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Contemporary Practice of the United States Relating to International Law (112:2 Am J Int'l L)

Jean Galbraith

University of Pennsylvania Carey Law School

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This article argues that a form of legal regulation is embodied in decisions at the UN Security Council that condone but do not formally authorize specific military operations. Such decisions sometimes inflect or go beyond what the *jus ad bellum* permits through its general standards—that is, under the prohibition of cross-border force and small handful of exceptions. Recognizing that this form of regulation is both part of the law and different in kind from regulation through the general standards should change how we think about the *jus ad bellum*.

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Although the United States has relied on the ICJ's doctrine of specially-affected states to claim that it and other powerful states in the Global North play a privileged role in the formation of customary international law, the doctrine itself has never been systematically developed by the ICJ or by legal scholars. This article fills that lacuna by addressing two questions: (1) what makes a state "specially affected"?; and (2) what is the importance of a state qualifying as "specially affected" for the formation of custom? It concludes that a theoretically coherent understanding of the doctrine would give states in the Global South significant power over custom formation.

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*Edited by Jean Galbraith**

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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

Executive Branch Imposes Limited Russia-Related Sanctions After Statutory Deadlines

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Despite the passage of several statutory deadlines, by February 2018 the Trump administration had imposed no Russia-related sanctions pursuant to certain provisions of the Countering America's Adversaries Through Sanctions Act (CAATSA),¹ suggesting at one point that the threat of sanctions alone would be sufficient to deter further malfeasance.² Then, on March 15, 2018, more than five months after the passage of an initial statutory deadline,³ the Trump administration announced that it would impose sanctions on five entities and nineteen individuals for their involvement in "malign" cyber activities on behalf of the Russian government.⁴

Passed in the late summer of 2017 by a vote of 419–3 in the House and 98–2 in the Senate, CAATSA imposes sanctions on Iran, Russia, and North Korea.⁵ Title II of CAATSA, the Countering Russian Influence in Europe and Eurasia Act of 2017,⁶ entrenches preexisting sanctions,⁷ provides the deadlines and conditions for the imposition of certain new sanctions,⁸ places various limits on presidential discretion,⁹ and establishes several reporting requirements.¹⁰ The new sanctions that CAATSA imposes include measures directed at persons who participate in cyberattacks on behalf of the Russian government,¹¹ foreign persons who are involved in the commission of human rights abuses in territories controlled by

¹ Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017) (codified as amended in scattered sections of 22 U.S.C.).

² See Patricia Zengerle, *Trump Administration Holds Off on New Russia Sanctions, Despite Law*, REUTERS (Jan. 29, 2018), at <https://ca.reuters.com/article/topNews/idCAKBN1FI2V7-OCATP>; Carol Morello, *White House Says There's No Need for New Russia Sanctions*, WASH. POST (Jan. 29, 2018), at https://www.washingtonpost.com/world/national-security/rich-russians-still-waiting-to-exhale/2018/01/29/7df459ca-052a-11e8-8777-2a059f168dd2_story.html?utm_term=.9dd3aa3574b6.

³ See Countering America's Adversaries Through Sanctions Act, *supra* note 1, at § 224(a), 131 Stat. at 908 (requiring the imposition of sanctions with respect to Russian cyber activities "[o]n and after the date that is 60 days after the date of the enactment of this Act").

⁴ See Peter Baker, *White House Penalizes Russia over Election Meddling and Cyberattacks*, N.Y. TIMES (Mar. 15, 2018), at <https://www.nytimes.com/2018/03/15/us/politics/trump-russia-sanctions.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news>; U.S. Dep't of Treas. Press Release, *Treasury Sanctions Russian Cyber Actors for Interference with the 2016 U.S. Elections and Malicious Cyber-Attacks* (Mar. 15, 2018), at <https://home.treasury.gov/news/press-releases/sm0312> [<https://perma.cc/LR4Z-BBSR>].

⁵ See generally Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 1015 (2017) (discussing the Countering America's Adversaries Through Sanctions Act's substantive provisions); see also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 483, 483–504 (discussing evidence of Russian interference with the 2016 U.S. election, the response of the Obama administration, and the approach taken initially by the Trump administration).

⁶ Countering America's Adversaries Through Sanctions Act, *supra* note 1, at § 201, 131 Stat. at 898.

⁷ *Id.* § 222(a), 131 Stat. at 906–07.

⁸ See generally *id.* §§ 221–38, 131 Stat. at 906–22.

⁹ *E.g., id.* § 216, 131 Stat. at 900–06.

¹⁰ *Id.* §§ 241–243, 131 Stat. at 922–25.

¹¹ *Id.* § 224(a), 131 Stat. at 908–10.

Russia;¹² and persons who engage in “significant” transactions with the Russian intelligence and defense sectors.¹³

Several of these provisions, including those related to Russian cyber activities and to persons engaged in transactions with the Russian intelligence and defense sectors, mandate the imposition of sanctions within a certain time period after the enactment of CAATSA. For example, Section 224, the sanctions provision related to Russian cyber activity, provides, in part:

- (a) IN GENERAL.—On and after the date that is 60 days after the date of the enactment of this Act, the President shall—
 - (1) Impose the sanctions described in subsection (b) with respect to any person that the President determines—
 - (A) knowingly engages in significant activities undermining cybersecurity against any person, including a democratic institution, or government on behalf of the Government of the Russian Federation; or
 - (B) is owned or controlled by, or acts or purports to act for or on behalf of, directly or indirectly, a person described in subparagraph (A);
 - ...
- (c) APPLICATION OF NEW CYBER SANCTIONS.—The President may waive the initial application under subsection (a) of sanctions with respect to a person only if the President submits to the appropriate congressional committees—
 - (1) a written determination that the waiver—
 - (A) is in the vital national security interests of the United States; or
 - (B) will further the enforcement of this title; and
 - (2) a certification that the Government of the Russian Federation has made significant efforts to reduce the number and intensity of cyber intrusions conducted by that Government.¹⁴

A similar structure can be found in Section 231, the CAATSA provision imposing sanctions on persons who “knowingly . . . engage[] in a significant transaction” with “the defense or intelligence sectors of the Government of the Russian Federation.”¹⁵ Section 231 sanctions are to be imposed “[o]n and after the date that is 180 days from the enactment of this Act.”¹⁶ Section 231 has a waiver provision that is identical to Section 224(c) given above,¹⁷ and additionally provides as follows:

- (c) DELAY OF IMPOSITION OF SANCTIONS.— The President may delay the imposition of sanctions under subsection (a) with respect to a person if the President certifies to the appropriate congressional committees, not less frequently than every 180 days while the delay is in effect, that the person is

¹² *Id.* § 228, 131 Stat. at 913–15.

¹³ *Id.* § 231, 131 Stat. at 916–17.

¹⁴ *Id.* § 224(a), (c), 131 Stat. at 908–09.

¹⁵ *Id.* § 231(a), 131 Stat. at 916.

¹⁶ *Id.*

¹⁷ *Id.* § 231(b), 131 Stat. at 916–17.

substantially reducing the number of significant transactions . . . in which that person engages.¹⁸

The Trump administration allowed these statutory deadlines to pass without imposing sanctions on Russia, despite bipartisan encouragement to take robust measures.¹⁹ For example, on the day on which the president was due to impose sanctions related to the Russian defense and intelligence sectors under Section 231 of CAATSA—180 days after the Act’s enactment, or January 29, 2018—State Department spokeswoman Heather Nauert said the administration had informed Congress that the imposition of sanctions was not necessary. She explained:

[s]ince the enactment of the . . . legislation, we estimate that foreign governments have abandoned planned or announced purchases of several billion dollars in Russian defense acquisitions From that perspective, if the law is working, sanctions on specific entities or individuals will not need to be imposed because the legislation is, in fact, serving as a deterrent.²⁰

Although not explicit on this point, Nauert’s statement implies that the president has invoked Section 231(c) quoted above, which permits sanctions to be delayed at 180-day intervals for persons who are “substantially reducing the number of significant transactions” in which they engage.²¹ Although Section 231(c) reads as though it requires individualized determinations, the Trump administration’s decision to delay in imposing sanctions appears to be more general.

On February 16, Special Counsel Robert S. Mueller III indicted thirteen Russian nationals and three companies for conspiracy to defraud the United States “for the purpose of interfering with the U.S. political and electoral processes, including the presidential election of

¹⁸ *Id.* § 231(c), 131 Stat. at 917.

¹⁹ See Peter Baker, *Trump’s Conspicuous Silence Leaves a Struggle Against Russia Without a Leader*, N.Y. TIMES (Feb. 17, 2018), at <https://www.nytimes.com/2018/02/17/us/politics/trump-russia.html> (“Mr. Trump’s position stood in contrast to that of fellow Republicans who responded to the indictment with calls for tougher action against Russia.”); Rebecca Kheel, *Armed Services Chair on Russian Meddling: “There Has to Be a Price to Be Paid,”* THE HILL (Feb. 28, 2018), at <http://thehill.com/policy/defense/376114-armed-services-chairman-on-russian-meddling-there-has-to-be-a-price-to-be-paid> (quoting Republican Representative Mac Thornberry, chairman of the House Armed Services Committee, as saying in response to questions about National Security Director Michael Rogers’s earlier testimony about Russia, “An aggressor will always push forward and do more until he meets resistance. We’ve seen that time and time again over history. There has to be a price to be paid.”); Maegan Vazquez, *GOP Sen. Kennedy: Trump Should Have Talked About Russia Sanctions at SOTU*, CNN (Jan. 31, 2018), at <https://edition.cnn.com/2018/01/31/politics/john-kennedy-russia-sanctions-state-of-the-union-cnntv/index.html> (quoting Republican Senator John Kennedy’s reaction to President Trump’s State of the Union Address: “I wish he’d talked about sanctions on the Russians and explained to us why he is not immediately imposing the sanctions, because I think President Putin has acted for the past five years like a thug.”). Democratic lawmakers in both the House and Senate introduced resolutions in February calling on President Trump to impose sanctions pursuant to CAATSA. See H. Res. 749, 115th Cong. (2018); S. Res. 402, 115th Cong. (2018).

²⁰ Zengerle, *supra* note 2.

²¹ Countering America’s Adversaries Through Sanctions Act, *supra* note 1, at § 231(c), 131 Stat. at 917; see also Robert Chesney, *Is the Trump Administration Breaking the Law by Failing to Issue New Russia Sanctions*, LAWFARE BLOG (Jan. 31, 2018), at <https://www.lawfareblog.com/trump-administration-breaking-law-failing-issue-new-russia-sanctions> (concluding that the Trump administration has likely made “a ‘delay’ determination under 231(c)”).

2016.”²² At a press briefing shortly thereafter, Nauert emphasized the Trump administration’s other efforts to counter Russian influence independent of CAATSA. She remarked:

We’ve talked a little bit about CAATSA. A lot of you have said, “Oh my gosh, you haven’t imposed those sanctions just yet.” Remember, January 29th was the first day that we could impose sanctions. Among the things that we have done—and I’ll have other things I want to talk about in addition to CAATSA. But among the things that we have done, we have sent out . . . cables to all of our posts around the world, where those posts have been instructed to speak with their host governments about the new CAATSA law. In explaining to those countries, here’s what you could face if companies, if individuals are involved in these sorts of activities that meet a certain threshold that would contribute positively to Russia’s defense and intelligence and other sectors that are similar to those.

. . .

I know you all want to see results overnight. We don’t have sanctionable activity just yet, but we are working every day to try to determine if there is something that is taking place. If there is something taking place, we will sanction those countries, those individuals, and those entities. That is something we continue to look at doing very, very carefully.

In addition to CAATSA, though, when we talk about election interference and how the U.S. Government has responded as a result, we have other sanctions that have taken place. . . . We have done a lot more than just CAATSA. There have been other sanctions that have taken place. You may recall the previous administration kicked the Russians out of their dachas. We have kept them out of their dachas. We have closed a consulate in San Francisco. People seem to forget about that. We have closed facilities in Washington, D.C. and also New York. That certainly upset the Russians. That is partly because of what they did in our 2016 elections.

You may recall last month—or maybe it was late December—that we expanded the list of individuals who were sanctioned under the Magnitsky Act. We also had the Global Magnitsky Act, in which there were Russians who were named—at least one Russian or two who were named under that. In addition to that, we have the sanctions that are put in place because of Russian activity in Ukraine.

Our government is engaged on an interagency level, where we are talking with one another and we are putting forth actions, activities related to Russians’ malign activity as it pertains to our 2016 election. So please, this is not just CAATSA. It’s a whole lot of other things that people tend to forget about.²³

²² See Indictment, *United States v. Internet Research Agency LLC et al.*, No. 1:18-cr-00032-DLF, 2018 WL 914777 (D.D.C. filed Feb. 16, 2018), available at <https://assets.documentcloud.org/documents/4380504/The-Special-Counsel-s-Indictment-of-the-Internet.pdf> [<https://perma.cc/V6J6-GH7M>]. The special counsel is mostly independent from the Trump administration, as part of his mandate is to investigate “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump.” Rod J. Rosenstein, Acting Attorney General, Order No 3915-2017 re Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), at <https://www.justice.gov/opa/press-release/file/967231/download> [<https://perma.cc/6M9E-T4ZV>].

²³ U.S. Dep’t of State Press Release, Department Press Briefing (Feb. 20, 2018), at <https://www.state.gov/r/pa/prs/dpb/2018/02/278501.htm> [<https://perma.cc/9W4E-PXD9>].

