schuman.eu/en/european-issues/801-unsettling-shifts-in-the-european-defence-fund>.

¹⁷ Jean-Brehon, “Unsettle Shifts in European Defense Fund.”

readiness. When defense-industrial relationships become distorted by political interests rather than strategic necessity, this undermines not only national resilience, but the coherence and reliability of the region's security posture. Russia has continuously voiced its desire to expand its influence on post-Soviet territories, and the annexation of Crimea in 2014 and the full-scale invasion of Ukraine in 2022 highlight how Russia is more than willing to pursue its ambitions. In this current security environment, effective defense capability in CEES is the difference between national autonomy and invasion. "Defense capture," however, increases the likelihood of a fragile defense structure. To move from theory to application, this article now examines two East-Central European countries, Hungary and the Czech Republic, whose defense sectors display distinct yet revealing patterns of political-industrial entanglement.

DEFENSE CAPTURE IN HUNGARY

In 2010, current Hungarian President Viktor Orban rose to power along with his populist far-right party Fidesz. The political transformation that underwent in Hungary set the stage for reshaping its key state sectors, and liberal democratic norms in Hungary were completely dismantled.

Institutional checks were gradually weakened, market competition narrowed, and industries were widely reoriented towards networks aligned with Fidesz. Among the transformed environments was defense. What followed was not simply a modernizing effort to enhance the defense sector, but a restructuring of the defense industry that intertwined political authority, private enterprise, and defense policy. The name for this relationship is "defense capture". Understanding Hungary's current defense industrial base comes with discussion over how defense fragmentation emerged, how it is sustained, and the various implications this system has over democratic functionality of Hungary and its institutional alignments.

AN INDEPENDENT HUNGARIAN DIB

The Soviet Union contained a centralized military-industrial management system, and the Soviet government widely oversaw all aspects of defense throughout the regime, including research and development (R&D) and weapons production.¹⁸ After the fall of the Soviet Union in 1991, Soviet republics were beginning to transition into market systems. In a general sense, most states privatized their DIBs and sought membership into a military alliance, the North Atlantic Treaty Organization (NATO). NATO membership meant a new set of standards on DIBs regarding weapon development and production, and this new collaborative military alliance allowed more weapons to be exported and imported between member states. Despite this, many countries could still not dedicate adequate resources towards developing their newly independent DIBs, Hungary included. After

18 "The Soviet Weapons Industry: An Overview." *U.S. Central Intelligence Agency*. Sept. 1986. <https://www.cia.gov/readingroom/docs/CIA-RDP89T01363R000200310005-3.pdf>.

1991, Hungary continued on a gradual downward trend of its DIB capabilities with only 1,900 people employed within its DIB by 1998.¹⁹ Due to economic instability in the country during the 1990s and early 2000s, Hungarian firms began to seek help from the government to remain functional, signaling the start of government privatization of public firms.²⁰

For about 20 years following Hungary's independence, its economic systems were liberal by nature, fostering decentralization and a heavy emphasis on foreign partnerships.²¹ In 2010, when the right-wing Fidesz party gained office alongside the Christian Democratic People's Party, economic policy prioritized heavy centralization with an aim to protect its domestic assets from outside influence.²² Most economic initiatives were overseen by the government, even private contributions. Its defense sector mirrored this. Enhancing defense became Hungary's priority, and it turned its sights towards a strong domestic arms industry. Previously, the Hungarian Ministry of Defense (MOD) owned four defense industries all with separate managers. In 2012, the four industries were consolidated within the Hungarian Defense Industrial Cluster, allowing its four main contributors of defense to be centralized beneath the MOD.²³ Because the Hungarian government wanted to become self-sufficient regarding its defense production capabilities, defense policy became rooted in nationalistic ideologies and consolidation tactics to ensure that the government had total control over defense industries. This became the foundation for "defense capture".

2021 DEFENSE INDUSTRIAL STRATEGY

In 2021, Hungarian President Viktor Orban introduced the Defense Industrial Strategy. This strategy revised the conditions set within the 2012 Defense Industrial Cluster regarding its recentralization tactics. The government aimed to form joint ventures with the most important defense firms in the state, and four clusters became six. *Figure 4* displays the consolidated nature of the defense strategy. Each cluster is led by a large defense firm in order to attract investments and partnerships from pre-established defense companies, and the strategy brings together a wide array of players through said joint ventures: foreign defense giants like Airbus and Rheinmental, companies bought-out by Hungary like Hirtenberger Defense, domestic private firms like 4iG, and government-owned but contractor-operated companies like GOCO Model.²⁴ The main goal of the strategy is

19 Pernica et al., "Defense industrial bases (DIBs)."

20 Yurdit Kiss, "Arms Industry Transformation and Integration," *Oxford University Press* (2014), <https://www.sipri.org/sites/default/files/2018-10/sipri14kiss.pdf>.

