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Gimme Shelter: International Political Asylum in the Information Age

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Gimme Shelter: International Political Asylum in the Information Age

ABSTRACT

On June 5, 2013, an article in the Guardian revealed highly classified information about surveillance operations being performed by the United States National Security Administration (NSA). The source of this information was a former NSA contractor named Edward Snowden. After arriving in Moscow on June 23, Snowden spent the next forty days in the transit area of Sheremetyevo International Airport in a bizarre state of geopolitical purgatory. Eventually, Russia granted Snowden temporary asylum for one year, followed by a three-year residency permit. This Note uses Snowden's circumstance to consider the current state of international political asylum within the context of domestic whistleblower regimes. The technological progress of the early twenty-first century has enabled not only previously unimaginable intelligence-gathering capabilities but also the capacity to instantaneously alert countries throughout the world to the existence of such activities. This Note addresses the resulting tension by recommending a range of preventative measures and suggesting an evolution in domestic applications of international asylum law.

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I. THE SNOWDEN AFFAIR

On June 5, 2013, the *Guardian* published an article under the headline, “NSA collecting phone records of millions of Verizon customers daily.”¹ The article contained a copy of a classified order from the U.S. Foreign Intelligence Surveillance Court (FISA Court).² The order required telecommunications company Verizon Wireless to provide the National Security Agency (NSA) certain metadata from all of its customers’ domestic phone calls from April 25, 2013, through July 19, 2013.³ In the months following this disclosure, numerous articles revealing further highly classified information about the surveillance apparatus of the United States would appear in the *Guardian*, *Der Spiegel*,⁴ *Le Monde*,⁵ and other media outlets.⁶

1. Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, *GUARDIAN* (June 5, 2013), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order/print> [<http://perma.cc/ZS2E-2XF9>] (archived Sept. 14, 2014). The *Guardian* is a prominent UK newspaper with wide readership, so such a dramatic headline is striking. See Josh Halliday, *The Guardian Reaches Nearly 9 Million Readers Across Print and Online*, *GUARDIAN* (Sept. 12, 2012), <http://www.theguardian.com/media/2012/sep/12/guardian-9-million-readers-nrs>. [<http://perma.cc/HS6E-AJYM>] (archived Sept. 14, 2014) (emphasizing the global reach and readership of the *Guardian*).

2. See *Foreign Intelligence Surveillance Court*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/courts_special_fisc.html (last visited Jan. 7, 2013) [<http://perma.cc/X7BW-ZGK4>] (archived Sept. 14, 2014) (stating that the FISA Court is a “special court” established by Congress in 1978 “to review applications for warrants related to national security investigations”).

3. Greenwald, *supra* note 1 (indicating that the order authorized the collection of “the numbers of both parties . . . , location data, call duration, unique identifiers, and the time and duration of all calls”).

4. See, e.g., *Embassy Espionage: The NSA’s Secret Spy Hub in Berlin*, *DER SPIEGEL* (Oct. 27, 2013, 7:02 PM), <http://www.spiegel.de/international/germany/cover-story-how-nsa-spied-on-merkel-cell-phone-from-berlin-embassy-a-930205.html> [<http://perma.cc/6SE8-UHC2>] (archived Sept. 24, 2013) (discussing the NSA’s monitoring of German Chancellor Angela Merkel’s cellular phone); Konrad Lischka & Christian Stöcker, *‘Real Time’: New Leaks Show Near Total NSA Surveillance System*, *DER SPIEGEL* (Aug. 1, 2013, 4:24 PM), <http://www.spiegel.de/international/world/new-nsa-leaks-describe-total-surveillance-system-xkeyscore-a-914244.html> [<http://perma.cc/QB6H-4N3V>] (archived Sept. 25, 2014) (describing the far reaches of XKeyscore, an NSA surveillance program); *Privacy Scandal: NSA Can Spy on Smart Phone Data*, *DER SPIEGEL* (Sept. 7, 2013, 6:00 PM), <http://www.spiegel.de/international/world/privacy-scandal-nsa-can-spy-on-smart-phone-data-a-920971.html> [<http://perma.cc/6Q7B-R825>] (archived Sept. 25, 2014) (indicating that the NSA is able to access information stored on smartphones). *Der Spiegel* is a “popular weekly news magazine[] in Germany.” *Der Spiegel*, UK-GERMAN CONNECTION, <http://www.ukgermanconnection.org/factfile-spiegel> (last visited Aug. 31, 2014) [<http://perma.cc/M5C6-2PFQ>] (archived Sept. 14, 2014).

The source of the classified national security information was a former NSA contractor named Edward Snowden.⁷ On June 5, at the time the initial article was published, Snowden had already positioned himself beyond the direct reach of American authorities.⁸ On June 9, from a Hong Kong hotel room, Snowden revealed his identity as the source behind the disclosure.⁹ On June 21, the *Washington Post* reported that U.S. federal prosecutors had brought three criminal charges against Snowden: two charges under the 1917 Espionage Act and one charge of theft.¹⁰ Fearing extradition, Snowden flew to Moscow on June 23.¹¹ For the next forty days, Snowden stayed in the transit area of Sheremetyevo International Airport in a bizarre state of geopolitical purgatory.¹²

During his time in both Hong Kong and the Sheremetyevo Airport, Snowden submitted applications for asylum to over twenty countries.¹³ Snowden's asylum requests were largely unsuccessful. Countries either denied his claim outright or refused to consider his application on procedural grounds.¹⁴ After June 21, the United States

5. *Le Monde* is considered an influential French newspaper. See, e.g., *The Revolution at Le Monde*, THE ECONOMIST, July 30, 2011, <http://www.economist.com/node/21524883> [<http://perma.cc/39ND-JSQF>] (archived Sept. 14, 2014) (highlighting anecdotal examples of *Le Monde's* influence).

6. See, e.g., *Timeline of Edward Snowden's Revelations*, AL JAZEERA AM., <http://america.aljazeera.com/articles/multimedia/timeline-edward-snowden-revelations.html> (last visited Nov. 13, 2013) [<http://perma.cc/N8WR-UW4B>] (archived Sept. 22, 2014) (collecting articles related to disclosures by Edward Snowden).

7. Glenn Greenwald, Ewen MacAskill, & Laura Poitras, *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, GUARDIAN (June 9, 2013), <http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance> [<http://perma.cc/9HD9-2PMT>] (archived Sept. 14, 2014).

8. See *id.* (explaining that Edward Snowden left the United States for Hong Kong on May 20, 2013).

9. See *id.* (recounting the revelation of Edward Snowden's identity in a Hong Kong hotel room).

10. The two Espionage Act charges were "unauthorized communication of national defense information" and "willful communication of classified communications intelligence information to an unauthorized person." Peter Finn & Sari Horwitz, *U.S. Charges Snowden with Espionage*, WASH. POST (June 21, 2013), http://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html [<http://perma.cc/YQ4U-LJDB>] (archived Sept. 14, 2014).

11. See Lidia Kelly, Alissa De Carbonnel & Timothy Heritage, *Russian Airport Limbo Ends for Snowden, New Life Begins*, REUTERS, Aug. 2, 2013, <http://www.reuters.com/article/2013/08/02/us-usa-security-snowden-airport-idUSBRE9710TZ20130802> [<http://perma.cc/34TP-USVU>] (archived Sept. 14, 2014) (indicating that Snowden arrived in Sheremetyevo on June 23).

12. See *id.* (describing the nearly forty days Snowden spent hiding in the Sheremetyevo International Airport).

13. Nicole Gaouette, *Snowden's Asylum Bid Spurned From Switzerland to India*, BLOOMBERG (July 2, 2013, 10:49 PM), <http://www.bloomberg.com/news/2013-07-02/snowden-retracts-russian-asylum-request-as-refuge-options-narrow.html> [<http://perma.cc/Q22-Z3G2>] (archived Sept. 14, 2014).

14. Many countries would not make a substantive judgment of Snowden's asylum case unless he followed their required procedures of submitting an application from within their countries or at their borders. See *id.* ("The Netherlands, Switzerland,

suspended the validity of Snowden's travel documents.¹⁵ Although Venezuela and Nicaragua offered Snowden asylum,¹⁶ this suspension left him unable to arrange travel to either country. Eventually, Russia granted Snowden temporary asylum for one year on August 1, 2013.¹⁷ Russia's decision sparked disappointment and anger from the United States,¹⁸ and further strained diplomatic relations between the two countries, which were already upset by the surveillance disclosures.¹⁹

Snowden's saga highlights the potential dynamics at play where an asylum applicant claims to be a political dissident.²⁰ Even though there is a uniform international law of asylum, standardized law does not necessarily lead to consistent application.²¹ Individual countries are responsible for interpreting and applying this uniform international law within their own borders.²² Political considerations inevitably affect asylum decisions.²³ For example, two Latin American countries with relatively adversarial relationships toward the United States offered full asylum to Snowden.²⁴ Because these countries perceived Snowden a dissident, offering asylum demonstrated political allegiance to his cause.²⁵

Spain, Norway, Ireland, and Austria said asylum applications are only considered when made by people inside their territory or at their border.”).

15. See Kelly, De Carbonnel & Heritage, *supra* note 11 (reporting that Snowden's passport had been revoked).

16. William Neuman & David M. Herszenhorn, *Venezuela Offers Asylum to N.S.A. Leaker*, N.Y. TIMES, July 6, 2013, at A7.

17. Steven Lee Myers & Andrew E. Kramer, *Defiant Russia Grants Snowden Year's Asylum*, N.Y. TIMES, Aug. 1, 2013, at A1.

18. *Id.*

19. See *id.* (reporting that the United States was considering withdrawing from a previously planned summit meeting scheduled for September 2013).

20. See Greenwald, MacAskill & Poitras, *supra* note 7 (quoting Snowden as saying he initially chose Hong Kong as a destination in part because of its “spirited commitment to free speech and the right of political dissent”).

21. See UNHCR, Convention and Protocol Relating to the Status of Refugees, Introductory Note by the Office of the U.N. High Commissioner for Refugees (July 28, 1951) 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter UNHCR Introductory Note], <http://www.unhcr.org/3b66c2aa10.html> [<http://perma.cc/VP2U-DW3Q>] (archived Sept. 19, 2014) (highlighting the inconsistencies between internationally acknowledged asylum law and its varying interpretations among countries).

22. See Max Fisher, *Edward Snowden Could Strain to Qualify for Asylum Under International Law*, WASH. POST (June 10, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/06/10/edward-snowden-could-strain-to-qualify-for-asylum-under-international-law/> [<http://perma.cc/Q2DJ-BFGX>] (archived Sept. 14, 2014) (showing the relative fluidity of international asylum law interpretation given individual circumstances).

23. See generally MATTHEW E. PRICE, RETHINKING ASYLUM: HISTORY, PURPOSE, AND LIMITS 69–94 (2009) (discussing the significance of political considerations in asylum determinations).

24. See Neuman & Herszenhorn, *supra* note 15 (reporting that Venezuela and Nicaragua offered Snowden asylum).

25. See *id.* (outlining the political rationale behind Snowden's asylum offers from Nicaragua and Venezuela).

Russia is a more complicated case. At the time Snowden received temporary asylum, Russia's relationship with the United States was uneasy. The two countries had, in the recent past, displayed disharmony one moment and cooperation the next. In April 2013 alone, the United States and Russia each banned from their countries eighteen of the other's citizens for alleged human rights abuses.²⁶ The countries later worked together through their intelligence services after the Boston Marathon bombing.²⁷ However, after Russia granted Snowden temporary asylum for one year on August 1, 2013, the United States-Russia relationship deteriorated to its least cooperative level in decades.²⁸ And so, as the one-year asylum term was set to expire on August 1, 2014, Russia's reconsideration of Snowden's status was reinforced with political considerations.²⁹ From this adversarial posture, Russia granted Snowden a three-year residency permit.³⁰

This Note will explore international asylum law in the context of proclaimed political whistleblower Edward Snowden. Part II

26. Steve Gutterman, *Russia Bars 18 Americans in Retaliation for Magnitsky List*, REUTERS (Apr. 13, 2013, 11:16 AM), <http://www.reuters.com/article/2013/04/13/us-russia-usa-rights-idUSBRE93B0PU20130413> [<http://perma.cc/G332-XHDB>] (archived Sept. 14, 2014) (describing how alleged human rights abuses led to a U.S. ban of eighteen Russians from the United States and Russia's retaliatory ban of eighteen Americans from Russia).

27. Ellen Barry, *After Boston Bombing, American Ties with Russia Improve*, N.Y. TIMES (Apr. 29, 2013), <http://www.nytimes.com/2013/04/30/world/europe/after-bombing-american-ties-with-russia-improve.html> [<http://perma.cc/9M5U-F358>] (archived Sept. 14, 2014) (reporting increased cooperation between U.S. and Russian intelligence services after the Boston Marathon bombing).