Until recently, the Trump administration had also not imposed any sanctions under Section 224,²⁴ notwithstanding its subsection calling for sanctions “on and after” sixty days from CAATSA’s enactment.²⁵ But on March 15, 2018—the same day the governments of the United Kingdom, France, Germany, and the United States issued a joint statement condemning the poisoning of a former Russian double agent living in the United Kingdom²⁶—the Treasury Department imposed sanctions on five entities and nineteen individuals.²⁷ These sanctions block access to all property subject to U.S. jurisdiction of the targeted individuals and bar U.S. persons from engaging in transactions with these individuals.²⁸ Three of the entities and thirteen of the individuals were the same actors who had previously been indicted by Special Counsel Mueller, and the sanctions on them were imposed pursuant to Executive Order 13694, “Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities” (as amended and codified by CAATSA).²⁹ The remaining two entities and six individuals were sanctioned pursuant to Section 224.³⁰

In announcing these sanctions, Treasury Secretary Steven Mnuchin said:

The Administration is confronting and countering malign Russian cyber activity, including their attempted interference in U.S. elections, destructive cyber-attacks, and intrusions targeting critical infrastructure. . . . These targeted sanctions are a part of a broader effort to address the ongoing nefarious attacks emanating from Russia. Treasury intends to impose additional CAATSA sanctions, informed by our intelligence community, to hold Russian government officials and oligarchs accountable for their destabilizing activities by severing their access to the U.S. financial system.³¹

The Treasury press release further identifies specific cyber-attacks that the administration has attributed to the Russian government and made references to other areas of concern:

Today’s action counters Russia’s continuing destabilizing activities, ranging from interference in the 2016 U.S. election to conducting destructive cyber-attacks, including the NotPetya attack, a cyber-attack attributed to the Russian military on February 15, 2018 in statements released by the White House and the British Government. This cyber-attack was the most destructive and costly cyber-attack in history. The attack resulted

²⁴ See Letter from Robert Menendez, U.S. Senator, to Rex Tillerson, U.S. Sec’y of State, and Steven Mnuchin, U.S. Sec’y of Treasury (Feb. 28, 2018) (noting that the Trump administration has “failed to impose any sanctions against Russia for its cyber activity, even though Section 224 of CAATSA requires sanctions against anyone who knowingly undermines the cyber security of an individual or a democratic institution on behalf of the Russian government”).

²⁵ Countering America’s Adversaries Through Sanctions Act, *supra* note 1, at § 224(a), 131 Stat. at 908; see also Chesney, *supra* note 21 (remarking that there is “no sign that the [Section 224(c) waiver] provision has been invoked, and . . . it seems that it could not be invoked in good faith given that certification requirement”).

²⁶ See Off. of the Brit. Prime Minister Press Release, Salisbury Attack: Joint Statement From the Leaders of France, Germany, the United States and the United Kingdom (Mar. 15, 2018), at <https://www.gov.uk/government/news/salisbury-attack-joint-statement-from-the-leaders-of-france-germany-the-united-states-and-the-united-kingdom> (commenting that “it was highly likely that Russia was responsible for the attack”).

²⁷ U.S. Dep’t of Treasury Press Release, *supra* note 4.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

in billions of dollars in damage across Europe, Asia, and the United States, and significantly disrupted global shipping, trade, and the production of medicines. Additionally, several hospitals in the United States were unable to create electronic records for more than a week.

Since at least March 2016, Russian government cyber actors have also targeted U.S. government entities and multiple U.S. critical infrastructure sectors, including the energy, nuclear, commercial facilities, water, aviation, and critical manufacturing sectors. Indicators of compromise, and technical details on the tactics, techniques, and procedures, are provided in the recent technical alert issued by the Department of Homeland Security and Federal Bureau of Investigation.

In addition to countering Russia's malign cyber activity, Treasury continues to pressure Russia for its ongoing efforts to destabilize Ukraine, occupy Crimea, meddle in elections, as well as for its endemic corruption and human rights abuses. The recent use of a military-grade nerve agent in an attempt to murder two UK citizens further demonstrates the reckless and irresponsible conduct of its government These sanctions are in addition to other ongoing efforts by Treasury to address destabilizing activity emanating from within Russia, including our sanctioning of Russians targeted for activities related to the North Korea sanctions program, the Global Magnitsky program, and the Sergei Magnitsky Act.³²

In addition to eventually imposing some sanctions pursuant to Section 224 of CAATSA, the Trump administration complied in a timely manner with a reporting requirement provided for in Section 241. That section requires the secretary of the Treasury, in consultation with the director of national intelligence and the secretary of State, to submit a report within 180 calendar days of the enactment of CAATSA—or by January 29, 2018—regarding:

- (1) Senior foreign political figures and oligarchs in the Russian Federation, including the following:
 - (A) An identification of the most significant senior foreign political figures and oligarchs in the Russian Federation, as determined by their closeness to the Russian regime and their net worth.
 - (B) An assessment of the relationship between individuals identified under subparagraph (A) and President Vladimir Putin or other members of the Russian ruling elite.
 - (C) An identification of any indices of corruption with respect to those individuals.
 - (D) The estimated net worth and known sources of income of those individuals and their family members (including spouses, children, parents, and siblings), including assets, investments, other business interests, and relevant beneficial ownership information.
 - (E) An identification of the non-Russian business affiliations of those individuals.³³

³² *Id.*

³³ Countering America's Adversaries Through Sanctions Act, *supra* note 1, at § 241(a)(1)(A)–(E), 131 Stat. at 922–23.

Pursuant to Section 241, the Treasury Department published a list of 114 senior Russian political figures and ninety-six oligarchs worth more than \$1 billion on January 29, 2018.³⁴ It also included a classified index of “additional information . . . in order to avoid potential asset flight from the named individuals and entities, as well as to prevent disclosure of sensitive information.”³⁵ In testimony before the Senate Banking and Finance Committee, Mnuchin said the classified annex would be used to inform future targeted sanctions, which he pledged would be forthcoming.³⁶ The same day the list was published, a Russian SU-27 plane buzzed an American EP-3 spy plane in international airspace over the Black Sea, a maneuver which the State Department called a flagrant violation of the bilateral 1972 Agreement for the Prevention of Incidents On and Over the High Seas.³⁷ Russian President Vladimir Putin reportedly considered retaliating against the United States for publishing the list of Russian politicians and oligarchs, but said that Russia would “refrain from such steps for the time being.”³⁸ The Russian government has, nevertheless, promised to protect individuals and businesses named in the Treasury Department list and has suggested that the publication of the list was itself an attempt to interfere with Russia’s own presidential election in March.³⁹

Although appearing on the list does not entail the imposition of any penalties,⁴⁰ fear that the list could be used by the U.S. government to impose future sanctions or cause banks to stop serving them led many wealthy Russians to engage in a flurry of lobbying activity to prevent their inclusion immediately prior to the publication of the list.⁴¹ The list has been criticized for being hastily constructed, however, as the names of the listed individuals appear to have been copied from publically available sources such as the *Forbes* list of Russian billionaires as well as a list of senior Russian officials on the Kremlin’s English language website.⁴² Treasury

³⁴ See U.S. DEP’T OF TREASURY, REPORT TO CONGRESS PURSUANT TO SECTION 241 OF THE COUNTERING AMERICA’S ADVERSARIES THROUGH SANCTIONS ACT OF 2017 REGARDING SENIOR FOREIGN POLITICAL FIGURES AND OLIGARCHS IN THE RUSSIAN FEDERATION AND RUSSIAN PARASTATAL ENTITIES (2018) [hereinafter TREASURY REPORT], available at https://s0.rbk.ru/v6_top_pics/media/file/8/78/755172907012788.pdf; Neil MacFarquhar & Peter Baker, *Trump’s Stance on Russia Sanctions Angers Both Moscow and Washington*, N.Y. TIMES (Jan. 30, 2018), at <https://www.nytimes.com/2018/01/30/world/europe/kremlin-russia-trump-list.html>.

³⁵ U.S. Dep’t of Treas. Press Release, Treasury Information on CAATSA Report and Russian Sanctions (Feb. 1, 2018), at <https://home.treasury.gov/news/press-releases/sm0276> [<https://perma.cc/B6M2-U7JS>].

³⁶ *Id.*

³⁷ U.S. Dep’t of State Press Release, Unsafe Russian Military Practices (Jan. 29, 2018), at <https://www.state.gov/t/pa/prs/ps/2018/01/277753.htm> [<https://perma.cc/CVQ7-9SWL>].

³⁸ MacFarquhar & Baker, *supra* note 34 (further quoting Putin as saying, “We were prepared to undertake retaliatory steps, and quite serious ones too, which would cut our relations to zero.”).

³⁹ Morello, *supra* note 2.

⁴⁰ See Gardiner Harris, *Coming U.S. List of Oligarchs Linked to Putin Alarms Russia’s Rich*, N.Y. TIMES (Jan. 26, 2018), at <https://www.nytimes.com/2018/01/26/us/politics/russia-oligarchs-list-sanctions.html?action=click&contentCollection=Europe&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>; TREASURY REPORT, *supra* note 34.

⁴¹ Harris, *supra* note 40.

⁴² See Julian Borger, *US “Name-and-Shame” List of Russian Oligarchs Binned by Top Trump Official-Expert*, GUARDIAN (Jan. 30, 2018), at <https://www.theguardian.com/world/2018/jan/30/russia-kremlin-list-trump-administration-forbes>; Adam Taylor, *“The Kremlin List”: Why Russian Oligarchs Shrugged*, WASH. POST (Jan. 30, 2018), at https://www.washingtonpost.com/news/worldviews/wp/2018/01/30/the-kremlin-list-why-russian-oligarchs-shrugged/?utm_term=.91cf9383dcf1.

Department officials have confirmed to reporters that the *Forbes* list, kremlin.ru, and other public sources were referenced in constructing the list.⁴³

GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

Time-Limited Provisions of the Foreign Intelligence Surveillance Act Reauthorized Through 2023
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President Trump signed the FISA Amendments Reauthorization Act on January 19, 2018, reauthorizing the mass surveillance provisions of the Foreign Intelligence Surveillance Act (FISA) through December 31, 2023.¹ The Act renewed Title VII of FISA and most notably its Section 702, which provides for the surveillance of foreign targets located outside the United States.² The six-year reauthorization faced opposition from lawmakers and advocates concerned for Americans' privacy interests, although Trump "would have preferred a permanent reauthorization of Title VII to protect the safety and security of the Nation."³

FISA was originally enacted in 1978, authorizing electronic surveillance in order to gather foreign intelligence information on "agent[s] of foreign powers" considered a potential threat to U.S. national security.⁴ It was subsequently amended several times, including by the USA PATRIOT Act following the September 11, 2001 terrorist attacks.⁵ Consistent with that history, the Trump administration similarly highlighted recent terrorist attacks as reason for why the reauthorized foreign intelligence gathering is essential for national security.⁶

Section 702 is a controversial portion of FISA as it allows the National Security Agency (NSA) to collect from U.S. companies the communications of foreign targets abroad—which in turn may include communications with U.S. persons—without obtaining a warrant. Congress first enacted Section 702 in 2008 so that the government could obtain communications of foreign targets located abroad without having to secure individual judicial approval for the surveillance.⁷ Instead, the specialized court created by FISA approves "annual

⁴³ Taylor, *supra* note 42; see also Dep't of Treas. Press Release, *supra* note 35 ("The unclassified report was derived from open source materials which include websites, government documents, public records, and news stories among other items. The classified version was derived from classified sources and methods.").

¹ Pub. L. No. 115–118, 132 Stat. 19 (2018) (codified at 50 U.S.C. §§ 1881a–e); Donald J. Trump, Statement on FISA Amendments Reauthorization Act of 2017, 2018 DAILY COMP. PRES. DOC. 40 (Jan. 19, 2018) [hereinafter Trump Signing Statement].

² White House Press Release, Statement by the Press Secretary on the FISA Amendments Reauthorization Act of 2017 (Jan. 19, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-fisa-amendments-reauthorization-act-2017> [<https://perma.cc/NEB2-D2JM>] [hereinafter White House Press Secretary Press Release].

³ Trump Signing Statement, *supra* note 1.

⁴ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, 92 Stat. 1783, 1784, 1790.

⁵ For a discussion of FISA at the time of enacting the USA PATRIOT Act, see Sean D. Murphy, Contemporary Practice in the United States, 96 AJIL 237, 252–53 (2002).

⁶ Trump Signing Statement, *supra* note 1; White House Press Secretary Press Release, *supra* note 2.

⁷ *The FISA Amendments Act: Q&A*, OFF. DIR. NAT'L INTELLIGENCE (Apr. 18, 2017), available at <https://www.dni.gov/files/icotr/FISA%20Amendments%20Act%20QA%20for%20Publication.pdf>; see also *id.* at 2 (noting that this provision was important given that "by 2008, technology had changed considerably and many terrorists

certifications” submitted by the attorney general and the director of national intelligence of what is frequently called “702 collection” of communications.⁸ The certification permits the U.S. intelligence community to “target non-U.S. persons reasonably believed to be located outside of the United States to acquire certain categories of foreign intelligence information.”⁹ Section 702 (as with Title VII more generally) was originally set to expire on December 31, 2012,¹⁰ and was reauthorized for another five years in 2012.¹¹

Section 702 does not permit the targeted surveillance of U.S. persons.¹² Nevertheless, opponents of Section 702 point out that the collected communications of foreign individuals abroad would include any communications they have with U.S. citizens, which constitutes a warrantless search and implicates significant privacy concerns for those U.S. citizens.¹³ The intelligence community has previously tried to address some of these concerns by instituting certain policy changes. For example, the NSA stated in April 2017 that it would “no longer collect certain internet communications that merely mention a foreign intelligence target” in order “to reduce the chance that it would acquire communications of U.S. persons or others who are not in direct contact with a foreign intelligence target.”¹⁴ Despite this policy shift, 702 collections could still gather communications to or from a U.S. person in direct contact with a foreign intelligence target.

Concerns for the privacy of American citizens sparked unique alliances in Congress during debate over FISA reauthorization. “Some of the most conservative Republicans in the House joined with some of the most liberal Democrats” to fight for additional privacy protections by amending the proposed legislation.¹⁵ Indeed, a bipartisan substitute bill introduced in the Senate in January 2018, known as the “USA Rights” Act, would have required a warrant to search through any records collected in the NSA database under Section 702 that contain

and other foreign intelligence targets abroad were using communication services based in this country, especially those provided by U.S.-based Internet service providers”).