21 Pernica et al., "Defense industrial bases (DIBs)."

22 Kiss, "Arms Industry Transformation and Integration."

23 Kiss, "Arms Industry Transformation and Integration."

24 Pernica et al., "Defense industrial bases (DIBs)."

to pull as many Hungarian businesses as possible into these clusters so they become part of the supply chain feeding into Hungary's growing defense industry. This can be characterized as centralization, or the government attempting to consolidate its defense sector into one body. The tactic of total integration of foreign and domestic companies into one overarching defense funnel is politically significant. The state essentially made itself into a very strategic and powerful gatekeeper for its defense sector, manifesting evident centralization throughout the sphere of defense.

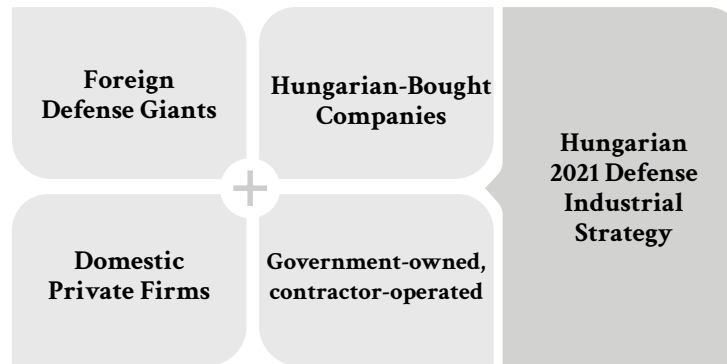


Figure 4. 2021 Hungarian Defense Strategy

Hungary's current defense strategy prioritizes a top-down approach where the government is able to control who gets included in the defense economy. This level of centralization opens the door for political favoritism within defense initiatives. Centralization, however, is not "defense capture," but the former can transform itself into the latter. State captors first need an institutional pathway into public policy, and captors often become enticed by centralization processes because of an implied level of government secrecy that comes with private transactions.²⁵ In Hungary, the 2021 Defense Strategy that designates flagship companies as the main heads of its defense clusters is the captors access point, as these companies now have increased jurisdiction over defense initiatives.²⁶ After identifying a pathway, captors then need resources or industrial assets they can ultimately control.²⁷ For Hungary's flagship firms, this is simple because of pre-established close relationships with the ruling party Fidesz. One of Hungary's largest domestic defense firm, 4iG, has received almost €200 million from Fidesz, and almost all the contributions towards 4iG's private equity fund has come from Fidesz rather than the company's chairman.²⁸ Therefore, a politically-secured collaboration of Hungarian flagship firms with the government

25 Dávid-Barrett, "State capture and development."

26 Dávid-Barrett, "State capture and development."

27 Dávid-Barrett, "State capture and development."

28 Petho, Andras, "The Secret History of Viktor Orban's Favorite Company," *Direkt 36*, Oct. 17, 2023. <https://www.direkt36.hu/en/az-orban-rendszer-csucsvallalatanak-titkai>.

means that the resource being acquired is strategic decision-making capacity within defense. This signals one of the most defining factors of state capture of defense sectors: defense decisions align with private-industrial interests rather than the interests of public necessity. When centralization subsequently allows politically-backed flagship firms to coordinate its defense clusters, this enables these firms to shape defense procurement decisions and defense policy in general.

In addition to mass centralization, Hungary has begun to privatize some of its top domestic defense firms. The process of privatization is often associated with “defense capture,” because when areas of the public sphere become privatized by the government, the interests of these private groups have greater opportunity to influence decision making. In 2025, the Hungarian government created a plan to transfer controlling stakes of the majority of its defense sector in a new defense holding to 4iG. N7 Holding, a state-owned holding group that owns nine defense industry stakes in Hungary, was expected to transfer its assets to a new N7 Defense Zrt subsidiary. 4iG is politically-connected to Viktor Orban’s Fidesz party, and the 4iG SDT subsidiary was to buy a 75% majority of N7 Defense Zrt, with the rest bought by the Hungarian government.²⁹ N7 Defense Zrt also includes Hungary’s joint ventures with Rheinmetall and Airbus, and the entire transaction is worth \$238 million for the Hungarian government.³⁰ Essentially, the sale exhibits public defense assets being transferred, under government mandate, to a company with elite political links. In practice, the privatization of the Hungarian defense sector places 4iG in a state of political control, opening the door for the defense company to become dependent on political favoritism rather than classic market competition. Hungary’s privatization benefits the industries that maintain a level of loyalty to the government by allowing them a greater role in defense decision making.