28. This was primarily due to the events surrounding Russia's annexation of the Crimean region of Ukraine on March 18, 2014. See Michael Birnbaum, *Russia Grants Edward Snowden Residency for Three More Years*, WASH. POST (Aug. 7, 2014), http://www.washingtonpost.com/world/europe/russia-grants-edward-snowden-residency-for-3-more-years/2014/08/07/8b257293-1c30-45fd-8464-8ed278d5341f_story.html [<http://perma.cc/CM96-C6RU>] (archived Sept. 14, 2014) ("The decision last year to grant asylum to Snowden for a year was a major factor in the souring of U.S.-Russian relations, which have deteriorated to Cold War lows over the conflict in Ukraine."). See generally Steven Lee Myers & Ellen Barry, *Putin Reclaims Crimea for Russia and Bitterly Denounces the West*, N.Y. TIMES (Mar. 18, 2014), http://www.nytimes.com/2014/03/19/world/europe/ukraine.html?_r=0 [<http://perma.cc/XLL8-QYH4>] (archived Sept. 14, 2014) (describing the increasing tension over Crimea between Russia and the West).

29. See Birnbaum, *supra* note 28 (observing that "Russia . . . granted . . . Edward Snowden permission to remain in the country for three more years, . . . a measure that promised to further strain U.S.-Russian relations"); Myers & Barry, *supra* note 28 (indicating that, in addition to the grant of Snowden's asylum, relations between the United States and Russia are strained by tension over Crimea); Myers & Kramer, *supra* note 17 (reporting that, as of August 1, 2013, Russia had granted Snowden asylum for one year).

30. See Birnbaum, *supra* note 28 (explaining that Russia gave Snowden "permission to remain in the country for three more years" and noting that, should Snowden "extend his stay for one year beyond [August 1, 2017]," Snowden would be eligible "potentially, to take up Russian citizenship").

discusses the importance of classification to asylum considerations and provides perspectives on the origins of asylum law. Part III provides an overview of the modern state of international asylum law as well as the various asylum laws and whistleblower protections of the United States, Russia, and Iceland. Part IV offers solutions to problems presented by political whistleblowers and is broken into three parts. Subpart A argues that countries should foster more open and frequent dialogue with one another so that the type of national security operations revealed by Snowden are not necessary in the first place. Subpart A also advocates for more unilateral disclosure of information that would have previously been classified, effectively discouraging whistleblowers by controlling the dissemination of information rather than reacting to leaks. Both approaches seek to eliminate any negative or potentially illegal behavior before the point of disclosure. Subpart B recognizes that the solutions of subpart A may be inadequate and difficult to verify. To address the difficult circumstances that will nonetheless arise even if subpart A is implemented, subpart B encourages countries use state policy, as expressed through domestic whistleblower statutes, as a guidepost in domestic implementation of international asylum law. Finally, subpart C applies this Note's proposals to Snowden and concludes.

II. GENERAL ASYLUM BACKGROUND

Although the primary focus of this Note is the current state of international political asylum, the general notion of asylum has existed in some form for thousands of years.³¹ Examining the origins and evolution of asylum law provides insight into the policy considerations built into the present international asylum regime.³² Subpart A contextualizes the modern state of international asylum law by exploring its history, while subpart B considers the impact of whistleblower labeling.

A. *Historical Origins of Asylum*

Asylum likely arose in connection with religion in ancient civilizations.³³ Greece established a complex system of religious asylum in its temples whereby criminals and noncriminals alike could avoid apprehension by civil authorities and civilian pursuers in

31. See generally S. PRAKASH SINHA, *ASYLUM AND INTERNATIONAL LAW* 5–20 (1971) (outlining the historical background of international asylum law).

32. See generally PRICE, *supra* note 23, at 24–58 (presenting an extensive history of academic analysis of the goals and purposes of asylum).

33. See SINHA, *supra* note 31, at 5 (describing the foundational philosophical thought pertaining to the idea of asylum).

a place where a deity resided out of respect for, and fear of retribution from, the resident god.³⁴ An asylum seeker would publically perform an act of supplication in a temple,³⁵ and the temple priest would then determine whether to grant the supplicant asylum.³⁶ Foreign supplicants granted asylum had a defense to extradition, as well as a claim of immunity from pursuing authorities.³⁷ However, granting asylum could provoke displeasure and confrontation with the foreigner's home state.³⁸ Leaders were therefore forced to make practical political decisions as part of the asylum determination.³⁹ In order to avoid unwanted repercussions while maintaining their sovereign asylum traditions, Greece even intercepted some potentially controversial foreigners before they could reach a sanctuary to begin the asylum process.⁴⁰

As Rome seized power, asylum law evolved. In 22 CE, Rome significantly curtailed the Greek system by stripping most temples of their power to grant asylum.⁴¹ Rome implemented a less liberal regime designed primarily to provide fugitives temporary reprieve from immediate violence in order to gather evidence for a trial.⁴² Asylum law again evolved as the Roman Empire waned, taking on a Christian influence.⁴³ Roman Emperor Constantine issued the Edict of Toleration in 313 CE.⁴⁴ The Edict of Toleration allowed Christianity to exist openly and formally recognized the power of the church to grant asylum.⁴⁵ Where past asylum regimes protected innocent or

34. See *id.* at 5–6, 8–9 (highlighting the religious foundation of asylum within ancient Greek society).

35. See PRICE, *supra* note 23, at 26–27 (explaining that “[supplication] was initiated when a person entered a temple, sat in an altar, or held on to an image of a god while grasping a broken twig or wool”).

36. See *id.* at 27 (noting that, to receive protection, the supplicant “had to convince god’s priest that they deserved protection”).

37. See *id.* at 28–29 (explaining that a foreign supplicant who was granted asylum was “beyond the requesting city’s authoritative reach” and “was given immunity from the authority of those who pursued him”).

38. See *id.* at 30 (noting that “[a] decision to shelter a fugitive would be interpreted as an affront to the foreign power and could sometimes precipitate war”).

39. See *id.* at 30–31 (illustrating the political dilemma Greek leaders faced when confronted with a foreign fugitive).

40. See *id.* at 31 (noting that Athens constructed “a police station near the Acropolis . . . to intercept ‘undesirable supplicants’”).

41. See *id.* at 27 (indicating that the Romans stripped most temples of their authority to grant asylum when the temples were unable to present “legal proof of their right to grant asylum”).

42. See SINHA, *supra* note 31, at 9–10 (discussing changes the Romans made to the asylum system after taking over Greece).

43. See *id.* at 10 (highlighting the influence of Christianity on asylum law in the Roman Empire).

44. *Id.* at 10–11.

45. See *id.* (noting that the “Edict of Toleration marked the beginning of the era of allowing the churches to give protection to the fugitives”).

unfairly targeted fugitives, the primary aim of this church asylum was to dispense divine mercy.⁴⁶

A far-reaching religious asylum regime persisted in most of medieval Europe until the twelfth century.⁴⁷ This regime fractured as church officials increasingly claimed immunity for their criminal activity, which strained public confidence.⁴⁸ Additionally, the rise of nation-states produced civil authorities intent on controlling their sovereign justice systems without church interference.⁴⁹ Governments placed significant restrictions on church asylum for hundreds of years.⁵⁰ England banned it altogether in 1625.⁵¹

Following the Reformation, European states implemented a territorial asylum regime to cope with the large-scale displacement of people fleeing violence between Protestants and Catholics.⁵² This regime emphasized that the right to grant or deny asylum existed with the state; an individual had no inherent claim to asylum.⁵³ State interest was a paramount consideration because the sovereign nation controlled all facets of the asylum determination.⁵⁴ In recognition of a transnational interest in administering justice and reducing crime, most state leaders mutually agreed to deliver fugitive criminals to their nations of origin as long as there was no government injustice.⁵⁵ Although asylum was not typically granted to common criminals, many states adopted a rule—the political offense exception—that

46. Such mercy extended to the innocent as well as the guilty, in some cases including intentional murderers. See PRICE, *supra* note 23, at 32–33 (describing the Church's version of asylum as "a vehicle for mercy" that advocated "not only for the wrongly accused, but for anyone who had been sentenced by Roman courts").

47. See *id.* at 33 (explaining that, until the twelfth century, Christian asylum was extended to a variety of individuals, including murderers).

48. See *id.* (noting that members of the clergy often escaped harsh punishment because they were "immune to secular authority" and received lesser punishments in the ecclesiastical courts, which ultimately resulted in the death of Thomas Becket, the Archbishop of Canterbury).

49. See SINHA, *supra* note 31, at 12 (explaining that nation-states removed the asylum power from the churches because they viewed asylum "as an institution created by man and, therefore, within the competence of the state for regulation").

50. See PRICE, *supra* note 23, at 34 ("On the Continent, Catholic kings tried to persuade the Court of Rome to limit [church asylum] even further, and when Rome was unresponsive, they abolished it themselves.").

51. *Id.*; SINHA, *supra* note 31, at 15.

52. See PRICE, *supra* note 23, at 34–35 (suggesting that the large numbers of people crossing national borders in search of "refuge . . . where their religion was dominant" helped establish concepts of territorial sovereignty).

53. See SINHA, *supra* note 31, at 18 (noting that following the Reformation "the notion of asylum as a right of the fugitive yielded to the notion . . . that it was the right of a state to either grant him the privilege of residence . . . or refuse to do so").

54. See *id.* ("Th[e] right [to either grant a fugitive the privilege of residence within its territory or refuse to do so] was to be exercised by the state in light of its own interests and obligations as a representative of the social order.").

55. See *id.* (recognizing that there existed "a general consensus of opinion . . . that states must assist each other in the suppression of crime and that they must not assure impunity to criminals unless their government has done injustice").

individuals who committed political crimes would be granted asylum and not be returned to their home countries.⁵⁶ In the nineteenth century, the political offense exception became a principle of customary international law through treaty.⁵⁷

The tradition of sovereign states having the capacity to regularly interfere with a foreign state's attempts to dispense justice through asylum could be viewed as evidence that political considerations are at the historical core of asylum law and therefore should be respected as part of the modern regime.⁵⁸ In *Rethinking Asylum*, Matthew E. Price notes that early asylum regimes in Greece involved political considerations by civil authorities, even if the process was technically the province of the temples.⁵⁹ These political considerations continued, he argues, for the duration of church-controlled asylum as well as after asylum transferred to sovereign states.⁶⁰ The political offense exception to extradition, recognized as a principle of international law in the nineteenth century, required a "categorical judgment about the legitimacy of foreign governments."⁶¹ Because the enabling treaties did not enact a definition of "political offense," individual states were left to make value judgments concerning acceptable government behavior.⁶² The decision to grant asylum to a political dissident, therefore, is an expression of the granting state's political values.⁶³

However, a number of factors have motivated asylum determinations throughout history, and political considerations have not always facially outweighed religious or humanitarian ones.⁶⁴ The humanitarian conception of asylum is particularly strong where

56. See *id.* at 20 ("Even the least liberal states felt obliged to admit and respect the principle of political asylum.").

57. Treaties containing this rule of political asylum include the Franco-Swiss treaty of 1828 and the Belgo-French Extradition Treaty of 1834. ATLE GRAHL-MADSEN, TERRITORIAL ASYLUM 4 (1980) (Belgo-French Extradition Treaty of 1834); SINHA, *supra* note 31, at 20 (Franco-Swiss treaty of 1828). France, Belgium, and the United Kingdom all publically supported this rule. See SINHA, *supra* note 31, at 20.

58. See PRICE, *supra* note 23, at 57–58 (arguing for a political conception of asylum rather than a humanitarian one in part because asylum has historically included clearly political considerations).

59. See *id.* at 30–31 (explaining that, in early Greek history, potential political ramifications would heavily influence a decision to grant asylum).

60. See generally *id.* at 31–51 (discussing the continuing influence of political considerations in asylum decisions).

61. *Id.* at 49.

62. See *id.* at 51 (positing that "the definition of 'political offense' . . . was rooted in value judgments about what counted as legitimate resistance to government and legitimate punishment by government").

63. See *id.* (noting that granting asylum for political offenses "often depended in part on one's view of the regime against which resistance was directed" and, therefore, a grant of asylum "advanced the cause of liberty by sheltering its partisans from punishment").