⁸ *Id.*; see also, e.g., Joint Statement from Att’y Gen. Sessions, FBI Dir. Wray, DNI Coats, CIA Dir. Pompeo, and NSA Dir. Rogers on FISA Section 702 Reauthorization (Dec. 21, 2017), at <https://www.justice.gov/opa/pr/joint-statement-attorney-general-sessions-fbi-director-wray-dni-coats-cia-director-pompeo-and> [<https://perma.cc/A3P4-4KEL>] (“The Intelligence Community conducts and uses 702 collection in a manner that protects the privacy and civil liberties of individuals.”).

⁹ *Release of the FISC Opinion Approving the 2016 Section 702 Certifications and Other Related Documents*, INTEL.GOV: OFF. DIR. NAT’L INTELLIGENCE, at <https://www.intelligence.gov/ic-on-the-record-database/results/3-release-of-the-fisc-opinion-approving-the-2016-section-702-certifications-and-other-related-documents> [<https://perma.cc/D7R9-YWH6>].

¹⁰ Pub. L. No. 110–261, § 403(b), 122 Stat. 2436, 2474 (2008).

¹¹ Pub. L. No. 112–238, § 2, 126 Stat. 1631, 1631 (2012).

¹² 50 U.S.C. § 1881a(b)(1)–(3).

¹³ See Karoun Demirjian, *Senate Passes Bill to Extend Key Surveillance Program, Sending It to Trump’s Desk*, WASH. POST (Jan. 18, 2018), at https://www.washingtonpost.com/powerpost/senate-passes-bill-to-extend-key-surveillance-program-sending-it-to-trumps-desk/2018/01/18/3f8d5036-fc71-11e7-8f66-2df0b94bb98a_story.html?utm_term=.2c66d578624eb (noting that under Section 702, federal law enforcement agents can obtain information about U.S. citizens who have communicated with foreign targets without first obtaining a warrant).

¹⁴ Nat’l Sec. Agency Press Release, *NSA Stops Certain Foreign Intelligence Collection Activities Under Section 702* (Apr. 28, 2017), at <https://www.nsa.gov/news-features/press-room/press-releases/2017/nsa-stops-certain-702-activities.shtml> [<https://perma.cc/2VJU-SN85>].

¹⁵ Charlie Savage, Eileen Sullivan & Nicholas Fandos, *House Extends Surveillance Law, Rejecting New Privacy Safeguards*, N.Y. TIMES (Jan. 11, 2018), at <https://www.nytimes.com/2018/01/11/us/politics/fisa-surveillance-congress-trump.html?action=click&contentCollection=Politics&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>.

communications from U.S. citizens.¹⁶ The White House opposed this alternative,¹⁷ which did not prevail. On January 11, the House passed the Reauthorization Act with only modest additional privacy protections—described below—by a vote of 256 to 164,¹⁸ and the Senate by a vote of 65 to 34 on January 18.¹⁹

The final Act provides some additional requirements for the use of surveillance acquired under Section 702 in criminal cases. Law enforcement agents must now obtain a court order when doing certain searches of communications gathered through 702 collection when these searches are “in connection with a predicated criminal investigation” not related to national security.²⁰ This requirement is subject to certain exceptions. Law enforcement agents do not need to procure a court order if “there is a reasonable belief that such contents could assist in mitigating or eliminating a threat to life or serious bodily harm.”²¹ Further, any evidence procured under Section 702 regarding a U.S. person can still be used as evidence in a criminal proceeding without a court order if the proceeding involves certain enumerated crimes, including death, kidnapping, cybersecurity, and human trafficking.²²

Despite his apparent misgivings,²³ Trump signed the Act into law on January 19, 2018. With respect to Section 702 in particular, Trump explained why such extraterritorial surveillance was important:

This intelligence is vital to keeping the Nation safe. . . . [W]e face a constant threat from foreign terrorist networks and other foreign actors who would do us harm. In order to detect and prevent attacks before they happen, we must be able to intercept the communications of foreign targets who are reasonably believed to possess foreign intelligence information. Section 702 provides the necessary authority, and it has proven to be among the Nation’s most effective foreign intelligence tools. It has enabled our

¹⁶ See Charlie Savage, *Surveillance and Privacy Debate Reaches Pivotal Moment in Congress*, N.Y. TIMES (Jan. 10, 2018), at <https://www.nytimes.com/2018/01/10/us/politics/nsa-surveillance-privacy-section-702-amendment.html> (describing the efforts of the bipartisan coalition behind the USA Rights Act); Karoun Demirjian & Josh Dawsey, *Congress Advances Bill to Renew NSA Surveillance Program After Trump Briefly Upstages Key Vote*, WASH. POST (Jan. 11, 2018), at https://www.washingtonpost.com/politics/trump-backtracks-after-appearing-to-contradict-his-administrations-support-of-fisa/2018/01/11/5d7f7088-f6d1-11e7-91af-31ac729add94_story.html?utm_term=.ebc337a9ec81 (noting how privacy advocates “rallied around an alternative measures from Rep. Justin Amash,” the USA Rights Act, “that would have required law enforcement agencies to obtain warrants before being able to sift through the NSA’s record database”).

¹⁷ White House Press Release, Statement from Press Secretary Sarah Sanders (Jan. 10, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-18> [<https://perma.cc/8H88-BFJQ>].

¹⁸ See Demirjian & Dawsey, *supra* note 16 (describing the House vote); Savage, Sullivan & Fandos, *supra* note 15 (same).

¹⁹ See Demirjian, *supra* note 13 (describing the Senate vote).

²⁰ 50 U.S.C. § 1881a(f)(2)(A); *see also* Demirjian, *supra* note 13 (noting that the legislation that passed requires a court order to search data that would be used in criminal cases, but “no such restriction in cases involving counterterrorism, counterintelligence, and counterespionage”).

²¹ 50 U.S.C. § 1881a(f)(2)(E).

²² 50 U.S.C. § 1881e(a)(2)(A)(ii)(II).

²³ Compare Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 11, 2018, 7:33 AM), at <https://twitter.com/realDonaldTrump/status/951431836030459905> (“House votes on controversial FISA ACT today.’ This is the act that may have been used, with the help of the discredited and phony Dossier, to so badly surveil and abuse the Trump Campaign by the previous administration and others?”), with Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 11, 2018, 9:14 AM), at <https://twitter.com/realDonaldTrump/status/951457382651056128> (“With that being said, I have personally directed the fix to the unmasking process since taking office and today’s vote is about foreign surveillance of foreign bad guys on foreign land.”).

Intelligence Community to disrupt numerous plots against our citizens at home and our warfighters abroad, and it has unquestionably saved American lives.²⁴

In hopes of assuaging concerns expressed by privacy advocates, he further underscored that Section 702 only permits the surveillance targeting of “foreigners located abroad” and not U.S. citizens.²⁵

STATE DIPLOMATIC AND CONSULAR RELATIONS

President Trump Recognizes Jerusalem as the Capital of Israel

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On December 6, 2017, President Trump officially recognized Jerusalem as Israel’s capital city. This decision reflects Trump’s “new approach to conflict between Israel and the Palestinians.”¹

In a proclamation titled “Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem,” Trump wrote:

I have determined that it is time for the United States to officially recognize Jerusalem as the capital of Israel. This long overdue recognition of reality is in the best interests of both the United States and the pursuit of peace between Israel and the Palestinians. . . .

Today’s actions—recognizing Jerusalem as Israel’s capital and announcing the relocation of our embassy—do not reflect a departure from the strong commitment of the United States to facilitating a lasting peace agreement. The United States continues to take no position on any final status issues. The specific boundaries of Israeli sovereignty in Jerusalem are subject to final status negotiations between the parties. The United States is not taking a position on boundaries or borders.

Above all, our greatest hope is for peace, including through a two-state solution, if agreed to by both sides. Peace is never beyond the grasp of those who are willing to reach for it. In the meantime, the United States continues to support the status quo at Jerusalem’s holy sites, including at the Temple Mount, also known as Haram al Sharif. Jerusalem is today—and must remain—a place where Jews pray at the Western Wall, where Christians walk the Stations of the Cross, and where Muslims worship at Al-Aqsa Mosque.²

²⁴ Trump Signing Statement, *supra* note 1.

²⁵ *Id.*

¹ Donald J. Trump, Remarks on Signing a Proclamation on Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem, 2017 DAILY COMP. PRES. DOC. 1 (Dec. 6, 2017) [hereinafter Dec. 6 Trump Remarks].

² Proclamation No. 9683, 82 Fed. Reg. 58,331 (Dec. 6, 2017); *see also* U.S. Dep’t of State Press Release, Briefing with Acting Assistant Secretary David M. Satterfield (Dec. 7, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/12/276349.htm> [<https://perma.cc/JE69-BABH>] (emphasizing that Trump recognized Jerusalem as Israel’s capital, but “[w]ith respect to boundaries of sovereignty, borders, geography, those are matters for final status negotiations between the party [sic] . . .”).

Nearly fifty years prior to Trump's declaration, President Truman formally acknowledged Israel as a foreign sovereign.³ Nonetheless, neither Truman nor any later president recognized Israel's sovereignty over Jerusalem due to the charged political posture of such a move.⁴

Trump's decision now aligns the White House with the long-standing position taken by the U.S. Congress. In 1995, Congress passed the Jerusalem Embassy Act.⁵ That Act instructs the executive branch to relocate the U.S. embassy from Tel Aviv to Jerusalem,⁶ but every sitting president since its passage has repeatedly invoked its waiver provision, which is renewable at six-month intervals. This provision allows the U.S. embassy to remain in Tel Aviv "to protect the national security interests of the United States."⁷ In 2002, Congress once again emphasized "its commitment to relocating the United States Embassy in Israel to Jerusalem" and instructed the State Department to allow U.S. citizens born in Jerusalem to be able to list "Israel" as their country of birth on their passports.⁸ The George W. Bush administration and later the Obama administration refused to comply on the grounds that the recognition power is exclusively vested in the president as a matter of constitutional law, and the U.S. Supreme Court upheld this position in its 2015 decision in *Zivotofsky v. Kerry*.⁹

In the speech accompanying his proclamation, President Trump acknowledged that "through all of these years, presidents representing the United States have declined to officially recognize Jerusalem as Israel's capital." He noted that

[a]fter more than two decades of waivers [of the embassy relocation], we are no closer to a lasting peace agreement between Israel and the Palestinians. It would be folly to assume that repeating the exact same formula would now produce a different or better result.¹⁰

Trump continued:

But today, we finally acknowledge the obvious: that Jerusalem is Israel's capital. That is nothing more, or less, than a recognition of reality. It is also the right thing to do. It's something that has to be done.

That is why, consistent with the Jerusalem Embassy Act, I am also directing the State Department to begin preparation to move the American embassy from Tel Aviv to Jerusalem. This will immediately begin the process of hiring architects, engineers, and planners so that a new embassy, when completed, will be a magnificent tribute to peace.¹¹

³ Statement by the President Announcing Recognition of the State of Israel, Public Papers of Harry S. Truman (May 14, 1948), at <https://www.trumanlibrary.org/publicpapers/index.php?pid=1623&st=israel&st1=>.

⁴ *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081 (2015).

⁵ Pub. L. No. 104-45, 109 Stat. 398 (1995) (also stating in § 3(a)(2) that "Jerusalem should be recognized as the capital of the State of Israel").

⁶ *Id.* § 3(a)(3).

⁷ *Id.* § 7.

⁸ Pub. L. No. 107-228 § 214, 116 Stat. 1350, 1365-66 (2002).

⁹ *Zivotofsky*, 135 S. Ct. at 2082-83, 2094.

¹⁰ Dec. 6 Trump Remarks, *supra* note 1.

¹¹ *Id.*

The same day Trump made this statement, however, he too authorized the national security waiver like his predecessors,¹² thus providing time for the embassy's transition.¹³

Immediately after Trump announced his decision, European and Arab leaders, including many U.S. allies, voiced their resistance to this stark departure from U.S. foreign policy and international consensus. UN Secretary-General Antonio Guterres reiterated his position "against any unilateral measures that would jeopardize the prospect of peace for Israelis and Palestinians" and reaffirmed that "there is no alternative to the two-state solution."¹⁴ Guterres continued:

Jerusalem is a final status issue that must be resolved through direct negotiations between the two parties on the basis of the relevant Security Council and General Assembly resolutions, taking into account the legitimate concerns of both the Palestinian and the Israeli sides.¹⁵

Unsurprisingly, Israeli and Palestinian leaders had diametrically opposing reactions. Palestinian President Mahmoud Abbas described Trump's decision as "a deliberate undermining of all peace efforts,"¹⁶ and Palestinians engaged in widespread protests.¹⁷ On the other hand, Prime Minister Benjamin Netanyahu of Israel appreciatively tweeted, "We're profoundly grateful for the President for his courageous and just decision to recognize Jerusalem as the capital of Israel and to prepare for the opening of the US embassy here."¹⁸

Two days after Trump's announcement, the UN Security Council held a special meeting, called for by eight of the fifteen countries on the Council.¹⁹ Each member of the Security Council other than the United States signaled disapproval of Trump's decision.²⁰ Several countries referred to Resolution 478, passed in 1980, which had disapproved of an Israeli basic law proclaiming Jerusalem in its entirety as the capital of Israel.²¹ In defending Trump's decision, U.S. Ambassador to the United Nations Nikki Haley reiterated that the

¹² Presidential Determination No. 2018-02 of December 6, 2017, 82 Fed. Reg. 61,127 (Dec. 6, 2017).

¹³ Mark Landler, *Trump Recognizes Jerusalem as Israel's Capital and Orders U.S. Embassy to Move*, N.Y. TIMES (Dec. 6, 2017), at <https://www.nytimes.com/2017/12/06/world/middleeast/trump-jerusalem-israel-capital.html>.

¹⁴ UN Statements, Secretary-General's Statement on the Middle East Peace Process [as delivered] (Dec. 6, 2017), at <https://www.un.org/sg/en/content/sg/statement/2017-12-06/secretary-general%E2%80%99s-statement-middle-east-peace-process-delivered>.