DEFENSE CAPTURE AND HUNGARIAN GOVERNANCE

“Defense capture” in Hungary is structurally embedded through the design of its defense strategy, a strategy that aims to centralize and privatize the entirety of its defense sector. As a result, a feedback loop is manifested where the government favors certain industrial actors, and the actors reinforce the defense initiatives that will keep them favored. This framework is dangerous for multiple reasons, the first being that “defense capture” drives policy making that is focused on political loyalty rather than societal well-being. The Hungarian government has made it clear that it is willing to foster a political environment where certain actors can gain superiority in the defense sector, therefore allowing their private goals to

²⁹ Reuters, “Hungary’s Government to Privatize Majority of its Stake in the Defense Industry,” June 12, 2025. <https://www.reuters.com/business/aerospace-defense/hungarys-government-privatise-majority-its-stake-defence-industry-2025-06-12>.

³⁰ Kiss, “Arms Industry Transformation and Integration.”

trump public good.³¹ Because Hungary has hand-picked the industries that fit within its defense clusters, as well as which flagship companies are able to oversee these clusters, defense officially becomes plagued with favoritism. “Defense capture” fundamentally shifts public policy away from the interest of the public and instead towards ensuring the interests of state-backed defense firms.³²

Centralization and privatization also inhibits market competitiveness that is necessary for ensuring a diverse group of firms are included within the economy.³³ Hungary restricts defense competition by awarding contracts to the same companies every bidding process, and these companies happen to be the largest and most developed firms within defense.³⁴ The deliberate restriction of competition in defense contracts ensures that certain companies are prioritized within defense procurement, allowing favoritism to once again flourish when specific firms are guaranteed a spot in the defense sector. With a lack of competition in defense procurement strategies, Hungary can ensure that its defense firms align with its key defense objectives, further bridging a divide between policy that benefits the public vs. certain interest groups.³⁵ A systematic lack of economic competition creates a closed political environment where democratic checks cannot interfere. Consequently, public transparency declines, government oversight is weakened, and policy becomes sheltered from public scrutiny. Hungary’s defense strategy has successfully allowed the state to secure a Corruption Percentage Index (CPI) score of 41/100 (with a score of 100 being perfectly uncorrupt), with an upward trend of corruption indication every year since Viktor Orban’s election in 2010.³⁶

DEFENSE CAPTURE AND EUROPEAN UNION GOVERNANCE

The presence of “defense capture” in Hungary does not just impact its own domestic governance and democratic functionality. Hungary is a member of the EU, an institution that aims to uphold democratic norms throughout its European member states. Unethical defense procurement in Hungary, therefore, impacts the governance and security of the EU as well.

Hungary’s persistent instrumentalization of “defense capture” undermines fundamental EU values, predominantly the maintenance of democratic practices and anti-corruption principles. The Treaty of the

31 Mihály Fazekas and István János Tóth, “From Corruption to State Capture: A New Analytical Framework with Empirical Applications from Hungary,” *Political Research Quarterly*, 69 no. 2 (2026): 320–334. <http://www.jstor.org/stable/44018013>.

32 Pernica et al., “Defense industrial bases (DIBs).”

33 Fazekas and Tóth, “From Corruption to State Capture.”

34 Fazekas and Tóth, “From Corruption to State Capture.”

35 Fazekas and Tóth, “From Corruption to State Capture.”

36 “Corruption Perceptions Index: Hungary,” *Transparency International*, February 11, 2025, <https://www.transparency.org/en/cpi/2024/index/hun>.

European Union Article 2 states that the institution is committed to upholding the standards of democracy and the rule of law. Additionally in Article 4, the European Union requires all member states to fulfill the obligations laid out within the treaty, noting that failure to uphold the democratic norms of the EU threatens the ethical integrity of the institution as a whole.³⁷ “Defense capture” in Hungary not only directly goes against the principles of democratic functionality that is fundamental to the EU, it risks undermining the credibility of the EU when loose governance standards are allowed to persist. The EU has identified Hungary as a threat to institutional democratic stability, exemplified through the procedure of Article 7 on Hungary in 2018 that determined the state as a threat to the European rule of law.³⁸ The procedure was triggered due to numerous efforts of President Orbán’s Fidesz party to dismantle state checks and balances in Hungary. Despite the EU’s understanding of Hungary’s dismissal of democratic principles, defense capture and corruption overall persists. A failure to meaningfully respond to Hungary’s democratic backsliding calls into doubt the EU’s capacity to maintain its own democratic credibility.

As East-Central Europe is particularly vulnerable to Russian aggression, the geopolitical environment makes “defense capture” in Hungary incredibly dangerous towards EU security efforts. On top of this, Hungary has voiced its support for Russia on multiple occasions, condemning EU sanctions against Russia and EU financial support towards Ukraine.³⁹ Hungary, therefore, is particularly susceptible to Russian influence due to its polluted defense sector and open support for the aggressor state. This creates a strategic vulnerability inside the European Union: a member state whose compromised governance and pro-Russian leanings can obstruct the notion of a unified EU security policy. “Defense capture” in Hungary becomes a direct challenge to the Union’s ability to protect itself from Russian expansionism.

Taken together, the domestic and supranational implications of state capture on defense sectors in Hungary demonstrates how a structurally distorted defense environment can simultaneously weaken national democratic governance and undermine the broader security architecture of the EU.