64. See, e.g., SINHA, *supra* note 31, at 9 ("[In Greece], the sanctity of the asylum was generally observed as a custom, for the fear of the divinity.") (emphasis added).

refugees seek safety from “core human rights” violations in their home countries.⁶⁵ State interest has nonetheless remained present—whether overtly political or under some other guise.⁶⁶

B. In Pursuit of Neutral Language

As a modern regime of international asylum law emerged in the twentieth century, so did a robust and globalized media.⁶⁷ Heightened media scrutiny amplifies political considerations surrounding proclaimed whistleblowers, particularly where underlying disclosures are controversial and transnational in scope.⁶⁸ Media descriptions of information disclosures can shape the debate over appropriate remedies, often before the legal system even considers actual asylum doctrine.⁶⁹ Labels are important because they influence whether an individual is popularly considered a whistleblower.⁷⁰ Use of the term “whistleblower” can indicate public opinion of a particular individual’s actions.⁷¹ Because public attitudes can shift depending on a number of factors, application of the descriptor whistleblower can vary while the underlying activity remains the same.⁷²

65. See Shalini Bhargava Ray, *Optimal Asylum*, 46 VAND. J. TRANSNAT’L L. 1215, 1222 (2014) (discussing the humanitarian purpose of asylum law).

66. See PRICE, *supra* note 23, at 57 (“Asylum’s focus on political morality [in the late eighteenth and early nineteenth centuries] . . . was in harmony with the ancient Greek practice . . . and it was also consistent with the general historical function of asylum to immunize people who faced unjust punishment.”).

67. See *infra* Part III.A (describing the modern international asylum regime).

68. See, e.g., Michael Calderon, *AP Editor: Do Not Describe Edward Snowden as a ‘Whistleblower,’* HUFFINGTON POST BLOG (June 10, 2013, 1:31 PM), http://www.huffingtonpost.com/michael-calderone/ap-snowden-whistleblower_b_3416380.html [<http://perma.cc/7ALD-P76C>] (archived Sept. 11, 2014) (evaluating the appropriateness of the term whistleblower and discussing its potential political implications). It follows that countries are more acutely aware of political consequences when their actions are closely monitored and documented.

69. See MARK WORTH, TRANSPARENCY INT’L, WHISTLEBLOWING IN EUROPE 16 (2013), available at files.transparency.org/content/download/697/2995/file/2013_WhistleblowinginEurope_EN.pdf (“Given the power that the media has in shaping public opinion, this shift [from seeing an information-discloser as a snitch or informer to a public servant] can contribute to improving the image and perception of whistleblowers.”); cf. Ben Zimmer, *The Epithet Nader Made Respectable*, WALL ST. J. (July 12, 2013, 8:01 PM), <http://online.wsj.com/news/articles/SB10001424127887323368704578596083294221030> [<http://perma.cc/E277-YTL9>] (archived Sept. 11, 2014) (describing the history of the term whistleblower).

70. See Calderon, *supra* note 67 (acknowledging that usage of the term whistleblower denotes a value judgment).

71. See *id.* (asserting that whistleblower often carries more positive connotations than “leaker” or “source”).

72. See, e.g., Editorial Board, *Edward Snowden, Whistle-Blower*, N.Y. TIMES (Jan. 1, 2014) [hereinafter Editorial Board, *Whistle-Blower*], <http://www.nytimes.com/2014/01/02/opinion/edward-snowden-whistle-blower.html> [<http://perma.cc/EJX7-5MQM>] (archived Sept. 11, 2014) (exhibiting the conscious decision to change label use and

Just as the tendency to label someone a whistleblower may change over time, so has the underlying connotation of the descriptor itself.⁷³ The phrase “blowing the whistle” first emerged in the early twentieth century, and its meaning was literal.⁷⁴ It meant the cessation of an event, generally of a sporting nature.⁷⁵ By the 1930s, the meaning of whistleblower had evolved to mean a person who reveals information, though it often carried a negative connotation.⁷⁶ To be a whistleblower was to be a person who alerts authorities to illicit activity. A whistleblower was a “rat” or “snitch.”⁷⁷ However, since the 1970s, the term whistleblower has carried a nearly universally positive connotation in the United States.⁷⁸ A modern definition of whistleblower specifies a “disclosure of corruption or wrongdoing.”⁷⁹ Because these negative terms are built into the definition, usage of the whistleblower label usually indicates support for the underlying disclosure.⁸⁰

The media coverage of Edward Snowden demonstrates how ideological perspectives inform labeling and indicate the preferred approach to administering justice.⁸¹ In Snowden media coverage, the primary labeling distinction is between the supportive term whistleblower and various neutral factual descriptions.⁸² For example, Amnesty International used supportive labeling early,⁸³

affix to Snowden the term whistleblower because his actions revealed wrongdoings by the NSA to the American public).

73. See Zimmer, *supra* note 68 (discussing changes in the perception of a whistleblower throughout history).

74. *Id.*

75. *Id.*

76. See *id.*

77. *Id.*

78. See *id.* (describing Ralph Nader's efforts to rehabilitate the word whistleblower in the 1970s).

79. *Whistle-blower Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/whistleblower?s=t> (last visited Sept. 27, 2014) [<http://perma.cc/RF9L-MXPV>] (archived Sept. 11, 2014).

80. See *id.* (defining “whistle-blower” as “a person who informs on another or makes public disclosure of corruption or wrongdoing”).

81. Cf. Calderon, *supra* note 67 (asserting that the label whistleblower often suggests that the actor behaved justly).

82. See, e.g., *id.* (urging AP writers not to use the term whistleblower to avoid the appearance of support).

83. See *USA Must Not Persecute Whistleblower Edward Snowden*, AMNESTY INT'L (July 2, 2013), <http://www.amnesty.org/en/news/usa-must-not-persecute-whistleblower-edward-snowden-2013-07-02> [<http://perma.cc/6V5D-CR74>] (archived Sept. 11, 2014) (referring to Snowden as a whistleblower in the opening statement of the article).

wire services have maintained neutral descriptions throughout,⁸⁴ and the *New York Times* has shifted over time.⁸⁵

Amnesty International explicitly expressed support for Snowden less than one month after he revealed his identity as the source of the classified FISA Court order.⁸⁶ The organization insisted that Snowden should be considered a whistleblower in a news item on its website.⁸⁷ Amnesty International's director of law and policy characterized the surveillance operations disclosed by Snowden as "unlawful actions that violate human rights."⁸⁸ As an ideologically aligned advocacy organization, Amnesty International strongly believed that no one—including Edward Snowden—should be punished for identifying human rights violations.⁸⁹

The *Guardian's* treatment of Snowden provides an example of a traditional news outlet using whistleblower in a casually supportive manner.⁹⁰ The paper repeatedly labeled Snowden a whistleblower throughout its ongoing coverage of both his surveillance disclosures as well as his personal plight.⁹¹ Although the use of whistleblower in a news story does not necessarily encourage an affirmative asylum grant to a source of disclosed information, the standard implication that the behavior of a whistleblower benefits society could indicate

84. See, e.g., Mark Hosenball, *U.S., Germany Discuss Intelligence Cooperation After Merkel Affair*, REUTERS (Nov. 8, 2013, 3:44 PM), <http://www.reuters.com/article/2013/11/08/us-usa-germany-spying-idUSBRE9A710820131108> [<http://perma.cc/UW4D-7SRD>] (archived Sept. 11, 2014) (referring to Snowden's leaks as "disclosures" and not ascribing a label to Snowden).

85. Compare Editorial Board, *Close the N.S.A.'s Back Doors*, N.Y. TIMES (Sept. 21, 2013), <http://www.nytimes.com/2013/09/22/opinion/sunday/close-the-nsas-back-doors.html> [<http://perma.cc/SM9R-HTB3>] (archived Oct. 15, 2014) ("former N.S.A. contractor"), and Editorial Board, *Surveillance Goes on Trial*, N.Y. TIMES, Nov. 22, 2013, <http://www.nytimes.com/2013/11/23/opinion/surveillance-goes-on-trial.html> [<http://perma.cc/MGF5-Q634>] (archived Oct. 15, 2014) ("disaffected N.S.A. contractor"), with Editorial Board, *Whistle-Blower*, *supra* note 71 ("whistle-blower").

86. See AMNESTY INT'L, *supra* note 82 ("The US authorities' relentless campaign to hunt down and block whistleblower Edward Snowden's attempts to seek asylum is deplorable and amounts to a gross violation of his human rights.").

87. See *id.* (insisting that Snowden's actions make him a whistleblower, because he "disclosed issues of enormous public interest in the US and around the world" and repeatedly referring to him as such).

88. *Id.*

89. See *id.* (arguing that disclosures of human rights violations "are protected under the rights to information and freedom of expression").

90. See, e.g., Tom McCarthy, *NSA Whistleblower Edward Snowden Says US 'Treats Dissent as Defection'*, GUARDIAN (Nov. 1, 2013, 5:18 PM), <http://www.theguardian.com/world/2013/nov/01/nsa-whistleblower-edward-snowden-letter-germany> [<http://perma.cc/YH8S-GTTE>] (archived Sept. 11, 2014) (labeling Snowden "[t]he NSA whistleblower Edward Snowden").

91. See, e.g., Ewen MacAskill & Julian Borger, *New NSA Leaks Show How US Is Bugging its European Allies*, GUARDIAN (June 30, 2013, 4:28 PM), <http://www.theguardian.com/world/2013/jun/30/nsa-leaks-us-bugging-european-allies> [<http://perma.cc/JM35-73UK>] (archived Sept. 11, 2014) (referring to Snowden as "the whistleblower Edward Snowden"); McCarthy, *supra* note 90 (applying the whistleblower label to Snowden).

popular support for applying the political offense exception. Thus, the cooperative relationship between Snowden and the *Guardian*, which traces back to the initial report on June 5, may inform popular perception of his actions.⁹²

Media outlets that sought to withhold support from Snowden attempted to describe Snowden's disclosures in neutral language.⁹³ Tom Kent, then standards editor for the *Associated Press* (AP), circulated a memo discussing use of the term whistleblower on June 10, only one day after Snowden revealed his identity as the source of the classified information.⁹⁴ In order to avoid passing judgment as to whether the disclosed activities constituted wrongdoing, Kent recommended that the AP describe Snowden's behavior rather than label him a whistleblower.⁹⁵ Fellow wire service *Reuters* followed a similar path by factually describing Snowden's position, referring to him as "former NSA contractor Edward Snowden."⁹⁶

The manner in which the editorial board of the *New York Times* treated Snowden demonstrates how perspectives and labeling can shift over time.⁹⁷ On June 11, 2013, only two days after Snowden revealed his identity as the source of classified national security information, the *New York Times* published an editorial titled "Surveillance: Snowden Doesn't Rise to Traitor."⁹⁸ In the immediate wake of Snowden's revelation, the editorial board's posture was

92. Greenwald, MacAskill & Poitras, *supra* note 7.

93. See Calderon, *supra* note 67 ("But some news organization [sic] have been less quick to describe Snowden as a 'whistleblower,' opting instead for terms like 'source' or 'leaker.'"); Jim Heintz, *Snowden Lawyer: Leaker Staying in Russia for Now*, ASSOCIATED PRESS, July 24, 2013, <http://bigstory.ap.org/article/russian-state-news-agency-says-us-leaker-edward-snowden-has-documents-enter-russia> [<http://perma.cc/S4K7-3TGS>] (archived Oct. 15, 2014) (referring to "National Security Agency leaker Edward Snowden"). While unsupportive media outlets generally used descriptive rather than negative language, some individuals used directly negative terminology. For instance, Secretary of State John Kerry referred to Snowden as a "coward" and a "traitor" after Snowden's first television interview. See, e.g., Jonathan Topaz, *John Kerry: Edward Snowden a 'Coward . . . Traitor'*, POLITICO (May 28, 2014, 9:59 AM), <http://www.politico.com/story/2014/05/edward-snowden-coward-john-kerry-msnbc-interview-nsa-107157.html?hp=l4> [<http://perma.cc/Z9C6-E4LL>] (archived Sept. 11, 2014) (reporting Kerry's "response to [Snowden's] first television interview").

94. See Calderon, *supra* note 67.

95. *Id.*

96. See, e.g., Hosenball, *supra* note 84 (describing Snowden's actions rather than labeling Snowden).

97. It is important to note that newspaper editorials are an accepted forum of opinion journalism and therefore do not carry the objective weight of pure news reporting. However, this instance is useful to the extent that it represents a clear evolution in perception by a prominent segment of the media. Compare Editorial Board, *Whistle-Blower*, *supra* note 72 (affixing the term "whistle-blower" to Snowden), with Editorial Board, *Snowden's Disclosures Do Not Amount to Treason*, N.Y. TIMES, June 12, 2013, at A26 [hereinafter Editorial Board, *Not Treason*] (arguing that Snowden's actions did not make him a "traitor," but not yet using the term whistleblower in his defense).

