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## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY JEAN GALBRAITH

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## GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

*Tensions Rise Between the United States and North Korea*

doi:10.1017/ajil.2018.4

On November 29, 2017, North Korea test-fired a ballistic missile that North Korean officials claim can deliver a nuclear warhead to any city in the United States.<sup>1</sup> According to North Korea's leader Kim Jong Un, the missile launch "finally realised" the nation's ambition "of completing the state nuclear force, the cause of building a rocket power."<sup>2</sup> At the same time, U.S. officials have reiterated that "[t]he United States does not accept a nuclear North Korea."<sup>3</sup> As a result, North Korea's fast-expanding nuclear weapons program has exacerbated the already fraught relations between the two countries.

During the latter half of 2017, the two nations engaged in an escalating tit-for-tat exchange of military threats. On August 8, President Trump told reporters: "North Korea best not make any more threats to the United States. They will be met with fire and fury like the world has never seen."<sup>4</sup> The following day, North Korea revealed a strike plan to launch nuclear weapons at the American territory of Guam.<sup>5</sup> In September, during his address to the United Nations General Assembly, Trump said:

No one has shown more contempt for other nations and for the well-being of their own people than the depraved regime in North Korea. . . . [N]ow North Korea's reckless pursuit of nuclear weapons and ballistic missiles threatens the entire world with unthinkable loss of human life. . . . The United States has great strength and patience, but if it is forced to defend itself or its allies, we will have no choice but to totally destroy North Korea. Rocket Man is on a suicide mission for himself and for his regime. . . . It is time for North Korea to realize that the denuclearization is its only acceptable future.<sup>6</sup>

<sup>1</sup> See *Kim Jong Un Guides Test-fire of ICBM Hwasong-15*, KCNA.KP (EN.) (Nov. 29, 2017), at <https://kcna.watch.co/newstream/1511960471-567278968/kim-jong-un-guides-test-fire-of-icbm-hwasong-15>. The claim has been corroborated by independent experts. See Michael Elleman, *The New Hwasong-15 ICBM*, INT'L INST. STRATEGIC STUD. (Dec. 1, 2017), at <http://www.iiss.org/en/regions/north-s-korea/the-new-hwasong-15-icbm-243a> (calculating the missile "could deliver a moderately-sized nuclear weapon to any city on the US mainland").

<sup>2</sup> *North Korea Tests Its Most Powerful Missile Yet*, ECONOMIST (Nov. 29, 2017), at <https://www.economist.com/news/asia/21731796-rhetoric-accompanying-launch-was-relatively-muted-north-korea-tests-its-most-powerful>.

<sup>3</sup> U.S. Dep't of Def. Press Release, Jim Mattis, U.S. Sec'y of Def., Joint News Conference with Secretary Mattis and South Korean Defense Minister Song Young-moo in Seoul, South Korea (Oct. 27, 2017), at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1356752/joint-news-conference-with-secretary-mattis-and-south-korean-defense-minister-s> [<https://perma.cc/2C6G-K3GK>].

<sup>4</sup> Donald J. Trump, Remarks Prior to a Briefing on the Opioid Crisis and an Exchange with Reporters in Bedminster, New Jersey, 2017 DAILY COMP. PRES. DOC. 2 (Aug. 8, 2017).

<sup>5</sup> Julian Borger, *North Korea Details Guam Strike Plan and Calls Trump 'Bereft of Reason'*, GUARDIAN (Aug. 10, 2017), at <https://www.theguardian.com/world/2017/aug/10/north-korea-details-guam-strike-trump-load-of-nonsense>.

<sup>6</sup> Donald J. Trump, Remarks to the United Nations General Assembly in New York City, 2017 DAILY COMP. PRES. DOC. 3 (Sept. 19, 2017).

In response, North Korea's Foreign Minister called Trump's comments "a declaration of war" and claimed North Korea has the right to shoot down American military planes operating outside North Korea's airspace.<sup>7</sup>

As suggested by Trump's UN remarks above, the two nations' leaders have also exchanged a series of personal insults and rebukes. Following Trump's remarks at the United Nations, Kim Jong Un called Trump "a mentally deranged U.S. dotard."<sup>8</sup> Trump has repeatedly and disparagingly referred to Kim Jong Un as "Little Rocket Man."<sup>9</sup> Though the threats and insults have garnered substantial media coverage, little attention has been paid to whether they constitute an unlawful threat of force under Article 2(4) of the UN Charter.<sup>10</sup>

Several American allies have expressed concern at this brinkmanship. In August, New Zealand's Prime Minister Bill English called Trump's threats "not helpful when the situation is so tense."<sup>11</sup> The German Foreign Ministry tweeted "[s]abre-rattling won't help," and "call[ed] on all parties for moderation."<sup>12</sup> And in South Korea, newly-elected President Moon Jae-in said: "Only the Republic of Korea can make the decision for military action on the Korean Peninsula. Without the consent of the Republic of Korea, no country can determine to take military action."<sup>13</sup>

Though neither side has gone beyond rhetorical threats, the Trump administration has made clear that "all options are on the table" with respect to North Korea.<sup>14</sup> The possibility of the United States launching a "first strike" raises several contested legal issues, including (1) whether, given North Korea's rhetoric and nuclear capabilities, such a strike would be in self-defense under the familiar *Caroline* test; (2) relatedly, whether such a strike would put the United States in breach of Article 2(4) of the UN Charter; and (3) to what extent the president has constitutional authority to order the use of force against North Korea in the absence of congressional authorization.<sup>15</sup>

<sup>7</sup> Rick Gladstone & David E. Sanger, *North Korea Says It Has the Right to Shoot Down U.S. Warplanes*, N.Y. TIMES (Sept. 25, 2017), at <https://www.nytimes.com/2017/09/25/world/asia/trump-north-korea.html?ref=collection%2Fsectioncollection%2Fworld&r=0>.

<sup>8</sup> *Full Text of Kim Jong-un's Response to President Trump*, N.Y. TIMES (Sept. 22, 2017), at <https://www.nytimes.com/2017/09/22/world/asia/kim-jong-un-trump.html>.

<sup>9</sup> E.g., Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 1, 2017, 7:30 AM), at <https://twitter.com/realDonaldTrump/status/914497877543735296>.

<sup>10</sup> See UN Charter Art. 2, para. 4 (providing that members "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"); cf. Marco Roscini, *Threats of Armed Force and Contemporary International Law*, 54 NETH. INT'L L. REV. 229, 234–43 (2007) (analyzing what constitutes a threat of force for purposes of Article 2(4)).

<sup>11</sup> Nicholas Jones, *PM Bill English Says Trump Threats to North Korea 'Not Helpful'*, NZ HERALD (Aug. 9, 2017), at [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11900966](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11900966).

<sup>12</sup> German Foreign Office (@GermanyDiplo), TWITTER (Aug. 9, 2017, 8:29 AM), at [https://twitter.com/GermanyDiplo/status/895306146331860993?ref\\_src=twsrc%5Etfw&ref\\_url](https://twitter.com/GermanyDiplo/status/895306146331860993?ref_src=twsrc%5Etfw&ref_url).

<sup>13</sup> Moon Jae-in, Address by President Moon Jae-in on the 72nd Anniversary of Liberation (Aug. 15, 2017), available at <http://www.korea.net/Government/Briefing-Room/Presidential-Speeches/view?articleId=148552>.

<sup>14</sup> Donald J. Trump, Statement on North Korea's Launch of a Ballistic Missile Over Japan, 2017 DAILY COMP. PRES. DOC. 1 (Aug. 29, 2017); see also White House Press Release, Sarah Sanders, White House Press Sec'y, Press Briefing (Oct. 6, 2017), at <https://perma.cc/7ZZT-YMGU> ("[A]ll options are on the table, as they have been.")

<sup>15</sup> For various views on these issues, see, e.g., Marty Lederman, *No, the President Cannot Strike North Korea Without Congressional Approval*, JUST SECURITY (Aug. 10, 2017), at <https://www.justsecurity.org/44056/no-president-strike-north-korea-congressional-approval> (arguing that a preemptive strike by the Trump administration would violate both international and domestic law); Monica Hakimi, *North Korea and the Law on Anticipatory*

More generally, the Trump administration has articulated a policy of “strategic accountability” aimed at “the complete, verifiable and irreversible denuclearization of the Korean Peninsula.”<sup>16</sup> According to Secretary of State Rex Tillerson and Secretary of Defense James Mattis, the policy entails working “with the support of the international community” to apply “diplomatic and economic pressure on North Korea.”<sup>17</sup> The policy is intended to replace what they describe as the earlier “failed policy of ‘strategic patience.’”<sup>18</sup>

The Trump administration has achieved some success in mobilizing the international community with respect to North Korea. On August 5, 2017, the UN Security Council unanimously adopted a resolution strengthening economic sanctions on North Korea.<sup>19</sup> Among other things, Resolution 2371 targets specific sectors of the North Korean economy—prohibiting the sale of coal, iron, iron ore, seafood, lead, and lead ore to other countries.<sup>20</sup> According to press reports, “China’s Commerce Ministry announced it would enforce the new rules passed by the United Nations Security Council as punishment for the North’s nuclear and missile tests” following requests by the Trump administration.<sup>21</sup>

After a North Korean nuclear test on September 2, the Security Council further tightened sanctions on September 11.<sup>22</sup> The Council voted unanimously in Resolution 2375 to impose what the U.S. Ambassador to the United Nations Nikki Haley called “massive sanctions” on North Korea<sup>23</sup>—including a ban on the sale of liquefied natural gas to the regime, a cap on oil exports to the country, and new sanctions on the country’s textile industry.<sup>24</sup> On December 22, the Security Council went further and unanimously adopted new, tougher sanctions on the North Korean regime.<sup>25</sup> Resolution 2397 largely prohibits the direct or indirect supply

*Self-Defense*, EJIL:Talk! (Mar. 28, 2017), at <https://www.ejiltalk.org/north-korea-and-the-law-on-anticipatory-self-defense> (suggesting that “the law on anticipatory self-defense is potentially in flux” and that “North Korea could present something of a test case”); Jack Goldsmith, *The Ease of Writing an OLC Opinion in Support of Military Action Against North Korea*, LAWFARE (Sept. 14, 2017), at <https://www.lawfareblog.com/ease-writing-olc-opinion-support-military-action-against-north-korea> (arguing that prior practice would allow executive branch lawyers to conclude “without much trouble” that the president can take military action against North Korea without congressional authorization).

<sup>16</sup> Jim Mattis & Rex Tillerson, *We’re Holding Pyongyang to Account*, WALL ST. J. (Aug. 14, 2017), at <https://www.wsj.com/articles/were-holding-pyongyang-to-account-1502660253> (also available at <https://www.state.gov/secretary/remarks/2017/08/273409.htm>).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *Security Council Toughens Sanctions Against Democratic People’s Republic of Korea, Unanimously Adopting Resolution 2371 (2017)*, UNITED NATIONS (Aug. 5, 2017), at <https://www.un.org/press/en/2017/sc12945.doc.htm>.

<sup>20</sup> S.C. Res. 2371, paras. 8–10 (Aug. 5, 2017).

<sup>21</sup> Jane Perlez, *China’s Crackdown on North Korea Over U.N. Sanctions Starts to Pinch*, N.Y. TIMES (Aug. 16, 2017), at <https://www.nytimes.com/2017/08/16/world/asia/china-north-korea-seafood-exports.html?ref=todayspaper>.

<sup>22</sup> S.C. Res. 2375, para. 1 (Sept. 11, 2017).

<sup>23</sup> White House Press Release, Press Briefing by Press Secretary Sarah Sanders, Nat’l Security Advisor H.R. McMaster, and U.N. (Sept. 15, 2017), at <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-national-security-advisor-h-r-mcmaster-u-n-ambassador-nikki-haley-091517> [<https://perma.cc/A9CP-QN5B>].

<sup>24</sup> S.C. Res. 2375, *supra* note 22, paras. 13–16.

<sup>25</sup> *Security Council Further Tightens Sanctions Against DPR Korea*, UNITED NATIONS (Dec. 22, 2017), at [http://www.un.org/apps/news/story.asp?NewsID=58345#.Wkv\\_FVQ-fu1](http://www.un.org/apps/news/story.asp?NewsID=58345#.Wkv_FVQ-fu1).

of crude oil, refined petroleum products, and other raw materials to North Korea.<sup>26</sup> Further, the Security Council directed states to inspect and seize ships that these states have reasonable grounds to believe are involved in transporting items prohibited by United Nations sanctions.<sup>27</sup> Finally, Resolution 2397 instructs states to repatriate North Korean nationals earning income abroad within the next two years.<sup>28</sup> North Korea called the most recent round of sanctions an “act of war.”<sup>29</sup>

The United States has also rallied nations to isolate North Korea diplomatically. In early October, the United States “secured a commitment from Sudan to stop buying arms from North Korea” as part of the process of lifting American sanctions on Khartoum.<sup>30</sup> Also in October, Italy became the fifth country—after Spain, Mexico, Peru, and Kuwait—to expel the North Korean ambassador this year.<sup>31</sup> Reports indicate that the Trump Administration has been “vigorously lobbying” governments to cut diplomatic relations with North Korea.<sup>32</sup> Indeed, the Trump administration allegedly issued a directive instructing diplomats to “bring up North Korea in virtually every conversation with foreign interlocutors and urge them to sever all ties with Pyongyang.”<sup>33</sup>

In addition to mobilizing the international community, the United States has also taken unilateral action to increase economic and diplomatic pressure on North Korea. Following North Korea’s test of a ballistic missile that overflew Japan on September 14, Trump issued an executive order on September 20 imposing additional sanctions on North Korea designed to cut the regime off from the international financial system.<sup>34</sup> The order authorizes the U.S. Treasury secretary to “prohibit the opening and prohibit or impose strict conditions on the maintenance of correspondent accounts or payable-through accounts in the United States” as well as to “block all property and interests in property that are in the United States” or that will “come within the United States” of any financial institution that is determined to have “knowingly conducted or facilitated any significant transaction in connection with trade with North Korea.”<sup>35</sup> The new sanctions enable the United States, according to Treasury

<sup>26</sup> S.C. Res. 2397, paras. 4–8 (Dec. 22, 2017) (identifying certain exceptions to the prohibitions, including an initial crude oil cap of four million barrels per year and refined petroleum cap of 500,000 barrels per year).