¹⁵ *Id.*

¹⁶ David M. Halbfinger, Mark Landler & Isabel Kershner, *Trump Calls Jerusalem Plan Step Toward Peace, but It Puts Mideast on Edge*, N.Y. TIMES (Dec. 6, 2017), at <https://www.nytimes.com/2017/12/06/world/middleeast/jerusalem-trump-embassy.html>.

¹⁷ Isabel Kershner, *Jerusalem Largely Calm as Region Protests Trump Move*, N.Y. TIMES (Dec. 8, 2017), at <https://www.nytimes.com/2017/12/08/world/middleeast/israel-jerusalem-trump.html> (also noting that "the enormous wave of violence that had been feared . . . did not immediately materialize").

¹⁸ Office of the Prime Minister of Israel (@IsraeliPM), TWITTER (Dec. 6, 2017, 10:37 AM), at <https://twitter.com/israelipm/status/938477546768920581>.

¹⁹ UN SCOR, 72d Sess. 8128th mtg., UN Doc. SC/13111 (Dec. 8, 2017), at <https://www.un.org/press/en/2017/sc13111.doc.htm> [<https://perma.cc/WHT6-JUMY>] [hereinafter Council Minutes] (noting that the meeting was called for by Bolivia, Britain, Egypt, France, Italy, Senegal, Sweden, and Uruguay).

²⁰ *Id.*

²¹ *Id.* (stating that Egypt, France, and Uruguay referenced Resolution 478 and other related Security Council resolutions); see also SC Res. 478 (1980) (determining Israel's basic law on Jerusalem to be "null and void" and calling upon member states "that have established diplomatic missions at Jerusalem to withdraw such missions from the Holy City").

United States had not specified the borders of Jerusalem and remained open to a two-state solution.²²

On December 18, the UN Security Council considered a draft resolution proposed by Egypt.²³ The text of the resolution stated:

[A]ny decisions and actions which purport to have altered the character, status or demographic composition of the Holy City of Jerusalem have no legal effect, are null and void and must be rescinded in compliance with relevant resolutions of the Security Council, and in this regard, calls upon all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem, pursuant to resolution 478 (1980) of the Security Council.²⁴

Notwithstanding the resolution's support from the rest of the UN Security Council, the United States blocked its passage with a veto.²⁵ Haley described the action in the Security Council as "an insult," vowing that "[i]t won't be forgotten."²⁶

The same day, Yemen as chair of the Arab Group and Turkey as chair of the Summit of the Organization of the Islamic Cooperation called on the president of the UN General Assembly to resume the tenth emergency special session of the General Assembly in accordance with the "Uniting for Peace" procedure.²⁷ In response to this request, Haley took to Twitter:

At the UN [the United States] is always asked to do more & give more. So, when we make a decision, at the will of the American [people, about] where to locate OUR embassy, we don't expect those we've helped to target us. On Thurs[day] there'll be a vote criticizing our choice. The US will be taking names.²⁸

At a cabinet meeting, Trump commended Haley's warnings.²⁹ He stated that it was the "right message" to send to nations who vote against the United States.³⁰ Trump reaffirmed:

²² Council Minutes, *supra* note 19.

²³ *Middle East: Security Council Fails to Adopt Resolution on Jerusalem*, UN NEWS (Dec. 18, 2017), at <https://news.un.org/en/story/2017/12/639772-middle-east-security-council-fails-adopt-resolution-jerusalem> [hereinafter *Middle East: Security Council Fails to Adopt Resolution on Jerusalem*].

²⁴ Text of UN Security Council Draft Resolution on Jerusalem, UN WATCH (Dec. 17, 2017), at <https://www.unwatch.org/text-uns-c-draft-resolution-jerusalem>.

²⁵ *Middle East: Security Council Fails to Adopt Resolution on Jerusalem*, *supra* note 23.

²⁶ U.S. Mission to the UN Press Release, Explanation of Vote Following the Veto of a Draft UN Security Council Resolution on Jerusalem (Dec. 18, 2017), at <https://usun.state.gov/remarks/8222> [<https://perma.cc/434L-248W>].

²⁷ Letter from Permanent Rep. of Yemen to the UN and Permanent Rep. Turkey to the UN to President of the General Assembly (Dec. 18, 2017), available at <https://www.un.org/pgal/72/wp-content/uploads/sites/51/2017/12/ESS-letter-by-the-PGA-with-attachment-for-distribution.pdf> [<https://perma.cc/6CT5-J8A8>]. The "Uniting for Peace" procedure allows the General Assembly to consider a matter "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, or act of aggression." GA Res. 377, para. 1 (Nov. 3, 1950).

²⁸ Nikki Haley (@nikkihaley), TWITTER (Dec. 19, 2019, 2:08 PM), at <https://twitter.com/nikkihaley/status/943241599953309696?lang=en>.

²⁹ *Trump Holds Cabinet Meeting Before Tax Revote*, CNN, 17:12–39 (Dec. 20, 2017), at <https://www.cnn.com/videos/politics/2017/12/20/trump-tax-bill-cabinet-full.cnn>.

³⁰ *Id.* at 17:42–45.

All of these nations that take our money and then they vote against us at the Security Council or they vote against us, potentially, at the Assembly, they take hundreds of millions of dollars and even billions of dollars and then they vote against us. Well, we're watching those votes. Let them vote against us. We'll save a lot. We don't care.³¹

On December 21, the General Assembly adopted by an “overwhelming” majority the “Status of Jerusalem” resolution, considered by the Security Council less than a week earlier.³² Of the 193 member states that comprise the General Assembly, 128 states voted in favor of the resolution, thirty-five states abstained, and nine states—Guatemala, Honduras, Israel, Marshall Islands, Federated States of Micronesia, Nauru, Palau, Togo, and the United States—voted against it.³³ Undeterred, Haley reiterated that “America will put its embassy in Jerusalem.”³⁴

A few weeks later, Trump indicated that the United States might scale back aid to Palestinians if they would not enter into peace negotiations.³⁵ Trump tweeted:

[W]e pay the Palestinians HUNDRED [sic] OF MILLIONS OF DOLLARS a year and get no appreciation or respect. They don't even want to negotiate a long overdue . . . peace treaty with Israel. We have taken Jerusalem, the toughest part of the negotiation, off the table, but Israel, for that, would have had to pay more. But with the Palestinians no longer willing to talk peace, why should we make any of these massive future payments to them?³⁶

Each year the United States provides the Palestinians with about \$700 million in aid through the United States Agency for International Development and the United Nations Relief and Works Agency (UNWRA).³⁷ On January 16, 2018, U.S. State Department spokeswoman Heather Nauert stated that the United States was withholding \$65 million of its planned \$120 million contribution to UNWRA “for future consideration.”³⁸

According to the State Department, the United States intends to open its embassy in Jerusalem in May of this year.³⁹ The embassy will initially be housed in the existing U.S. consulate building in Jerusalem.⁴⁰

³¹ *Id.* at 17:17–34.

³² UN Meetings Coverage and Press Releases, General Assembly Overwhelmingly Adopts Resolution Asking Nations Not to Locate Diplomatic Missions in Jerusalem (Dec. 21, 2017), at <https://www.un.org/press/en/2017/ga11995.doc.htm>.

³³ *Id.*

³⁴ *Id.*

³⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 2, 2018, 2:37 PM), at <https://twitter.com/realDonaldTrump/status/948322497602220032>.

³⁶ *Id.*

³⁷ Loveday Morris & Ruth Eglash, *Israelis Voice Warnings, Palestinians Talk of 'Blackmail' in Wake of Tweets by Trump*, WASH. POST (Jan. 3, 2018), at https://www.washingtonpost.com/world/israelis-voice-warnings-palestinians-talk-of-blackmail-after-trump-threatens-to-cut-funding/2018/01/03/7ca137a8-f078-11e7-b390-a36dc3fa2842_story.html?utm_term=.e8e463686e49.

³⁸ U.S. Dep't of State Press Release, Department Press Briefing (Jan. 16, 2018), at <https://www.state.gov/t/pa/prs/dpb/2018/01/277473.htm> [<https://perma.cc/Z734-F9FS>].

³⁹ U.S. Dep't of State Press Release, Opening of U.S. Embassy Jerusalem (Feb. 23, 2018), at <https://www.state.gov/t/pa/prs/ps/2018/02/278825.htm> [<https://perma.cc/8HCD-R87P>].

⁴⁰ *Id.*

INTERNATIONAL ORGANIZATIONS

Trump Administration Ends Participation in Global Compact on Migration, Citing Concerns Regarding U.S. Sovereignty

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On December 2, 2017, the Trump administration announced the end of its participation in the Global Compact on Migration, a proposed United Nations commitment that would address global flows of migrants.¹ Citing American sovereign interests as the reason for withdrawal, U.S. officials stated that the Global Compact on Migration would undermine current U.S. immigration policy focused on border security.²

The United States began participating in talks to negotiate the Global Compact on Migration in September 2016, when the Obama administration joined the New York Declaration for Refugees and Migrants.³ The New York Declaration was adopted in part to launch negotiations for two global compacts: the Global Compact on Refugees and the Global Compact on Migration.⁴ As envisioned in the New York Declaration, the Global Compact on Migration would “set out a range of principles, commitments and understandings among Member States regarding international migration in all its dimensions.”⁵

Despite this prior U.S. involvement in developing the Global Compact on Migration, actions by the Trump administration signaled that an international agreement on migration would not be consistent with its “America First” policy agenda. President Trump decided on December 1 that the United States would not participate in a global conference on migration in Mexico.⁶ The next day, the United States announced its decision to withdraw from participation in the Global Compact on Migration, noting that the New York Declaration contained several provisions “inconsistent with U.S. immigration policy and the Trump Administration’s immigration principles.”⁷ Specifically, Ambassador Nikki Haley, U.S. Ambassador to the United Nations, explained:

¹ U.S. Mission to the UN Press Release, United States Ends Participation in Global Compact on Migration (Dec. 2, 2017), at <https://usun.state.gov/remarks/8197> [<https://perma.cc/AR46-EAKW>] [hereinafter U.S. Mission to the UN Press Release]; Rick Gladstone, *U.S. Quits Migration Pact, Saying It Infringes on Sovereignty*, N.Y. TIMES (Dec. 3, 2017), at <https://www.nytimes.com/2017/12/03/world/americas/united-nations-migration-pact.html?rref=collection%2Fsectioncollection%2Fworld>.

² U.S. Mission to the UN Press Release, *supra* note 1.

³ *Id.*

⁴ See GA Res. 71/1, at 21, 23 (Sept. 19, 2016), at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1 (adopting the New York Declaration and incorporating its text). The Global Compact on Migration is also called the Global Compact for Safe, Orderly and Regular Migration. See *id.* at 21.

⁵ *Id.* at 21. The Global Compact on Migration will not be a legally binding international agreement, but rather an “unprecedented opportunity for leaders to . . . lay out a common vision of how to make migration work for all our nations.” UN Secretary-General Press Release, Antonio Guterres, Towards a New Global Compact on Migration (Jan. 11, 2018), at <https://www.un.org/sg/en/content/sg/articles/2018-01-11/towards-new-global-compact-migration>.

⁶ See Colum Lynch, *Trump Boycotts U.N. Migration Talks*, FOR. POL’Y (Dec. 2, 2017), at <http://foreignpolicy.com/2017/12/02/trump-boycotts-u-n-migration-talks> (reporting Trump’s decision to boycott the global conference on migration days before it was scheduled to commence).

⁷ U.S. Mission to the UN Press Release, *supra* note 1.

America is proud of our immigrant heritage and our long-standing moral leadership in providing support to migrant and refugee populations across the globe. No country has done more than the United States, and our generosity will continue. But our decisions on immigration policies must always be made by Americans and Americans alone. We will decide how best to control our borders and who will be allowed to enter our country. The global approach in the New York Declaration is simply not compatible with U.S. sovereignty.⁸

The next day, Secretary of State Rex Tillerson issued a statement with a similar tone:

While we will continue to engage on a number of fronts at the United Nations, in this case, we simply cannot in good faith support a process that could undermine the sovereign right of the United States to enforce our immigration laws and secure our borders.⁹

To date, the Trump administration has not announced a comparable withdrawal from the Global Compact on Refugees.

The decision to leave the Global Compact on Migration follows other measures by the Trump administration to restrict entry into the United States in the name of national security. Indeed, the withdrawal reinforced what has been called “an atmosphere of renewed American isolationism and exceptionalism at the United Nations in the first year of the Trump White House.”¹⁰ Among other things, the Trump administration restricted the entry of nationals from several predominantly Muslim countries into the United States and capped refugee admissions at 45,000 for Fiscal Year 2018—the lowest cap since 1980.¹¹ Comments by Trump further underscore his administration’s “America First” stance on immigration, including an alleged profanity in relation to immigrants from Haiti, El Salvador, and African countries.¹²

Despite the Trump administration’s withdrawal from the Global Compact on Migration, several American cities have petitioned to join the process and provide collective input.¹³ The mayors of eighteen U.S. cities, including Chicago, Los Angeles, New York, Philadelphia, and the District of Columbia, signed a position paper along with more than 130 mayors from cities across the world in hopes of formally contributing to both Global Compacts.¹⁴ The

⁸ *Id.*

⁹ U.S. Dep’t of State Press Release, U.S. Ends Participation in the Global Compact on Migration (Dec. 3, 2017), at <https://www.state.gov/secretary/remarks/2017/12/276190.htm> [<https://perma.cc/BY5N-BDAJ>].

¹⁰ Gladstone, *supra* note 1.

¹¹ For a detailed discussion of the Trump administration’s executive actions restricting entry into the United States and subsequent litigation, see Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 109 (2018); Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 111 AJIL 764 (2017).

¹² Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018), at https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.cf065882db5f. In November of 2017, the Trump administration had already revoked deportation protection for nearly 60,000 individuals from Haiti. *Id.*

¹³ Bethany Allen-Ebrahimian, *U.S. Cities Want to Join U.N. Migration Talks That Trump Boycotted*, FOR. POL’Y (Dec. 5, 2017), at <http://foreignpolicy.com/2017/12/05/u-s-cities-want-to-join-u-n-migration-talks-that-trump-boycotted>.