98. Editorial Board, *Not Treason*, *supra* note 97.

defensive against his most extreme critics but did not use whistleblower.⁹⁹ After Snowden made further disclosures regarding American surveillance activity, the editorial board adopted more overtly supportive terminology.¹⁰⁰ “Edward Snowden, Whistleblower” was published on January 1, 2014.¹⁰¹ In that article, the editorial board unambiguously affixed Snowden with the whistleblower label and also suggested the United States should grant him “some form of clemency.”¹⁰²

The *Sydney Morning Herald*, an Australian newspaper, utilized both labeling strategies in the same article.¹⁰³ In a headline reporting Snowden’s decision to seek temporary asylum in Russia, the paper referred to him as a “security leaker,” in the more factually descriptive style of the AP and *Reuters*.¹⁰⁴ However, the body of the article begins by labeling him “US whistleblower Edward Snowden.”¹⁰⁵ This treatment indicates that the *Sydney Morning Herald* may not consider the choice of language important, and selected a phrase for its form rather than function. It may also suggest that whistleblower is not as distinct in other countries as it is in the United States, where the term’s connotation is positive.¹⁰⁶

Terminology used to describe proclaimed political dissidents is merely a first impression of the public perception.¹⁰⁷ Labeling is important because it can help shape the popular debate, in turn transforming the general public policy of a country over time.¹⁰⁸

99. See *id.* (noting that Snowden “technically . . . did not blow the whistle on fraud or criminal activity”).

100. See Editorial Board, *Whistle-Blower*, *supra* note 72 (arguing that Snowden should be treated as a whistleblower).

101. *Id.*

102. *Id.*

103. See, e.g., Tom Parfitt, *Security Leaker Snowden Opts for Russian Asylum*, SYDNEY MORNING HERALD (Nov. 8, 2013, 11:27 AM), <http://www.smh.com.au/world/security-leaker-snowden-opts-for-russian-asylum-20130713-2pwxs.html> [<http://perma.cc/BW6C-CUZ4>] (archived Sept. 11, 2014) (describing Snowden as both a “security leaker” and a whistleblower).

104. *Id.* See generally Hosenball, *supra* note 84 (*Reuters*); Heintz, *supra* note 93 (AP).

105. *Id.*

106. Compare WORTH, *supra* note 69 at 19 (describing how the difficulty in translating whistleblower to European languages has left citizens and media to use synonyms of varying connotations) with Zimmer, *supra* note 69 (establishing the current positive connotation of whistleblower in the United States).

107. See Editorial Board, *Not Treason*, *supra* note 97 (displaying the initial reaction of *New York Times* Editorial Board to Snowden’s disclosure).

108. See Calderon, *supra* note 68 (explaining that, because the term whistleblower is positive, its application to a particular type of disclosure will eventually indicate increased public support for the underlying activity).

III. EXPLANATION OF CURRENT LAW

Media coverage ultimately has questionable bearing on a particular state's consideration of an asylum application at the time it occurs because countries rely on a combination of international and domestic law for actual asylum determinations.¹⁰⁹ Established parameters of international asylum law provide a framework for a given country's asylum considerations.¹¹⁰ The ultimate decision on whether to grant asylum is a sovereign prerogative, and so it depends on a nationally unique comingling of international and domestic laws.¹¹¹ Domestic laws are an expression of a country's public policy and provide an opportunity to evince a state interest in transparency through whistleblower protections.¹¹² Part III will first establish the parameters of international asylum law before considering the political postures of particular states based on their domestic refugee and whistleblower regimes.¹¹³

A. Modern International Asylum Law

International law establishes clear requirements for individuals seeking asylum. Under the Refugee Convention, one must prove (1) a well-founded fear of persecution (2) for reasons of race, religion, nationality, membership in a protected group, or political opinion (3) and that the underlying activity did not constitute a serious nonpolitical crime (4) or was contrary to UN principles.¹¹⁴ Because the decision whether to grant asylum is ultimately left to individual countries, both domestic law and interpretations of international law are relevant.¹¹⁵ The resolution of this overlap in asylum law for proclaimed whistleblowers will likely depend on domestic law, the international political climate, and whistleblower protections of individual countries.

109. See DEP'T OF INT'L PROT., OFFICE OF THE UN HIGH COMM'R FOR REFUGEES (UNHCR), AN INTRODUCTION TO INTERNATIONAL PROTECTION 62 (Aug. 1, 2005), available at <http://www.unhcr.org/3ae6bd5a0.pdf> (last visited Sept. 30, 2014) [<http://perma.cc/6M8K-E6KE>] (archived Sept. 11, 2014).

110. See, e.g., Convention Relating to the Status of Refugees, art. I, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention] (establishing the definition, scope, and application of the term "refugee").

111. DEP'T OF INT'L PROT., *supra* note 109, at 62 ("It is primarily the responsibility of the government of a country to determine whether someone falls within the applicable refugee definition within its jurisdiction.").

112. See *infra* Part III.B.1–3 (discussing the whistleblower regimes of the United States, Russia, and Iceland).

113. See *infra* Part III.A–B (discussing modern international asylum law and the domestic refugee and whistleblower laws of the United States, Russia, and Iceland).

114. Refugee Convention, *supra* note 110, art. I(A), (F).

115. DEP'T OF INT'L PROT., *supra* note 109, at 62.

The rights afforded to individuals in modern international asylum law were first established in the Universal Declaration of Human Rights (UDHR), passed in 1949 by the UN General Assembly.¹¹⁶ The UDHR is nonbinding but nonetheless carries enormous weight and provides the basis for numerous binding agreements that came afterward.¹¹⁷ Article 14 of the UDHR states that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”¹¹⁸ However, Article 14 limits this right by stipulating that it “may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”¹¹⁹ Thus, the UDHR establishes a dichotomy between persecution stemming from political crimes and prosecution stemming from nonpolitical crimes.¹²⁰

In 1950, the UN General Assembly established the Office of the United Nations High Commissioner for Refugees (UNHCR).¹²¹ The UNHCR interprets its mandate as to “provide, on a nonpolitical and humanitarian basis, international protection to refugees and to seek permanent solutions for them.”¹²² The UNHCR describes “international protection” as ensuring “admission to a country of asylum, the grant of asylum and respect for . . . fundamental human rights, including the right not to be forcibly returned to a country where . . . safety or survival are threatened.”¹²³ Although the UNHCR’s mandate ends only with the attainment of a “durable solution,” the UNHCR does not have the power to compel a state to grant asylum.¹²⁴ Likewise, an individual does not have a right to be granted asylum.¹²⁵

116. See generally Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287 (1995) (describing how the UDHR has provided the basis for much national and international law).

117. See generally *id.* (discussing the influential weight of the UDHR in both domestic and international laws).

118. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 14, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

119. *Id.*

120. See *id.* (declaring that the right to asylum without persecution does not extend to nonpolitical crimes).

121. *About Us*, UN HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/pages/49c3646c2.html> (last visited Sept. 30, 2014) [<http://perma.cc/J7RN-7ETT>] (archived Sept. 11, 2014).

122. DEP’T OF INT’L PROT., *supra* note 109, at 7.

123. *Id.*

124. *Id.*; Riikka E. Morrill, Note, *The Plight of the Persecuted: The European Union and United States Asylum Law*, 33 SUFFOLK TRANSNAT’L L. REV. 87, 88 (2010) (“The UNHCR[] . . . rel[ies] on governments to work with the UNHCR to reduce situations resulting in forced displacement of civilians and to collaborate with the UNHCR to resettle refugees.”) (emphasis added) (footnote omitted).

125. See Ray *supra* note 65, at 1221 (“Refugee law creates no right to be granted asylum.”) (footnote omitted).

In 1951, shortly after passage of the UDHR, the United Nations approved the Refugee Convention.¹²⁶ The Refugee Convention is “the centrepiece of international refugee protection today.”¹²⁷ It defines a refugee as

any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country[.]¹²⁸

The rights established in the Refugee Convention do not apply to individuals who have “committed a serious non-political crime outside the country of refuge prior to [their] admission to that country as a refugee,” or to individuals who are “guilty of acts contrary to the purposes and principles of the United Nations.”¹²⁹ Therefore, the Refugee Convention tracks the UDHR’s distinction between fear of persecution for political crimes and fear of prosecution for nonpolitical ones.¹³⁰ The Protocol Relating to the Status of Refugees (Refugee Protocol) amended the Refugee Convention in 1967, essentially removing the temporal and geographic limits of the Refugee Convention and affirming its underlying principles.¹³¹

As mentioned in this subpart’s introduction, there is no uniform manner of parsing the difference between a political crime and a nonpolitical crime in international law. Sovereign states are left to make this distinction as part of their asylum determinations.¹³² Because there is still no precise definition of a “political offense,” one could argue that the current system of international asylum law is implicitly designed to encourage normative political judgments and that states should embrace asylum as a political tool.¹³³

126. *The 1951 Refugee Convention*, UN HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/pages/49da0e466.html> (last visited Sept. 30, 2014) [<http://perma.cc/NG5U-GXQV>] (archived Sept. 30, 2014).

127. UNHCR Introductory Note, *supra* note 21.

128. *Id.* art. I(A)(2).

129. *Id.* art. I(F)(b)

130. Compare *id.* art. I(F)(b), with Universal Declaration of Human Rights, *supra* note 118, art. 14(2) (indicating that neither convention provides asylum for nonpolitical crimes).

131. UNHCR Introductory Note, *supra* note 21.

132. See DEPT OF INT’L PROT., *supra* note 109, at 62 (noting that individual governments “determine whether someone falls within the applicable refugee definition within its jurisdiction”).

133. See PRICE, *supra* note 23, at 57–58 (arguing for a political conception of asylum rather than a humanitarian one in part because asylum has historically included clearly political considerations).

B. Domestic Laws and Whistleblower Protections

There are two particularly relevant areas of domestic law behind political asylum determinations regarding information disclosures: (1) general refugee law and (2) whistleblower protections.¹³⁴ While seemingly neutral refugee statutes can be manipulated by a sovereign state to avoid extradition in certain circumstances, enhanced whistleblower protections built into the domestic code provide more direct evidence of state policy.¹³⁵

Subpart B briefly describes the domestic asylum laws and whistleblower protections of the United States, Russia, and Iceland. Snowden stated that his decision to flee to foreign jurisdictions before publically revealing classified intelligence information was motivated in part by the expectation that he would not be protected by the existing U.S. whistleblower regime.¹³⁶ Russia's domestic asylum law is especially germane because its grant of temporary asylum and subsequent issuance of a residence permit are Snowden's only semblance of resolution. With almost nonexistent whistleblower protections, Russia seems to have leveraged its domestic asylum law to grant relief for at least partially political reasons. Iceland is widely regarded as possessing a very strong state policy in favor of whistleblowers and was also one of Snowden's initial preferred destinations.¹³⁷

1. The United States¹³⁸

The United States is a signatory to the Refugee Protocol¹³⁹ and expressed desire to comport with existing international asylum law

134. See generally *infra* Part III.B.1–3 (comparing refugee and whistleblower laws in the United States, Russia, and Iceland).

135. See generally *id.*

136. See Jacob Siegel, *Edward Snowden: Not All Spying is Bad*, DAILY BEAST (Jan. 24, 2014), <http://www.thedailybeast.com/articles/2014/01/24/edward-snowden-not-all-spying-is-bad.html> [<http://perma.cc/6ZBW-LPNL>] (archived Sept. 13, 2014) (claiming Snowden believed that he would not be protected under current whistleblower protections and that whistleblower protections were inadequate in the United States).

137. See Greenwald, MacAskill & Poitras, *supra* note 7 (claiming that Snowden viewed Iceland as “his best hope as the possibility of asylum” and noting that Iceland has a “reputation of a champion of internet freedom”).

138. The United States is of particular relevance both as a global leader and as Snowden's country of origin.

139. UNITED NATIONS HIGH COMM'R FOR REFUGEES, STATE PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL 4, <http://www.unhcr.org/3b73b0d63.html> (last visited Sept. 29, 2014) [<http://perma.cc/A7J6-QZYE>] (archived Sept. 29, 2014). Though the United States has not signed the Refugee Convention, it is nonetheless within the mainstream of international asylum law because the Refugee Protocol reinforced the Convention's underlying principles. See UNHCR Introductory Note, *supra* note 21.

by directly incorporating the Protocol's definition of refugee in the Refugee Act of 1980.¹⁴⁰ Prior to passage of the Refugee Act of 1980, the refugee law of the United States was essentially a series of disconnected fixes implemented through immigration policy.¹⁴¹ However, an intention to adopt the international asylum regime is empty if the administration of domestic law diverges from that intent.¹⁴² Between 2008 and 2011, U.S. immigration courts granted 31.8 percent of those applications that were not abandoned or withdrawn.¹⁴³ Regardless of success rate, the Refugee Act codifies the uncertain standard of accepting individuals with a well-grounded fear of persecution for political crimes.¹⁴⁴

Various levels of government in the United States have passed a large number of laws establishing whistleblower protections.¹⁴⁵ In addition to measures enacted by individual states, the federal government has passed almost sixty statutes with some whistleblower protections.¹⁴⁶ These statutes span the public and private sector, reach many different disciplines, and establish a potentially unclear framework for whistleblowers themselves.¹⁴⁷ While a comprehensive discussion of these protections is beyond the

140. See Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 77–78 (1981–82) (stating that, “by adopting the Refugee Act of 1980,” the United States adopted “the definition of ‘refugee’ [as] contained in the Protocol”).