<sup>27</sup> *Id.*, para. 9.

<sup>28</sup> *Id.*, para. 8 (excepting dual citizens and North Korean nationals “whose repatriation is prohibited, subject to applicable national and international law, including international refugee law and international human rights law, and the United Nations Headquarters Agreement and the Convention on the Privileges and Immunities of the United Nations”).

<sup>29</sup> Russel Goldman, *North Korea Calls U.N. Sanctions an ‘Act of War,’* N.Y. TIMES (Dec. 24, 2017), at <https://www.nytimes.com/2017/12/24/world/asia/north-korea-un-sanctions.html>.

<sup>30</sup> Matina Stevis-Gridneff & Ian Talley, *U.S. to Ease Sanctions Against Sudan After It Cuts Ties with North Korea*, WALL ST. J. (Oct. 6, 2017), at <https://www.wsj.com/articles/u-s-to-ease-sanctions-against-sudan-1507311816>; see also Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 100 (2018).

<sup>31</sup> Anna Fifield, *Italy Becomes Fifth Country to Expel North Korean Ambassador*, WASH. POST (Oct. 1, 2017), at [https://www.washingtonpost.com/world/europe/italy-becomes-fifth-country-to-expel-north-korean-ambassador/2017/10/01/98785c14-a6ad-11e7-8ed2-c7114e6ac460\\_story.html?utm\\_term=.a70b7a0802d7](https://www.washingtonpost.com/world/europe/italy-becomes-fifth-country-to-expel-north-korean-ambassador/2017/10/01/98785c14-a6ad-11e7-8ed2-c7114e6ac460_story.html?utm_term=.a70b7a0802d7).

<sup>32</sup> *Id.*

<sup>33</sup> Karen DeYoung, Ellen Nakashima & Emily Rauhala, *Trump Signed Presidential Directive Ordering Actions to Pressure North Korea*, WASH. POST (Sept. 30, 2017), at [https://www.washingtonpost.com/world/national-security/trump-signed-presidential-directive-ordering-actions-to-pressure-north-korea/2017/09/30/97c6722a-a620-11e7-b14f-f41773cd5a14\\_story.html?utm\\_term=.e3a9c97b8d8de](https://www.washingtonpost.com/world/national-security/trump-signed-presidential-directive-ordering-actions-to-pressure-north-korea/2017/09/30/97c6722a-a620-11e7-b14f-f41773cd5a14_story.html?utm_term=.e3a9c97b8d8de).

<sup>34</sup> Exec. Order No. 13,810, 82 Fed. Reg. 44,705 (Sept. 20, 2017).

<sup>35</sup> *Id.* at 44,706–07.

Secretary Steven Mnuchin, “to freeze or block any transactions, with any financial institution, anywhere in the world that facilitates any transactions” with North Korea or North Korean officials.<sup>36</sup>

The Trump administration has also taken other, more symbolic action. Though almost no North Korean nationals travel to the United States,<sup>37</sup> Trump included North Korea in the third iteration of his travel ban, indefinitely suspending “entry into the United States of nationals of North Korea as immigrants and nonimmigrants.”<sup>38</sup> And on November 20, 2017, the Trump administration redesignated North Korea as a state sponsor of terrorism.<sup>39</sup> Though the practical effects of the designation are limited—state sponsors of terror are subject to a “range of sanctions,” such as a ban on American arms-related sales and exports, that are largely redundant with already existing sanctions on North Korea<sup>40</sup>—Trump claimed the “designation will impose further sanctions and penalties on North Korea and related persons, and supports our maximum pressure campaign to isolate the murderous regime . . . .”<sup>41</sup>

Even as the United States has taken steps to isolate North Korea economically and diplomatically, the U.S. State Department has kept lines of communication open with North Korean leadership. In late September, Tillerson revealed that the two nations were in direct communication.<sup>42</sup> On December 12, 2017, Tillerson asserted that the United States is “ready to talk anytime North Korea would like to talk.”<sup>43</sup> Although he initially suggested the United States would be willing to meet “without precondition[s],”<sup>44</sup> Tillerson struck a tougher tone a few days later, insisting “a sustained cessation of North Korea’s threatening behavior must occur before talks can begin. North Korea must earn its way back to the table.”<sup>45</sup>

<sup>36</sup> White House Press Release, Steven Mnuchin, U.S. Treas. Sec’y, Press Briefing (Sept. 21, 2017), at <https://www.whitehouse.gov/briefings-statements/press-briefing-treasury-secretary-steven-mnuchin-092117> [<https://perma.cc/Z7N5-DJ92>]. On September 26, 2017, the U.S. Treasury Department used its authority pursuant to Executive Order 13,810 to sanction “eight North Korean banks and 26 individuals linked to North Korean financial networks.” U.S. Dep’t of Treas. Press Release, Treasury Sanctions Banks and Representatives Linked to North Korean Financial Networks (Sept. 26, 2017), at <https://www.treasury.gov/press-center/press-releases/Pages/sm0165.aspx> [<https://perma.cc/7KE6-CX4G>].

<sup>37</sup> Emily Rauhala, *Almost No North Koreans Travel to the U.S., So Why Ban Them?*, WASH. POST (Sept. 25, 2017), at [https://www.washingtonpost.com/world/almost-no-north-koreans-travel-to-the-us-so-why-ban-them/2017/09/25/822ac340-a19c-11e7-8c37-e1d99ad6aa22\\_story.html?utm\\_term=.16a96eae3d3](https://www.washingtonpost.com/world/almost-no-north-koreans-travel-to-the-us-so-why-ban-them/2017/09/25/822ac340-a19c-11e7-8c37-e1d99ad6aa22_story.html?utm_term=.16a96eae3d3).

<sup>38</sup> Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,166 (Sept. 24, 2017); Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 109 (2018).

<sup>39</sup> U.S. Dep’t of State, *State Sponsors of Terrorism*, at <https://www.state.gov/j/ct/list/c14151.htm> [<https://perma.cc/EL9U-RHGP>]. North Korea had been previously designated a state sponsor of terrorism, but that designation ended in 2008. See John R. Crook, *Contemporary Practice of the United States*, 103 AJIL 164 (2009).

<sup>40</sup> See U.S. DEP’T OF STATE, BUREAU OF COUNTERTERRORISM AND COUNTERING VIOLENT EXTREMISM, COUNTRY REPORTS ON TERRORISM 2016, at ch. 3 (2016), available at <https://www.state.gov/documents/organization/272488.pdf> [<https://perma.cc/JV22-HW5G>].

<sup>41</sup> Donald J. Trump, Remarks Prior to a Cabinet Meeting, 2017 DAILY COMP. PRES. DOC. 1 (Nov. 20, 2017).

<sup>42</sup> U.S. Dep’t of State Press Release, Rex W. Tillerson, U.S. Sec’y of State, Remarks at a Press Roundtable (Sept. 30, 2017), at <https://www.state.gov/secretary/remarks/2017/09/274563.htm> [<https://perma.cc/57Z8-3AVX>].

<sup>43</sup> U.S. Dep’t of State Press Release, Rex W. Tillerson, U.S. Sec’y of State, On Meeting the Foreign Policy Challenges of 2017 and Beyond (Dec. 12, 2017), at <https://www.state.gov/secretary/remarks/2017/12/276570.htm> [<https://perma.cc/H4QE-MEWT>].

<sup>44</sup> *Id.*

<sup>45</sup> U.S. Dep’t of State Press Release, Rex W. Tillerson, U.S. Sec’y of State, Remarks at the UN Security Council Ministerial Meeting on D.P.R.K. (Dec. 15, 2017), at <https://www.state.gov/secretary/remarks/2017/12/276627.htm> [<https://perma.cc/R7VS-SCXC>].

The White House has expressed greater skepticism about the prospects of negotiating with Pyongyang. Referring to the Secretary of State's remarks in late September, Trump tweeted that Tillerson "is wasting his time trying to negotiate with Little Rocket Man."<sup>46</sup> And in December, the White House issued a statement distancing itself from Tillerson's initial offer to meet with North Korea "without precondition," saying: "The President's views on North Korea have not changed."<sup>47</sup>

GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

*United States Lifts Economic Sanctions on Sudan*

doi:10.1017/ajil.2018.3

Effective October 12, 2017, the United States lifted a number of long-standing sanctions on Sudan. This decision reflects the U.S. view that Sudan has made "sustained positive actions" with respect to ongoing conflicts, humanitarian access, and cooperation with the United States.<sup>1</sup>

The sanctions on Sudan began in 1997. In Executive Order 13,067, President Clinton stated:

[T]he policies and actions of the Government of Sudan, including continued support for international terrorism; ongoing efforts to destabilize neighboring governments; and the prevalence of human rights violations, including slavery and the denial of religious freedom, constitute an unusual and extraordinary threat to the national security and foreign policy of the United States . . . .<sup>2</sup>

This order blocked the Sudanese government from retrieving any of its property in the United States and largely prohibited the trade of goods and other transactions between Sudan and the United States.<sup>3</sup>

In April 2006, President George W. Bush issued Executive Order 13,400 to expand the sanctions imposed by Clinton due to "the persistence of violence in Sudan's Darfur region."<sup>4</sup> This action came just over a year after Resolution 1591 of the UN Security Council, which imposed targeted sanctions on individuals who contributed in various ways to the conflict in

<sup>46</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 1, 2017, 7:30 AM), at <https://twitter.com/realDonaldTrump/status/914497877543735296>.

<sup>47</sup> Adam Taylor, *3 Big Questions About North Korea and No-Precondition Talks*, WASH. POST (Dec. 13, 2017), at [https://www.washingtonpost.com/news/worldviews/wp/2017/12/13/3-big-questions-about-north-korea-and-no-precondition-talks/?utm\\_term=.90926c0bd714](https://www.washingtonpost.com/news/worldviews/wp/2017/12/13/3-big-questions-about-north-korea-and-no-precondition-talks/?utm_term=.90926c0bd714).

<sup>1</sup> U.S. Dep't of State Press Release, *Sanctions Revoked Following Sustained Positive Action by the Government of Sudan* (Oct. 6, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/10/274659.htm> [<https://perma.cc/YU73-S3R8>] [hereinafter Oct. 6 Press Release].

<sup>2</sup> Exec. Order No. 13,067, 62 Fed. Reg. 59,989 (Nov. 3, 1997) (generally citing the International Emergency Economic Powers Act and the National Emergencies Act as sources of presidential authority to impose sanctions).

<sup>3</sup> *Id.*

<sup>4</sup> Exec. Order No. 13,400, 71 Fed. Reg. 25,483 (Apr. 26, 2006).

Darfur.<sup>5</sup> Executive Order 13,400 blocked persons whom the Secretary of the Treasury determined contributed in various ways to the conflict in Darfur from accessing property in the United States or under the control of U.S. persons.<sup>6</sup> This order facilitated U.S. implementation of Resolution 1591.<sup>7</sup>

In October 2006, Bush issued Executive Order 13,412, which imposed still more U.S. sanctions on Sudan.<sup>8</sup> This order noted “certain policies and actions of the Government of Sudan that violate human rights, in particular with respect to the conflict in Darfur.”<sup>9</sup> Citing the Sudanese government’s “pervasive role” over the petroleum and petrochemical industries in Sudan, Bush prohibited most transactions between U.S. persons and these industries.<sup>10</sup>

On July 9, 2011, the United States recognized South Sudan as an independent sovereign after supporting its 2011 referendum on self-determination.<sup>11</sup> Starting in June 2016, the United States began a “high-level focused and hardnose diplomatic effort with Sudan.”<sup>12</sup>

On January 13, 2017, President Obama issued Executive Order 13,761, which conditionally provided for the future rollback of certain sanctions on Sudan in the following terms:

[T]he situation that gave rise to the actions taken in Executive Order 13067 of November 3, 1997, and Executive Order 13412 of October 13, 2006, relating to the policies and actions of the Government of Sudan has been altered by Sudan’s positive actions over the past 6 months. These actions include a marked reduction in offensive military hostilities in conflict areas in Sudan and steps towards the improvement of humanitarian access throughout Sudan, as well as cooperation with the United States on addressing regional conflicts and the threat of terrorism.<sup>13</sup>

The order specified that if those actions were sustained over the next six months, then Executive Order 13,412 and much of Executive Order 13,067 would be revoked effective July 12, 2017.<sup>14</sup>

<sup>5</sup> S.C. Res. 1591 (Mar. 29, 2005) (creating a committee authorized to impose targeted sanctions on individuals who contributed in various ways to the conflict in Darfur and applying a Darfur-related arms embargo to the Sudanese government). A second resolution, from which the United States abstained, referred the situation in Darfur to the International Criminal Court. S.C. Res. 1593 (Mar. 31, 2005).

<sup>6</sup> Exec. Order No. 13,400, 71 Fed. Reg. at 25,483–84.

<sup>7</sup> See *id.* (referencing Resolution 1591 and identifying as one source of authority the United Nations Participation Act, which authorizes the president to implement Security Council resolutions).

<sup>8</sup> Exec. Order No. 13,412, 71 Fed. Reg. 61,369 (Oct. 13, 2006).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See U.S. Dep’t of State, Bureau of African Affairs Fact Sheet, U.S. Relations with South Sudan (Oct. 26, 2017), at <https://www.state.gov/r/pa/ei/bgn/171718.htm> [<https://perma.cc/4HXG-STBM>]. On September 6, 2017, the U.S. Treasury Department placed targeted sanctions on two South Sudanese government officials, Malek Reuben Riak Rengu and Michael Makuei Lueth, and one former official, Paul Malong Awan, for contributing to the current crisis in South Sudan. U.S. Dep’t of State Press Release, Treasury Announces Targeted Sanctions on South Sudanese Officials and Companies (Sept. 6, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/09/273836.htm> [<https://perma.cc/YE29-A32Q>].