¹⁴ Metropolis World Association of Major Metropolises, Position Paper Submitted as a Contribution to the United Nations Global Compact for Safe, Orderly and Regular Migration, and to the Global Compact on

paper urged nations and international organizations to “[s]ee cities as partners in defining and implementing international instruments related to migration” and “[g]ive cities a seat at the table in the discussions that will lead into the negotiations of the Compacts.”¹⁵ The New York City Mayor’s Office of Immigrant Affairs explained the desire to participate: “We need to be part of U.N. decision-making if international agreements are to be responsive to on-the-ground realities.”¹⁶

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

United States Reaches Agreement to Limit Arctic Fishing

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On November 30, 2017, the United States concluded negotiations on an agreement to limit fishing in the Arctic, titled the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean.¹ Delegations from the European Union and nine countries—Canada, China, Denmark with regard to Greenland and the Faroe Islands, Iceland, Japan, Norway, Russia, South Korea, and the United States—participated in the negotiations, which began in December of 2015.² According to a statement made by the U.S. State Department:

The Agreement will prevent unregulated commercial fishing in the high seas portion of the central Arctic Ocean, an area that is roughly 2.8 million square kilometers in size, roughly the size of the Mediterranean Sea. Commercial fishing has never been known to occur in this area, nor is it likely to occur in the near future. However, given the changing conditions of the Arctic Ocean, the governments in question developed this Agreement in accordance with the precautionary approach to fisheries management.³

The agreement also provides for the establishment and operation of a “Joint Program of Scientific Research and Monitoring with the aim of improving the understanding of the

Refugees (dated Dec. 12, 2017) [hereinafter Position Paper]; see also Hon. Jorge Elorza & Jessica Brandt, *Why Cities Are the New Face of American Leadership on Global Migration*, BROOKINGS INST. (Dec. 18, 2017), at <https://www.brookings.edu/opinions/why-cities-are-the-new-face-of-american-leadership-on-global-migration> (describing the steps taken by cities to be involved in the Global Compact).

¹⁵ Position Paper, *supra* note 14, at 5. See also Mayors’ Letter to Filippo Grandi, High Commissioner for Refugees, United Nations (Jan. 27, 2018) (requesting in a letter signed by nineteen cities, nine of which are in the United States, that the High Commissioner involve them in various efforts related to refugees, including the Global Compact on Refugees).

¹⁶ Allen-Ebrahimian, *supra* note 13.

¹ U.S. Dep’t of State Press Release, Meeting on High Seas Fisheries in the Central Arctic Ocean, 28–30 November 2017: Chairman’s Statement (Nov. 30, 2017), at <https://www.state.gov/e/oes/ocns/opa/rls/276136.htm> [<https://perma.cc/M47E-4C5W>] [hereinafter November 30 Press Release].

² U.S. Dep’t of State Press Release, Meeting on High Seas Fisheries in the Central Arctic Ocean: Chairman’s Statement (Mar. 27, 2017), at <https://www.state.gov/e/oes/ocns/opa/rls/269126.htm> [<https://perma.cc/7QPA-T5H2>] [hereinafter March 27 Press Release].

³ November 30 Press Release, *supra* note 1.

ecosystem(s) of this area and, in particular, of determining whether fish stocks might exist in this area that could be harvested on a sustainable basis.”⁴ The text of the agreement has not yet been made public.

Several non-U.S. parties to the agreement have emphasized the importance of this agreement in light of climate change. In discussing the value of the collaborative research initiative in particular, the Norwegian government stated that “such research will be important in monitoring the effects of climate change on the ecosystems of the Arctic high seas.”⁵ Norway had previously noted the importance of limiting unregulated fishing in response to climate change’s alteration of marine ecosystems in the Arctic Ocean.⁶ The European Union also cited climate change as being critical to the importance of the agreement, stating in its press release that:

The Arctic region is warming at almost twice the global average rate, causing a change in the size and distribution of fish stocks. As a result, the Arctic high seas potentially become more attractive for commercial fisheries in the medium to long term. However, until present, most of the Arctic high seas were not covered by any international conservation and management regime. The agreement, reached in Washington DC at the fifth and final round of negotiations, will be a first step towards the creation of regional fisheries management organisations for the Central Arctic Ocean, to ensure that any future fishing is carried out sustainably.⁷

The Canadian government described the agreement as a “strong proactive and precautionary approach to potential fishing activities in the central Arctic Ocean as climate change continues to have a major impact in the area.”⁸ The Trump administration has not made the same explicit connection to climate change, although the State Department press release notes the “changing conditions of the Arctic Ocean.”⁹

In July of 2015, the five Arctic coastal countries—Canada, Denmark, Norway, Russia, and the United States—reached a similar substantive understanding regarding the prevention of unregulated fishing of the Arctic.¹⁰ The State Department at the time noted that the concluded declaration was consistent with past U.S. action to limit commercial fishing in the Arctic and with the intent expressed by Congress in a 2008 joint resolution:

⁴ *Id.*

⁵ Norwegian Gov’t Press Release, Agreement on Unregulated Fishing in the Arctic Ocean (Dec. 1, 2017), at <https://www.regjeringen.no/en/aktuelt/agreement-on-unregulated-fishing-in-the-arctic-ocean/id2580484> [<https://perma.cc/9W5X-4S4B>].

⁶ Norwegian Gov’t Press Release, Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean (July 16, 2015), available at <https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf> [<https://perma.cc/59WM-U32W>].

⁷ Eur. Comm’n Press Release, EU and its Arctic Partners Agree to Prevent Unregulated Fishing in High Seas (Dec. 1, 2017), at http://europa.eu/rapid/press-release_MEX-17-5065_en.htm [<https://perma.cc/5MLS-36KL>] [hereinafter EU Press Release].

⁸ Fisheries and Oceans Canada Statement, Minister LeBlanc Commends Historic International Agreement to Prevent Unregulated Fishing in the High Seas of the Central Arctic Ocean (Nov. 30, 2017), at https://www.canada.ca/en/fisheries-oceans/news/2017/11/minister_leblanccommendshistoricinternationalagreementtopreventu.html [<https://perma.cc/ZX6J-4GYL>] [hereinafter Canada Statement].

⁹ Nov. 30 Press Release, *supra* note 1.

¹⁰ Law Libr. of Congress, Canada; Denmark; Norway; Russia; United States: Fishing Declaration Covering Central Arctic (July 21, 2015), at <http://www.loc.gov/law/foreign-news/article/canada-denmark-norway-russia-united-states-fishing-declaration-covering-central-arctic> [<https://perma.cc/N5HU-J9U8>].

The declaration builds on U.S. action in 2009 to prohibit commercial fishing in its Exclusive Economic Zone north of the Bering Strait until better scientific information to support sound fisheries management is available. The United States initiated this five-state process consistent with congressional direction under Public Law 110–243, which calls for the United States to take steps with other Arctic nations to negotiate an agreement for managing fish stocks in the Arctic Ocean, as well as the Implementation Plan for the 2013 National Strategy for the Arctic Region, which commits the United States to prevent unregulated high seas fisheries in the Arctic.¹¹

Negotiations for the expanded 2017 agreement were expressly grounded in the 2015 declaration but included not only the EU but also China, Iceland, Japan, and South Korea—nations which do not directly border the Arctic but do possess large fishing fleets.¹²

As of the March 2017 round of negotiations, the 2017 agreement was drafted to be legally binding as a matter of international law,¹³ and the Canadian government expressly referred to the agreement as legally binding in its November 2017 press release.¹⁴ It remains to be seen what constitutional process the United States will use in pursuing ratification. The agreement is to enter into force once it has been signed and ratified by all ten parties.¹⁵

INTERNATIONAL ECONOMIC LAW

Trump Administration Continues Push to Reshape American Trade Relations by Imposing Tariffs on Steel and Aluminum Imports

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On March 8, 2018, President Trump signed Proclamation 9704¹ and Proclamation 9705² imposing tariffs on imported aluminum and steel articles, respectively. According to Trump,

¹¹ U.S. Dep’t of State Press Release, Arctic Nations Sign Declaration to Prevent Unregulated Fishing in the Central Arctic Ocean (July 16, 2015), at <https://web.archive.org/web/20150718230333/http://www.state.gov/r/pa/prs/ps/2015/07/244969.htm> [<https://perma.cc/5WE6-MB5M>]. See also Pub. L. No. 110-243, 122 Stat. 1569 (2008).

¹² U.S. Dep’t of State Press Release, Meeting on High Seas Fisheries in the Central Arctic Ocean: Chairmen’s Statement (Dec. 3, 2015), at <https://web.archive.org/web/20170113151028/https://www.state.gov/e/oes/rls/pr/250352.htm> [<https://perma.cc/PF95-FR93>] (“The meeting followed the signing of the Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean by Canada, the Kingdom of Denmark in respect of Greenland, the Kingdom of Norway, the Russian Federation and the United States of America on 16 July 2015.”). See also Sima Sahar Zerehi, *Binding Agreement on High Seas Fishing in Arctic Ocean Needed, Says Conservation Group*, CBC NEWS (July 9, 2016), at <http://www.cbc.ca/news/canada/north/canada-pushing-for-finding-agreement-on-arctic-fishing-1.3671168> (discussing how the 2016 negotiations hoped to build on the 2015 agreement).

¹³ March 27 Press Release, *supra* note 2 (“Delegations worked on the basis of a Chairman’s Text . . . that was in the format of a legally binding agreement.”).

¹⁴ Canada Statement, *supra* note 8.

¹⁵ EU Press Release, *supra* note 7.

¹ Proclamation No. 9704, 83 Fed. Reg. 11,619 (Mar. 8, 2018) [hereinafter Aluminum Tariff].

² Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018) [hereinafter Steel Tariff].

the tariffs are “necessary and appropriate to address the threat that imports” of steel and aluminum articles “pose to the national security.”³ The imposition of tariffs in the name of national defense is the latest and most high-profile move by the Trump administration to orient the United States toward an “America First” trade policy.

The Trump administration enacted the tariffs pursuant to Section 232 of the Trade Expansion Act of 1962.⁴ Section 232 provides that when “the [secretary of Commerce] finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security” and the president “concurs with the finding of the Secretary,” then the president shall “determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.”⁵

In making the national security determination, the statute instructs the secretary of Commerce and the president to consider:

domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements.⁶

In addition, the secretary of Commerce and the president must “take into consideration the impact of foreign competition on the economic welfare of individual domestic industries.”⁷ And “any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered.”⁸

Since 1980, the Department of Commerce has conducted fourteen Section 232 investigations, the most recent of which occurred in 2001.⁹ During that time the president has issued restrictive tariffs only once—in 1982, when President Reagan embargoed crude oil produced in Libya.¹⁰ In every other instance, the president determined that, notwithstanding any potential threat to national security, no action was necessary to adjust imports.¹¹

³ *Id.* at 11,626; Aluminum Tariff, *supra* note 1, at 11,620.

⁴ 19 U.S.C. § 1862.

⁵ *Id.* at § 1862(c)(1)(A).

⁶ *Id.* at § 1862(d).

⁷ *Id.*

⁸ *Id.*

⁹ Dep’t of Commerce, Section 232 Investigations: The Effect of Imports on the National Security, at <https://www.bis.doc.gov/232> [<https://perma.cc/F796-FFHA>].

¹⁰ DEP’T OF COMMERCE, SECTION 232 INVESTIGATIONS PROGRAM GUIDE: THE EFFECTS OF IMPORTS ON THE NATIONAL SECURITY 16 (2007), available at <https://www.bis.doc.gov/index.php/forms-documents/section-232-investigations/86-section-232-booklet/file> [<https://perma.cc/FE38-E7T4>].

¹¹ *Id.*

In April of 2017, Trump instructed the Department of Commerce to conduct Section 232 investigations into steel and aluminum imports to the United States.¹² The Department of Commerce released its report on February 16, 2018, finding that “the quantities and circumstances of steel and aluminum imports threaten to impair the national security.”¹³ The Department “determined that ‘national security’ for purposes of Section 232 includes the ‘general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to minimum operations of the economy and government.’”¹⁴ Thus, the Department concluded that “present quantities and circumstance” of steel and aluminum imports threaten national security by “weakening our internal economy.”¹⁵ For both metals, the Department provided three alternative recommendations: the imposition of a global tariff, targeted tariffs on specific nations, or quotas limiting imports from all countries.¹⁶

In a memorandum responding to the Section 232 investigation, the Department of Defense, while agreeing with the Department of Commerce that “imports of foreign steel and aluminum based on unfair trading practices impair the national security,” noted that it does “not believe that the findings in the reports impact the ability of [Department of Defense] programs to acquire the steel or aluminum necessary to meet national defense requirements.”¹⁷ It also warned of the “negative impact on our key allies regarding the recommended options within the reports.”¹⁸

Nevertheless, on March 1, Trump announced at a press event his intention to “impos[e] tariffs on steel imports, and tariffs on aluminum imports” because “[w]e need great steel-makers, great aluminum makers for defense.”¹⁹ A week later, on March 8, Trump signed Proclamation 9704 and Proclamation 9705, concurring with the secretary of Commerce’s findings that steel and aluminum articles “are being imported into the United States in such quantities and under such circumstances as to threaten to impair

¹² Donald J. Trump, Memorandum on Steel Imports and Threats to National Security, 2017 DAILY COMP. PRES. DOC. (Apr. 20, 2017); Donald J. Trump, Memorandum on Aluminum Imports and Threats to National Security, 2017 DAILY COMP. PRES. DOC. (Apr. 27, 2017).

¹³ U.S. Dep’t of Commerce Press Release, Secretary Ross Releases Steel and Aluminum 232 Reports in Coordination with White House (Feb. 16, 2018), at <https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination> [<https://perma.cc/S8M6-BHCG>] (internal quotations omitted) [hereinafter Feb. 16 Dep’t of Commerce Press Release].

