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The Rise and Fall of Section 502B

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Cover Page Footnote

John Ramming Chappell is a joint J.D. and M.S. in Foreign Service candidate, 2023, at Georgetown University. I would like to thank Professors Rita Siemion and Heather Brandon-Smith for their guidance and support. I am grateful to Katie Dames and Ari Tolany for reviewing drafts of this Article, and to Annie Shiel, Brittany Benowitz, David Fite, Seth Binder, and Professor Jane Stromseth for their insights and questions. Finally, thanks to the Northwestern Journal of Human Rights staff for their editorial work. Any errors or oversights are mine alone.

THE RISE AND FALL OF SECTION 502B

*John Ramming Chappell**

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Section 502B of the Foreign Assistance Act (FAA) prohibits security assistance to “any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.”¹ As the United States supplies weapons, military training, and other forms of security assistance to many governments that appear to consistently violate human rights, the provision invites several questions. Why is Section 502B, which once marked a significant victory for congressional oversight of foreign policy and a commitment to human rights, not a larger part of modern Congressional discourse? Why do apparent violations of Section 502B persist? And in light of Section 502B’s decline, could today’s Congress use Section 502B to realize the vision of its drafters and hold foreign governments—and the executive branch—accountable for human rights violations?

The first major foreign policy legislation of the human rights revolution of the 1970s,² Section 502B is a latent oversight tool that Congress should use to promote human rights in U.S. security assistance. Section 502B may be the most potent provision of U.S. law regarding human rights and security assistance, yet it has never been used. Section 502B’s central prohibition comes with an enforcement mechanism and a requirement that the State Department report on human rights issues.³

Instead of using Section 502B, Congress has relied upon other mechanisms when overseeing security assistance that poses human rights concerns—namely the joint resolution of disapproval of the Arms Export Control Act, and the Leahy Laws.⁴ However, neither tool adequately addresses systemic human rights abuses by security partners. Instead, they block specific proposals of major arms sales or security assistance to certain individuals or units of foreign armed groups. Meanwhile, Section 502B has largely faded into obscurity.

This paper traces Section 502B’s history and contends that Congress should incorporate Section 502B into its efforts to promote human rights in the context of U.S. security assistance. Part I discusses how Section 502B functions. Part II then traces the introduction and strengthening of the statute in the context of a rise in congressional oversight and attention to human

¹ 22 U.S.C. § 2304(a).

² For a discussion of the rise of global human rights activism and U.S. human rights legislation during the 1970s, see SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* 121–23 (Harvard Univ. Press 2018). *But see* KATHRYN SIKKINK, *EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY* 28–29 (Princeton Univ. Press 2017) (arguing that Moyn overemphasized the Carter administration’s role in the rise of the human rights movement in the 1970s).

³ 22 U.S.C. § 2304(b).

⁴ *See id.* § 2778; *id.* § 2378d.

rights in the 1970s. Part III tracks the decline of Section 502B, pointing to executive resistance to implement the provision's mandates, judicial tolerance of 502B violations, and legislative reluctance to enforce the statute. Part IV notes a quiet reemergence of interest in Section 502B that began in 2018. Finally, Part V describes how Congress could invoke Section 502B to elevate human rights considerations in U.S. security assistance and offers recommendations for Congress to that end.

I. THE MECHANICS OF SECTION 502B

Section 502B of the FAA is comprised of four principal parts: (1) a prohibition on security assistance to countries that consistently violate human rights,⁵ (2) a requirement for annual human rights reports,⁶ (3) a system for Congress to request further reports on particular countries,⁷ and (4) a mechanism for joint resolutions of disapproval to enforce the Section's central prohibition.⁸

Section 502B's central prohibition bans security assistance to "any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."⁹ Gross violations under the Section include torture or cruel, inhuman, or degrading treatment or punishment; prolonged detention without charges or trial; causing the disappearance of persons by abduction and clandestine detention; and other flagrant denials of the rights to life, liberty, or the security of person.¹⁰ It also broadly defines security assistance as including military assistance, economic support funds, military education, and training or antiterrorism assistance; sales of defense articles or services;¹¹ and licenses for defense articles or services.¹²

Section 502B(b) requires the Secretary of State to annually provide "a full and complete report . . . with respect to practices regarding the observance of and respect for internationally recognized human rights in

⁵ 22 U.S.C. § 2304(a).

⁶ *Id.* § 2304(b).

⁷ *Id.* § 2304(c)(1).

⁸ *Id.* § 2304(c)(4).

⁹ *Id.* § 2304(b).

¹⁰ *Id.* § 2304(d).

¹¹ "Defense article" and "defense service" are terms of art defined in 22 C.F.R. § 120.31 (2022) and 22 C.F.R. § 120.32 (2022).

¹² *See* 22 U.S.C. § 2304(d)(2). Security assistance also includes items listed on the 600 series of the Commerce Control List, which is comprised of items previously controlled on the United State Munitions List or are included in the Wassenaar Arrangement Munitions List. *See* BIS Website 600 Series Items, Bureau of Industry and Security (2020), https://www.bis.doc.gov/index.php/component/fsj_faqs/cat/62-600-series-items-2#faq_302.

each country proposed as a recipient of security assistance.”¹³ The State Department’s Country Reports on Human Rights Practices (Country Reports) fulfill this requirement.¹⁴

In addition to the annual reports, members of Congress can utilize Section 502B(c) to request further information about human rights issues in target countries.¹⁵ Any member of Congress can introduce a single-chamber resolution requesting a report from the Secretary of State regarding human rights or other concerns in a particular country.¹⁶ Such a resolution is privileged in the Senate according to the expedited procedures of the International Security and Arms Export Control Act (ISAECA).¹⁷ Alternatively, the House Foreign Affairs Committee (HFAC) or the Senate Foreign Relations Committee (SFRC) can request such information by letter.¹⁸ If the Secretary of State fails to provide a report within thirty days, “no security assistance shall be delivered to such country except as may thereafter be specifically authorized by law from such country unless and until such statement is transmitted.”¹⁹

After receiving a 502B(c) report from the Secretary of State, Congress may “adopt a joint resolution terminating, restricting, or continuing security assistance” to the country in question.²⁰ Like the resolution requesting a targeted report, a joint resolution of disapproval is privileged in the Senate

¹³ 22 U.S.C. § 2304(b).

¹⁴ See U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2020 Country Reports on Human Rights Practices (Mar. 30, 2021).

¹⁵ See 22 U.S.C. § 2304(c).

¹⁶ See *id.*

¹⁷ See *Id.* § 2304(c)(2)(A) (applying expedited procedures); Int’l Sec. Assistance and Arms Exports Control Act, 1976, Pub. L. 94-329, § 601(b), 90 Stat. 729 (describing expedited procedures). The ISAECA establishes a rule with respect to Senate procedure for considering joint resolutions that supersedes contradictory Senate rules. Pub. L. 94-329 § 601(b), 90 Stat. 729. The relevant provision provides for a motion to discharge the committee of jurisdiction from further consideration of the resolution. *Id.* Any Senator favoring the resolution may make a motion to discharge. *Id.* The motion is privileged and with debate limited to one hour. *Id.* The Senator may then introduce a privileged motion to proceed on the Senate floor with debate limited to ten hours. *Id.* In practice, the privileged procedures provide a fast-track to a floor vote in the Senate without the possibility of a bill dying in committee or being filibustered. The privilege also applies to joint resolutions of disapproval under the AECA. The procedures do not lower the voting threshold to enact a joint resolution – Congress still needs supermajorities in each chamber to overcome a presumptive presidential veto for both AECA and Section 502B joint resolutions of disapproval. But privilege does provide a pathway to debate and a floor vote, which would usually require a committee to discharge a resolution and then 60 members of the Senate to overcome a potential filibuster on a cloture motion before proceeding to a vote. See *About Filibusters and Cloture*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm>.

¹⁸ See 22 U.S.C. § 2304(c)(1).

¹⁹ *Id.* § 2304(c)(3).

²⁰ *Id.* § 2304(c)(4).

under the procedures of the ISAECA.²¹ This mechanism is similar to joint resolutions under the Arms Export Control Act (AECA),²² which allows Congress to block major arms sales upon receiving a mandatory sale notification from the executive branch.²³

II. THE RISE OF SECTION 502B

Section 502B's history dates to the mid-1970s when Congress passed legislation to strengthen its oversight of U.S. foreign policy. Over the course of several years, legislators identified the need for legislation to prevent sending U.S. security assistance to consistent human rights abusers, enacted the legislation, and then strengthened it through a series of amendments. This Part traces Section 502B's legislative history. It then discusses the Country Reports on Human Rights Practices mandate, which is arguably the law's most visible legacy.

A. The Origins of Section 502B

Section 502B was a vital aspect of the shift towards human rights promotion in U.S. foreign policy in the 1970s.²⁴ The Vietnam War triggered a series of congressional challenges to the "imperial presidency" as the anti-war movement opposed continued U.S. involvement in the conflict.²⁵ The

²¹ See *Id.* § 2304(c)(4)(B) (applying expedited procedures); Int'l Sec. Assistance and Arms Exports Control Act, 1976, Pub. L. 94-329, § 601(b), 90 Stat. 729 (describing expedited procedures); see also *supra* note 16 (explaining how the expedited procedures work and why they matter).

²² See 22 U.S.C. § 2776.

²³ See Brittany Benowitz & John Ramming Chappell, *Human Rights, Civilian Harm, and Arms Sales: A Primer on U.S. Law and Policy*, CTR. FOR CIVILIANS IN CONFLICT & AM. BAR ASSOC. CTR. IN HUM. RTS. 1, 5 (2022), <https://civiliansinconflict.org/arms-sales-law-and-policy-primer/>.

²⁴ See Mark P. Gibney, *Judicial Failure to Enforce Human Rights Legislation: An Alternative Analysis of Crockett v. Reagan*, 4 N.Y.L.S.J. HUM. RTS. 115, 115 (1986) ("The legal basis for the pursuit of human rights goals can essentially be found in Section 502B of the Foreign Assistance Act."); Roberta Cohen, *Integrating Human Rights in US Foreign Policy: The History, the Challenges, and the Criteria for an Effective Policy*, BROOKINGS INST. 2, 2-3 (2008), at 2-3, https://www.brookings.edu/wp-content/uploads/2016/06/04_human_rights_cohen.pdf ("Congress then enacted legislation that required human rights reports on every country receiving US aid, and prohibited military and economic assistance to governments consistently violating human rights unless national security or humanitarian aid considerations warranted the assistance."); Barbara Keys, *Congress, Kissinger, and the Origins of Human Rights Diplomacy*, 34 DIPLOMATIC HIST. 823, 840-50 (2010) (discussing Secretary Kissinger's State Department's response to Section 502B's mandates).

²⁵ See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR*, 45-46 (1990). See also Sarah B. Snyder, "A Call for U.S. Leadership": Congressional Activism on Human Rights, 37 DIPLOMATIC HIST. 372 (Apr. 2013). Historian Arthur Schlesinger popularized the term "imperial presidency" a book released in the wake of the Watergate scandal that traced the development of presidential power from the 18th through mid-20th centuries, focusing on war powers. See generally ARTHUR M. SCHLESINGER JR., *THE IMPERIAL PRESIDENCY* (1973). In a 1973 article, Schlesinger argued: "The imperial presidency, created by wars abroad, has made a bold bid for power at home. The belief of the Nixon Administration in its own mandate and its own

Watergate scandal, too, sparked new interest in oversight on Capitol Hill amid declining public trust in the executive branch.²⁶ Congress made strides in enhancing human rights legislation²⁷ and reclaimed foreign policy oversight through laws like the Case-Zablocki Act,²⁸ War Powers Resolution,²⁹ Arms Export Control Act,³⁰ National Emergencies Act,³¹ and Foreign Intelligence Surveillance Act.³² Much of the current foreign affairs legislative framework dates back to Congress' reaction to what many legislators saw as the excesses of presidential national security powers at that time.³³ Congress similarly constructed legislative safeguards to protect and promote human rights in U.S. foreign policy in response to U.S. abuses in Vietnam and U.S. support for right-wing states and armed groups implicated in human rights abuses during the Cold War.³⁴

The House Foreign Affairs Committee, long considered a rubber-stamp body for the President, became a significant vehicle for pressuring the executive branch on human rights issues.³⁵ As chair of the Subcommittee on International Organizations, Congressman Donald Fraser (D-Minn.) held a series of fifteen hearings on human rights and U.S. foreign policy in 1973,³⁶ resulting in a fifty-four page report titled *Human Rights in the World Community: A Call for U.S. Leadership*.³⁷ The report recommended that

virtue, compounded by its conviction that the republic has been in mortal danger from internal enemies, has produced an unprecedented concentration of power in the White House and an unprecedented attempt to transform the presidency of the Constitution into a plebiscitary presidency.” Arthur Schlesinger, Jr., *The Runaway Presidency*, ATLANTIC MONTHLY (Nov. 1973), <https://www.theatlantic.com/magazine/archive/1973/11/the-runaway-presidency/306211/>.

²⁶ See Keys, *supra* note 25, at 834.

²⁷ See SARAH B. SNYDER, FROM SELMA TO MOSCOW: HOW HUMAN RIGHTS ACTIVISTS TRANSFORMED U.S. FOREIGN POLICY 148–67 (2018).

²⁸ See Case-Zablocki Act, 1 U.S.C. § 112b (requiring the Secretary of State to “transmit to the Congress the text of any international agreement . . . other than a treaty, to which the United States is a party”).

²⁹ See War Powers Resolution, 50 U.S.C. §§ 1541–1550.

³⁰ See Arms Export Control Act, 22 U.S.C. §§ 2751–2799aa-2.

³¹ See National Emergencies Act, 50 U.S.C. §§ 1601–1651.

³² Foreign Intelligence Surveillance, 50 U.S.C. §§ 1801–1885c.

³³ See Thomas E. Cronin, *A Resurgent Congress and the Imperial Presidency*, 95 POL. SCI. Q. 209, 216–27 (1980).

³⁴ Margaret E. McGuinness, *Congressional Enforcement of International Human Rights*, 44 FORDHAM INT’L L.J. 9, 22 (2020).

³⁵ See Keys, *supra* note 25, at 830.