DEFENSE CAPTURE IN THE CZECH REPUBLIC

The Czech Republic materializes “defense capture” from within the system itself. Rather than a top-down consolidation of defense assets as seen

37 European Union, “Consolidated Version of the Treaty of the European Union,” *Official Journal of the European Union*, (2012), https://eurlex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF.

38 Daniel Hegedus, “European Parliament’s Article 7 Against Hungary Not a Nuclear Option but a Right Step,” *German Marshall Fund*, (2018), <https://www.gmfus.org/news/european-parliaments-article-7-against-hungary-not-nuclear-option-right-step>.

39 Kathryn Carlson, “Ukraine Has ‘No Chance’ of Winning War, Hungary’s Orbán Says,” *Politico*, November 16, 2025, <https://www.politico.eu/article/hungary-viktor-orban-war-ukraine-russia-finance-eu>.

through Hungary, Czechia's defense-industrial relationships emerge through networks of private firms, military officials, and industry players that blur the boundaries between public authority and private interest. Including the Czech Republic within this analysis provides a complementary lens for understanding how defense capture is not a linear phenomenon, rather a product of diverse institutional differences and governance strategies. Understanding the implications on democratic norms and regional security efforts, however, remains.

Unlike Hungary's highly centralized and politically-controlled defense sector, the Czech Republic presents a more complex and decentralized model. Its DIB is evidently competitive, decently developed, and strategically embedded in the global supply chains. Despite an open defense environment, the Czech Republic still demonstrates "defense capture" driven not by state centralization but by revolving doors of various networks into the defense sector. The Ministry of Defense, former military officials, economic elites, and academic players widely collaborate to form a mutually-beneficial relationship within defense decisions.⁴⁰ "Defense capture" has the ability to emerge within a system that is not overtly politicized, illustrating that defense acquisition can still develop in an environment that appears competitive.

The Czech Republic facilitates a strong involvement of interest groups within defense procurement, mostly because a pool of various actors are encouraged to collaborate in defense decisions. Defense firms within the DIB regularly employ retired military officials who formerly worked with the Ministry of Defense or other government agencies involved with defense decisions.⁴¹ These military officials possess insider knowledge of procurement needs, ranging from budgets to overall defense capability gaps. These officials often shape company bids to align with the needs of the MOD because they helped design those needs. As many defense firms within the Czech DIB are privatized under the MOD, government officials are also able to help defense companies navigate and exploit procurement rules, creating a regulatory environment that can be captured from within. The Czech government has very little regulation set over who has access to defense procurement decisions, and political actors do not need to go through any official screening processes before entering the defense arena.⁴² The ability for so many different actors to meddle with the DIB empowers defense companies to push for specific tenders or bids through the sheer level of insider awareness of procurement mechanisms. In 2010, an official investigation was conducted in the Czech Republic after its deputy defense minister, Jaroslav Kopřiva, was accused of a corrupt procurement contract with a domestic defense firm. The Supreme Audit office of the Czech Republic confirmed that corruption and recurring lack of transparency was causing

40 Pernica et al., "Defense industrial bases (DIBs)."

41 Pernica et al., "Defense industrial bases (DIBs)."

42 Pernica et al., "Defense industrial bases (DIBs)."

financial hardship in the defense sector.⁴³ In the absence of state-mandated centralization processes, it is the network of informal power structures that ultimately enables disproportionate defense-industrial relationships in the country.

Certain defense industries are given larger amounts of influence on the DIB despite the fact that Czechia does maintain a competitive procurement environment. Czechoslovakia Group is owned by M. Strnad, a billionaire who shares ownership of the firm throughout his family. Though it is not common for top domestic industrial firms to be owned by wealthy elites, some of the top industry firms in the Czech Republic have sponsored defense ministers through funding for political campaigns and other general party financing. Some of the wealthiest individuals in Czech society possess the financial capacity to cultivate political alignment that ultimately allows self-interest to enter the defense sphere, all exacerbated by the fact that the Czech Republic has no regulation on lobbying whatsoever.⁴⁴ Czech defense conglomerates have more influence than what a competitive market would allow.

DEFENSE CAPTURE AND CZECH GOVERNANCE

Like Hungary, Czechia's mobilization of "defense capture" poses a risk on the governing standards of the state. In order for state capture to be present within a system, captors need access to not only the resources that they hope to acquire, but a foundation for which they can successfully infiltrate a sector.⁴⁵ The Czech Republic offers both: economic, military, and political actors have access to procurement decisions, and the foundation for this is a lack of government transparency and limited oversight over revolving door networks. As mentioned before in the case of Hungary, "defense capture" in Czechia implies that policy is not only highly susceptible to being plagued with self-interest, but it also fundamentally delegitimizes the national security imperatives of the state.

