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CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

President Trump "Unsigns" Arms Trade Treaty After Requesting Its Return from the Senate

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In a speech before the National Rifle Association (NRA) on April 26, 2019, President Trump announced that he was requesting the return of the Arms Trade Treaty (ATT) from the Senate and that the United States would unsign this treaty.[1] Shortly thereafter, Trump issued a formal letter to the Senate requesting the ATT's return.[2] As of late September, the Senate had not formally approved Trump's request.[3] Nonetheless, on July 18, 2019, the Trump administration communicated to the secretary-general of the United Nations that the United States does not intend to become a party to the ATT and thus has no future legal obligations stemming from signature.[4]

The ATT seeks to "[e]stablish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms" and to "[p]revent and eradicate the illicit trade in conventional arms and prevent their diversion."[5] In particular, the ATT requires each state party to establish and maintain a national control system to regulate and document the international export, import, transit, trans-shipment, and brokering of conventional arms.[6] The national control system documentation as well as a report of the national laws and regulations enacted to implement the provisions of the treaty are to be made available to the other state parties.[7] Additionally, each state party must consider whether a transfer of conventional arms "would contribute to or undermine peace and security" in the international community, and the state is entirely prohibited from engaging in a transfer if the state knows that the transferred arms would be used in the commission of genocide, crimes against humanity, or war crimes.[8] Presently, 104 nations are party to the ATT.[9]

[1] Remarks at the National Rifle Association Institute for Legislative Action Leadership Forum in Indianapolis, Indiana, 2019 DAILY COMP. PRES. DOC. No. 243, at 6 (Apr. 26) [hereinafter Trump Announcement].

[2] Donald J. Trump, Message to the Senate on the Withdrawal of the Arms Trade Treaty, 2019 DAILY COMP. PRES. DOC. NO. 249 (Apr. 29) [hereinafter ATT Return Request].

[3] *See* S. Res. 204 – An Executive Resolution to Return to the President of the United States the Arms Trade Treaty, *at* https://www.congress.gov/bill/116th-congress/senate-resolution/204 [https://perma.cc/8KY7-J4QY] [hereinafter S. Res. 204] (showing that a resolution to return the ATT was introduced to the Senate on May 13, 2019, but has not yet been approved).

[4] *See* Depositary Notification from the UN Secretary-General, UN Doc. C.N.314.2019.TREATIES-XXVI.8 (July 19, 2019) [hereinafter Unsigning Letter].

[5] Arms Trade Treaty, Art. 1, C.N.266.2013.TREATIES-XXVI.8 (Apr. 2, 2013), *available at* https://treaties.un.org/doc/Treaties/2013/04/20130410%2012-01%20PM/Ch_XXVI_08.pdf [https://perma.cc/7T83-KGMU] [hereinafter ATT].

[6] *Id.* Arts. 2(2), 5(2)–(5). The ATT defines conventional arms as including the following categories: "(a) Battle tanks; (b) Armored combat vehicles; (c) Large-caliber artillery systems; (d) Combat aircraft; (e) Attack helicopters; (f) Warships; (g) Missiles and missile launchers; and (h) Small arms and light weapons." *Id.* Art. 2. The treaty also covers ammunition and munitions fired, launched or delivered by the above-listed arms as well as the parts and components which can be assembled into these arms. *Id.* Arts. 3–4.

[7] *Id.* Art. 13(1).

[8] *Id.* Arts. 6(3), 7(1).

[9] United Nations, *Depositary Status for the Arms Trade Treaty*, *at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&clang=_en#3 [https://perma.cc/WBC2-K34Y] [hereinafter UN Depositary Status for ATT].

The UN General Assembly adopted the ATT on April 2, 2013,[10] and it entered into force on December 24, 2014.[11] The U.S. secretary of state at the time, John Kerry, signed the ATT on September 25, 2013, and President Obama transmitted the treaty to the Senate for its advice and consent on December 9, 2016, within his last two months in office.[12] In his letter accompanying the transmission, Obama noted that the United States did not need to change or enact any regulations or laws to comply with the treaty.[13] The Senate referred the ATT to the Senate Foreign Relations Committee on the same date, but no further action has been taken by the Committee.[14]

Speaking at an NRA convention on April 26, 2019, Trump publicly announced his intent to withdraw the ATT from the Senate's advice and consent process, simultaneously signing a letter requesting the ATT's return.[15] Trump also stated: "[T]he United States will be revoking the effect of America's signature from this badly misguided treatment [agreement]. We're taking our signature back. The United Nations will soon receive a formal notice that America is rejecting this treaty."[16] Following Trump's statement, the White House issued a public statement reiterating Trump's announcement "that he will never ratify the ATT and will ask the Senate to return it."[17] The statement continued:

- The ATT is being opened up for amendment in 2020 and there are potential proposals that the United States cannot support.

  . . .
- By announcing the United States will not join the ATT, President Trump is ensuring this agreement will not become a platform to threaten Americans' Second Amendment rights.

  . . .
- Currently, 63 countries are completely out of the agreement, including major arms exporters like Russia and China.

[10] GA Res. 67/234B (Apr. 2, 2013).

[11] *See* ATT, *supra* note 5, Art. 22 (providing that the treaty would enter into force ninety days after the fiftieth ratification or accession); UN Depositary Status for ATT, *supra* note 9 (listing the date of its entry into force).

[12] Message from the President of the United States Transmitting the Arms Trade Treaty, S. TREATY DOC. NO. 114-14, at III (Dec. 9, 2016).

[13] *Id.* (explaining that "United States national control systems and practices to regulate the international transfer of conventional arms already meet or exceed the requirements of the Treaty" and adding that a "key goal of the Treaty is to persuade other States to adopt national control systems for the international transfer of conventional arms that are closer to our own high standards"); *see also* CONG. RESEARCH SERV., RL33865, ARMS CONTROL AND NONPROLIFERATION: A CATALOG OF TREATIES AND AGREEMENTS 54 (2019) ("Because the United States already has strong export control laws in place, the ATT would likely require no significant changes to policy, regulations, or law.").

[14] 114th Cong., 162 CONG. REC. S6998-7000 (daily ed. Dec. 9, 2016) (statement of Sen. Inhofe); 114th Congress, The Arms Trade Treaty, *at* https://www.congress.gov/treaty-document/114th-congress/14 [https://perma.cc/FBZ7-D857] (showing that the latest action with regard to the ATT was its referral to the Senate Foreign Relations Committee).

[15] Trump Announcement, *supra* note 1, at 6.

[16] *Id.* (second alteration in the original document).

[17] White House Fact Sheet, President Donald J. Trump is Defending Our Sovereignty and Constitutional Rights from the United Nations Arms Trade Treaty (Apr. 26, 2019), *at* https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-is-defending-our-sovereignty-and-constitutional-rights-from-the-united-nations-arms-trade-treaty [https://perma.cc/8CFJ-CQ95].

- The ATT cannot achieve its chief objective of addressing irresponsible arms transfers if these major arms exporters are not subject to it at all.[18]

Three days later, Trump issued an official letter to the Senate, stating:

> I have concluded that it is not in the interest of the United States to become a party to the Arms Trade Treaty (Senate Treaty Doc. 114-14, transmitted December 9, 2016). I have, therefore, decided to withdraw the aforementioned treaty from the Senate and accordingly request that it be returned to me.[19]

Trump's request to the Senate is not unprecedented. In 1856, President Pierce sent an analogous request to the Senate, which formally returned the treaty shortly thereafter.[20] Since then, this request-and-return procedure has occurred periodically.[21] Other presidents to make this type of request include President Wilson,[22] President Franklin D. Roosevelt,[23] and President Nixon.[24] In the modern era, the Senate's process for returning a treaty involves a resolution referred out by the Senate Foreign Relations Committee, which the Senate then has the opportunity to adopt by a majority vote.[25] In a major report prepared in 2001 about

[18] *Id.*

[19] ATT Return Request, *supra* note 2.

[20] On August 9, 1856, Pierce wrote: "Deeming it advisable to withdraw [the treaty between the United States and the Netherlands] from the consideration of the Senate, I request that it may be returned to me." 10 J. EXEC. PROC. S. U.S. 140, 140–41 (1856). On August 13, 1856, after the message was read in the Senate, the Senate ordered "the convention . . . between the United States and His Majesty the King of the Netherlands, be returned by the Secretary to the President of the United States, agreeably to the request contained in his message dated 9th August, instant." *Id.* at 142.

[21] *See* David C. Scott, Comment, *Presidential Power to "Un-Sign" Treaties*, 69 U. CHI. L. REV. 1447, 1468 (2002) (explaining that the exchange between Pierce and the Senate "provide[d] an initial model to which most later interactions conform"); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 175 (1990) ("Between 1947 and 1963, forty-five treaties were withdrawn, in each case pursuant to a request of the President (which was met by the Senate's unanimous consent, order, or resolution)"). While presidents often "request" the return of a treaty from the Senate, there are also examples in which they have used more robust language. *See* 24 J. EXEC. PROC. S. U.S. 474, 474 (1885) (quoting President Arthur's February 18, 1885 message to the Senate "recall[ing] the treaty" rather than requesting its return); 34 J. EXEC. PROC. S. U.S. 58, 58 (1902) (quoting President Theodore Roosevelt's December 8, 1902 message to the Senate "withdraw[ing]" a treaty between the United States and Dominican Republic rather than asking for the treaty's return).

[22] On March 21, 1918, Wilson requested that the Senate return two treaties previously signed by the United States and Great Britain; the Senate did so on the same day. *See* 52 J. EXEC. PROC. S. U.S. 792, 792 (1918). Additionally, Wilson requested that another treaty between the United States and Great Britain be returned on January 15, 1920. *See* 55 J. EXEC. PROC. S. U.S. 83, 83 (1920). The Senate complied with this request two days later. *Id.* at 86.

[23] On May 7, 1934, Roosevelt submitted a treaty between the United States and Mexico to the Senate and requested that a treaty previously signed by the two nations be returned. *See* 75 J. EXEC. PROC. S. U.S. 509, 509 (1934). The Senate returned the treaty on April 1, 1935. *See* 76 J. EXEC. PROC. S. U.S. 493, 493 (1935).

[24] On February 24, 1970, President Nixon requested to withdraw a treaty with Mexico from the Senate. *See* 112 J. EXEC. PROC. S. U.S. 74, 74–75 (1970). The message was referred to the Senate Foreign Relations Committee that same day, *id.*, and the treaty was returned on March 13, 1970. *Id.* at 117.