³⁶ *Int’l Prot. of Hum. Rts: The Work of Int’l Orgs. and the Role of U.S. Foreign Pol’y: Hearing Before the S. Comm. on Int’l Orgs. and Movements of the Comm. on Foreign Affs.*, 93rd Cong. (1973); See Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT’L L. 246, 251 (1982); See generally Snyder, *supra* note 26, at 372–97 (arguing that Congressman Fraser’s hearings precipitated a wave of human rights legislation, formalized human rights as a factor in U.S. foreign policy, and laid the groundwork for President Carter’s work on human rights).

³⁷ H.R. REP. NO. 29-692, at 1-54 (1974).

“[t]he Department of State . . . discourage governments which are committing serious violations of human rights through . . . withdrawal of military assistance and sales.”³⁸ The report’s release marked a watershed moment for human rights in U.S. foreign policy, resulting in the institutionalization of human rights work in the State Department.³⁹ Rep. Fraser’s hearing and report were closely associated with Section 502B: Congress enacted a precursor to the statute during Rep. Fraser’s subcommittee hearings⁴⁰ and then introduced and gradually strengthened Section 502B pursuant to the subcommittee report’s recommendation.

The precursor to Section 502B came in the Foreign Assistance Act of 1973.⁴¹ Section 32 of the Act included a “sense of Congress” provision expressing that “the President should deny economic or military assistance to the government of any foreign country which practices the internment or imprisonment of that country’s citizens for political purposes.”⁴² The Department of State instructed U.S. embassies in countries receiving security assistance to transmit the provision to host governments and assess the host governments’ compliance.⁴³ However, the State Department did not alter its security assistance to any country based on Section 32.⁴⁴ This was not for a lack of human rights violations by U.S. security partners. For example, Amnesty International’s annual report covering 1974 and 1975 detailed torture and deaths of political prisoners in Iran.⁴⁵ In the fiscal year ending in June 1974 Iran received \$4 billion in U.S. arms sales.⁴⁶ State Department officials argued identifying political prisoners was too difficult and that “quiet diplomacy” could better improve human rights conditions than cutting off aid.⁴⁷

Then, just nine months after the publication of *Human Rights in the World Community*, Congress enacted Section 502B as part of the Foreign Assistance Act of 1974.⁴⁸ Following executive reluctance to implement

³⁸ *Id.* at 3.

³⁹ See Keys, *supra* note 25 at 832.

⁴⁰ *Int’l Prot. of Hum. Rts: The Work of Int’l Orgs. and the Role of U.S. Foreign Pol’y: Hearing Before the S. Comm. on Int’l Orgs. and Movements of the Comm. on Foreign Affs.*, *supra* note 37.

⁴¹ Foreign Assistance Act of 1973, Pub. L. 93-189, 87 Stat. 714; see David Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 GA. J. INT’L & COMP. L. 231, 241 (1977).

⁴² Foreign Assistance Act of 1973, Pub. L. No. 93-189, 87 Stat. 714.

⁴³ See Weissbrodt, *supra* note 42, at 241 n.39.

⁴⁴ *See id.*

⁴⁵ Amnesty Int’l, *Annual Report 1974/75*, at 128–29, AI Index POL 10/001/1975 (1975).

⁴⁶ Leslie H. Gelb, *U.S Arms Sales Doubled in ‘73–74 Reach \$815-Billion*, N.Y. TIMES (Jul. 10, 1974), <https://www.nytimes.com/1974/07/10/archives/u-s-arms-sales-doubled-in-7374-reach-85billion-mideasts-share-is.html>.

⁴⁷ See Cohen, *supra* note 37, at 250.

⁴⁸ Foreign Assistance Act of 1974, Pub. L. No. 93-559, 88 Stat. 1795.

Section 32, Section 502B improved upon its predecessor by providing more specific terms to describe covered human rights abuses and defining security assistance in a manner that included arms sales.⁴⁹ Yet, it was couched in non-binding language:

*It is the sense of Congress that, except in extraordinary circumstances, the President shall substantially reduce or terminate security assistance to any government which engages in a consistent pattern of gross violations of internationally recognized human rights . . .*⁵⁰

In 1976, Senator Hubert Humphrey (D-Minn.) introduced a bill to increase congressional authority over arms sales decisions, including by strengthening Section 502B.⁵¹ The House report on the bill noted, “the executive branch response to the existing human rights provision has not been satisfactory” after increasing executive requests for security assistance to countries with serious human rights abuses.⁵² The draft bill would have removed the “sense of Congress” language in Section 502B, making its central prohibition binding.⁵³

Another provision allowed Congress to pass a concurrent resolution to halt arms sales to governments on human rights grounds.⁵⁴ A concurrent resolution does not require a presidential signature and is not subject to a presidential veto.⁵⁵ However, President Ford vetoed the bill, claiming that such a mechanism would violate the Supreme Court’s recent decision in *INS v. Chadha*⁵⁶ and make Congress a “virtual co-administrator” of U.S. foreign policy.⁵⁷ Regarding Section 502B, President Ford complained, “[t]he use of

⁴⁹ See Cohen, *supra* note 37, at 252.

⁵⁰ See *id.* at 251 (emphasis added) (Rep. H.R. Gross (R-Iowa) introduced an unsuccessful amendment to expand Section 502B’s coverage to include all human rights violations rather than gross violations alone); see *id.* at 267.

⁵¹ See *Congressional Review: Stalemate Continued*, 32 CQ ALMANAC 3 (1977), <https://library.cqpress.com/cqalmanac/document.php?id=cqal76-1186590>.

⁵² See Cohen, *supra* note 37, at 252–53.

⁵³ See *id.* at 252.

⁵⁴ See S. 2662, 94th Cong. (1976).

⁵⁵ See *Types of Legislation*, U.S. SENATE, https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm (last visited Nov 30, 2022).

⁵⁶ See Weissbrodt, *supra* note 42, at 246; see also Peter K. Tompa, *The Arms Export Control Act and Congressional Codetermination over Arms Sales*, 1 AM. U. INT’L L. REV. 291, 299–300 (1986); GERALD R. FORD, VETO OF THE FOREIGN ASSISTANCE BILL (1976), *reprinted* AM. PRES. PROJ. (“[These] provisions [are] incompatible with the express provision in the Constitution that a resolution having the force and effect of law must be presented to the President and, if disapproved, repassed by a two-thirds majority in the Senate and the House of Representatives. They extend to the Congress the power to prohibit specific transactions authorized by law without changing the law—and without following the constitutional process such a change would require”).

⁵⁷ *Congressional Review: Stalemate Continued*, *supra* note 52.

the proposed sanctions against sovereign nations is . . . an awkward and ineffective device for the promotion of [human rights].”⁵⁸

Congress eventually enacted the bill in a diluted form. After President Ford’s veto, Congress reintroduced the measure with a non-binding “policy of the United States” clause and a joint resolution to block or modify the provision of security assistance, which requires a presidential signature and is subject to a veto, unlike a concurrent resolution.⁵⁹ President Ford signed the revised measure and it was enacted into law. Thus, to pass a joint resolution of disapproval under Section 502B, Congress must rally supermajorities in each chamber to override a presumptive presidential veto—a much more difficult task than enacting a concurrent resolution with a majority in each house.⁶⁰

In 1978, Congress further amended Section 502B with the International Security Assistance Act, removing the “policy of the United States” language to make the law binding upon the executive branch.⁶¹ The committee report expressly stated that, “the intended effect of this amendment is to substitute for the current policy statement a legal requirement to deny security assistance.”⁶² President Carter signed this bill into law.⁶³

Establishing Section 502B and then giving it binding force marked a significant victory for Congress. The law ushered in “the era of American human rights diplomacy, proceeding on a separate track from the international human rights treaty institutions the United States remained outside.”⁶⁴ Human rights diplomacy has since become integrated in U.S. foreign policy. For example, the United States regularly reports on human rights conditions in foreign countries, privately engages with foreign governments to bring attention to human rights issues, and publicly calls for improvements in human rights practices.⁶⁵

⁵⁸ FORD, *supra* note 57.

⁵⁹ See Cohen, *supra* note 37 at 253; International Security Assistance Act of 1978 § 6, 22 U.S.C. § 2304.

⁶⁰ See *Types of Legislation*, *supra* note 55.

⁶¹ See International Security Assistance Act of 1978, *supra* note 59.

⁶² Cohen, *supra* note 37, at 254.

⁶³ See International Security Assistance Act of 1978, *supra* note 59.

⁶⁴ McGuinness, *supra* note 35, at 22–23; see also Roberta Cohen, *Integrating Human Rights In US Foreign Policy: The History, The Challenges, And the Criteria For An Effective Policy*, BROOKINGS INST. 1, 2–3 (2008), https://www.brookings.edu/wp-content/uploads/2016/06/04_human_rights_cohen.pdf (providing a diplomat’s perspective on the role of Section 502B and other congressional efforts in integrating human rights concerns into U.S. foreign policy.)

⁶⁵ See Roberta Cohen, *Integrating Human Rights In US Foreign Policy: The History, The Challenges, And The Criteria For An Effective Policy*, BROOKINGS INST., at 2–3, (2008), https://www.brookings.edu/wp-content/uploads/2016/06/04_human_rights_cohen.pdf (providing a diplomat’s

B. *Establishing Human Rights Reports*

Today, the most prominent aspect of Section 502B is its mandated human rights reports.⁶⁶ Section 502B requires the Department of State to provide annual reports on human rights in countries receiving U.S. security assistance, a requirement that has been in force since 1977. The State Department refers to these reports as the annual Country Reports on Human Rights Practices.⁶⁷ In 1979, Congress extended this mandate to all countries.⁶⁸ Since then, Congress has steadily expanded the specific issues covered in the reports, which now address areas ranging from child soldiers to reproductive rights.⁶⁹

The Country Reports have created new opportunities for NGOs to engage with policymakers on human rights issues. Organizations like Amnesty International, the Center for International Policy, and Americans for Democratic Action use the reports as an opportunity to interface with both the State Department and members of Congress.⁷⁰

The Country Reports have helped integrate human rights norms into the regular activities of U.S. embassies and the State Department's bureaucracy.⁷¹ According to one Carter administration official, "having to do [the reports] . . . transformed the whole apparatus inside the [State] Department."⁷² Each year, every U.S. embassy collects information on human rights in their post country and summarizes human rights practices in the report. The Country Reports have become a means for the United States to promote human rights outside of its borders, including through fact-

perspective on the role of Section 502B and other congressional efforts in integrating human rights concerns into U.S. foreign policy.) For an assessment of the effectiveness of one form of U.S. human rights diplomacy, see Rachel Myrick & Jeremy M. Weinstein, *Making Sense of Human Rights Diplomacy: Evidence from a US Campaign to Free Political Prisoners*, 76 INT'L ORG. 379 (2022).

⁶⁶ See, e.g., U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices, <https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/>. See also Antony J. Blinken, Sec'y of State, Remarks on the Release of the 2021 Country Reports on Human Rights Practices (Apr. 12, 2022) ("So this is the second time that I've jointed the launch of this report as Secretary of State because it's important to U.S. foreign policy; it's important to [the Department of State]").

⁶⁷ MICHAEL A. WEBER, CONG. RSCH. SERV., IF10795, GLOBAL HUMAN RIGHTS: THE DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 1 (Apr. 14, 2022).

⁶⁸ See *id.*

⁶⁹ Margaret E. McGuinness, *Human Rights Reporting as Human Rights Governance*, 59 COLUM. J. OF TRANSNAT'L L. 364, 368 (2021).

⁷⁰ See Keys, *supra* note 25, at 849–50.

⁷¹ See McGuinness, *supra* note 70, at 390–91.

⁷² Keys, *supra* note 25, at 841.

finding,⁷³ even as the U.S. government remains outside many international human rights institutions.⁷⁴

The Country Reports are a central means by which the United States engages in “naming and shaming” governments to call for improvements to human rights practices.⁷⁵ Their publication regularly makes headlines, bringing periodic attention to human rights issues around the world and impacting agenda-setting by policymakers.⁷⁶ Although the reports are descriptive rather than prescriptive, they are not uncontroversial and regularly draw condemnation from foreign governments. In reaction to the 2021 Country Report, which detailed human rights abuses in Xinjiang, Tibet, and Hong Kong,⁷⁷ a Chinese government spokesperson urged the United States to “face up to and reflect on its own human rights problems, give up politicizing human rights, do something concrete to promote Americans’ human rights and stop undermining human rights in other countries.”⁷⁸ The Country Reports remain the leading example of an aspect of Section 502B with enduring relevance to executive branch decisionmakers, but the executive branch’s resistance to 502B as a whole has caused most of the law to fall by the wayside.

⁷³ See McGuinness, *supra* note 70, at 398–400.

⁷⁴ See Louis Henkin, *Rights: American and Human* 79 COLUM. L. R. 405, 421 (1979). (“But the United States has not been a pillar of human rights, only a ‘flying buttress’—supporting them from the outside. Human rights have been a kind of ‘white man’s burden’; international human rights have been ‘for export only.’ Congress has invoked international human rights standards only as a basis for sanctions against other countries. President Carter has invoked human rights agreements in criticism of others”).

⁷⁵ See James C. Franklin, *Human Rights Naming and Shaming: International and Domestic Processes*, THE POLITICS OF LEVERAGE IN INT’L. REL. 43–45 (H. Richard Friman ed., 2015).

⁷⁶ See, e.g., Missy Ryan, *Human Rights and Democracy Eroding Worldwide, U.S. Finds*, WASH. POST (Apr. 12, 2022), [washingtonpost.com/national-security/2022/04/12/state-global-human-rights-report/](https://www.washingtonpost.com/national-security/2022/04/12/state-global-human-rights-report/); Carol Morello, *State Department Strikes Reproductive Rights, ‘Occupied Territories’ from Human Rights Report*, WASH. POST (Apr. 20, 2018), https://www.washingtonpost.com/world/national-security/state-department-strikes-reproductive-rights-occupied-territories-from-annual-report/2018/04/20/46ef0874-44a6-11e8-ad8f-27a8c409298b_story.html; Carol Morello, *Rex Tillerson Skips State Department’s Annual Announcement on Human Rights, Alarming Advocates*, WASH. POST (Mar. 3, 2017), https://www.washingtonpost.com/world/national-security/rex-tillerson-skips-state-departments-annual-announcement-on-human-rights-alarming-advocates/2017/03/03/7fbf8584-002d-11e7-8f41-ea6ed597e4ca_story.html.