141. See *id.* at 12–13 (characterizing the state of refugee law in the United States after World War II until serious reform efforts began in the 1970s).

142. See *id.* at 78 (providing that it is “incumbent on the executive branch to make good our intention to comply with international standards”).

143. The Statistical Year Book for 2011 includes a yearly breakdown of asylum completions by disposition from 2007 through 2011. I first added the total number of asylum grants for the years 2008 through 2011 (Figure 1, totaling 42,602 grants). I then added the total number of asylum cases, less those that were abandoned or withdrawn (Figure 2, totaling 133,764 cases). Finally, I divided Figure 1 by Figure 2 (42,602 grants/133,764 cases) to arrive at 31.8 percent. See U.S. DEPT. OF JUST., EXEC. OFFICE FOR IMMIGR. REV., FY 2011 STATISTICAL YEAR BOOK K3 (2012), <http://www.justice.gov/eoir/statspub/fy11syb.pdf> [<http://perma.cc/6FY5-V6SA>] (archived Sept. 27, 2014).

144. See Refugee Act of 1980, Pub. L. No. 96-212, sec. 201(a)(42), 94 Stat. 102, 102 (1980) (amending the Immigration Nationality Act to add a definition of refugee that includes those “who ha[ve] a well-founded fear of persecution”). Because the U.S. standard mirrors the ambiguous language in international law, it is particularly useful to examine whether potential whistleblower protections in the United States reveal a public policy on political crimes.

145. See Dana L. Gold, *Introduction: Speaking Up for Justice, Suffering Injustice: Whistleblower Protection and the Need for Reform*, 11 SEATTLE J. SOC. JUST. 555, 560 (2012) (noting that whistleblowers in the United States are protected by “a patchwork of federal, state, and local laws with holes through which it is too easy to fall”).

146. See *id.* (“On the federal level alone, there are nearly sixty statutes that contain provisions intended to protect and provide redress for whistleblowers.”).

147. See *id.* (“This patchwork of protections makes whistleblower law an amalgamation of many legal disciplines, . . . a fascinating area for both practitioners and scholars, but a confusing and vulnerable landscape for whistleblowers.”).

scope of this Note, some commentators have noted that, despite the breadth of coverage, the tendency of these protections to focus on anti-retaliation measures has historically left whistleblowers substantively unprotected.¹⁴⁸

At least regarding private employees in the financial sector, the United States has recently demonstrated enhanced interest in protecting whistleblowers. In particular, the Sarbanes-Oxley Act of 2002 (SOX)¹⁴⁹ and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010¹⁵⁰ contain significantly greater whistleblower incentives and protections than simple anti-retaliation measures. Though it has not been as successful as anticipated in curbing corporate abuses, SOX signals support for whistleblowers by providing procedural protections, covering a broad range of disclosures and employees, and supplying a reduced burden of proof for retaliation claims.¹⁵¹ In addition to further broadening the protections established by SOX, Dodd-Frank strongly incentivizes disclosures of wrongful activity by allowing the whistleblower to keep 10 to 30 percent of the monetary penalty assessed to the wrongdoer for the particular action, pending certain procedures and limitations.¹⁵²

While SOX and Dodd-Frank contain clear policy choices to support and incentivize private-sector corporate whistleblowers, the United States has also updated protections for public-sector employees.¹⁵³ Passed in 1989, the Whistleblower Protection Act (WPA) is the primary statute covering federal workers.¹⁵⁴ Congress has recently updated what was widely considered to be an insufficient

148. See Terry Morehead Dworkin & A.J. Brown, *The Money or the Media? Lessons From Contrasting Developments in US and Australian Whistleblowing Laws*, 11 SEATTLE J. SOC. JUST. 653, 657–58 (2012) (arguing that “this public sector anti-retaliation model, [in addition to the private-sector model], has generally proved unsuccessful in spurring whistleblowing or protecting whistleblowers”).

149. See Richard Moberly, *Sarbanes-Oxley’s Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 5–21 (2012) (describing the additional protections provided by Sarbanes-Oxley and finding that “[i]n many ways, Sarbanes-Oxley represents a great leap forward for whistleblowers in the United States”).

150. See generally Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2010) [hereinafter Dodd-Frank] (providing additional protections and incentives to whistleblowers).

151. See Moberly, *supra* note 149, at 7–9 (noting that Sarbanes-Oxley “include[s] a broad range of whistleblower disclosures” and provides “burdens of proof and procedural protections” that favor the whistleblower).

152. See Dodd-Frank, 12 U.S.C. § 5301 at sec. 748(b)(1)(A)–(B) (providing that whistleblowers are entitled to 10 to 30 percent of the collected monetary sanctions imposed as a result of the whistleblower’s action).

153. See JON O. SHIMABUKURO & L. PAIGE WHITAKER, CONG. RESEARCH SERV., R42727, *WHISTLEBLOWER PROTECTIONS UNDER FEDERAL LAW: AN OVERVIEW 1* (2012), available at <https://www.fas.org/sgp/crs/misc/R42727.pdf> (last visited Sept. 27, 2014) [<http://perma.cc/R2TK-98WE>] (archived Sept. 27, 2014) (describing how Congress has enhanced whistleblower protections for Federal employees).

154. See *id.* (noting that the WPA, enacted in 1989, covers federal employees).

protection scheme¹⁵⁵ with the passage of the Whistleblower Protection Enhancement Act of 2012 (WPEA).¹⁵⁶ To qualify for protection under the WPA, a circumstance must contain (1) a personnel action, (2) a protected disclosure, and (3) a covered employee.¹⁵⁷ The WPEA broadened the protected disclosure prong and strengthened the procedures available during and after a disclosure, among other things.¹⁵⁸

However, the statutory definition of a covered employee under the WPA excludes many national security agencies,¹⁵⁹ and the President may remove whistleblower rights at his discretion for employees of any agency “the principal function of which is the conduct of foreign intelligence or counterintelligence activities.”¹⁶⁰ The WPA explicitly excludes employees of the NSA, Federal Bureau of Investigation, Central Intelligence Agency, Defense Intelligence Agency, National Reconnaissance Office, National Geospatial Intelligence Agency, and Office of the Director of National Intelligence.¹⁶¹ Regarding the president’s discretionary exclusion power, the WPEA did enhance whistleblower protections by requiring “the determination be made prior to a personnel action.”¹⁶²

While the WPA does not generally protect members of the intelligence community, there is a federal statute that may protect the disclosure of classified information under certain circumstances.¹⁶³ The Intelligence Community Whistleblower Protection Act of 1998 (ICWPA) provides some procedures for intelligence agency employees to divulge confidential information of “urgent concern” to the Inspector General of their respective executive agencies or a member of a congressional intelligence

155. See Dworkin & Brown, *supra* note 148, at 656–57 (indicating that “the approach has been spectacularly unsuccessful in protecting whistleblowers”).

156. See *id.* at 658 (asserting that the passage of the WPEA may lead to greater success in the future).

157. See SHIMABUKURO & WHITAKER, *supra* note 153, at 15 (“In order to trigger the protections of the WPA, a case must contain the following elements: a ‘personnel action’ that was taken because of a ‘protected disclosure’ made by a ‘covered employee.’”).

158. See *Whistleblower Protection Enhancement Act Summary of Reforms*, PROJECT ON GOV’T OVERSIGHT (Sept. 17, 2012), <http://www.pogo.org/our-work/resource-pages/2012/20120917-whistleblower-protection-enhancement-act.html> [<http://perma.cc/CG9C-RLMC>] (archived Sept. 14, 2014) (listing the aspects of the Whistleblower Protection Enhancement Act that expand protective coverage and support fair procedures).

159. See, e.g., 5 U.S.C. § 2302(a)(2)(C)(ii)(I) (2013) (providing an exception to coverage for select intelligence agencies).

160. *Id.* § 2302(a)(2)(C)(ii)(II).

161. *Id.* § 2302(a)(2)(C)(ii)(I).

162. *Id.* § 2302(a)(2)(C)(ii)(II).

163. See *id.* § 2302(a)(2)(C)(ii)(I)–(II) (providing exceptions to coverage for certain intelligence agencies).

committee.¹⁶⁴ However, the ICWPA mandates a narrow reporting procedure and does not even contain a retaliation provision.¹⁶⁵ These limitations indicate the ICWPA may not actually result in meaningful oversight.¹⁶⁶ Some intelligence agency employees have argued for an overhaul of the intelligence community whistleblower scheme.¹⁶⁷

In an apparent effort to address some of the gaps in protection for members of the intelligence community remaining after the WPEA and ICWPA, President Obama signed Presidential Policy Directive 19 on October 10, 2012.¹⁶⁸ Among other things, this executive order contains an anti-retaliation provision for employees of the agencies explicitly excluded from the WPA.¹⁶⁹ However, the order also contains a general provision that it does not create any enforceable substantive or procedural right.¹⁷⁰ The purely executive nature of such orders is perhaps a less persuasive indicator of state interest than statutes that undergo constitutional bicameralism and presentment requirements.¹⁷¹

There have been concrete steps in the United States to codify the types of protections established in President Obama's executive order. On November 5, 2013, by a vote of thirteen to two, the Senate Intelligence Committee recommended passage of a 2014 intelligence appropriations bill that would strengthen whistleblower protections for employees of intelligence agencies.¹⁷² On July 7, 2014, President

164. See Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, sec. 702(a)(5)(A), 112 Stat. 2396, (1998) ("An employee of the Agency . . . may report such complaint or information to the Inspector General.").

165. See *id.*, sec. 702 (outlining the reporting procedure); Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531, 1545 (2008) (arguing that the procedure "leaves countless federal employees unprotected").

166. See Vladeck, *supra* note 165, at 1545-46 (casting doubt on the effectiveness of disclosure under the WPA or ICWPA).

167. See *id.* at 1545 (noting that intelligence agency employees have continued to push for further whistleblower protection).

168. See Presidential Policy Directive/PPD-19 at 1-3 (2012), available at <http://www.fas.org/irp/offdocs/ppd/ppd-19.pdf> [<http://perma.cc/D2XT-5FK9>] (archived Sept. 14, 2014) (prohibiting retaliation against whistleblowers).

169. See *id.* at 2 (providing protection from retaliation for employees of intelligence agencies).

170. See *id.* at 8 (indicating that "[t]his directive is not intended to, and does not, create any right or benefit, substantive or procedural").

171. See John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 345 (2010) ("[T]he executive order inherently carries the force of law with no requirement for congressional approval, which renders it available for abuse.").

172. See DIANNE FEINSTEIN, INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2014, S. REP. NO. 113-120, tit. VI § 601, tit. VII, at Committee Action (2013), available at http://www.fas.org/irp/congress/2013_rpt/ssci-2014.html [<http://perma.cc/7WZ8-SGF6>] (archived Sept. 14, 2014) (documenting the Senate Intelligence Committee's vote to recommend the creation of "a new Section 2303A of Title 5 of the United States Code" that would protect intelligence employees from retaliation for whistleblowing).

Obama signed the Intelligence Authorization Act for Fiscal Year 2014, which includes provisions barring retaliation against employees within the intelligence community who make protected disclosures, as well as some procedural safeguards.¹⁷³ However, members of the Federal Bureau of Investigation are explicitly excluded from coverage under the Act.¹⁷⁴ The Act further does not apply to terminated employees in certain circumstances, including where an agency head notifies congressional intelligence committees of the firing within thirty days.¹⁷⁵ While passage of this Act signals strong state interest in whistleblower protections for members of the intelligence community, conclusions regarding the efficacy of the Act should be withheld until there is more time to observe its implementation.¹⁷⁶

2. Russia

On February 2, 1993, the Russian Federation signed both the Refugee Convention and the Refugee Protocol, bringing the country into accord with modern international asylum law.¹⁷⁷ This includes the international definition of refugee, with its unclear distinctions between persecution and prosecution.¹⁷⁸ Shortly after ratifying the Refugee Convention, the Russian Federation addressed asylum through both domestic statutes and its constitution.¹⁷⁹

Adopted on December 12, 1993, two articles of the Russian Constitution of 1993 (Russian Constitution) explicitly reference asylum, while two more bear directly on the issue.¹⁸⁰ Article 63 of the Russian Constitution guarantees a right of political asylum to foreigners “according to the universally recognized norms of international law,” as well as those who have been “persecuted for political convictions.”¹⁸¹ This language is ostensibly deferential to

173. See Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113-126, sec. 601, § 3234(b), 128 Stat. 1390, 1415 (2014) (“Any employee of an agency who has authority to take . . . any personnel action . . . shall not . . . take . . . a personnel action with respect to any employee of a covered intelligence community element as a reprisal for a lawful disclosure of information . . .”); *id.* sec. 602, § 3341(j)(4)–(6), at 1418–19 (describing required agency adjudication procedures and stipulating that judicial review is not available).