¹⁴ DEP’T OF COMMERCE, THE EFFECTS OF IMPORTS OF STEEL ON THE NATIONAL SECURITY 1 (2018), available at: https://www.commerce.gov/sites/commerce.gov/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf [<https://perma.cc/CMH9-9R5Y>] (quoting DEP’T OF COMMERCE, THE EFFECTS OF IMPORTS OF IRON ORE AND SEMI-FINISHED STEEL ON THE NATIONAL SECURITY 5 (2001) and thereby adopting an understanding of “national security” similar to the one used in past Section 232 investigations).

¹⁵ *Id.* at 5. See also DEP’T OF COMMERCE, THE EFFECTS OF IMPORTS OF ALUMINUM ON THE NATIONAL SECURITY 5 (Jan. 17, 2018), available at https://www.commerce.gov/sites/commerce.gov/files/the_effect_of_imports_of_aluminum_on_the_national_security_-_with_redactions_-_20180117.pdf [<https://perma.cc/4Y26-C8CP>].

¹⁶ Feb. 16 Dep’t of Commerce Press Release, *supra* note 13.

¹⁷ Memorandum from Jim Mattis, Secretary of Defense, U.S. Dep’t of Defense, to Wilbur Ross, Secretary of Commerce, available at https://www.commerce.gov/sites/commerce.gov/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf [<https://perma.cc/PEJ3-DTH6>].

¹⁸ *Id.* (also noting that, of the three proposed recommendations made by Commerce, the Department of Defense preferred targeted tariffs to the two other options).

¹⁹ Donald J. Trump, Remarks at a Listening Session with Steel and Aluminum Industry Leaders and an Exchange with Reporters, 2018 DAILY COMP. PRES. DOC. 3 (Mar. 1, 2018).

the national security of the United States.”²⁰ Effective March 23, 2018, the Proclamations imposed a global “25 percent ad valorem tariff on steel articles”²¹ and a global “10 percent ad valorem tariff on aluminum articles.”²² According to Trump, the global tariffs are “an important first step in ensuring the economic viability of our domestic” steel and aluminum industries.²³

The proclamations carve out exemptions from the global tariff for Canadian and Mexican imports of aluminum and steel, “at least at this time.”²⁴ As Trump explained, “Canada and Mexico present a special case,” given the nations’ shared commitments “to supporting each other in addressing national security concerns” and “addressing global excess capacity,” “the physical proximity of our respective industrial bases, the robust economic integration between our countries,” and the export of aluminum and steel produced in the United States to Canada and Mexico.²⁵ On the day the proclamations issued, the secretary of Commerce remarked that “the action the president took today is a further motivation to both Canada and Mexico to make a fair arrangement with the United States” in its continuing renegotiations over the North American Free Trade Agreement (NAFTA).²⁶

In addition to the exemptions granted Mexico and Canada, the tariff scheme leaves open the possibility of tariff relief for “[a]ny country” that has a “security relationship” with the United States.²⁷ Such nations may propose “alternative ways to address the threatened impairment of the national security caused by imports from that country.”²⁸ Trump states in both proclamations that:

Should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on [aluminum/steel] articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.²⁹

On March 9, Trump tweeted that he and Australian Prime Minister Malcom Turnbull were “[w]orking very quickly on a security agreement so we don’t have to impose steel or

²⁰ Aluminum Tariff, *supra* note 1, at 11,619; Steel Tariff, *supra* note 2, at 11,626.

²¹ Steel Tariff, *supra* note 2, at 11,627.

²² Aluminum Tariff, *supra* note 1, at 11,621.

²³ *Id.* at 11,620; Steel Tariff, *supra* note 2, at 11,626.

²⁴ Aluminum Tariff, *supra* note 1, at 11,621; Steel Tariff, *supra* note 2, at 11,627.

²⁵ Aluminum Tariff, *supra* note 1, at 11,620; Steel Tariff, *supra* note 2, at 11,626.

²⁶ Michelle Fox, *Commerce Secretary Ross: Tariffs Are ‘Motivation’ for Canada, Mexico to Make a ‘Fair’ NAFTA Deal*, CNBC (Mar. 8, 2018), at <https://www.cnbc.com/2018/03/08/commerce-secretary-ross-tariffs-are-motivation-for-canada-mexico-to-make-a-fair-nafta-deal.html>.

²⁷ Aluminum Tariff, *supra* note 1, at 11,620; Steel Tariff, *supra* note 2, at 11,626. The tariff scheme also leaves open the possibility of narrower relief for any steel or aluminum article that the Secretary of Commerce determines is not “produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality” or “based upon specific national security considerations.” Aluminum Tariff, *supra* note 1, at 11,621; Steel Tariff, *supra* note 2, at 11,627.

²⁸ Aluminum Tariff, *supra* note 1, at 11,620; Steel Tariff, *supra* note 2, at 11,626.

²⁹ *Id.*

aluminum tariffs on our ally.”³⁰ In addition, reporting suggest that the potential for additional carveouts has “prompted a stampede by foreign countries and companies and their American partners pressing for exemptions and exclusions that could be worth billions of dollars in trade.”³¹ Depending on what further actions the Trump administration takes, the overall result may more closely resemble a regime of targeted tariffs on specific nations rather than a truly global tariff.

Both in the lead up to and aftermath of the announcement, the imposition of Section 232 tariffs prompted pointed criticism from domestic and international actors alike. On March 7, over one hundred Republican members of the House of Representatives sent a letter to the president expressing “deep concern about the prospect of broad, global tariffs on aluminum and steel imports.”³² In the Senate, Republican Jeff Flake announced his intention to draft and introduce legislation to “nullify these tariffs.”³³ Wang Yi, China’s Foreign Minister, warned: “Choosing a trade war is a mistaken prescription. The outcome will only be harmful. China would have to make a justified and necessary response.”³⁴ Cecilia Malmström, the EU Trade Commissioner, expressed the view that “the E.U. should be excluded from these measures” as a “close ally of the U.S.”³⁵ In addition, the EU signaled that it might impose retaliatory tariffs on U.S. products, including bourbon, blue jeans, and Harley-Davidson motorcycles.³⁶

In her remarks, Malmström made clear that “we are talking to friends and partners around the world who are also affected by the 232 decisions and who would be impacted by these measures, to see if we can coordinate our rights in the WTO.”³⁷ Were the issue to reach the World Trade Organization, one issue would be the scope of Article XXI of the GATT, which provides that

[n]othing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . (ii) relating to . . . such traffic in other goods and materials as is carried on directly or indirectly for purpose of supplying a military establishment.³⁸

³⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 9, 2018, 6:48 PM), at <https://twitter.com/realDonaldTrump/status/972242845636669440>.

³¹ Ana Swanson & Kenneth P. Vogel, *Trump’s Tariffs Set Off Storm of Lobbying*, N.Y. TIMES (Mar. 16, 2018), at <https://www.nytimes.com/2018/03/16/us/politics/trump-tariffs-lobbying.html?ref=collection%2Fsectioncollection%2Fworld>.

³² Letter from Representative Kevin Brady, Chairman of House Committee on Way & Means, et. al. to President Donald Trump (Mar. 7, 2018), available at <https://online.wsj.com/public/resources/documents/LettertoPotus-03-07-2018.pdf> [<https://perma.cc/YH7F-956M>].

³³ Jordain Carney, *Flake to Introduce Bill to Nullify Trump’s Tariffs*, THE HILL (Mar. 8, 2018), at <http://thehill.com/homenews/senate/377477-flake-to-introduce-bill-to-nullify-trumps-tariffs>.

³⁴ *A Storm of Reactions to Trump’s Tariffs*, N.Y. TIMES (Mar. 9, 2018), at <https://www.nytimes.com/2018/03/08/business/economy/trump-tariff-reaction.html> (collecting reactions).

³⁵ Statements by Vice-President Katainen and Commissioner Malmström at the European Parliament Plenary Debate: US Decision to Impose Tariffs on Steel and Aluminium (Mar. 14, 2018), available at http://trade.ec.europa.eu/doclib/docs/2018/march/tradoc_156640.pdf [hereinafter Katainen & Malmström Statement].

³⁶ Ana Swanson, *Trump’s Tariffs Prompt Global Threats of Retaliation*, N.Y. TIMES (Mar. 2, 2018), at <https://www.nytimes.com/2018/03/02/us/politics/trump-tariffs-steel-aluminum.html>.

³⁷ Katainen & Malmström Statement, *supra* note 35.

³⁸ General Agreement on Tariffs and Trade, Art. XXI, Oct. 30, 1947, 55 UNTS 194.

The invocation of Article XXI(b) has “only been challenged a handful of times, and those challenges have never resulted in a binding GATT/WTO decision.”³⁹ Moreover, international trade scholars and practitioners are divided as to what extent the provision is “self-judging” and thus immune from WTO review.⁴⁰ The ability of parties affected by the Section 232 tariffs to seek redress at the WTO is, therefore, an unresolved question.

Although the steel and aluminum tariffs mark the first use of the president’s authority under Section 232 to impose protective trade measures on imports, the tariffs are largely consistent with the Trump administration’s broader attempts to reshape U.S. trade relations in order to “stand[] up for American interests.”⁴¹ A central plank of that approach is “renegotiating trade deals and international agreements that have not provided the expected benefits to the United State”—most notably NAFTA.⁴² Indeed, Trump signed the steel and aluminum tariffs a mere three days after trade representatives from Canada, Mexico, and the United States wrapped up the seventh round of NAFTA renegotiations.⁴³ Substantial disagreements between the nations remain in areas including rules of origin, labor standards, and dispute

³⁹ Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 699 (2011). The closest the WTO has come to issuing a determinative ruling was in 1996, when the European Community filed a request for WTO consultation over the U.S.’s Cuban Liberty and Democratic Solidarity Act of 1996, which imposed a secondary boycott on Cuba. *Id.* at 719. But after President Clinton waived the effective date of the boycott, the European Community requested the suspension of proceedings at the WTO and the issue was ultimately resolved through diplomatic channels. *See id.*

⁴⁰ Compare, e.g., Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT’L ECON. L. 263, 268–69 (1998) (implying from the text of Article XXI (b) that a member state has “sole discretion to determine whether an action conforms to the requirements set forth in” it and “no WTO Member nor group of Members, and no WTO panel or other adjudicatory body, has any right to determine whether a measure taken by a sanctioning member satisfies the requirements”), with Hannes L. Schloemann & Stefan Ohlhoff, “Constitutionalization” and Dispute Settlement in the WTO: *National Security as an Issue of Competence*, 93 AJIL 424, 445 (1999) (observing that “there is no inherent reason why a panel should not review [a state’s assertion of essential security interests], sorting out cases of clear unreasonableness, without otherwise interfering with the state’s definitional prerogative”); Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO*, 43 VA. J. INT’L L. 365, 381 (2003) (rejecting “an entirely self-judging” interpretation of Article XXI).

⁴¹ White House Press Release, President Donald J. Trump Is Promoting Free, Fair, and Reciprocal Trade (Jan. 30, 2018), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-promoting-free-fair-reciprocal-trade> [<https://perma.cc/ZT3H-7P47>] [hereinafter Jan. 30 White House Press Release]. *See also* Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 111 AJIL 1045 (2017) (discussing trade-related policy made during Trump’s first year in office); cf. John K. Veroneau & Catherine H. Gibson, *Presidential Tariff Authority*, 111 AJIL 957 (2017) (evaluating the extent to which Section 338 of the Tariff Act of 1930 could be used by the Trump administration to promote its trade agenda).

⁴² Jan. 30 White House Press Release, *supra* note 41. *See, e.g.*, Donald J. Trump, Remarks on Signing Proclamations on Imports of Large Residential Washers and Certain Photovoltaic Cells and an Exchange with Reporters, 2018 DAILY COMP. PRES. DOC. 4 (Jan. 23, 2018) (“We’re, as you know, negotiating a new deal with NAFTA.”). Even as President Trump seeks to renegotiate America’s existing free trade agreements, other nations are forging ahead without the United States on new trade pacts. For example, on January 28, 2018, eleven Pacific Rim nations agreed to a renegotiated Trans-Pacific Partnership, a trade agreement that the Obama administration had originally helped negotiate but from which President Trump withdrew prior to ratification. *See* Chieko Tsuneko, *TPP Members Reach Agreement on Major Trade Pact*, WALL ST. J. (Jan. 23, 2018), at <https://www.wsj.com/articles/tpp-members-reach-agreement-a-year-after-u-s-exit-1516709064>.

⁴³ *See* Megan Cassella, *The Steel Elephant in the Room at NAFTA Round 7*, POLITICO (Mar. 5, 2018), at <https://www.politico.com/newsletters/morning-trade/2018/03/05/the-steel-elephant-in-the-room-at-nafta-round-7-123039>.

resolution mechanisms.⁴⁴ As U.S. Trade Representative Robert Lighthizer explained, while “[t]he United States views NAFTA as a very important agreement,” and is “committed to moving forward” with the negotiations, the parties “are progressing very slowly.”⁴⁵ Absent an agreement that favorably adjusts U.S. trade balances with Mexico and Canada,⁴⁶ Trump has reiterated his commitment to “terminate” NAFTA.⁴⁷ Such a threat has prompted questions as to the scope of presidential power to effectuate such a withdrawal in the absence of commensurate Congressional action.⁴⁸

Beyond renegotiating trade agreements, the Trump administration has also “take[n] tough enforcement action against countries that break the rules,” in the form of countervailing duty and antidumping tariffs.⁴⁹ On January 23, Trump signed Presidential Proclamations 9693 and 9694 imposing protective tariffs on imports of “crystalline silicon photovoltaic cells” and “large residential washers,” respectively.⁵⁰ The Trump administration explained that the products were “being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat of serious injury, to the domestic industry producing a like or directly competitive article.”⁵¹

Also in January, an earlier effort to issue antidumping and countervailing duties on Canadian aerospace imports was blocked by a unanimous determination of the United States International Trade Commission (USITC). The USITC found that U.S. industry is not materially injured by “imports of 100- to 150-seat large civil aircraft from Canada.”⁵²

⁴⁴ See Paul Vieira & William Maudlin, *U.S. Cites NAFTA Progress But Rejects Canadian Proposals*, WALL ST. J. (Jan. 29, 2018), at <https://www.wsj.com/articles/u-s-cites-nafta-progress-but-rejects-canadian-proposals-1517249003>.