⁷⁷ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: China (Includes Hong Kong, Macau, and Tibet) (2022).

⁷⁸ Phelim Kine, *China Activists Call for Reboot of State Dept. Annual Human Rights Report*, POLITICO (Apr. 13, 2022), <https://www.politico.com/news/2022/04/13/china-activists-state-dept-human-rights-00024876>.

III. EXECUTIVE RESISTANCE AND THE FALL OF SECTION 502B

The decades since Section 502B's enactment have seen an upsurge in presidential foreign affairs powers.⁷⁹ Executive overreach and congressional acquiescence have created a dynamic that favors executive authority,⁸⁰ and the judiciary has tolerated continued executive encroachments.⁸¹ The fall of Section 502B reflects a broader tendency toward executive prerogative in foreign policy.

A. Early Executive Resistance

During the Nixon and Ford administrations, Secretary of State Henry Kissinger was particularly hostile to Congress' human rights requirements.⁸² President Nixon's State Department provided a mandatory report to Congress that, instead of providing information on the state of human rights in countries receiving U.S. military assistance, "attacked the policy enunciated by Section 502B and clearly implied that the Executive has no intention of ever refusing military aid or arms sales to any government on human rights grounds."⁸³

However, other officials were more receptive to human rights concerns than Kissinger. Carlyle Maw, a legal advisor to Kissinger, concluded that Section 502B's prohibition applied to U.S. security assistance to Brazil, Chile, South Korea, Indonesia, Spain, and Uruguay.⁸⁴ The Office of the Legal Adviser and Office of Congressional Relations recommended reducing aid to those countries to comply with Section 502B, but Kissinger "made it clear he did not want to be presented with these types of options."⁸⁵

⁷⁹ See, e.g., KOH, *supra* note 26, at 101–49; KAREN J. GREENBERG, *SUBTLE TOOLS: THE DISMANTLING OF AMERICAN DEMOCRACY FROM THE WAR ON TERROR TO DONALD TRUMP* 8–51 (2021); CHRIS EDELSON, *POWER WITHOUT CONSTRAINT: THE POST-9/11 PRESIDENCY AND NATIONAL SECURITY* 43–160 (2016); Andrew Boyle, *Checking the President's Sanctions Powers*, BRENNAN CTR. (June 10, 2021), <https://www.brennancenter.org/our-work/policy-solutions/checking-presidents-sanctions-powers>; John Ramming Chappell, *The Chadha effect: how SCOTUS put a chokehold on congressional powers*, RESPONSIBLE STATECRAFT (Sept. 23, 2021), <https://responsiblestatecraft.org/2021/09/23/the-chadha-effect-how-scotus-put-a-chokehold-on-congressional-powers/>; Brian Finucane & Stephen Pomper, *Crossing Back Over: Time to Reform Legal Culture and Legal Practice of the "War on Terror,"* JUST SEC. (Sept. 10, 2021), <https://www.justsecurity.org/78169/crossing-back-over-time-to-reform-the-legal-culture-and-legal-practice-of-the-war-on-terror/>.

⁸⁰ See KOH, *supra* note 26, at 117.

⁸¹ See *id.* at 134–49 (describing how "the Supreme Court has intervened consistently across the spectrum of United States foreign policy interests to tip the balance of foreign-policy-making power in favor of the president").

⁸² See generally Keys, *supra* note 25.

⁸³ See Cohen, *supra* note 37, at 252.

⁸⁴ See Keys, *supra* note 25, at 843.

⁸⁵ See *id.*

During the Ford Administration, Congress invoked Section 502B(c) to request information about the human rights records of particular governments for the first (and only) time.⁸⁶ In three letters sent in September and October 1976, Congressman Thomas Morgan, chair of the House Committee on International Relations, requested a report on human rights conditions in Argentina, Haiti, Indonesia, Iran, Peru, and the Philippines.⁸⁷ Congressman Fraser followed up with a letter expressing that the report should be public.⁸⁸ Before submitting the report to Congress, Winston Lord, then director of the State Department's Policy Planning Staff, urged Kissinger to implement Section 502B.⁸⁹ Calling the decision "an extremely important moment in our relations with Congress," Lord opposed maintaining aid to the countries in question due to the prohibition outlined in Section 502B.⁹⁰

While Section 502B requires the Secretary of State to provide Congress with "all available" information about human rights in a target country, the 1976 report did not do so.⁹¹ The report was "extremely circumspect" in its discussion of abuses, causing State Department lawyers to propose an alternate version for South Korea that the East Asia Bureau eventually rejected.⁹² Human rights leaders in Congress criticized the report. Sen. Alan Cranston (D-Calif.) called it "a cover-up," and Sen. Hubert Humphrey (D-Minn.) described it as "about as bland as swallowing a bucket of sawdust."⁹³

B. Section 502B in the Carter Era

Building on congressional momentum, President Carter prioritized human rights. When he accepted the Democratic nomination for president, Carter said, "The foremost responsibility of any President . . . is to guarantee the security of our nation . . . and the ability with our allies to maintain peace. But peace is not the mere absence of war Peace is the unceasing effort to preserve human rights."⁹⁴ After his election, President Carter continued to

⁸⁶ See Weissbrodt, *supra* note 42, at 267.

⁸⁷ See U.S. DEP'T OF STATE, HUMAN RIGHTS AND U.S. POLICY: ARGENTINA, HAITI, INDONESIA, IRAN, PERU, AND THE PHILIPPINES H.R. REP. NO. 80-756, at 35 (1976).

⁸⁸ See *id.* at 36.

⁸⁹ See Keys, *supra* note 25, at 843.

⁹⁰ *Id.*

⁹¹ See Weissbrodt, *supra* note 42, at 269–71.

⁹² See Keys, *supra* note 25, at 845–46.

⁹³ See *id.* at 847–48.

⁹⁴ Jimmy Carter, "Our Nation's Past and Future": Address Accepting the Presidential Nomination at the Democratic National Convention in New York City (July 15, 1976) (transcript available at <https://www.presidency.ucsb.edu/documents/our-nations-past-and-future-address-accepting-the-presidential-nomination-the-democratic>).

emphasize human rights in his rhetoric, asserting, “our commitment to human rights must be absolute”⁹⁵ and “[w]e can no longer separate the traditional issues of war and peace from the new global questions of justice, equity, and human rights.”⁹⁶ Carter went further than his predecessors in implementing Section 502B but still fell short of Congress’ intent.

Although President Carter emphasized human rights in his foreign policy and signed a key Section 502B amendment into law, his State Department was reluctant to implement the provision. While the newly-created Bureau of Human Rights advocated cutting military assistance to human rights abusers,⁹⁷ foreign service officers in regional bureaus resisted complying with 502B requirements because they prioritized maintaining cordial relations with other states.⁹⁸ In particular, regional bureaus minimized the relevance of Section 502B, “distort[ed] information about human rights conditions in particular countries,” and overstated the extent of the U.S. interests at stake.⁹⁹ The Carter Administration used the discretion permitted to it by Section 502B to find that human rights violations were not “gross” or that “extraordinary circumstances” warranted continued arms sales.¹⁰⁰ For example, regional bureaus in Secretary of State Cyrus Vance’s State Department dismissed credible reports of massacres by the Indonesian military in East Timor and exaggerated the likelihood of Filipino President Ferdinand Marcos cancelling a military basing agreement if the United States did not increase security assistance.¹⁰¹

While the Carter Administration’s efforts in its first year were substantial, Congress felt that they did not go far enough and resumed the process of strengthening Section 502B in 1978.¹⁰² Despite Congress’ desire to see more policy changes resulting from the law, Section 502B did influence the Administration’s decisions. Although the Carter

⁹⁵ Jimmy Carter, *Inaugural Address of Jimmy Carter*, THE AVALON PROJECT, (Jan. 20, 1977), https://avalon.law.yale.edu/20th_century/carter.asp.

⁹⁶ Jimmy Carter, Address at Commencement Exercises at the University of Notre Dame (May 22, 1977)(transcript available at <https://www.presidency.ucsb.edu/documents/address-commencement-exercises-the-university-notre-dame>). President Carter also linked human rights issues to security assistance decisions as part of his arms transfer restraint policy, mentioning human rights in the first Conventional Arms Transfer Policy. Jimmy Carter, Conventional Arms Transfer Policy Statement by the President (May 19, 1977) (transcript available at <https://www.presidency.ucsb.edu/documents/conventional-arms-transfer-policy-statement-the-president>) (“In formulating security assistance programs consistent with these controls, we will continue our efforts to promote and advance respect for human rights in recipient countries”).

⁹⁷ See Cohen, *supra* note 37, at 261.

⁹⁸ See *id.* at 257.

⁹⁹ *Id.* at 259–60.

¹⁰⁰ See *id.* at 271–72.

¹⁰¹ See *id.* at 259–61.

¹⁰² See *id.* at 254.

Administration never formally invoked Section 502B, some in the State Department recalled that “the section was applied to twelve countries” and halted security assistance for eight of them: Argentina, Bolivia, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay, and Uruguay.¹⁰³ In an early hearing, Secretary Vance told Congress that the Administration would not provide security assistance to Ethiopia or Uruguay in 1978 and would halve security assistance to Argentina.¹⁰⁴ However, the Carter Administration’s compliance with Section 502B proved biased. It partially cut aid to certain gross violators of human rights but not others and only restricted particular forms of security assistance.¹⁰⁵ For example, the Carter Administration never restricted security assistance to Indonesia’s government, which held thousands of political prisoners.¹⁰⁶ Nevertheless, President Carter’s posture toward Section 502B was far more cooperative to Congress’ mandate than that of his successors.

C. Executive Disregard for Section 502B after Carter

The Reagan Administration deprioritized human rights in U.S. security assistance, instead focusing on Cold War politics and arming authoritarian anti-communist partners.¹⁰⁷ U.S. security assistance skyrocketed 300% between 1980 and 1984.¹⁰⁸ Reversing Carter’s policy of “arms sale restraint,” the Reagan Administration removed arms transfer policy restrictions that they alleged “substituted theology for a healthy sense of self-preservation” and were part of “an American withdrawal from world responsibilities.”¹⁰⁹ As one Reagan Administration official put it, “We do not necessarily believe that [human rights] should be the sole determinant of relationships entered into for our security Nor do we believe that a policy which has the effect of isolating us from contacts with other countries necessarily advances our ability to persuade other countries to improve their civil rights conditions.”¹¹⁰

¹⁰³ David P. Forsythe, *Congress and Human Rights in U. S. Foreign Policy: The Fate of General Legislation*, 9 HUM. RTS. Q. 382, 383 (1987).

¹⁰⁴ See Cohen, *supra* note 37, at 272.

¹⁰⁵ See *id.* at 272.

¹⁰⁶ See Forsythe, *supra* note 104, at 384.

¹⁰⁷ See *id.* at 384-85.

¹⁰⁸ See *id.* at 385.

¹⁰⁹ John M. Goshko, *Carter Restraints on Arms Sales to Friends Are Scrapped by Reagan Administration*, WASH. POST (May 22, 1981), <https://www.washingtonpost.com/archive/politics/1981/05/22/carter-restraints-on-arms-sales-to-friends-are-scrapped-by-reagan-administration/9222a9d9-a381-445c-b5ac-2301f067aeac/>.

¹¹⁰ Dean Reynolds, *Reagan Nixes Human Rights Considerations in Arms Sales*, UPI (July 10, 1981), <https://www.upi.com/Archives/1981/07/10/Reagan-nixes-human-rights-considerations-in-arms-sales/1054363585600/>.

During the Reagan presidency, the United States gave security assistance to several recipients that were the subject of human rights concerns, including Guatemala,¹¹¹ Nicaragua's Contras,¹¹² South Korea,¹¹³ and South Africa.¹¹⁴ In a 1981 opinion essay, Aryeh Neier, co-founder of Human Rights Watch, accused the Reagan Administration of disregarding Section 502B's mandate.¹¹⁵ Neier pointed specifically to Guatemala, where the government engaged in extrajudicial killings of "thousands of teachers, priests, lawyers, journalists, and leaders of Indian and peasant organizations, unions, and opposition parties" but nevertheless received trucks and Jeeps worth \$3.2 million from the United States that same year.¹¹⁶ Declassified documents indicate that Reagan Administration officials were aware of massacres by the Guatemalan military under President Efraín Ríos Montt, including a "well-founded allegation of a large-scale killing of Indian men, women, and children in a remote area by the Guatemalan army."¹¹⁷ Nevertheless, security assistance continued.¹¹⁸ President Ríos Montt was convicted of genocide against the Ixil indigenous community.¹¹⁹ The Reagan Administration's provision of weapons, training, and funding to the Nicaraguan Contras using proceeds from arms sales to embargoed Iran also sparked controversy and was in violation of the Boland Amendment.¹²⁰ Contemporary reporting detailed extensive abuses by the Contras in violation of international human rights and humanitarian law.¹²¹ Other

¹¹¹ See *infra* note 120.

¹¹² See *infra* note 121.

¹¹³ See *infra* note 122.

¹¹⁴ See *infra* note 123.

¹¹⁵ Aryeh Neier, *Of Reagan and Rights*, N.Y. TIMES (Nov. 12, 1981), <https://www.nytimes.com/1981/11/12/opinion/of-reagan-and-rights.html>.

¹¹⁶ *Id.*

¹¹⁷ Dan Beeton & Stephan LeFebvre, *U.S. Supported Former Ally Ríos Montt While Aware of Atrocities Committed by the Dictatorship*, CTR. FOR ECON. AND POL'Y RSCH. (May 16, 2013), <https://cepr.net/us-supported-former-ally-rios-montt-while-aware-of-atrocities-committed-by-the-dictatorship/>.

¹¹⁸ Bernard Gwertzman, *U.S. Lifts Embargo On Military Sales To Guatemalans*, N.Y. TIMES (Jan. 8, 1983), <https://www.nytimes.com/1983/01/08/world/us-lifts-embargo-on-military-sales-to-guatemalans.html>.

¹¹⁹ Stephen Kinzer, *Efraín Ríos Montt, Guatemalan Dictator Convicted of Genocide, Dies at 91*, N.Y. TIMES (Apr. 1, 2018), <https://www.nytimes.com/2018/04/01/obituaries/efrain-rios-montt-guatemala-dead.html>.