174. *Id.* at sec. 604, § 3234(a)(2), at 1421.

175. See *id.* at sec. 604, § 3234(d)(1)–(2), at 1421–22 (detailing how the Act does not apply to certain terminations).

176. See generally *id.*

177. UNHCR, *supra* note 139, at 4.

178. See Refugee Convention, *supra* note 110, art. I (defining refugee according to international norms).

179. See KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 63 (Russ.) (stating that “[t]he Russian Federation shall grant political asylum to foreign nationals and stateless persons according to the universally recognized norms of international law”).

180. See generally *id.* arts. 15, 62, 63, 89.

181. *Id.* art. 63(2).

international asylum law, both through general reference to norm compliance and by specifically incorporating the internationally recognized political persecution requirement.¹⁸² However, the Russian President has apparent superseding authority over Article 63's directives. Article 89 states that the president "shall decide on issues of citizenship of the Russian Federation and of granting political asylum."¹⁸³ It is not difficult to imagine such substantial executive authority being utilized outside of international norms where the issue is of particular significance to the country as a whole or to the president individually.

Despite excluding the term "asylum" from the text, two further Articles are particularly relevant to Russia's domestic asylum law. Article 62 extends to "stateless persons" rights and obligations equivalent to a Russian citizen, except as contravened by federal law or international treaty.¹⁸⁴ The terminology of Article 62's stateless persons indicates an intention to separate the realms of asylum law for displaced migrants and those seeking political asylum.¹⁸⁵ However, there will always be significant overlap between those with traditional migratory claims and those seeking political asylum.¹⁸⁶ Political persecution is often a driving force behind displacement. Article 15 states that the rules of an international agreement will predominate in any conflict with domestic Russian law.¹⁸⁷ Therefore, because Russia is a signatory to the Refugee Convention, the Convention should prevail in any dispute with domestic asylum law.¹⁸⁸

Domestic Russian asylum law largely reflects the ostensible acceptance of international law in the Russian Constitution and is divided into three categories: political asylum, refugee status, and temporary asylum.¹⁸⁹ As established in the Russian Constitution, the

182. See Refugee Convention, *supra* note 110, art. I.

183. KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 89(a) (Russ.).

184. *Id.* art. 62(3).

185. See *id.* 62(3), 63(2) (using different language to describe displaced migrants and political asylum).

186. Thomas K. Bauer, John P. Haisken-DeNew & Christoph M. Schmidt, *International Labour Migration, Economic Growth and Labour Markets: The Current State of Affairs*, in THE NEW DEMOGRAPHIC REGIME: POPULATION CHALLENGES AND POLICY RESPONSES 111, 114–15 (U.N. Econ. Comm'n for Eur. & U.N. Population Fund eds.), U.N. Sales No. E.05.II.E.10 (2005) (explaining that "it may be unclear from the viewpoint of the receiving [country] whether to classify an asylum seeker or refugee as a humanitarian or economic migrant" because the decision to migrate is based on numerous factors).

187. KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 15(4) (Russ.).

188. *Id.*; UNHCR, *supra* note 139, at 4.

189. See Vladimir Mukomel, *Asylum: The Russian Federation*, CARIM-EAST (2011), http://www.carim-east.eu/media/sociopol_module/RF_Asymlum_EN_Mukomel.pdf [<http://perma.cc/YV5R-64FR>] (archived Sept. 14, 2014) (noting that Russian law grants

grant of political asylum is within the discretion of the president.¹⁹⁰ However, stateless persons rarely officially seek this designation; there were only fourteen applications for political asylum between 2008 and 2013.¹⁹¹

There is more statutory authority regarding refugee status and temporary asylum.¹⁹² The primary source for both categories of refugee law is the 1997 Law on Refugees, which amended an earlier version of the law passed in 1993.¹⁹³ Although the Law on Refugees essentially adopts the Refugee Convention definition of refugee in form,¹⁹⁴ it diverges from international law in ways that are detrimental to applicants.¹⁹⁵ For instance, there are broad grounds for substantive denial, and there is no explicit guarantee of “non-refoulement” in the Russian law.¹⁹⁶ Whatever protections are written into the law often suffer from arbitrary and harsh implementation by Russian officials.¹⁹⁷ The restrictive nature of the Law on Refugees is further revealed by the very low success rate of applicants.¹⁹⁸ Between 2008 and 2011, only 7.7 percent of applicants were recognized as refugees.¹⁹⁹

The Law on Refugees also provides procedures for granting temporary asylum, largely similar to the general refugee procedure but for a limited duration of one year.²⁰⁰ However, there is an additional provision allowing those stateless persons not qualifying as

asylum protection in three forms: refugee status, temporary asylum, and political asylum).

190. See KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 89(a) (Russ.) (“The President of the Russian Federation shall: . . . solve the issues of citizenship of the Russian Federation and of granting political asylum.”).

191. *Official Statistics: Asylum*, FMS OF RUSSIA (Apr. 4, 2013), http://translate.google.com/translate?sl=ru&tl=en&js=n&prev=_t&hl=en&ie=UTF-8&u=http%3A%2F%2Fwww.fms.gov.ru%2Fstatistics%2Fdata%2Fdetails%2F52086%2F [<http://perma.cc/TR96-T8KR>] (archived Sept. 14, 2014) (using an English language translation of a Russian government website).

192. See, e.g., *Federal'nyi Zakon RF o Bezhentsy* [Federal Law of the Russian Federation on Refugees], Feb. 19, 1993, No. 4258-1, available at <http://www.legislationline.org/documents/action/popup/id/3986> [<http://perma.cc/G62L-E7T2>] (archived Sept. 14, 2014).

193. See generally *id.* (incorporating subsequent amendments).

194. See *id.* pmbl., art. 1(1) (identifying and defining the various categories of refugees recognized under the Law of the Russian Federation on Refugees).

195. See Ahoura Afshar, *Refugees in Russia: The Law on Refugees and Its Implementation*, 18 J. REFUGEE STUD. 468, 471–72 (2005) (discussing differences between the 1997 Law on Refugees and the Refugee Convention).

196. See *id.* at 473 (“There is no clear and explicit provision that prohibits *refoulement* of refugees.”).

197. See *id.* at 478–79 (“[B]ecause access to the [application] procedure is not granted as a right . . . the authorities are not concerned with ensuring that the procedure is fair and accessible.”).

198. *Official Statistics: Asylum*, FMS OF RUSSIA, *supra* note 191.

199. *Id.*

200. See *Federal'nyi Zakon RF o Bezhentsy* [Federal Law of the Russian Federation on Refugees], Feb. 19, 1993, No. 4258-1, art. 12 (defining the process through which a refugee may be granted temporary refugee status).

a refugee under Russian law to nonetheless attain temporary asylum if Russia chooses not to deport for “humane motives.”²⁰¹ The temporary asylum system is much more accommodating, granting 56 percent of applications from 2008 to 2011.²⁰²

Russia does not exhibit a state interest in transparency through its domestic law, as its whistleblower protections are widely regarded as weak or nonexistent. Russia fares very poorly in Transparency International’s Corruption Perception Index (CPI), a yearly measure of perceived public sector corruption.²⁰³ The CPI indicates that Russia has a serious corruption problem and ranked the country 127th out of 177 countries and territories in 2013.²⁰⁴ That there are no specific whistleblower protections in Russian law is directly tied to the widespread corruption.²⁰⁵ In April 2013, Russian President Vladimir Putin signed a decree to provide government aid to those who expose corruption, but only if the whistleblower was persecuted or pressured or has a lawsuit filed against them.²⁰⁶ However, Russia would need to undertake a considerable overhaul of its anticorruption laws to provide any type of meaningful protection for whistleblowers.²⁰⁷

There is pressure on Russia for significant reforms in order to convince companies to bring business within its borders and grow the economy.²⁰⁸ These economic pressures could reasonably lead to illustrations of Russian state interest in curbing the appearance of corruption though legislation and further presidential decrees. But disclosing corruption for economic benefit is altogether separate from

201. See *id.* art. 12(2)(2) (indicating that Russia may grant temporary refugee status to those who “have no grounds for the recognition as refugees due to the circumstances, provided for by the Federal Law, but cannot be deported beyond the territory of the Russian Federation from humane motives”).

202. *Official Statistics: Asylum*, FMS OF RUSSIA, *supra* note 191.

203. See *Corruption Perceptions Index* (2013), TRANSPARENCY INT’L, <http://www.transparency.org/research/cpi/> (last visited Sept. 30, 2014) [<http://perma.cc/P255-RCQ9>] (archived Sept. 14, 2014) (showing Russia’s Corruption Perceptions Index to be 28, with a score of 0 being the most corrupt and a score of 100 being least corrupt).

204. See *id.*

205. See OECD, RUSSIA MODERNISING THE ECONOMY, BETTER POLICIES SER. 25 (Apr. 2013), available at <http://www.oecd.org/russia/Russia-Modernising-the-Economy-EN.pdf> (last visited Sept. 28, 2014) [<http://perma.cc/AK2Z-FPHT>] (archived Sept. 28, 2014) (“There is no specific legal protection for whistleblowers besides the general rules in the Federal Law on Counteracting Corruption.”).

206. See *Government to Protect Whistleblowers*, RUSS. LEGAL INFO. AGENCY (RAPSI) (Feb. 4, 2013, 4:45 PM), http://rapsinews.com/anticorruption_news/20130402/266899792.html [<http://perma.cc/9UEE-AVEL>] (archived Sept. 14, 2014).

207. See OECD, *supra* note 205, at 23 (suggesting that “[a] comprehensive approach is . . . needed to reduce overall levels of corruption in” the fields of regulation and law enforcement).

208. See *generally id.* at 10–12 (highlighting Russia’s corruption as a serious burden on business growth and recommending changes to Russia).

disclosing information to combat wrongful government conduct.²⁰⁹ There does not appear to be momentum for extending protections to whistleblowers engaging in the latter.²¹⁰

3. Iceland

In the first article to reveal his identity as the source of the classified intelligence information, Snowden indicated that Iceland was his best chance for asylum.²¹¹ Snowden's belief was apparently derived, at least in part, from Iceland's reputation as a strong defender of Internet freedom.²¹² However, the perceived policy alignment between Snowden and Iceland regarding open information did not yield Snowden a favorable result.²¹³ From the outset, Iceland's Ministry of Interior sidestepped the substance of the issue.²¹⁴ The Ministry's chief spokesman insisted that any asylum request be initiated from within the country.²¹⁵ Later, the Icelandic Parliament would decline to grant Snowden the citizenship that would ensure his secure settlement.²¹⁶

Iceland is a signatory to both the Refugee Convention and the Refugee Protocol.²¹⁷ The Act on Foreigners No. 96/2002, which "appl[ies] to the right of foreigners to enter Iceland," incorporates the

209. Cf. Yulia Krylova, *The Nature of Corruption and Multilateral System of Anti-Corruption Regulation in the Transition Economy of Russia*, 65 EUR. J. SCI. RES., 79, 79–92 (2011) (noting that in the United States, economic incentives for whistleblowing have been instrumental in detecting misconduct, both in the public and private sector).

210. See, e.g., *id.* at 88–90 (positing that even though Russia adopted new anticorruption legislation in 2008, anticorruption efforts in Russia continue to fail due to insufficient protection for whistleblowers and the absence of "special independent anti-corruption agenc[ies] with authority to investigate and prosecute corruption practices").

211. See Greenwald, MacAskill & Poitras, *supra* note 7 (reporting that Snowden considers Iceland "his best hope as the possibility of asylum").

212. See *id.* (attributing his hopes for asylum in Iceland to "its reputation of [being] a champion of internet freedom").

213. See generally Kim Hjelmgaard, *Edward Snowden Says He Seeks Safe Harbor in Iceland*, USA TODAY (June 10, 2013), <http://www.usatoday.com/story/news/world/2013/06/10/iceland-snowden/2407737/> [<http://perma.cc/48Z6-RZJQ>] (archived Sept. 14, 2014) (explaining that asylum in Iceland was hindered by Snowden's inability to travel there without the risk of being extradited).