<sup>12</sup> U.S. Dep’t of State Press Release, Special Briefing, Senior Administration Officials on Sudan Sanctions (Oct. 6, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/10/274678.htm> [<https://perma.cc/MU2B-94KY>]. Sudan remains under the leadership of Omar al-Bashir, the subject of two arrest warrants from the International Criminal Court. See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-95, Warrant of Arrest (Mar. 4, 2009); *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-95, Second Warrant of Arrest (July 12, 2012).

<sup>13</sup> Exec. Order No. 13,761, 82 Fed. Reg. 5331 (Jan. 13, 2017).

<sup>14</sup> *Id.*

This executive order was issued just before Obama left office. Almost immediately upon taking office, President Trump included Sudan on a list of Muslim-majority countries whose citizens were subject to a travel ban.<sup>15</sup> Yet rather than reversing Obama's approach with respect to sanctions, on July 11, 2017, President Trump simply extended the review period provided for in Executive Order 13,761 for a further three months.<sup>16</sup> Thereafter, on September 24, 2017, Trump issued a revised travel ban that no longer listed Sudan as a country whose citizens were subject to this ban.<sup>17</sup>

In early October 2017, the Trump Administration announced its decision to roll back the sanctions on Sudan consistent with the approach set forth by Obama in Executive Order 13,761.<sup>18</sup> Executive Order 13,412 from the George W. Bush era was thus revoked, as were the portions of Clinton's Executive Order 13,067 that had blocked the Sudanese government from accessing property in the United States and had barred U.S. persons from entering into transactions with the Sudanese government.<sup>19</sup> The press release announcing the sanctions relief highlighted that the government of Sudan is "serious about cooperating with the United States."<sup>20</sup>

In a report accompanying the announcement of sanctions relief, the U.S. Secretary of State described Sudan's progress in five key areas:

- 1) maintaining a cessation of hostilities (COH) in Darfur, the Two Areas of South Kordofan and Blue Nile states; 2) improving humanitarian access throughout Sudan; and maintaining its cooperation with the United States on: 3) the conflict in South Sudan; 4) countering the Lord's Resistance Army; and 5) addressing the threat of terrorism.<sup>21</sup>

The report concluded with the statement that the Trump administration had also used its "expanded bilateral relationship to engage [the Sudanese government] to fully implement all UN Security Council resolutions on North Korea, a critically important issue for U.S. national security."<sup>22</sup>

Despite these developments, U.S. relations with Sudan remain far from fully normalized. Sudan remains on the U.S. list of state sponsors of terrorism, which triggers various restrictions on U.S. foreign assistance and defense exports.<sup>23</sup> Furthermore, the October 2017 revocation of sanctions did not terminate the national emergency declared with respect to Sudan under Executive Order 13,067 and also left in place Executive Order 13,400, which facilitates the implementation of Security Council Resolution 1591. In addition, the Trump

<sup>15</sup> Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

<sup>16</sup> Exec. Order No. 13,804, 82 Fed. Reg. 32,611 (July, 11 2017).

<sup>17</sup> Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

<sup>18</sup> U.S. Dep't of State Press Release, Notice Regarding Positive Actions by the Government of Sudan, 82 Fed. Reg. 47,287 (Oct. 4, 2017).

<sup>19</sup> See U.S. Dep't of Treasury, Sanctions Action Pursuant to Executive Order 13,067 and Executive Order 13,412, 82 Fed. Reg. 49,698 (Oct. 26, 2017).

<sup>20</sup> Oct. 6 Press Release, *supra* note 1.

<sup>21</sup> U.S. Dep't of State, Bureau of African Affairs Press Release, The Secretary's Report on Whether the Government of Sudan Has Sustained the Positive Actions That Gave Rise to E.O. 13761 (Oct. 12, 2017), at <https://www.state.gov/p/af/rls/2017/274667.htm> [<https://perma.cc/TSG7-ZA8V>].

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

administration's revocation of sanctions came with a warning that "the United States is prepared to use additional tools to apply pressure if the Government of Sudan regresses on progress to date . . . or takes negative actions on other areas of concern."<sup>24</sup>

#### GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

*United States Imposes Broad Economic Sanctions on Venezuela After Constitutional Crisis*  
doi:10.1017/ajil.2018.1

On August 24, 2017, President Donald Trump signed Executive Order 13,808, imposing economic sanctions on Venezuela.<sup>1</sup> Trump issued the order not long after Venezuelan President Nicolás Maduro convened an election to assemble a new Constituent Assembly that would have the power to rewrite the Venezuelan constitution.<sup>2</sup> The sanctions prohibit U.S. individuals and entities from dealing in most transactions in new debt and equity with the government of Venezuela and its state-owned oil company, Petroleos de Venezuela, S.A. (PdVSA),<sup>3</sup> but do not prohibit the import of Venezuelan oil.<sup>4</sup>

According to the Trump administration, the sanctions were imposed "in light of recent actions and policies of the government of Venezuela."<sup>5</sup> These included:

serious abuses of human rights and fundamental freedoms; responsibility for the deepening humanitarian crisis in Venezuela; establishment of an illegitimate Constituent Assembly, which has usurped the power of the democratically elected National Assembly and other branches of the Government of Venezuela; rampant public corruption; and ongoing repression and persecution of, and violence toward, the political opposition.<sup>6</sup>

<sup>24</sup> Oct. 6 Press Release, *supra* note 1.

<sup>1</sup> Exec. Order No. 13,808, 82 Fed. Reg. 41,155 (Aug. 24, 2017).

<sup>2</sup> Anthony Faiola, *With Low Turnout, Venezuela's Election Will Create What Opponents Call 'Puppet Congress'*, WASH. POST (July 31, 2017), at [https://www.washingtonpost.com/world/the\\_americas/defying-international-calls-venezuela-holds-contentious-election/2017/07/30/be3cd614-7089-11e7-8c17-533c52b2f014\\_story.html?utm\\_term=.48f0e0ee4a07](https://www.washingtonpost.com/world/the_americas/defying-international-calls-venezuela-holds-contentious-election/2017/07/30/be3cd614-7089-11e7-8c17-533c52b2f014_story.html?utm_term=.48f0e0ee4a07).

<sup>3</sup> Exec. Order No. 13,808, *supra* note 1, at 41,155 (also prohibiting dividend payments to the government of Venezuela and related entities). The U.S. Department of the Treasury Office of Foreign Assets Control published four general licenses that would authorize certain transactions otherwise prohibited by the sanctions, including certain transactions involving the U.S. subsidiary of PdVSA—CITGO Holding, Inc.—and transactions related to the exportation of agriculture, food, and medicine. See U.S. Dep't of Treas. Press Release, *Issuance of Venezuela-Related Executive Order and Associated General Licenses* (Aug. 25, 2017), at <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20170825.aspx> [<https://perma.cc/ZD9T-NTKD>].

<sup>4</sup> Clifford Krauss, *White House Raises Pressure on Venezuela with New Financial Sanctions*, N.Y. TIMES (Aug. 25, 2017), at <https://www.nytimes.com/2017/08/25/world/americas/venezuela-sanctions-maduro-trump.html> (noting that this "would almost certainly be a crippling step").

<sup>5</sup> Exec. Order No. 13,808, *supra* note 1, at 41,155. In 2015, an earlier executive order by President Obama prohibited certain transactions with specific Venezuelan individuals and entities involved in the political crisis. See Exec. Order No. 13,692, 80 Fed. Reg. 12,747 (Mar. 8, 2015).

<sup>6</sup> Exec. Order No. 13,808, *supra* note 1, at 41,155.

Maduro's decision on May 1, 2017 to convene a constituent assembly appears to have been the most direct catalyst.<sup>7</sup> Under Venezuela's constitution, "[t]he original constituent power rests with the people of Venezuela. This power may be exercised by calling a National Constituent Assembly for the purpose of . . . drawing up a new Constitution."<sup>8</sup> The constitution further provides that several actors possess the "initiative for calling a National Constituent Assembly," including the president, two-thirds of the National Assembly, and 15 percent of registered voters.<sup>9</sup> Although Maduro called for a Constituent Assembly "to achieve the peace needed by the republic, defeat the fascist coup, and let the sovereign people impose peace, harmony and true national dialogue,"<sup>10</sup> the opposition and critics considered that a new assembly would further weaken or even dissolve the opposition-dominated legislature, the National Assembly.<sup>11</sup> On July 16, more than 7 million Venezuelans overwhelmingly voted against support for the new assembly in a symbolic referendum organized by the opposition.<sup>12</sup> In response, Trump called for Maduro to cancel the elections, warning of U.S. sanctions otherwise:

Yesterday, the Venezuelan people again made clear that they stand for democracy, freedom, and rule of law. Yet their strong and courageous actions continue to be ignored by a bad leader who dreams of becoming a dictator. The United States will not stand by as Venezuela crumbles. If the Maduro regime imposes its Constituent Assembly on July 30, the United States will take strong and swift economic actions.<sup>13</sup>

On July 30, elections were held to convene the new Constituent Assembly. The opposition did not provide any candidates for the Constituent Assembly and boycotted the election.<sup>14</sup> Throughout the day, violence erupted around the country as government forces clashed with demonstrators.<sup>15</sup> Even though opinion polls indicated that only 15 percent of registered voters planned to vote, the official turnout provided that over 8 million, or 42 percent of

<sup>7</sup> *Venezuela's President Maduro Calls for New Constituent Body*, BBC (May 2, 2017), at <http://www.bbc.com/news/world-latin-america-39775092>.

<sup>8</sup> VENEZUELA (BOLIVARIAN REPUBLIC OF) CONSTITUTION OF 1999 WITH AMENDMENTS THROUGH 2009, Art. 347 (trans.), available at [https://www.constituteproject.org/constitution/Venezuela\\_2009.pdf](https://www.constituteproject.org/constitution/Venezuela_2009.pdf). This and other provisions relating to the Constituent Assembly were added to the constitution in 1999 during the presidency of Maduro's predecessor, Hugo Chávez. See William Partlett, *Hugo Chavez's Constitutional Legacy*, BROOKINGS INST. (Mar. 14, 2013), at <https://www.brookings.edu/opinions/hugo-chavez-constitutional-legacy>.

<sup>9</sup> *Id.* Art. 348.

<sup>10</sup> *Venezuelan President Maduro Calls for New Constitution Amid Further Clashes*, GUARDIAN (May 1, 2017), at <https://www.theguardian.com/world/2017/may/01/venezuelan-president-nicolas-maduro-police-protests>.

<sup>11</sup> Jennifer L. McCoy, *Venezuela's Controversial New Constituent Assembly, Explained*, WASH. POST (Aug. 1, 2017), at [https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/01/venezuelas-dubious-new-constituent-assembly-explained/?utm\\_term=.181f299f8d62](https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/01/venezuelas-dubious-new-constituent-assembly-explained/?utm_term=.181f299f8d62).

<sup>12</sup> Julia Jones & Stefano Pozzebon, *Venezuelans Reject Constitutional Rewrite in Non-binding Referendum* (July 17, 2017), at <http://www.cnn.com/2017/07/17/americas/venezuela-referendum-votes/index.html>.

<sup>13</sup> Donald J. Trump, Statement on the Situation in Venezuela, 2017 DAILY COMP. PRES. DOC. 1 (July 17, 2017).

<sup>14</sup> *What Has Venezuela's Constituent Assembly Achieved?*, BBC (Aug. 30, 2017), at <http://www.bbc.com/news/world-latin-america-41094889>.

<sup>15</sup> Nicholas Casey, Patricia Torres & Vanessa Herrero, *Venezuela Vote Marred by Violence, Including Candidate's Death*, N.Y. TIMES (July 30, 2017), at <https://www.nytimes.com/2017/07/30/world/americas/venezuela-constituent-assembly-election.html>.

registered voters, had voted.<sup>16</sup> A software company involved in the voting process later announced that the figures had been manipulated.<sup>17</sup> In the end, the majority of the members elected to new Constituent Assembly were pro-government.<sup>18</sup>

Reinforcing the concerns raised earlier by Trump, the U.S. State Department condemned the elections:

The United States stands by the people of Venezuela, and their constitutional representatives, in their quest to restore their country to a full and prosperous democracy. We will continue to take strong and swift actions against the architects of authoritarianism in Venezuela, including those who participate in the National Constituent Assembly as a result of today's flawed election.<sup>19</sup>

In addition, the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) imposed sanctions on Maduro himself.<sup>20</sup> It was less than a month after these elections that Trump issued Executive Order 13,808.<sup>21</sup>

Since the issuance of that order and pursuant to it, additional U.S. sanctions have been imposed in the wake of regional elections for governorships in all twenty-three states of Venezuela on October 15, 2017.<sup>22</sup> Opinion polls had predicted that the opposition would win many of the elections, yet Maduro's governing party won seventeen of the governorships.<sup>23</sup> Once again, considerable irregularities were identified in the voting process,<sup>24</sup> and once again, the State Department condemned the election results.<sup>25</sup> OFAC thereupon imposed sanctions on an additional ten Venezuelan government officials, including those associated with "undermining electoral processes."<sup>26</sup>

<sup>16</sup> McCoy, *supra* note 11.

<sup>17</sup> Nicholas Casey, *Venezuela Reported False Election Turnout, Voting Company Says*, N.Y. TIMES (Aug. 2, 2017), at <https://www.nytimes.com/2017/08/02/world/americas/venezuela-election-turnout.html>.