¹²⁰ See generally MALCOLM BYRNE, *IRAN-CONTRA: REAGAN'S SCANDAL AND THE UNCHECKED ABUSE OF PRESIDENTIAL POWER* (2014).

¹²¹ *Report of Donald T. Fox, Esq. and Prof. Michael J. Glennon to the International Human Rights Law Group and the Washington Office on Latin America Concerning Abuses Against Civilians By Counterrevolutionaries Operating in Nicaragua*, WASH. OFF. ON LATIN AM. 14-21 (Apr. 1985), available online at <https://www.wola.org/sites/default/files/downloadable/Central%20America/past/1985->

controversial arms transfers included the provision of shock batons to South Korea soon after the end of martial law¹²² and to South Africa's apartheid government.¹²³

After the Reagan Administration, the prospect of executive implementation of Section 502B faded. In the rare cases when Congress has pressed administrations on Section 502B, executive branch officials have insisted human rights violations are not part of a consistent pattern necessary to trigger Section 502B's cutoff obligation.¹²⁴ For example, in a 2008 hearing, Sen. Russ Feingold (D-Wis.) asked Deputy Secretary of State John Negroponte to explain how U.S. security assistance to Chad, Djibouti, and Ethiopia was "consistent with the Foreign Assistance Act."¹²⁵ In a written response submitted after the hearing, the State Department argued gross violations of human rights in the countries did not amount to a consistent pattern.¹²⁶ Because Section 502B does not define "consistent pattern" of gross violations of human rights and the executive branch has not publicly expressed its interpretation of the term,¹²⁷ finding that human rights violations do not meet the "consistent pattern" requirement has provided a flexible justification to not implement the statute's mandate.

D. Judicial Tolerance

With the executive branch unwilling to comply with Section 502B, lawmakers and advocates alike turned to the courts for enforcement. However, in all instances in which plaintiffs have sued to enforce Section 502B, judges have dismissed the cases on procedural grounds.¹²⁸ Those cases fit into a broader pattern of courts "condon[ing] executive initiatives in foreign affairs by refusing to hear challenges to the president's authority."¹²⁹

Nicaragua-Abuses%20Against%20Civilians%20by%20Counterrevolutionaries%20Operating%20in%20Nicaragua%20PART%201.pdf.

¹²² See *U. S. to Sell 'Shock' Baton to Seoul*, N.Y. TIMES, Sep. 11, 1982, at 2; Richard M. Weintraub, *Policy Clash Develops on Shock Batons*, WASH. POST (Sep. 24, 1982), <https://www.washingtonpost.com/archive/politics/1982/09/24/policy-clash-develops-on-shock-batons/749b6f57-e880-4f4b-93a5-173d99fad969/>.

¹²³ *High-Voltage Batons Sent to South Africa*, N.Y. TIMES, Sep. 21, 1982, at 5.

¹²⁴ See 22 U.S.C. § 2304(a).

¹²⁵ *Defining the Military's Role Towards Foreign Policy: Hearing Before the Committee on Foreign Relations of the U.S. Senate*, 110th Cong. 36 (2008).

¹²⁶ See *id.*

¹²⁷ See 22 U.S.C. § 2304(a).

¹²⁸ See, e.g., *Crockett v. Reagan*, 558 F. Supp. 893, 902 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983); *Clark v. United States*, 609 F. Supp. 1249, 1249 (D. Md. 1985).

¹²⁹ See KOH, *supra* note 25, at 146-47. For additional discussion of judicial acquiescence to executive initiatives in foreign affairs, see MARTIN FLAHERTY, *RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS* 167-89 (2019) and Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814-21 (1989).

In 1982, a bipartisan group of sixteen senators and thirteen representatives sued President Reagan for violating Section 502B and the War Powers Resolution by providing security assistance to El Salvador.¹³⁰ In support of their Section 502B claim, the lawmakers alleged that the government of El Salvador had engaged in a consistent pattern of gross violations of human rights, including “political assassinations of massive numbers of innocent civilians, arbitrary arrests, cruel and inhuman punishment and imprisonment, disappearances, and torture.”¹³¹ They sought a “writ of mandamus and/or an injunction directing that defendants withdraw all United States Armed Forces, weapons, and military equipment and aid from El Salvador and prohibiting any further aid of that nature.”¹³²

The ideological diversity of the members of Congress involved in *Crockett v. Reagan* exemplifies that efforts to enforce Section 502B drew interest from a wide array of legislators invested in foreign policy oversight. The plaintiffs included prominent civil rights veterans, human rights stalwarts, and civil libertarians—a coalition of strange bedfellows that included Rep. Tom Harkin (D-Iowa), Rep. Ron Dellums (D-Calif.), and Sen. Jesse Helms (R-N.C.).¹³³ While Georgetown professor Rev. Robert Drinan and lawyers from the Center for Constitutional Rights represented the House Democrats, Daniel Popeo of the conservative Washington Legal Foundation represented the Senate Republicans. The named plaintiff in the lawsuit was Congressman George Crockett (D-Mich.), a first-term member representing Detroit. Rep. Crockett consistently opposed security assistance, saying, “[t]axpayers’ money is being wasted to keep the profit machine going for the munitions industry.”¹³⁴

In *Crockett v. Reagan*, the D.C. District Court granted the Reagan Administration’s motion to dismiss the Section 502B claim under the equitable discretion doctrine.¹³⁵ The doctrine holds, “Where a congressional

¹³⁰ MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL30352, WAR POWERS LITIGATION INITIATED BY MEMBERS OF CONGRESS SINCE THE ENACTMENT OF THE WAR POWERS RESOLUTION 3 (2012).

¹³¹ *Crockett v. Reagan*, 558 F. Supp. 893, 902 (D.D.C. 1982), *aff’d*, 720 F.2d 1355 (D.C. Cir. 1983).

¹³² *Id.* at 896.

¹³³ *Id.* at 894–95.

¹³⁴ Joanne Omang, *Rep. Crockett and the Volley from the Right*, WASH. POST (Feb. 10, 1987), <https://www.washingtonpost.com/archive/politics/1987/02/10/rep-crockett-and-the-volley-from-the-right/4b6f70fc-8c4d-442e-8964-3d8f6543956c/>.

¹³⁵ The defendants sought dismissal based on the political question doctrine, standing, equitable discretion, or the lack of a private right of action. *Accord* Gibney, *supra* note 25 at 122. Gibney suggests the Court granted the Government’s motion to dismiss on equitable discretion grounds rather than political question grounds (as it did for the War Powers Resolution claim) because “there is very little that is subtle about the civil war in El Salvador. While the court could maintain that it did not have the resources and expertise to find out exactly what a relatively small number of U.S. military personnel were

plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's action."¹³⁶ As the *Crockett* court put it, "[w]hen a member of Congress is a plaintiff in a lawsuit, concern about separation of powers counsels judicial restraint even where a private plaintiff may be entitled to relief."¹³⁷ The court found the plaintiffs' dispute was with their fellow lawmakers, putting the onus on Congress to pass legislation further restricting military aid to El Salvador.¹³⁸ Because the case was dismissed on justiciability grounds, the court did not proceed to consider whether the Salvadoran government engaged in a consistent pattern of gross violations of human rights. The D.C. Circuit affirmed the district court's ruling.¹³⁹

After *Crockett*, a group of Quakers with a longstanding involvement in anti-war advocacy brought a lawsuit against the United States government for violating Section 502B by providing security assistance to El Salvador and the Nicaraguan Contras. In *Clark v. United States*, they sought the return of about \$28 in taxes they paid in 1982 and 1983.¹⁴⁰ The plaintiffs objected to the use of their taxes "in support of acts of violence against innocent and helpless persons in El Salvador and Nicaragua."¹⁴¹ In 1985, the Maryland District Court ruled that they did not have standing to sue because they had not suffered any actual or threatened injury as a result of the government's conduct.¹⁴² As a result, the court dismissed *Clark v. United States* without considering the merits of the plaintiffs' claim that the Salvadoran government engaged in a consistent pattern of gross violations of human rights.¹⁴³

No case has addressed the judicial enforcement of Section 502B since *Clark*. With *Crockett* preventing legislators from suing under Section 502B, and *Clark* doing the same for taxpayers, the judiciary closed the courthouse doors to those wishing to enforce the mandate through litigation.¹⁴⁴

doing in El Salvador, it would have a much harder time convincing anyone that it could not develop an understanding of the general political, social, and military conditions in El Salvador." *Id.* at 123.

¹³⁶ *Riegle v. Federal Open Market Comm'n*, 656 F.2d 873, 881 (D.C. Cir. 1981).

¹³⁷ *Crockett v. Reagan*, 558 F. Supp. 893, 902 (D.D.C. 1982).

¹³⁸ *Id.* at 903.

¹³⁹ *Crockett v. Reagan*, 720 F.2d 1355, 1357 (D.C. Cir. 1983).

¹⁴⁰ See *World of Friends*, FRIENDS J., at 17 (1985), <https://www.friendsjournal.org/wp-content/uploads/emember/downloads/1985/HC12-50778.pdf>.

¹⁴¹ *Id.*

¹⁴² *Clark v. United States*, 609 F. Supp. 1249, 1250 (D. Md. 1985).

¹⁴³ See *id.*

¹⁴⁴ See James W. Moeller, *Human Rights and U.S. Security Assistance: El Salvador and the Case for Country-Specific Legislation*, 24 HARV. INT'L L.J. 75, 101 (1983) ("The *Crockett* holding requires a Senator or Representative to have Congress, and not the federal courts, address his concern with human

E. Legislative Acquiescence

Congress has not used Section 502B to its full potential. Congressman Fraser's 1976 request for a report on human rights conditions in Argentina, Haiti, Indonesia, Iran, Peru, and the Philippines remains the only instance to date where Congress has successfully used the mechanism established in 502B(c). Congress has never voted on—let alone passed—a Section 502B joint resolution of disapproval.¹⁴⁵

As demonstrated in the table below,¹⁴⁶ mentions of Section 502B in the Congressional Record steadily declined between 1985 and 2015.¹⁴⁷ For example, Section 502B appeared in just one bill each in 2002 and 2003¹⁴⁸—both Foreign Relations Authorization Acts—and each mention of 502B focused exclusively on the 502B-mandated Country Reports.¹⁴⁹ In 2012, Section 502B again appeared just once in the Congressional Record,¹⁵⁰ in the context of a new reporting requirement, this time related to child marriage.¹⁵¹ In 2017, the only mention of Section 502B was an acknowledgment that its prohibition applied to an Economic Support Fund for countering extremism.¹⁵² In 2006, 2011, and 2015, the Congressional Record did not mention Section 502B at all.¹⁵³

Time Period	Average Annual Occurrences in Congressional Record
1975–1984	11.1
1985–1994	5.9

rights and United States security assistance.”). The judiciary’s retreat from adjudicating separation of powers and deference to executive authority are also reflected in other areas of foreign affairs. *See* KOH, *supra* note 26, at 134–149.

¹⁴⁵ Benowitz & Ramming Chappell, *supra* note 24, at 8.

¹⁴⁶ Using Congress.gov’s search function, I identified each mention of Section 502B in the Congressional Record from 1975 to 2022. I eliminated mentions of sections enumerated 502B in other statutes and came to a total of 312 instances. I then calculated the number of mentions per year and, where relevant, read the context for particular entries in the Congressional Record. CONGRESS.GOV, [https://www.congress.gov/search?pageSize=250&pageSort=issueAsc&q={%22source%22:\[%22congress%22\],%22search%22:%22%22section+502B%22}](https://www.congress.gov/search?pageSize=250&pageSort=issueAsc&q={%22source%22:[%22congress%22],%22search%22:%22%22section+502B%22}) (data on file with author and available upon request) [hereinafter *Congressional Record Analysis*].

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *See* 148 CONG. REC. H6435–60 (daily ed. Sept. 23, 2002); 149 CONG. REC. H6764 (daily ed. July 15, 2003).

¹⁵⁰ *Congressional Record Analysis*, *supra* note 146.

¹⁵¹ *See* 158 CONG. REC. S3657 (daily ed. May 24, 2012).

¹⁵² *See* 163 CONG. REC. H3235, (daily ed. May 13, 2017).

¹⁵³ *Congressional Record Analysis*, *supra* note 146.

1995–2004	3.9
2005–2014	3
2015–2021	9.1 ¹⁵⁴

The decline of Section 502B may be attributable in part to the enactment of other laws intended to promote human rights. In the 1990s, efforts to promote human rights through U.S. security assistance shifted to focus on the Leahy Laws.¹⁵⁵ Named for Senator Patrick Leahy (D-Vt.), the Leahy Laws prohibit the provision of security assistance to “any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.”¹⁵⁶

The principal difference between the Leahy Laws and Section 502B is scope: the Leahy Laws apply to particular units, and Section 502B applies to entire countries. While the scope of the Leahy Laws makes them more precise tools, cutting off support to individual units does not necessarily drive change when human rights abuses are widespread across a country’s security forces or are poorly documented. Choosing to focus on units also poses two problems that do not exist when addressing the country as a whole. Establishing connections between specific abuses and specific units can be particularly challenging, as is preventing transfers of hardware from one unit to another.¹⁵⁷ Another key difference between the Leahy Laws and Section 502B is that the Leahy Laws do not define “security assistance,” allowing the executive branch to interpret their scope as limited to support provided with appropriated funds.¹⁵⁸ Therefore, in practice, Leahy vetting does not apply to most arms sales.

The Leahy Laws include a remediation mechanism whereby units may receive assistance after the Secretary of State determines that the recipient

¹⁵⁴ Interest in Section 502B spiked in 2019 amid efforts to limit security assistance to Saudi Arabia. For more discussion of a resurgence in attention to Section 502B, see discussion *infra* Part IV.

¹⁵⁵ See NINA M. SERAFINO, JUNE S. BEITTEL, LAUREN PLOCH BLANCHARD & LIANA ROSEN, CONG. RSCH. SERV., R43361, “LEAHY LAW” HUMAN RIGHTS PROVISIONS AND SECURITY ASSISTANCE: ISSUE OVERVIEW 3–4 (2014).

¹⁵⁶ 22 U.S.C. § 2378d(a).