214. See *id.* (identifying Snowden's absence as the threshold issue).

215. See *id.* ("The main stipulation for seeking asylum in Iceland would be that the person must be in Iceland to start the process.")

216. See Robert Robertsson, *Iceland Parliament Declines Snowden's Citizenship Bid*, REUTERS (July 5, 2013, 3:14 PM), <http://www.reuters.com/article/2013/07/05/us-usa-security-snowden-iceland-idUSBRE9640PS20130705> [<http://perma.cc/B9V6-T6TQ>] (archived Sept. 14, 2014) (suggesting that Iceland's refusal to extend citizenship to Snowden was because of its new conservative government).

217. UNHCR, *supra* note 139, at 3.

Refugee Convention's standard definition of refugee.²¹⁸ Additionally, Article 44 extends the refugee designation to foreigners who could experience capital punishment, torture, or other inhumane treatment upon return to their home country.²¹⁹ Combined with Iceland's reputation as an informational freedom advocate, this relatively broad refugee definition suggests that Iceland should be among the more generous nations in granting asylum applications; however, recent statistics do not support this conclusion.²²⁰

Even domestic law that evinces a clear state interest in openness is ultimately meaningless to the individual unless actual procedures implement the policy.²²¹ Iceland granted only 6.5 percent of its asylum applications through roughly ten months of 2013.²²² There was a very small sample size of 137 applications for this time period, but the result still registers beneath Russia's 7.7 percent refugee approval.²²³

Although clearly reluctant to protect foreigners through the asylum system, Iceland's recent history of statutory whistleblower protections suggests a strong domestic interest in transparency.²²⁴ On June 16, 2010, the parliament unanimously approved a proposal for the Icelandic Modern Media Initiative (IMMI), a wide-ranging set

218. See Act on Foreigners No. 96/2002, 2003, art. 1, 44 (Ice.), available at <http://eng.innanrikisraduneyti.is/laws-and-regulations/nr/105> [<http://perma.cc/F2EN-KG2G>] (archived Sept. 14, 2014) (citing Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267; Convention relating to the Status of Refugees, art. 1(A), July 28, 1951, 189 U.N.T.S. 137) (comparing the definition provided therein with the definition proffered in the Refugee's Convention).

219. See *id.* arts. 44, 44a (expanding the definition of refugee beyond that which was proffered in the Refugee's Convention, thereby encompassing a wider range of foreigners).

220. See *Vast Majority of Asylum Applications Rejected in Iceland*, ICE. REV. (Oct. 23, 2013, 4:11 PM), <http://icelandreview.com/news/2013/10/23/vast-majority-asylum-applications-rejected-iceland> [<http://perma.cc/TBG6-2L3V>] (archived Sept. 14, 2014) (reporting that, as of October 2013, 128 out of 137 applications for asylum in Iceland had been rejected that year).

221. See generally *id.* (illustrating the disparity between Iceland's reputation as a political safe haven and the surprisingly low percentage of applications for asylum the country grants).

222. See *id.* (reporting that, as of October 2013, only "6.5 percent of applications for asylum in Iceland have been accepted").

223. Compare *id.* (noting that Iceland only received 137 applications for asylum), with Max Fisher, *Russian Law Leaves Snowden Few Paths to Permanent Shelter*, WASH. POST (Aug. 1, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/08/01/russian-asylum-law-leaves-snowden-few-paths-to-permanent-shelter/> [<http://perma.cc/AP9C-SVFN>] (archived Sept. 14, 2014) ("[B]etween January 2007 and April 2012, 12,500 people applied for refugee status but only 961 got it – a success rate of just 7 percent.").

224. See generally Afua Hirsch, *Iceland Aims to Become a Legal Safe Haven for Journalists*, GUARDIAN (July 11, 2010), <http://www.theguardian.com/media/2010/jul/12/iceland-legal-haven-journalists-immi> [<http://perma.cc/HEC5-2YHF>] (archived Sept. 14, 2014) (discussing the Icelandic Modern Media Initiative's push to turn Iceland into "the equivalent of an offshore tax haven" for media freedom).

of journalist and whistleblower protections to be implemented in subsequent years.²²⁵ The IMMI aims to expand the right to request information from the government, enhance whistleblower protections, and cultivate a friendly regulatory environment for media and their sources.²²⁶ Despite Iceland exhibiting a particularly ambitious public policy favoring transparency, the extent to which it will apply this policy in asylum determinations, and the extent to which it will influence the international community, is yet to be determined.²²⁷

IV. REMEDIES FOR TENSION BETWEEN SOVEREIGNTY AND TRANSPARENCY

The technological progress of the early twenty-first century has enabled not only previously unimaginable intelligence-gathering capabilities but also the capacity to instantaneously alert countries throughout the world to the existence of such activities. This rapid advancement inevitably presents challenges for established systems of international and domestic law. Part IV suggests methods of coping with the issue of unauthorized intelligence disclosures and political asylum, and has three parts. Subpart A advocates for preventative measures that will lower the risk of unauthorized disclosures by removing the veil of secrecy around the information in question. Subpart B proposes that countries ground their asylum determinations in state interest as demonstrated through domestic whistleblower protections. Subpart C considers the Snowden affair in light of these proposals and concludes.

A. Preventative Measures

Maintaining secrecy in an interconnected world is a difficult task for all people, organizations, and nations. The Snowden disclosures illustrate that all countries, no matter their military might or influence on world events, are susceptible to data breach.²²⁸ As states

225. See *id.* (reporting that Iceland is focused on “creating a . . . freedom of expression law [that] would protect journalists from . . . legal threats”); Archie Bland, *Iceland Rewrites Law to Create Haven for Investigative Reporting*, INDEP., June 17, 2010, <http://www.independent.co.uk/news/world/europe/iceland-rewrites-law-to-create-haven-for-investigative-reporting-2002591.html> [<http://perma.cc/PU8T-NABZ>] (archived Oct. 15, 2014) (reporting the date of IMMI passage).

226. See Hirsch, *supra* note 224 (listing the seven essential aspects of IMMI’s “modern media’ plan”).

227. Cf. *id.* (noting that the IMMI plan faces several legal hurdles and indicating that “even if . . . [the plan] become[s] law, it remains to be seen whether the world’s major newspapers will rush to install their servers and investigative journalists in the country.”).

228. See, e.g., Angus West, *16 Disturbing Things Snowden Has Taught Us (So Far)*, GLOBAL POST (July 9, 2013), <http://www.globalpost.com/dispatch/news/politics/>

continue to use and store data for national security purposes, the growing connectivity of countries from technological advancements renders the protection of secrets increasingly difficult.²²⁹ The United States has a strong interest in the security that surveillance capabilities are meant to provide. However, national security may also benefit from reducing the need for such surveillance in the first place and increasing transparency of those capabilities that remain.²³⁰

1. Diplomatic Disarmament

Greater international cooperation generally decreases the need for intelligence gathering. Countries that work closely together on matters of mutual interest are less likely to threaten each other's power structures.²³¹ To do so would harm each country's cause. If the United States feels sufficiently less threatened, the type of extensive surveillance apparatus revealed in the wake of the Snowden disclosures would be less useful.²³² The problem of disclosing classified information is thus preempted, as the underlying activity does not occur.

However, this type of diplomatic disarmament faces certain obstacles beyond the basic notion that diplomacy suffers from obstinate or fundamentally hostile partners. First, the issue is complicated where there is not a formal state entity with which to cooperate. Non-state actors play a significant role in international affairs, and some may carry an informal power structure that makes it difficult to build the type of close relationship necessary to support this solution.²³³ Further, states must retain the level of sovereignty

130703/edward-snowden-leaks [http://perma.cc/XC2K-CZYS] (archived Oct. 1, 2014) (suggesting that because of Snowden's leaks, "[n]ew questions were raised as to whether the U.S. intelligence community can adequately stem the current leak and prevent future breaches from occurring" and detailing the data NSA collected on other countries).

229. See Greenwald, *supra* note 1 (explaining that the metadata collected by the NSA "enable[s] the government to know the identity of every person with whom an individual communicates electronically, how long they spoke, and their location at the time of the communication"); West, *supra* note 228 (detailing how the U.S. government, through the NSA, has collected data from several major American wireless carriers).

230. See *infra* Part IV.A.1–2 (illustrating how a transparency initiative could remove the advantages of cyber attacks).

231. See generally Kenneth W. Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, 2008 U. ILL. L. REV. 5, 6 (2008) ("Institutionalists have demonstrated that relatively modest actions—such as producing unbiased information, reducing the transactions costs of interactions, pooling resources, monitoring state behavior, and helping to mediate disputes—can help states achieve their goals by overcoming structural barriers to cooperation.").

232. See *supra* notes 4–6 and accompanying text (identifying articles that detail the U.S. surveillance apparatus).

233. See Abbott, *supra* note 231, at 24 ("[O]ne of the most significant trends in international governance is the growing role of NSAs in international institutions, especially within the United Nations system.") (footnote omitted).

necessary to provide for their national defense.²³⁴ Although there will be barriers to building trust, they are not insurmountable. States can devise strategies to take verifiable steps toward using intelligence information in a collaborative rather than adversarial manner.

2. Unilateral Transparency

Openness need not be achieved through a predetermined accord, skeptically monitoring the compliance of all countries involved. A state may unilaterally pursue a policy of transparency, which would have the same effect of preempting domestic disclosures. Although it may seem foolish to risk national defense in service of an ideological conceit, it is necessary to acknowledge the logistical realities of a large surveillance apparatus. At least two factors suggest that Snowden-like disclosures are increasingly likely to occur as surveillance technology continues to expand.²³⁵ If that is the case, it is wiser to control the dissemination of information rather than react to unexpected leaks.

First, the Snowden disclosures confirm the massive scope of the U.S. surveillance apparatus. While the technology is such that relatively few individuals can oversee a particular surveillance program without difficulty, the intelligence community as a whole employed around 200,000 people as of September 2009.²³⁶ Such a sprawling intelligence network provides more people the opportunity to see or access classified information. Of course, intelligence agencies thoroughly screen potential employees and conduct random security audits—particularly since the Snowden affair.²³⁷ But these procedures are imperfect, and the chance of an individual successfully evading them increases with a larger pool.²³⁸

234. See GLOBAL PRINCIPLES ON NATIONAL SECURITY AND THE RIGHT TO INFORMATION, pmb. (2013) [hereinafter *The Tshwane Principles*], <http://www.fas.org/sgp/library/tshwane.pdf> (last visited Sept. 30, 2014) [<http://perma.cc/R3YP-5CMH>] (archived Sept. 30, 2014) (“Recognizing that states can have a legitimate interest in withholding certain information, including on grounds of national security.”) (emphasis omitted).

235. See *supra* Part IV.A.2.

236. See Conference Call with Dennis C. Blair, Dir. of Nat'l Intelligence, 2009 National Intelligence Strategy (Sept. 15, 2009), available at <http://www.fas.org/irp/news/2009/09/dni091509-m.pdf> [<http://perma.cc/QY4Z-9G86>] (archived Sept. 27, 2014) (describing the NSA as a “200,000-person, \$75 billion national enterprise in intelligence”).

237. See Tabassum Zakaria, *Exclusive: Hundreds of U.S. Security Clearances Seen Falsified*, REUTERS (Sept. 25, 2013, 9:22 AM), <http://www.reuters.com/article/2013/09/25/us-usa-security-clearances-idUSBRE98004Z20130925> [<http://perma.cc/8V9Z-VXHQ>] (archived Sept. 14, 2014) (“The screening process for security clearances has come [sic] under heightened security this year since Snowden . . .”).

238. See *generally id.* (reporting that “[f]ederal prosecutors have documented at least 350 instances of faulty background investigations”).

Second, no single country has exclusive claim to advancing technologies. As surveillance capabilities advance, so do malicious hacking techniques.²³⁹ Such attacks could come from many different sources attempting to gain a strategic advantage, including individuals, non-state actors, and other countries.²⁴⁰ It is unclear whether surveillance technologies can evolve with sufficient defensive measures to guard against attacks. Most likely, the balance shifts as parties compete in a technological arms race for cyber supremacy. Such uncertainty is not a desirable national security posture. By controlling information dissemination through a transparency initiative, the United States would remove the potential advantage created by a successful cyber attack.