[25] *See* CONG. RESEARCH SERV., S. PRT. 106–71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 145 (2001) ("The normal practice for returning treaties has been for the committee to report out, and for the Senate to adopt, a Senate resolution directing the Secretary of the Senate to return a particular treaty or treaties to the President."); Standing Rules of the Senate, S. Doc. 113–18, Rule XXX(1)(d) (Jan. 24, 2013) ("On the final question to advise and consent to the ratification in the form agreed to, the concurrence of two-thirds of the Senators present shall be necessary to determine it in the affirmative; but all other motions and questions upon a treaty shall be decided by a majority vote, except a motion to postpone indefinitely, which shall be decided by a vote of two-thirds.").

the role of the Senate with respect to treaties and other international agreements, the Congressional Research Service stated: "The President does not have the formal authority to withdraw a treaty from Senate consideration without the Senate's concurrence."[26] Historically, the Senate has apparently always consented to the return of a treaty requested by the president.[27] This may stem in part from the fact that, as a matter of U.S. constitutional practice, treaties can only be ratified with the concurrence of the president, and the president is under no legal obligation to ratify a treaty even after the Senate has given its advice and consent.[28]

For the ATT, Senator Rand Paul, a member of the Senate Foreign Relations Committee, presented a resolution to return the treaty to Trump approximately two weeks after Trump's formal request to the Senate.[29] As of late September of 2019, the Committee had not yet acted on the resolution.[30]

Trump did not wait for the Senate to return the ATT before communicating to the United Nations that the United States did not intend to become a party to the ATT. On July 18, 2019, his administration sent the following message to the UN secretary-general:

> This is to inform you, in connection with the Arms Trade Treaty, done at New York on April 2, 2013, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on September 25, 2013.
>
> The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty, and all other publicly available media relating to the treaty be updated to reflect this intention not to become a party.[31]

This language closely tracks language from Article 18 of the Vienna Convention on the Law of Treaties regarding the duration of international legal obligations arising from treaty

[26] Cong. Research Serv., S. Prt. 106–71, *supra* note 25, at 145; *see also* Glennon, *supra* note 21, at 174–75 (observing that since "the President (should the Senate give its consent) retains the discretion to decline to proceed to ratification, it might seem sensible that the President can withdraw a treaty from the Senate without its consent" but that "[n]onetheless, practicality argues against such presidential authority, since at that point the Senate, not the President, has custody of the official treaty documents; they are not then within the President's control"); *but see* Scott, *supra* note 21, at 1477 (arguing that the president should have "the unilateral power . . . to withdraw treaties from the Senate," including "in order to 'un-sign' it").

[27] Scott, *supra* note 21, at 1471; *see also* Restatement (Fourth) of Foreign Relations Law § 303, rep. n. 4 (2018) ("The President may also request that a treaty be withdrawn from further Senate consideration, and as a matter of practice the Senate has cooperated with such requests.").

[28] Cong. Research Serv., S. Prt. 106–71, *supra* note 25, at 152 ("U.S. law does not impose any legal obligation on the President to ratify a treaty after the Senate has given its advice and consent.").

[29] 165 Cong. Rec. S2792-2793 (daily ed. May 13, 2019) (statement of Sen. Paul); U.S. Senate Committee on Foreign Relations, Committee Membership, *at* https://www.foreign.senate.gov/about/membership [https://perma.cc/9QCJ-MZG9].

[30] S. Res. 204, *supra* note 3. Notably, U.S. Senator Bob Menendez, the ranking member of the Senate Foreign Relations Committee, issued a statement on April 26, 2019, criticizing Trump's announcement. *See* U.S. Senate Comm. on Foreign Relations Ranking Member's Press, Menendez on Pres. Trump Telling NRA He is Cancelling U.S. Participation in Global Arms Treaty (Apr. 26, 2019), *at* https://www.foreign.senate.gov/press/ranking/release/menendez-on-pres-trump-telling-nra-he-is-cancelling-us-participation-in-global-arms-treaty [https://perma.cc/5JMN-C7NA].

[31] Unsigning Letter, *supra* note 4.

signature. Article 18 provides that, after it has signed a treaty, "[a] State is obliged to refrain from acts which would defeat the object and purpose of [this] treaty . . . until it shall have made its intention clear not to become a party to the treaty."[32] A common interpretation of this provision is that a state party may not act in such a manner that would make it impossible or substantially more difficult for the state to ultimately comply with the treaty.[33]

An earlier example—*the* initial example[34]—of treaty "unsigning" by the United States occurred when the administration of President George W. Bush sent an analogous letter to the United Nations in 2002 in connection with the Rome Statute establishing the International Criminal Court.[35] The Rome Statute was in a different procedural posture than the ATT, however, because it had not yet been submitted to the Senate for advice and consent.[36] Thus, Trump's unsigning is the first time a United States president has unsigned a treaty at a time when, as a matter of U.S. domestic legal procedure, the treaty was pending before the Senate. Few commentators have thus considered whether such an action is permissible as a matter of U.S. constitutional law or whether the Trump administration's notification to the United Nations can be taken as adequate for purposes of Article 18 at a time when the treaty is pending before the Senate.[37]

[32] Vienna Convention on the Law of Treaties, Art. 18, May 23, 1969, 1155 UNTS 331, 8 ILM 679. Although the United States is not a party to the Vienna Convention, it views many aspects of the treaty as reflective of customary international law. *See* U.S. Dep't of State, Vienna Convention on the Law of Treaties, *at* https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm [https://perma.cc/DK9B-H4V3].

[33] Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2078 (2003); *see also* Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 329 (2007) ("[Article 18's] drafting history suggests that the object and purpose obligation is designed to ensure that one of the signatory parties . . . does not change the status quo in a way that eliminates or substantially undermines the reasons for entering into the treaty.").

[34] Swaine, *supra* note 33, at 2064 (noting that the Bush unsigning was "apparently unprecedented"). At the beginning of his administration, Trump similarly unsigned the Trans-Pacific Partnership Agreement—an internationally binding agreement that President Obama had signed, although one that, as a matter of U.S. domestic constitutional practice, was intended to receive the approval of Congress rather than of two-thirds of the Senate. *See* Letter from the Acting U.S. Trade Representative to the TPP Depositary (Jan. 30, 2017), *available at* https://ustr.gov/sites/default/files/files/Press/Releases/1-30-17%20USTR%20Letter%20to%20TPP%20Depositary.pdf [https://perma.cc/2V4X-BPJ4] (stating that "the United States does not intend to become a party to the Trans-Pacific Partnership Agreement" and therefore "has no legal obligations arising from its signature on February 4, 2016").

[35] *See* U.S. Dep't of State Press Release, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), *at* https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm [https://perma.cc/V227-T5TQ]. In language that appears to be the model for the ATT Unsigning Letter, the letter stated: "This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty." *Id.*

[36] President Clinton authorized the signing of the Rome Statute in the last weeks of his administration, but he did not submit it to the Senate for advice and consent. William J. Clinton, Statement on the Rome Treaty on the International Criminal Court (Dec. 31, 2000), *available at* https://www.govinfo.gov/content/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf (stating that "I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied").

[37] Among the sparse examples are Scott, *supra* note 21, at 1475 (asserting that "if the President asks for the return of the treaty, but the Senate denies his request . . . it appears the President cannot 'unsign' the treaty," although also arguing that the president can unilaterally force the return of the treaty from the Senate); Ryan Chorkey Burke, Note, *Losers Always Whine About Their Test: American Nuclear Testing, International Law, and the International Court of Justice*, 39 GA. J. INT'L & COMP. L. 341, 361 (2011) (claiming that "[o]nce the President submits a treaty for the Advice and Consent of the Senate, however, the document becomes the legal property of

Senate Gives Advice and Consent to Ratification of Four Bilateral Tax Treaties
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In July of 2019, the U.S. Senate gave advice and consent to protocols updating tax treaties with Spain, Switzerland, Japan, and Luxembourg, after a nearly decade-long period during which no tax treaties were approved by the Senate. This drought was primarily due to the privacy concerns of a single senator, Rand Paul of Kentucky, who deployed the Senate's procedural rules to increase the difficulty of the advice and consent process. Tax treaties with Hungary, Chile, and Poland, as well as a protocol to a multilateral tax convention, remained pending in the Senate Foreign Relations Committee as of mid-August of 2019.

Bilateral tax treaties typically focus on some combination of reducing double taxation and deterring tax avoidance. In the years leading up to 2011, the Senate generally gave its advice and consent to these treaties within a year or two of their signing.[1] Senator Paul's opposition, which began shortly after he joined the Senate in 2011, changed this pattern.[2]

In a 2014 letter, Senator Paul explained that his concern with pending tax treaties stemmed from provisions that, in his view, increased the scope of authority of tax officials to share and ascertain taxpayer information and represented a departure from individual privacy rights:

the Senate Foreign Relations Committee, making it impossible for the President to unsign it until it is returned") (internal quotation marks and citations omitted).

[1] *E.g.*, U.S. Senate Resolution of Advice and Consent to Ratification of the Tax Convention with Malta, 111th Cong., 156 CONG. REC. S5976 (daily ed. July 15, 2010) (signed Aug. 8, 2008; advice and consent on July 15, 2010); U.S. Senate Resolution of Advice and Consent to Protocol Amending Tax Convention with New Zealand, 111th Cong., 156 CONG. REC. S5976 (daily ed. July 15, 2010) (signed Dec. 1, 2008; advice and consent on July 15, 2010); U.S. Senate Resolution of Advice and Consent to Ratification of the Protocol Amending Tax Convention with France, 111th Cong., 155 CONG. REC. S12350-S12351 (daily ed. Dec. 3, 2009) (signed Jan. 13, 2009; advice and consent on Dec. 3, 2009); U.S. Senate Resolution of Advice and Consent to Ratification of the Protocol Amending 1980 Tax Convention with Canada, 110th Cong., 154 CONG. REC. S9332 (daily ed. Sept. 23, 2008) (signed Sept. 21, 2007; advice and consent on Sept. 23, 2008); U.S. Senate Resolution of Advice and Consent to Ratification of the Tax Convention and Protocol with Bulgaria with Proposed Protocol of Amendment, 110th Cong., 154 CONG. REC. S9332 (daily ed. Sept. 23, 2008) (signed Feb. 26, 2008; advice and consent on Sept. 23, 2008); U.S. Senate Resolution of Advice and Consent to Ratification of the Tax Convention with Iceland, 110th Cong., 154 CONG. REC. S9332 (daily ed. Sept. 23, 2008) (signed Oct. 23, 2007; advice and consent on Sept. 23, 2008); U.S. Senate Resolution of Advice and Consent to Ratification of the Tax Convention with Belgium, 110th Cong., 153 CONG. REC. S15706 (daily ed. Dec. 14, 2007) (signed Nov. 27, 2006; advice and consent on Dec. 14, 2007); U.S. Senate Resolution of Advice and Consent to Ratification of the Protocol Amending Tax Convention with Germany, 110th Cong., 153 CONG. REC. S15706 (daily ed. Dec. 14, 2007) (signed June 1, 2006; advice and consent on Dec. 14, 2007); U.S. Senate Resolution of Advice and Consent to Ratification of the Protocol Amending Tax Convention with Denmark, 110th Cong., 153 CONG. REC. S14654 (daily ed. Nov. 16, 2007) (signed May 2, 2006; advice and consent on Nov. 16, 2007); U.S. Senate Resolution of Advice and Consent to Ratification of the Protocol Amending Tax Convention with Finland, 110th Cong., 153 CONG. REC. S14654 (daily ed. Nov. 16, 2007) (signed May 31, 2006; advice and consent on Nov. 16, 2007).