Corruption in defense procurement has caused negative consequences on the economic stability of Czechia's defense sectors. A common byproduct of state capture is pursuing economic activities that may benefit a business model for defense industries while failing to ensure productive gains for the economy as a whole. The same 2010 investigation on Jaroslav Kopřiva revealed that the Czech Ministry of Defense had fallen short on multiple occasions to effectively carry out its financial obligations on defense. Through sheer amounts of government misspending, certain pieces of military equipment were bought despite carrying no real benefit for the defense sector. For example, the MOD decided to purchase 72 L-159 subsonic aircrafts even though the state realistically only needed around 20. Additionally, the European Commission has flagged the Czech MOD for

43 Kiss, "Arms Industry Transformation and Integration."

44 Pernica et al., "Defense industrial bases (DIBs)."

45 Dávid-Barrett, "State capture and development."

spending over \$300 million on military equipment without proper tenders or justification for purchase.⁴⁶ These misallocations of funds for defense purchases are representative of a system that prioritizes purchasing power over broader economic and security needs, and a defense strategy that is geared towards financial motives is alarming.

DEFENSE CAPTURE AND EUROPEAN UNION GOVERNANCE

While the specific mechanisms of “defense capture” differ from those in Hungary, their implications for the European Union converge on the same structural risks: weakened democratic oversight, distorted procurement practices, and reduced trust in EU-wide security integration. Analysis on Czechia’s corrupt defense structure reinforces the phenomenon in Hungary by illuminating how different pathways of “capture” can ultimately lead to the same challenges towards EU governance and security. Any member state that threatens ethical democratic procedures threatens the credibility of the institution as a whole. In 2021, the European Commission placed conflict of interest charges over Czech Prime Minister Andrej Babis when he used EU subsidies towards two different trust funds for his own business Agrofert.⁴⁷ The money that was ultimately supposed to go to the agricultural conglomerate was transferred over into personal funds that went to Babis’s family.⁴⁸ The European Union has been monitoring growing corruption rates in Czechia for the past decade, and the EU’s Group of States Against Corruption unit stated in 2016 that Czechia had begun experiencing growing levels of corruption because of a lack of transparency within its governing bodies.⁴⁹ Babis had also voiced his support for Viktor Orban and his authoritarian-like governance, causing the EU to note a rise in collaborative efforts to stimulate illiberal governance in East-Central Europe.⁵⁰ As the European Union recognizes Hungary’s lack of adherence to the democratic norms it aims to promote throughout its member states, the same notion applies to the Czech Republic. Growing rates of corruption, especially associated with state capture, is a threat to the integrity of the European Union as a whole.

Although Czechia’s “defense capture” does not translate into a pro-Russia stance like that of Hungary, it still poses significant risks to regional security. Security cooperation in Europe relies not only on the absence of foreign influence, especially from aggressor states that cause security

46 Kiss, “Arms Industry Transformation and Integration.”

47 “EU Audit Finds Czech PM Babis in conflict of interest” *Reuters*, April 24, 2021, <https://www.reuters.com/world/europe/eu-audit-finds-czech-pm-babis-conflict-interest-2021-04-24>.

48 Marcus Kolga, “How Long Can The Czech Government Evade EU Article 7 Proceedings?” *Inside Policy*, October 7, 2021, <https://macdonaldlaurier.ca/long-can-czech-government-evade-eu-article-7-proceedings-marcus-kolga-inside-policy>.

49 Kolga, “How Long Can the Czech Government Evade EU Article 7?”

50 Kolga, “How Long Can the Czech Government Evade EU Article 7?”

tensions like Russia, but on strong institutional safeguards and predictable defense governance. When these conditions are weakened, even in pro-EU states like Czechia, the result is diminished security cohesion at an EU-level. It is important to note when discussing the security structure of the European Union why independent member states must maintain strong national defense measures. In the context of the EU, security failures do not remain within national borders. If the Czech Republic, for example, was compromised, the strategic and political consequences would reverberate across the entire European Union, relationally displayed in *Figure 5*. The EU's collective institutions and shared defense commitments make every member's security a matter of common concern, and if defense capture exacerbates weakened security measures, this becomes a collective threat.

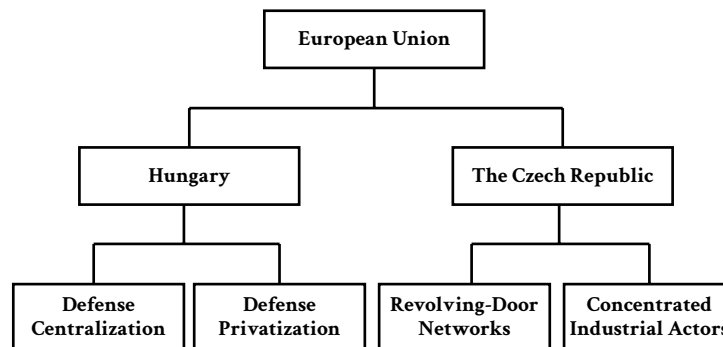


Figure 5. European Union Defense Capture

Taken together, the Hungarian and Czech models illustrate that the existence of “defense capture” in East-Central Europe does not necessarily adhere to a single pattern due to institutional differences. Though the ways in which the two countries mechanize defense capture are unique, both cases exhibit erosion on democratic oversight, fragile procurement decisions, and weakened regional security efforts. Because state capture on defense sectors has vast consequences on both a domestic and supranational level in East-Central Europe, solutions and recommendations must be provided to ensure democracy and security are a priority throughout the region.