<sup>18</sup> Mariana Zuñiga & Anthony Faiola, *Venezuela Ushers in New Pro-government Chamber as Opposition Struggles to Regroup*, WASH. POST (Aug. 4, 2017), at [https://www.washingtonpost.com/world/the\\_americas/venezuela-ushers-in-new-pro-government-chamber-as-opposition-vows-rebellion/2017/08/04/9c0c71e2-7883-11e7-8c17-533c52b2f014\\_story.html?utm\\_term=.c88a3fe9a129](https://www.washingtonpost.com/world/the_americas/venezuela-ushers-in-new-pro-government-chamber-as-opposition-vows-rebellion/2017/08/04/9c0c71e2-7883-11e7-8c17-533c52b2f014_story.html?utm_term=.c88a3fe9a129).

<sup>19</sup> U.S. Dep't of State Press Release, *Defending Democracy in Venezuela* (July 30, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/07/272940.htm> [<https://perma.cc/V7EG-3XQS>].

<sup>20</sup> U.S. Dep't of Treas. Press Release, *Treasury Sanctions the President of Venezuela* (July 31, 2017), at <https://www.treasury.gov/press-center/press-releases/Pages/sm0137.aspx> [<https://perma.cc/3TRV-8HUA>].

<sup>21</sup> Exec. Order No. 13,808, *supra* note 1.

<sup>22</sup> Olga Onuch & Jeanmiguel Uva, *Venezuela's Latest Elections Are Likely to Trigger a Regional Migration Crisis*, WASH. POST (Oct. 19, 2017), at [https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/19/venezuelas-latest-elections-are-likely-to-trigger-a-regional-migration-crisis/?utm\\_term=.562a5bf010a3](https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/19/venezuelas-latest-elections-are-likely-to-trigger-a-regional-migration-crisis/?utm_term=.562a5bf010a3).

<sup>23</sup> *Id.*

<sup>24</sup> Rachelle Krygier & Anthony Faiola, *Overwhelmingly Defeated Opposition Decries 'Illegals' in Venezuela Vote*, WASH. POST (Oct. 16, 2017), at [https://www.washingtonpost.com/world/the\\_americas/opposition-decries-illegals-as-venezuelans-go-to-the-polls/2017/10/15/361ba690-b12d-11e7-9e58-e6288544af98\\_story.html?utm\\_term=.438b54c5a3aa](https://www.washingtonpost.com/world/the_americas/opposition-decries-illegals-as-venezuelans-go-to-the-polls/2017/10/15/361ba690-b12d-11e7-9e58-e6288544af98_story.html?utm_term=.438b54c5a3aa) (describing the relocation of voting sites in opposition districts and other difficulties targeting the opposition).

<sup>25</sup> U.S. Dep't of State Press Release, *Gubernatorial Elections in Venezuela* (Oct. 16, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/10/274833.htm> [<https://perma.cc/7M5C-Y7Q7>].

<sup>26</sup> U.S. Dep't of Treas. Press Release, *Treasury Sanctions Ten Venezuelan Government Officials* (Nov. 9, 2017), at <https://www.treasury.gov/press-center/press-releases/Pages/sm0214.aspx> [<https://perma.cc/PSK7-Y9M6>].

Thus far, in response to the continuing political situation in Venezuela, the United States has relied mostly on economic sanctions. Nonetheless, the Trump administration has signaled its displeasure with the Maduro regime in other ways during the summer and fall of 2017. In August, President Trump stated that he would not “rule out a military option” with respect to Venezuela.<sup>27</sup> When asked about this statement, U.S. National Security Advisor H. R. McMaster remarked that “[i]n terms of military options or other options, there’s no such thing really anymore as only a military option, or a diplomatic option, or an economic option. We try to integrate all elements together.”<sup>28</sup> McMaster stated that “obviously, any decision would be in conjunction with our partners in the region, and no military actions are anticipated in the near future.”<sup>29</sup> In September, the Trump administration placed restrictions on certain Venezuelan officials traveling to the United States in its third iteration of the travel ban.<sup>30</sup> The proclamation imposing the ban described the government of Venezuela as “uncooperative” in sharing public safety information.<sup>31</sup>

The United States has also raised concerns about Venezuela at the United Nations. In his address to the United Nations General Assembly in September, Trump stated,

The socialist dictatorship of Nicolás Maduro has inflicted terrible pain and suffering on the good people of [Venezuela]. . . . As a responsible neighbor and friend, we and all others have a goal. That goal is to help them regain their freedom, recover their country, and restore their democracy.<sup>32</sup>

When the United States organized an informal UN Security Council meeting on Venezuela in November, ambassadors from Russia, China, Egypt, and Bolivia chose not to attend, stating that the Council should not interfere in Venezuela’s domestic affairs.<sup>33</sup> Nonetheless, the United States has not been the only country to impose sanctions on Venezuela. In November 2017, for example, the European Union imposed an arms embargo and set in place a framework for additional sanctions.<sup>34</sup>

<sup>27</sup> Donald J. Trump, Remarks Following a Meeting with Secretary of State Rex W. Tillerson et al., 2017 DAILY COMP. PRES. DOC. 5 (Aug. 11, 2017).

<sup>28</sup> White House Press Release, Press Briefing by Press Secretary Sarah Sanders et al. (Aug. 25, 2017), at <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-et-al-082517> [<https://perma.cc/G8PC-PYRQ>].

<sup>29</sup> *Id.*

<sup>30</sup> Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

<sup>31</sup> *Id.* at 45,166. Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 109 (2018).

<sup>32</sup> Donald J. Trump, Remarks to the United Nations General Assembly in New York City, 2017 DAILY COMP. PRES. DOC. 3 (Sept. 19, 2017).

<sup>33</sup> Michelle Nichols, *Russia, China, Others Boycott U.S. Meeting at U.N. on Venezuela*, REUTERS (Nov. 14, 2017), at <https://www.reuters.com/article/us-venezuela-politics-un/russia-china-others-boycott-u-s-meeting-at-u-n-on-venezuela-idUSKBN1DE056>.

<sup>34</sup> Council of the European Union Press Release, *Venezuela: EU Adopts Conclusions and Targeted Sanctions* (Nov. 13, 2017), at <http://consilium.europa.eu/en/press/press-releases/2017/11/13/venezuela-eu-adopts-conclusions-and-targeted-sanctions>.

## INTERNATIONAL ORGANIZATIONS

*United States Gives Notice of Withdrawal from UNESCO, Citing Anti-Israel Bias*  
doi:10.1017/ajil.2018.2

On October 12, 2017, the United States announced its intent to withdraw from the United Nations Educational, Scientific and Cultural Organization (UNESCO), citing “concerns with mounting arrears . . . , the need for fundamental reform in the organization, and continuing anti-Israel bias.”<sup>1</sup> The United States will remain a full UNESCO member until December 31, 2018, when the withdrawal becomes effective.<sup>2</sup> Thereafter, it will continue to engage with UNESCO as a non-member observer state.<sup>3</sup>

The United States joined UNESCO in 1946 pursuant to a congressional-executive agreement.<sup>4</sup> President Ronald Reagan withdrew the United States from the organization—without seeking congressional approval<sup>5</sup>—in 1984. In his notice of withdrawal, Secretary of State George Shultz wrote,

[W]e have been concerned that trends in the management, policy, and budget of UNESCO were detracting from the Organization’s effectiveness. . . . We felt that they tended to serve—wittingly or unwittingly, but improperly—the political purposes of a few member states.<sup>6</sup>

Subsequently, on September 12, 2002, President George W. Bush announced in a speech before the UN General Assembly that the United States would rejoin UNESCO.<sup>7</sup> Explaining the decision to rejoin, the U.S. State Department observed that UNESCO “has recently made a concerted effort to institute financial and management reform and resumed efforts to reinforce founding principles, including an emphasis on international press freedom.”<sup>8</sup>

<sup>1</sup> U.S. Dep’t of State Press Release, *The United States Withdraws from UNESCO* (Oct. 12, 2017), at <https://www.state.gov/t/pa/prs/ps/2017/10/274748.htm> [<https://perma.cc/PQ2X-EAWJ>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* Shortly after the United States announced its intent to withdraw, Prime Minister Benjamin Netanyahu instructed the Israeli Foreign Ministry to prepare the country’s own withdrawal from UNESCO. Israel Ministry of Foreign Affairs Press Release, *PM Netanyahu Welcomes US Pres. Trump’s Decision to Withdraw from UNESCO* (Oct. 12, 2017), at <http://mfa.gov.il/MFA/PressRoom/2017/Pages/PM-Netanyahu-welcomes-US-Pres-Trumps-decision-to-withdraw-from-UNESCO-12-October-2017.aspx>.

<sup>4</sup> Joint Resolution Providing for Membership and Participation by the United States in the United Nations Educational, Scientific, and Cultural Organization, and Authorizing an Appropriation Therefor, Pub. L. No. 79-565, 60 Stat. 712 (1946).

<sup>5</sup> See Peri A. Hoffer, Note, *Upheaval in the United Nations System: United States’ Withdrawal from UNESCO*, 12 *BROOK. J. INT’L L.* 161, 190–91, 195 (1986) (noting that the president gave Congress little if any prior notice of his decision to withdraw). Before the withdrawal took effect, a bill was introduced in the U.S. House of Representatives to prohibit the president from terminating participation in UNESCO unless “specifically authorized by law,” but this bill did not become a law. *Id.* at 195 & n. 180. There is no evidence that the Trump administration is seeking congressional approval for its decision to withdraw from UNESCO.

<sup>6</sup> Letter from George Shultz, U.S. Sec’y of State, to Amadou-Mahtar M’Bow, Dir. Gen., UNESCO (Dec. 28, 1983), reprinted in 23 *ILM* 220, 221 (1984).

<sup>7</sup> George W. Bush, Address to the United Nations General Assembly in New York City, 38 *WEEKLY COMP. PRES. DOC.* 1529 (Sept. 12, 2002).

<sup>8</sup> U.S. Dep’t of State Press Release, *The United States Rejoins UNESCO* (Sept. 22, 2003), at <https://2001-2009.state.gov/p/io/rls/fs/2003/24189.htm> [<https://perma.cc/P6U4-ZV2E>].

Well before the United States rejoined UNESCO in 2002, Congress had passed two laws placing certain conditions on U.S. funding to the United Nations and its specialized agencies. The first, passed in 1990, prohibits funding to any UN entity that “accords the Palestine Liberation Organization the same standing as member states.”<sup>9</sup> The second law, while not mentioning Palestine or the Palestine Liberation Organization by name, prohibits funding for the UN or any affiliated organization which “grants full membership as a state to any organization or group that does not have the internationally recognized attributes of statehood.”<sup>10</sup> Pursuant to the second law, the United States halted funding to UNESCO on October 31, 2011 when UNESCO admitted Palestine as a full member—a move which the United States described as “regrettable” and “premature.”<sup>11</sup> As a result, beginning in 2013, the United States lost its voting rights in the UNESCO General Conference.<sup>12</sup>

Most recently, in July 2017, UNESCO designated the occupied West Bank city of Hebron, site of the historic Tomb of the Patriarchs, as a Palestinian World Heritage Site.<sup>13</sup> Along with what the State Department has characterized as chronic, structural problems plaguing UNESCO, this decision contributed to the U.S. decision to withdraw from UNESCO a second time. A press release of October 12, 2017 from the U.S. Mission to the United Nations reads:

In July, when UNESCO made its latest outrageous and politically based decision, designating the Old City of Hebron and the Tomb of the Patriarchs as part of Palestinian territory, the United States clearly stated that this decision would negatively affect our evaluation of our level of engagement with the organization. The United States will continue to evaluate all agencies within the United Nations system through the same lens.

“The purpose of UNESCO is a good one. Unfortunately, its extreme politicization has become a chronic embarrassment. The Tomb of the Patriarchs decision was just the latest in a long line of foolish actions, which includes keeping Syrian dictator Bashar al-Assad on a UNESCO human rights committee even after his murderous crackdown on peaceful protestors. Just as we said in 1984 when President Reagan withdrew from UNESCO, U.S.

<sup>9</sup> Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, § 414, Pub. L. No. 101-246, 104 Stat. 70 (1990).

<sup>10</sup> Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, § 410, Pub. L. No. 103-236, 108 Stat. 454 (1994).

<sup>11</sup> U.S. Dep’t of State Press Release, Palestinian Admission to UNESCO (Oct. 31, 2011), at <https://2009-2017.state.gov/r/pa/prs/ps/2011/10/176418.htm> [<https://perma.cc/M5QN-DQUB>]. In 2015, the U.S. Supreme Court held that, as a matter of constitutional law, the president has the exclusive power vis-à-vis Congress to make decisions about the recognition of foreign nations. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). It remains unclear precisely what effect this decision will have on the validity of congressional statutes that tie appropriations to preconditions related to recognition.

<sup>12</sup> *U.S., Israel Lose Voting Rights at UNESCO over Palestine Row*, REUTERS (Nov. 8, 2013), at <https://www.reuters.com/article/us-unesco/u-s-israel-lose-voting-rights-at-unesco-over-palestine-row-idUSBRE9A70I320131108>. Israel similarly lost its voting rights, as it had also frozen its funding to UNESCO after Palestine became a member. *Id.* UNESCO’s Constitution provides that a “Member State shall have no vote in the General Conference if the total amount of contributions due from it exceeds the total amount of contributions payable by it for the current year and the immediately preceding calendar year.” United Nations Educational, Scientific and Cultural Organization Constitution, Art. IV(C)(8)(b).