¹⁵⁷ See Nathanael Tenorio Miller, Note, *The Leahy Law: Congressional Failure, Executive Overreach, and the Consequences*, 45 CORNELL INT’L L.J. 667, 686–88 (2012).

¹⁵⁸ Paul K. Kerr & Liana W. Rosen, CONG. RSCH. SERV., *U.S. Arms Sales and Human Rights: Legislative Basis and Frequently Asked Questions*, CONG. RSCH. SERV., at 2 (2021), <https://sgp.fas.org/crs/weapons/IF11197.pdf>.

government “is taking effective steps to bring the responsible members of the security forces unit to justice.”¹⁵⁹ The Leahy Laws have sometimes prevented security assistance from facilitating human rights abuses.¹⁶⁰

Since the enactment of the Leahy Laws, Section 502B has often been framed as their defunct precursor, which detracts from Section 502B’s potential to be used alongside Leahy vetting and AECA joint resolutions of disapproval.¹⁶¹

IV. THE RETURN OF SECTION 502B?

The last several years brought forth a renewed interest in Section 502B. In 2018 and 2019, a bipartisan group in Congress attempted to block then-President Trump’s arms sales to Saudi Arabia amid possible war crimes by the Saudi-led coalition in Yemen.¹⁶² As Congress explored ways to end U.S. security assistance to Saudi Arabia in 2019, Section 502B appeared in the Congressional Record twenty-three times, an all-time high.¹⁶³ This Part considers whether a return of Section 502B is on the horizon. It examines renewed interest in the law on Capitol Hill, assesses how a revitalized Section 502B would interact with other oversight mechanisms, and finally analyzes a constitutional issue that could hamper the use of Section 502B.

¹⁵⁹ 22 U.S.C. § 2378d(b). Section 502B also includes a remediation mechanism, incorporated through an amendment in 1979. The provision allows the president to resume security assistance based on a finding that “a significant improvement in [a country’s] human rights record has occurred.” 22 U.S.C. § 2304(e).

¹⁶⁰ The State Department generally does not publicize decisions to suspend assistance due to Leahy vetting. See Lora Lumpe, *What the Leahy Law Means for Human Rights*, OPEN SOC’Y FOUND. (Apr. 24, 2014), <https://www.opensocietyfoundations.org/voices/what-leahy-law-means-human-rights>. But in response to the Myanmar military’s potential acts of genocide, crimes against humanity, and war crimes against the Rohingya people, the State Department found units in Rakhine State, Myanmar ineligible for security assistance. *Assessing U.S. Policy Towards Burma: Hearing Before the S. Comm. on For. Rel.*, 115th Cong. 5– 6 (2017) (statement of W. Patrick Murphy, Dep. Asst. Sec., Bureau of E. Asian and Pacific Affs.). The enforcement of the Leahy Laws in Myanmar includes an “embargo on military sales.” *Id.* at 6.

¹⁶¹ E.g., SERAFINO ET AL., CONG. RSCH. SERV. *supra* note 155, at 3 n.8 (“In response to CRS requests, the State Department did not report any instances in which Section 502B was invoked. State Department officials stated that this provision has not been used because it is ‘overly broad.’”); Nandor F.R. Kiss, Note, *Leahy-Sharpening the Blade*, 31 PACE INT’L L. REV. 499, 513 (2019) (“However, this proto-Leahy [502B] suffered from its breadth . . . the Department of State never invoked Section 502B to refuse funding because it was ‘overly broad.’”); Ivan Waggoner, *Military Assistance Conditioned on Justice: An Empirical Study of the Leahy Law and Human Rights Prosecutions*, 29 FLA. J. INT’L L. 253, 254 (2017) (“The [Department of State] has resisted the implementation of [Section 502B] because it is overly broad”).

¹⁶² For further discussion of Saudi Arabia in the context of Section 502B, see discussion *infra* Part V(B).

¹⁶³ See *Congressional Record Analysis*, *supra* note 146.

A. Resurgent Interest in Congress

Using U.S.-manufactured weapons, the Saudi-led coalition perpetrated apparent war crimes that killed civilians in homes,¹⁶⁴ marketplaces,¹⁶⁵ a school bus,¹⁶⁶ a funeral hall,¹⁶⁷ and at a wedding party.¹⁶⁸ As concerns in Congress mounted regarding possible war crimes perpetrated by the U.S.-supported and Saudi-led coalition in Yemen, members of Congress introduced several legislative vehicles that invoked Section 502B to request information about human rights in Yemen.¹⁶⁹ In April 2018, Sen. Jeff Merkley (D-Ore.) introduced a resolution requesting a statement under 502B(c) with respect to violations of human rights by the Government of Saudi Arabia.¹⁷⁰ The resolution cited Saudi Arabia's abuses in Yemen alongside its arbitrary arrests of activists.¹⁷¹ The next year, Sen. Merkley introduced another resolution repeating the same request.¹⁷² In June 2019, Sens. Chris Murphy (D-Conn.) and Todd Young (R-Ind.) introduced another resolution that requested information on Saudi Arabia's human rights practices in Yemen.¹⁷³ Sen. Young's press release about the resolution stated that it would "begin the process of forcing a vote on arms sales [*sic*] and other security assistance to Saudi Arabia," but the vote never took place.¹⁷⁴

¹⁶⁴ See *Yemen: US-made Bomb Used in Deadly Air Strike on Civilians*, AMNESTY INT'L (Sep. 26, 2019), <https://www.amnesty.org/en/latest/press-release/2019/09/yemen-us-made-bomb-used-in-deadly-air-strike-on-civilians/>. The Saudi-led coalition treated entire neighborhoods, cities, and regions as military targets, a violation of international humanitarian law. See Letter from Michael Pates, Dir. A.B.A. Ctr. for Hum. Rts. & Brittany Benowitz, Chief Couns. A.B.A. Ctr. for Hum. Rts., to U.S. Senate 2 (May 29, 2017), <https://s3.documentcloud.org/documents/3727674/ABA-CHR-Assessment-of-Arms-Sales-to-Saudi-Arabia.pdf>.

¹⁶⁵ See *Yemen: US Bombs Used in Deadliest Market Strike*, HUM. RTS. WATCH (Apr. 7, 2016), <https://www.hrw.org/news/2016/04/08/yemen-us-bombs-used-deadliest-market-strike>.

¹⁶⁶ See *Yemen: Coalition Bus Bombing Apparent War Crime*, HUM. RTS. WATCH (Sep. 2, 2018), <https://www.hrw.org/news/2018/09/02/yemen-coalition-bus-bombing-apparent-war-crime>.

¹⁶⁷ See *Yemen: Saudi-Led Funeral Attack Apparent War Crime*, HUM. RTS. WATCH (Oct. 13, 2016), <https://www.hrw.org/news/2016/10/13/yemen-saudi-led-funeral-attack-apparent-war-crime>.

¹⁶⁸ See Aric Toler, *American-Made Bomb Used in Airstrike on Yemen Wedding*, BELLINGCAT (Apr. 27, 2018), <https://www.bellingcat.com/news/mena/2018/04/27/american-made-bomb-used-airstrike-yemen-wedding/>.

¹⁶⁹ See, e.g., S. Res. 613, 115th Cong. (2018); S. Res. 169, 116th Cong. (2019); S. Res. 243, 116th Cong. (2019).

¹⁷⁰ S. Res. 613, 115th Cong. (2018).

¹⁷¹ See Press Release, Sen. Jeff Merkley, Merkley, Senate Democrats Stand With Saudi Women, Push for Human Rights Progress (Aug. 23, 2018), <https://www.merkley.senate.gov/news/press-releases/merkley-senate-democrats-stand-with-saudi-women-push-for-human-rights-progress>.

¹⁷² See S. Res. 169, 116th Cong. (2019).

¹⁷³ S. Res. 243, 116th Cong. (2019).

¹⁷⁴ Press Release, Sen. Todd Young, Young and Murphy Resolution to Force Vote on Saudi Arms Sale (June 10, 2019), <https://www.young.senate.gov/newsroom/press-releases/young-and-murphy-resolution-to-force-vote-on-saudi-arms-sale>.

In an op-ed published soon after Sen. Young participated in a congressional delegation to Saudi Arabia, the Senator made no mention of cutting off security assistance to the Kingdom.¹⁷⁵ Although all three measures would qualify for expedited voting procedures in the Senate, none left its originating committee.¹⁷⁶

In addition to standalone resolutions, draft legislation regarding Saudi human rights abuses has also referenced Section 502B. In April 2019, Rep. Tom Malinowski (D-N.J.) introduced the Saudi Arabia Human Rights and Accountability Act, which included a request for a report under 502B(c).¹⁷⁷ In April 2021, Rep. Malinowski introduced another version of the bill titled the Saudi Arabia Accountability for Gross Violations of Human Rights Act. The bill quoted Section 502B, requiring:

[A]n unclassified report that describes whether and how the provision of . . . assistance will ‘avoid identification of the United States . . . with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States’ in accordance with section 502B.¹⁷⁸

Although the bulk of recent interest in Section 502B has focused on Saudi Arabia, Sen. Robert Menendez (D-N.J.), chair of the Senate Foreign Relations Committee, has introduced resolutions requesting information under 502B in other contexts. In 2019, Sen. Menendez introduced a resolution requesting information on Turkey’s human rights practices in Syria soon after Amnesty International documented evidence of war crimes by Turkish forces in Syria’s northeast.¹⁷⁹ He followed that resolution with another requesting information on the Turkish government’s broader human rights practices under Section 502B(c).¹⁸⁰ The same day, he introduced a resolution requesting information on the Azerbaijani government’s human rights practices pursuant to Section 502B(c).¹⁸¹ Both Azerbaijani and Armenian forces faced accusations of war crimes during the 2020 Nagorno-

¹⁷⁵ Angus King & Todd Young, *Public Actions, Not Private Assurances, Will Help Repair US-Saudi Relations*, DEFENSE NEWS (Sep. 19, 2019), <https://www.defensenews.com/opinion/commentary/2019/09/19/public-actions-not-private-assurances-will-help-repair-us-saudi-relations/>.

¹⁷⁶ See 22 U.S.C. § 2304(c)(2)(A).

¹⁷⁷ H.R. 2037, 116th Cong., § 4 (2019).

¹⁷⁸ H.R. 1464, 117th Cong., § 5 (2021).

¹⁷⁹ See S. Res. 409, 116th Cong. (2019). See also *Syria: Damning Evidence of War Crimes and Other Violations by Turkish Forces and Their Allies*, AMNESTY INT’L (Oct. 18, 2019), <https://www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/>.

¹⁸⁰ S. Res. 755, 116th Cong. (2020).

¹⁸¹ S. Res. 754, 116th Cong. (2020).

Karabakh War.¹⁸² It is unclear why Sen. Menendez chose to introduce resolutions in those instances instead of requesting information by letter in his capacity as chair.¹⁸³ It is also unclear why neither Sen. Menendez nor any other Senator who has introduced a 502B(c) request took advantage of the expedited procedures that would allow them to force a floor vote.¹⁸⁴ None of their resolutions saw a vote.

Organizations that often engage in congressional advocacy have also expressed interest in Section 502B as a tool for promoting human rights in U.S. security assistance. Some advocacy organizations have called for members of Congress to use Section 502B to its full potential and suggested ways to do so.¹⁸⁵ In a 2020 report on human rights-centered foreign policy, the advocacy group Human Rights First described “little-known and habitually ignored” Section 502B as the “U.S. government’s most important law related to human rights conditionality.”¹⁸⁶ The progressive think tank New America recommended using Section 502B to enforce human rights requirements in a 2020 report on managing U.S. security partnerships.¹⁸⁷ Calls from advocacy groups have increased awareness of Section 502B and

¹⁸² *UN Rights Chief Warns of Possible War Crimes in Nagorno-Karabakh Conflict*, U.N. NEWS (Nov. 2, 2020), <https://news.un.org/en/story/2020/11/1076672>.

¹⁸³ See 22 U.S.C. § 2304(c).

¹⁸⁴ Scott Anderson suggests that Senator Merkley may not have invoked expedited procedures due to concerns about Section 502B(c)’s constitutionality. See Scott Anderson, *Untangling the Yemen Arms Sales Debate*, LAWFARE (June 19, 2019), <https://www.lawfareblog.com/untangling-yemen-arms-sales-debate>. For further analysis of the Section 502B’s constitutionality, see Part IV(C) of this paper.

¹⁸⁵ See, e.g., ‘Conditionality’: A Broken Tool for Reform in the Middle East, DEMOCRACY FOR THE ARAB WORLD NOW (Aug. 5, 2021), <https://dawnmena.org/conditionality-a-broken-tool-for-reform-in-the-middle-east/> (“Specifically, address and demand U.S. compliance with . . . Section 502B of the Foreign Assistance Act”); Benowitz & Ramming Chappell, *supra* note 24, at 9 (“Leaders of SFRC and HFAC could also use 502B to establish a practice of requesting further information about human rights conditions for high-risk countries that meet particular criteria”); Ari Tolany, *How the FY23 NDAA Can Strengthen Oversight and Transparency of U.S. Security Assistance and Civilian Harm (Part II)*, JUST SEC. (Sep 12, 2022), <https://www.justsecurity.org/83025/how-the-fy23-ndaa-can-strengthen-oversight-and-transparency-of-u-s-security-assistance-and-civilian-harm-part-ii/> (“Amendments seeking greater human rights reporting or temporary bars on security assistance, such as those on Saudi Arabia and Azerbaijan, could thus be resolved more quickly through a 502B request. Congress would do well to use time remaining on the legislative calendar to finally use 502B to conduct stronger oversight on these priorities.”); Brittany Benowitz & Alicia Ceccanese, *How States Supporting Armed Proxies Can Reduce Civilian Casualties and Protracted Hostilities*, JUST SEC. (May 20, 2020), <https://www.justsecurity.org/70222/how-states-supporting-armed-proxies-can-reduce-civilian-casualties-and-protracted-hostilities/> (“ . . . both committees have the authority, pursuant to Section 502B, to request information about the human rights practices of proposed recipients . . . Regular use of this authority would also contribute to adherence to the law”).

¹⁸⁶ *Walking the Talk: 2021 Blueprints for a Human Rights-Centered U.S. Foreign Policy*, HUM. RTS. FIRST (Oct. 2020), https://humanrightsfirst.org/wp-content/uploads/2022/09/HRF_Standalone_Ch.8_v5.pdf.