⁴⁵ Off. of U.S. Trade Rep. Press Release, Closing Statement of USTR Robert Lighthizer at the Sixth Round of NAFTA Renegotiations (Jan. 29, 2018), at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/january/closing-statement-ustr-robert> [<https://perma.cc/6GSD-YYQG>].

⁴⁶ *Id.*

⁴⁷ See Trump Remarks, *supra* note 42.

⁴⁸ Compare Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, at 2 (Oct. 25, 2017), available at <https://ssrn.com/abstract=3049279> (arguing that, because the president has the authority to act unilaterally on behalf of the United States in terminating Article II treaties, the president has the unilateral authority to terminate *ex post* congressional-executive agreements such as NAFTA), with Joel P. Trachtman, *Power to Terminate U.S. Trade Agreements: The Presidential Dormant Commerce Clause Versus an Historical Gloss Half Empty*, at 4 (Oct. 15, 2017), available at <https://ssrn.com/abstract=3015981> (“[A]llocation of the power to terminate trade agreements to the President, acting alone, would be inconsistent with the substance of the Constitution’s allocation to Congress of control over both international *and domestic* commerce under the Commerce Clause of the Constitution.”). If withdrawal were to occur, there remains the related issue of whether and to what extent implementing legislation remains applicable following withdrawal. See Jean Galbraith, *The President’s Power to Withdraw the United States from International Agreements at Present and in the Future*, 111 AJIL UNBOUND 445, 447 (2018) (noting that “[s]ometimes implementing legislation specifies that it will not outlive the underlying agreement, but other implementing legislation lacks such obvious signals”).

⁴⁹ Jan. 30 White House Press Release, *supra* note 41.

⁵⁰ Proclamation No. 9693, 83 Fed. Reg. 3,541 (Jan. 23, 2018); Proclamation No. 9694, 83 Fed. Reg. 3,553 (Jan. 23, 2018).

⁵¹ Proclamation No. 9693, *supra* note 50, at 3,541.

⁵² U.S. Int’l Trade Commission Press Release, 100- to 150-Seat Large Civil Aircraft from Canada Do Not Injure U.S. Industry, Says USITC (Jan. 26, 2018), at https://www.usitc.gov/press_room/news_release/2018/er0126ll898.htm [<https://perma.cc/79N7-Q5CH>]. Although duties spoke of “Canadian civil aircraft” generally, the catalyst for the complaint was Canadian aerospace company Bombardier’s sale of its new C Series aircraft to Delta Airways. See U.S. Dep’t of Commerce Press Release, U.S. Department of Commerce Initiates Investigation of Imports of Civil Aircraft from Canada (May 18, 2017), at <https://www.commerce.gov/news/press-releases/2017/05/us-department-commerce-initiates-investigation-imports-civil-aircraft> [<https://perma.cc/CL5X-294X>].

The decision scuttled the Department of Commerce's plans to impose a 219.63 percent countervailing duty and a 79.82 percent anti-dumping duty on Bombardier jets.⁵³ As the Department of Commerce explained: "If the U.S. International Trade Commission (ITC) makes affirmative final injury determinations, Commerce will issue AD and CVD orders. If the ITC makes negative final determinations of injury, *the investigations will be terminated and no orders will be issued.*"⁵⁴ Notably, Section 232 tariffs do not require such a determination from the USITC.⁵⁵

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

Responses by the United States to Attacks on the Rohingya in Burma

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On November 22, 2017, Secretary of State Rex Tillerson released a statement addressing attacks on the Rohingya population in Burma:

[T]he key test of any democracy is how it treats its most vulnerable and marginalized populations, such as the ethnic Rohingya and other minority populations. Burma's government and security forces must respect the human rights of all persons within its borders, and hold accountable those who fail to do so.

....

These abuses by some among the Burmese military, security forces, and local vigilantes have caused tremendous suffering and forced hundreds of thousands of men, women, and children to flee their homes in Burma to seek refuge in Bangladesh. After a careful and thorough analysis of available facts, it is clear that the situation in northern Rakhine state constitutes *ethnic cleansing* against the Rohingya.¹

(referencing Bombardier Press Release, Delta Air Lines and Bombardier Sign Largest C Series Order for up to 125 Aircraft (Apr. 28, 2016), at <https://www.bombardier.com/en/media/newsList/details.delta-air-lines-and-bombardier-sign-largest-c-series-order-for-u0.bombardiercom.html> [<https://perma.cc/6328-UR2H>]).

⁵³ U.S. Dep't of Commerce Fact Sheet, Commerce Finds Dumping and Subsidization of Imports of 100- to 150-Seat Large Civil Aircraft from Canada (Dec. 20, 2017), available at https://www.commerce.gov/sites/commerce.gov/files/fact_sheet_commerce_finds_dumping_and_subsidization_of_imports_of_100-_to_150-seat_large_civil_aircraft_from_canada.pdf [<https://perma.cc/6CPT-6Y3Z>].

⁵⁴ U.S. Dep't of Commerce Press Release, U.S. Department of Commerce Finds Dumping and Subsidization of Imports of 100- to 150-Seat Large Civil Aircraft from Canada (Dec. 20, 2017), at <https://www.commerce.gov/news/press-releases/2017/12/us-department-commerce-finds-dumping-and-subsidization-imports-100-150> [<https://perma.cc/PC82-GL5D>] (emphasis added).

⁵⁵ Compare 19 U.S.C. § 1862(c) (leaving to the secretary of Commerce, and ultimately the president, the authority to "determine the effects on the national security of imports"), with 19 U.S.C. § 1671d(b) (assigning authority to the USITC to make the "final determination" as to whether an industry is "materially injured" or "threatened with material injury" for countervailing duties) and 19 U.S.C. § 1673d(b) (assigning the USITC the same authority for anti-dumping duties).

¹ U.S. Dep't of State Press Release, Efforts to Address Burma's Rakhine State Crisis (Nov. 22, 2017), at <https://www.state.gov/secretary/remarks/2017/11/275848.htm> [<https://perma.cc/3P4H-SAVL>] (emphasis added) [hereinafter Nov. 22 Press Release].

Tillerson's statement came after several months of increasing concern within the Trump administration about attacks on Rohingya Muslims and the corresponding influx of Rohingya refugees into neighboring Bangladesh. It also came a little more than a year after President Obama had rolled back long-standing U.S. sanctions on Burma in response to its tilt toward a more democratic government.

The twenty-year history of previous sanctions can be summarized briefly. In 1997, President Clinton issued Executive Order 13,047, which ordered the imposition of sanctions on Burma partly in response to "large-scale repression of the democratic opposition in Burma."² These sanctions were further developed by the George W. Bush administration in 2003,³ 2007,⁴ and 2008.⁵ In July 2012, the Obama administration eased, but did not remove, sanctions on Burma in recognition of the fact that the Burmese government had made "progress towards reform in a number of areas."⁶ Then on October 7, 2016, Obama signed Executive Order 13,742, which ordered the termination of sanctions on Burma upon finding that:

[T]he situation that gave rise to the declaration of a national emergency in Executive Order 13047 of May 20, 1997, with respect to the actions and policies of the Government of Burma, in particular a deepening pattern of severe repression by the State Law and Order Restoration Council, the then-governing regime in Burma . . . has been significantly altered by Burma's substantial advances to promote democracy, including historic elections in November 2015 that resulted in the former opposition party, the National League for Democracy, winning a majority of seats in the national parliament and the formation of a democratically elected, civilian-led government; the release of many political prisoners; and greater enjoyment of human rights and fundamental freedoms, including freedom of expression and freedom of association and peaceful assembly.⁷

On June 16, 2017, the Department of the Treasury's Office of Foreign Assets Control issued a final rule terminating sanctions.⁸

In August of 2017, Rohingya militants attacked security forces in the Rakhine State, a region in western Burma, resulting in the deaths of at least twelve members of the security forces and fifty-nine militants.⁹ Shortly thereafter, the U.S. State Department issued a statement condemning the attacks, encouraging all in Burma to continue working toward peace, and noting that:

² Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (May 20, 1997); *see also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 368–70 (2000) (describing legislation passed the previous year which underlay this executive order).

³ Exec. Order No. 13,310, 68 Fed. Reg. 44,853 (July 28, 2003).

⁴ Exec. Order No. 13,448, 72 Fed. Reg. 60,223 (Oct. 18, 2007).

⁵ Exec. Order No. 13,464, 73 Fed. Reg. 24,491 (Apr. 30, 2008).

⁶ Exec. Order No. 13,619, 77 Fed. Reg. 41,243 (July 11, 2012). *See also* John R. Crook, *Contemporary Practice of the United States*, 106 AJIL 858 (2012) (discussing the 2012 reduction of sanctions in more detail).

⁷ Exec. Order No. 13,742, 81 Fed. Reg. 70,593 (Oct. 7, 2016).

⁸ Removal of Burmese Sanctions Regulations, 82 Fed. Reg. 27,613 (June 16, 2017) (to be codified at 31 CFR pt. 537).

⁹ Wa Lone & Shoon Naing, *At Least 71 Killed in Myanmar as Rohingya Insurgents Stage Major Attack*, REUTERS (Aug. 24, 2017), at <https://www.reuters.com/article/us-myanmar-rohingya/at-least-71-killed-in-myanmar-as-rohingya-insurgents-stage-major-attack-idUSKCN1B507K>.

As government and security forces act to prevent further violence and bring those responsible for the attacks to justice, we expect them to do so in a way that is consistent with the rule of law, protects and respects human rights and fundamental freedoms, demonstrates transparency, and avoids inflaming a tense situation.¹⁰

Instead, the Burmese military and police forces responded with attacks against the Rohingya population, allegedly killing thousands and forcing hundreds of thousands more to flee to Bangladesh.¹¹ Commissions established by the civilian Burmese government, which is led by Aung San Suu Kyi, have been slow to attribute the attacks to Burmese security forces, and an internal investigation by the Burmese military disputed the allegations of abuse.¹² The Burmese government has refused entry to the UN special rapporteur on Myanmar and “is not cooperating with the Human Rights Council independent international fact-finding mission.”¹³

In early September, the U.S. State Department issued a statement expressing concern over the growing number of Rohingya refugees,¹⁴ and a bipartisan group of senators introduced a joint resolution condemning the violence and urging the Burmese government to address the humanitarian crisis and improve its treatment of the Rohingya.¹⁵ In October, the State Department announced it was actively exploring targeted sanctions unless the Burmese government and military were to

take immediate action to ensure peace and security; implement commitments to ensure humanitarian access to communities in desperate need; facilitate the safe and voluntary return of those who have fled or been displaced in Rakhine State; and address the root causes of systematic discrimination against the Rohingya by implementing the Rakhine

¹⁰ U.S. Dep’t of State Press Release, *Attacks in Rakhine State and Release of the Rakhine Advisory Commission Report* (Aug. 25, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/08/273655.htm> [<https://perma.cc/57V7-KEAX>].

¹¹ Jeffrey Gettleman, *Rohingya Recount Atrocities: ‘They Threw My Baby Into a Fire,’* N.Y. TIMES (Oct. 11, 2017), at <https://www.nytimes.com/2017/10/11/world/asia/rohingya-myanmar-atrocities.html>; see also, e.g., Human Rights Watch, *Rohingya Crisis*, at <https://www.hrw.org/tag/rohingya-crisis>. A full investigation has yet to be conducted but estimates as of December 2017 put the death toll at 6,700 and the number of refugees at about 700,000. Richard C. Paddock, *Reuters Publishes Account of Myanmar Massacre After Journalists’ Arrests*, N.Y. TIMES (Feb. 10, 2018), at <https://www.nytimes.com/2018/02/10/world/asia/reuters-myanmar-massacre-rohingya.html>.

¹² Hannah Beech, *Rex Tillerson Tells Myanmar Leaders to Investigate Attacks on Rohingya*, N.Y. TIMES (Nov. 15, 2017), at <https://www.nytimes.com/2017/11/15/world/asia/rex-tillerson-myanmar-aung-san-suu-kyi.html>. See also Hannah Beech, *Across Myanmar, Denial of Ethnic Cleansing and Loathing of Rohingya*, N.Y. TIMES (Oct. 24, 2017), at <https://www.nytimes.com/2017/10/24/world/asia/myanmar-rohingya-ethnic-cleansing.html> (discussing more broadly the anti-Muslim sentiment in Burma that has contributed to denial of ethnic cleansing within the country). Although Aung San Suu Kyi is not formally the head of state, she is understood to be the leader of the civilian government in practice. See Jonathan Head, *Rohingya Crisis: How Much Power Does Aung San Suu Kyi Really Have?*, BBC NEWS (Sept. 13, 2017), at <http://www.bbc.com/news/world-41243635>. The military retains enormous power within Burma, including within the Rakhine State. See *id.*

¹³ U.N. Rights Expert ‘Disappointed’ by Myanmar’s Decision to Refuse Visit, UN NEWS (Dec. 20, 2017), at <https://news.un.org/en/story/2017/12/639982-un-rights-expert-disappointed-myanmars-decision-refuse-visit>.

¹⁴ U.S. Dep’t of State Press Release, *Bangladesh Hosting of Rohingya* (Sept. 9, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/09/273929.htm> [<https://perma.cc/4EEF-XNY8>].

¹⁵ S. Res. 250, 115th Cong. (2017). Other resolutions and bills introduced which condemn the attacks on the Rohingya include H.R. Res. 591, 115th Cong. (2017); H.R. Con. Res. 90, 115th Cong. (2017); S. Res. 360, 115th Cong. (2017); H.R. Res. 528, 115th Cong. (2017); H.R. 4223, 115th Cong. (2017); and S. 2060, 115th Cong. (2017).

