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# Contemporary Practice of the United States Relating to International Law (112:4 Am J Int'l L)

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

EDITED BY JEAN GALBRAITH\*

***In this section:***

- Trump Administration Imposes Sanctions on Russia for Chemical Weapons Use, While More Generally Sending Mixed Signals Regarding NATO and Russia
- U.S. Supreme Court Upholds Presidential Proclamation Restricting Entry of Individuals from Covered Countries
- United States Withdraws from the UN Human Rights Council, Shortly After Receiving Criticism About Its Border Policy
- Tariff-Based Disputes Continue to Characterize Trump Administration Trade Policies
- D.C. Circuit Upholds Injunction Barring the Involuntary Transfer to an Unidentified Third Country of a U.S. Citizen Alleged to be an Enemy Combatant
- Historic Meeting in Singapore Marks a Change in Relations Between the United States and North Korea and Generates a North Korean Commitment to Work Toward Denuclearization

\*Kristen DeWilde, Patricia Liverpool, Jessica Rizzo, Sabrina Ruchelli, and Brian Yeh contributed to the preparation of this section.



What good is NATO if Germany is paying Russia billions of dollars for gas and energy? Why are there only 5 out of 29 countries that have met their commitment? The U.S. is paying for Europe's protection, then loses billions on Trade. Must pay 2% of GDP IMMEDIATELY, not by 2025.<sup>8</sup>

In Brussels, Trump continued to press aggressively on the issue of NATO funding, as well as to express concerns about German dependence on Russian gasoline.<sup>9</sup> At the same time, he and the other leaders agreed on a wide-ranging declaration, the text of which was apparently finalized in advance of the summit.<sup>10</sup> Covering seventy-nine paragraphs, the Brussels Summit Declaration identified ongoing shared concerns regarding Russia and spoke to the issue of funding, as well as addressing numerous other topics ranging from military preparedness to energy security.<sup>11</sup> It also emphasized that "NATO remains the foundation for strong collective defence" and that "[a]ny attack against one Ally will be regarded as an attack against us all, as set out in Article 5 of the Washington Treaty."<sup>12</sup>

As to Russia, the declaration faulted it for "breach[ing] the values, principles and commitments which underpin the NATO-Russia relationship . . . ."<sup>13</sup> It continued:

The Euro-Atlantic security environment has become less stable and predictable as a result of Russia's illegal and illegitimate annexation of Crimea and ongoing destabilisation of eastern Ukraine; its military posture and provocative military activities, including near NATO borders, such as the deployment of modern dual-capable missiles in Kaliningrad, repeated violation of NATO Allied airspace, and the continued military build-up in Crimea; its significant investments in the modernisation of its strategic forces; its irresponsible and aggressive nuclear rhetoric; its large-scale, no-notice snap exercises; and the growing number of its exercises with a nuclear dimension. This is compounded by Russia's continued violation, non-implementation, and circumvention of numerous

<sup>8</sup> Donald J. Trump (@realDonaldTrump), TWITTER (July 11, 2018, 10:07 AM), at <https://twitter.com/realdonaldtrump/status/1017093020783710209> [<https://perma.cc/9LY6-ZM9Q>].

<sup>9</sup> See Donald J. Trump, Remarks at a Breakfast with Secretary General Jens Stoltenberg of the North Atlantic Treaty Organization and an Exchange with Reporters in Brussels, Belgium, at 2, 2018 DAILY COMP. PRES. DOC. 478 (July 11, 2018) ("I think it's very sad when Germany makes a massive oil and gas deal with Russia, where you're supposed to be guarding against Russia, and Germany goes out and pays billions and billions of dollars a year to Russia."); Michael Birnbaum & Philip Rucker, *At NATO, Trump Claims Allies Make New Defense Spending Commitments After He Upends Summit*, WASH. POST (July 12, 2018), at [https://www.washingtonpost.com/world/europe/trump-upends-nato-summit-demanding-immediate-spending-increases-or-he-will-do-his-own-thing/2018/07/12/a3818cc6-7f0a-11e8-a63f-7b5d2aba7ac5\\_story.html?utm\\_term=.33d0af4238fb](https://www.washingtonpost.com/world/europe/trump-upends-nato-summit-demanding-immediate-spending-increases-or-he-will-do-his-own-thing/2018/07/12/a3818cc6-7f0a-11e8-a63f-7b5d2aba7ac5_story.html?utm_term=.33d0af4238fb) ("President Trump jolted a NATO summit on Thursday with a last-minute demand that leaders immediately pour billions into their military budgets . . . .").

<sup>10</sup> Brussels Summit Declaration, *supra* note 2; Helene Cooper & Julian E. Barnes, *U.S. Officials Scrambled Behind the Scenes to Shield NATO Deal from Trump*, N.Y. TIMES (Aug. 9, 2018) <https://www.nytimes.com/2018/08/09/us/politics/nato-summit-trump.html> (reporting that the text was finalized in advance of the summit). In addition to this Declaration, the NATO countries agreed on several other declarations, including a considerably shorter Declaration on Transatlantic Security and Solidarity and a joint declaration with Georgia. See NATO Press Release, Brussels Declaration on Transatlantic Security and Solidarity (July 11, 2018), at [https://www.nato.int/cps/en/natohq/official\\_texts\\_156620.htm?selectedLocale=en](https://www.nato.int/cps/en/natohq/official_texts_156620.htm?selectedLocale=en); NATO Press Release, NATO-Georgia Commission Declaration at the Brussels Summit (July 12, 2018), at [https://www.nato.int/cps/en/natohq/official\\_texts\\_156627.htm?selectedLocale=en](https://www.nato.int/cps/en/natohq/official_texts_156627.htm?selectedLocale=en).

<sup>11</sup> See generally Brussels Summit Declaration, *supra* note 2.

<sup>12</sup> *Id.*, para. 1.

<sup>13</sup> *Id.*, para. 4.

obligations and commitments in the realm of arms control and confidence- and security-building measures. Russia is also challenging Euro-Atlantic security and stability through hybrid actions, including attempted interference in the election processes, and the sovereignty of our nations, as was the case in Montenegro, widespread disinformation campaigns, and malicious cyber activities. We condemn the attack using a military-grade nerve agent in Salisbury, United Kingdom and note the independent confirmation by the Organisation for the Prohibition of Chemical Weapons (OPCW) of the nerve agent used. The UK assesses that it is highly likely that the Russian Federation was responsible for the attack and that there is no plausible alternative explanation. We stand in solidarity with the UK in its assessment.

...

There can be no return to “business as usual” until there is a clear, constructive change in Russia’s actions that demonstrates compliance with international law and its international obligations and responsibilities. . . .<sup>14</sup>

On the issue of funding, the declaration stated that “[f]air burden sharing underpins the Alliance’s cohesion, solidarity, credibility, and ability to fulfil our Article 3 and Article 5 commitments.”<sup>15</sup> It made clear that NATO countries were “committed to improving the balance of sharing the costs and responsibilities of Alliance membership,” in accordance with the Defense Investment Pledge agreed upon in 2014.<sup>16</sup>

During a press conference following the summit, Trump emphasized the funding commitments and generally appeared satisfied with the “very amazing 2-day period.”<sup>17</sup> He stated that “I believe in NATO.”<sup>18</sup> In response to a question as to whether he had threatened to pull out of NATO if other member countries failed to meet their spending goals, Trump responded:

I told people that I’d be very unhappy if they didn’t up their commitments very substantially . . . . I let them know that I was extremely unhappy with what was happening, and they have substantially upped their commitment, yes. And now we’re very happy and have a very, very powerful, very, very strong NATO, much stronger than it was 2 days ago.<sup>19</sup>

Asked whether he believed he could pull the United States out of NATO without Congress’s explicit approval, Trump responded, “I think I probably can, but that’s unnecessary.”<sup>20</sup>

<sup>14</sup> *Id.*, paras. 6, 9; *see also id.* paras. 4–5, 7–8 (making additional statements regarding Russia).

<sup>15</sup> *Id.*, para. 3.

<sup>16</sup> *Id.* (offering further specifics). This 2014 pledge set various standards with respect to military spending, most notably that NATO countries who spent less than 2% of their gross domestic product on defense would “aim to move towards the 2% guideline within a decade . . . .” NATO Press Release, Wales Summit Declaration (Sept. 5, 2014), *at* [https://www.nato.int/cps/en/natohq/official\\_texts\\_112964.htm](https://www.nato.int/cps/en/natohq/official_texts_112964.htm). The extent to which Trump extracted additional commitments beyond those set forth in the 2018 Brussels Summit Declaration is unclear. *See* Birnbaum & Rucker, *supra* note 9 (noting the different views expressed on this point).

<sup>17</sup> Donald J. Trump, President’s News Conference in Brussels, Belgium, at 1, 2018 DAILY COMP. PRES. DOC. 481 (July 12, 2018).

<sup>18</sup> *Id.* at 2.

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

<sup>20</sup> *Id.* at 3.

On July 16, 2018, Trump met with Russian President Vladimir Putin in Helsinki. At a joint press conference after their private meeting, Putin noted that during this meeting,

President Trump mentioned the issue of the so-called interference of Russia when the American elections, and I had to reiterate things I said several times, including during our personal contacts, that the Russian state has never interfered and is not going to interfere into internal American affairs, including the election process.<sup>21</sup>

Asked whether he believed Putin or the U.S. intelligence agencies, which have unanimously concluded that Russia did in fact interfere with the 2016 election, Trump replied:

My people came to me—[Director of National Intelligence] Dan Coats came to me and some others—they said they think it’s Russia. I have President Putin; he just said it’s not Russia.

I will say this: I don’t see any reason why it would be . . . .

So I have great confidence in my intelligence people, but I will tell you that President Putin was extremely strong and powerful in his denial today. . . .<sup>22</sup>

This equivocation triggered immediate domestic pushback, not only from Democrats but also from leading Republicans. Senate Minority Leader Charles Schumer of New York said that the president’s “behavior was so bizarre, so weak, so deleterious to American interests and our national security that millions of Americans are left wondering if Putin indeed has something over the president.”<sup>23</sup> House Speaker Paul Ryan of Wisconsin stated that “[t]here is no question that Russia interfered in our election and continues attempts to undermine democracy here and around the world” and “[t]here is no moral equivalence between the United States and Russia, which remains hostile to our most basic values and ideals.”<sup>24</sup>

Faced with considerable pressure to walk back his Helsinki remarks, Trump offered a correction of sorts at a meeting the next day:

So I’ll begin by stating that I have full faith and support for America’s great intelligence agencies. Always have. And I have felt very strongly that, while Russia’s actions had no impact at all on the outcome of the election, let me be totally clear in saying that—and I’ve said this many times—I accept our intelligence community’s conclusion that Russia’s meddling in the 2016 election took place. Could be other people also; there’s a lot of people out there.

<sup>21</sup> Donald J. Trump, President’s News Conference with President Vladimir Vladimirovich Putin of Russia in Helsinki, Finland, at 2, 2018 DAILY COMP. PRES. DOC. 488 (July 16, 2018).

<sup>22</sup> *Id.* at 11; see also Jeremy Herb, *U.S. Intel Chiefs Unanimous that Russia is Targeting 2018 Elections*, CNN (Feb. 14, 2018), at <https://www.cnn.com/2018/02/13/politics/intelligence-chiefs-russia-2018-elections-target/index.html> (noting that the director of national intelligence, the CIA director, the FBI director, and three other intelligence chiefs all testified affirmatively to the conclusion that Russia had interfered in the 2016 election).

<sup>23</sup> Paul Leblanc, *Trump “Acting Like Someone Who’s Compromised,” Democratic Congressman Says*, NEWSWEEK (July 22, 2018), at <https://www.newsweek.com/trump-acting-compromised-adam-schiff-democratic-congressman-says-1036390> (quoting comments by Senator Schumer on the day after the Helsinki conference).

<sup>24</sup> Office of Speaker Paul Ryan Press Release, Statement on Russia (July 16, 2018), at <https://www.speaker.gov/press-release/statement-russia> [<https://perma.cc/S5RH-MGWB>]. For responses of other leading Republicans and Democrats, see Lauren Fox, *Top Republicans in Congress Break with Trump Over Putin Comments*, CNN (July 17, 2018), at <https://www.cnn.com/2018/07/16/politics/congress-reaction-trump-putin-comments/index.html>.

There was no collusion at all. And people have seen that, and they've seen that strongly. The House has already come out very strongly on that. A lot of people have come out strongly on that.

...

In a key sentence in my remarks [at Helsinki], I said the word “would” instead of “wouldn't.” The sentence should have been: I don't see any reason why I wouldn't—or why it wouldn't be Russia. . . . Sort of a double negative.

So you can put that in, and I think that probably clarifies things pretty good by itself.

I have, on numerous occasions, noted our intelligence findings that Russians attempted to interfere in our elections. Unlike previous administrations, my administration has and will continue to move aggressively to repeal any efforts—and repel—we will stop it; we will repel it—any efforts to interfere in our elections. . . .<sup>25</sup>

On August 8, 2018, the State Department announced the imposition of a new set of sanctions on Russia, based on the determination that Russia used a chemical weapon in an attempted assassination against a former spy and his daughter earlier in the year in the United Kingdom.<sup>26</sup> These sanctions were imposed pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991. This act provides that when the president is presented with “persuasive information” suggesting that a foreign government has used chemical weapons, the president “shall” determine within sixty days whether the government has done so either in violation of international law or against its own nationals.<sup>27</sup> If the president concludes that this is the case, then he or she “shall forthwith” impose certain sanctions, including terminating most foreign aid and financial assistance, imposing restrictions on arms sales, and limiting the export of “national security-sensitive” goods and technology.<sup>28</sup> Even more significantly, if the foreign government has not provided “reliable assurances” of non-repetition and permitted international inspections, then within three months the President “shall impose” a stronger set of sanctions.<sup>29</sup> For effectively all of these initial and subsequent sanctions, however, the president has the power

<sup>25</sup> Donald J. Trump, Remarks in a Meeting with Republican Members of Congress and an Exchange with Reporters, at 2, 2018 DAILY COMP. PRES. DOC. 489 (July 17, 2018).

<sup>26</sup> Aug. 8 State Dep't Press Release, Sanctions Imposition, *supra* note 3. For discussion of earlier U.S. responses to the attack, which occurred in March in the city of Salisbury, see Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 493 (2018).

<sup>27</sup> Pub. L. No. 102–182, § 306, 105 Stat. 1233, 1252–53 (1991) (codified at 22 U.S.C. § 5604). One of the two poisoning victims, Yulia Skripal, is a Russian citizen. Patrick Wintour & Shaun Walker, *Russia Expels Diplomat in Tit-for-Tat Actions Over Salisbury Attack*, GUARDIAN (Mar. 29, 2018), at <https://www.theguardian.com/uk-news/2018/mar/29/russia-accuses-uk-of-violating-international-law-skripal-case>.

<sup>28</sup> Pub. L. No. 102–182, at § 307(a), 105 Stat. at 1254 (codified at 22 U.S.C. § 5605(a)).

<sup>29</sup> *Id.* at § 307(b), 105 Stat. at 1254–55 (codified at 22 U.S.C. § 5605(b)). For the second round, the president is instructed to impose at least three of the following six kinds of sanctions: opposing loans and assistance to that country by international development banks; banning U.S. banks from making most kinds of loans to that government; imposing additional restrictions on exports to that country; imposing additional restrictions on imports from that country; downgrading diplomatic relations; and suspending air transportation into and out of the United States by an airline controlled by that government. *Id.*

to waive them if he or she “determines and certifies to the Congress that such waiver is essential to the national security interests of the United States . . . .”<sup>30</sup>

In its announcement, the State Department explained that the United States had determined “that the Government of the Russian Federation has used chemical or biological weapons in violation of international law or has used lethal chemical or biological weapons against its own nationals.”<sup>31</sup> In imposing the initial sanctions, which went into effect on August 27,<sup>32</sup> the State Department made some use of the waiver power. Specifically, it waived the termination of foreign assistance, waived the termination on arms sales to the extent that it applied to “government space cooperation and commercial space launches,” and granted various specific waivers with respect to the prohibition on the export of national security-sensitive goods and technology.<sup>33</sup> Of the sanctions that remained, a State Department official explained that “the most significant” aspect of them would be:

the imposition of a presumption of denial for all national security sensitive goods or technologies that are controlled by the Department of Commerce pursuant to the Export Administration Regulations. These goods are currently subject to a license—a case-by-case license determination, but we are—henceforth, when these sanctions go into effect, we will be presumptively denying such applications.<sup>34</sup>

As to the extent to which the Trump administration would move forward with the second round of sanctions after three months, the official explained that in the event Russia fails to provide assurances of non-repetition and take the other statutorily mandated steps, then “we will have to be in a basis of considering whether or not to impose a second—or what sanctions to impose in a second tranche as specified by the structure of the statute.”<sup>35</sup>

The words and actions of the Trump administration in relation to Russia have unfolded against the backdrop of the ongoing investigation into Russian interference in the 2016 election led by Special Counsel Robert Mueller. The scope of the investigation encompasses any coordination between the Trump campaign and Russian agents in the months leading up to the election.<sup>36</sup> Trump repeatedly refers to the investigation as a “Witch Hunt.”<sup>37</sup> On July 13,

<sup>30</sup> *Id.* at § 307(d), 105 Stat. at 1256 (codified at 22 U.S.C. § 5605(d)) (further requiring that the president give the relevant congressional committees fifteen days of notice of the exercise of a waiver). The waiver authority covers all sanctions except the sanction of downgrading diplomatic relations, which is one that the president likely has the constitutional authority to decline to impose regardless.