¹⁸⁷ Alexandra Stark, *Managing U.S. Security Partnerships: A Toolkit for Congress*, NEW AM. 9 (Oct. 2020), https://d1y8sb8igg2f8e.cloudfront.net/documents/Managing_U.S._Security_Partnerships.pdf.

resulted in new suggestions for its use, but they have not yet translated into legislative action.

B. *A Potential Role for 502B*

Congress should use the mechanisms in Section 502B more frequently. Invoking the law would fill a gap in arms sales oversight measures. Section 502B's mechanisms could effectively complement the core tools for accountability in U.S. security assistance law: the AECA, which allows for joint resolutions of disapproval blocking particular arms sales, and the Leahy Laws, which prohibit the provision of security assistance to "any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights."¹⁸⁸

Debates around security assistance to human rights abusers often revolve around two competing themes: (1) exercising leverage on partners to reduce abuses, and (2) limiting moral culpability in ongoing abuses.¹⁸⁹ Proponents of maintaining security assistance to partners with lackluster human rights records often argue that continuing aid allows the United States to pressure its partners to improve their human rights practices.¹⁹⁰ While using Section 502B to cut off security assistance would reduce the moral culpability of the United States, it would also reduce the leverage that U.S. policymakers can exercise to induce reform. Thus, invoking Section 502B would be most effective as an escalatory measure after using security assistance as leverage has failed. Utilizing Section 502B more frequently would also introduce a credible threat of cutting off security assistance, thereby helping to encourage reform on a large scale and not only in the individual country subject to a Section 502B restriction.¹⁹¹

Section 502B also differs from other oversight tools in its treatment of the relationship between assistance and harms. An important debate

¹⁸⁸ 22 U.S.C. § 2378d.

¹⁸⁹ See Moeller, *supra* note 144, at 79.

¹⁹⁰ A. Trevor Thrall & Caroline Dorminey, *Risky Business: The Role of Arms Sales in U.S. Foreign Policy*, CATO INST. (Mar. 13, 2018), <https://www.cato.org/policy-analysis/risky-business-role-arms-sales-us-foreign-policy> ("Advocates argue that arms sales bolster American security by enhancing the military capabilities of allies, providing leverage over the behavior and policies of client nations, and boosting the American economy while strengthening the defense industrial base").

¹⁹¹ See Max Bergmann & Alexandra Schmitt, *A Plan To Reform U.S. Security Assistance*, CTR. AM. PROGRESS (Mar. 9, 2021), <https://www.americanprogress.org/article/plan-reform-u-s-security-assistance/> ("Countries know that the United States is unlikely to cut assistance, even despite bad behavior, in order to avoid harming a bilateral relationship. Recipients take note of such reluctance to pull aid even when gross abuses occur and thus ignore U.S. chastising on bad behavior. As long as the United States is unwilling to cut off assistance or move funds elsewhere after a country commits actions that U.S. officials oppose, security assistance will provide no foreign policy leverage").

concerning security assistance and human rights centers on the capacity of a specific type of security assistance to directly contribute to specific harms. The Leahy Laws focus on the nexus between harm and assistance by only prohibiting assistance to the particular units that commit gross violations of human rights.¹⁹² Similarly, debates around AECA joint resolutions of disapproval often center on the likelihood that specific defense articles or services will be used to commit human rights abuses.¹⁹³ Section 502B, on the other hand, requires no harm-assistance nexus. Security assistance used solely in a country's war outside of its borders would violate Section 502B even if the country engages in gross violations of human rights domestically in a context that has no relation to the assistance provided. Therefore, Section 502B could be useful to Congress where a government commits abuses that the United States ought to distance itself from or discourage, even if U.S. security assistance does not directly facilitate those violations.

Using Section 502B would avoid some challenges in Leahy implementation. Attributing gross violations of human rights abuses to specific units of the armed forces can be challenging.¹⁹⁴ Often, survivors of these abuses cannot identify the precise affiliation of their abusers. By considering whether a consistent pattern of gross violations of human rights exists on the national level, Section 502B avoids this problem, facilitating a national assessment using public reporting. Governments can evade the Leahy Laws by reshuffling, restructuring, or renaming units of their armed forces that commit gross violations of human rights,¹⁹⁵ but the broader scope of 502B precludes such evasion. The 502B resolution of disapproval also avoids the fungibility problem by cutting off all security assistance to a government instead of allowing the government to fill a gap in assistance to a particular unit with resources from another unit.

Utilizing Section 502B would strengthen Leahy compliance. A credible threat of prohibiting arms sales to a country would increase the likelihood of

¹⁹² See 22 U.S.C. § 2378d.

¹⁹³ See, e.g., *Chairman Menendez Lays Out Opposition to Joint Resolution of Disapproval to Block Proposed Arms Sale to Saudi Arabia*, FOREIGN RELATIONS COMM. (December 7, 2021), <https://www.foreign.senate.gov/press/dem/release/chairman-menendez-lays-out-opposition-to-joint-resolution-of-disapproval-to-block-proposed-arms-sale-to-saudi-arabia>.

¹⁹⁴ See Daniel R. Mahanty, *The 'Leahy Law' Prohibiting US Assistance to Human Rights Abusers: Pulling Back the Curtain*, JUST SEC. (June 27, 2017), <https://www.justsecurity.org/42578/leahy-law-prohibiting-assistance-human-rights-abusers-pulling-curtain/>.

¹⁹⁵ See Erica Gaston, *The Leahy Law and Human Rights Accountability in Afghanistan: Too Little, too Late or A Model for the Future?*, AFG. ANALYSTS NETWORK (Mar. 5, 2017), <https://www.afghanistan-analysts.org/en/reports/international-engagement/the-leahy-law-and-human-rights-accountability-in-afghanistan-too-little-too-late-or-a-model-for-the-future/> (“[Department of State] officials noted that while they feared that reorganization of units would prove to be a major loophole, in their experience, it had not so far been proposed as a remediation avenue”).

governments taking measures to bring human rights abusers to justice and professionalize their security forces. If the threat of a nationwide cutoff of security assistance looms over a recipient, they will perceive higher consequences for continuing a consistent pattern of gross violations of human rights. Therefore, using Section 502B would expand the spectrum of consequences that recipient governments may credibly face, allowing Congress to ratchet up restrictions.

Section 502B and AECA resolutions of disapproval are alike in that their passage requires Congress to muster a two-thirds supermajority to overcome a presumed presidential veto. Unlike the AECA resolution of disapproval, Congress can invoke Section 502B resolutions at any time. AECA joint resolutions of disapproval usually come within the Executive Branch's notification period before issuance of an export license or letter of offer, providing a narrow window for congressional action. The Executive Branch controls the timing, requiring Congress to respond quickly.¹⁹⁶ In contrast, Congress independently commences the 502B joint resolution process with a request of a report from the Secretary of State.¹⁹⁷

Even where Congress does not garner sufficient votes to overcome a presumed presidential veto of a joint resolution, the release of a public report requested under Section 502B(c) regarding human rights conditions in the target country could provide a valuable resource for advocacy organizations and create an opportunity for engagement. Similarly, requests for human rights information offer a chance for the State Department's Bureau of Democracy, Human Rights, and Labor to highlight human rights concerns in target countries. The Bureau could point to the possibility of a Section 502B request or resolution to proactively argue against certain arms transfers. Efforts to pass a joint resolution of disapproval would also force a public debate and require the Executive Branch to defend its decisions.¹⁹⁸

Leaders of the Senate Foreign Relations Committee and House Foreign Affairs Committee could adopt a practice of invoking the 502B(c) request mechanism to solicit information about the records of governments that may have engaged in a consistent pattern of gross violations of human rights or

¹⁹⁶ For example, the Biden administration notified Congress of a proposed arms sale to Saudi Arabia on November 4, 2021. See Press Release, Defense Security Cooperation Agency Saudi Arabia – AIM-120C Advanced Medium Range Air-to-Air Missiles (AMRAAM) (Nov. 4, 2021), <https://www.dsca.mil/press-media/major-arms-sales/saudi-arabia-aim-120c-advanced-medium-range-air-air-missiles-amraam>. At the time, fewer than thirty legislative work days remained for the year and Congress was considering several important pieces of legislation that required significant time and attention. Under such circumstances, passing a joint resolution of disapproval is especially difficult.

¹⁹⁷ 22 U.S.C. § 2304(c)(1).

¹⁹⁸ Alexandra Stark, *Managing U.S. Security Partnerships: A Toolkit for Congress*, NEW AM. 24 (2020), https://d1y8sb8igg2f8e.cloudfront.net/documents/Managing_U.S._Security_Partnerships.pdf.

otherwise raise concerns.¹⁹⁹ Based on public information, they could tailor their requests to focus on situations of particular concern or issues closely related to U.S. security assistance.²⁰⁰

Some of Section 502B's advantages derive from its utility for political messaging. Congress enacted Section 502B with human rights specifically in mind, whereas the AECA centers on generic separation of powers concerns. Members of Congress can invoke Section 502B's human rights mandate to assert that security assistance violates U.S. law, a stronger message than urging presidents to stop providing assistance despite their authority to do so and Congress' failure to block specific sales.

Increasing reliance on 502B should not mean ceasing use of other mechanisms. The Leahy Laws offer a more precise way to target specific units of security forces and incentivize judicial proceedings against human rights violators. AECA joint resolutions of disapproval offer a timely opportunity to prevent specific arms transfers before they occur. However, Section 502B resolutions represent an important complement with broader application.

C. Potential Constitutional Barriers to Using Section 502B

Section 502B(c)'s mechanism for requesting reports on human rights in target countries—a necessary prerequisite for introducing a joint resolution to cut off security assistance—may be vulnerable to constitutional challenges.²⁰¹ In *INS v. Chadha*, the Supreme Court invalidated the use of the legislative veto.²⁰² The *Chadha* court ruled that legislative acts require presentment (sending a bill to the president for signature or veto) and bicameralism.²⁰³

Chadha triggered a wave of amendments to framework legislation, including the AECA,²⁰⁴ which originally allowed Congress to pass concurrent resolutions to override presidential exercise of arms sales

¹⁹⁹ See, e.g., Benowitz & Ramming Chappell, *supra* note 24, at 9.

²⁰⁰ See 22 U.S.C. § 2304(C)(1)(D) (Section 502B requires the Secretary of States to provide “such other information as such committee or such House may request,” leaving the requester with significant leeway to request particular information).

²⁰¹ See Scott R. Anderson, *Untangling the Yemen Arms Sales Debate*, LAWFARE (June 14, 2019), <https://www.lawfareblog.com/untangling-yemen-arms-sales-debate> (speculating that potential challenges to Section 502B's constitutionality may have dissuaded members of Congress from invoking it).

²⁰² *Immigr. and Nat'l Serv. v. Chadha*, 462 U.S. 919, 958 (1983).

²⁰³ *Id.* (“To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution’s prescription for legislative action: passage by a majority of both Houses and presentment to the President”).

²⁰⁴ Pub. L. 99-247, 100 Stat. 9 (1986). See also Tompa, *supra* note 57, at 292–93 (discussing the effects of *INS v. Chadha* on the AECA).

authorities delegated by Congress.²⁰⁵ The amendments required joint resolutions instead, which, unlike concurrent resolutions, require a presidential signature and, thus, comply with *INS v. Chadha*. By the time the Supreme Court ruled in *INS v. Chadha*, Section 502B already required a joint resolution, which Congress wrote into the draft version of Section 502B as a compromise to ward off a veto from President Ford.²⁰⁶

However, Section 502B's request-for-information mechanism in subsection (c) may violate *INS v. Chadha*. Under Section 502B(c), the House Foreign Affairs Committee or Senate Foreign Relations Committee may request a report on human rights conditions in a target country. A simple resolution by a single chamber of Congress is also sufficient to request such a report on human rights conditions in a target country. If the Secretary does not respond within thirty days, "no security assistance shall be delivered to such country . . . until such statement is transmitted."²⁰⁷ Neither a committee request nor a simple resolution meet the presentment and bicameralism requirements. Because the cutoff has the force of law, but the request that triggers it does not fulfill the presentment and bicameralism requirements, the cutoff mechanism may amount to an unconstitutional legislative veto.

The George H.W. Bush Administration raised the issue of the legislative veto in Section 502B in 1989. In a signing statement for the International Narcotics Control Act of 1989, which stated that Section 502B(c) would apply to the provision of assistance under the Act, President Bush wrote: "This section violates the constitutional principle, recognized by the Supreme Court in *INS v. Chadha*, that every legislative act of the Congress must be presented to the President in accordance with the requirements of Article I, section 7 of the Constitution."²⁰⁸

Nevertheless, these vulnerabilities should not dissuade Congress from using Section 502B. The constitutionality question is not as clear-cut as, for example, the constitutionality of a concurrent resolution of disapproval to block an arms sale. The Section 502B cutoff may be distinguishable from unconstitutional legislative vetoes because the cutoff mechanism functions automatically and is established in the law itself, not the resolution requesting the information. The creation of the automatic mechanism was subject to bicameralism and presentment. Also, the precipitating event for

²⁰⁵ 22 U.S.C. § 2776.

²⁰⁶ See Weissbrodt, *supra* note 42, at 246, 248.

²⁰⁷ 22 U.S.C. § 2304(c)(3).

²⁰⁸ George H.W. Bush, Statement on Signing the International Narcotics Control Act of 1989, THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/statement-signing-the-international-narcotics-control-act-1989>.

cutting off aid is not congressional action but rather executive inaction: the Secretary of State's failure to provide a requested report. Upon such a failure, the cutoff takes effect automatically, requiring no action from the legislature because the cutoff is established in a statute enacted in accordance with bicameralism and presentment.