The Open Society Justice Initiative (OSJI) recently facilitated an effort to spur such transparency initiatives by providing suggested reforms to a government's power to rely on national security rationales when withholding information or punishing disclosures.²⁴¹ Issued on June 12, 2013, The Global Principles on National Security and the Right to Information (the Tshwane Principles) provides a well-researched template advocating that the right to information shall only be overcome by a national security interest in carefully prescribed circumstances.²⁴² The Tshwane Principles do not call for radical transparency, recognizing the need to keep certain types of information classified for national and economic security reasons.²⁴³ According to the OSJI's Briefing Paper on The Tshwane Principles, three different principles establish an anti-retaliation provision for whistleblowers and the media.²⁴⁴ However, the whistleblower must

239. See Ellen Nakashima, *Chinese Hackers Who Breached Google Gained Access to Sensitive Data, U.S. Officials Say*, WASH. POST (May 20, 2013), http://www.washingtonpost.com/world/national-security/chinese-hackers-who-breached-google-gained-access-to-sensitive-data-us-officials-say/2013/05/20/51330428-be34-11e2-89c9-3be8095fe767_story.html [<http://perma.cc/P96M-V578>] (archived Sept. 14, 2014) ("It stands to reason, [experts] said, that adversaries would be interested in finding vulnerabilities in the networks of the companies that authorize surveillance on behalf of the government.").

240. See, e.g., *id.* (discussing concerns about "Chinese cyberespionage" and noting the U.S. government's allegation that "[t]he Chinese . . . have stolen massive volumes of data from companies in sectors including defense, technology, aerospace, and oil and gas").

241. See generally The Tshwane Principles, *supra* note 234, pmb1. ("Desiring to provide practical guidance to governments . . . concerning some of the most challenging issues at the intersection of national security and the right to information . . .").

242. *Id.* princs. 2–5.

243. See *id.* pmb1. ("[S]triking the appropriate balance between the disclosure and withholding of information is vital to a democratic society and essential for its security, progress, development, and welfare, and the full enjoyment of human rights and fundamental freedoms.").

244. See *Understanding the Global Principles on National Security and the Right to Information* 5 (Open Soc'y Justice Initiative, Briefing Paper, June 12, 2013), available at <http://www.opensocietyfoundations.org/sites/default/files/briefing-understanding-tshwane-06122013%20%2Bsc.pdf> (last visited Sept. 28, 2014) [<http://perma.cc/WZK6->

act in good faith, follow applicable procedures, and only disclose an amount of information reasonably necessary to satisfy the public interest.²⁴⁵ While still advancing an interest in transparency, such affirmative requirements on the whistleblower ensure that individuals would not be free to commit nefarious deeds for personal gain and later obtain clemency on the technicality that there was some disclosure involved.²⁴⁶

B. *Damage Control*

Diplomatic disarmament and unilateral transparency do not address the legal issue of ambiguity in the international and domestic asylum law definitions of refugee. Even if preventative measures are largely successful in avoiding future disclosures, some remedial measures are necessary to address preexisting cases and instances that fall through the cracks.²⁴⁷ Snowden is one such example. Therefore, countries should embrace domestic political asylum determinations as an opportunity to exhibit consistency with the policies underlying domestic whistleblower statutes. Although some countries, such as Russia, lack any formal or functional protections from which to draw policy, the potential availability of redress in other jurisdictions should protect certain disclosures and deter unlawful behavior.

A single agreement—the Refugee Convention—rests at the heart of international asylum law.²⁴⁸ Through domestic asylum adjudications, sovereign states have the opportunity to interpret the Refugee Convention in such a way to guide the evolution of political asylum jurisprudence in a more stable and individualized way.²⁴⁹

Some scholars have demonstrated a functional approach to extending international asylum law jurisprudence across a range of

S39A] (archived Sept. 28, 2014) (identifying Principles 40, 43, and 46 as principles that set forth whistleblower protections).

245. *See id.* (indicating that the Principles require that whistleblowers be protected, “provided [they] acted in good faith[,] . . . followed applicable procedures[,]” and did not “disclose[] more information than was reasonably necessary to disclose the information of public interest”).

246. *See id.* (explaining that for any whistleblower who “discloses more information than was reasonably necessary . . . any punishment should be proportionate to the harm caused”).

247. *See, e.g.,* Erik Laykin, *The Business End of the ‘Snowden Lessons’*, LAW360 (July 19, 2013, 6:39 PM), <http://www.law360.com/articles/458412/the-business-end-of-the-snowden-lessons> [<http://perma.cc/DXP5-S4JA>] (archived Sept. 27, 2014) (discussing a variety of remedial measures that can be useful “when a disclosure or misuse of . . . information occurs”).

248. *See generally* UNHCR Introductory Note, *supra* note 21, (stating that the Convention, at the international level, provides the most comprehensive codification of refugee’s rights).

249. *See* DEP’T OF INT’L PROT., *supra* note 109, at 62 (indicating that individual states are ultimately responsible for implementing the Refugee Convention).

topics.²⁵⁰ For example, the United States has recently imbued domestic asylum determination with domestic policy by granting asylum to victims of discrimination for sexual orientation, gender violence, and concealment of religious belief.²⁵¹ Although these designations do not explicitly appear in the text of the Refugee Convention, U.S. courts have embraced the opportunity to implement international law in a way that compensates for its perceived deficiencies or ambiguities.²⁵² At least in the United States, there is a precedent for purposive interpretations of the Refugee Convention.²⁵³

Aside from any normative benefits to this purposive method of implementing the Refugee Convention, it is consistent with the historical role of asylum as an indicator of value judgments.²⁵⁴ Although the prominence of political considerations varied over time, they have factored into asylum determinations in some capacity throughout history.²⁵⁵ Because this approach encourages nations to embrace individual state policies, there will be uneven application of asylum law depending on the jurisdiction.²⁵⁶ However, this is already the case among signatories of the Refugee Convention. The United States, Russia, and Iceland all experience widely varying implementation of the Refugee Convention.²⁵⁷ This approach, therefore, benefits from consistency between reasoning and rulings and allows flexibility for individual states. The influence of

250. See, e.g., William Thomas Worster, *The Evolving Definition of the Refugee in Contemporary Asylum Law*, 30 BERKELEY J. INT'L L. 94, 104 (2012) (discussing the role international law concerning asylum plays in the changing definition of refugee).

251. See Leonard Birdsong, "Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution . . .": *The New Grounds for Grants of Asylum*, 32 NOVA L. REV. 357, 389 (2008) (suggesting that the expanded basis upon which asylum could be granted stemmed from the belief that even people fleeing persecution for things like sexual identity have basic human rights); Peter J. Smith, Note, *Suffering in Silence: Asylum Law and the Concealment of Political Opinion as a Form of Persecution*, 44 CONN. L. REV. 1021, 1031 (2012) ("[C]ourts generally have been unwilling to deny asylum applications when the applicant could avoid persecution by concealing his or her beliefs.").

252. See, e.g., Birdsong, *supra* note 251, at 375–78 (describing the development of U.S. case law that broadened the definition of "a particular social group" to provide asylum to persons persecuted for their sexual orientation); Smith, *supra* note 251, at 1031–33 (providing examples of cases where U.S. courts have gone above and beyond the requirements of international law in offering asylum to victims of religious persecution).

253. See Worster, *supra* note 250, at 132–33 (noting that the interpretation of the Convention has been "dynamic and human-oriented").

254. See PRICE, *supra* note 23, at 57 (describing how a focus on "political morality" in asylum determinations is consistent with asylum's historical origins).

255. See *generally id.* at 24–58 (discussing the influence of political considerations on asylum since the early Greek period).

256. See *generally id.* (arguing that historically, the political considerations attached to asylum determinations resulted in inconsistent applications of asylum law).

257. See *supra* Part III.B.1–3 (outlining the various Convention implementation strategies employed in the United States, Russia, and Iceland).

jurisdictions exhibiting strong policy for transparency should mitigate the uneven application of whistleblower policy in asylum over time.²⁵⁸

C. Application to Snowden

For Snowden's claim to succeed under the Refugee Convention, he must argue that his charged crimes—particularly the Espionage Act violations for the unauthorized and willful communication of classified intelligence information to unauthorized parties—are sufficiently political and that the fear he would suffer from persecution as a result of membership in a protected class upon return to the United States is well-founded.²⁵⁹ As established in the discussion on modern asylum law, these issues are not consistently resolved across jurisdictions.²⁶⁰

With the benefit of hindsight, it is possible that the United States could have preempted the disclosures in accord with the goals of this Note's proposals regarding preventative measures.²⁶¹ In this case, whether unilateral transparency could have avoided Snowden's disclosures depends on the nature of the information included in the initiative. Although one may assume that there existed a level of surveillance activity under which Snowden would not have revealed information, the precise tipping point is entirely speculative.²⁶² Further, diplomatic disarmament through enhanced cooperation between states on the basis of mutual interest would likely not have been sufficient in Snowden's case.²⁶³ Because the disclosed surveillance operations included so many different countries, it is unreasonable to assume that the United States would have been able to reach the required trust level with all of them to make diplomatic disarmament a viable approach.²⁶⁴

258. See Simon Wolfe et. al, *Whistleblower Protection Rules in G20 Countries: The Next Action Plan* 10–11 (Public Consultation Draft, June 2014) (indicating that most international organizations and governmental anticorruption agencies have incorporated whistleblowing into their anticorruption, pro-transparency programs because of its proven effectiveness in diminishing those issues).

259. See Refugee Convention, *supra* note 110, art. I(A)(2) (stipulating that “the term ‘refugee’ . . . appl[ies] to any person who . . . owing to well-founded fear of being persecuted” cannot return to “the country of his nationality”); Finn & Horwitz, *supra* note 10 (noting that “[f]ederal prosecutors have filed a criminal complaint against Edward Snowden” that charges Snowden “with theft, ‘unauthorized communication of national defense information’ and ‘willful communication of classified communications intelligence information to an unauthorized person’”).

260. See *supra* Part III.A (discussing the lack of a uniform definition of political persecution).

261. See *supra* Part IV.A.1–2 (advocating for measures to reduce the tension between sovereignty and transparency such as diplomatic disarmament and unilateral transparency).

262. See, e.g., Mark Felsenthal, *Obama: US Needs Checks on NSA Data Gathering But Can't Disarm*, REUTERS (Dec. 20, 2013, 5:45 PM), <http://www.reuters.com/article/2013/12/20/us-usa-surveillance-obama-idUSBRE9BJ19L20131220>

Assuming that preventative measures would not have preempted Snowden's disclosures, his likelihood of success under Part IV.B's method of grounding domestic asylum determinations in a state-specific purposive reading of the Refugee Convention would, by necessity, depend on the jurisdiction.²⁶⁵ The three countries analyzed in Part III.B would produce three different results depending on the strength of their domestic whistleblower protections. Russia, without any whistleblower statute on which to base a state interest, would firmly deny Snowden asylum.²⁶⁶ To the extent that the IMMI represents a very strong state interest in transparency, Iceland would likely grant asylum.²⁶⁷ Ignoring for a moment that the United States is Snowden's home country and the focus of the disclosures, the result is less clear. While there are numerous statutes establishing whistleblower protections in the United States, they have been historically ineffective.²⁶⁸ SOX, Dodd-Frank, and the Intelligence Authorization Act for Fiscal Year 2014 may indicate a grant of asylum, but the corporate nature or uncertain implementation of those statutes is a complicating factor.²⁶⁹

This Note's approach is ultimately prescriptive, not predictive. It offers a general framework for resolving ambiguities in international and domestic asylum law by allowing significant flexibility to the adjudicating country. Although there would be variance among individual cases, the general trend would reveal the domestic state's policy preference over time, providing states incentive to increase transparency by encouraging the disclosure of wrongful behavior.

*Jacob Stafford**

[<http://perma.cc/4LPW-62LQ>] (archived Sept. 14, 2014) (reporting that President Obama acknowledged that some checks on U.S. surveillance practices are necessary, but stated "we can't unilaterally disarm").

263. See *id.* (noting Obama's opinion that Snowden's actions caused "unnecessary damage" to U.S. diplomacy and made America vulnerable to other countries that are interested in disparaging U.S. policies).

264. See *supra* Part IV.A.1 (highlighting the inherent difficulties impeding the viability of diplomatic disarmament).

265. See DEP'T OF INT'L PROT., *supra* note 109, at 62 (indicating that individual states are ultimately responsible for determining who qualifies as a refugee within their borders).

266. See *supra* Part III.B.2 (highlighting the lack of specific whistleblower protections in Russian law).

267. See *supra* Part III.B.3 (suggesting that Iceland's recent history of statutory whistleblower protections indicates a strong interest in transparency).

268. See *supra* Part III.B.1 (explaining that the focus on whistleblower protections in the United States tends to be on anti-retaliation measures and not remedies).

269. See *supra* Part III.B.1 (acknowledging that SOX and Dodd-Frank support and incentivize private-sector corporate whistleblowers).

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