<sup>13</sup> UNESCO Press Release, World Heritage Committee Inscribes New Site and Approves Extension of Existing Site on UNESCO’s World Heritage List (July 7, 2017), at <http://whc.unesco.org/en/news/1685>.

taxpayers should no longer be on the hook to pay for policies that are hostile to our values and make a mockery of justice and common sense,” said Ambassador Nikki Haley.<sup>14</sup>

In a press briefing that same day, State Department spokeswoman Heather Nauert described the U.S. decision as the culmination of a “long and deliberative process” related to the congressional funding limitations and the Obama Administration’s decision to halt its funding to UNESCO.<sup>15</sup> Several factors, including arrears amounting to approximately \$550 million, the need for overall UN reform, and anti-Israel bias, all factored into the decision to withdraw, she said.<sup>16</sup> She remarked that if UNESCO “wants to reform itself and get back to a place where they’re truly promoting culture and education and all of that, perhaps we could take another look at this, but we haven’t seen that taking place.”<sup>17</sup> Describing the decision as “deeply regrettable,” Director-General of UNESCO Irina Bokova expressed her “profound regret” for the U.S. decision to withdraw.<sup>18</sup> “This is a loss to UNESCO. This is a loss to the United Nations family. This is a loss for multilateralism.”<sup>19</sup>

#### INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

##### *Presidential Proclamation Indefinitely Restricting Entry of Individuals from Designated Countries Is Fully Implemented Amid Ongoing Legal Challenges*

doi:10.1017/ajil.2018.7

On December 4, 2017, the U.S. Supreme Court permitted the most recent version of President Trump’s executive action restricting the entry of nationals from certain countries to take effect. The decision stayed nationwide injunctions granted by two federal district courts on constitutional and statutory grounds.<sup>1</sup> This version of Trump’s “travel ban,” (EO-3), issued on September 24, 2017, restricts the entry of nationals from Iran, Libya, Somalia, Syria, and Yemen—all of whom had been restricted under previous orders—as well as North Korea, Venezuela, and Chad.<sup>2</sup> While litigation continues in the Courts of Appeals for the Fourth and Ninth Circuits, the Trump administration fully implemented EO-3 by December 8.<sup>3</sup>

<sup>14</sup> U.S. Mission to the United Nations Press Release, Ambassador Haley on the United States’ Withdrawal from UNESCO (Oct. 12, 2017), at <https://usun.state.gov/remarks/8009> [<https://perma.cc/GY2N-ECGU>].

<sup>15</sup> U.S. Dep’t of State Press Release, Daily Press Briefing (Oct. 12, 2017), at <https://www.state.gov/r/pa/prs/dpb/2017/10/274769.htm> [<https://perma.cc/6D4Y-TDN8>].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> UNESCO Press Release, Statement by Irina Bokova, Director-General of UNESCO, on the Occasion of the Withdrawal by the United States of America from UNESCO (Oct. 12, 2017), at <https://en.unesco.org/news/statement-irina-bokova-director-general-unesco-occasion-withdrawal-united-states-america-unesco>.

<sup>19</sup> *Id.*

<sup>1</sup> *Trump v. Hawaii*, No. 17A550, 2017 WL 5987406, at \*1 (S. Ct. Dec. 4, 2017); *Trump v. Int’l Refugee Assistance Project*, No. 17A560, 2017 WL 5987435, at \*1 (S. Ct. Dec. 4, 2017).

<sup>2</sup> Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) [hereinafter EO-3].

<sup>3</sup> U.S. Dep’t of State Press Release, Presidential Proclamation Fully Implemented Today (Dec. 8, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/12/276376.htm> [<https://perma.cc/QAX4-QVRC>].

Two earlier executive orders restricting the entry of certain nationals into the United States preceded EO-3.<sup>4</sup> The first iteration was an executive order signed January 27, 2017 (EO-1), which temporarily blocked the entry of citizens from seven Muslim-majority countries.<sup>5</sup> EO-1 also suspended for 120 days the U.S. Refugee Admissions Program (USRAP), the interagency effort to selectively identify and admit refugees for resettlement in the United States.<sup>6</sup>

EO-1 sparked public outrage, with many arguing it was motivated by religious animus given certain comments made by Trump as a candidate. For example, in December 2015 he had called for a “total and complete shutdown of Muslims entering the United States.”<sup>7</sup> Several courts enjoined EO-1, deeming such presidential action to be in violation of the Establishment Clause and the Immigration and Nationality Act (INA) and questioning the motive behind the order by relying, in part, on Trump’s statements.<sup>8</sup>

On March 6, Trump issued a new executive order (EO-2), less than a month after the Ninth Circuit upheld a temporary restraining order against EO-1.<sup>9</sup> EO-2 temporarily suspended “the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, subject to categorical exceptions and case-by-case waivers.”<sup>10</sup> Unlike its predecessor, EO-2 removed Iraq as a banned country, excluded lawful permanent residents, and eliminated preferential treatment of persons based on religious persecution.<sup>11</sup> EO-2 once again suspended the entry of refugees and decisions on applications for refugee status for 120 days.<sup>12</sup>

Litigants who had challenged EO-1 quickly amended their claims in response to EO-2. District courts in Hawaii and Maryland enjoined the enforcement of EO-2, issuing a temporary restraining order and preliminary injunction respectively.<sup>13</sup> Both decisions were later upheld by appellate courts.<sup>14</sup> The Trump administration filed petitions for certiorari to the Supreme Court and requested stays, which were partially granted on June 26 in a *per curiam* order.<sup>15</sup> The Court’s decision reinstated EO-2 but carved out an exception for

<sup>4</sup> For a more detailed account, see Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 764 (2017).

<sup>5</sup> Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8978–79 (Jan. 27, 2017).

<sup>6</sup> *Id.*; see U.S. CITIZENSHIP & IMMIGR. SERVS., THE UNITED STATES REFUGEE ADMISSIONS PROGRAM (USRAP) CONSULTATION & WORLDWIDE PROCESSING PRIORITIES, at <https://www.uscis.gov/humanitarian/refugees-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-worldwide-processing-priorities> [<https://perma.cc/MR7G-DBBZ>] (outlining the requirements that executive officials “review the refugee situation,” “project the extent of possible participation of the United States in resettling refugees,” and “discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns, grave humanitarian concerns or is otherwise in the national interest”).

<sup>7</sup> Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States,’* WASH. POST (Dec. 7, 2015), at [https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm\\_term=.cc4b910b1b50](https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.cc4b910b1b50).

<sup>8</sup> See, e.g., *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (upholding a nationwide temporary restraining order); *Aziz v. Trump*, 234 F. Supp. 3d 724, 726, 737 (E.D. Va. 2017) (issuing a preliminary injunction).

<sup>9</sup> *Washington v. Trump*, 847 F.3d at 1164–69.

<sup>10</sup> Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,211 (Mar. 6, 2017) [hereinafter EO-2].

<sup>11</sup> *Id.* at 13,211, 13,213, 13,215.

<sup>12</sup> *Id.* at 13,215–16 (allowing for case-by-case exceptions under certain conditions).

<sup>13</sup> *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1123 (D. Haw. 2017); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 544 (D. Md. 2017).

<sup>14</sup> *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017), *vacated as moot* by No. 16-1540, 2017 WL 4782860 (S. Ct. 2017); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), *vacated as moot* by 138 S. Ct. 353 (2017).

<sup>15</sup> 137 S. Ct. 2080 (2017).

those people who had a “bona fide relationship with a person or entity in the United States.”<sup>16</sup> In the months following the June 26 decision, the parties litigated the interpretation of this exception,<sup>17</sup> with the Supreme Court clarifying that this exception did not extend to refugees who had received formal assurances from resettlement agencies.<sup>18</sup>

Although the Supreme Court was scheduled to hear oral arguments on EO-2 in October, Trump issued yet a third order, EO-3, that superseded it on September 24. Oral arguments were canceled, signaling “the beginning of the end for a politically charged legal case that could have produced a blockbuster ruling on the clash between presidential power and claims of religious discrimination.”<sup>19</sup> The Court then dismissed the last remaining EO-2 appeal on October 24—expressing no view on the merits—and vacated the Ninth Circuit’s earlier decision upholding the temporary restraining order, such that it was no longer precedential.<sup>20</sup>

Referencing his constitutional authority and power pursuant to the INA, Trump issued EO-3 to *indefinitely* restrict the immigrant and nonimmigrant entry into the United States of nationals from eight designated countries, subject to certain exceptions.<sup>21</sup> Its section 1 uses policy language similar to the first two orders, identifying the need to protect American citizens “from terrorist attacks and other public-safety threats.”<sup>22</sup> It refers to

a worldwide review of whether, and if so what, additional information would be needed from each foreign country to assess adequately whether their nationals seeking to enter the United States pose a security or safety threat. This was the first such review of its kind in United States history.<sup>23</sup>

The proclamation goes on to identify “global requirements for information sharing in support of immigration screening and vetting” by the secretary of Homeland Security to evaluate the practices and capabilities of foreign governments.<sup>24</sup> EO-3 lays out three categories of criteria that were used to evaluate the practices of foreign governments: (1) identity-management information; (2) national security and public-safety information; and (3) national security and public-safety risk assessment.<sup>25</sup> After evaluating “all foreign governments,” the practices of sixteen countries were identified as “inadequate,” and thirty-one were “at risk” of becoming “inadequate” based on the criteria.<sup>26</sup>

<sup>16</sup> *Id.* at 2088. For coverage of how the U.S. State Department initially interpreted the scope of the June 26 decision, see Daugirdas & Mortenson, *supra* note 4, at 774–75.

<sup>17</sup> *E.g.*, *Hawaii v. Trump*, 871 F.3d 646, 654–59 (9th Cir. 2017) (upholding the district court’s determination that individuals could have “bona fide relationships” with grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins in the United States).

<sup>18</sup> *Trump v. Hawaii*, 138 S. Ct. 1 (2017) (temporarily lifting the lower court injunction that blocked EO-2 from applying to refugees who had received such formal assurances).

<sup>19</sup> Michael D. Shear, Ron Nixon & Adam Liptak, *Supreme Court Cancels Hearing on Previous Trump Travel Ban*, N.Y. TIMES (Sept. 25, 2017), at <https://www.nytimes.com/2017/09/25/us/politics/trump-travel-ban-supreme-court.html?ref=collection%2Fsectioncollection%2Fmiddleeast>.

<sup>20</sup> *Trump v. Hawaii*, No. 16-1540, 2017 WL 4782860, at \*1 (S. Ct. Oct. 24, 2017).

<sup>21</sup> EO-3, *supra* note 2.

<sup>22</sup> *Id.* at 45,162.

<sup>23</sup> *Id.* at 45,161.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 45,162.

<sup>26</sup> *Id.* at 45,163.

Some countries made improvements following requests by the State Department,<sup>27</sup> but the performances of several were still considered “inadequate”:

After reviewing the Secretary of Homeland Security’s report . . . and accounting for the foreign policy, national security, and counterterrorism objectives of the United States, I have determined to restrict and limit the entry of nationals of 7 countries found to be “inadequate” with respect to the baseline described [above]: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen.<sup>28</sup>

Section 2 of EO-3 outlines these restrictions, suspending indefinitely the entry of: nationals of Chad, Yemen, and Libya as immigrants or nonimmigrants on business and tourist visas;<sup>29</sup> nationals of Iran as immigrants or nonimmigrants, except those with valid student and exchange visitor visas;<sup>30</sup> nationals of North Korea and Syria as immigrants or nonimmigrants;<sup>31</sup> and Venezuelan government officials and their immediate family members as nonimmigrants on business or tourist visas.<sup>32</sup>

Notably, although Iraq did not meet the established baseline, the secretary of Homeland Security recommended that Iraqi nationals could enter the United States under enhanced screening.<sup>33</sup> Conversely, while Somalia satisfied the baseline criteria, due to its identity-management deficiencies and “significant terrorist presence” in its territory, the entry of Somalis as immigrants was suspended and nonimmigrants became subject to enhanced scrutiny.<sup>34</sup>

EO-3 identified several categorical exceptions to the travel restrictions, including lawful permanent residents, foreign nationals previously granted asylum in the United States or traveling on a diplomatic visa, dual citizens traveling using a passport from an unrestricted country, and anyone granted advance parole or protection under the Convention Against Torture.<sup>35</sup> Case-by-case waivers of the restrictions could be considered when appropriate, as well. A foreign national must demonstrate at a minimum three requirements for a waiver to be granted: (1) undue hardship; (2) that entry would not pose a threat to national security; and (3) that entry would be in the national interest.<sup>36</sup>

Unlike the first two orders, EO-3 is imposed for an indefinite period. The secretary of Homeland Security is instructed to “assess whether any suspensions and limitations imposed . . . should be continued, terminated, modified, or supplemented,” and to submit a report to the president every 180 days.<sup>37</sup> According to officials, the restrictions will continue until the affected countries can “demonstrate their ability to deliver the information requested by

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 45,164.

<sup>29</sup> *Id.* at 45,165–67.

<sup>30</sup> *Id.* at 45,165 (further providing for enhanced screening for these visa holders).

<sup>31</sup> *Id.* at 45,166.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 45,163.

<sup>34</sup> *Id.* at 45,165, 45,167.

<sup>35</sup> *Id.* at 45,167–68.

<sup>36</sup> *Id.* at 45,168.

<sup>37</sup> *Id.* at 45,169.

the United States.”<sup>38</sup> EO-3 immediately entered into effect for foreign nationals affected by EO-2 who lacked a bona fide connection to the United States. For those affected by EO-2 with a bona fide relationship, as well as for nationals of Chad, North Korea, and Venezuela, the restrictions entered into effect on October 18.<sup>39</sup>

EO-3 did not separately restrict the entry of refugees, but soon after its issuance Trump announced the “American First Refugee Program.”<sup>40</sup> This program capped refugee admission to 45,000 for the 2018 fiscal year, less than half of the 110,000 cap that President Obama had set for 2017 and indeed the lowest cap since 1980.<sup>41</sup> The White House specifically identified financial concerns as the basis for the decision, while Trump had proclaimed more generally in EO-2 that “the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States.”<sup>42</sup> On October 24, Trump signed an executive order to resume a revised USRAP. Although the USRAP vetting process was deemed “generally adequate,” that program would resume with enhanced security measures to “certain categories of refugees whose entry continues to pose potential threats.”<sup>43</sup> News reports indicate that applications from citizens of eleven countries would be subjected to an additional ninety-day suspension, subject to certain exceptions.<sup>44</sup>

Legal challenges to EO-3 quickly arose throughout the country. Plaintiffs in *Hawaii v. Trump* filed a motion for a nationwide temporary restraining order (TRO)—except with respect to North Korean and Venezuelan nationals<sup>45</sup>—on October 10. The motion was granted by the Hawaii district court on October 17.