<sup>31</sup> Aug. 8 State Dep’t Press Release, Sanctions Imposition, *supra* note 3; *see also* U.S. Dep’t of State Press Release, Special Briefing, Previewing the Imposition of Chemical and Biological Weapons Control and Warfare Elimination Sanctions on Russia (Aug. 8, 2018) [hereinafter Aug. 8 State Dep’t Press Release, Sanctions Preview], at <https://www.state.gov/t/pa/prs/ps/2018/08/285046.htm> [<https://perma.cc/7BGF-NWNZ>] (explaining that this determination was made somewhat later than the sixty-day period mandated by the statute because “[t]hese are complicated pieces of moving equipment, if you will, inside the U.S. bureaucracy”).

<sup>32</sup> Determinations Regarding Use of Chemical Weapons by Russia Under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, 83 Fed. Reg. 43,723 (Aug. 27, 2018).

<sup>33</sup> *Id.* at 43,723–24.

<sup>34</sup> Aug. 8 State Dep’t Press Release, Sanctions Preview, *supra* note 31.

<sup>35</sup> *Id.*

<sup>36</sup> 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), *available at* <https://www.justice.gov/opa/press-release/file/967231/download> [<https://perma.cc/6M9E-T4ZV>].

<sup>37</sup> *E.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 1, 2018, 6:24 AM), at <https://twitter.com/realdonaldtrump/status/1024646945640525826> [<https://perma.cc/9P2G-A39E>]; Olivia Paschal, *Trump’s*



shortly before Trump headed to Helsinki to meet with Putin, Mueller indicted twelve Russian intelligence officers for conspiracy to launder money, conspiracy to commit an offense against the United States, and, with respect to eleven of these officers, aggravated identity theft.<sup>38</sup> “The object of the conspiracy,” the indictment states, “was to hack into the computers of U.S. persons and entities involved in the 2016 U.S. presidential election, steal documents from those computers, and stage releases of the stolen documents to interfere with the 2016 U.S. presidential election.”<sup>39</sup>

Congress, meanwhile, has signaled its unflinching support for NATO and continued concern regarding the threat posed by Russia. The Countering America’s Adversaries Through Sanctions Act, which became law on August 2, 2017, previously expressed Congress’s sense of the “vital importance” of the North Atlantic Treaty<sup>40</sup> and imposed various sanctions on Russia.<sup>41</sup> Consistent with this stance, the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which Trump signed into law on August 13, 2018,<sup>42</sup> described the United States as having an “ironclad commitment . . . to its obligations under the North Atlantic Treaty” and stated that the United States should pursue in coordination with NATO “an integrated approach to strengthening the defense of allies and partners in Europe as part of a broader, longer-term strategy backed by all elements of United States national power to deter and, if necessary, defeat Russian aggression.”<sup>43</sup>

*U.S. Supreme Court Upholds Presidential Proclamation Restricting Entry of Individuals from Covered Countries*

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On June 26, 2018, the U.S. Supreme Court upheld President Trump’s most recent iteration of restrictions on entry to the United States by nationals from certain foreign countries.<sup>1</sup>

*Tweets and the Creation of “Illusory Truth,”* ATLANTIC (Aug. 3, 2018), at <https://www.theatlantic.com/politics/archive/2018/08/how-trumps-witch-hunt-tweets-create-an-illusory-truth/566693> (noting Trump had used “Witch Hunt” to describe the Mueller investigation at least eighty-four times in 2018).

<sup>38</sup> See generally *Indictment, United States v. Netyksho*, No. 1:18-cr-00215, 2018 WL 3407381 (D.D.C. filed July 13, 2018), available at <https://www.documentcloud.org/documents/4598892-DNC-Hack-Indictment.html#document> [<https://perma.cc/B3KC-GJ25>].

<sup>39</sup> *Id.*, para. 20.

<sup>40</sup> Pub. L. No. 115–44, § 292, 131 Stat. 886, 939–40 (2017) (also stating Congress’s sense that “the United States remains fully committed to the North Atlantic Treaty Organization and will honor its obligations enshrined in Article 5”).

<sup>41</sup> For discussion of these sanctions and the extent to which they have been implemented by the Trump administration, see Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 1015, 1017–21 (2017); Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 296, 296–302 (2018); Galbraith, *supra* note 26, at 493.

<sup>42</sup> White House Press Release, *President Donald J. Trump Signs H.R. 5515 into Law* (Aug. 13, 2018), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signs-h-r-5515-law> [<https://perma.cc/HD4G-XXEH>].

<sup>43</sup> Pub. L. No. 115–232, § 1248(a), \_ Stat. \_ (2018). For a summary of other provisions in the act, including ones relevant to NATO and Russia, see Scott R. Anderson, Sarah Tate Chambers & Molly E. Reynolds, *What’s in the New NDAA*, LAWFARE (Aug. 14, 2018), at <https://www.lawfareblog.com/whats-new-ndaa>.

<sup>1</sup> Trump v. Hawaii, 138 S. Ct. 2392, 2402–06, 2423 (2018).

Following several rewrites of this travel ban, ensuing legal challenges, and lower court injunctions, the Court, in a five-to-four decision authored by Chief Justice Roberts, reversed the latest ruling of a lower court that had granted a partial preliminary injunction against the ban.<sup>2</sup> Although acknowledging that there was considerable evidence tying the travel ban to bias against Muslims, the Supreme Court found that the plaintiffs were nonetheless unlikely to succeed either in their statutory claim that Trump lacked the authority to impose this ban or in their constitutional claim that the ban violated the Establishment Clause of the First Amendment.<sup>3</sup> The Court accordingly reversed the lower court's injunction and remanded the case for further proceedings.<sup>4</sup> The ruling, based on the Trump administration's asserted national security interest, leaves in place travel restrictions imposed on nationals of seven countries—Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen—only two of which are not Muslim-majority countries.<sup>5</sup>

As a statutory matter, the Supreme Court found that the proclamation fell within the scope of presidential authority under the Immigration and Nationality Act (INA), which allows the president to “suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate” in situations where the entry of such individuals “would be detrimental to the interests of the United States.”<sup>6</sup> The Court found that this requirement of a presidential finding was fulfilled by actions undertaken by the Trump administration prior to the current travel ban—namely, a “worldwide, multi-agency review” of the extent to which other countries ensure the integrity of issued passports, assist in disclosing criminal history information about nationals seeking to travel to the United States, and more generally trigger national security concerns regarding terrorism.<sup>7</sup> Additionally, though the plaintiffs argued that a separate provision of the INA prohibits discrimination based on nationality,<sup>8</sup> the Court found that this provision was limited in applicability to those individuals deemed admissible for entry into the United States, not “the *entire* immigration process.”<sup>9</sup> Thus, this provision did not limit the president's authority to determine those eligible for admission into the country.<sup>10</sup>

The Court also rejected the plaintiffs' constitutional claim that the executive action violated the Establishment Clause, which provides that “Congress shall make no law respecting an establishment of religion.”<sup>11</sup> In finding that the proclamation was constitutional, the Court referenced

<sup>2</sup> *Id.* at 2406–07. For discussion of the three versions of the ban and of earlier legal proceedings relating to these versions, see Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 109 (2018); Kristin Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 764 (2017).

<sup>3</sup> *Hawaii*, 138 S. Ct. at 2415, 2417–18, 2423.

<sup>4</sup> *Id.* at 2423.

<sup>5</sup> *Id.* at 2405–06, 2420–23. Plaintiffs challenged the executive action only as applicable to the five Muslim-majority countries: Iran, Libya, Somalia, Syria, and Yemen. *Id.* at 2406. The proclamation varied the restrictions applicable to each of the seven countries, sometimes preventing the entry of all types of travelers and sometimes only the entry of certain types of visa holders. *See id.* at 2405. For Venezuela, the proclamation only applied to certain government officials and their families. *Id.* at 2406.

<sup>6</sup> 8 U.S.C. § 1182(f); *Hawaii*, 138 S. Ct. at 2415.

<sup>7</sup> *Hawaii*, 138 S. Ct. at 2404–05 (describing the review process, whose results produced a list of countries of concern that overlapped considerably with the countries singled out in the travel ban); 2408–09 (quoting the statutory standard and deeming the review process sufficient to satisfy this standard).

<sup>8</sup> *Id.* at 2413–14 (discussing Section 1152(a)(1)(A) of the INA).

<sup>9</sup> *Id.* at 2414–15.

<sup>10</sup> *Id.* at 2415.

<sup>11</sup> *Id.* at 2419–22; U.S. CONST. amend. I.

statements by Trump on the campaign trail calling explicitly for the prevention of Muslim immigration, as well as certain statements made by Trump and his advisors after he took office that linked the travel ban with his campaign promises or more generally indicated continued anti-Muslim bias.<sup>12</sup> The Court did not find these statements dispositive, stating that:

But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.<sup>13</sup>

In considering the constitutionality of the policy, the Court applied a rational basis standard of review.<sup>14</sup> It stated that:

For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. . . . As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.<sup>15</sup>

The Court found that the proclamation had "a legitimate grounding in national security concerns, quite apart from any religious hostility."<sup>16</sup>

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority population. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.<sup>17</sup>

...

Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of covered countries. The Proclamation emphasizes that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks" . . . and establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be terminated. . . .

<sup>12</sup> *Id.* at 2417–18 (discussing these statements); *see also id.* at 2435–37 (Sotomayor, J., dissenting) (describing these statements at more length).

<sup>13</sup> *Hawaii*, 138 S. Ct. at 2418.

<sup>14</sup> *Id.* at 2418, 2420 (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

<sup>15</sup> *Id.* at 2420.

<sup>16</sup> *Id.* at 2421.

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

Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. . . .

Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. . . . The Proclamation also directs DHS and the State Department to issue guidance elaborating upon the circumstances that would justify a waiver.<sup>18</sup>

Justice Kennedy and Justice Thomas each wrote concurrences. Justice Kennedy's short concurrence noted that while there "are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention," it is nonetheless "an urgent necessity that officials adhere to [First Amendment] constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs."<sup>19</sup> Justice Thomas's concurrence expressed doubt about the power of federal district courts to issue nationwide injunctions.<sup>20</sup>

In a dissent joined by Justice Ginsburg, Justice Sotomayor found the Trump administration's claim of a national security interest pretextual:

[The Court's decision] leaves undisturbed a policy first advertised openly and unequivocally as a "total and complete shutdown of Muslims entering the United States" because the policy now masquerades behind a facade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created.<sup>21</sup>

Rejecting the majority's application of a rational basis test, Sotomayor argued that the standard should be:

whether a reasonable observer, presented with all "openly available data," the text and "historical context" of the Proclamation, and the "specific sequences of events" leading up to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. . . . The answer is unquestionably yes.<sup>22</sup>

She further concluded that even applying rational basis review, the travel ban should still fail because its existence of the policy could only be explained by animus.

The President's statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis.<sup>23</sup>

<sup>18</sup> *Id.* at 2422–23. The waiver program would allow individuals from covered countries to enter the United States on a case-by-case basis. *Id.*

<sup>19</sup> *Id.* at 2424 (Kennedy, J., concurring).

<sup>20</sup> *Id.* at 2424–25 (Thomas, J., concurring).

<sup>21</sup> *Id.* at 2433 (Sotomayor, J., dissenting).

<sup>22</sup> *Id.* at 2438 (Sotomayor, J., dissenting) (citation omitted).

<sup>23</sup> *Id.* at 2442 (Sotomayor, J., dissenting) (also concluding that the travel ban's inclusion of North Korea and Venezuela was done to "evade criticism or legal consequences for the Proclamation's otherwise clear targeting of Muslims"). Sotomayor likened the Court's decision to *Korematsu v. United States*, 323 U.S. 214 (1994), which had upheld the internment of U.S. citizens of Japanese descent during World War II. *Id.* at 2448 (Sotomayor, J.,

In a separate dissent joined by Justice Kagan, Justice Breyer looked to the extent to which the Trump administration was making case-by-case waivers to the travel ban actually available in practice.<sup>24</sup> He reasoned that “if the Government is not applying the Proclamation’s exemption and waiver system, the claim that the Proclamation is a ‘Muslim ban,’ rather than a ‘security-based’ ban becomes much stronger.”<sup>25</sup> Given evidence suggesting that the executive branch was failing to grant waivers in practice, he would have upheld the lower court’s injunction.<sup>26</sup>

The Trump administration celebrated the Supreme Court’s decision. Trump described the Court’s decision as a “tremendous victory for the American people and the Constitution” and vowed to continue “fight[ing] for an immigration system that serves the national interests of the United States and its citizens.”<sup>27</sup> By contrast, human rights groups condemned the decision,<sup>28</sup> and Hawaii’s Lieutenant Governor Doug Chin emphasized that “I hurt today for Hawaii families and others who have experienced discrimination and scapegoating due to President Trump’s bullying remarks and orders.”<sup>29</sup>

#### INTERNATIONAL ORGANIZATIONS

*United States Withdraws from the UN Human Rights Council, Shortly After Receiving Criticism About Its Border Policy*

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On June 19, 2018, the United States withdrew from the UN Human Rights Council.<sup>1</sup> Announcing this decision, U.S. Ambassador to the United Nations Nikki Haley characterized the Council as “a protector of human rights abusers and a cesspool of political bias.”<sup>2</sup> U.S. Secretary of State Mike Pompeo observed that while “the United States has no opposition in

dissenting). Responding to this point, the Court stated that “*Korematsu* has nothing to do with this case” and described *Korematsu* as “gravely wrong the day it was decided.” *Id.* at 2423.

<sup>24</sup> *Id.* at 2429–30 (Breyer, J., dissenting).

<sup>25</sup> *Id.* at 2430 (Breyer, J., dissenting).

<sup>26</sup> *Id.* at 2431–33 (Breyer, J., dissenting).

<sup>27</sup> Donald J. Trump, Statement on the United States Supreme Court Ruling in *Trump v. Hawaii*, 2018 DAILY COMP. PRES. DOC. 455 (June 26, 2018); see also U.S. Dep’t of Homeland Security Press Release, DHS Statement on U.S. Supreme Court Decision on the President’s Executive Order on Protecting the Nation from Foreign Terrorist Entry into the United States (June 26, 2017), at <https://www.dhs.gov/news/2017/06/26/dhs-statement-us-supreme-court-decision-president-s-executive-order-protecting> [<https://perma.cc/7H6Z-A37S>] (announcing that the decision would allow the agency to pursue “rational and necessary steps to protect [the United States] from persons looking to enter and potentially do harm”).

<sup>28</sup> E.g., Amnesty International USA, *Amnesty International USA Reaction to Supreme Court Ruling on Muslim Ban* (June 26, 2018), at <https://www.amnestyusa.org/press-releases/amnesty-international-usa-reaction-to-supreme-court-ruling-on-muslim-ban>.

<sup>29</sup> *The Latest: Group: Don’t Base Immigration on Race, Religion*, AP (June 26, 2018), at <https://www.apnews.com/019fb806a05c49eab32cb1ed951af363>. As Hawaii’s former attorney general, Chin initially led the challenge against the executive actions. *Id.*

<sup>1</sup> U.S. Dep’t of State Press Briefing, Remarks on the UN Human Rights Council (June 19, 2018), at <https://www.state.gov/secretary/remarks/2018/06/283341.htm> [<https://perma.cc/MPB4-9AQW>] [hereinafter June 19 Press Briefing].