RECOMMENDATIONS AND SOLUTIONS

Defense capture undermines both national democratic integrity and the European Union's collective security architecture. With geopolitical pressures mounting in East-Central Europe due to Russia's full-scale invasion of Ukraine, national and collective defense structures must be optimal and focused entirely on the combatting potential threats of Russian imperialism. The risks posed by defense capture cannot be left unaddressed and able to flourish. The recommendations below present steps that individual nation states, in this case Hungary and the Czech Republic, can take to strengthen democratic control over defense sectors.

HUNGARY

Hungary's domestic defense strategy involves political favoritism through heavy state centralization and top-down control. The concentration of defense policy and procurement among political and economic elites requires solutions that are oriented towards decentralization and greater levels of public oversight on defense policy.

Hungary should uphold the standards of Directive 2009/81/EC of the European Parliament. This directive sets the standards for EU member states and their respective defense sectors for a wide range of defense-related issues. Its goal is to sustain an open and competitive European defense market that simultaneously prioritizes national security efforts.⁵¹ The directive lists certain obligations that pertain to Hungary's use of defense capture:

Member states must develop their defense-industrial bases to prioritize capability and competitiveness. To achieve this, EU member states are encouraged to implement small and medium sized enterprises (SMEs) into their bases. The structural integrity of Hungary's DIB necessitates a wider range of industries that are not just the state's wealthiest, promoting market competition, diversification, and cooperation. Open competition in Hungary would ensure that contract awards are not just distributed for state economic gain, instead through merit and defense capability. Hungary has an incredibly low competitive bidding market in all aspects of public procurement, maintaining a 40% rate of single bidding procedures in 2022.⁵² Hungary, therefore, should diversify its contracting mechanism to include SMEs while simultaneously decreasing its single-bid rates, lessening the potential for defense capture by aligning with the competitive requirements of the EU.

Member states must ensure total transparency regarding defense-industrial relationships. EU states are obligated to track open tenders and publicly report awarded defense contracts and all industrial collaborations with the state. As part of ensuring transparency, member states are restricted from partnering with, or awarding contracts to, defense companies that have taken part in corrupt practices.⁵³ This includes acts of fraud. Hungary should maintain a procurement registry, publicly listing all defense-industrial partnerships that can be referenced when tracking potential fraudulent behavior or corruption-inducing collaborations. Independent entities, such as the European Union, should audit all joint ventures that Hungary pursues with domestic and foreign defense firms.

Hungary should adopt a decentralized defense structure that limits total consolidation of private defense firms under the state.

51 European Union, "Directive 2009/81/EC," (2009). <https://eurlex.europa.eu/eli/dir/2009/81/oj/eng>.

52 European Union, "Directive 2009/81/EC."

53 European Union, "Directive 2009/81/EC."

The 2025 Hungarian initiative to privatize its stake in 4iG highlights public defense assets that were directly transferred to a company heavily overseen by the Hungarian government.⁵⁴ Centralization tactics as such promote political favoritism on certain defense companies. Hungary should refrain from consolidating influential defense industries under its most politically backed commercial actor, replacing its current single-firm dominance model with a multi-actor procurement system. This requires legislation at an EU level that mandates competition audits and diversified collaboration between industries.

THE CZECH REPUBLIC

Czechia's domestic defense strategy is centered around a revolving door of military officials, private defense firms, and political actors. Capture in the country is network-driven and highly collaborative. A system of defense webs gives certain entities disproportionate power and access to defense initiatives. Recommendations and solutions for the Czech Republic should focus on regulating the overlap of networks present within the defense sector:

The Czech Republic should uphold the standards of Directive 2009/81/EC of the European Parliament. Like that of Hungary, the directive lists requirements and obligations that can be applied to Czechia's DIB.

Member states must maintain a level of discretion for defense decision-making and collaborations. Many decisions and projects within individual defense sectors include sensitive information, documents, and war-plans. Because of this, EU member states are obligated to ensure that defense sectors remain uncompromised. The directive references the importance of defining unauthorized access to defense environments, especially within the military.⁵⁵ The Czech Republic has a network-driven approach to its DIB, meaning that a wide range of individuals are allowed access to procurement decisions and defense policy. The state should be pressured to oblige the limitations of unauthorized access. Unqualified individuals, such as economic actors or academic entities, should not have the ability to tamper with or influence defense decision-making. This type of regulation can include a new state code for ethically determining who can gain access to defense projects or procurement initiatives.