Judge Watson on the Hawaii district court issued the TRO after determining that each plaintiff satisfied standing requirements and alleged justiciable claims under the INA.<sup>46</sup> His decision did not reach the constitutional claims.

Section 1182(f) of the INA provides that:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may . . . for such period as he shall deem necessary, suspend the entry of all aliens of any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.<sup>47</sup>

<sup>38</sup> Shear, Nixon & Liptak, *supra* note 19.

<sup>39</sup> EO-3, *supra* note 2, at 45,171.

<sup>40</sup> White House Press Release, President Donald J. Trump is Taking a Responsible and Humanitarian Approach on Refugees (Sept. 29, 2017), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-responsible-humanitarian-approach-refugees> [<https://perma.cc/H5SV-VHLR>].

<sup>41</sup> Julie Hirschfeld Davis & Miriam Jordan, *Trump Plans 45,000 Limit on Refugees Admitted to U.S.*, N.Y. TIMES (Sept. 26, 2017), at [https://www.nytimes.com/2017/09/26/us/politics/trump-plans-45000-limit-on-refugees-admitted-to-us.html?\\_r=0](https://www.nytimes.com/2017/09/26/us/politics/trump-plans-45000-limit-on-refugees-admitted-to-us.html?_r=0).

<sup>42</sup> EO-2, *supra* note 10, at 13,216.

<sup>43</sup> Exec. Order No. 13,815, 82 Fed. Reg. 50,055, 50,056 (Oct. 24, 2017).

<sup>44</sup> Nick Miroff, *These Are the 11 Countries Whose Refugee Applicants the U.S. Considers Too High Risk*, WASH. POST (Oct. 25, 2017), at [https://www.washingtonpost.com/world/national-security/these-are-the-11-countries-whose-refugee-applicants-the-us-considers-too-high-risk/2017/10/25/118db3b0-b9f5-11e7-99c6-46bdf7f6f8ba\\_story.html?utm\\_term=.e66527615820](https://www.washingtonpost.com/world/national-security/these-are-the-11-countries-whose-refugee-applicants-the-us-considers-too-high-risk/2017/10/25/118db3b0-b9f5-11e7-99c6-46bdf7f6f8ba_story.html?utm_term=.e66527615820).

<sup>45</sup> *Hawaii v. Trump*, No. 17-00050-DKW-KSC, 2017 WL 4639560, at \*1, 4 n.10 (D. Haw. Oct. 17, 2017) [hereinafter *Hawaii Oct. 17 Opinion*].

<sup>46</sup> *Id.* at \*4–8.

<sup>47</sup> 8 U.S.C. § 1182(f) (2012).

Section 1185(a)(1) prohibits, unless otherwise ordered by the president, “any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the president may prescribe.”<sup>48</sup>

According to Judge Watson, because the “findings are inconsistent with and do not fit the restrictions that the order actually imposes, and because EO-3 improperly uses nationality as a proxy for risk,” plaintiffs would likely succeed on the merits of their INA claims.<sup>49</sup> He outlined three main reasons why plaintiffs were likely to prevail specifically under Sections 1182(f) and 1185(a):

[First,] EO-3 is simultaneously overbroad *and* underinclusive. . . . Second, EO-3 does not reveal why existing law is insufficient to address the President’s described concerns. . . . Third, EO-3 contains internal incoherencies that markedly undermine its stated “national security” rationale.<sup>50</sup>

Plaintiffs in the same case had also brought a claim under INA Section 1152(a), which prohibits nationality-based discrimination in the issuance of immigrant visas.<sup>51</sup> While the government argued this provision did not limit presidential authority otherwise granted in the statute, the court, citing the Ninth Circuit opinion regarding EO-2, disagreed:

[A]sserted now with respect to EO-3, the Government’s position untenably contradicts the Ninth[] Circuit’s holding. In short, EO-3 plainly violates Section 1152(a) by singling out immigrant visa applicants seeking entry to the United States on the basis of nationality.<sup>52</sup>

Like prior courts that had reviewed EO-1 and EO-2, the Hawaiian district court order also continued to rely on statements made by Trump suggesting religious animus, which the court deemed to undercut the proffered national security interests underlying the orders.<sup>53</sup>

The White House described the lower court actions to block enforcement of EO-3 as “dangerously flawed, . . . undercut[ing] the President’s efforts to keep the American people safe and enforce minimum security standards for entry.”<sup>54</sup> On appeal, the Ninth Circuit stayed the district court’s TRO for foreign nationals who did not have a bona fide relationship within the United States.<sup>55</sup>

A Maryland district court similarly enjoined enforcement of EO-3 on October 17, except with respect to nationals of Venezuela and North Korea and persons who lacked a bona fide

<sup>48</sup> 8 U.S.C. § 1185(a)(1) (2012).

<sup>49</sup> Hawaii Oct. 17 Opinion, *supra* note 45, at \*9.

<sup>50</sup> *Id.* at \*10–11.

<sup>51</sup> 8 U.S.C. § 1152(a)(1)(A) (2012).

<sup>52</sup> Hawaii Oct. 17 Opinion, *supra* note 45, at \*13. This opinion was issued before the Ninth Circuit’s EO-2 decision had been vacated by the Supreme Court.

<sup>53</sup> *See id.* at \*3 n.9 (listing examples of comments made by Trump as president, from June–September 2017).

<sup>54</sup> White House Press Release, Statement Regarding Court Action Affecting the President’s Proclamation Regarding Travel to the United States by Nationals of Certain Countries (Oct. 17, 2017), at <https://www.whitehouse.gov/briefings-statements/statement-regarding-court-action-affecting-presidents-proclamation-regarding-travel-united-states-nationals-certain-countries> [<https://perma.cc/EMN5-CVVX>].

<sup>55</sup> Hawaii v. Trump, No. 17-17168, 2017 WL 5343014, at \*1 (9th Cir. Nov. 13, 2017) (quoting 137 S. Ct. 2080, 2088 (2017)).

relationship within the United States.<sup>56</sup> The injunction was granted based on their INA and Establishment Clause claims. Unlike the Hawaii district court, the Maryland district court determined that the plaintiffs had only demonstrated a likelihood of success on the merits on their INA claim that EO-3 violates the non-discrimination provision of that law's Section 1152(a).<sup>57</sup> Despite "compelling arguments that the Proclamation's nationality-based restrictions are not actually necessary," the district court could not conclude plaintiffs were likely to prevail under Section 1182(f):

[T]here is no requirement that a § 1182(f) entry restriction meet more stringent standards found elsewhere in the law. . . . The text of § 1182(f) does not even require the President to find that suspending the entry of a class of aliens would be detrimental to national security, only that it is detrimental to the *interests* of the United States.<sup>58</sup>

Further, while the court reasoned that presidential authority exercised pursuant to Section 1182(f) was subject to judicial review and that there must be "some limit on § 1182(f) authority," it found that those limits were not clear and that therefore the plaintiffs were not likely to succeed on that INA claim.<sup>59</sup>

For these reasons, the Maryland district court proceeded to address the constitutional issues raised by the plaintiffs and focused in particular on their Establishment Clause claim. Although the court noted that the national security interest of EO-3 was "facially legitimate," it found this interest pretextual:

Plaintiffs, however, assert that the Proclamation's proffered national security rationale is not the true motivation behind the restrictions, but is instead a pretext for anti-Muslim bias. In support of their assertion of bad faith, Plaintiffs, as part of their challenge to EO-2, previously offered President Trump's statements during his presidential campaign calling for a "Muslim ban"; his statements that he would fulfill his campaign promise of a Muslim ban by focusing on territories rather than religion; EO-1, adopted without agency consultation, which targeted only majority-Muslim countries and contained preferences for religious minorities within those countries; and statements of President Trump and his advisors that EO-2 had the same policy goals as EO-1. Plaintiffs also pointed to the continued focus in EO-2 on countries with majority-Muslim populations, and what they asserted was a lack of correlation between the stated national security aims of EO-2 and the mechanisms outlines to achieve it. Based on these facts, this Court concluded that the primary purpose for EO-2 was to effect the equivalent of a Muslim ban. The Court now reaffirms that finding for purposes of this present analysis. . . . This combined record provides facts that plausibly allege with sufficient particularity an affirmative showing of bad faith in the stated rationale for the Proclamation.<sup>60</sup>

<sup>56</sup> *Inr'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 4674314, at \*39, 41 (D. Md. Oct. 17, 2017), *appeal filed*, No. 17-2231 (4th Cir. Oct. 23, 2017).

<sup>57</sup> *Id.* at \*19–22.

<sup>58</sup> *Id.* at \*23 (internal citations omitted).

<sup>59</sup> *Id.* at \*24–27.

<sup>60</sup> *Id.* at \*28–29 (citations omitted).

Next, the court analyzed whether EO-3 violated the Establishment Clause under the *Lemon* framework, which requires that: (1) an act must have a secular purpose; (2) its principal/primary effect must neither advance nor inhibit religion; and (3) it must not foster excessive government entanglement with religion.<sup>61</sup> Relying heavily on public statements made by Trump as a candidate and as president, the court found that the government could not establish that the primary purpose of EO-3 was not religious animus, in violation of the Establishment Clause.<sup>62</sup>

While the Hawaii and Maryland court orders turned on U.S. national law, some scholars argued that EO-3 (like its predecessors) violated international law as well. In an amicus brief filed in November, for example, some international law scholars and nongovernmental organizations reiterated arguments that they had made against the earlier versions of EO-3. Specifically, they argued that such executive action violates two human rights treaties to which the United States is a party:

Discrimination based on religion or national origin is prohibited by the International Covenant on Civil and Political Rights (“CCPR”) . . . . Restrictions on travel and entry caused by the EO that impose disparate and unreasonable burdens on the exercise of this right violate CCPR article 2. . . . The International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) also bars discrimination based on national origin. . . . The Proclamation thus makes an explicit distinction based on national origin that, unless necessary and narrowly tailored to achieve a legitimate government aim, would violate U.S. obligations under international law.<sup>63</sup>

These arguments were not raised in the amended complaints or in the court decisions regarding EO-3.

On December 4, the Supreme Court stayed both lower court orders enjoining the enforcement of EO-3 while the government’s appeals remained pending in the Fourth and Ninth Circuits.<sup>64</sup> The Supreme Court’s orders noted that Justices Ginsburg and Sotomayor would have denied the stay requests.<sup>65</sup> Unlike the Court’s previous order staying injunctions of EO-2, there was no carveout permitting the continued entry of foreign nationals who had a “bona fide relationship” within the United States.

After considering the government’s appeal of the Hawaii district court’s preliminary injunction order, the Ninth Circuit on December 22 determined that EO-3 violated the INA with respect to foreign nationals with a bona fide relationship in the United States.<sup>66</sup> But given the Supreme Court’s December 4 order, the court opted to “stay our decision today pending Supreme Court review.”<sup>67</sup> The panel of judges found that Trump

<sup>61</sup> *Id.* at \*29 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

<sup>62</sup> *Id.* at \*30–31, 34–35.

<sup>63</sup> Brief of Amici Curiae International Law Scholars and Nongovernmental Organizations in Support of Appellees at 9, 11, 14–16, *Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KSC (9th Cir. 2017) (No. 17-17168).

<sup>64</sup> *Trump v. Hawaii*, No. 17A550, 2017 WL 5987406, at \*1 (S. Ct. Dec. 4, 2017); *Trump v. Int’l Refugee Assistance Project*, No. 17A560, 2017 WL 5987435, at \*1 (S. Ct. Dec. 4, 2017).

<sup>65</sup> *Supra* note 64.

<sup>66</sup> *Hawaii v. Trump*, No. 17-17168, 2017 WL 6554184 at \*3, 24–25 (9th Cir. Dec. 22, 2017) (per curiam).

<sup>67</sup> *Id.* at \*25.

“exceed[ed] the scope of his delegated authority,” and that EO-3 “once again conflicts with the INA’s prohibition on nationality-based discrimination.”<sup>68</sup>

The Ninth Circuit further held that EO-3 violated separation-of-powers principles and the statutory framework of the INA because “the Constitution gives Congress the primary, if not exclusive, authority to set immigration policy.”<sup>69</sup> Specifically:

[W]hen, as here, a presidential proclamation addresses only matters of immigration already passed upon by Congress, the President’s § 1182(f) authority is at its nadir. . . . by suspending entry of a class of 150 million potentially admissible aliens, [EO-3] sweeps broader than any past entry suspension and indefinitely nullifies existing immigration law as to multiple countries. The Proclamation does so in the name of addressing general public-safety and terrorism threats, and what it deems to be foreign countries’ inadequate immigration-related practices—concerns that Congress has already addressed.<sup>70</sup>

The panel did not reach the plaintiffs’ Establishment Clause claims.<sup>71</sup>

Litigants challenging EO-3 are likely to continue to use comments made by Trump. Indeed, after Trump shared “three inflammatory anti-Muslim videos posted by a far-right British activist” on November 29, Neal Katyal, one of the lawyers representing Hawaii in *Hawaii v. Trump*, suggested that such actions could bolster their case.<sup>72</sup> Questions during oral argument in the Fourth Circuit similarly suggested these statements could continue to be relevant. For example, after Deputy Assistant Attorney General Hashim Mooppan acknowledged that Trump’s tweets were official statements of the president, but argued they were legally irrelevant, Judge Wynn asked if the judges should “just ignore reality” in light of the videos Trump shared.<sup>73</sup> Judge Motz further noted: “The President has continued to make statements that some people regard to be anti-Muslim after the issuance of this order. Should we be surprised that it might be construed as an anti-Muslim order?”<sup>74</sup> While the Ninth Circuit did not reference such comments in its most recent opinion on December 22, it remains to be seen if and how such comments will ultimately factor into U.S. national court decisions on the merits.

