

CLOSING A LEAHY LAW LOOPHOLE: THE “DUTY TO INFORM” AND HUMAN RIGHTS VETTING FOR NON-TRACEABLE ASSISTANCE

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On December 31, 2022, a significant amendment to the Leahy Law came into full effect that addresses a persistent loophole in the law’s implementation: non-traceable security assistance. For the first time, in instances where the United States has not identified the specific security force units receiving the assistance, the foreign government must agree not to provide US aid to any unit that the US government identifies as a perpetrator of gross violations of human rights.

The Leahy Law

- The Leahy Law **prohibits** the United States from providing security assistance to any unit of a foreign security force when there is credible information that the unit has committed a gross violation of human rights, including “torture, extrajudicial killing, enforced disappearance, and rape.”
- Introduced in 1997 and named for its champion, former Senator Patrick Leahy, the law is codified in title 22 of the US Code for the Department of State and title 10 of the US Code for the Department of Defense.
- The State Department enforces the Leahy Law by vetting specific security force units proposed to receive US assistance in order to determine whether there is credible information that they, or anyone in their unit, have committed a gross violation of human rights.

BUT

The State Department does not vet most arms sales—contrary to Senator Leahy’s stated intent.



The Loophole

NON-TRACEABLE ASSISTANCE

- The United States often provides security assistance in a manner whereby it is unable to easily identify the specific recipient unit before the assistance is transferred to the foreign government, making it “non-traceable” or “untraceable.” This has most often been the case for large amounts of military equipment transferred to a Ministry of Defense or other central government entity rather than a specific unit.
- Contrary to the intent of the Leahy Law, the State Department has not vetted units for types of assistance considered non-traceable.

Duty to Inform

The Fix

On March 15, 2022, President Joe Biden signed into law the Consolidated Appropriations Act for Fiscal Year 2022. Section § 7035(b)(6) of the law amended the “duty to inform” subsection of the State Department Leahy Law to address the problem of non-traceable assistance, stipulating that foreign governments must agree to not provide US assistance to prohibited units.

EXAMPLES

- Leahy vetting **should apply** to Foreign Military Financing (FMF), but often when the US government transfers FMF-financed equipment to a foreign government, it considers that assistance non-traceable and does not vet the eventual recipients. FMF to Egypt and Israel alone account for \$4.6 billion in non-traceable assistance that historically has not been subject to Leahy vetting.
- Similarly, when the United States transfers Excess Defense Articles, it often does so without knowing what unit will receive them. The President may transfer up to \$500 million in Excess Defense Articles annually without further authorizing legislation.

Stipulations

BILATERAL AGREEMENTS

Starting December 31, 2022, non-traceable assistance can only be provided to a foreign government subject to a written agreement that the recipient government will not provide US assistance to specific prohibited units that have committed gross violations of human rights.

LIST OF BARRED UNITS

The Secretary of State must regularly provide to foreign government recipients a list of units that cannot receive US assistance under the Leahy Law due to gross human rights violations.

REPORT TO CONGRESSIONAL COMMITTEES

The State Department must convey the lists of barred units to the House and Senate Appropriations Committees, House Foreign Affairs Committee, and Senate Foreign Relations Committee.

ASSISTANCE IN BRINGING PERPETRATORS TO JUSTICE

The Secretary of State shall “assist the foreign government in bringing the responsible members of the unit to justice.” Once the foreign government “takes effective steps” to bring responsible members to justice for their role in gross violations of human rights, the unit will once again be eligible for US assistance under subsection (b) of the State Department Leahy Law.

PUBLIC DISCLOSURE

Subsection (e) clarifies that the identity of prohibited units must generally be made publicly available. The Secretary of State, however, may exempt units from disclosure for national security reasons by providing a detailed justification for that determination to the House and Senate Appropriations Committees, House Foreign Affairs Committee, and Senate Foreign Relations Committee.

As of February 2023, the State Department has published twelve bilateral agreements communicating that a list of barred units shall be provided to the foreign government separately:

2021

ESTONIA
KOSOVO
MOROCCO
NORTH MACEDONIA
UKRAINE
ISRAEL

2022

GEORGIA
GREECE
JORDAN
LATVIA
MONTENEGRO
TUNISIA

Recommendations

THE DEPARTMENT OF STATE SHOULD

- finalize agreements promptly with all foreign governments receiving non-traceable US security assistance, as required by the FY2022 amendment to the Department of State Leahy Law.
- transmit lists of prohibited units to foreign governments and the appropriate congressional committees, as required in the “duty to inform” subsection. The government-to-government agreements will have little to no effect without the regular transmittal of lists of ineligible units.
- implement a monitoring and accountability process to ensure foreign governments are abiding by their commitments to not provide US assistance to prohibited units.
- publish prohibited units of foreign security forces, as covered under the “duty to inform” subsection of the State Department Leahy Law.

THE CONGRESS SHOULD

- maintain diligent oversight to ensure proper implementation of the new amendment. With this in mind, it should consider an additional reporting requirement on the status of implementation, including a list of any known violations of the bilateral agreements.

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