Member states must ensure total transparency regarding defense-industrial relationships. The Czech Republic, like Hungary, is obligated to uphold total transparency and competitiveness within its DIB. This includes within the act of awarding contracts or determining the suitability of certain candidates for defense projects. The state is required to create a selection criterion for

54 "Hungary's Government to Privatize Majority of its Stake in the Defense Industry," Reuters, June 12, 2025. <https://www.reuters.com/business/aerospace-defense/hungarys-government-privatise-majority-its-stake-defence-industry-2025-06-12>.

55 European Union, "Directive 2009/81/EC."

contracts and candidates, stating why these options were chosen and how they will contribute to the effectiveness of the defense sector.⁵⁶ This is critical for ensuring that selection processes are ethical and secure. As expressed, Czechia has repeatedly allowed a wide array of military officials, wealthy elites, and political actors to interfere in its defense sector. Therefore, the Czech Republic has an obligation to not only document the associations of the various entities present within the DIB, but also to regularly inform why this network is necessary for defense efficiency and a wider goal of national security. Requiring public discourse of its defense network ensures greater transparency about defense collaboration, preventing disproportionate allocations of influence over policy.

The Czech Republic should implement an alternative to its “revolving door” defense-industrial system, prioritizing institutionalized separation and increased oversight. It would be unrealistic to dismantle the movement between different sectors within Czechia’s defense environment, and doing so would destroy necessary perspectives and expertise. However, there are ways to regulate these movements and ensure that they are not causing disproportionate influence on the DIB. The Czech Republic could follow a model currently employed in The Netherlands: a mandatory “cool off” period that establishes a fixed time where former ministers or senior officials cannot work in a private field related to their past work. This can ensure that former political actors cannot accept immediate employment in an institution that has contracts with a former place of employment. Subsequently, insider knowledge cannot immediately be leveraged for private or individual gain. Lobbyist activities directed towards a former place of employment are also restricted during this cool-off period.⁵⁷ In the context of the Czech Republic, senior military officials would be restricted from working within private defense firms during this period, establishing an anti-corruption safeguard when self-interest is separated from national security initiatives.

These national recommendations underscore a single imperative: mitigating “defense capture” requires action across multiple governance layers. Domestic reforms strengthen transparency and institutional resilience within defense sectors; upholding each member state to the standards of the EU ensures that cohesion can combat corruption within defense. Europe undeniably wants to preserve its strategic autonomy, and this means building defense structures that strengthen democratic norms, not dismantling them.

THE EUROPEAN UNION

Addressing disproportionate relationships in defense does not simply require the creation of new criminal categories; rather, it requires the strategic recalibration of existing governance. Though “defense capture” is not illegal per EU doctrine, and the collaboration between private firms

⁵⁶ European Union, “Directive 2009/81/EC.”

⁵⁷ “Code of Conduct on the Integrity for BZ,” Government of the Netherlands, <https://www.government.nl/documents/publications/2024/03/04/code-of-conduct-on-integrity-for-bz>.

and the state will most likely not cease, the institution can play a role in strengthening the governance of its defense environments. The EU has implemented multiple projects to aid its member states' defense sectors, including defense funding initiatives and budget proposals, so the Union can solidify ethical governance within its own institutional frameworks.

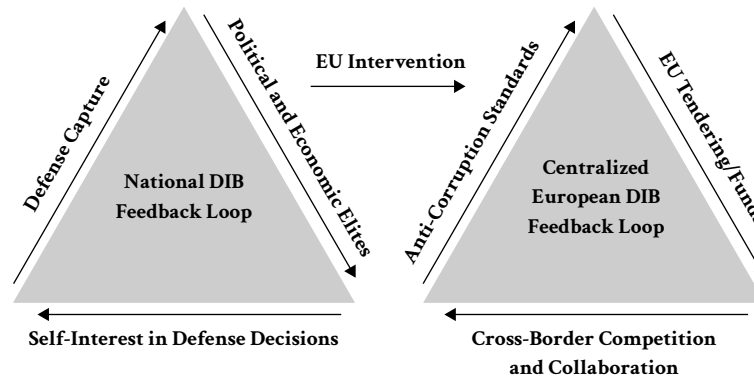


Figure 6. National vs. EU DIB

Facilitating more effort towards joint procurement frameworks would help the EU promote a European-wide DIB. There has been ongoing discussion about revising the current, fragmented approach towards defense industries that are present in Europe. The 2024 European Defense Industrial Strategy (EDIS) encourages a stronger European DIB that combats fragmentation, collaborating with SMEs from all over the region. The initiative hopes to ensure that 50% of member-state procurement comes from an overarching European DIB by 2030, as well as encourage that 40% of defense procurement be a collaborative effort.⁵⁸ A single-market system regarding defense industries in Europe would reduce the risk of markets dominated by individual governments, as displayed in Figure 6.⁵⁹ Joint procurement projects combat the dangers of individual self-interest in defense decisions, mitigating individual governments' influence on defense markets. There are also economic benefits that arise from single-market systems, as weapon procurement would become cheaper and faster when consolidated. The European Commission notes that the economies of scale approach that comes with dismantling fragmented markets would be highly cost effective, as the lack of collaboration costs between 25 billion euros to 100 billion euros a year. There are, however, two potential setbacks that come from encouraging a single-market defense industry in Europe:

58 Juan Mejino Lopez, "European Defense Industrial strategy in a hostile world," *Bruegel*, 20 (2024), <https://www.bruegel.org/policy-brief/european-defence-industrial-strategy-hostile-world>.