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

principle to multilateral bodies working to protect human rights,” nonetheless “when organizations undermine our national interests and our allies, we will not be complicit.”<sup>3</sup> The withdrawal occurred one day after the UN High Commissioner for Human Rights criticized the United States in a speech at the Human Rights Council for its “unconscionable” practice of forcibly separating undocumented families entering the United States.<sup>4</sup> In August, U.S. National Security Advisor John Bolton stated that in addition to withdrawing from the Council, the United States would also reduce its assessed contribution to the United Nations by the amount that would ordinarily flow to the Human Rights Council and the UN High Commissioner for Human Rights.<sup>5</sup>

U.S. involvement with the Human Rights Council has varied in the years since its creation. In April 2005, UN Secretary-General Kofi Annan called for the dissolution of its predecessor, the UN Commission on Human Rights, stating that this body had been “undermined by the politicization of its sessions and the selectivity of its work.”<sup>6</sup> The creation of the Human Rights Council as a replacement for the Commission went to a vote in the General Assembly in March 2006.<sup>7</sup> The United States under President George W. Bush was one of just four states to vote against the establishment of the new Council, objecting that it needed “stronger mechanisms for maintaining credible membership.”<sup>8</sup> The United States also declined to seek a seat on the Council in its first round of elections.<sup>9</sup> After President Obama took office, the United States promptly and successfully sought election to the Human Rights Council “because we believe that working from within, we can make the council a more effective forum to promote and protect human rights.”<sup>10</sup>

Not long after President Trump took office, his administration signaled skepticism about the Council and the extent to which the United States should pursue change from within it. On June 6, 2017, Haley remarked in an address to the Human Rights Council that “the United States is looking carefully at this Council and our participation in it.”<sup>11</sup> Elaborating in a later speech that same day, she stated that “[i]f [the Council] fails to change,

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

<sup>4</sup> UN High Comm’r for Human Rights, Opening Statement and Global Update of Human Rights Concerns by UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein at 38th Sess. of the Human Rights Council (June 18, 2018), at <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23206&LangID=E> [hereinafter June 18 Statement].

<sup>5</sup> Associated Press, *Bolton Presses Russia About Meddling in U.S. Election Process*, POLITICO (Aug. 23, 2018), at <https://www.politico.com/story/2018/08/23/john-bolton-russia-meeting-election-meddling-794339> [hereinafter Bolton story].

<sup>6</sup> UN Secretary-General, Secretary-General’s Address to the Commission on Human Rights (Apr. 7, 2005), at <https://www.un.org/sg/en/content/sg/statement/2005-04-07/secretary-generals-address-commission-human-rights>.

<sup>7</sup> John R. Crook, *Contemporary Practice of the United States*, 100 AJIL 697, 699 (2006).

<sup>8</sup> *Id.* at 697–98 (quoting U.S. Dep’t of State Press Release, *Explanation of Vote on the Human Rights Council Draft Resolution* (Mar. 15, 2006), at <https://2001-2009.state.gov/p/io/rls/rm/63143.htm>).

<sup>9</sup> *Id.* at 698.

<sup>10</sup> John R. Crook, *Contemporary Practice of the United States*, 103 AJIL 355, 357–58 (2009) (quoting U.S. Dep’t of State Press Release, *U.S. to Run for Election to the UN Human Rights Council* (Mar. 31, 2009), at <https://2009-2017.state.gov/t/pa/prs/ps/2009/03/121049.htm>); John R. Crook, *Contemporary Practice of the United States*, 103 AJIL 604, 608 (2009) (noting that the United States ran unopposed and was elected to the Council).

<sup>11</sup> Nikki Haley, U.S. Ambassador to the UN, *Ambassador Nikki Haley Addresses the UN Human Rights Council* (June 6, 2017), at <https://geneva.usmission.gov/2017/06/06/ambassador-nikki-haley-address-to-the-un-human-rights-council> [https://perma.cc/TR64-WW24].

then we must pursue the advancement of human rights outside of the Council.”<sup>12</sup> She pointed specifically to two “critically necessary changes.”<sup>13</sup> First, she called on the United Nations to “keep the worst human rights abusers from obtaining seats on the Council,”<sup>14</sup> a concern reiterated by Trump in his address to the General Assembly that September.<sup>15</sup> Second, she called for the removal of the Council’s Agenda Item Seven, which ensures that the topic of “[h]uman rights violations and implications of the Israeli occupation of Palestine and other occupied Arab territories” and the “[r]ight to self-determination of the Palestinian people” is on the agenda of each Council session.<sup>16</sup> Haley described Agenda Item Seven as “the scandalous provision that singles out Israel for automatic criticism.”<sup>17</sup>

Haley returned to these themes in announcing the U.S. withdrawal from the Human Rights Council on June 19, 2018:

Regrettably, it is now clear that our call for reform was not heeded. Human rights abusers continue to serve on and be elected to the council. The world’s most inhumane regimes continue to escape scrutiny, and the council continues politicizing and scapegoating of countries with positive human rights records in an attempt to distract from the abusers in their ranks.

Therefore, as we said we would do a year ago if we did not see any progress, the United States is officially withdrawing from the UN Human Rights Council. In doing so, I want to make it crystal clear that this step is not a retreat from human rights commitments; on the contrary, we take this step because our commitment does not allow us to remain a part of a hypocritical and self-serving organization that makes a mockery of human rights.

...

When a so-called Human Rights Council cannot bring itself to address the massive abuses in Venezuela and Iran, and it welcomes the Democratic Republic of Congo as a new member, the council ceases to be worthy of its name. Such a council, in fact, damages the cause of human rights.

And then, of course, there is the matter of the chronic bias against Israel. Last year, the United States made it clear that we would not accept the continued existence of agenda item seven, which singles out Israel in a way that no other country is singled out. Earlier this year, as it has in previous years, the Human Rights Council passed five resolutions against Israel—more than the number passed against North Korea, Iran, and Syria combined. This disproportionate focus and unending hostility towards Israel is clear proof that the council is motivated by political bias, not by human rights.

<sup>12</sup> Nikki Haley, U.S. Ambassador to the UN, Remarks at the Graduate Institute of Geneva on “A Place for Conscience: The Future of the United States in the Human Rights Council” (June 6, 2017), *at* <https://usun.state.gov/remarks/7828> [<https://perma.cc/R56F-FV88>] [hereinafter June 6 Graduate Institute Address].

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

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

<sup>15</sup> Donald J. Trump, Remarks to the United Nations General Assembly in New York City, 2017 DAILY COMP. PRES. DOC. 658 (Sept. 19, 2017) (“[I]t is a massive source of embarrassment to the United Nations that some governments with egregious human rights records sit on the U.N. Human Rights Council”).

<sup>16</sup> Human Rights Council Res. 5/1, UN Doc. A/HRC/RES/5/1 (Aug. 7, 2007).

<sup>17</sup> June 6 Graduate Institute Address, *supra* note 12.

For all these reasons, the United States spent the past year engaged in a sincere effort to reform the Human Rights Council. It is worth examining why our efforts didn't succeed. At its core, there are two reasons. First, there are many unfree countries that simply do not want the council to be effective . . . .

...

The second reason our reforms didn't succeed is in some ways even more frustrating. There are several countries on the Human Rights Council who do share our values

....

Ultimately, however, many of these likeminded countries were unwilling to seriously challenge the status quo. We gave them opportunity after opportunity and many months of consultations, and yet they would not take a stand unless it was behind closed doors . . . .

...

Even as we end our membership in the Human Rights Council, we will keep trying to strengthen the entire framework of the UN engagement on human rights issues, and we will continue to strongly advocate for reform of the Human Rights Council. Should it become reformed, we would be happy to rejoin it.<sup>18</sup>

The President of the Human Rights Council, Vojislav Šuc of Slovenia, greeted the news of the U.S. withdrawal from the Council with regret:

In times when the value and strength of multilateralism and human rights are being challenged on a daily basis, it is essential that we uphold a strong and vibrant Council recognizing it as a central part of the United Nations for the 21st century.

Over the past 12 years, the Human Rights Council has tackled numerous human rights situations and issues keeping them in sharp focus. In many senses, the Council serves as an early warning system by sounding the alarm bells ahead of impending or worsening crises. Its actions lead to meaningful results for the countless human rights victims worldwide, those the Council serves.<sup>19</sup>

UN Secretary-General António Guterres stated via a spokesperson that he “would have much preferred for the United States to remain in the Human Rights Council.”<sup>20</sup>

The day before its withdrawal, on June 18, the United States came in for severe criticism in an address delivered to the Human Rights Council by the UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein.<sup>21</sup> This criticism concerned the “zero-tolerance” policy

<sup>18</sup> June 19 Press Briefing, *supra* note 1; see also White House Fact Sheet, President Donald J. Trump is Standing Up for Human Rights at the UN (June 21, 2018), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-standing-human-rights-u-n> [<https://perma.cc/G2ZM-VK78>] (noting that “[t]he Administration believes that withdrawal from the [Council] will cast a spotlight on the urgent need for structural reform”).

<sup>19</sup> UN, Human Rights Council, Press Statement by the President of the Human Rights Council, Ambassador Vojislav Šuc (Slovenia) (June 19, 2018), at <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23220&LangID=E>.

<sup>20</sup> UN Secretary-General, Note to Correspondents on the Withdrawal of the United States of America from the Human Rights Council (June 19, 2018), at <https://www.un.org/sg/en/content/sg/note-correspondents/2018-06-19/note-correspondents-withdrawal-united-states-america-human>.

<sup>21</sup> June 18 Statement, *supra* note 4.



for undocumented immigrants crossing the border, which was implemented by the Trump administration in April 2018.<sup>22</sup> As U.S. Attorney General Jeff Sessions described the policy in a May 7, 2018 speech in San Diego, “If you cross this border unlawfully, then we will prosecute you. It’s that simple. . . . If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law.”<sup>23</sup> As a result of this policy, the Trump administration separated thousands of children from their parents at the border.<sup>24</sup>

At the Human Rights Council, Al Hussein expressed his “deep concern” at the policy, lamenting that in the United States over the course of the preceding six weeks:

. . . nearly two thousand children have been forcibly separated from their parents. The American Association of Pediatrics has called this cruel practice “government-sanctioned child abuse” which may cause “irreparable harm,” with “lifelong consequences.” The thought that any State would seek to deter parents by inflicting such abuse on children is unconscionable. I call on the United States to immediately end the practice of forcible separation of these children, and I encourage the Government to at last ratify the Convention on the Rights of the Child, in order to ensure that the fundamental rights of all children, whatever their administrative status, will be at the centre of all domestic laws and policies.<sup>25</sup>

In addition to Al Hussein, other world leaders condemned the U.S. policy, including UK Prime Minister Theresa May, Canadian Prime Minister Justin Trudeau, and Pope Francis.<sup>26</sup> Mexican Secretary of Foreign Affairs Luis Videgaray said that the “cruel and inhumane” policy “clearly represents a violation of human rights.”<sup>27</sup> The Inter-American Commission on

<sup>22</sup> See U.S. Dep’t of Justice Press Release, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), at <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [https://perma.cc/QNE3-LY8J].

<sup>23</sup> Jeff Sessions, Attorney General, U.S. Dep’t of Justice, Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [https://perma.cc/3Z79-5V7W]. A long-standing settlement between the United States and immigration rights groups—the *Flores* settlement—prevents the United States from detaining children for more than brief periods of time. See Katherine Hawkins, *Where Family Separation Began: A Case in El Paso Shows Flores is the Solution, Not the Problem*, JUST SECURITY (June 22, 2018), at <https://www.justsecurity.org/58363/family-separation-began-case-el-paso-shows-flores-solution-problem> (describing aspects of the 1997 *Flores* settlement agreement). As Sessions’s comments indicate, the Trump administration understood that its decision to detain and prosecute all adults thought to be crossing illegally would therefore result in the separation of families.

<sup>24</sup> See Brian Naylor, *DHS: Nearly 2,000 Children Separated from Adults at Border in 6 Weeks*, NPR (June 16, 2018), at <https://www.npr.org/2018/06/16/620451012/dhs-nearly-2-000-children-separated-from-adults-at-border-in-six-weeks> (noting that the U.S. Department of Homeland Security reported the separation of 1,995 minors from April 19 to the end of May).

<sup>25</sup> June 18 Statement, *supra* note 4 (making this criticism in the course of a broader address that also criticized the human rights practices of various other countries). His office had expressed “deep[] concern[]” about the policy several weeks earlier. UN, Office of the UN High Comm’r for Human Rights, Press Briefing Note on Egypt, United States and Ethiopia (June 5, 2018), at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174&LangID=E>.

<sup>26</sup> Chico Harlan & William Branigin, *Trump’s Family-Separation Policy Faces International Condemnation from Pope Francis, Theresa May, and Others*, WASH. POST (June 20, 2018), at [https://www.washingtonpost.com/world/pope-francis-criticizes-trumps-family-separation-policy-on-migrants-says-populism-is-not-the-solution/2018/06/20/65c15102-7472-11e8-9780-b1dd6a09b549\\_story.html?utm\\_term=.2b9406109e08](https://www.washingtonpost.com/world/pope-francis-criticizes-trumps-family-separation-policy-on-migrants-says-populism-is-not-the-solution/2018/06/20/65c15102-7472-11e8-9780-b1dd6a09b549_story.html?utm_term=.2b9406109e08).

<sup>27</sup> Stephanie Murray, *Mexican Foreign Minister Calls U.S. Family Separations “Cruel and Inhumane,”* POLITICO (June 19, 2018), at <https://www.politico.com/story/2018/06/19/family-separations-mexico-foreign-minister-reaction-654183>.

Human Rights also expressed “deep concern” over the policy, with its Rapporteur on the Rights of Migrants Luis Ernesto Vargas Silva stating that “[i]mmigration policies and practices can never be used as mechanisms to cause cruel, inhuman and degrading treatments, to separate families, to attack children and their families, or to place the lives of persons in need of protection at greater risk. This is just inhuman and above any comprehension.”<sup>28</sup>

Faced with domestic and international outrage, Trump officially ended the policy of family separation on June 20, 2018.<sup>29</sup> As protocols for tracking parents and children concurrently were poor or lacking, however, numerous children already separated from their parents remain in limbo. Having sent hundreds of parents back to countries such as Honduras and Guatemala, the Trump administration has no simple way of locating them or reconnecting them with their children, who remain in government custody. On June 26, a federal district court ruled that the government must reunite separated children under the age of five with their parents by July 10, and all other separated children with their parents by July 26.<sup>30</sup> The Trump administration met these deadlines for many but far from all of the children.<sup>31</sup> As of August 27, 2018, the majority of children have experienced family reunification, but 497 children were reported to still be separated from their families.<sup>32</sup>

In announcing the U.S. withdrawal from the Human Rights Council, Trump administration officials did not connect the timing of this withdrawal with the contemporaneous criticism it was receiving regarding family separation. Pompeo did state in general terms that the “United States . . . will not take lectures from hypocritical bodies and institution[s] as Americans selflessly give their blood and treasure to help the defenseless . . .”<sup>33</sup> The U.S. term on the Human Rights Council was due to expire at the end of 2019, and Iceland has

<sup>28</sup> Org. of Am. States [OAS], *IACHR Expresses Concern over Recent Migration and Asylum Policies and Measures in the United States* (June 18, 2018), at [http://www.oas.org/en/iachr/media\\_center/PReleases/2018/130.asp](http://www.oas.org/en/iachr/media_center/PReleases/2018/130.asp).

<sup>29</sup> Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018). While making family separation no longer a norm, this order sought to preserve the underlying “zero-tolerance” prosecutorial approach. It therefore instructed the attorney general to seek modification of the *Flores* settlement to make it lawful for undocumented families to be detained together. *See id.*; *see also* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486 (Sept. 7, 2018) (announcing a proposed rule intended to “terminate the” *Flores* settlement by “creat[ing] an alternative to the existing licensed program requirement for family residential centers, so that ICE may use appropriate facilities to detain family units together during their immigration proceedings”). As this litigation and related regulatory efforts are ongoing, however, the United States has “effectively return[ed] to the ‘catch and release’ policy that President Trump promised to eliminate.” Miriam Jordan, Katie Benner, Ron Nixon & Caitlin Dickerson, *As Migrant Families Are Reunited, Some Children Don’t Recognize Their Mothers*, N.Y. TIMES (July 10, 2018), at <https://www.nytimes.com/2018/07/10/us/politics/trump-administration-catch-and-release-migrants.html>.

<sup>30</sup> *L. v. U.S. Immigration & Customs Enft*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018) (including an exception if “the parent is unfit or presents a danger to the child” or “the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child”).