[2] *See* Diane M. Ring, *When International Tax Agreements Fail at Home: A U.S. Example*, 41 BROOK. J. INT'L L. 1185, 1197–207 (2016) (describing Paul's concerns and his method of delaying the treaties); *see also* Jim Tankersley, *Senate Approves Tax Treaties for First Time in Decade*, N.Y. TIMES (July 17, 2019), *at* https://www.nytimes.com/2019/07/17/business/tax-treaties-vote.html ("Mr. Paul has long objected to those information-sharing provisions on privacy grounds, and he succeeded for years in holding up approval of the treaties.").

> Previous tax treaties were more focused on information specific to suspicions of tax fraud while requiring that serious allegations of tax wrongdoing were grounded in evidence. However, these new bulk collection treaties demand Americans' records under a vague standard that allows the government to access personal financial information that "may be relevant" through information exchanges between the U.S. and foreign governments—a standard extended to other governments, as well. This new, much lower and ambiguous threshold allows the government to access bank records for hardly any reason at all.
>
> . . .
>
> I certainly do not condone tax cheats, but I can't support a law that endangers regular foreign investment and punishes every American in pursuit of a few tax cheats. Most importantly, I cannot support a bulk collection tax treaty that has complete disregard for the important protections provided to every American by the Fourth Amendment.[3]

Senator Paul also cited the potential for these tax treaties to lead to implementation of a recently passed domestic law which, in his view, was also problematic with respect to taxpayer privacy.[4]

Of the four tax treaties that recently received advice and consent, the earliest treaty (Luxembourg) was submitted to the Senate in 2010.[5] The following year, the Senate Foreign Relations Committee voted to send the protocol to the full Senate, but Senator Paul invoked a procedural rule to make it challenging for entire Senate to vote on this protocol. The usual process for bringing a treaty to a vote on the Senate floor requires the unanimous consent of the Senate. In a break from common practice, Senator Paul began registering objections to tax treaties that prevented such unanimous consent.[6] While the Senate could have overridden Paul's request by voting in favor of cloture (a vote which would require sixty Senators in its favor), this could have led to delays in the other business of the Senate. If cloture occurs, Senate Rule XXII establishes that the issue in question "shall be the unfinished business to the exclusion of all other business until disposed of," which may amount to up to thirty hours of debate.[7] Given the other considerations facing the Senate, its membership opted not to seek cloture on the tax treaties reported out favorably by the Senate Foreign Relations Committee between 2011 and 2018.[8]

In June of 2019, the Senate Foreign Relations Committee once again reported the protocols with Spain, Switzerland, Japan, and Luxembourg favorably out of committee.[9] The U.S.

[3] Letter from Rand Paul, U.S. Senator, to Harry Reid, U.S. Senate Majority Leader (May 7, 2014), *available at* http://online.wsj.com/public/resources/documents/PaulLetter050714.pdf [https://perma.cc/5HT9-FPNP].

[4] *Id.*; *see also* Letter from Coalition of 23 Groups to Congress (Mar. 21, 2017), *available at* http://freedomandprosperity.org/files/2017-FATCA_repeal_coalition_ltr.pdf [https://perma.cc/GWW4-MLAU] (expressing concerns similar with respect to Paul's); *see also* John S. Wisiackas, Comment, *Foreign Account Tax Compliance Act: What It Could Mean for the Future of Financial Privacy and International Law*, 31 Emory Int'l L. Rev. 585, 606 (2017) (noting that Senator Paul's court case against this domestic law was dismissed for lack of standing and that the underlying information sharing policies of this law have not been ruled unconstitutional to date).

[5] Protocol Amending Tax Convention with Luxembourg, S. Treaty Doc. No. 111-8 (2010).

[6] *See* Ring, *supra* note 2, at 1205.

[7] Standing Rules of the Senate, Rule XXII(2), S. Doc. No. 113-18 (2013), *at* https://www.rules.senate.gov/rules-of-the-senate; Ring, *supra* note 2, at 1197–207.

[8] *See* Ring, *supra* note 2, at 1197–207.

[9] Senate Committee on Foreign Relations, Chairman's Press Release, Four Tax Treaties Approved in Foreign Relations Committee Business Meeting (June 26, 2019), *at* https://www.foreign.senate.gov/press/chair/release/four-tax-treaties-approved-in-foreign-relations-committee-business-meeting- (quoting the Chair, Senator Jim

Chamber of Commerce and multiple U.S. corporations strongly supported their approval.[10] On July 11, with the support of Senate Majority Leader Mitch McConnell, motions for cloture for all four treaties were brought to the Senate floor.[11] On July 16, the Senate voted for cloture on the protocol with Spain by a vote of 94 to 1, with Paul casting the sole "no" vote.[12] Following debate, the Senate then advised and consented to this protocol on the same day by a vote of 94 to 2, with the two "no" votes coming from Paul and Senator Mike Lee of Utah.[13] Presumably following an understanding reached with Paul, the cloture motions were withdrawn on the other three treaties and unanimous consent was given for votes to be held with respect to them.[14] On July 17, these three treaties were approved by overwhelming majorities.[15] As of mid-August 2019, none of the treaties have yet been ratified by the president.

During the debate over these treaties in the Senate, Paul was chided for his delaying tactics by McConnell who, like Paul, is a Republican Senator from Kentucky. McConnell remarked:

> [T]he years of delays in getting these noncontroversial treaties ratified have cost American businesses that employ American workers millions and millions of dollars.
>
> . . .
>
> I was curious to hear one colleague of ours come to the floor yesterday and passionately argue against what I have done as majority leader to support these agreements. . . .
>
> At every step, executive branch officials and Senate colleagues have tried to engage his concerns in good faith. But for 6 years in the case of the Spain treaty, 8 years with respect to Switzerland, and 9 years with respect to Luxembourg, he was unable to persuade anyone—over 9 years. In all of that time, no one was persuaded, partly because the changes he demanded don't solve a real problem, partly because they would have forced reopening the treaties for even more negotiations, and partly because everybody else was actually listening to the job creators who have been pleading with us for years to get this millstone

Risch, as saying: "[T]hese treaties have languished and awaited ratification for nearly a decade, and are incredibly important to our own citizens. I appreciate Leader McConnell's commitment to moving these treaties. I look forward to working with him to see that they are ratified by the full Senate.").

[10] *See, e.g.*, Letter from Business Roundtable et al. to James Risch, Chairman, Senate Comm. on Foreign Relations (Apr. 11, 2019), *available at* https://www.semiconductors.org/wp-content/uploads/2019/04/2019-Trade-Association-Letter-on-Tax-Treaties-to-all-Senate-Leadership-Risch-Letter-Final.pdf [https://perma.cc/SQ5U-QJEV]; Letter from Neil L. Bradley, Exec. Vice President, Chamber of Commerce of the United States, to James E. Risch & Bob Menendez, Senate Comm. on Foreign Relations (June 20, 2019), *available at* https://www.uschamber.com/letters-congress/us-chamber-letter-tax-treaties [https://perma.cc/PHU2-FHAB].

[11] 116th Cong., 165 CONG. REC. S4795-S4797 (daily ed. July 11, 2019).

[12] 116th Cong., 165 CONG. REC. S4847 (daily ed. July 16, 2019).

[13] U.S. Senate Resolution of Advice and Consent to Protocol Amending Tax Convention with Spain, 116th Cong., 165 CONG. REC. S4850 (daily ed. July 16, 2019).

[14] 165 CONG. REC. S4795-S4797 *Supra* note 12 (statement of Sen. Risch and the noted lack of objection to his request for unanimous consent). Senator Risch also noted that the Senate would have an opportunity to vote on an amendment proposed by Paul to the resolution of advice and consent for the Spain protocol. *Id.* The amendment was rejected by an overwhelming majority. 116th Cong., 165 CONG. REC. S4849 (daily ed. July 16, 2019) (rejecting Paul's proposed amendment, with the vote being four in favor and ninety-two against).

[15] 116th Cong., 165 CONG. REC. S4875-S4878 (daily ed. July 17, 2019) (including the roll call for the treaties, which passed 95–2 (Japan), 95–2 (Switzerland), and 93–3 (Luxembourg)). The "no" votes on the treaties were Paul and Lee and, for the Luxembourg treaty, Senator Dick Durbin of Illinois. *Id.* Durbin had previously expressed skepticism about the importance of the Luxembourg treaty measured against other legislative priorities. 116th Cong., 165 CONG. REC. S4830 (daily ed. July 16, 2019) (statement of Sen. Durbin).

> off their necks. There were 9 years—9 years of rejecting reasonable counteroffers and accommodations, 9 years of working to hold up these treaties and trying to sell the Obama administration, the Trump administration, and his Senate colleagues on an off-the-wall story that failed to persuade anyone.
>
> Look, I am a patient man, but my patience is not inexhaustible. After unanimous consent was denied on multiple occasions, I determined, after consulting with the Treasury Secretary and the Chairman of the Foreign Relations Committee, that I would prepare to file cloture on these tax protocols. . . .
>
> . . .
>
> Year after year, money that could have been immediately used to hire Americans or make new investments had to either be frozen up or handed over in duplicate taxes—all in large part because one of our colleagues could not accept that one single senator who hasn't persuaded his fellow Members is not entitled to singlehandedly rewrite international treaties.[16]

Following the passage of these four tax protocols, the Senate continues to have before it bilateral tax treaties with Hungary, Chile, and Poland, as well as a protocol to a multilateral tax treaty.[17] All of these treaties had been reported favorably out by the Senate Foreign Relations Committee in prior years,[18] only to fail to receive floor votes and therefore be returned to the Committee at the end of the legislative session. The three bilateral treaties remain stalled in the Senate Foreign Relations Committee, apparently due in part to a Treasury Department request for the addition of a new reservation to each treaty.[19] It remains to be seen when these treaties will advance out of committee and, if so, whether they will receive floor votes.

[16] 116th Cong., 165 CONG. REC. S4872-S4873 (daily ed. July 17, 2019) (statement of Sen. McConnell).

[17] *See* U.S. Dep't of State, *Treaties Pending in the Senate* (July 17, 2019), *at* https://www.state.gov/treaties-pending-in-the-senate [https://perma.cc/FF4Z-2ZDV].