Advisory Commission’s recommendations, which includes providing a credible path to citizenship.¹⁶

In the same press release, the State Department stated that it had already found “all units and officers in operation in northern Rakhine State to be ineligible to receive or participate in any U.S. assistance programs,” and that it had “rescinded invitations for senior Burmese security forces to attend U.S.-sponsored events.”¹⁷

One month after Tillerson’s November 22 designation of the attacks as ethnic cleansing,¹⁸ the Trump administration placed sanctions on Maung Maung Soe, the former chief of the Burmese Army’s Western command who oversaw the military operations in the Rakhine State.¹⁹ According to the Treasury Department:

The United States Government examined credible evidence of Maung Maung Soe’s activities, including allegations against Burmese security forces of extrajudicial killings, sexual violence, and arbitrary arrest as well as the widespread burning of villages. Security operations have led to hundreds of thousands of Rohingya refugees fleeing across Burma’s border with Bangladesh. In August 2017, witnesses reportedly described mass killings and arson attacks by the Burmese Army and Burmese Border Guard Police, both then under Maung Maung Soe’s command in northern Rakhine State. In August 2017, soldiers described as being from the Western Command allegedly entered a village and reportedly separated the inhabitants by gender. According to witnesses, soldiers opened fire on the men and older boys and committed multiple acts of rape. Many of the women and younger children were reportedly also shot. Other witnesses described soldiers setting huts on fire with villagers inside.²⁰

In January 2018, the State Department re-designated Burma as a “Country of Particular Concern”—countries whose governments “have engaged in or tolerated systematic, ongoing, and egregious violations of religious freedom”—under the International Religious Freedom Act of 1998.²¹

In February of 2018, the United States addressed the attacks on the Rohingya population at a UN Security Council briefing on Burma. Speaking at the briefing, UN Ambassador Nikki Haley noted that “powerful forces in the Burmese government have denied the

¹⁶ U.S. Dep’t of State Press Release, Accountability for Human Rights Abuses in Rakhine State, Burma (Oct. 23, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/10/275021.htm> [<https://perma.cc/WQ2P-ELPK>].

¹⁷ *Id.*

¹⁸ Nov. 22 Press Release, *supra* note 1.

¹⁹ U.S. Dep’t of Treas. Press Release, United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe (Dec. 21, 2017), at <https://www.state.gov/r/pa/prs/ps/2018/01/276843.htm> [<https://perma.cc/R6H5-BMFY>] [hereinafter Dec. 21 Press Release]. These sanctions were imposed pursuant to the 2016 Global Magnitsky Human Rights Accountability Act, which allows the president of the United States to sanction “any foreign person the President determines, based on credible evidence” is “responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights.” Global Magnitsky Human Rights Accountability Act, § 1263(a), Pub. L. No. 114-328, 130 Stat. 2533.

²⁰ Dec. 21 Press Release, *supra* note 19.

²¹ U.S. Dep’t of State Press Release, Designations Under the International Religious Freedom Act of 1998 (Jan. 4, 2018), at <https://www.state.gov/r/pa/prs/ps/2018/01/276843.htm> [<https://perma.cc/2FYJ-MC4H>].

ethnic cleansing in Rakhine State.”²² She called on the “Burmese government to allow a UN fact-finding mission and the Special Rapporteur into the country,” and further for the “immediate and unconditional release” of two Reuters reporters who had documented the massacre of ten Rohingya men and boys.²³ Haley also called on the secretary-general to “quickly appoint a Special Envoy for Burma” and criticized the Security Council more broadly for thus far “fail[ing] in its responsibility to act in response to the clear threat to international peace and security that has resulted from recent events in northern Rakhine State.”²⁴

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

President Trump Issues Executive Order Keeping the Guantánamo Bay Detention Camp Open
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On January 30, 2018, President Trump signed Executive Order 13,823, directing officials to keep the Guantánamo Bay detention camp open and permitting additional detainees to be transported to the facility.¹ In announcing his decision during the State of the Union address to Congress, Trump stated, “I am asking Congress to ensure that, in the fight against ISIS and Al Qaida, we continue to have all necessary power to detain terrorists . . . And in many cases, for them, it will now be Guantánamo Bay.”² Section 2 of the order provides:

- (a) Section 3 of Executive Order 13492 of January 22, 2009 . . . , ordering the closure of detention facilities at U.S. Naval Station Guantánamo Bay, is hereby revoked.
- (b) Detention operations at U.S. Naval Station Guantánamo Bay shall continue to be conducted consistent with all applicable United States and international law, including the Detainee Treatment Act of 2005.
- (c) In addition, the United States may transport additional detainees to U.S. Naval Station Guantánamo Bay when lawful and necessary to protect the Nation.³

The executive order departs from the approach taken by former President Obama. On the second day of his presidency, Obama had ordered the future closure of the detention camp,⁴ and throughout his presidency he viewed this camp as contrary to American values and

²² Nikki Haley, Remarks at a UN Security Council Briefing on Burma (Feb. 13, 2018), at <https://usun.state.gov/remarks/8303> [<https://perma.cc/2QNS-L6L7>] [hereinafter Haley Remarks].

²³ *Id.* The U.S. government had previously called for the release of the two Reuters journalists in a State Department press release. U.S. Dep’t of State Press Release, Prosecution of Reuters Reporters Wa Lone and Kyaw Soe Oo (Jan. 10, 2018), at <https://www.state.gov/r/pa/prs/ps/2018/01/277385.htm> [<https://perma.cc/U3QW-RF7X>].

²⁴ Haley Remarks, *supra* note 22.

¹ Exec. Order No. 13,823, 83 Fed. Reg. 4831 (Jan. 30, 2018).

² Donald J. Trump, Address Before a Joint Session of the Congress on the State of the Union, 2018 DAILY COMP. PRES. DOC. 64 (Jan. 30, 2018).

³ Exec. Order No. 13,823, *supra* note 1, at 4831.

⁴ Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

harmful to U.S. foreign policy.⁵ Specifically, Section 3 of Obama's executive order had directed that remaining detainees be returned to their home country, transferred to another country or a U.S. detention facility, or released by January 2010.⁶ Because of political opposition, this was not accomplished by January 2010 or indeed during Obama's tenure,⁷ and Trump's executive order now formally revokes this provision.⁸ Still, under Obama's direction, 196 detainees were transferred from the facility, leaving forty-one detainees by the end of his presidency.⁹ These forty-one individuals are still detained today,¹⁰ although several have been cleared for transfer.¹¹ Despite the continuation and geographic expansion in the war on terror, no new detainees have been brought to the detention facility since 2008.¹²

In Section 1 of the executive order, Trump deemed the use of the Guantánamo detention camp to be consistent with domestic and international law obligations and necessary in the context of the continued war on terror:

- (a) Consistent with long-standing law of war principles and applicable law, the United States may detain certain persons captured in connection with an armed conflict for the duration of the conflict.
- (b) Following the terrorist attacks of September 11, 2001, the 2001 Authorization for Use of Military Force (AUMF) and other authorities authorized the United States to detain certain persons who were a part of or substantially supported al-Qa'ida, the Taliban, or associated forces engaged in hostilities against the United States or its coalition partners. Today, the United States remains engaged in an armed conflict with al-Qa'ida, the Taliban, and associated forces, including with the Islamic State of Iraq and Syria.
- (c) The detention operations at the U.S. Naval Station Guantánamo Bay are legal, safe, humane, and conducted consistent with United States and international law.
- (d) Those operations are continuing given that a number of the remaining individuals at the detention facility are being prosecuted in military commissions, while others

⁵ Barack Obama, Remarks on Closing the Detention Facilities at the United States Naval Base in Guantánamo Bay, Cuba, 2016 DAILY COMP. PRES. DOC. 94 (Feb. 23, 2016) [hereinafter Obama Remarks] (also noting that "15 years after 9/11, . . . we're still having to defend the existence of a facility and a process where not a single verdict has been reached in those attacks").

⁶ Exec. Order No. 13,492, *supra* note 4, at 4898.

⁷ Obama Remarks, *supra* note 5 (noting that since the time of this executive order, "Congress has repeatedly imposed restrictions aimed at preventing us from closing this facility").

⁸ Exec. Order No. 13,823, *supra* note 1.

⁹ Letter to Congressional Leaders on the Detention Facility at Guantánamo Bay, Cuba, 2017 DAILY COMP. PRES. DOC. 56 (Jan. 19, 2017). At one point, the facility held approximately eight hundred detainees. *See id.*

¹⁰ Human Rights First, *Guantánamo by the Numbers* (Feb. 2018), available at <https://www.humanrightsfirst.org/sites/default/files/gtmo-by-the-numbers.pdf>.

¹¹ Missy Ryan & Ellen Nakashima, *Trump, Reversing 2009 Move, Vows to Keep Guantánamo Open Indefinitely*, WASH. POST (Jan. 31, 2018), at https://www.washingtonpost.com/world/national-security/trump-revoking-2009-order-moves-to-keep-guantanamo-open-indefinitely/2018/01/30/c45a0b02-061b-11e8-8777-2a059f168dd2_story.html?utm_term=.4d1d3659f34e (noting that five have been approved for transfer); *see also* Charlie Savage, *Stranded at Guantánamo, a Cooperative Detainee Criticizes Saudi Arabia*, N.Y. TIMES (Feb. 28, 2018), at <https://www.nytimes.com/2018/02/28/us/politics/guantanamo-detainee-saudi-arabia.html> (noting that the terms of another detainee's plea agreement provided for transfer to Saudi Arabia by February 20, 2018, but that this transfer did not occur as scheduled).

¹² Felicia Schwartz, *Trump Signs Executive Order to Keep Guantánamo Bay Open*, WALL ST. J. (Jan. 30, 2018), at <https://www.wsj.com/articles/trump-signs-executive-order-to-keep-guantanamo-bay-open-1517370533>.

must be detained to protect against continuing, significant threats to the security of the United States, as determined by periodic reviews.¹³

The positions taken here are the subject of robust debate and, in some instances, legal challenge. For example, in January 2018, lawyers representing eleven of the detainees facing the prospect of seemingly endless detention moved for an order granting a writ of habeas corpus, alleging that Trump's refusal to release detainees violates U.S. constitutional law and is unjustified by the 2001 AUMF as interpreted through law-of-war principles.¹⁴ The extent to which the 2001 AUMF applies to "associated forces, including . . . the Islamic State of Iraq and Syria" has also received considerable attention and is the subject of an ongoing lawsuit originally brought during the Obama administration.¹⁵ The conditions of confinement at Guantánamo have also been the subject of criticism, as by the United Nations Special Rapporteur on Torture who raised concerns in December 2017 about the ongoing treatment of detainees, including allegations of torture.¹⁶

Although Trump's executive order formally reverses Obama's pronounced policy of closing the camp and sends a very different signal of presidential priorities, it remains to be seen how much effect this order will have in practice. The Trump administration has yet to send any new detainees to Guantánamo, although a State Department official has been quoted as saying that two captured ISIS fighters (both with ties to the United Kingdom) allegedly implicated in the 2014 beheadings of two American journalists might end up being sent there.¹⁷ The executive order further requires an interagency review headed by the U.S. secretary of Defense to "recommend policies to the President regarding the disposition of individuals captured in connection with an armed conflict, including policies governing transfer of individuals to U.S. Naval Station Guantánamo Bay."¹⁸ This process must be completed by April 30, 2018.¹⁹ Asked in February about whether "Guantánamo will be a solution," U.S. Secretary of

¹³ Exec. Order No. 13,823, *supra* note 1, at 4831. The periodic review process referred to is set out in Executive Order 13,567 from the Obama administration and applies to detainees subject to ongoing detention who have not been charged or convicted. *See id.* at 4831–32; Exec. Order No. 13,567, 76 Fed. Reg. 13,277, 13,278 (Mar. 10, 2011).

¹⁴ Jabbarov v. Bush, No. 5-cv-2386-RBW (D.D.C. 2018), *petition for habeas corpus filed, available at* https://ccrjustice.org/sites/default/files/attach/2018/01/AlBihani_et_al_v_Trump_MotionforOrderGrantingWrit.pdf.

¹⁵ *See* Sabrina McCubbin, Smith v. Trump: *AUMF Challenge Pretrial Motion Summaries*, LAWFARE BLOG (Oct. 23, 2017) (describing this case, which was brought by a U.S. soldier, found non-justiciable by a federal district court, and is presently on appeal in the D.C. Circuit with respect to justiciability).

¹⁶ "US Must Stop Policy of Impunity for the Crime of Torture" – *UN Rights Expert*, UN HUM. RTS. OFF. HIGH COMM'R, (Dec. 13, 2017), at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22532&LangID=E> (focusing on the case of one detainee for whom "noise and vibrations are reportedly still being used against him, resulting in constant sleep deprivation and related physical and mental disorders, for which he allegedly does not receive adequate medical attention"); *see also* Tom Miles, *U.N. Expert Says Torture Persists at Guantánamo Bay; U.S. Denies*, REUTERS (Dec. 13, 2017), at <https://www.reuters.com/article/us-usa-guantanamo-torture/u-n-expert-says-torture-persists-at-guantanamo-bay-u-s-denies-idUSKBN1E71QO> (noting that the Pentagon denies these allegations).

¹⁷ Paul Sonne, Devlin Barrett & Ellen Nakashima, *U.S. and Britain Are Divided over What to Do with Captured ISIS Fighters*, WASH. POST (Feb. 14, 2018), at https://www.washingtonpost.com/world/national-security/us-and-britain-are-divided-over-what-to-do-with-captured-isis-fighters/2018/02/14/8ad4786e-0f7f-11e8-827c-5150c6f3dc79_story.html?utm_term=.53fa00ddadc7 (further noting both that the United States has been encouraging the United Kingdom to take custody and that trial in a U.S. federal court is also a possibility).

¹⁸ Exec. Order No. 13,823, *supra* note 1, at 4831.

¹⁹ *Id.*

Defense James Mattis responded that “I’m not willing to say anything on that right now. I think the best thing is to define the problem and then we’ll get the solution.”²⁰

²⁰ U.S. Dep’t of Defense Press Release, Media Availability with Secretary Mattis en Route to Brussels (Feb. 13, 2018), *at* <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1441004/media-availability-with-secretary-mattis-en-route-to-brussels> [<https://perma.cc/S95P-VJS8>].