59 "Defining the European Defense Technological and Industrial Base," *Debates and Dilemmas*, July 26, 2013, <https://www.frstrategie.org/en/publications/notes/defining-european-defence-technological-and-industrial-base-debates-dilemmas-i-2013#:~:text=Those%20who%20argue%20for%20state,transaction%20costs%20between%20partner%20nations.>

1. Article 342(2) of the Treaty of the Function of the EU grants member states the fundamental right to their own defense-industrial policies on the basis of ensuring national security strategies;
2. East-Central European EU member states are disproportionately affected by current geopolitical tensions by Russia simply because of geographical proximity, and a single market risks generalizing threat mitigation efforts.⁶⁰

These obstacles must be considered when recommending a joint defense-industrial system across Europe. The basis of promoting a collective defense environment lies in a single-market framework, though this relies entirely on the voluntary participation of each member state in this effort of defense consolidation.

Focusing EU funding on domestic firms that uphold democratic norms and promote fair competition would help the EU encourage ethical defense structures. Member states are heavily reliant on EU funding for defense projects. The European Defense Fund (EDF) created in 2021 has become the most prominent and sought out funding projects for member state defense support. With a current budget of over 7 billion euros, the fund acts as a subsidy for those wanting to collaborate with the EU. Grants are offered towards R&D, specific companies in the sector, and the creation of factories and laboratories. In the years of 2021–2023, the EDF received 512 proposals, 162 programs had been completely financed, and the EU funded projects ranging from 3 million euros to 100 million euros. The current 2025 report states that the EDF has spent more than 5 billion euros to support defense projects.⁶¹ The program is essential: it promotes EU-wide cooperation, it helps ensure that national security initiatives are accounted for, and it reduces fragmentation of market systems. Since the EU has created itself into a top investor in defense, member states can potentially use this funding to fuel their own cases of “defense capture”. The European Union, however, can encourage ethical defense-industrial relationships by threatening to cut funds from states that exhibit defense corruption and other forms of corruption in public procurement. This will not only pressure states to place heavier focus on maintaining balanced defense mechanisms, but it will also promote greater participation in the single-market model the EU hopes to foster. There are certain implications that could arise from intentional cutbacks to member state funding, especially East-Central Europe, that are necessary to acknowledge:

1. Cutting EDF grants to East-Central Europe makes the region more susceptible to the threats of Russian aggression, as their national security relies on EU funding for defense;

60 Mejino Lopez, “European Defense Industrial Strategy.”

61 Nicolas Jean Brehon, “European Support to the defense industry - Mid term review of the European Defense Fund,” *Fondation Robert Schuman*, (2025), <https://www.robert-schuman.eu/en/questions-d-europe/779-le-soutien-europeen-a-l-industrie-de-defense-bilan-a-mi-parcours-du-fonds-europeen-de-defense?>

2. The overall structural integrity of the EU relies on collective efforts of member states to ensure total security, so cutting EDF grants to certain countries could cause disruptions to the functionality of the institution as a whole.

The EU must keep these consequences in mind when considering withholding defense funds to certain member states. This recommendation relies on determining if the collateral damage from funding cutbacks is worth the benefits of rewarding ethical defense-industrial relationships while punishing disproportionate ones.

CONCLUDING THOUGHTS

The desire for certain groups of economic or political elites to disproportionately influence public policy is state capture at its core. State capture can manifest itself into a more specific scope of “defense capture” when private defense firms, often in direct collaboration with society’s wealthiest, aim to influence state defense procurement. The result is a self-reinforcing cycle that empowers the continuous partnership between state and private entities, causing defense policy to be plagued with self-interest and economic profit. In East-Central European states, defense capture threatens the structural integrity of national borders, as defense policy is no longer prioritizing security when self-interest interferes. In the European Union, defense capture within its member states undermines its goals of upholding democratic norms, and cohesive regional security efforts become compromised. “Defense capture” fundamentally impedes the principles of liberal democratic frameworks within Europe, and it introduces insurmountable dangers on the national security efficiency in a region of states already extremely susceptible to Russian aggression. If Europe wants to remain secure, unified, and resilient against external pressures, it must ensure that no member state’s defense sector becomes a gateway for corruption or geopolitical manipulation.

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