[18] For the earlier actions of the Senate Foreign Relations Committee reporting these treaties out of committee, see Tax Convention with Hungary, S. EXEC. REP. NO. 112-4 (2011), *at* https://www.congress.gov/congressional-report/112th-congress/executive-report/4 [https://perma.cc/HM2P-GDDW]; Tax Convention with Chile, S. EXEC. REP. NO. 113-9 (2014), *at* https://www.congress.gov/congressional-report/113th-congress/executive-report/9 [https://perma.cc/PG53-Z529]; Tax Convention with Poland, S. EXEC. REP. NO. 113-11 (2014), *at* https://www.congress.gov/congressional-report/113th-congress/executive-report/11 [https://perma.cc/GE35-BUVC]; Protocol Amending Multilateral Convention on Mutual Administrative Assistance in Tax Matters, S. EXEC. REP. 113-8 (2014), *at* https://www.congress.gov/congressional-report/113th-congress/executive-report/8.

[19] *See* Letter from Robert Menendez, Ranking Member, Senate Comm. on Foreign Relations, to Steven T. Mnuchin, Sec'y, U.S. Dep't Treasury (June 11, 2019), *available at* https://www.foreign.senate.gov/imo/media/doc/06-11-19%20RM%20letter%20to%20Mnuchin%20re%20Tax%20Treaties.pdf [https://perma.cc/4PYE-LXHJ] (expressing concern and confusion about a reservation the Treasury Department sought to add concerning the "base erosion anti-abuse tax" and enquiring whether this addition would require the international renegotiation of these treaties).

INTERNATIONAL ORGANIZATIONS

United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process

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With only three remaining members of what is supposed to be a seven-member body, the World Trade Organization's (WTO) Appellate Body may soon cease to function. Since 2016, the United States has blocked the reappointment of Appellate Body members and rejected over a dozen proposals to launch selection processes that could fill the remaining vacancies. As a lead reason for these blocks, the United States has cited concerns about the practice whereby members whose terms have expired continue to serve on appeals to which they were previously appointed. On December 10, 2019, the terms of two Appellate Body members will expire, leaving only one member remaining. Because the WTO's dispute settlement process requires three Appellate Body members for each appeal, WTO members will be unable to make any new appeals by this year's end unless a solution emerges to the current impasse.

When a conflict arises between WTO member states over an obligation, members often proceed through the WTO's dispute resolution mechanism. The mechanism, as laid out by the Dispute Settlement Understanding (DSU), consists of consultations, a panel report, and, if the parties choose, an appeal before three members of the WTO Appellate Body.[1] The Appellate Body is comprised of seven persons who each serve for a four-year term with the possibility of a one-time reappointment.[2] Through the Dispute Settlement Body (DSB), representatives from all WTO member states select Appellate Body members using the practice of consensus, which means that any matter submitted for the DSB's consideration is accepted—unless a present member "formally objects to the proposed decision."[3] The three members of the Appellate Body appointed for a particular case have the authority to "uphold, modify or reverse" panel-made legal conclusions or interpretations and must issue their report within ninety days.[4] In practice, Appellate Body reports provide the only

[1] Lasting from 1986 to 1994, the Uruguay Round of Negotiations established the current dispute resolution system. World Trade Organization, *Understanding the WTO: Basics: The Uruguay Round*, *at* https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm. After consultation attempts and a request by the complaining party, the Dispute Settlement Body (DSB) selects a panel to issue a report including factual findings and legal conclusions. Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Arts. 4, 6, 7, 11, 12, Apr. 15, 1994, 1869 UNTS 401, 33 ILM 1226 [hereinafter DSU]. The panel's final report is circulated to all WTO members and, unless appealed or rejected by consensus, becomes the DSB's final ruling or recommendation. *Id.* Art. 16.

[2] DSU, *supra* note 1, Art. 17(1)–(2). The DSU provides that the Appellate Body should be comprised of "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally." *Id.* Art. 17(3).

[3] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Arts. IV(2)–(3), IX(1), n. 1, Apr. 15, 1994, 1867 UNTS 154, 33 ILM 1144 [hereinafter WTO Agreement]; DSU, *supra* note 1, Arts. 2(4), 17(2).

[4] DSU, *supra* note 1, Arts. 17(6), 17(13). Specifically, appellate proceedings "shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report." *Id.* Art. 17(5). If the Appellate Body is unable to circulate a report within sixty days, it must "inform the DSB in writing of the reasons for the delay" and "[i]n no case shall the proceedings exceed 90 days." *Id.*

avenue for obtaining a binding resolution in many WTO disputes since, once a panel report has been appealed, the DSB cannot act on the matter until the completion of the appeal.[5]

Currently, the Appellate Body only has three serving members, two of whom have second terms ending on December 10, 2019.[6] The Appellate Body's low member count is due mainly to the United States' continued objections to reappointments and to the selection processes for new Appellate Body members over the last three years.[7] Under the Obama administration, the United States objected in 2016 to the reappointment of Seung Wha Chang (South Korea), citing its view that Chang had deviated from Appellate Body responsibilities.[8]

The administration of President Trump has raised still broader concerns about the WTO Appellate Body. During Trump's first year as president, Mexico introduced a joint proposal by dozens of WTO member states urging that the DSB launch a selection process to fill three upcoming Appellate Body vacancies.[9] The United States refused to support the proposal because one of the Appellate Body members had "continue[d] to serve on an appeal, despite ceasing to be a member of the Appellate Body nearly 5 [five] months ago."[10] The practice of Appellate Body members serving on appeals past their term is rooted in Rule 15 of the Working Procedures for Appellate Review, which provides:

Unless the DSB "decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members," it adopts the report, and the parties to the dispute must accept the Appellate Body's holdings. *Id.* Art. 17(14).

[5] *See* DSU, *supra* note 1, Art. 16. In a drafted reform proposal, the European Union expressed concern that without a functioning Appellate Body, "any party to the dispute may attempt to block the adoption of panel rulings (by appealing it) . . . ." Council of the European Union, *Note for the Attention of the Trade Policy Committee: WTO – EU's Proposals on WTO Modernisation*, at 14, WK 8329/2018 INIT (July 5, 2018), *available at* http://src.bna.com/Aoe [https://perma.cc/CQ4S-3N2N] [hereinafter Drafted EU Proposal].

[6] These two members are Ujal Singh Bhatia (India) and Thomas R. Graham (United States). World Trade Organization, *Dispute Settlement Members: Appellate Body Members*, *at* https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm [https://perma.cc/5CVE-J2H5]. Their terms will end on December 10, 2019, leaving only Hong Zhao (China) remaining until his first term ends on November 30, 2020. *Id.* It remains to be seen whether Graham will continue to participate in appeals that were pending prior to the end of his term. Should he not do so, then the Appellate Body would be without a quorum for those appeals as well as for new ones. *See* Simon Lester, *Clarifying Tom Graham's Status on the Appellate Body*, Int'l Econ. L. & Pol'y Blog (Sept. 23, 2019), *at* https://ielp.worldtradelaw.net/2019/09/clarifying-tom-grahams-status-on-the-appellate-body.html (reporting that Graham had made a "neutral statement about being undecided on how to approach cases after the expiration of his term").

[7] The U.S. decision to block reappointments or initial appointments is not unprecedented. For a discussion about two blocks the United States made in 2011 and 2014, see Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 110 AJIL 573, 576 (2016).

[8] Statement by the United States at the Meeting of the WTO Dispute Settlement Body, at 1 (May 23, 2016), *available at* https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf [https://perma.cc/ML7M-8T9X]. For more detailed information about the United States' 2016 decision to block Chang's reappointment to the WTO Appellate Body, see generally Daugirdas & Mortenson, *supra* note 7.

[9] Proposal by Argentina, Brazil, Chile, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609, *at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=243206,241536,240077&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/WRK7-CVJM]; World Trade Organization Press Release, WTO Sets Up Panel to Review UAE Measures on Goods, Services, IP Rights (Nov. 22, 2017), *at* https://www.wto.org/english/news_e/news17_e/dsb_22nov17_e.htm [https://perma.cc/8NLG-P4QZ].

[10] Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 13 (Nov. 22, 2017), *available at* https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB_.pdf [https://perma.cc/E6KB-CH9F] [hereinafter November 2017 U.S. Statement].

> A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.[11]

Although the Appellate Body has unquestioned authority to draft and implement appellate procedural rules, the United States specifically takes issue with Rule 15 insofar as the rule allows the Appellate Body "to deem someone who is not an Appellate Body member to be a member."[12] The United States has pointed to Article 17(2) of the DSU which states in full:

> The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.[13]

The United States explained in a statement that under Article 17(2), "the DSB has a responsibility under the DSU to decide whether a person whose term of appointment has expired should continue serving," and that "Members need to discuss and resolve that issue first before moving on to the issue of replacing such a person."[14]

From January to May 2018, member states submitted the proposal to fill the three vacancies four more times, each time with additional WTO member states joining the proposal.[15] The United States continued to reject the proposals, again citing to Rule 15:

[11] Appellate Body, *Working Procedures for Appellate Review*, WTO Doc. WT/AB/WP/6 (Aug. 16, 2010). The rules as they existed at the time of this writing can be found permanently here: https://perma.cc/A7GH-L3EX.

[12] The DSU provides that "[w]orking procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information." DSU, *supra* note 1, Art. 17(9). For an articulation of the U.S. position on this issue, see Office of the U.S. Trade Representative, 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program, at 25–26 (2018), *available at* https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF [https://perma.cc/TZP9-SJFC].

[13] DSU, *supra* note 1, Art. 17(2).

[14] November 2017 U.S. Statement, *supra* note 10, at 13.

[15] Proposal by Argentina, Australia, Brazil, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609/Rev.1 (Jan. 11, 2018), *at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=243206,241536,240077&CurrentCatalogueIdIndex=1&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/DE3G-MNH5]; Proposal by Argentina, Australia, Bolivia, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609/Rev.2 (Feb. 15, 2018), *at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=243206,241536,240077&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/G2GP-Q2AG]; Proposal by Argentina, Australia, Bolivia, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609/Rev.3 (Apr. 16, 2018), *at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=255590,254971,253363,252364,251578,250293,249527,248090,245255,244608&CurrentCatalogueIdIndex=9&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/G72H-RUV8]; Proposal by Argentina, Australia, Bolivia, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609/Rev.4 (May 17, 2018), *at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=255590,254971,253363,252364,251578,250293,249527,248090,245255,244608&CurrentCatalogueIdIndex=8&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/QEC7-XN3Z].