<sup>68</sup> *Id.* at \*1.

<sup>69</sup> *Id.* at \*11, 15.

<sup>70</sup> *Id.* at \*15.

<sup>71</sup> *Id.* at \*10 n.9; 25.

<sup>72</sup> Matt Zapotosky, *Trump’s Tweets Could Again Complicate Effort to Defend Travel Ban*, WASH. POST (Nov. 29, 2017), at [https://www.washingtonpost.com/news/post-nation/wp/2017/11/29/thanks-see-you-in-court-trumps-tweets-could-again-complicate-effort-to-defend-travel-ban/?tid=hybrid\\_collaborative\\_1\\_na&utm\\_term=.f5e957690c2e](https://www.washingtonpost.com/news/post-nation/wp/2017/11/29/thanks-see-you-in-court-trumps-tweets-could-again-complicate-effort-to-defend-travel-ban/?tid=hybrid_collaborative_1_na&utm_term=.f5e957690c2e).

<sup>73</sup> Ann E. Marimow, *Trump Travel Ban and His Tweets Argued at Federal Appeals Court*, WASH. POST (Dec. 8, 2017), at [https://www.washingtonpost.com/local/public-safety/trump-travel-ban-the-30-version-argued-at-appeals-court/2017/12/08/58f506fe-daa7-11e7-a841-2066faf731ef\\_story.html?utm\\_term=.9f457b82d6b9](https://www.washingtonpost.com/local/public-safety/trump-travel-ban-the-30-version-argued-at-appeals-court/2017/12/08/58f506fe-daa7-11e7-a841-2066faf731ef_story.html?utm_term=.9f457b82d6b9).

<sup>74</sup> *Id.*

## INTERNATIONAL CRIMINAL LAW

*U.S. District Court Convicts Mohammad Jabbateh of Perjury and Immigration Fraud for Concealing His Role as Former Liberian Warlord “Jungle Jabbah”*

doi:10.1017/ajil.2018.6

In the spring of 2016, U.S. prosecutors charged Mohammad Jabbateh with four counts of perjury and immigration fraud for making false statements during his pursuit of asylum and later permanent legal residency in the United States.<sup>1</sup> At the time of the indictment, Jabbateh was a Liberian national living in East Lansdowne, Pennsylvania, and the owner of a shipping company.<sup>2</sup> The indictment charged that Jabbateh lied to U.S. immigration officials to conceal the role he played in Liberia’s first civil war as the warlord “Jungle Jabbah.”<sup>3</sup> In October of 2017, a jury convicted Jabbateh on all four counts.<sup>4</sup> Jabbateh is reportedly the first person prosecuted and found guilty in connection with atrocities carried out during Liberia’s first civil war, which ran from 1989 to 1997.<sup>5</sup>

The indictment alleged that Jabbateh was a commander within the United Liberation Movement for Democracy in Liberia (ULIMO), a rebel group which fought against the National Patriotic Front of Liberia (NPFL) and its leader Charles Taylor.<sup>6</sup> It further stated that:

During his overall time as a ULIMO commander . . . , defendant Mohammed Jabbateh, a/k/a/ “Jungle Jabbah,” either personally committed, or ordered ULIMO troops under his command to commit the following nonexclusive list of acts: 1) the murder of civilian noncombatants; 2) the sexual enslavement of women; 3) the public raping of women; 4) the maiming of civilian noncombatants; 5) the torturing of civilian noncombatants [;] 6) the enslavement of civilian noncombatants; 7) the conscription of child soldiers; 8) the execution of prisoners of war; 9) the desecration and mutilation of corpses; and 10) the killing of any person because of race, religion, nationality, ethnic origin or political opinion.<sup>7</sup>

<sup>1</sup> United States v. Jabbateh, Crim. No. 2:16-CR-00088, Indictment (E.D. Pa. Apr. 13, 2016), available at <https://www.justice.gov/usao-edpa/file/840546/download> [<https://perma.cc/SC73-NQWQ>] [hereinafter Indictment].

<sup>2</sup> Jeremy Roebuck, *In Historic Verdict, Delco Man Convicted in ‘Jungle Jabbah’ War Crimes Case*, PHIL. INQUIRER (Oct. 18, 2017), at <http://www.philly.com/philly/news/pennsylvania/philadelphia/delco-man-guilty-of-immigration-fraud-in-jungle-jabbah-war-crimes-case-20171018.html>.

<sup>3</sup> See Indictment, *supra* note 1, at 7–13.

<sup>4</sup> U.S. Attorney’s Office for the Eastern District of Pennsylvania Press Release, *Liberian National Found Guilty of Immigration Fraud and Perjury* (Oct. 18, 2017), at <https://www.justice.gov/usao-edpa/pr/liberian-national-found-guilty-immigration-fraud-and-perjury> [<https://perma.cc/N4DE-FCGE>] [hereinafter Oct. 18 U.S. Attorney’s Office for the Eastern District of Pennsylvania Press Release].

<sup>5</sup> Roebuck, *In Historic Verdict, Delco Man Convicted in ‘Jungle Jabbah’ War Crimes Case*, *supra* note 2; see also Civitas Maxima & Global Justice and Research Project Press Release, *U.S. Court Finds Liberian Rebel Commander “Jungle Jabbah” Guilty of Crimes Linked to Atrocities in Liberia’s First Civil War* (Oct. 18, 2017), available at [https://www.civitas-maxima.org/sites/default/files/docs/2017-10/cm\\_171018\\_press\\_release\\_jungle\\_jabbah\\_verdict-1\\_1.pdf](https://www.civitas-maxima.org/sites/default/files/docs/2017-10/cm_171018_press_release_jungle_jabbah_verdict-1_1.pdf) (“To date, no one has been held to account [regarding the first civil war] in Liberia, and the trial against Jabbateh is the first confrontation of the crimes committed during the first civil war in a foreign country.”).

<sup>6</sup> Indictment, *supra* note 1, at 3.

<sup>7</sup> *Id.* at 8.

In December of 1998, Jabbateh applied for asylum in the United States.<sup>8</sup> In his asylum application statement, Jabbateh described running from NPFL troops in 1990 as they invaded his town and murdered his brother and mother.<sup>9</sup> He claimed that he had spent the next two years in a refugee camp, where he had become involved with the ULIMO or its precursor, and that he later returned in 1992 to the capital of Liberia, Monrovia, where he had served as a security official at the executive mansion.<sup>10</sup> He described himself as having been captured and tortured after Taylor came to power in 1997.<sup>11</sup>

In January 1999, a U.S. immigration officer interviewed Jabbateh to determine whether his application for asylum should be granted. Jabbateh answered “No” when asked “1) ‘[H]ave you ever committed a crime?’; and 2) ‘[H]ave you ever harmed anyone else?’”<sup>12</sup>

In December 1999, the United States granted Jabbateh asylum.<sup>13</sup> Three years later, Jabbateh applied for legal permanent residency.<sup>14</sup> During the application process, he responded “No” to the following two questions on the applicable form:

Have you ever engaged in genocide, or otherwise ordered, incited, assisted or otherwise participated in the killing of any person because of race, religion, nationality, ethnic origin or political opinion?

. . . [H]ave you, by fraud or willful misrepresentation of a material fact, ever sought to procure . . . , or procured, a visa, other documentation, or entry into the U.S. or any immigration benefit?<sup>15</sup>

After an extensive investigation by U.S. Immigration and Customs Enforcement, including its Homeland Security Investigations (HSI) office in Philadelphia and its Human Rights Violators and War Crimes Center, the U.S. Attorney in Philadelphia charged Jabbateh “with two counts of fraud in immigration documents and two counts of perjury.”<sup>16</sup>

On October 2, 2017, Jabbateh’s trial began. During the eight-day trial, seventeen Liberian witnesses testified for the prosecution about Jabbateh’s war time acts.<sup>17</sup> One witness recounted how Jabbateh’s soldiers killed her husband and subsequently forced her to cook his heart, while others described rapes, murders, and horrific acts perpetrated by Jabbateh

<sup>8</sup> *Id.*

<sup>9</sup> Jeremy Roebuck, *Jungle Jabbah’s War: Accused Liberian’s Own Story Emerges in Court*, PHIL. INQUIRER (Oct. 5, 2017), at <http://www.philly.com/philly/news/crime/jabbateh-jabateh-jungle-jabbah-liberian-war-crimes-philly-trial-20171005.html>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Indictment, *supra* note 1, at 9.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> U.S. Attorney’s Office for the Eastern District of Pennsylvania Press Release, *Immigration Charges Unsealed Against Liberian National* (Apr. 13, 2016), at <https://www.justice.gov/usao-edpa/pr/immigration-charges-unsealed-against-liberian-national> [<https://perma.cc/2RYS-9DAD>]; U.S. Immigrations and Customs Enforcement Press Release, *Liberian National Found Guilty of Immigration Fraud, Perjury* (Oct. 18, 2017), at <https://www.ice.gov/news/releases/liberian-national-found-guilty-immigration-fraud-perjury> [<https://perma.cc/K8XB-N53Q>].

<sup>17</sup> Roebuck, *In Historic Verdict, Delco Man Convicted in ‘Jungle Jabbah’ War Crimes Case*, *supra* note 2.

and his soldiers.<sup>18</sup> No witnesses took the stand for Jabbateh, but ten character witnesses observed in sworn statements that they knew him to be a “peaceful, law-abiding and non-violent person.”<sup>19</sup>

On October 18, 2017, the jury found Jabbateh guilty of all four counts of the indictment.<sup>20</sup> In a press statement announcing Jabbateh’s guilty verdict, Special Agent Marlon Miller of HSI’s Philadelphia office observed:

The United States will not be a safe haven for human rights violators and war criminals. . . . Today’s verdict will help bring justice to the victims of Mr. Jabbateh’s atrocities. . . . HSI will continue to use every tool at our disposal to ensure that those who have committed such acts abroad never evade justice and accountability for their crimes by hiding among their victims in the United States.<sup>21</sup>

Jabbateh’s sentencing will occur some time after the end of the trial.<sup>22</sup> He faces up to thirty years’ imprisonment in the United States and deportation after he completes his prison sentence.<sup>23</sup>

#### USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

*President Trump Refuses to Recertify Iran Nuclear Deal, But No Sanctions Are Reimposed on Iran*  
doi:10.1017/ajil.2018.5

On October 13, 2017, President Trump announced that he would not recertify Iran’s compliance with the Joint Comprehensive Plan of Action (JCPOA). This paved the way for Congress to reimpose sanctions on Iran for its nuclear program through an expedited legislative process, but congressional leaders have declined to do so.

In a televised address, Trump remarked:

Today, I am announcing our strategy, along with several major steps we are taking to confront the Iranian regime’s hostile actions and to ensure that Iran never, and I mean never, acquires a nuclear weapon.

Our policy is based on a clear-eyed assessment of the Iranian dictatorship, its sponsorship of terrorism, and its continuing aggression in the Middle East and all around the world.

...

<sup>18</sup> Jeremy Roebuck, *Witness: They Murdered My Husband, Then Ordered Me to Boil His Heart*, PHIL. INQUIRER (Oct. 11, 2017), at <http://www.philly.com/philly/news/pennsylvania/philadelphia/jungle-jabbah-philly-jabateh-jabbateh-liberian-war-crimes-20171011.html>.

<sup>19</sup> Jeremy Roebuck, *Jurors Could Begin Weighing Charges in ‘Jungle Jabbah’ Warlord Trial*, PHIL. INQUIRER (Oct. 16, 2017), at <http://www.philly.com/philly/news/pennsylvania/philadelphia/jungle-jabbah-liberian-warlord-lansdowne-trial-20171016.html>.

<sup>20</sup> Oct. 18 U.S. Attorney’s Office for the Eastern District of Pennsylvania Press Release, *supra* note 4.

<sup>21</sup> *Id.*

<sup>22</sup> Roebuck, *In Historic Verdict, Delco Man Convicted in ‘Jungle Jabbah’ War Crimes Case*, *supra* note 2.

<sup>23</sup> *Id.*

When the [JCPOA] was finalized in 2015, Congress passed the Iran Nuclear Agreement Review Act to ensure that Congress’s voice would be heard on the deal. Among other conditions, this law requires the President, or his designee, to certify that the suspension of sanctions under the deal is “appropriate and proportionate” to measure—and other measures taken by Iran to terminate its illicit nuclear program. Based on the factual record I have put forward, I am announcing today that we cannot and will not make this certification.

We will not continue down a path whose predictable conclusion is more violence, more terror, and the very real threat of Iran’s nuclear breakout.<sup>1</sup>

The five permanent members of the UN Security Council, Germany, the European Union, and Iran concluded the JCPOA on July 14, 2015.<sup>2</sup> Under that agreement, in return for the lifting of various sanctions imposed on it, Iran agreed to never seek, develop, or acquire nuclear weapons and to be subject to an inspection scheme for many years.<sup>3</sup> Two months before the JCPOA was concluded, Congress passed the Iran Nuclear Agreement Review Act of 2015 to ensure that it had “the opportunity to review any agreement and, as necessary, take action to modify the statutory sanctions regime imposed by Congress.”<sup>4</sup> Under that Act, the president must determine every ninety days whether he can certify that:

- (i) Iran is transparently, verifiably, and fully implementing the agreement, including all related technical or additional agreements;
- (ii) Iran has not committed a material breach with respect to the agreement or, if Iran has committed a material breach, Iran has cured the material breach;
- (iii) Iran has not taken any action, including covert activities, that could significantly advance its nuclear weapons program; and
- (iv) suspension of sanctions related to Iran pursuant to the agreement is—
  - (I) appropriate and proportionate to the specific and verifiable measures taken by Iran with respect to terminating its illicit nuclear program; and
  - (II) vital to the national security interests of the United States.<sup>5</sup>

If the president is unable to certify these conditions, the majority or minority leader of either the U.S. House of Representatives or the U.S. Senate may—but is not required to—introduce<sup>6</sup> “qualifying legislation” within sixty days of that determination or event:

<sup>1</sup> White House Press Release, Remarks by President Trump on Iran Strategy (Oct. 13, 2017), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-iran-strategy> [<https://perma.cc/7JK5-3S5Y>] [hereinafter Remarks by President Trump on Iran Strategy].