<sup>31</sup> *See generally* Nick Miroff, Amy Goldstein & Maria Sacchetti, “Deleted” Families: What Went Wrong with Trump’s Family-Separation Effort, WASH. POST (July 28, 2018), at [https://www.washingtonpost.com/local/social-issues/deleted-families-what-went-wrong-with-trumps-family-separation-effort/2018/07/28/54bcdcc6-90cb-11e8-8322-b5482bf5e0f5\\_story.html?utm\\_term=.61090872e29c](https://www.washingtonpost.com/local/social-issues/deleted-families-what-went-wrong-with-trumps-family-separation-effort/2018/07/28/54bcdcc6-90cb-11e8-8322-b5482bf5e0f5_story.html?utm_term=.61090872e29c).

<sup>32</sup> Leslie Shapiro & Manas Sharma, *How Many Migrant Children Are Still Separated from Their Families?*, WASH. POST, at [https://www.washingtonpost.com/graphics/2018/local/tracking-migrant-family-separation/?noredirect=on&utm\\_term=.068a91015164](https://www.washingtonpost.com/graphics/2018/local/tracking-migrant-family-separation/?noredirect=on&utm_term=.068a91015164) (last updated Aug. 27, 2018) (noting that as of August 27, the adults originally attached to 322 still-separated children are now outside the United States, presumably because of deportations or decisions to depart voluntarily rather than to face formal removal).

<sup>33</sup> June 19 Press Briefing, *supra* note 1. Pompeo and Haley left the briefing room without answering any questions, the first of which was: “Is the timing related to the criticism of the border policy?” *See id.*

now been elected to fill this seat.<sup>34</sup> In August 2018, a high-ranked U.S. administration official made clear that, in addition to withdrawing, the United States was also “going to de-fund the Human Rights Council” by decreasing its assessed contribution to the UN budget by the amount that would ordinarily go to the Human Rights Council and the High Commissioner for Human Rights.<sup>35</sup> As of the end of August, the Trump administration has not addressed whether and to what extent the United States will continue to participate in the Universal Periodic Review, a process under the auspices of the Human Rights Council through which states voluntarily have their human rights practices reviewed every few years. The United States is scheduled for its third cycle of assessment during the Human Rights Council’s thirty-sixth session in the spring of 2020.<sup>36</sup>

#### INTERNATIONAL ECONOMIC LAW

*Tariff-Based Disputes Continue to Characterize Trump Administration Trade Policies*  
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Over the summer of 2018, trade relations between the United States and many of its trading partners continued to be marked by tensions. The United States and China ratcheted up their use of tariffs against each other. The United States both received and initiated requests for consultation with various countries at the World Trade Organization (WTO) related to its earlier steel and aluminum tariffs and to tariffs imposed in response by other countries. President Trump has continued to pursue the possibility of further tariffs, including with respect to automobile and uranium imports. The United States also escalated trade tensions with Turkey through various measures, explicitly linking some of these measures to Turkey’s detainment of an American pastor. Despite the broader theme of tensions, negotiations have proved productive between the United States and two of its major trading partners—the European Union and Mexico—paving a way for future settlements. With the European Union, the Trump administration has reached a tentative understanding and agreed not to impose new tariffs while the parties negotiate toward finalizing this understanding. As to Mexico, in late August 2018 the Trump administration announced that the two countries had reached agreement with respect to many issues underlying their ongoing North American Free Trade Agreement (NAFTA) negotiations.

In March 2018, the Trump administration determined that China was engaging in unfair trade practices and announced its intent to respond by imposing new tariffs under Section

<sup>34</sup> *Iceland to Take Vacated U.S. Seat on Human Rights Council*, UN NEWS (July 13, 2018), at <https://news.un.org/en/story/2018/07/1014672>.

<sup>35</sup> Bolton story, *supra* note 5 (quoting Bolton as remarking that: “We’ll calculate 22 percent of the Human Rights Council and the High Commissioner’s budget, and our remittances to the U.N. for this budget year will be less 22 percent of those costs—and we’ll say specifically that’s what we’re doing”). The United States pays 22% of the general UN budget. *Id.*

<sup>36</sup> UN, Human Rights Council, 3rd UPR Cycle: Contributions and Participation of “Other Stakeholders” in the UPR, at <https://www.ohchr.org/en/hrbodies/upr/pages/ngosnhris.aspx> (last updated May 22, 2017).

301 of the Trade Act of 1974.<sup>1</sup> Following several months of developments, on June 15, 2018, the Trump administration released a finalized list of Chinese imports worth around \$34 billion that would be subject to new tariffs of 25 percent effective July 6, as well as identifying another \$16 billion worth of imports that would be subject to later tariffs.<sup>2</sup> China swiftly announced that it would retaliate in kind.<sup>3</sup> Three days later, President Trump, responding to China's proposed retaliatory tariffs, "directed the United States Trade Representative [(USTR)] to identify \$200 billion worth of Chinese goods for additional tariffs at a rate of 10 percent."<sup>4</sup> These tariffs would go into effect "[a]fter the legal process is complete, . . . if China refuses to change its practices and also if it insists on going forward with the new tariffs that it has recently announced."<sup>5</sup> China responded by reasserting that "[i]f the US . . . releases the tariff list, China will have to take powerful and comprehensive solutions both in quantitative and qualitative ways."<sup>6</sup>

On July 6, the initial tariffs on \$34 billion in goods went into effect.<sup>7</sup> China immediately responded with its own comparable tariffs.<sup>8</sup> Four days later, the USTR described China's retaliation as "without any international legal basis or justification" and released an initial list identifying the additional \$200 billion worth of goods that would be subject to future tariffs.<sup>9</sup> The USTR stated that it would follow the same "transparent and comprehensive public notice and comment process" that had been used for the previous round of tariffs.<sup>10</sup> On August 1, Trump

<sup>1</sup> For a full discussion of previous developments in the U.S.-China trade relationship, see Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 505 (2018) (including a description of Section 301 and its relationship to international trade law).

<sup>2</sup> Office of the U.S. Trade Rep. Press Release, USTR Issues Tariffs on Chinese Products in Response to Unfair Trade Practices (June 15, 2018), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/ustr-issues-tariffs-chinese-products> [<https://perma.cc/6SWL-2EA8>]; see also Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies and Practices Related to Technology, Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 28710, 28711 (2018).

<sup>3</sup> Galbraith, *supra* note 1, at 507.

<sup>4</sup> Donald J. Trump, Statement on China-United States Trade, 2018 DAILY COMP. PRES. DOC. NO. 426 (June 18, 2018).

<sup>5</sup> *Id.*

<sup>6</sup> People's Republic of China Ministry of Commerce Press Release, MOFCOM Spokesman Comments on the White House's Statement Released on June 18 (June 20, 2018), at <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201806/20180602759964.shtml>.

<sup>7</sup> See U.S. Customs & Border Prot., Section 301 Trade Remedies to be Assessed on Certain Products from China Effective July 6, 2018 (last modified Aug. 23, 2018), at <https://www.cbp.gov/trade/programs-administration/entry-summary/section-301-trade-remedies-be-assessed-certain-products-china-effective-july-6-2018> [<https://perma.cc/D67V-7454>]. At the same time that these tariffs were imposed, USTR released a process by which members of the public can "request exclusion of a particular product from the additional duties to address situations that warrant excluding a particular product within a subheading, but not the tariff subheading as a whole." Office of the U.S. Trade Rep. Press Release, USTR Releases Product Exclusion Process for Chinese Products Subject to Section 301 Tariffs (July 6, 2018), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/july/ustr-releases-product-exclusion> [<https://perma.cc/HD4G-3MGK>]. In determining whether to grant an exclusion or not, "USTR may consider whether a product is available from a source outside of China, whether the additional duties would cause severe economic harm to the requestor or other U.S. interests, and whether the particular product is strategically important or related to Chinese industrial programs including 'Made in China 2025.'" *Id.*

<sup>8</sup> Raymond Zhong, *China Strikes Back at Trump's Tariffs, but its Consumers Worry*, N.Y. TIMES (July 6, 2018), at <https://www.nytimes.com/2018/07/06/business/china-trump-trade-war-tariffs.html>.

<sup>9</sup> Office of the U.S. Trade Rep. Press Release, Statement by U.S. Trade Representative Robert Lighthizer on Section 301 Action (July 10, 2018), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/july/statement-us-trade-representative> [<https://perma.cc/QJX6-L9TY>].

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

directed the USTR to increase the duty level on this additional \$200 billion in goods from 10 percent to 25 percent.<sup>11</sup> China responded by threatening to impose additional tariffs on another \$60 billion worth of U.S. goods.<sup>12</sup> As these reciprocal threats were pending, both countries have followed through on imposing a 25 percent tariff on an additional \$16 billion in imports, consistent with their earlier announcements in June.<sup>13</sup> In September, the United States and then China went ahead with the previously threatened tariffs on \$200 billion in Chinese goods and \$60 billion in U.S. goods respectively.<sup>14</sup> In the backdrop of these developments are the ongoing consultations between the two countries at the WTO.<sup>15</sup>

In addition to its use of tariffs, over the summer of 2018 the United States has taken other legislative or regulatory steps aimed explicitly or implicitly at China. In June, the White House Office of Trade & Manufacturing released a report criticizing China's policies regarding technology transfer and intellectual property,<sup>16</sup> which are issues that the Trump administration has flagged within its broader concerns about unfair Chinese trade practices.<sup>17</sup> On June 27, the Trump administration endorsed a piece of congressional legislation named the Foreign Investment Risk Review Modernization Act (FIRRMA), which "will enhance [the administration's] ability to protect the United States from new and evolving threats posed by foreign investment while also sustaining the strong, open investment environment to which [the United States] is committed and which benefits [the U.S.] economy and [] people."<sup>18</sup> On August 13, FIRRMA, which received bipartisan support, became law as a part of

<sup>11</sup> Office of the U.S. Trade Rep. Press Release, Statement by U.S. Trade Representative Robert Lighthizer on Section 301 Action (Aug. 1, 2018), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/august/statement-us-trade-representative> [<https://perma.cc/RMJ2-5BDP>].

<sup>12</sup> Keith Bradsher & Cao Li, *China Threatens New Tariffs on \$60 Billion of U.S. Goods*, N.Y. TIMES (Aug. 3, 2018), at <https://www.nytimes.com/2018/08/03/business/china-us-trade-tariffs.html>.

<sup>13</sup> Office of the U.S. Trade Rep. Press Release, USTR Finalizes Second Tranche of Tariffs on Chinese Products in Response to China's Unfair Trade Practices (Aug. 7, 2018), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/august/ustr-finalizes-second-tranche> [<https://perma.cc/2KSW-P6SJ>] (announcing that these tariffs would take effect on August 23); People's Republic of China Ministry of Commerce Press Release, MOFCOM Spokesman Comments on China's Countermeasures on US\$16 Billion Worth of Products Imported from the US (Aug. 9, 2018), at <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201808/20180802775504.shtml> (announcing that these tariffs would "be implemented synchronously with the US side").

<sup>14</sup> See Anna Fifield, *China China Says U.S. Is "Holding a Knife to Our Neck" in Trade War*, WASH. POST (Sept. 25, 2018), at [https://www.washingtonpost.com/world/china-says-the-us-is-holding-a-knife-to-our-neck-in-trade-war/2018/09/25/1d0d4f58-c0a6-11e8-92f2-ac26fda68341\\_story.html?utm\\_term=.8676d85bcf24](https://www.washingtonpost.com/world/china-says-the-us-is-holding-a-knife-to-our-neck-in-trade-war/2018/09/25/1d0d4f58-c0a6-11e8-92f2-ac26fda68341_story.html?utm_term=.8676d85bcf24) (also noting that Trump has indicated that he will impose tariffs on an additional \$267 billion of Chinese goods given retaliation by China to the tariffs on \$200 billion of goods). The tariffs imposed by China range from 5% to 10%, *see id.*, while the tariffs imposed by the United States are initially set at 10% but slated to rise to 25% on January 1, 2019. See White House Press Release, Statement from the President (Sept. 17, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-from-the-president-4/> (also noting that September 24, 2018 is the start date for the tariffs).

<sup>15</sup> Galbraith, *supra* note 1, at 509 (describing how both countries initiated requests for consultations in the spring of 2018).

<sup>16</sup> White House Press Release, Office of Trade & Manufacturing Policy Report: "How China's Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World" (June 19, 2018), at <https://www.whitehouse.gov/briefings-statements/office-trade-manufacturing-policy-report-chinas-economic-aggression-threatens-technologies-intellectual-property-united-states-world> [<https://perma.cc/7EQ9-XBPZ>].

<sup>17</sup> See Galbraith, *supra* note 1, at 506–07, n.15.

<sup>18</sup> Donald J. Trump, Statement on Congressional Action on Legislation to Reduce the National Security Risks Posed by Certain Types of Foreign Investment, 2018 DAILY COMP. PRES. DOC. NO. 459 (June 27, 2018) (also

the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019.<sup>19</sup> Also included in the NDAA was a provision prohibiting federal agencies from purchasing products made by Zhongxing Telecommunications (ZTE) Corporation, a Chinese company that has been the target of considerable U.S. ire due to its illicit dealings with North Korea.<sup>20</sup>

In addition to rising trade tensions with China, during the summer of 2018 the Trump administration continued to face international and domestic responses to its March decision to impose tariffs on steel and aluminum imports pursuant to an investigation, brought under Section 232 of the Trade Expansion Act of 1962, that found such tariffs essential to national security.<sup>21</sup> Internationally, these tariffs generated numerous requests for consultation in the WTO and retaliatory tariffs from a handful of major trading partners, and they also have triggered some domestic litigation regarding their legality under U.S. law.

At the WTO, many countries filed requests for consultations over the spring and summer of 2018, all alleging violations of the General Agreement on Tariffs and Trade (GATT) 1994 and the Agreement on Safeguards.<sup>22</sup> The United States has continued to respond to such complaints by asserting that

setting in motion, among other things, multi-agency efforts to “engage with our allies and partners to support their efforts to combat harmful technology transfer and intellectual property theft”). While FIRRMA is not explicitly about China, in practice it is very much a part of broader U.S.-China trade relations and indeed Trump referenced the ongoing Section 301 investigation in his remarks endorsing FIRRMA. *See id.* Initial reports before the FIRRMA endorsement took place described a plan by the Trump administration to impose severe restrictions on Chinese investments in U.S. technology firms, citing national security concerns. Bob Davis, *Trump Plans New Curbs on Chinese Investment, Tech Exports to China*, WALL ST. J. (June 24, 2018), at <https://www.wsj.com/articles/trump-plans-new-curbs-on-chinese-investment-tech-exports-to-china-1529883988>; Saleha Mohsin & Jenny Leonard, *U.S. Plans to Curb Chinese Tech Investments, Citing Security*, BLOOMBERG (June 24, 2018), at <https://www.bloomberg.com/news/articles/2018-06-24/u-s-plans-curbs-on-chinese-investment-citing-security-risks>. Secretary of the Treasury Steve Mnuchin denied these reports, and asserted that a forthcoming statement on the matter would “not [be] specific to China, but to all countries that are trying to steal [U.S.] technology.” Steven Mnuchin (@stevenmnuchin1), TWITTER (June 25, 2018, 7:41 AM), at <https://twitter.com/stevenmnuchin1/status/1011258207182966786> [<https://perma.cc/M2SC-MC6A>]. The FIRRMA endorsement followed a few days later.

<sup>19</sup> Jill Colvin, *President Trump Doesn't Mention John McCain as He Signs Defense Bill Named for Him*, TIME (Aug. 13, 2018), at <http://time.com/5365956/trump-john-mccain-defense-bill>.

<sup>20</sup> Pub. L. No. 115–232, § 889, \_ Stat. \_ (2018) (also applying to Huawei Technologies Companies and including various other conditions, including making temporary waivers available under certain circumstances). For more about ZTE, see Galbraith, *supra* note 1, at 509–10 (describing ZTE’s violations with respect to North Korea, subsequent executive branch sanctions, and the Trump administration’s decision to try to avoid sanctioning ZTE to the point of collapse); U.S. Dep’t of Commerce Press Release, *Commerce Department Lifts Ban After ZTE Deposits Final Tranche of \$1.4 Billion Penalty* (July 13, 2018), at <https://www.commerce.gov/news/press-releases/2018/07/commerce-department-lifts-ban-after-zte-deposits-final-tranche-14> [<https://perma.cc/3LTK-Y228>] (announcing that ZTE had paid the final tranche of a \$1.4 billion settlement and that the Department had lifted a ban on ZTE’s ability to use U.S. technology exports); Jordain Carney & Rebecca Kheel, *Congress Won't Block Trump's Deal to Save Chinese Telecom Giant ZTE*, HILL (July 20, 2018), at <http://thehill.com/blogs/ballot-box/398086-defense-bill-wont-block-trumps-zte-deal> (noting that congressional efforts to take a tougher approach to ZTE in the NDAA were unsuccessful).