> For at least the past 8 months, the United States has been raising and explaining the systemic concerns that arise from the Appellate Body's decisions that purport to "deem" as an Appellate Body member someone whose term of office has expired and thus is no longer an Appellate Body member, pursuant to its Working Procedures for Appellate Review (Rule 15).
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> . . .
>
> [U]nlike other international tribunals . . . , Rule 15 is not set out in the constitutive text of the WTO dispute settlement system—that is, the DSU. It has therefore not been agreed to by WTO Members.[16]

In August 2018, another appellate body member, Mr. Shree Baboo Chekitan Servansing, faced an approaching end date to his first term.[17] Causing the fourth vacancy on the Appellate Body, the United States announced at a WTO meeting that it "[was] not prepared to support [his] reappointment."[18] The United States explained that its position was "no reflection on any one individual but reflect[ed] [its] principled concerns."[19] The United States again grounded its decision in Rule 15 while also articulating several new areas of contention:

> The United States has raised repeated concerns that appellate reports have gone far beyond the text setting out WTO rules in varied areas, such as subsidies, antidumping duties, anti-subsidy duties, standards and technical barriers to trade, and safeguards, restricting the ability of the United States to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices.
>
> On procedural, systemic issues, for example, the Appellate Body has issued advisory opinions on issues not necessary to resolve a dispute, reviewed panel fact-finding despite appeals being limited to legal issues, asserted that panels must follow its reports although there is no system of precedent in the WTO, and continuously disregarded the 90-day mandatory deadline for appeals—all contrary to the WTO's agreed dispute settlement rules.
>
> And for the last year, the United States has been calling for WTO Members to correct the situation where the Appellate Body acts as if it has the power to permit ex-Appellate Body members to continue to decide appeals even after their term of office—as set by the WTO Members—has expired. This so-called "Rule 15" is, on its face, another example of the Appellate Body's disregard for the WTO's rules.

[16] Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 23 (May 28, 2018), *available at* https://geneva.usmission.gov/wp-content/uploads/sites/290/May28.DSB_.Stmt_.as-deliv.fin_.public.Rev_.pdf [https://perma.cc/7Z2P-PUSY].

[17] Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 38 (Aug. 27, 2018), *available at* https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_.public.pdf [https://perma.cc/C6MC-PYBX] [hereinafter August 2018 U.S. Statement]; Proposal by Argentina, Australia, Bolivia, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609/Rev.5 (Sept. 13, 2018), *at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=255590,254971,253363,252364,251578,250293,249527,248090,245255,244608&CurrentCatalogueIdIndex=7&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/RGX7-NVQ8].

[18] August 2018 U.S. Statement, *supra* note 17, at 38.

[19] *Id.*

> Our concerns have not been addressed. . . .[20]

In an attempt to address the persistent U.S. refusal to permit the selection of new Appellate Body members, the European Union, China, Canada, Mexico, and several other WTO member states submitted a proposal at the December 12, 2018 WTO General Council Meeting.[21] The member states expressed "deep[] concern[] that the enduring absence of consensus in the [DSB] to fill the vacancies on the Appellate Body risks undermining the viability of the WTO dispute settlement system."[22] The proposal suggested five different amendments to the DSU which involved: (1) permitting outgoing Appellate Body members to "complete the disposition of a pending appeal in which a hearing has already taken place during that member's term"; (2) allowing parties to agree to extend the ninety-day timeframe in which Appellate Body panels must issue a report; (3) requiring clarification that issues of law and legal interpretation "do not include the meaning itself of [] municipal measures" in panel reports; (4) "provid[ing] that the Appellate Body shall address each of the issues raised on appeal by the parties to the dispute to the extent this is necessary for the resolution of the dispute"; and (5) hosting annual meetings between the Appellate Body and the DSB where members can discuss the Appellate Body's jurisprudence.[23] Stressing the proposal's importance, Commissioner Malmström of the European Union stated that "[t]he appellate body function of the WTO dispute settlement system is moving towards a cliff's edge" and that "[w]ithout this core function of the WTO, the world would lose a system that has ensured stability in global trade for decades."[24]

The United States responded with disinterest to the proposed amendments, although it provided little reasoning as to why the proposals were unacceptable or unworkable:

[20] *Id.* at 37. Following the U.S. announcement, Trump told news reporters that if the WTO did not "shape up," he would withdraw the United States from the WTO. John Micklethwait, Margaret Talev & Jennifer Jacobs, *Trump Threatens to Pull U.S. Out of WTO if It Doesn't "Shape Up,"* BLOOMBERG (Aug. 31, 2018), *at* https://www.bloomberg.com/news/articles/2018-08-30/trump-says-he-will-pull-u-s-out-of-wto-if-they-don-t-shape-up. Trump recently threatened to leave the WTO again during a visit to Pennsylvania. White House Press Release, Remarks by President Trump on American Energy and Manufacturing | Monaca, PA (Aug. 13, 2019), *at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-american-energy-manufacturing-monaco-pa/ [https://perma.cc/7H5R-DUHU] ("We were losing all our cases in the World Trade Organization. Almost every case, we were — lost, lost, lost. They thought we were stupid. . . . We will leave, if we have to. And all of the sudden, we're winning a lot of cases."). The U.S. congressional act implementing the WTO's Uruguay Round of Agreements provides that "[t]he approval of the Congress . . . of the WTO Agreement shall cease to be effective if, and only if, a joint resolution . . . is enacted into law . . . ." 19 U.S.C.A. § 3535(b)(1). The implementing legislation further specifies that such a joint resolution will employ the following text: "That the Congress withdraws its approval, provided under section 101(a) of the Uruguay Round Agreements Act, of the WTO Agreement as defined in section 2(9) of that Act." *Id.* § 3535(c)(1).

[21] Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council, WTO Doc. WT/GC/W/752 (Nov. 26, 2018), *available at* https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157514.pdf [https://perma.cc/VP6L-GDAZ] [hereinafter December 2018 Reform Proposal]. This proposal was an adaptation of one originally drafted in mid-2018. Drafted EU Proposal, *supra* note 5.

[22] December 2018 Reform Proposal, *supra* note 21, at 1.

[23] *Id.* at 1–3.

[24] European Comm'n Press Release, WTO Reform: EU Proposes Way Forward on the Functioning of the Appellate Body (Nov. 26, 2018), *at* https://europa.eu/rapid/press-release_IP-18-6529_en.htm [https://perma.cc/F65E-PEB9].

> We recognize the proposals presented by some WTO Members at the December 12 meeting of the General Council. These proposals to some extent acknowledge the systemic concern the United States has been raising in the WTO for years—namely, that the Appellate Body has strayed from the role agreed for it by WTO Members.
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> . . .
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> However, on a close reading, the proposals would not effectively address the concerns that WTO Members have raised. The United States has made its views on these issues very clear: if WTO Members say that we support a rules-based trading system, then the Appellate Body must follow the rules we agreed in 1995.[25]

Despite the apparent U.S. intransigence, member states continued to request a selection process be launched to fill the body's four vacancies.[26] Beginning in June 2019, member states requested two additional selection processes be launched for Mr. Ujal Singh Bhatia and Mr. Thomas Graham, who both have their second four-year terms ending on December 10, 2019.[27] At an August 15 meeting, the United States rejected this proposal to fill the now six vacancies that will exist on the Appellate Body.[28]

Several member states have questioned whether the U.S. practice of Appellate Body blocking violates Article 17(2) of the DSU, which states that "[v]acancies *shall* be filled as they arise."[29] At a DSB meeting earlier this year, over twenty WTO member states tried to present the argument that Article 17(2) places a legal obligation on the United States and all other members to fill appellate body vacancies.[30] The United States responded to these concerns with the following:

[25] Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 44 (Dec. 18, 2018), *available at* https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf [https://perma.cc/Q4HS-RWF6]. In this statement, the United States also provided an extensive legal analysis for why it believes the Appellate Body engages in a "misguided" practice when it uses reports as precedents "absent cogent reasons." *Id.* at 10–35.

[26] *See* Proposal by Argentina, Australia, Benin, et al., Appellate Body Appointments, WT/DSB/W/609/Rev.10 (Apr. 15, 2019), *at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=256059,255590,254971,253363,252364,251578,250293,249527,248090,245255&CurrentCatalogueIdIndex=3&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/38JA-4RMZ].

[27] Proposal by Argentina, Australia, Benin, et al., Appellate Body Appointments, WT/DSB/W/609/Rev.11 (June 13, 2019), *at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=256059,255590,254971,253363,252364,251578,250293,249527,248090,245255&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/XRW5-F2TK].

[28] Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 30 (Aug. 15, 2019), *available at* https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug15.DSB_.Stmt_.as-deliv.fin_.public.pdf [https://perma.cc/2KGG-J7YL].

[29] DSU, *supra* note 1, Art. 17(2) (emphasis added).

[30] World Trade Organization Press Release, Members Consider Thai Request for Panel to Rule on Turkish Air Conditioner Duties (Feb. 25, 2019), *at* https://www.wto.org/english/news_e/news19_e/dsb_25feb19_e.htm [https://perma.cc/AQW5-HV8V]. Argentina, Brazil, Colombia, Chile, Guatemala, Mexico, and Peru also presented Article 17(2)'s "shall" language regarding the Appellate Body selection process in late 2017. Communication from Argentina, Brazil, et al., Proposal Regarding the Appellate Body Selection Process, WTO Doc. WT/DSB/W/596/Rev.5 (Oct. 12, 2017), *available at* https://www.ip-watch.org/weblog/wp-content/uploads/2017/10/Proposal-Appellate-Body-Selection-Process-Ar-Bz-Col-Chil-Guat-Mex-Peru.pdf [https://perma.cc/4F5A-8GVY].

> We note that several Members, including Mexico, the EU, Canada, and China, have referenced the "shall" in the third sentence of Article 17.2 of the DSU.
>
> We would ask these Members to share their views on the "shall" in the first sentence of that article. That sentence reads, in part, that "[t]he DSB shall appoint persons to serve on the Appellate Body. . .".
>
> Do these Members agree that this provision makes clear that it is the DSB that has the authority to appoint and reappoint members of the Appellate Body? And that the DSB—not the Appellate Body—has the responsibility to decide whether a person whose term of appointment has expired should continue serving, as if a member of the Appellate Body, on any pending appeals?
>
> Can these Members share their views on the "shall" in Article 17.5 of the DSU? As the text of Article 17.5 provides that "[i]n no case shall the proceedings exceed 90 days", do these Members agree that the Appellate Body breaches this provision when it issues a report beyond the 90-day deadline?
>
> What are these Members' views on the "shall" in Article 17.6? This article provides that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." Do these Members agree that the Appellate Body does not respect this text when it engages in review of panel findings of fact?
>
> We look forward to hearing these Members' views on these questions.[31]

Although the United States skirted the issue of whether it has an obligation to fill vacancies on the Appellate Body, a recent statement by U.S. Ambassador Dennis Shea at the WTO General Council Meeting recognized that the term "shall" is "mandatory" with respect to the rule requiring the Appellate Body to issue a report within ninety days of an appeal.[32]

Some practitioners and scholars have suggested various workarounds that could be used if the ongoing disagreements are not resolved. During his farewell speech, former Appellate Body member Peter Van den Bossche suggested that "if consensus among all WTO members on such reforms is not possible, a coalition of willing WTO members should consider establishing a new parallel dispute settlement system that would copy the existing, but dysfunctional, DSU, in order to settle WTO disputes between them in an orderly and rules-based manner."[33] Jennifer Hillman has suggested turning to an arbitration process in place of the dispute settlement mechanism using Article 25 of the DSU.[34] Ernst-Ulrich Petersmann has

[31] Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 13–14 (Feb. 25, 2019), *available at* https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb25.DSB_.Stmt_.as-deliv.fin_.public.pdf [https://perma.cc/W4JF-Z4TN] (formatting omitted).