Section 502B(c) thus resembles a condition applied to Congress' delegation of its foreign commerce power to the president: the executive must provide a report on human rights in a target country when requested or lose its delegated authority with respect to the target country. Therefore, the Section 502B cutoff contrasts with the AECA's concurrent resolution of disapproval, which Congress changed to a joint resolution in 1986 in reaction to the *Chadha* decision. The AECA resolution of disapproval was a congressional action to block a president's proposed arms sale—the passage of the resolution itself was the precipitating event. But the president himself triggers the Section 502B cutoff by not complying with a congressional mandate. The Section 502B cutoff is comparable to an automatic cutoff of funding for a military operation if the president engages in prolonged hostilities without congressional authorization, and such a mechanism is constitutionally permissible.²⁰⁹

Furthermore, the cutoff provision that may violate *INS v. Chadha* only comes into effect if the Secretary of State fails to provide a report to Congress within thirty days of a request.²¹⁰ Considering the consequences of missing the deadline, a Secretary of State will likely provide at least a minimal report to avoid the cutoff of security assistance. So long as the secretary provides a report, the executive branch will not have a justiciable claim for a lawsuit challenging the constitutionality of Section 502B(c). Granted, a Secretary of State hostile to congressional oversight may refuse to provide a report in hopes of invalidating the provision.

Finally, if the dispute went to court and a judge found the automatic cutoff provision to be a legislative veto, the judiciary should find the automatic cutoff provision of Section 502B(c) severable from the rest of the law.²¹¹ As no other aspect of Section 502B poses constitutional concerns, the remainder of the law, including the central prohibition, would stand.

The severability doctrine states that a court should only invalidate the unconstitutional aspects of a law unless Congress did not intend for the

²⁰⁹ Tess Bridgeman & Stephen Pomper, *A Giant Step Forward for War Powers Reform*, JUST SEC. (July 20, 2021), <https://www.justsecurity.org/77533/a-giant-step-forward-for-war-powers-reform/>.

²¹⁰ 22 U.S.C. § 2304(c)(3).

²¹¹ See generally David Gans, *To Save and Not to Destroy: Severability, Judicial Restraint, and the Affordable Care Act*, AM. CONST. SOC'Y (Dec. 4, 2019), https://www.acslaw.org/issue_brief/briefs-landing/to-save-and-not-to-destroy-severability-judicial-restraint-and-the-affordable-care-act/.

remaining, constitutional parts of the law to stand alone.²¹² According to the *Chadha* court, the legislative veto—which it found unconstitutional—was severable from the Immigration and Nationality Act because of a severability clause in the statute, support for severability in the law’s legislative history, and the sound operation of the remainder of the law without the severed provision.²¹³ However, “[e]ven in the absence of a severability clause, the ‘traditional’ rule is that ‘the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.’”²¹⁴ Overcoming a presumption of severability requires “strong evidence” of congressional intent for a statute not to stand without the provision in question.²¹⁵

Section 502B does not include a non-severability clause. While the 1976 statute that enacted the automatic cutoff provision did not include a severability clause, the thereof does not raise a presumption against severability.²¹⁶ There is no evidence in the congressional record that Congress did not intend for Section 502B to stand if it did not include the automatic cutoff provision. There is substantial evidence that Congress sought to create a robust human rights mandate based on its repeated efforts to strengthen Section 502B through several amendments.²¹⁷ While the automatic cutoff provision is helpful to pressure a recalcitrant Secretary of State like Henry Kissinger,²¹⁸ it was not a crucial aspect of the Section 502B framework, which would still function without it. To be sure, the automatic cutoff provision of Section 502B(c) imposes consequences for presidential non-compliance, incentivizing the Department of State to promptly provide the requested report or trigger the prohibition of the delivery of any security assistance to a target country. But even without the inducement to provide the report, Section 502B(c) would still impose a legally binding reporting requirement that Congress could enforce through other means.

In light of possible constitutional objections, members of Congress may determine that the risk of invalidation is preferable to Section 502B’s continued disuse. Since Congress has not used Section 502B in nearly fifty

²¹² See *Bank of Hamilton v. Dudley’s Lessee*, 27 U.S. 492, 520 (1829) (“If any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States or of the state or to the ordinance of 1787”).

²¹³ *Immigr. and Nat’l Serv. v. Chadha*, 462 U.S. 919, 958 (1983).

²¹⁴ *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2209 (2020) (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)).

²¹⁵ *Id.*

²¹⁶ *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) (“In the absence of a severability clause, however, Congress’ silence is just that—silence—and does not raise a presumption against severability”).

²¹⁷ See *supra* Part II(A).

²¹⁸ See *supra* Part III(A).

years, the consequences of a court finding it unconstitutional would be minimal, but the potential benefits for promoting human rights in U.S. security assistance could be significant.

V. APPLYING SECTION 502B

There are new, more effective ways Congress could apply Section 502B to governments committing human rights abuses. While the history of Section 502B implementation highlights the provision's pitfalls, Congress can avoid these traps with the benefit of hindsight. This Part proposes three ways for Congress to invoke Section 502B. It then discusses U.S. security assistance to Saudi Arabia, which likely violates Section 502B's mandate based on the annual Country Reports,²¹⁹ and offers insight on how Congress could implement Section 502B regarding Saudi Arabia.

A. Approaches to Enforcing Section 502B

The typical Section 502B process laid out in the statute comprises three steps: (1) Congress requests information about human rights issues in a target country,²²⁰ (2) the Secretary of State prepares and transmits a report,²²¹ and (3) Congress enacts a joint resolution of disapproval blocking all security assistance,²²² thereby enforcing Section 502B's core prohibition against security assistance to governments with a consistent pattern of gross violations of human rights.²²³ However, as it considers ways to reintegrate Section 502B into its human rights toolkit, Congress need not be limited to

²¹⁹ The author reviewed the Country Reports for 2016 through 2021 (i.e. all editions of the Country Reports available on the State Department's website) and recorded mentions of the four categories of gross violations of human rights as defined in 22 U.S.C. § 2304(d): (1) torture or cruel, inhuman, or degrading treatment or punishment, (2) prolonged detention without charges and trial, (3) causing the disappearance of persons by the abduction and clandestine detention of those persons, and (4) other flagrant denial of the right to life, liberty, or the security of person. The author did so for the Country Reports on Saudi Arabia, Israel, Egypt, Nigeria, and the Philippines. See U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., 2016 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2017); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., 2017 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2018); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., 2018 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2019); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., 2019 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2020); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2021); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., 2021 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2022) [hereinafter *Country Reports Analysis*]. The Country Reports are available online at <https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/>.

²²⁰ See 22 U.S.C. § 2304(c)(1).

²²¹ See *id.*

²²² See 22 U.S.C. § 2304(c)(4).

²²³ See 22 U.S.C. § 2304(a)(2).

the statute's multi-step structure. The following models provide members of Congress with options to tailor their use of Section 502B to the circumstances at hand.

Blocking all security assistance to a country is a blunt instrument that may encounter resistance from many legislators. However, the full Section 502B process does have advantages. The expedited Senate procedures for both 502B(c) simple resolutions and joint resolutions allow Senators to force a floor vote and make members of the Senate publicly defend their position.²²⁴ With Congress inevitably balancing competing priorities, the expedited procedures offer a rare shortcut to a guaranteed vote.

However, instead of using the traditional 502B process, Congress could tailor the scope of a Section 502B joint resolution of disapproval to particular circumstances. The statute allows Congress to restrict security assistance to a target country in a joint resolution of disapproval,²²⁵ meaning that it could impose conditions on security assistance, require enhanced end-use monitoring, block certain forms of security assistance but not others, or otherwise adapt the Section 502B process to a specific situation.²²⁶ Such an approach would offer a middle ground between the case-by-case votes of the AECA and the blanket ban of Section 502B's central prohibition.

Instead of proceeding through the process laid out in Section 502B from start to finish, Congress could use the 502B(c) request for information mechanism to inform independent, country-specific legislation.²²⁷ If Congress can muster enough votes to enact a 502B joint resolution of disapproval and overcome a presumptive presidential veto, it could also pass

²²⁴ See 22 U.S.C. § 2304(c)(2)(A) (applying expedited procedures); International Security Assistance and Arms Export Control Act of 1976, Pub. L. 94-329 § 601(b), 90 Stat. 729, 765–66 (describing expedited procedures).

²²⁵ 22 U.S.C. § 2304(c)(4).

²²⁶ Benowitz & Ramming Chappell, *supra* note 24, at 9.

²²⁷ Other mechanisms to request information regarding specific countries include reports from the Government Accountability Office (GAO), reports from the Congressional Research Service (CRS), reports from federally funded research and development centers (FFRDCs), and reports from executive agencies mandated in legislation. However, the Section 502B mechanism, especially as exercised by committee chairs, would be a faster and more efficient way to secure a report on human rights issues in a target country from the State Department because it has a thirty-day timeline and does not need to proceed through the entire legislative process. GAO reports and CRS reports do not require legislation. See *Reports & Testimonies*, U.S. GOV'T. ACCOUNTABILITY OFF., <https://www.gao.gov/about/what-gao-does/reports-testimonies> (last visited Jan. 13, 2023); see *About Site & FAQs*, CONG. RSCH. SERV., <https://crsreports.congress.gov/Home/About> (last visited Jan. 23, 2023). However, FFRDCs, GAO, and CRS do not have the in-country resources and country-specific expertise present in the State Department. See 22 U.S.C. § 2304(c). As independent agencies, they are not as well-positioned to explain or justify administration policy decisions as the State Department itself.

independent legislation.²²⁸ The appropriations process could offer a particularly effective venue for country-specific legislation.²²⁹ Exercising Congress' power of the purse has previously been a potent way to hold the executive branch accountable.²³⁰ The foreign commerce power, too, shows promise for the implementation of country-specific arms embargoes.²³¹

By passing country-specific legislation based on 502B requests for information, Congress could reduce the interpretive ambiguity that facilitated executive resistance to implementing Section 502B during the 1970s and 1980s.²³² Requesting information about a country's human rights record would provide an opportunity for members of Congress, civil society, and human rights-oriented government offices to make appeals for policy change. More targeted than the annual human rights reports, a request for information could give advocates a chance to rally support for country-specific legislation. Without a hostile Secretary of State obstructing reporting, such as Kissinger in 1976, 502B(c) reports could be potent oversight tools. Routinely requesting 502B(c) reports for countries that raise red flags—whether by denying access to monitoring personnel or engaging in repeated violations according to the Country Reports—would close oversight gaps and keep Congress apprised of concerning situations as they develop.²³³

B. Application to Saudi Arabia

Some U.S. security assistance provided today likely violates the executive branch's obligations under Section 502B. Several governments

²²⁸ Both measures require bicameral majorities and a presidential signature. See *Types of Legislation*, *supra* note 56.

²²⁹ Benowitz & Ramming Chappell, *supra* note 24, at 13.

²³⁰ The most famous appropriations restriction related to security assistance and human rights is likely the Boland Amendment, which resulted in the Iran-Contra affair. During the 1970s, similar measures prohibited the expenditure of U.S. government funds for particular purposes in Vietnam, Cambodia, Laos, and Angola. See KOH, *supra* note 26, at 52–53.

²³¹ See, e.g., Richard D. Lyons, *Senate Votes Overhaul of Military Aid*, N.Y. TIMES, Feb. 19, 1976, at 1. (For example, the Kennedy Amendment imposed an arms embargo on Chile in 1976). See also *Assessing U.S. Policy Towards Burma: Hearing Before the S. Comm. on For. Rel.*, 115th Cong. (Oct. 24, 2017), <https://www.govinfo.gov/content/pkg/CHRG-115shrg37332/html/CHRG-115shrg37332.htm>. In a more recent example, the United States imposed an embargo on military sales to Myanmar based on violations of the Leahy Laws in Rakhine State) (statement of W. Patrick Murphy, Dep. Asst. Sec., Bureau of E. Asian and Pacific Affs.). Such measures are based in Congress' exclusive authority to regulate foreign commerce. U.S. CONST. art. I, § 8, cl. 3.

²³² See Cohen, *supra* note 37, at 277. See also Forsythe, *supra* note 104, at 404 (“Congress has passed general legislation on human rights, but it has lacked . . . the attention span, the will power, and the consensus for effective oversight that would implement the original congressional intent.”). See generally Moeller, *supra* note 144 (arguing for country-specific legislation to restrict security assistance to Nicaragua).

²³³ See Benowitz & Ramming Chappell, *supra* note 24, at 9.

receiving the most U.S. security assistance—including Saudi Arabia²³⁴—have been repeatedly described in the State Department’s annual human rights reports as having committed gross human rights violations as defined in Section 502B.²³⁵ Section 502B prohibits security assistance to countries that have a “consistent pattern” of such abuses.²³⁶

Although the enactment of a Section 502B joint resolution of disapproval does not require a congressional finding of a consistent pattern of gross violations of human rights, members of Congress would likely consider the “consistent pattern” standard in determining how to vote. Without a definition, the application of Section 502B to specific cases necessarily relies on conjecture. However, many countries that receive U.S. security assistance have been described in the last five annual reports as committing gross violations of human rights.²³⁷ In recent years, the human rights reports have consistently described abuses by the government of Saudi Arabia consistent with Section 502B’s definition of gross violations of human rights.

As Saudi Arabia’s de facto ruler, Crown Prince Muhammad bin Salman has cracked down on political opposition at home while leading a military coalition in Yemen that has disproportionately killed civilians in over 23,000 airstrikes since 2015.²³⁸ The 2018 murder of Jamal Khashoggi, a *Washington Post* journalist, by a Saudi special operations team also drew attention to human rights abuses in the Kingdom.²³⁹

The State Department has documented arbitrary detention in Saudi Arabia in the last six Country Reports on Human Rights Practices.²⁴⁰ The last five reports have also included torture, and the last three have documented forced disappearances.²⁴¹ Although they have not made any conclusion about

²³⁴ See *Country Reports Analysis*, *supra* note 219. Other countries with concerning human rights records that are leading recipients of U.S. security assistance include Egypt and the Philippines.

²³⁵ See *Country Reports Analysis*, *supra* note 219. The 502B definition of “gross violations of internationally recognized human rights” includes: “torture or cruel, inhuman, or degrading treatment or punishment; prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person.” 22 U.S.C. § 2304(d).

²³⁶ 22 U.S.C. § 2304(a).

²³⁷ See *Country Reports Analysis*, *supra* note 219.

²³⁸ *UN: 18,000 Yemeni Airstrike Casualties since 2015*, ASSOC. PRESS (Sept. 9, 2021), <https://apnews.com/article/middle-east-united-nations-yemen-houthis-bde67c6d3f0c3007410134e9f2963ad3>.