<sup>21</sup> For discussion of the original enactment of the Section 232 steel and aluminum tariffs, see Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 315, 316–18 (2018).

<sup>22</sup> Request for Consultations by Norway, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS552/1 (June 12, 2018); Request for Consultations by the Russian Federation, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS554/1 (June 29, 2018); Request for Consultations by Switzerland, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS556/1 (July 9, 2018). For information on earlier WTO consultations requests, and for a fuller discussion of the legal arguments advanced therein, see Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 499 (2018).

the tariffs imposed pursuant to Section 232 are not safeguard measures but rather tariffs on imports of steel and aluminum articles that threaten to impair the national security of the United States. The United States did not take action pursuant Section 201 of the Trade Act of 1974, which is the law under which the United States imposes safeguard measures. Therefore, there is no basis to consult pursuant to the Agreement on Safeguards with respect to tariffs imposed under Section 232.<sup>23</sup>

On July 16, the United States filed its own WTO requests for consultations, disputing the ability of other countries to impose retaliatory tariffs in reaction to the steel and aluminum tariffs and alleging violations of measures contained in the GATT 1994. Thus far, these disputes have targeted five WTO members—Canada, China, the European Union (EU), Mexico, and Turkey,<sup>24</sup> each of which had imposed retaliatory tariffs.<sup>25</sup> In all five requests, the United States has claimed that there has been a violation of the most-favored-nation obligation contained in

Article I:1 of the GATT 1994, because [the tariffs] fail[] to extend to products of the United States an advantage, favor, privilege or immunity granted by [WTO Member] with respect to customs duties and charges of any kind imposed on or in connection with the importation of products originating in the territory of other Members.<sup>26</sup>

<sup>23</sup> *E.g.* Communication from the United States, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS552/9 (June 22, 2018). For a discussion of how both the U.S. assertion of a national security interest and the decision by some major trading partners to respond by imposing retaliatory tariffs under the Agreement on Safeguards (rather than going through the full WTO dispute process) fit into the broader context of the WTO system, see Joseph Weiler, *Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System*, 29 EUR. J. INT'L L. 339 (2018).

<sup>24</sup> Request for Consultations by the United States, *Canada—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS557/1 (July 16, 2018) [hereinafter U.S. Request with Canada]; Request for Consultations by the United States, *China—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS558/1 (July 16, 2018); Request for Consultations by the United States, *European Union—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS559/1 (July 16, 2018); Request for Consultations by the United States, *Mexico—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS560/1 (July 16, 2018); Request for Consultations by the United States, *Turkey—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS561/1 (July 16, 2018).

<sup>25</sup> See People's Republic of China Ministry of Commerce Press Release, Spokesman of Ministry of Commerce Comments on China's Decision to Slap Tariffs on Part of Products Imported from US (Apr. 3, 2018), at <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201804/20180402733539.shtml> (imposing tariffs on 128 categories of U.S. imports); David Alire Garcia & Miguel Gutierrez, *Aiming at Trump Strongholds, Mexico Hits Back with Trade Tariffs*, REUTERS (June 5, 2018), at <https://www.reuters.com/article/us-usa-trade-mexico/aiming-at-trump-strongholds-mexico-hits-back-with-trade-tariffs-idUSKCN1J11EV> (describing Mexican tariffs imposed on a variety of U.S. goods, including steel, pork, and bourbon); European Commission Press Release, EU Adopts Rebalancing Measures in Reaction to US Steel and Aluminum Tariffs (June 20, 2018), at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1868> (announcing a decision to impose immediate tariffs on some €2.8 billion worth of U.S. goods, with a further €3.6 billion to follow at a later date); *Turkey to Start Implementing Retaliatory Tariffs Against United States*, REUTERS (June 21, 2018), at <https://www.reuters.com/article/us-usa-trade-turkey/turkey-to-start-implementing-retaliatory-tariffs-against-united-states-idUSKBN1JH0DY> [hereinafter *Turkey Retaliatory Tariffs*] (reporting on retaliatory tariffs worth some \$266.5 million, covering “U.S. coal, paper, walnuts/almonds, tobacco, unprocessed rice, whisky, automobiles, cosmetics, machinery equipment and petrochemical products”); Department of Finance Canada, Countermeasures in Response to Unjustified Tariffs on Canadian Steel and Aluminum Products (July 1, 2018), at <https://www.fin.gc.ca/access/tt-it/casap-cmpcaa-1-eng.asp> (listing Canada's responsive tariffs). Mexico has also imposed a second round of tariffs. See Sabrina Rodriguez, *Mexico Imposes Retaliatory Tariffs on Dozens of U.S. Goods*, POLITICO (July 5, 2018), at <https://www.politico.com/story/2018/07/05/mexico-imposes-retaliatory-tariffs-670424>.

<sup>26</sup> *E.g.*, U.S. Request with Canada, *supra* note 24.

With the exception of the request with Mexico, all requests also allege a violation of “Article II:1(a) and (b) of the GATT 1994, because [the tariffs] accord[] less favorable treatment to products originating in the United States than that provided for in [WTO Member’s] schedule of concessions.”<sup>27</sup> All U.S. requests noted that the tariffs “appear[] to nullify or impair the benefits accruing to the United States directly or indirectly under the GATT 1994.”<sup>28</sup>

The Section 232 tariffs have also continued to generate domestic legal challenge.<sup>29</sup> On June 27, the American Institute for International Steel (AIIS) brought suit in the U.S. Court of International Trade challenging the legality of Section 232.<sup>30</sup> The core argument advanced by AIIS is that Section 232 “is unconstitutional as an improper delegation of legislative power to the President, in violation of Article I, section 1 of the Constitution and the doctrine of separation of powers and the system of checks and balances that the Constitution protects.”<sup>31</sup> This is a challenging argument under existing precedent, as the U.S. Supreme Court has not been receptive to such non-delegation arguments since the 1930s.<sup>32</sup>

In addition to using Section 232 to impose tariffs on steel and aluminum, the Trump administration has also initiated several other Section 232 investigations that may eventually lead to other tariffs.<sup>33</sup> Following its announcement in May 2018 that it was starting a Section 232 investigation into automobiles and automobile parts,<sup>34</sup> the U.S. Department of Commerce held an initial hearing on this matter in July.<sup>35</sup> Separately, on July 18, the Commerce Department announced that it was beginning a Section 232 investigation “into whether the present quantity and circumstances of uranium ore and product imports

<sup>27</sup> *E.g., id.*

<sup>28</sup> *E.g., id.*

<sup>29</sup> For description of a challenge brought in March, see Galbraith, *supra* note 22, at 504.

<sup>30</sup> Complaint, *Am. Inst. for Int’l Steel, Inc. v. United States* (No. 18-00152) (U.S. Ct. Int’l Trade June 27, 2018).

<sup>31</sup> *Id.* at 1; *see also* Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, *Am. Inst. for Int’l Steel, Inc. v. United States*, 3 (No. 18-00152) (U.S. Ct. Int’l Trade July 19, 2018) (elaborating on this argument in the course of moving for summary judgment and emphasizing the absence of judicial review with respect to how the president exercises his or her discretion).

<sup>32</sup> *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 418 (2008) (observing that since 1935 “the Court has never since invalidated a federal statute on the ground that it delegates excessive lawmaking authority to an agency”); *see also* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 404 (2016) (observing that “[a] review of the Court’s treatment of challenges to federal and state statutes on the grounds that they had impermissibly delegated legislative power to nonlegislative actors does not provide much basis for thinking that there was ever a seriously confining nondelegation doctrine as part of the effective constitutional order”). In its 2018 term, the Supreme Court will hear a case in which a criminal statute has been challenged as an unlawful delegation of executive power. *Gundy v. United States*, 138 S. Ct. 1260 (2018); *see also* *Gundy v. United States*, SCOTUSblog, at <http://www.scotusblog.com/case-files/cases/gundy-v-united-states> (noting that the issue at stake is “[w]hether the federal Sex Offender Registration and Notification Act’s delegation of authority to the attorney general to issue regulations under 42 U.S.C. § 15913 violates the nondelegation doctrine”).

<sup>33</sup> For a discussion of what Section 232 investigations entail, see Galbraith, *supra* note 21, at 316–18.

<sup>34</sup> U.S. Dep’t of Commerce Press Release, U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports (May 23, 2018), at <https://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports> [<https://perma.cc/A8XL-M79N>].

<sup>35</sup> U.S. Dep’t of Commerce Press Release, U.S. Department of Commerce to Host Public Hearing on the Section 232 National Security Investigation of Imports of Automobiles and Automotive Parts (July 12, 2018), at <https://www.commerce.gov/news/press-releases/2018/07/us-department-commerce-host-public-hearing-section-232-national-security> [<https://perma.cc/PY8E-AKWQ>].



into the United States threaten to impair national security.”<sup>36</sup> It remains to be seen how long these investigations will take or whether they will ultimately lead to tariffs. As a comparative data point, the Trump administration’s steel and aluminum investigation ran from April 2017 to February 2018, resulting in the imposition of its first tariffs in March 2018.<sup>37</sup>

While Trump adjusted the steel and aluminum tariffs downward for several countries in the spring and early summer of 2018,<sup>38</sup> the month of August brought a notable upward adjustment with respect to Turkey. Earlier in the summer, Turkey had announced the imposition of retaliatory tariffs to the original steel and aluminum tariffs,<sup>39</sup> and relations between the two countries have further been complicated by Turkey’s ongoing detention of an American pastor, Andrew Brunson.<sup>40</sup> On July 26, Trump tweeted that the United States would impose “large sanctions” on Turkey “for their long time detainment of Pastor Andrew Brunson, a great Christian, family man and wonderful human being” and called for Brunson’s immediate release.<sup>41</sup> On August 1, the Trump administration imposed sanctions on two Turkish officials,<sup>42</sup> leading Turkish President Recep Tayyip Erdogan to order “his government to ‘freeze the assets’ in Turkey of the American counterparts of the targeted Turkish officials, describing them as ‘the U.S. justice and interior ministers.’”<sup>43</sup> Then, on August 10, Trump issued a proclamation adjusting the Section 232 steel tariffs on Turkey from 25 percent to 50 percent.<sup>44</sup> This proclamation did not expressly reference Brunson, and explained the decision by saying that “Turkey is among the major exporters of steel to the United States for domestic consumption” and “[t]he Secretary [of Commerce] has advised me that this adjustment will be a significant step toward ensuring the viability of the domestic steel industry.”<sup>45</sup> Erdogan has responded by increasing Turkey’s retaliatory tariffs and urging a boycott of U.S. technology products.<sup>46</sup>

Despite escalating trade tensions on many fronts, over the summer of 2018 the United States reached a preliminary understanding with one major trading partner—the European Union—that there would be a “new phase in the relationship . . . of strong trade relations in

<sup>36</sup> U.S. Dep’t of Commerce Press Release, U.S. Department of Commerce Initiates Section 232 Investigation into Uranium Imports (July 18, 2018), at <https://www.commerce.gov/news/press-releases/2018/07/us-department-commerce-initiates-section-232-investigation-uranium> [<https://perma.cc/3WTK-4GBF>].

<sup>37</sup> Galbraith, *supra* note 21, at 317–18.

<sup>38</sup> See generally Galbraith, *supra* note 21; Galbraith, *supra* note 22 (describing various country-specific carveouts).

<sup>39</sup> See Turkey Retaliatory Tariffs, *supra* note 25.

<sup>40</sup> For a general overview of Brunson’s arrest and detainment, see Ezgi Erkoyun & Humeyra Pamuk, *U.S. Missionary Thrust to the Center of Turkey-U.S. Crisis*, REUTERS (Aug. 18, 2018), at <https://www.reuters.com/article/us-turkey-security-usa-brunson-insight/u-s-missionary-thrust-to-the-center-of-turkey-u-s-crisis-idUSKBN1L30DR>.

<sup>41</sup> Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2018, 8:22 AM), at <https://twitter.com/realDonaldTrump/status/1022502465147682817>.

<sup>42</sup> U.S. Dep’t of the Treasury Press Release, Treasury Sanctions Turkish Officials with Leading Roles in Unjust Detention of U.S. Pastor Andrew Brunson (Aug. 1, 2018), at <https://home.treasury.gov/news/press-releases/sm453> [<https://perma.cc/SJ37-JSHP>] (describing these officials as having “leading roles in the organizations responsible for the arrest and detention of Pastor Andrew Brunson”).

<sup>43</sup> Carlotta Gail, *Turkey’s Erdogan Orders Retaliatory Sanctions Against American Officials*, N.Y. TIMES (Aug. 4, 2018), at <https://www.nytimes.com/2018/08/04/world/europe/turkey-erdogan-sanctions-us.html> (also noting that the U.S. officials identified are unlikely to have assets in Turkey).

<sup>44</sup> Donald J. Trump, Proclamation 9772—Adjusting Imports of Steel into the United States, 2018 DAILY COMP. PRES. DOC. NO. 531 (Aug. 10, 2018).

<sup>45</sup> *Id.*

<sup>46</sup> Colin Dwyer, *Turkey Counterpunches by Raising Tariffs on U.S. Goods*, NPR (Aug. 15, 2018), at <https://www.npr.org/2018/08/15/638842407/turkey-escalates-fight-by-raising-tariffs-on-u-s-goods>.

which both of us will win.”<sup>47</sup> On July 25, Trump met with President Jean-Claude Juncker of the European Commission. Following the meeting, the two held a joint press conference where they announced the understanding which they had reached. As Juncker described their meeting:

We have identified a number of areas on which to work together. Work towards zero tariffs on industrial goods, that was my main intention: to propose to come down to zero tariffs on industrial goods.

We’ve decided to strengthen our cooperation on energy. The EU will build more terminals to import liquefied natural gas from the U.S. This is also a message for others.

We agreed to establish a dialogue on standards. As far as agriculture is concerned, the European Union can import more soybeans from the U.S., and it will be done. And we also agreed to work together on the reform of the WTO. This, of course, is on the understanding that as long as we are negotiating, unless one party would stop the negotiations, we will hold off further tariffs, and we will reassess existing tariffs on steel and aluminum.<sup>48</sup>

Trump explained that in order to build on this understanding, they would “set up immediately an Executive Working Group of very intelligent people on both sides.”<sup>49</sup> He noted that “[w]hile we are working on this, we will not go against the spirit of this agreement, unless either party terminates the negotiation. So we’re starting the negotiation right now, but we know very much where it’s going.”<sup>50</sup> In a speech later that day, Juncker indicated that going into the meeting he had been particularly concerned about the prospect of future automobile tariffs and characterized as “major progress” the U.S. commitment not to impose new tariffs during the course of negotiations.<sup>51</sup>

The final major development in U.S. trade relations in the summer of 2018 was that the “United States and Mexico have reached a preliminary agreement in principle, subject to finalization and implementation, to update the 24-year-old NAFTA with modern provisions representing a 21st century, high-standard agreement.”<sup>52</sup> On August 27, 2018, Trump announced this agreement, remarking that “[w]e’re going to call it the United States-Mexico Trade Agreement, and we’ll get rid of the name NAFTA.”<sup>53</sup> The agreement’s terms have been described as including robust protections for intellectual property, various provisions aimed at dealing with the digital economy, an increase from \$50 to \$100 of the

<sup>47</sup> Donald J. Trump, Remarks to Members of the Press with President Jean-Claude Juncker of the European Commission, 2018 DAILY COMP. PRES. DOC. NO. 504 (July 25, 2018).

<sup>48</sup> *Id.* at 2.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Doug Palmer, *Juncker Hails “Major Concession” from U.S. on Autos*, POLITICO (July 25, 2018), at <https://www.politico.com/story/2018/07/25/trump-juncker-trade-concession-tariffs-1661543>.

<sup>52</sup> U.S. Mission to Mexico Press Release, *Modernizing NAFTA to Be a 21st Century Trade Agreement* (Aug. 27, 2018), at <https://mx.usembassy.gov/modernizing-nafta-to-be-a-21st-century-trade-agreement> [<https://perma.cc/YA2T-4JQ9>].