[32] U.S. Mission to International Organizations in Geneva, Statements Delivered by Ambassador Dennis Shea – WTO General Council Meeting (July 23, 2019), *at* https://geneva.usmission.gov/2019/07/23/statements-delivered-by-ambassador-dennis-shea-wto-general-council-meeting-july-23-2019 [https://perma.cc/YZ5F-XR8Y].

[33] World Trade Organization Press Release, Farewell Speech of Appellate Body Member Peter Van den Bossche (May 28, 2019), *at* https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm [https://perma.cc/3RA7-TT7K].

[34] Jennifer Hillman, *Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly?*, INST. INT'L ECON. L., at 8–9 (2018), *available at* https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf. Article 25 states that "[e]xpeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes

suggested interpreting the foundational agreements underlying the WTO in a way that offers an escape valve from the consensus procedure with respect to the selection of Appellate Body members.[35]

The Trump administration has been less than clear in articulating a path forward.[36] As of mid-August, there is no indication that the United States will agree to a solution before this December when the terms for two of the three remaining Appellate Body members end.[37] When criticized over the summer for its lack of engagement to date in finding a workable solution, the United States submitted:

> [W]e have made clear our willingness to discuss these concerns further with any Member in order to deepen each other's understanding of these substantive issues. . . .
>
> . . .
>
> Unfortunately, one, or perhaps a few, WTO Members have indicated they do not share the concerns of the United States that the Appellate Body has deviated from the DSU text. These Members have not, however, adequately or persuasively explained how they could read the plain DSU text differently. . . .
>
> So the United States continues, as it has always done, to be engaged on these important substantive issues, including by meeting regularly with the Facilitator and Members to exchange views on the issues under discussion.
>
> . . . In other words, Members need to engage in a deeper discussion of *why* the Appellate Body has felt free to depart from what Members agreed to.
>
> Engagement is a two-way street. Without further engagement from WTO Members on the cause of the problem, there is no reason to believe that simply adopting new or additional language, in whatever form, will be effective in addressing the concerns that the United States and other Members have raised.[38]

that concern issues that are clearly defined by both parties." DSU, *supra* note 1, Art. 25(1). But "resort to arbitration shall be subject to mutual agreement of the parties" making it an unequal replacement to the WTO's current dispute settlement mechanism. *Id.* Art. 25(2); Hillman, *supra* note 34, at 9.

[35] Ernst-Ulrich Petersmann, *Petersmann on "How Should WTO Members Respond to the WTO Appellate Body Crisis?,"* Int'l Econ. L. & Pol'y Blog (Dec. 13, 2018), *at* https://worldtradelaw.typepad.com/ielpblog/2018/12/ulli-petersmann-on-how-should-wto-members-respond-to-the-wto-appellate-body-crisis.html.

[36] *See* Simon Lester, *What Does the U.S. Want to See Happen with Appellate Body Reform?*, Int'l Econ. L. & Pol'y Blog (July 23, 2019), *at* https://ielp.worldtradelaw.net/2019/07/what-does-the-us-want-to-happen-with-appellate-body-reform.html (questioning whether the United States is hoping for the Appellate Body to change its behavior on its own or for the DSB to pass amendments to the Dispute Settlement Understanding which would force the Appellate Body to change).

[37] Trump's 2019 Trade Agenda was unenlightening. Office of the U.S. Trade Representative, 2019 Trade Policy Agenda and 2018 Annual Report of the President of the United States on the Trade Agreements Program, at 149 (2019), *available at* https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf [https://perma.cc/TT4N-BS4Y] ("The United States will continue to raise its systemic concerns with Appellate Body overreaching and press for WTO Members to take responsibility to ensure the WTO dispute settlement system operates as intended and agreed in the DSU. . . . Participants will continue to consider reform proposals in 2019.").

[38] Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 30–31 (July 22, 2019), *available at* https://geneva.usmission.gov/wp-content/uploads/sites/290/Jul22.DSB_.Stmt_.as-deliv.fin_.public.pdf [https://perma.cc/28GE-PJSC] (formatting omitted). Some member states have agreed with certain U.S. positions regarding the Appellate Body. For example, China agreed with the United States that "the

The fate of the WTO Appellate Body adds more uncertainty to the brewing global trade developments under Trump's administration. Trade negotiations have continued between the United States and China and appeared to make progress in late July of 2019 when China agreed to increase purchases of U.S. agricultural exports.[39] But then, in early August, Trump tweeted that the United States will "put[] a small additional Tariff of 10% on the remaining 300 Billion Dollars of goods and products coming from China into our Country" in addition to the "250 Billion Dollars already Tariffed at 25%," which would go into effect on September 1 or December 15, depending on the article.[40] When China retaliated by placing tariffs on $75 billion of U.S. products, Trump tweeted again later that month that "[s]tarting on October 1st, the 250 BILLION DOLLARS of goods and products from China, currently being taxed at 25%, will be taxed at 30%," and that the products "being taxed from September 1st at 10% will now be taxed at 15%."[41] With respect to trade relations across the Atlantic, Trump recently announced that the United States signed an agreement with the European Union "mak[ing] it easier to export American beef," with the goal that duty-free American beef exports would increase by ninety percent over the next seven years.[42] In statements to reporters, however, Trump described the beef agreement as only breaking the "first barrier" and that "[a]uto tariffs are never off the table."[43] Adding to the force of Trump's statements, earlier this year the U.S. Court of International Trade assessed the legality of Trump's 2018 steel and aluminum tariffs and held that Congress

Appellate Body should only address the issues appealed by the parties to the dispute and refrain from making findings on the issues that neither party appealed but said concerns about this should not be used to block the launch of the Appellate Body selection process." World Trade Organization Press Release, Panels Established to Examine Pakistani Duties on Film, Korean Duties on Steel (Oct. 29, 2018), *at* https://www.wto.org/english/news_e/news18_e/dsb_29oct18_e.htm. More broadly, member states have expressed "their willingness to discuss the US concerns" with the condition that "the resolution of those concerns [] not be linked to the launching of the selection process." World Trade Organization Press Release, Qatar Seeks WTO Panel Review of UAE Measures on Goods, Services, IP Rights (Oct. 23, 2017), *at* https://www.wto.org/english/news_e/news17_e/dsb_23oct17_e.htm.

[39] White House Press Release, Statement from the Press Secretary (July 31, 2019), *at* https://www.whitehouse.gov/briefings-statements/statement-press-secretary-71 [https://perma.cc/5CFC-SMFE].

[40] Donald J. Trump (@realDonaldTrump), Twitter (Aug. 1, 2019, 10:26 AM), *at* https://twitter.com/realDonaldTrump/status/1156979446877962243 [https://perma.cc/3CS4-M6EY]. Trump's tweet had announced that all goods would have an additional 10% tariff starting on September 1, 2019, *id.*; however, the U.S. Trade Representative recently announced that the additional tariff would be delayed for certain articles such as "cell phones, laptop computers, video game consoles . . . ." U.S. Trade Representative Press Release, USTR Announces Next Steps on Proposed 10 Percent Tariff on Imports from China (Aug. 13, 2019), *at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/august/ustr-announces-next-steps-proposed# [https://perma.cc/KC82-4Y5M]. For a longer discussion about the tariffs already imposed on China, see Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 751, 751–53 (2018).

[41] Donald J. Trump, (@realDonaldTrump), Twitter (Aug. 23, 2019, 2:00 PM), *at* https://twitter.com/realDonaldTrump/status/1165005929831702529 [https://perma.cc/R9BF-ZYAU]; Alan Rappeport & Keith Bradsher, *Trump Says He Will Raise Existing Tariffs on Chinese Goods to 30%*, N.Y. Times (Aug. 23, 2019), *at* https://nyti.ms/30oNQEV. Trump later announced that these tariffs would be delayed by several weeks, amid the continuation of trade negotiations between the United States and China. Ana Swanson, *Trump Delays Planned Tariff Increase in "Gesture of Good Will" to China*, N.Y. Times (Sept. 11, 2019), *at* https://www.nytimes.com/2019/09/11/us/politics/trump-counterfeit-drugs-china.html.

[42] Donald J. Trump, Remarks on the Signing of a European Union-United States Trade Agreement, 2019 Daily Comp. Pres. Doc. No. 532, at 1 (Aug. 2).

[43] Donald J. Trump, Remarks in an Exchange with Reporters Prior to Departure for Bedminster, New Jersey, 2019 Daily Comp. Pres. Doc. No. 533, at 7 (Aug. 2).

does have the constitutional authority to delegate such tariff-imposing responsibilities to the president.[44]

International Oceans, Environment, Health, and Aviation Law

United States Resists Efforts to Have the Arctic Council Make Climate-Related Statement

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The Arctic Council convened for the eleventh time in early May 2019 in Rovaniemi, Finland, for a two-day conference. On May 7, the Arctic Council released a Joint Ministerial Statement that affirmed the desire of the eight member states to work together to face upcoming challenges but made no substantive commitments and no mention of climate change. In remarks to the Council, Secretary of State Mike Pompeo expressed wariness about collective decision making and warned against potential effects of Chinese activity in the Arctic.

In its final statement, the Arctic Council focused on the member states' commitment to each other rather than on specific policies:

> Reaffirming our commitment to maintain peace, stability and constructive cooperation in the Arctic,
>
> Emphasizing the role of Arctic States in providing leadership in addressing new opportunities and challenges in the Arctic, working in close cooperation with the Permanent Participants,
>
> Recognizing the diversity of the societies, cultures and economies in the Arctic, reaffirming our commitment to the well-being of the inhabitants of the Arctic, to sustainable development and to the protection of the Arctic environment,
>
> . . . .
>
> [We] [w]elcome the ongoing strategic work, and instruct the Senior Arctic Officials to continue strategic planning, in order to provide guidance and improve the efficiency and effectiveness of the Arctic Council, further instruct the SAOs to review the roles of the Ministerial meetings, the Senior Arctic Officials and the Permanent Participants, and to report to Ministers in 2021 . . . .[1]

Notably missing from the final statement were any substantive decisions and any mention of climate change.[2] The Arctic Council Chair, Finnish Minister for Foreign Affairs Timo

[44] Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019). For legal analysis of this issue, see Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump's New Tariffs on Mexico*, Lawfare (June 3, 2019), *at* https://www.lawfareblog.com/legal-authority-behind-trumps-new-tariffs-mexico.