²³⁹ See Patricia Zengerle, *U.S. Lawmakers Demand Accountability for Killing of Saudi Journalist*, REUTERS (Jan. 10, 2019, 6:55 PM), <https://www.reuters.com/article/us-saudi-khashoggi-congress-u-s-lawmakers-demand-accountability-for-killing-of-saudi-journalist-idUSKCN1P5026>.

²⁴⁰ See *Country Reports Analysis*, *supra* note 219.

²⁴¹ See *id.*

whether Saudi Arabia has committed war crimes in Yemen, the last six reports have discussed Saudi Arabia's human rights violations there.²⁴² An expert opinion commissioned by the American Bar Association Center for Human Rights argued that intentional, disproportionate, or indiscriminate attacks in Yemen resulting in the loss of civilian life constitute a “flagrant denial of the right to life” under Section 502B.²⁴³

In spite of these abuses, the U.S. government has approved billions of dollars in sales of major defense equipment to Saudi Arabia since the beginning of the war in Yemen.²⁴⁴ The United States and Saudi Arabia have maintained a partnership since 1945, a relationship centered on the exchange of U.S. security guarantees for Saudi petroleum sales.²⁴⁵ In the intervening years, the United States has often sold and licensed major defense equipment to the Kingdom, sparking controversy during multiple administrations.²⁴⁶

U.S. sales became especially contentious as the Saudi-led war in Yemen escalated and human rights organizations documented apparent war crimes and indiscriminate civilian harm.²⁴⁷ The U.S. government has failed to adequately assess how over \$50 billion in military aid to the coalition has

²⁴² See *id.*

²⁴³ Letter from Michael Pates, Director of the American Bar Association Center for Human Rights, and Brittany Benowitz, Chief Counsel of the American Bar Association Center for Human Rights, to the U.S. Senate (May 29, 2017), at 7, (available online at <https://s3.documentcloud.org/documents/3727674/ABA-CHR-Assessment-of-Arms-Sales-to-Saudi-Arabia.pdf>).

²⁴⁴ See, e.g., Press Release, Defense Security Cooperation Agency, Kingdom of Saudi Arabia – Aircraft Follow-On Support And Services (May 24, 2019), <https://www.dsca.mil/press-media/major-arms-sales/kingdom-saudi-arabia-aircraft-follow-support-and-services>; Press Release, Defense Security Cooperation Agency, Saudi Arabia – PATRIOT MIM-104E Guidance Enhanced Missile-Tactical Ballistic Missiles (GEM-T) (Aug. 2, 2022), <https://www.dsca.mil/press-media/major-arms-sales/saudi-arabia-patriot-mim-104e-guidance-enhanced-missile-tactical>; Press Release, Defense Security Cooperation Agency, Saudi Arabia – AIM-120C Advanced Medium Range Air-To-Air Missiles (AMRAAM) (Nov. 4, 2021), <https://www.dsca.mil/press-media/major-arms-sales/saudi-arabia-aim-120c-advanced-medium-range-air-air-missiles-amraam>.

²⁴⁵ See Bruce Riedel, *75 Years After a Historic Meeting on the USS Quincy, US-Saudi Relations Are in Need of a True Re-think*, BROOKINGS INST. (Feb. 10, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/02/10/75-years-after-a-historic-meeting-on-the-uss-quincy-us-saudi-relations-are-in-need-of-a-true-re-think/>.

²⁴⁶ Samuel Oakford & Peter Salisbury, *Yemen: The Graveyard of the Obama Doctrine*, THE ATLANTIC (Sep. 23, 2016), <https://www.theatlantic.com/international/archive/2016/09/yemen-saudi-arabia-obama-riyadh/501365/>; Mark Landler & Peter Baker, *Trump Vetoes Measure to Force End to U.S. Involvement in Yemen War*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/us/politics/trump-veto-yemen.html>; Catie Edmondson, *Lawmakers Press Biden to Track U.S. Aid Tied to Civilian Harm in Yemen*, N.Y. TIMES (Sept. 7, 2022), <https://www.nytimes.com/2022/09/07/us/politics/biden-aid-yemen-saudi-arabia.html>.

²⁴⁷ See, e.g., Bruce Riedel, *It's Time to Stop US Arms Sales to Saudi Arabia*, BROOKINGS INST. (Feb. 4, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/02/04/its-time-to-stop-us-arms-sales-to-saudi-arabia/>.

contributed to civilian casualties.²⁴⁸ However, one recent assessment estimates that “19,200 civilians have been killed or maimed as a result of coalition airstrikes alone, including over 2,300 children.”²⁴⁹ A 2022 *Washington Post* investigation concluded that all airstrike-capable coalition squadrons known to have participated in the air campaign in Yemen “probably benefitted” from U.S. weapons and equipment contracts.²⁵⁰

Congressional oversight for U.S. security assistance to Saudi Arabia has mostly focused on introducing joint resolutions of disapproval to block specific arms sales. Those efforts reached a crescendo in 2019 when Congress came closer to blocking a president’s arms sale than at any other time since 1986.²⁵¹ After mustering bipartisan majorities in the Senate and House, Congress failed to overcome then-President Trump’s veto to halt arms sales to Saudi Arabia in 2019.²⁵²

Early in his presidency, President Biden pledged to end “all American support for offensive operations in the war in Yemen, including relevant arms sales,” and committed to “stepping up our diplomacy to end the war.”²⁵³ However, debate has continued over which arms sales are “offensive” and which are “defensive.”²⁵⁴ The precise definition of “support for offensive operations” remains unclear,²⁵⁵ but the Biden Administration has since

²⁴⁸ U.S. GOV’T ACCOUNTABILITY OFF., GAO-22-105988, YEMEN: STATE AND DOD NEED BETTER INFORMATION ON CIVILIAN IMPACTS OF U.S. MILITARY SUPPORT TO SAUDI ARABIA AND THE UNITED ARAB EMIRATES 21 (2022).

²⁴⁹ *Yemen*, GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT (Sep. 1, 2022), <https://www.globalr2p.org/countries/yemen/>.

²⁵⁰ Joyce Sohyun Lee, Meg Kelly & Atthar Mirza, *Saudi-led Airstrikes in Yemen Have Been Called War Crimes. Many Relied on U.S. Support*, WASH. POST (June 4, 2022), <https://www.washingtonpost.com/investigations/interactive/2022/saudi-war-crimes-yemen/>.

²⁵¹ In that year, President Reagan vetoed an AECA joint resolution of disapproval blocking an arms sale to Saudi Arabia, and the Senate nearly overrode his veto. *See* S.J. Res. 316, 99th Cong (1986); *see also* Vanessa Patton Sciarra, Note, *Congress and Arms Sales: Tapping the Potential of the Fast-Track Guarantee Procedure*, 97 YALE L.J. 1439, 1448 (1988); Edward Walsh, *Senate, 73 to 22, Rejects Sale of Weapons to Saudi Arabia*, WASH. POST (May 7, 1986), <https://www.washingtonpost.com/archive/politics/1986/05/07/senate-73-to-22-rejects-sale-of-weapons-to-saudi-arabia/2c04e55c-9b65-4b0d-bfb8-316ca5c64ed6/>.

²⁵² Catie Edmondson, *Senate Fails to Override Trump’s Veto on Saudi Arms Sales*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/07/29/us/politics/trump-veto-saudi-arms-sales.html>.

²⁵³ Joseph R. Biden, Remarks by President Biden on America’s Place in the World (Feb. 4, 2021).

²⁵⁴ *See, e.g.*, Umar A Farooq, *US Claims It Only Sells ‘Defensive’ Weapons to Saudi Arabia. But Does This Distinction Exist?*, MIDDLE EAST EYE (July 12, 2022), <https://www.middleeasteye.net/news/us-saudi-arabia-selling-defensive-weapons-does-distinction-exist>.

²⁵⁵ *See* Alex Ward, *The US May Still Be Helping Saudi Arabia in the Yemen War After All*, VOX (Apr. 27, 2021), <https://www.vox.com/2021/4/27/22403579/biden-saudi-yemen-war-pentagon>; *see also* Stephen Biddle, *Is There A Difference Between ‘Defensive’ and ‘Offensive’ Weapons?*, WASH. POST (Apr. 28, 2022), <https://www.washingtonpost.com/politics/2022/04/28/ukraine-russia-military-warfare-offensive-defensive-weaponry/> (discussing the difficulty of defining defensive and offensive weapons in general and in the context of Ukraine).

proposed over \$1 billion in sales of defense articles and services sales to Saudi Arabia.²⁵⁶ In July 2022, the Biden Administration reportedly considered resuming support for offensive operations in Yemen.²⁵⁷

Congress could use Section 502B to block or condition security assistance to Saudi Arabia. Although President Biden pledged not to transfer any “offensive” weapons to Saudi Arabia, one of his successors could easily restore offensive support to the Saudi-led coalition. Former President Trump, who is expected to run for a second non-consecutive term as president,²⁵⁸ boasted about the benefits of arms sales to Saudi Arabia for U.S. defense manufacturing.²⁵⁹ Thus, Congress could block all U.S. security assistance to Saudi Arabia or enshrine President Biden’s promise in law with Section 502B by restricting U.S. security assistance to Saudi Arabia to defensive assistance, which Congress would need to define in its resolution.

VI. “HUMAN RIGHTS AT THE CENTER OF U.S. FOREIGN POLICY”²⁶⁰

Congress has all but abdicated its responsibility to exercise oversight when it comes to human rights and security assistance. Legislators often reach for the Leahy Laws and the AECA for checks and balances on

²⁵⁶ See Mike Stone & Patricia Zengerle, *U.S. State Department Approves Potential \$500 Million Saudi Maintenance Deal*, REUTERS (Sept. 16, 2021), <https://www.reuters.com/world/us-state-department-approves-potential-500-million-saudi-maintenance-deal-2021-09-16/>; Mike Stone & Patricia Zengerle, *Saudi Gets First Major Arms Deal under Biden with Air-to-Air Missiles*, REUTERS (Nov. 4, 2021), <https://www.reuters.com/world/middle-east/us-state-dept-okays-650-million-potential-air-to-air-missile-deal-saudi-arabia-2021-11-04/>. <https://www.reuters.com/world/us-state-department-approves-potential-500-million-saudi-maintenance-deal-2021-09-16/>.

²⁵⁷ See Matt Spetalnick, Aziz El Yaakoubi & Mike Stone, *Exclusive: U.S. Weighs Resumption of Offensive Arms Sales to Saudis, Sources Say*, REUTERS (July 11, 2022), <https://www.reuters.com/world/us/exclusive-us-weighs-possible-resumption-offensive-arms-sales-saudis-sources-2022-07-11/>.

²⁵⁸ See, e.g., Elaine Godfrey, *Trump Soft-Launches His 2024 Campaign*, ATLANTIC MONTHLY (Jan. 15, 2022), <https://www.theatlantic.com/politics/archive/2022/01/trump-arizona-rally-2024-election/621244/>; Russell Berman, *Why Aren't More People Running for President?*, ATLANTIC MONTHLY (Feb. 4, 2023), <https://www.theatlantic.com/politics/archive/2023/02/presidential-election-2024-trump-biden-republican-nomination/672950/>.

²⁵⁹ President Trump resisted calls to halt arms sales to Saudi Arabia, saying, “Well, I think that would be hurting us . . . We have a country that’s doing probably better economically than it’s ever done before . . . Part of that is what we are doing with our defense systems, and everybody is wanting them, and frankly I think that would be a very, very tough pill to swallow for our country.” Joe Gould, *Trump Warns Halting Saudi Arms Sales Would Hurt Economy*, DEFENSE NEWS (Oct. 11, 2018), <https://www.defensenews.com/congress/2018/10/11/trump-warns-halting-saudi-arms-sales-would-hurt-economy/>. In defending continued arms sales to Saudi Arabia, President Trump also framed the issue in terms of competition with Russia and China. See Statement from President Donald J. Trump on Standing with Saudi Arabia (Nov. 20, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-donald-j-trump-standing-saudi-arabia/>.

²⁶⁰ Antony J. Blinken, Secretary of State, Putting Human Rights at the Center of U.S. Foreign Policy (Feb. 24, 2021).

presidential power, but those statutes have not held the president and the recipients of U.S. security assistance accountable. The executive branch has interpreted the Leahy Laws as inapplicable to most U.S. arms sales, and post-*INS v. Chadha* amendments made it all but impossible to block an arms sale through AECA resolutions of disapproval. The prevailing tools for protecting human rights in U.S. security assistance have fallen short. Section 502B is due for a revival.

Absent a wholesale restructuring of the legislative framework governing arms sales and security assistance,²⁶¹ Congress needs to enforce human rights obligations more assertively. Section 502B, Congress' first law on human rights and security assistance, may also be its most powerful tool to do so. The enactment of the law marked a significant victory for human rights and congressional oversight, but the landmark law has suffered from judicial non-enforcement, executive resistance, and legislative acquiescence. For decades, Section 502B has been underutilized despite its provision of legislative enforcement measures.

U.S. support for Saudi Arabia's devastating campaign in Yemen has sparked new interest in Section 502B on Capitol Hill, but familiarity with the law remains limited. One of the law's key reporting provisions—a mandated report on human rights in a target country as a prerequisite for a resolution terminating or restricting assistance—has only been used once nearly fifty years ago. Requesting a targeted report under Section 502B(c) is the first step to reviving Section 502B, and it should become a regular practice for HFAC and SFRC for countries of particular concern.

Possible constitutional issues require careful navigation, but Section 502B's potential merits its use. Congress need not be bound by Section 502B's rigid structure. By treating the law as a set of discrete tools that can be applied both independently and in concert, the legislature could develop a more effective and versatile portfolio of mechanisms to promote human rights in U.S. security assistance.

In enacting Section 502B, Congress was clear: the United States should not provide weapons to governments that consistently commit gross violations of human rights. Section 502B offers an opportunity to hold abusive governments accountable, distance the United States from human rights violations, and avoid American moral complicity in human rights abuses. It is time for Congress to usher in a new era for Section 502B nearly half a century after its passage and after decades of disuse.

²⁶¹ The National Security Powers Act proposes such a restructuring. If enacted, it would require joint resolutions of approval from Congress for certain high-risk arms sales and shift the presumption against arms sales for non-allies. *See* S. 2391, 117th Cong. (2021).