<sup>53</sup> Remarks During a Teleconference Call with President Peña Nieto of Mexico To Discuss the United States-Mexico Trade Agreement and an Exchange with Reporters, 2018 DAILY COMP. PRES. DOC. NO. 548 (Aug. 27, 2018), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-phone-call-president-pena-nieto-mexico-united-states-mexico-trade-agreement> (adding that “NAFTA . . . has a bad connotation”).

cutoff by which shipments can avoid duties and certain entry procedures, some changes with respect to investor-state dispute settlement, and increased labor and environmental protections.<sup>54</sup> As of late August, some major issues remain unsettled—most notably involving Canada’s participation in the agreement.<sup>55</sup> Further details of this agreement and subsequent developments related to it will be covered in a later issue of *AJIL*.

#### INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

##### *D.C. Circuit Upholds Injunction Barring the Involuntary Transfer to an Unidentified Third Country of a U.S. Citizen Alleged to be an Enemy Combatant*

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On May 7, 2018, the U.S. Court of Appeals for the D.C. Circuit blocked the transfer to an unidentified third country of a dual U.S.-Saudi national detained in Iraq as an alleged enemy combatant.<sup>1</sup> The decision, *Doe v. Mattis*, also upheld a district court order requiring the government to provide seventy-two hours’ notice before transferring him to another country.<sup>2</sup> In an opinion authored by Judge Srinivasan and joined by Judge Wilkins, the court emphasized that while it was “respectful of—and with appreciation for—the considerable deference owed to the Executive’s judgments in the prosecution of a war,” “things are different” for alleged enemy combatants who are U.S. citizens.<sup>3</sup> Further proceedings in the district court could potentially address whether the U.S. military campaign against the Islamic State of Iraq and the Levant (ISIL) is lawful under U.S. domestic law.

The case stemmed from the capture of “John Doe” in September 2017 by Syrian Democratic Forces during clashes with ISIL on a Syrian battlefield.<sup>4</sup> After Doe was transferred to U.S. custody and detained as an enemy combatant,<sup>5</sup> the American Civil Liberties Union (ACLU) filed a petition for a writ of habeas corpus on his behalf in October 2017.<sup>6</sup> The ACLU argued that Doe had to be either criminally tried in a federal court or released, asserting that U.S. domestic law does not authorize the current military campaign against ISIL and by extension does not grant the “legal authority to detain an alleged member of ISIL.”<sup>7</sup> The federal district court ordered the executive branch to provide the ACLU with “temporary, immediate and unmonitored access to the detainee so that it may inquire as to whether he wishes to have [it] or court-appointed

<sup>54</sup> United States-Mexico Trade Fact Sheet: Modernizing NAFTA to Be a 21st Century Trade Agreement, at [http://www.sice.oas.org/tpd/nafta/Modernization/USA\\_MEX\\_Fact\\_Sheet\\_21st\\_Century\\_Agt\\_e.pdf](http://www.sice.oas.org/tpd/nafta/Modernization/USA_MEX_Fact_Sheet_21st_Century_Agt_e.pdf) (reproducing a fact sheet originally available on the USTR website but subsequently removed).

<sup>55</sup> See Ana Swanson, Katie Rogers & Alan Rappeport, *Trump Reaches Revised Trade Deal with Mexico, Threatening to Leave Out Canada*, N.Y. TIMES (Aug. 27, 2018), at <https://www.nytimes.com/2018/08/27/us/politics/us-mexico-nafta-deal.html> (also noting that issues relating to the steel and aluminum tariffs remain unresolved).

<sup>1</sup> *Doe v. Mattis*, 889 F.3d 745, 747–48 (D.C. Cir. 2018).

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

<sup>3</sup> *Id.* at 749.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (describing Doe’s designation as an enemy combatant as a “preliminary determination”).

<sup>6</sup> *Id.* at 750.

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

counsel continue this action on his behalf.”<sup>8</sup> After receiving Doe’s approval for the representation, the ACLU sought a preliminary injunction prohibiting Doe’s transfer to another country pending the resolution of his claim on the merits.<sup>9</sup> The court ordered the government to give the ACLU “seventy-two hours’ notice prior to transferring [Doe],” at which point the ACLU could “file an emergency motion contesting his transfer.”<sup>10</sup> During the pendency of its appeal of this order, the government gave notice of its intent to transfer Doe to the custody of an unidentified third country,<sup>11</sup> widely understood to be Saudi Arabia.<sup>12</sup> On the ACLU’s motion for a temporary restraining order or preliminary injunction, the district court blocked Doe’s transfer.<sup>13</sup> The government subsequently appealed this injunction as well, thus placing both the issue of notice and the even more significant issue of an actual transfer before the D.C. Circuit.<sup>14</sup>

In determining whether Doe had shown a likelihood of success on the merits of his claim that the government lacked authority to transfer him, the D.C. Circuit considered two issues.

First, the D.C. Circuit addressed whether, in light of the U.S. Supreme Court’s rulings in *Munaf v. Geren*<sup>15</sup> and *Wilson v. Girard*,<sup>16</sup> the government has the power to transfer a U.S. citizen, who has voluntarily left the United States, to any foreign country that has a “legitimate sovereign interest” in the citizen.<sup>17</sup> The government considered a foreign country to have a “legitimate” interest in a person if that country had “prescriptive jurisdiction” over that person under international law.<sup>18</sup> Rejecting this argument, the D.C. Circuit concluded that the government’s “expansive vision of unilateral Executive power over a U.S. citizen who ventures abroad does not follow from *Munaf* and *Wilson*,” as those cases “did not involve a citizen forcibly transferred from one foreign country they voluntarily visited to the custody of another foreign country.”<sup>19</sup> The court continued:

<sup>8</sup> Am. Civil Liberties Union Found. v. Mattis, 286 F. Supp. 3d 53, 55 (D.D.C. 2017).

<sup>9</sup> *Doe*, 889 F.3d at 750.

<sup>10</sup> *Doe v. Mattis*, 288 F. Supp. 3d 195, 201 (D.D.C. 2018).

<sup>11</sup> *Doe*, 889 F.3d at 747–48.

<sup>12</sup> E.g., Robert Chesney, *Enjoining the Transfer of a US-Saudi Citizen to Saudi Arabia: A Doe v. Mattis Update and Initial Preview*, LAWFARE (Apr. 23, 2018), at <https://www.lawfareblog.com/enjoining-transfer-us-saudi-citizen-saudi-arabia-doe-v-mattis-update-and-initial-preview> (observing that “everyone knows already that the deal under examination involved Saudi Arabia”).

<sup>13</sup> *Doe*, 889 F.3d at 750–51.

<sup>14</sup> *Id.* at 751.

<sup>15</sup> 553 U.S. 674, 705 (2008) (stating that “[h]abeas corpus does not require the United States to shelter such fugitives from the criminal justice system of the sovereign with authority to prosecute them” in denying habeas relief to two American citizens detained by U.S. forces in Iraq who were seeking to block their transfer to Iraqi control for prosecution for alleged crimes committed in Iraq).

<sup>16</sup> 354 U.S. 524, 529 (1957) (permitting the handover to Japanese authorities of a U.S. serviceman for prosecution for committing a homicide in Japan’s territory, noting that a “sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders”).

<sup>17</sup> *Doe*, 889 F.3d at 755. By contrast, the government acknowledged that whenever it seeks to transfer a citizen present in the United States to the custody of a foreign country, it may do so only pursuant to a statute or treaty. See *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936) (holding that the executive branch could not extradite to France several U.S. citizens arrested in New York City in the absence of a treaty or statute authorizing this extradition).

<sup>18</sup> *Doe*, 889 F.3d at 755 (also noting that in its argument the government cited to Restatement (Fourth) of the Foreign Relations Law of the United States § 211 (Draft No. 2, 2016)); see also *id.* at 756 (noting the government’s position that prescriptive jurisdiction “extends to ‘any individual with a ‘genuine connection’ to the state, even when the individual is located outside the state’s territory”).

<sup>19</sup> *Id.* at 755.

[T]he fact that a foreign country may have prescriptive jurisdiction over an American citizen who is outside its territory hardly means that, as long as the citizen is somewhere else abroad, the Executive has power to seize her and deliver her to that foreign country.

Indeed, we know of no instance—in the history of the United States—in which the government has forcibly transferred an American citizen from one foreign country to another.<sup>20</sup>

Second, the D.C. Circuit considered whether the government could transfer Doe pursuant to its constitutional authority relating to the conduct of war.<sup>21</sup> The court, looking to the U.S. Supreme Court’s decision in *Hamdi v. Rumsfeld*,<sup>22</sup> agreed that such transfers can be permissible under certain conditions:

[T]he Executive does generally possess authority under the law of war to transfer an enemy combatant to the custody of an ally in the conflict. But that authority, we hold, could potentially support a transfer of Doe only if the government (i) demonstrates that it is legally authorized to use military force against ISIL, and (ii) affords Doe an adequate opportunity to challenge the Executive’s factual determination that he is an ISIL combatant.<sup>23</sup>

Although *Hamdi* concerned the government’s wartime power to detain U.S. citizens as enemy combatants, the D.C. Circuit concluded that the government’s “transfer authority over citizens and detention authority over citizens essentially rise or fall together.”<sup>24</sup> The court observed that the practice of transferring enemy soldiers in wartime is well-established.<sup>25</sup> It also emphasized that Congress “expressly considers transfer of an enemy combatant to be one option available to the military under the law of war,”<sup>26</sup> pointing to a provision of the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA) that indicates that transfer is an appropriate “disposition under the law of war.”<sup>27</sup> While historical evidence lent little support for the specific authority to transfer U.S. citizen as enemy combatants, the court, relying on *Hamdi*, saw “no basis for excluding a citizen—at least as a categorical matter—from the Executive’s wartime authority to transfer enemy combatants.”<sup>28</sup> Given the “fundamental liberty interests” at stake, however, the court concluded that, as *Hamdi*

<sup>20</sup> *Id.* at 756.

<sup>21</sup> *Id.* at 758.

<sup>22</sup> 542 U.S. 507, 509 (2004) (plurality opinion) (concluding that a U.S. citizen detained as an enemy combatant had a constitutional right to “a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker”).

<sup>23</sup> *Doe*, 889 F.3d at 758.

<sup>24</sup> *Id.* at 759.

<sup>25</sup> *Id.* at 760.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (quoting Section 1021(a) of the 2012 NDAA, Pub. L. No. 112-81, 125 Stat. 1298 (Dec. 31, 2011), and also referring to Section 1021(c), which in turn provides that the “disposition of a person under the law of war as described in subsection (a) may include . . . (4) transfer to the custody or control of the person’s country of origin, any other foreign country, or any other foreign entity”). By its terms, this provision is intended to clarify certain issues regarding the interpretation of the 2001 Authorization for Use of Military Force. *Id.*

<sup>28</sup> *Id.* at 760–61.

had held with respect to detention, a U.S. citizen facing transfer to a third country as an enemy combatant must be allowed to challenge the basis of this determination.<sup>29</sup>

In a heavily redacted section of the opinion, the D.C. Circuit applied these principles to Doe's case and upheld the injunction against his transfer at this stage of the proceedings.<sup>30</sup> In its view, the government needed to establish its authority to "wage war against ISIL" and to give Doe "a meaningful chance to rebut the government's factual assertion that he is an ISIL combatant, per the requirements set out in *Hamdi*," and had as yet failed to do so for both conditions.<sup>31</sup> The court also upheld the seventy-two-hour notice requirement with respect to the main issue remaining in contention—namely, whether it applied to a particular "Country A"—and, in doing so, emphasized the scantiness of briefing on this issue.<sup>32</sup>

In dissent, Judge Henderson criticized the court as overstepping, writing that "[t]he opinion treats all but silently the judiciary's dispositively downsized role in the theater of war," and "portends a hazardous expansion of the judiciary's role in matters of war and diplomacy."<sup>33</sup> In contrast to the majority, Judge Henderson suggested that Doe is still effectively a battlefield captive, to whom, she argued, no process need be afforded until a decision has been made to extend his detention.<sup>34</sup> More broadly, she found no reason for reaching a different result than in *Munaf*, noting that case's factual similarity and the presence of analogous "comity and separation of powers considerations."<sup>35</sup>

Although the D.C. Circuit did not address the merits of the legality of the military campaign against ISIL, the government and the ACLU staked out starkly contrasting positions on this question in briefing at the district court. The ACLU had argued in its habeas petition that the only plausible legal bases for detaining a citizen without charge in military custody were the 2001 Authorization for Use of Military Force (2001 AUMF) in conjunction with the 2012 NDAA, or the 2002 Authorization for Use of Military Force (2002 AUMF)—none of which, it argued, applied to individuals who were not "part of or substantially supported al-Qaeda, the Taliban, or associated forces engaged in hostilities with the United States or coalition partners."<sup>36</sup> ISIL, the ACLU pointed out, "did not exist at the time of the 9/11 attacks," "is distinct from al-Qaeda," and "has, in fact, opposed al-Qaeda."<sup>37</sup> In response, the government argued that both the 2001 AUMF and 2002 AUMF justified the detention, noting that ISIL shared common roots with Al Qaeda, and also invoked the president's

<sup>29</sup> *Id.* at 762.

<sup>30</sup> *Id.* at 765.

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

<sup>32</sup> *Id.* at 767. Country A is thought to be Iraq. See Steve Vladeck, *The Four Problems with Judge Henderson's Dissent in Doe v. Mattis*, LAWFARE (May 10, 2018), at <https://www.lawfareblog.com/four-problems-judge-hendersons-dissent-doe-v-mattis> (noting that there is "good reason to suspect that 'Country A' is Iraq"). Transfer to Iraq might present different legal issues than those addressed in the *Doe* decision with respect to third countries because Doe is presently being held on Iraqi territory.

<sup>33</sup> *Doe*, 889 F.3d at 768–69 (Henderson, J., dissenting).

<sup>34</sup> *Id.* at 779 (Henderson, J., dissenting).

<sup>35</sup> *Id.* at 769 (Henderson, J., dissenting).

<sup>36</sup> Petition for a Writ of Habeas Corpus, at 8, *Doe v. Mattis*, 288 F. Supp. 3d 195 (D.D.C. 2018) (No. 1:17-cv-2069 (TSC)), available at <https://www.aclu.org/legal-document/doe-v-mattis-aclu-foundations-petition-writ-habeas-corpus>.

<sup>37</sup> *Id.*

authority under Article II of the Constitution.<sup>38</sup> The *Doe* case is thus a potential vehicle for a court to consider the important question of whether the military campaign against ISIL is covered by the current AUMFs.

The current status of the case, however, leaves unclear how much further it will proceed. On June 6, 2018, the government informed the district court that, over Doe's objections, it planned to release him in Syria within seventy-two hours "either in a town or outside an Internally Displaced Person camp," with the choice left to Doe.<sup>39</sup> The following day, the ACLU filed a motion for a temporary restraining order, arguing that "the government's proposal violates the requirement that military detainees be released to safety and not be exposed to hostile forces" as well as "shock[ing] the conscience that the government proposes to abandon a U.S. citizen with no passport, no assurances of safety, and no means of escaping a country that his own government has assessed as categorically unsafe for all U.S. citizens."<sup>40</sup> Over the summer of 2018, the parties sought to reach an agreed-upon resolution.<sup>41</sup> As of mid-August, no such resolution had materialized.

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

*Historic Meeting in Singapore Marks a Change in Relations Between the United States and North Korea and Generates a North Korean Commitment to Work Toward Denuclearization*

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North Korea's Chairman, Kim Jong Un, agreed to work toward the Korean peninsula's denuclearization at a Singapore summit meeting with President Trump on June 12, 2018. The encounter marked the first time in history that the president of the United States and the leader of North Korea have met in person. It came after an intense year and a half of interactions between the two countries, including the exchange of nuclear-laced military threats, the imposition of new sanctions by the United States and the UN Security Council, and, eventually, a touch of détente. Since the meeting occurred, North Korea has taken several steps consistent with commitments it made, including returning remains said to be those of American service members, refraining from missile launches, and beginning to dismantle its testing facilities. Also since the meeting occurred, the United States has suspended its usual

<sup>38</sup> Factual Return, at 8–31, *Doe v. Mattis*, 288 F. Supp. 3d 195 (D.D.C. 2018) (No. 1:17-cv-2069 (TSC)), available at <https://www.aclu.org/legal-document/doe-v-mattis-governments-factual-return>.

<sup>39</sup> Notice, *Doe v. Mattis*, 288 F. Supp. 3d 195 (D.D.C. 2018) (No. 1:17-cv-2069 (TSC)), available at <https://www.justsecurity.org/wp-content/uploads/2018/06/Doe.pdf> (noting that more precise locations were specified in an accompanying filing under seal).