[1] Arctic Council Press Release, Rovaniemi Joint Ministerial Statement (May 7, 2019), *available at* https://oaarchive.arctic-council.org/bitstream/handle/11374/2342/Rovaniemi%20Joint%20Ministerial%20Statement_2019_Signed.pdf?sequence=1&isAllowed=y.

[2] *Id.*

Soini, provided additional information through a separate statement, indicating that climate change was a concern of a majority of members:

> A majority of us noted with concern the [Intergovernmental Panel on Climate Change] Special Report on Global Warming of 1.5°C and its findings, and emphasized the importance of mitigation and adaptation actions to limit the impacts of climate change on Arctic communities as well as on Arctic cryosphere and ecosystems,
>
> The meeting welcomed the Arctic Climate Change Update 2019 report, and a majority of us underlined that changes in Arctic ecosystems have serious consequences for people who rely on and benefit from them, and called on the Arctic Council to continue monitoring and assessing changes taking place in the Arctic, in collaboration with relevant international organizations . . . .[3]

Media reports indicated that the United States objected to any mention by the Council of either climate change or the Paris Agreement, to the frustration of other Council members.[4] In his remarks to the Council, Pompeo signaled some skepticism about collective agreements but asserted American environmental leadership:

> This forum that we're in today embodies many of the characteristics that we'd all like to see in multilateral forum all around the world; it's built on the bedrock principles of individual sovereignty, voluntary cooperation, and shared responsibility . . . .
>
> . . .
>
> In addition to sharing our vision, I also came here to listen. I've appreciated this opportunity today to hear from each of you, including on topics that we don't always agree on. Even on those topics, I think it is the case that we tend to agree much more than we disagree. For example, the Trump administration shares your deep commitment to environmental stewardship. In fact, it's one reason Chinese activity, which has caused environmental destruction in other regions, continues to concern us in the Arctic. . . .
>
> Collective goals, even when well-intentioned, are not always the answer. They're rendered meaningless, even counterproductive, as soon as one nation fails to comply. Regardless of whether our goal is in place, the United States strives to operate with honesty and transparency. Though we are not signing on to the collective goal for reduction of black carbon, America nonetheless recently reported the largest

[3] Arctic Council Press Release, Statement by the Chair, at 1, *available at* https://arctic-council.org/images/PDF_attachments/Rovaniemi-Statement-from-the-chair_FINAL_840AM-7MAY.pdf.

[4] *See* Anne Gearan, Carol Morello & John Hudson, *Trump Administration Pushed to Strip Mention of Climate Change from Arctic Policy Statement*, WASH. POST (May 2, 2019), *at* https://www.washingtonpost.com/politics/trump-administration-pushed-to-strip-mention-of-climate-change-from-arctic-policy-statement/2019/05/02/1dabcd5e-6c4a-11e9-8f44-e8d8bb1df986_story.html (quoting a source as stating that '"There have been challenges in the negotiations with the United States'"); Somini Sengupta, *United States Rattles Arctic Talks with a Sharp Warning to China and Russia*, N.Y. TIMES (May 6, 2019), *at* https://www.nytimes.com/2019/05/06/climate/pompeo-arctic-china-russia.html (quoting a source as remarking that '"There's seven countries on one side, and the U.S. on the other'").

> reduction in black carbon emissions by any Arctic Council state. We are doing our part, and we encourage other states to do the same, and to do so with full transparency. That's true for every issue before this council . . . .[5]

The day before the official Arctic Council ministerial meeting, Pompeo delivered a separate address in which he argued that the Arctic Council could no longer afford to focus exclusively on cultural and scientific issues and indicated that it should also consider strategic ones.[6] In the same speech, Pompeo raised security concerns relating to China and Russia, arguing that "China could use its civilian research presence in the Arctic to strengthen its military presence" and that Russia's attempts to control the passage through the Northern Sea Route were "part of a pattern of aggressive Russian behavior . . . in the Arctic."[7] China's Special Representative for Arctic Affairs responded that Pompeo's accusations were groundless and would not affect China's involvement in the Arctic.[8] In his official remarks at the council meeting, Russian Foreign Minister Sergey Lavrov stated, "there are absolutely no pretexts for conflicts or attempts to address any issues arising here with a military response."[9]

International Human Rights and Humanitarian Law

Trump Administration Takes Domestic and International Measures to Restrict Asylum

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The Trump administration has continued its efforts to restrict immigration through a series of measures designed to limit the availability of asylum in the United States and to promote increased immigration enforcement in Mexico. In July of 2019, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) promulgated an interim final rule disqualifying asylum applicants who transited through third countries without seeking protection in those countries. This rule immediately became the subject of ongoing litigation, and, in September of 2019, the Supreme Court stayed an injunction that had been issued against its enforcement, with two justices dissenting. At the international level, over the summer

[5] U.S. Dep't of State Press Release, Remarks at the Arctic Council Ministerial Meeting (May 7, 2019), *at* https://www.state.gov/remarks-at-the-arctic-council-ministerial-meeting-2 [https://perma.cc/VRS8-N5ZU].

[6] *Secretary of State Pompeo Remarks on U.S.-Arctic Policy*, C-Span, at 3:20 (May 6, 2019), *at* https://www.c-span.org/video/?460478-1/secretary-state-pompeo-warns-russia-china-arctic-policy-address-finland.

[7] *Id.* at 8:40, 10:56.

[8] Ming Mei, *Chinese Representative Refutes Unwarranted U.S. Accusation on Arctic Cooperation*, Xinhua (May 7, 2019), *at* http://www.xinhuanet.com/english/2019-05/07/c_138040973.htm. China has observer status at the Arctic Council. *See* Arctic Council, Observers, *at* https://arctic-council.org/index.php/en/about-us/arctic-council/observers.

[9] Arctic Council Press Release, Foreign Minister Sergey Lavrov's Remarks at the 11th Arctic Council Ministerial Meeting, Rovaniemi, at 1 (May 7, 2019), *at* https://oaarchive.arctic-council.org/bitstream/handle/11374/2405/2019_Rovaniemi_Ministerial_Statement_by_the_Russian_Federation_English.pdf?sequence=5&isAllowed=y.

and early fall of 2019, threats of economic sanctions led Guatemala, El Salvador, Honduras, and Mexico to make agreements with the United States aimed at curbing unauthorized migration into the United States. Guatemala signed an agreement with the United States under which asylum applicants in the United States who had transited through Guatemala on the way could be returned to Guatemala to pursue their asylum claims. El Salvador and Honduras also reached agreements with the United States relating to migration. Mexico committed to increasing its efforts to stem the flow of unauthorized immigration through its borders and assented to the U.S. expansion of its Migrant Protection Protocols. The Trump administration has continued pursuing other tactics to limit immigration and the availability of asylum, including through the issuance of legal decisions by Attorney General William Barr and continued litigation surrounding the construction of a border wall.

Throughout his presidency, Trump has implemented policies designed to reduce immigration to the United States.[1] In the past year, the Trump administration has intensified efforts to curb migration across the southern border by severely restricting the ability of individuals to seek asylum in the United States.[2] On November 9, 2018, Trump announced his intention to limit access to asylum to those who entered the United States at an official port of entry,[3] and DHS and DOJ promulgated an interim final rule to this effect.[4] Litigation contesting the rule was swift, and a preliminary injunction against its enforcement was granted on December 19, 2018.[5]

On July 16, 2019, DHS and DOJ published an interim final rule that would further limit the availability of asylum. Under this rule, individuals who transited through third countries and did not apply for asylum in those countries would be ineligible to apply for asylum in the United States.[6] The rule states:

[1] For additional background, see Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 377 (2019) [hereinafter Asylum Story]; Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 741 (2018).

[2] *See* Asylum Story, *supra* note 1. On April 29, 2019, Trump cited asylum fraud as "the biggest loophole drawing illegal aliens to our borders" and issued a presidential proclamation calling on officials to "strengthen asylum procedures" by promulgating regulations to restructure court proceedings for asylum seekers, institute fees to apply for asylum or request work authorization, and "reprioritize the assignment of immigration officers." White House Fact Sheet, President Donald J. Trump Is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crisis (Apr. 29, 2019), *at* https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis [https://perma.cc/T72G-GCRS]; Donald J. Trump, Presidential Memorandum on Additional Measures To Enhance Border Security and Restore Integrity to Our Immigration System, 2019 DAILY COMP. PRES. DOC. No. 251 (Apr. 29).

[3] Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018).

[4] Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018).

[5] E. Bay Sanctuary Covenant v. Trump, 354 F. Supp. 3d 1094 (N.D. Cal. Dec. 19, 2018). For additional information, including a discussion of the Supreme Court's decision not to stay the injunction, see Asylum Story, *supra* note 1, at 382–83. Trump extended the November 9 proclamation, which was set to expire ninety days after its issuance, through two additional proclamations issued on February 7, 2019, and May 8, 2019. In each of these additional proclamations, Trump dismissed the preliminary injunction as "hamper[ing]" "the ability of the United States to address these problems" of migration through the southern border and indicated that "[t]he United States is appealing that injunction." Proclamation No. 9842, 84 Fed. Reg. 3,665 (Feb. 7, 2019) (extending the November 9 proclamation for another ninety days); Proclamation No. 9880, 84 Fed. Reg. 21,229 (May 8, 2019) (extending the November 9 proclamation until ninety days after either (1) "the United States obtains relief from all injunctions that prevent full implementation of the interim final rule promulgated" on November 9, or (2) the United States enters into a safe third country agreement with Mexico).

[6] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019).

> [A]n alien who enters or attempts to enter the United States across the southern border after failing to apply for protection in a third country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States is ineligible for asylum.[7]

Although the rule would serve to deny access to asylum to migrants who had transited through and not sought protection in any third country, it did not purport to disqualify such individuals from seeking withholding of removal or relief under the Convention against Torture (CAT).[8]

The 1951 Refugee Convention does not require an asylum seeker to apply for protection in the first country transited, but rather allows a covered individual to be considered a refugee unless that person has "acquired a new nationality, and enjoys the protection of the country of his new nationality" or "is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."[9] The Office of the United Nations High Commissioner for Refugees (UNHCR) expressed "deep[] concern[]" about the interim final rule and its compliance with international law:

> UNHCR believes the rule excessively curtails the right to apply for asylum, jeopardizes the right to protection from *refoulement*, significantly raises the burden of proof on asylum seekers beyond the international legal standard, sharply curtails basic rights and freedoms of those who manage to meet it, and is not in line with international obligations.
>
> . . .
>
> People have been leaving parts of Central America in growing numbers in recent years for reasons ranging from extreme economic deprivation to persecution.

[7] *Id.* at 33,830.