<sup>2</sup> Joint Comprehensive Plan of Action, July 14, 2015, 55 ILM 108 (2016) [hereinafter JCPOA].

<sup>3</sup> See generally *id.*; Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 109 AJIL 649 (2015) (describing the JCPOA and events surrounding its enactment).

<sup>4</sup> Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114–17, § 2(d)(7)(D), 129 Stat. 201, 207 (2015) (codified at 42 U.S.C. §§ 2011, 2160(e)).

<sup>5</sup> *Id.* § 2(d)(6)(A), 129 Stat. at 207.

<sup>6</sup> *Id.* § 2(e)(3), 129 Stat. at 208.

- (A) the title of which is as follows: “A bill reinstating statutory sanctions imposed with respect to Iran”; and
- (B) the matter after the enacting clause of which is: “Any statutory sanctions imposed with respect to Iran pursuant to \_\_\_\_\_ that were waived, suspended, reduced, or otherwise relieved pursuant to an agreement submitted pursuant to section 135(a) of the Atomic Energy Act of 1954 are hereby reinstated and any action by the United States Government to facilitate the release of funds or assets to Iran pursuant to such agreement, or provide any further waiver, suspension, reduction, or other relief pursuant to such agreement is hereby prohibited,” with the blank space being filled in with the law or laws under which sanctions are to be reinstated.<sup>7</sup>

The Act provides that such qualifying legislation will receive “expedited consideration” and sets forth strict timelines for consideration and debate on the proposed legislation in both the House and the Senate. For example, if the relevant House committees or the Senate Committee on Foreign Relations do not report the legislation within ten session days of the referral, it must be discharged for further consideration by the full House and Senate.<sup>8</sup> During consideration on the floor, debate is limited to two hours in the House and ten hours in the Senate.<sup>9</sup> In the Senate, opponents cannot make use of the filibuster.<sup>10</sup>

In refusing to provide the certification required under the Iran Nuclear Agreement Review Act, Trump did not explicitly determine that Iran had failed to implement the JCPOA or otherwise materially breached the agreement. Two months prior to Trump’s refusal to recertify, the International Atomic Energy Agency (IAEA) verified Iran’s compliance with the JCPOA for the eighth time,<sup>11</sup> and did so again for a ninth time on November 13, 2017.<sup>12</sup> Additionally, in his fourth report on the implementation of UN Security Council Resolution 2231, the UN secretary-general acknowledged the IAEA’s reports of Iran’s compliance with its nuclear-related commitments and stated that “I continue to believe that the [JCPOA] is the best way to ensure the exclusively peaceful nature of the [Iranian] nuclear programme.”<sup>13</sup> Trump himself also had certified—although with reluctance—Iran’s compliance in both April and July of 2017.<sup>14</sup>

In his October 2017 statement, the president declined to certify on the grounds that the continued suspension of sanctions against Iran was not “[a]ppropriate and proportionate” to other measures taken by Iran to halt its nuclear program. This decision was allegedly the result

<sup>7</sup> *Id.* § 2(e)(2)(A)–(B), 129 Stat. at 208.

<sup>8</sup> *Id.* §§ 2(e)(4)(A); 2(e)(5)(B), 129 Stat. at 208–09.

<sup>9</sup> *Id.* §§ 2(e)(4)(C); 2(e)(5)(D), 129 Stat. at 209–10.

<sup>10</sup> *See id.* at § 2(e)(5)(C), 129 Stat. at 209.

<sup>11</sup> *See* IAEA Director General Press Release, Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 (Aug. 31, 2017), available at <https://www.iaea.org/sites/default/files/gov2017-35.pdf>.

<sup>12</sup> *See* IAEA Director General Press Release, Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 (Nov. 13, 2017), available at <https://www.iaea.org/sites/default/files/17/11/gov2017-48.pdf>.

<sup>13</sup> UN Secretary-General, Fourth Report of the Secretary-General on the Implementation of Security Council Resolution 2231 (2015), at 1, UN Doc. S/2017/1030 (Dec. 8, 2017), at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2017/1030](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2017/1030) [hereinafter Secretary-General Report].

<sup>14</sup> Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 111 AJIL 1056 (2017).

of a protracted debate within the administration in which Secretary of State Rex Tillerson and Defense Secretary James Mattis persuaded Trump not to immediately terminate U.S. participation in the JCPOA.<sup>15</sup> Rather than taking this more dramatic step and exercising his own authority to reimpose sanctions, Trump chose to take the more limited step of non-certification, an action which, in and of itself, does not constitute a violation of the deal.

In explaining the decision not to recertify, the president claimed that Iran had violated various provisions of the JCPOA, stating that “on two separate occasions, they have exceeded the limit of 130 metric tons of heavy water” and that “[u]ntil recently, the Iranian regime has also failed to meet our expectations in its operation of advanced centrifuges.”<sup>16</sup> He also accused Iran of intimidating international nuclear inspectors and refusing access to military sites.<sup>17</sup>

The president’s speech also reflected a structural difference in approach taken by the Trump administration and the Obama administration. As former Secretary of State John Kerry has explained, the Obama administration sought to separate efforts to dismantle Iran’s nuclear program from its progress in halting support for terrorism and other illicit activities:

Some ask why our agreement didn’t stop Iran’s destabilizing behavior, including its support of Hezbollah and the brutal Assad regime in Syria. It’s a good question with good answers: We were not going to bargain away certainty on the nuclear issue for anything else; as France said, there would be no “quid pro quo.” We had deep disagreements with Iran and zero trust, hadn’t negotiated with them since 1979, and were on a collision course toward military action as the countdown clock on break-out ticked down.

The world was united on one issue alone—Iran’s nuclear capability. We could not have achieved unity or held the sanctions regime together if we added other issues. But we believed it would be easier to deal with other differences with Tehran if we weren’t simultaneously confronting a nuclear regime.<sup>18</sup>

By contrast, Trump’s speech placed the nuclear deal within the broader framework of tensions between the United States and Iran. Calling Iran “the world’s leading state sponsor of terrorism,”<sup>19</sup> Trump began his speech by recounting a spate of terrorist attacks and incidents perpetrated or facilitated by Iran beginning with the 1979 seizure of the U.S. embassy in Tehran. He also condemned Iran for its role in “fuel[ing] sectarian violence in Iraq, and vicious civil wars in Yemen and Syria.”<sup>20</sup> “Given the regime’s murderous past and present,” he said, “we should not take lightly its sinister vision for the future.” Iran’s actions, Trump continued, showed that it “is not living up to the spirit of the deal.”<sup>21</sup> In his speech, he also revealed that he had authorized the U.S. Treasury Department to impose sanctions on Iran’s

<sup>15</sup> See Mark Landler & David E. Sanger, *Trump Disavows Nuclear Deal, But Doesn’t Scrap It*, N.Y. TIMES (Oct. 13, 2017), at [https://www.nytimes.com/2017/10/13/us/politics/trump-iran-nuclear-deal.html?\\_r=1](https://www.nytimes.com/2017/10/13/us/politics/trump-iran-nuclear-deal.html?_r=1).

<sup>16</sup> Remarks by President Trump on Iran Strategy, *supra* note 1.

<sup>17</sup> *Id.*

<sup>18</sup> John F. Kerry, *The Nuclear Deal Is Working. Here’s How We Know*, WASH. POST (Sept. 29, 2017), at [https://www.washingtonpost.com/opinions/the-iran-deal-is-working-heres-how-we-know/2017/09/29/d138b070-a44c-11e7-b14f-f41773cd5a14\\_story.html?utm\\_term=.f0329386d5ce](https://www.washingtonpost.com/opinions/the-iran-deal-is-working-heres-how-we-know/2017/09/29/d138b070-a44c-11e7-b14f-f41773cd5a14_story.html?utm_term=.f0329386d5ce).

<sup>19</sup> Remarks by President Trump on Iran Strategy, *supra* note 1.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

Islamic Revolutionary Guard Corps for its support for terrorism.<sup>22</sup> These sanctions do not violate the JCPOA, which only applies to certain kind of sanctions.<sup>23</sup>

In a statement that same day, the Russian Foreign Ministry described the president's decision not to recertify as "an element of internal political discussions within the framework of US national legislation," adding that "[w]e hope that this move will have no direct impact on the implementation of the agreement, though it is clearly at odds with the spirit and letter of the JCPOA."<sup>24</sup> British Prime Minister Theresa May, German Chancellor Angela Merkel, and French President Emmanuel Macron also issued a joint statement acknowledging the president's decision not to recertify but reaffirming their commitment to the JCPOA and its full implementation. Their statement reads, in part:

[W]e encourage the US Administration and Congress to consider the implications to the security of the US and its allies before taking any steps that might undermine the JCPoA, such as re-imposing sanctions on Iran lifted under the agreement.

At the same time as we work to preserve the JCPoA, we share concerns about Iran's ballistic missile programme and regional activities that also affect our European security interests. . . . Our governments are committed to ensuring the JCPoA is maintained. Independent of the JCPoA, we need to make sure that our collective wider concerns are being addressed.<sup>25</sup>

Iranian President Hassan Rouhani described President Trump's speech as "incorrect rhetoric, baseless allegations, and bad-mouthing."<sup>26</sup> He stated:

This is an international, multilateral deal that has been ratified by the UN Security Council. . . . This [JCPOA] is not a document between Iran and the United States that [President Trump] can treat the way he likes. Respect and ethics are also important. . . .

With regard to the JCPOA, we see this [as] an international deal, a multilateral deal. As long as our rights are served, as long as our interests are secured, if we continue to benefit from this deal within the framework of our national interest, we will continue to stick to the deal; we will continue to cooperate with the IAEA within the framework of

<sup>22</sup> *Id.*; see also U.S. Dep't of Treas. Press Release, Treasury Designates the IRGC Under Terrorism Authority and Targets IRGC and Military Supporters Under Counter-proliferation Authority (Oct. 13, 2017), at <https://www.treasury.gov/press-center/press-releases/Pages/sm0177.aspx> [<https://perma.cc/58HY-39KW>].

<sup>23</sup> See JCPOA, *supra* note 2, para. 26 (committing the United States to refrain from reimposing or reintroducing sanctions it ceased applying on Iran under the JCPOA and from introducing new nuclear-related sanctions); cf. Secretary-General Report, *supra* note 13, at 1 (noting with respect to the decertification decision that "[a]t present these national executive actions do not affect the validity of the Plan or the respective commitments of the participants contained therein").

<sup>24</sup> Min. of For. Aff. of the Russ. Fed. Press Release, Statement by the Foreign Ministry Regarding Implementation of the Joint Comprehensive Plan of Action on Iran's Nuclear Programme (Oct. 13, 2017), at [http://www.mid.ru/en/web/guest/about/social\\_organizations/association/-/asset\\_publisher/w6CkLeKcy2bQ/content/id/2903939](http://www.mid.ru/en/web/guest/about/social_organizations/association/-/asset_publisher/w6CkLeKcy2bQ/content/id/2903939).

<sup>25</sup> Office of the British Prime Minister Press Release, Declaration by the Heads of State and Government of France, Germany and the United Kingdom (Oct. 13, 2017), at <https://www.gov.uk/government/news/declaration-by-the-heads-of-state-and-government-of-france-germany-and-the-united-kingdom>.

<sup>26</sup> Speech of Iranian President Hassan Rouhani, C-SPAN, at 19:36 (Oct. 13, 2017), at <https://www.c-span.org/video/?435714-2/iranian-president-reacts-president-trumps-speech>.

international law. . . . However, if one day our interests are not met or other sides refuse to abide by their commitments, they should know, Iran will not hesitate; we'll give them a fitting response.<sup>27</sup>

In the sixty days that followed Trump's decision not to recertify the Iran deal, neither the majority nor the minority leaders of the Senate and the House introduced the expedited legislation contemplated in the Iran Nuclear Agreement Review Act. The window for this expedited legislation has thus closed. Assuming that the president's obligation to make certifications every ninety days continues even after a decision not to certify, the sixty-day window for expedited legislation again will be available should Trump decline to make the certification in January 2018.<sup>28</sup>

Trump's decision not to recertify does not itself place the United States in violation of the JCPOA. But the president or Congress could take other steps that would have this effect. The president could reimpose nuclear-related sanctions, or Congress could legislate to the same effect through ordinary legislation (or through expedited legislation if a subsequent window for doing so pursuant to the Iran Nuclear Agreement Review Act becomes available). In his October 13 address, Trump indicated that members of Congress are considering legislation to amend the Act to strengthen its enforcement mechanisms and permanently prohibit Iran from developing its nuclear program.<sup>29</sup>

Although the United States thus continues to accept the JCPOA, Trump made clear in his speech that this may change. He described "insufficient enforcement and near total silence on Iran's missile programs" as "flaws in the deal."<sup>30</sup> He then stated that "in the event we are not able to reach a solution working with Congress and our allies, then the agreement will be terminated. It is under continuous review, and our participation can be cancelled by me, as President, at any time."<sup>31</sup>

<sup>27</sup> *Id.* at 6:17, 18:16.

<sup>28</sup> See Iran Nuclear Agreement Review Act, Pub. L. No. 114-17, § 2(d)-(e), 129 Stat. 201, 207-208 (2015) (providing that the president is to make certification decisions "not less than every 90 calendar days" but not further specifying whether this obligation survives a decision not to certify).

<sup>29</sup> Remarks by President Trump on Iran Strategy, *supra* note 1.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*