<sup>40</sup> Application for a Temporary Restraining Order, at 16, *Doe v. Mattis*, 288 F. Supp. 3d 195 (D.D.C. 2018) (No. 1:17-cv-2069 (TSC)), available at <https://www.aclu.org/legal-document/doe-v-mattis-redacted-application-tro>.

<sup>41</sup> Joint Status Report of July 19, *Doe v. Mattis*, 288 F. Supp. 3d 195 (D.D.C. 2018) (No. 1:17-cv-2069 (TSC)), available at <https://www.aclu.org/legal-document/doe-v-mattis-joint-status-report>; Joint Status Report of July 30, *Doe v. Mattis*, 288 F. Supp. 3d 195 (D.D.C. 2018) (No. 1:17-cv-2069 (TSC)), available at <https://www.aclu.org/legal-document/doe-v-mattis-second-joint-status-report>; Joint Status Report of August 13, *Doe v. Mattis*, 288 F. Supp. 3d 195 (D.D.C. 2018) (No. 1:17-cv-2069 (TSC)), available at <https://www.aclu.org/legal-document/doe-v-mattis-third-joint-status-report>.

joint military exercises with South Korea, consistent with a statement made by Trump at the summit, while leaving in place existing sanctions against North Korea.

U.S. efforts toward a denuclearized North Korea can be traced back to 1994, when the two countries reached an agreement whereby the United States would provide a light-water reactor power plant in exchange for North Korea's commitment to refrain from further nuclear development.<sup>1</sup> Beginning in 1998, the United States began to doubt whether North Korea was fulfilling its commitment, and the agreement eventually broke down.<sup>2</sup> In 2005, at the time of a review conference for the Non-Proliferation Treaty (NPT), North Korea declared that it had nuclear weapons.<sup>3</sup> By this time, North Korea had announced its withdrawal from the NPT and expelled international inspectors.<sup>4</sup> Following the announcement, the United States began a series of "on-again, off-again efforts," known as the Six-Party talks, to negotiate North Korea's denuclearization.<sup>5</sup> In a joint statement at one of the talks, North Korea "committed to abandoning all nuclear weapons and existing nuclear programs and returning, at an early date to the" NPT.<sup>6</sup> North Korea continued developing its nuclear program,<sup>7</sup> and the Six-Party talks ended in 2009.<sup>8</sup> In subsequent years—during which time Kim Jong Un succeeded his father to power—the Obama administration worked to increase international sanctions on North Korea, which continued to build its nuclear weapons program.<sup>9</sup>

Shortly after Trump came to office, his administration pursued a "pressure campaign of economic and diplomatic sanctions against North Korea" to encourage it to negotiate its "complete, verifiable, and irreversible" denuclearization with the United States.<sup>10</sup> South Korea also committed to this campaign.<sup>11</sup> After a year that involved escalating military threats between Trump and Kim, numerous new Security Council resolutions placing sanctions against North Korea, and North Korea's test-firing a ballistic missile that it claimed could send a nuclear warhead to any U.S. city, hostility between the two countries continued into 2018.<sup>12</sup>

In January, Trump reacted to Kim's comments that a "[n]uclear button is on [Kim's] desk at all times" by asking on Twitter if "someone from his depleted and food starved regime

<sup>1</sup> U.S. Dep't of State Press Release, U.S. Relations with North Korea, at <https://www.state.gov/t/pa/ei/bgn/2792.htm> [<https://perma.cc/3EU5-WCQJ>] [hereinafter U.S. Relations with North Korea]; Sean D. Murphy, Contemporary Practice of the United States, 93 AJIL 908, 908–09 (1999).

<sup>2</sup> See Murphy, *supra* note 1, at 909 (recounting the beginnings of this breakdown).

<sup>3</sup> John R. Crook, Contemporary Practice of the United States, 99 AJIL 715, 716 (2005).

<sup>4</sup> *Id.* at 717. North Korea had become a party to the NPT in 1985. International Atomic Energy Agency, Fact Sheet on DPRK Nuclear Safeguards, at <https://www.iaea.org/newscenter/focus/dprk/fact-sheet-on-dprk-nuclear-safeguards>.

<sup>5</sup> John R. Crook, Contemporary Practice of the United States, 99 AJIL 914, 915 (2005).

<sup>6</sup> *Id.* at 915–16.

<sup>7</sup> See generally John R. Crook, Contemporary Practice of the United States, 101 AJIL 216 (2007).

<sup>8</sup> U.S. Relations with North Korea, *supra* note 1.

<sup>9</sup> David E. Sanger, Choe Sang-Hun & Jane Perlez, *A Big Blast in North Korea, and Big Questions on U.S. Policy*, N.Y. TIMES (Sept. 9, 2016), at <https://www.nytimes.com/2016/09/10/world/asia/north-korea-nuclear-test.html>.

<sup>10</sup> U.S. Dep't of State Press Release, Remarks at the UN Security Council Ministerial Meeting on DPRK (Dec. 15, 2017), at <https://translations.state.gov/2017/12/15/remarks-by-secretary-of-state-rex-tillerson-to-the-un-security-council-on-north-korea> [<https://perma.cc/W7H7-LLNB>].

<sup>11</sup> White House Press Release, President Donald J. Trump's Visit to the Republic of Korea (Nov. 8, 2017), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-visit-republic-korea> [<https://perma.cc/L4QP-R4MJ>].

<sup>12</sup> For a more in-depth account of the rising tensions between the United States and North Korea leading up to 2018, see Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 95 (2018).



[could] please inform him that I too have a Nuclear Button, but it is a much bigger & more powerful one than his, and my Button works!”<sup>13</sup> Rex Tillerson, then the secretary of state, explained that Trump’s tweet reflected the U.S. position that its “diplomatic efforts are backed by a strong military option if necessary.”<sup>14</sup> Later that month, Tillerson warned that if North Korea “[did] not choose the pathway of engagement, discussion, negotiation, then they themselves will trigger an option.”<sup>15</sup> Shortly after Tillerson’s warning, the U.S. Department of the Treasury announced new sanctions targeting entities and individuals involved in financing or supporting North Korea’s government.<sup>16</sup> The rising hostilities between the two countries sparked debate among scholars about the extent to which Trump could use military force against North Korea on the grounds of anticipatory self-defense.<sup>17</sup>

North Korea continued to show no signs of denuclearization and, in February, Vice President Pence announced that the United States would continue to intensify its campaign against North Korea by imposing “the toughest and most aggressive round of economic sanctions on North Korea ever.”<sup>18</sup> Secretary of the Treasury Steven Mnuchin announced these sanctions at the end of the month as the “largest set of sanctions ever imposed in connection with North Korea.”<sup>19</sup> The sanctions targeted “27 entities, 28 vessels, and 1 individual, all involved in sanctions evasions schemes.”<sup>20</sup> These new sanctions were sparked by North Korea’s illicit trade and illegal ship-to-ship transfers, and the Department of the Treasury released images of these activities in conjunction with the imposition of the sanctions.<sup>21</sup> After the sanctions were announced, Trump again alluded to military action against North Korea when he warned that the

<sup>13</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 2, 2018, 4:49 PM), at <https://twitter.com/realDonaldTrump/status/94835557022420992>.

<sup>14</sup> Interview by Elise Labott with Rex Tillerson, Secretary of State, United States of America (Jan. 5, 2018), available at <https://kr.usembassy.gov/010518-secretary-tillersons-interview-with-elise-labott-of-cnn> [<https://perma.cc/D4WJ-W9FX>].

<sup>15</sup> U.S. Dep’t of State Press Release, Remarks with Canadian Foreign Minister Chrystia Freeland at a Press Availability (Jan. 16, 2018), at <https://www.state.gov/secretary/20172018tillerson/remarks/2018/01/277481.htm> [<https://perma.cc/7FRB-KFHQ>].

<sup>16</sup> U.S. Dep’t of the Treas. Press Release, Treasury Sanctions North Korean Overseas Representatives, Shipping Companies, and Chinese Entities Supporting the Kim Regime (Jan. 24, 2018), at <https://home.treasury.gov/news/press-releases/sm0257> [<https://perma.cc/2GSZ-NYK6>]. These sanctions came in response to photos that were taken showing suspected illicit transfers between North Korean and foreign vessels. Carol Morello, *U.S. Imposes Sanctions on North Korean Ships Suspected of Smuggling Goods*, WASH. POST (Jan. 24, 2018), at [https://www.washingtonpost.com/world/national-security/us-sanctions-north-korean-ships-suspected-of-smuggling-goods/2018/01/24/065cb8a2-011b-11e8-bb03-722769454f82\\_story.html](https://www.washingtonpost.com/world/national-security/us-sanctions-north-korean-ships-suspected-of-smuggling-goods/2018/01/24/065cb8a2-011b-11e8-bb03-722769454f82_story.html).

<sup>17</sup> See, e.g., Matthew Waxman, *War, Threats of Force, and Law: Thoughts on North Korea*, LAWFARE (Feb. 1, 2018), at <https://www.lawfareblog.com/war-threats-force-and-law-thoughts-north-korea> (“Some advocates stress that the law should be sufficiently permissive and flexible to allow the United States to address militarily the North Korean menace (or cases involving other nuclear proliferators), while others stress that it should be sufficiently constraining and rigid to help prevent unnecessary and catastrophic war.”).

<sup>18</sup> White House Press Release, Remarks by Vice President Pence and Prime Minister Abe of Japan in Joint Statements (Feb. 7, 2018), at <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-prime-minister-abe-japan-joint-statements> [<https://perma.cc/CTZ8-ACF9>].

<sup>19</sup> White House Press Release, Press Briefing by Treasury Secretary Steven Mnuchin on North Korea Sanctions (Feb. 23, 2018), at <https://www.whitehouse.gov/briefings-statements/press-briefing-treasury-secretary-steven-mnuchin-north-korea-sanctions/> [<https://perma.cc/QKR3-WPKX>].

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

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

United States would have to go to “phase two” if the sanctions did not work, which “may be a very rough thing” and “very, very unfortunate for the world.”<sup>22</sup>

Relations between the United States and North Korea began to shift in March when North Korea announced that it would be willing to discuss “issues of mutual concern” with the United States if there were no “preconditions” for the talks.<sup>23</sup> This announcement came after President Moon Jae-in of South Korea met with senior North Korean officials at the close of the PyeongChang Winter Olympics to discuss possible dialogue.<sup>24</sup> A few days after North Korea’s announcement, South Korea’s National Security Advisor, Chung Eui-Yong, visited the White House to communicate to Trump that Kim wanted to meet with him to discuss denuclearization and that the chairman pledged to “refrain from any further nuclear or missile tests.”<sup>25</sup> Trump immediately accepted,<sup>26</sup> making him the first sitting U.S. president to agree to meet with the leader of North Korea.<sup>27</sup>

North Korea announced in the following month that it would suspend its nuclear and missile test program and shut down its nuclear testing site.<sup>28</sup> On April 27, Kim crossed onto the South Korean side of the demilitarized zone in the village of Panmunjom, where he signed a joint statement with Moon that they would work toward the peninsula’s denuclearization.<sup>29</sup> Despite suspicion among some officials in the White House regarding North Korea’s intentions,<sup>30</sup> Secretary of State Mike Pompeo traveled to North Korea to establish a date and location for the meeting,<sup>31</sup> maintaining that the United States would not relieve economic

<sup>22</sup> Donald J. Trump, The President’s News Conference with Prime Minister Malcolm B. Turnbull of Australia, at 8, 2018 DAILY COMP. PRES. DOC. NO. 114 (Feb. 23, 2018).

<sup>23</sup> Choe Sang-Hun, *North Korea, Seeking “Equal Footing,” Rejects Preconditions for U.S. Talks*, N.Y. TIMES (Mar. 3, 2018), at <https://www.nytimes.com/2018/03/03/world/asia/north-korea-nuclear-talks.html>.

<sup>24</sup> Rick Noack, *Within 3 Months, Trump’s Dealings with North Korea and Iran have Antagonized: Russia, China, Germany, France, Japan, Britain, Austria, Italy, Belgium, the Netherlands, Denmark, Sweden, Spain, Slovakia, Portugal, Finland, Ireland, South Korea [ . . . ]*, WASH. POST (May 25, 2018), at <https://www.washingtonpost.com/news/world/wp/2018/05/25/within-3-months-trumps-dealings-with-north-korea-and-iran-have-antagonized-russia-china-germany-france-japan-britain-austria-italy-belgium-the-netherlands-denmark-sweden-spain-slovakia> (more generally providing a detailed timeline of events leading up the summit meeting).

<sup>25</sup> White House Press Release, Remarks by Republic of Korea National Security Advisor Chung Eui-Yong (Mar. 8, 2018), at <https://www.whitehouse.gov/briefings-statements/remarks-republic-korea-national-security-advisor-chung-eui-yong> [<https://perma.cc/4J3D-HH7U>].

<sup>26</sup> *Id.*

<sup>27</sup> Tessa Berenson, *Why Trump’s Predecessors Did Not Meet with North Korea*, TIME (Mar. 9, 2018), at <http://time.com/5192579/trump-meets-kim-jong-un-north-korea>.

<sup>28</sup> Anna Fifield, *North Korea Says It Will Suspend Nuclear and Missile Tests, Shut Down Test Site*, WASH. POST (Apr. 20, 2018), at [https://www.washingtonpost.com/world/north-korean-leader-suspends-nuclear-and-missile-tests-shuts-down-test-site/2018/04/20/71ff2eea-44e7-11e8-baaf-8b3c5a3da888\\_story.html](https://www.washingtonpost.com/world/north-korean-leader-suspends-nuclear-and-missile-tests-shuts-down-test-site/2018/04/20/71ff2eea-44e7-11e8-baaf-8b3c5a3da888_story.html).

<sup>29</sup> Choe Sang-Hun, *North and South Korea Set Bold Goals: A Final Peace and No Nuclear Arms*, N.Y. TIMES (Apr. 27, 2018), at <https://www.nytimes.com/2018/04/27/world/asia/north-korea-south-kim-jong-un.html>.

<sup>30</sup> David Nakamura & John Hudson, *White House Privately Skeptical of North Korea’s Plans to Freeze Nuclear Testing*, WASH. POST (Apr. 21, 2018), at [https://www.washingtonpost.com/politics/white-house-privately-skeptical-of-north-koreas-plans-to-freeze-nuclear-testing/2018/04/21/ab64980e-4583-11e8-8569-26fda6b404c7\\_story.html](https://www.washingtonpost.com/politics/white-house-privately-skeptical-of-north-koreas-plans-to-freeze-nuclear-testing/2018/04/21/ab64980e-4583-11e8-8569-26fda6b404c7_story.html) (reporting that White House aides were suspicious that North Korea was only trying to receive economic sanction relief when requesting a meeting with the United States).

<sup>31</sup> U.S. Dep’t of State Press Release, Remarks to the Traveling Press (May 8, 2018), at <https://www.state.gov/secretary/remarks/2018/05/281944.htm> [<https://perma.cc/9LXU-QCSG>] [hereinafter Pompeo’s Trip to North Korea]. The date and location were set for June 12 in Singapore. Donald J. Trump (@realDonaldTrump), TWITTER (May 10, 2018, 7:37 AM), at <https://twitter.com/realDonaldTrump/status/994587349718847489> [<https://perma.cc/C2VL-2AB9>].

pressure on North Korea until denuclearization was fully achieved.<sup>32</sup> At the end of his trip, North Korea released three U.S. citizens whom it was holding in custody.<sup>33</sup>

After some intervening uncertainty—including a temporary cancellation<sup>34</sup>—Trump and Kim met in Singapore on June 12.<sup>35</sup> Trump complimented Kim as “very talented,” “[v]ery smart,” and a “[v]ery good negotiator” and called the meeting “honest, direct, and productive.”<sup>36</sup> They issued a joint statement agreeing to a set of commitments:

President Trump committed to provide security guarantees to the DPRK, and Chairman Kim Jong Un reaffirmed his firm and unwavering commitment to complete denuclearization of the Korean Peninsula.

Convinced that the establishment of new U.S.–DPRK relations will contribute to the peace and prosperity of the Korean Peninsula and of the world, and recognizing that mutual confidence building can promote the denuclearization of the Korean Peninsula, President Trump and Chairman Kim Jong Un state the following:

1. The United States and the DPRK commit to establish new U.S.–DPRK relations in accordance with the desire of the peoples of the two countries for peace and prosperity.
2. The United States and the DPRK will join their efforts to build a lasting and stable peace regime on the Korean Peninsula.
3. Reaffirming the April 27, 2018 Panmunjom Declaration, the DPRK commits to work toward complete denuclearization of the Korean Peninsula.
4. The United States and the DPRK commit to recovering POW/MIA remains, including the immediate repatriation of those already identified.

... President Trump and Chairman Kim Jong Un commit to implement the stipulations in this joint statement fully and expeditiously. The United States and the DPRK commit to hold follow-on negotiations, led by the U.S. Secretary of State, Mike Pompeo, and a relevant high-level DPRK official, at the earliest possible date, to implement the outcomes of the U.S.–DPRK summit.<sup>37</sup>

<sup>32</sup> Pompeo’s Trip to North Korea, *supra* note 31 (“We’re not going to relieve sanctions until such time as we achieved our objectives.”).

<sup>33</sup> Jonathan Cheng & Michael Bender, *North Korea Frees Three U.S. Citizens*, WALL ST. J. (May 9, 2018), at <https://www.wsj.com/articles/in-pyongyang-pompeo-expresses-hope-about-working-with-north-korea-1525848842>.

<sup>34</sup> For details, see Anna Fifield, *North Korea Says It’s Up to U.S. Whether They Meet at a Table or in a “Nuclear Showdown,”* WASH. POST. (May 23, 2018), at [https://www.washingtonpost.com/world/north-korea-says-its-up-to-us-whether-they-meet-at-a-table-or-in-a-nuclear-showdown/2018/05/23/45f97960-5ee9-11e8-8c93-8cf33c21da8d\\_story.html](https://www.washingtonpost.com/world/north-korea-says-its-up-to-us-whether-they-meet-at-a-table-or-in-a-nuclear-showdown/2018/05/23/45f97960-5ee9-11e8-8c93-8cf33c21da8d_story.html); Donald J. Trump, Letter to Chairman of the State Affairs Commission Kim Jong Un of North Korea, 2018 DAILY COMP. PRES. DOC. NO. 371 (May 24); Choe Sang-Hun, *North Korea Says It Will Give Trump “Time and Opportunity” to Reconsider*, N.Y. TIMES (May 24, 2018), at <https://www.nytimes.com/2018/05/24/world/asia/north-korea-trump-reconsider.html>; Donald J. Trump, Remarks Following a Meeting with Vice Chairman of the State Affairs Commission Kim Yong Chol North Korea and an Exchange with Reporters, 2018 DAILY COMP. PRES. DOC. NO. 392 (June 1, 2018).

<sup>35</sup> Donald J. Trump, The President’s News Conference on Sentosa Island, Singapore, 2018 DAILY COMP. PRES. DOC. NO. 423 (June 12, 2018) [hereinafter Trump Press Conference].

<sup>36</sup> *Id.*

<sup>37</sup> Donald J. Trump, Joint Statement by President Trump and Chairman of the State Affairs Commission Kim Jong Un of North Korea, 2018 DAILY COMP. PRES. DOC. NO. 422 (June 12, 2018).

After signing the document, Trump held a press conference discussing the negotiations:

Chairman Kim has told me that North Korea is already destroying a major missile engine testing site. That's not in your signed document; we agreed to that after the agreement was signed. That's a big thing—for the missiles that they were testing, the site is going to be destroyed very soon.

Today is the beginning of an arduous process. Our eyes are wide open, but peace is always worth the effort, especially in this case. . . .

. . .

In the meantime, the sanctions will remain in effect. . . .<sup>38</sup>

Trump also confirmed that a verification process for North Korea's denuclearization would be implemented but did not give a timetable for the commitments made in the agreement.<sup>39</sup> Trump announced that in addition to the agreement, military exercises with South Korea, known as "war games," would not continue.<sup>40</sup> The war games are a long-standing practice used to prepare forces from the United States and South Korea for war with North Korea.<sup>41</sup>

Around the world, foreign officials praised the agreement. Moon described it as a "great victory achieved by both the United States and the two Koreas, and a huge step forward for people across the world who long for peace."<sup>42</sup> Singapore's Prime Minister Lee Hsien Loong called the agreement a "dramatic step forward."<sup>43</sup> Through his spokesperson, the UN secretary-general welcomed the summit "as an important milestone in the advancement of sustainable peace and the complete and verifiable denuclearization on the Korean Peninsula."<sup>44</sup>

On Trump's way back from the summit, he tweeted that "[t]here is no longer a Nuclear Threat from North Korea."<sup>45</sup> Pompeo traveled to North Korea in the beginning of July to discuss how the commitments between the United States and North Korea would be carried

<sup>38</sup> Trump Press Conference, *supra* note 35, at 2.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 3. ("We will be stopping the war games, which will save us a tremendous amount of money, unless and until we see the future negotiation is not going along like it should.")

<sup>41</sup> Daniel Flatley & Anthony Capaccio, *Trump Suspends South Korea "War Games" in Bet Kim Can Be Trusted*, BLOOMBERG (June 12, 2018), at <https://www.bloomberg.com/news/articles/2018-06-12/trump-suspends-south-korea-war-games-in-bet-kim-can-be-trusted>.

<sup>42</sup> White House Press Release, WTAS: Support for President Donald J. Trump's Summit with North Korea (June 12, 2018), at <https://www.whitehouse.gov/briefings-statements/wtas-support-president-donald-j-trumps-summit-north-korea> [https://perma.cc/P7RB-S2K6].

<sup>43</sup> *Id.*

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

<sup>45</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 13, 2018, 2:56 AM), at <https://twitter.com/realDonaldTrump/status/1006837823469735936>. Congress has been more hesitant in accepting that there is no longer a North Korean nuclear threat. It recently passed, and Trump signed into law, the John S. McCain National Defense Authorization Act for fiscal year 2019. H.R. 5515, 115th Cong. (2018) (listed as Pub. L. No. 115–232). Regarding North Korea, the act restricts reductions of active-duty U.S. service members below 22,000 in South Korea, subject to a waiver through certification by the secretary of defense that certain conditions have been met, and mandates executive branch reporting to Congress regarding North Korea's nuclear weapons program. Pub. L. 115–232 at §§ 1264, 1265, \_ Stat. \_ (2018). In his signing statement, Trump indicated his view that these provisions might unconstitutionally intrude on exclusive presidential powers under certain circumstances. Donald J. Trump, Statement on Signing the John S. McCain National Defense Authorization Act for Fiscal Year 2019, 2018 DAILY COMP. PRES. DOC. NO. 533 (Aug. 13) (interpreting the certification requirement for troop reduction to "encompass only actions for which such advance certification or notification is feasible and

out,<sup>46</sup> but he has stated that sanctions and economic pressure will not be relieved prior to full denuclearization.<sup>47</sup> Pompeo has sought assurances from other countries, such as Vietnam, that they will enforce existing Security Council sanctions against North Korea.<sup>48</sup> In July, the United States called for the cessation of oil transfers to North Korea, stating that its annual cap had been exceeded and any more transfers would violate the Security Council sanctions.<sup>49</sup>

As of early September 2018, North Korea has taken several steps relevant to its summit commitments. Using satellite imagery, analysts say North Korea has begun dismantling its testing facilities at its satellite launch station.<sup>50</sup> On July 26 and August 2, North Korea returned remains of what were said to be American service members.<sup>51</sup> And Deputy White House Press Secretary Hogan Gidley mentioned at the end of July that North Korea has not fired a missile in nine months.<sup>52</sup> Although North Korea has been taking steps toward the fulfillment of its summit commitments, it considers the United States to not be living up to its commitment of improved relations.<sup>53</sup> According to a recent statement

consistent” with the president’s commander-in-chief powers and stating that the reporting requirement may be limited by various presidential privileges with respect to the disclosure of information).

<sup>46</sup> U.S. Dep’t of State Press Release, Secretary of State Michael R. Pompeo Remarks to Traveling Press (July 7, 2018), at <https://www.state.gov/secretary/remarks/2018/07/283878.htm> [<https://perma.cc/7AHE-F34J>].

<sup>47</sup> See, e.g., Rick Gladstone & Satoshi Sugiyama, *Pompeo, at U.N., Says North Korean Leader Must Keep Vow to Denuclearize*, N.Y. TIMES (July 20, 2018), at <https://www.nytimes.com/2018/07/20/world/asia/pompeo-haley-north-korea.html>. Trump has similarly stated that “[t]he sanctions will come off when [they] are sure that the nukes are no longer a factor.” Trump Press Conference, *supra* note 35.

<sup>48</sup> U.S. Dep’t of State Press Release, Secretary Pompeo’s Meeting with Vietnamese Leaders (July 9, 2018), at <https://www.state.gov/t/pa/prs/ps/2018/07/283897.htm> [<https://perma.cc/322C-L7PS>]. Pompeo delivered similar messages to officials representing other countries that are part of the ASEAN Regional Forum. See U.S. Dep’t of State Press Release, Previewing Secretary Pompeo’s Upcoming Trip to Kuala Lumpur, Singapore, and Jakarta (July 31, 2018), at <https://www.state.gov/t/pa/prs/ps/2018/07/284840.htm> [<https://perma.cc/2Q3W-6L4E>]; U.S. Dep’t of State Press Release, Press Availability with Secretary of Defense James Mattis, Australian Foreign Minister Julie Bishop, and Australian Defense Minister Marise Payne (July 24, 2018), at <https://www.state.gov/secretary/remarks/2018/07/284471.htm> [<https://perma.cc/9DS4-NRZE>].

<sup>49</sup> Carol Morello, *U.S. Urges U.N. to Halt All Oil Transfers to North Korea*, WASH. POST (July 12, 2018), at [https://www.washingtonpost.com/world/national-security/us-urges-un-to-halt-all-oil-transfers-to-north-korea/2018/07/12/db70a144-85e5-11e8-8f6c-46cb43e3f306\\_story.html](https://www.washingtonpost.com/world/national-security/us-urges-un-to-halt-all-oil-transfers-to-north-korea/2018/07/12/db70a144-85e5-11e8-8f6c-46cb43e3f306_story.html).

<sup>50</sup> Adam Taylor, *North Korea Begins Dismantling Key Test Site, Satellite Imagery Suggests*, WASH. POST (July 23, 2018), at <https://www.washingtonpost.com/news/worldviews/wp/2018/07/23/north-korea-begins-dismantling-key-test-site-satellite-imagery-suggests>.

<sup>51</sup> White House Press Release, Statement from the Press Secretary on the Repatriation of Remains from North Korea (July 26, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-repatriation-remains-north-korea> [<https://perma.cc/6WEZ-4BMM>]; White House Press Release, In Photos: 65 Years Later, Fallen American Soldiers of the Korean War Come Home (Aug. 2, 2018), at <https://www.whitehouse.gov/articles/photos-65-years-later-fallen-american-soldiers-korean-war-come-home> [<https://perma.cc/L58E-PADA>]. Although North Korea and the Trump administration announced that the remains of fallen American service members were returned, forensic labs in Hawaii are studying the remains to ensure they are in fact fallen American soldiers. See Interview by Tara Copp with Jim Mattis, U.S. Secretary of Defense, MILITARY TIMES (July 27, 2018), at <https://www.militarytimes.com/news/your-military/2018/07/27/how-will-the-us-know-the-war-remains-north-korea-sent-are-real-qa-with-mattis>. As of mid-September 2018, two identifications of American soldiers have been made. *First Remains Identified from Remains Returned by North Korea*, BBC NEWS (Sept. 21, 2018).

<sup>52</sup> White House Press Release, Press Gaggle by Deputy Press Secretary Hogan Gidley (July 31, 2018), at <https://www.whitehouse.gov/briefings-statements/press-gaggle-deputy-press-secretary-hogan-gidley-073118> [<https://perma.cc/YPR6-837W>].

<sup>53</sup> Choe Sang-Hun, *U.S. Isn’t Holding Up Its End of Nuclear Deal, North Korean Envoy Charges*, N.Y. TIMES (Aug. 4, 2018), at <https://www.nytimes.com/2018/08/04/world/asia/north-korea-us-nuclear-deal.html>.

by North Korea's foreign minister, Ri Yong-ho, North Korea interpreted this commitment to include more immediate steps to reduce economic pressure and sanctions.<sup>54</sup>

Pompeo has stated that moving forward he wants to “engage[] in patient diplomacy” and “will not let this drag out to no end,” even though North Korea's possible denuclearization could be a slow process.<sup>55</sup> The sanctions that existed at the time of the summit have remained in place.<sup>56</sup> Questioned about why North Korean denuclearization is not moving faster, Trump remarked, “I left 3 months ago. We got our hostages back. There's no more missiles flying over Japan. There's no rockets going up. There's no nuclear testing. And we have a good relationship with North Korea. So we'll see how it works.”<sup>57</sup> North Korea now demands that the United States declare that the Korean War is over before it will provide disclosures to the United States about its atomic weapons, nuclear production facilities, and missiles.<sup>58</sup> Trump had previously stated that the United States will sign a peace treaty ending the Korean War “at the appropriate time . . . a little bit further down the road.”<sup>59</sup>

In late August 2018, the Trump administration announced that it was cancelling a planned trip by the U.S. Secretary of State to North Korea because of insufficient progress on the issue of denuclearization.<sup>60</sup> Shortly thereafter, the U.S. executive branch sent conflicting signals about whether future war games would be suspended, with Trump ultimately emphasizing that “the President believes that his relationship with Kim Jong Un is a very good and warm one, and there is no reason at this time to be spending large amounts of money on joint U.S.-South Korea war games.”<sup>61</sup> In early September, the Trump administration revealed that Kim had requested a second summit meeting, “which we are open to and are already in the process of coordinating.”<sup>62</sup>

<sup>54</sup> *Id.* (noting that after Pompeo's July visit, North Korea complained of a “unilateral and gangster-like demand for denuclearization” by the United States).

<sup>55</sup> U.S. Dep't of State Press Release, An Update on American Diplomacy to Advance Our National Security Strategy (July 25, 2018), at <https://www.state.gov/secretary/remarks/2018/07/284487.htm> [<https://perma.cc/2Q2Q-DB43>].

<sup>56</sup> For a collective list of sanctions, see U.S. Dep't of the Treas., North Korea Sanctions, at <https://www.treasury.gov/resource-center/sanctions/Programs/pages/nkorea.aspx> [<https://perma.cc/W8BL-YRGB>].

<sup>57</sup> Donald J. Trump, Remarks Prior to a Dinner with Business Leaders and an Exchange with Reporters in Bedminster, New Jersey, at 11, 2018 DAILY COMP. PRES. DOC. NO. 527 (Aug. 7, 2018).

<sup>58</sup> David E. Sanger & William J. Broad, *Once “No Longer a Nuclear Threat,” North Korea Now in Standoff with U.S.*, N.Y. TIMES (Aug. 10, 2018), at <https://www.nytimes.com/2018/08/10/us/politics/north-korea-denuclearize-peace-treaty.html>.

<sup>59</sup> Trump Press Conference, *supra* note 35, at 6.

<sup>60</sup> See Mark Landler & Gardiner Harris, *Trump Asks Pompeo to Cancel North Korea Trip, Pointing to Stalled Diplomacy*, N.Y. TIMES (Aug. 24, 2018), at <https://www.nytimes.com/2018/08/24/us/politics/pompeo-north-korea-trip.html>.

<sup>61</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 29, 2018, 2:23 PM), at <https://twitter.com/realDonaldTrump/status/1034914371099676674>; see also Paul Sonne, *Trump Says U.S. Shouldn't Be Spending Money on “War Games” with South Korea*, WASH. POST (Aug. 29, 2018), at [https://www.washingtonpost.com/world/national-security/pentagon-no-decisions-made-about-suspending-future-exercises-with-south-korea/2018/08/29/08cf70da-abab-11e8-8f4b-ace063e14538\\_story.html?utm\\_term=.957e4038b7a1](https://www.washingtonpost.com/world/national-security/pentagon-no-decisions-made-about-suspending-future-exercises-with-south-korea/2018/08/29/08cf70da-abab-11e8-8f4b-ace063e14538_story.html?utm_term=.957e4038b7a1) (describing how these tweets came after the secretary of defense had stated that “there are ongoing exercises all the tie on the peninsula” and that “no decisions have been made about suspending any future exercises”).

<sup>62</sup> White House Press Release, Press Briefing by Press Secretary Sarah Sanders and CEA Chairman Kevin Hassett (Sept. 10, 2018), at <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-cea-chairman-kevin-hassett-091018/> [<https://perma.cc/WC8X-QE9Q>].