[8] *Id.* Under U.S. immigration laws, asylum, withholding of removal, and relief under CAT carry with them different requirements and burdens of proof and provide the successful applicant with different benefits. *See, e.g.*, Wakkary v. Holder, 558 F.3d 1049, 1065 (9th Cir. 2009) ("[A]sylum and withholding of removal have different quantitative standards of proof [that the applicant, if returned will suffer persecution based on a protected ground]—ten percent for asylum, and 'more likely than not' for withholding"); 8 C.F.R. § 1208.16(c)(2) (requiring a showing under [CAT] that it is more likely than not that the applicant will be tortured if returned to his or her home country). Asylum is a discretionary benefit, while it is mandatory for a judge to grant withholding of removal or CAT if an applicant meets the requirements. *See, e.g.*, Ismaiel v. Mukasey, 516 F.3d 1198, 1204 (10th Cir. 2008) ("Although a grant of asylum is in the discretion of the Attorney General, [withholding of removal] is granted to qualified aliens as a matter of right . . . [and] [r]elief under the CAT is mandatory if the convention's criteria are satisfied") (internal citations omitted). Relief under withholding of removal and CAT do not carry the same benefits as asylum—a successful applicant does not have a path to becoming a lawful permanent resident under withholding of removal or CAT as he or she would under asylum. U.S. Dep't of Justice Fact Sheet, Asylum and Withholding of Removal Relief Convention Against Torture Protections, at 1, 6–7 (Jan. 15, 2009), *available at* https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf [https://perma.cc/EM68-4S4S].

[9] UN Convention Relating to the Status of Refugees, Art. 1, July 28, 1951, 189 UNTS 150 [hereinafter Refugee Convention] (also identifying several other situations in which the person will no longer be considered a refugee). The United States is not a party to the Refugee Convention but has accepted its obligations by acceding to the 1967 Protocol Relating to the Status of Refugees, January 31, 1967, 606 UNTS 267.

> Many of them are fleeing horrific violence by brutal gangs and are in need of international protection.[10]

The interim final rule faced immediate court challenge. In a complaint filed in the Northern District of California, the plaintiffs argued, among other things, that this rule was inconsistent with existing asylum laws and did not comport with international legal obligations.[11] The U.S. statutory provisions governing asylum state that non-citizens present in the United States "may apply for asylum" subject to specified exceptions.[12] These exceptions include two that are related to third countries, but neither of these is invoked by the interim final rule. One exception is if the individual has been "firmly resettled in another country prior to arriving to the United States"[13] and the other is if he or she may be removed pursuant to a safe third country agreement.[14] The firm resettlement bar has consistently been interpreted to require an offer or receipt of permanent status or citizenship in a third country and thereby cannot be satisfied solely by transit through another country.[15] The third safe country provision permits removal where the United States has entered into an agreement with a country, other than the one of which the individual in question is a citizen, which permits removal to that country.[16] In addition to the case in the Northern District of California, plaintiffs also brought a case challenging the interim final rule in the District of Columbia.[17]

On July 24, opposing rulings were issued by federal district courts in the two cases. While District of Columbia Judge Timothy Kelly issued a decision that would have allowed the interim rule to take effect,[18] Northern District of California Judge Jon Tigar granted a preliminary nationwide injunction enjoining enforcement of the rule.[19] Judge Tigar concluded that an injunction was appropriate because the rule likely conflicted with existing asylum laws, violated the procedural requirements of the Administrative Procedure Act, and was arbitrary and capricious.[20]

[10] UN High Commissioner for Refugees (UNHCR) Press Release, UNHCR Deeply Concerned about New U.S. Asylum Restrictions (July 15, 2019), *at* https://www.unhcr.org/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html.

[11] Pl.'s Memo. in Supp. of Mot. for T.R.O. at 3, E. Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922, 930 (N.D. Cal. 2019) (No. 19-cv-04073) ("Critically, as part of our nation's commitment to the protection of people fleeing persecution and consistent with our international obligations, it is longstanding federal law that merely transiting through a third country is not a basis to categorically deny asylum to refugees who arrive in the United States.").

[12] *See* 8 U.S.C. § 1158(a)(1).

[13] 8 U.S.C. § 1158(b)(2)(A)(vi).

[14] 8 U.S.C. § 1158(a)(2)(A) [hereinafter Safe Third Country Provision].

[15] *See, e.g.*, 8 C.F.R. § 208.15. For an in-depth explanation of the firm resettlement bar, see USCIS, *Firm Resettlement Training Module* (Jan. 17, 2019), *available at* https://www.uscis.gov/sites/default/files/files/native
documents/Firm_Resettlement_LP_RAIO.pdf [https://perma.cc/2XNJ-6P89].

[16] Safe Third Country Provision, *supra* note 14; *see also* 8 U.S.C. § 1158(a)(2)(E) (stating that this provision does not apply to unaccompanied minors). Additional qualifications to the Safe Third Country Provision are discussed in note 32 *infra* and accompanying text.

[17] *See* Adina Appelbaum, *CAIR Coalition Joins in Challenge of New Rule Barring Asylum Eligibility for Many Migrants*, Capital Area Immigrants' Rts. Coal. (July 16, 2019), *at* https://www.caircoalition.org/news-clip/cair-coalition-joins-challenge-new-rule-barring-asylum-eligibility-many-migrants.

[18] Capital Area Immigrants' Rights Coal. v. Trump, No. 1:19-CV-02117-TJK, 2019 WL 3436501 (D.D.C. July 24, 2019).

[19] E. Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922 (N.D. Cal. 2019).

[20] *Id.* at 922–23; *see also id.* at 924 (expressing additional concerns about the application of the rule to unaccompanied minors).

The Trump administration responded to the rulings in turn, first with praise,[21] and then with criticism,[22] ultimately vowing with respect to the second decision that it would "pursue all available options to address this meritless ruling and to defend this Nation's borders."[23] On August 16, the Ninth Circuit issued a ruling allowing the interim final rule to go into effect outside of the Ninth Circuit while litigation continues, but denying the government's motion for a stay with respect to asylum applicants within the Ninth Circuit.[24] On August 26, the Trump administration requested that the Supreme Court stay the preliminary injunction in order to permit the interim final rule to also go into effect within the Ninth Circuit while the litigation continues.[25]

On September 11, the Supreme Court granted the government's motion and stayed the lower court injunction "pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such a writ is sought."[26] Justice Sotomayor dissented, joined by Justice Ginsburg. She stated:

> Given the [Northern District of California's] thorough analysis, and the serious questions that court raised, I do not believe the Government has carried its "especially heavy" burden [for obtaining a stay]. . . . The rule here may be, as the District Court concluded, in significant tension with the asylum statute. It may also be arbitrary and capricious for failing to engage with the record evidence contradicting its conclusions. It is especially concerning, moreover, that the rule the Government promulgated topples decades of settled asylum practices and affects some of the most vulnerable people in the Western Hemisphere–without affording the public a chance to weigh in.[27]

The Trump administration issued the July rule at a time when it was negotiating an agreement with Guatemala concerning Guatemala's designation as a safe third country for asylum seekers.[28] Although negotiations had appeared to break down as Guatemala's constitutional court declared that the president was unable to enter into a safe third country agreement

[21] White House Press Release, Statement from the Press Secretary (July 24, 2019), *at* https://www.whitehouse.gov/briefings-statements/statement-press-secretary-68 [https://perma.cc/8Y4L-4AVS] ("Today's ruling in the United States District Court for the District of Columbia is a victory for Americans concerned about the crisis at our southern border. The court properly rejected the attempt of a few special interest groups to block a rule that discourages abuse of our asylum system.").

[22] White House Press Release, Statement from the Press Secretary (July 25, 2019), *at* https://www.whitehouse.gov/briefings-statements/statement-press-secretary-69 [https://perma.cc/MM6B-AD52] ("Yesterday evening, a single district judge in California, based on a complaint filed by a few activist groups with no legal standing, issued a nationwide injunction against a lawful and necessary rule that discourages abuse of our asylum system—and did so despite a ruling from another Federal judge earlier in the day rejecting the same request by other plaintiffs and suggesting that the Government was likely to prevail against challenges to the rule.").

[23] *Id.*

[24] E. Bay Sanctuary Covenant v. Barr, No. 19-16487, 2019 WL 3850928 (9th Cir. Aug. 16, 2019).

[25] Application for a Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit and Pending Further Proceedings in This Court, Barr v. E. Bay Sanctuary Covenant, S. Ct. No. 19A230 (Aug. 26, 2019), *at* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19a230.html.

[26] Decision on Application for Stay at 1, Barr v. E. Bay Sanctuary Covenant, S. Ct. No. 19A230 (Sept. 11, 2019), *available at* https://www.supremecourt.gov/opinions/18pdf/19a230_k53l.pdf. The order itself did not contain any substantive legal reasoning. *See id.*

[27] *Id.* at 4 (Sotomayor, J., dissenting). Justice Sotomayor's dissent also detailed several further proceedings in the lower courts that occurred between the August 16 decision of the Ninth Circuit and the Supreme Court's order. *See id.* at 4-5.

[28] Marcia Brown, *Trump's Latest Asylum Rule, Explained*, Am. Prospect (July 22, 2019), *at* https://prospect.org/article/trumps-latest-asylum-rule-explained.

without legislative consent,[29] the two countries abruptly signed an agreement on July 26[30] amidst threats from Trump of tariffs and other retaliatory measures.[31] When asked how the agreement would function, Acting Secretary of Homeland Security Kevin McAleenan explained:

> So this is a return to the appropriate approach with—under international law to protecting asylum seekers at the earliest possible point in their journey. If you have a Honduran family or an El Salvadorian national, instead of having them pay a smuggler, come all the way to our border to seek asylum, when they arrive in Guatemala, they're in a country that has a fair proceeding for assessing asylum claims, and that's where they should make that claim. That returns that understanding under international law.
>
> They can make a protection claim, if they would like, in Guatemala. So if they arrive in the U.S. not having availed themselves of that opportunity, they'll be returned to Guatemala.[32]

Despite the Trump administration's statements, critics have decried the agreement as an inadequate protection of migrants' rights.[33] U.S. asylum law requires that removal pursuant to a safe third country agreement can occur only when, in the determination of the attorney general, it will not threaten the life or freedom of the individual removed "on account of race, religion, nationality, membership in a particular social group, or political opinion" but will provide "access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection."[34] UNHCR has similarly concluded that "in keeping with relevant international law standards" the safe third country should be one which will "grant the person access to a fair and efficient procedure for determination of refugee status and other international protection needs" and "accord the person standards of treatment commensurate with

[29] Ministerio de Relaciones Exteriores, Noticias de Interés (July 23, 2019), *at* https://www.minex.gob.gt/noticias/Noticia.aspx?id=28309. *See also* Marcia Brown, *As a Guatemala Asylum Agreement Fades, a New Trump Rule Threatens Migrants*, AM. PROSPECT (July 15, 2019), *at* https://prospect.org/article/guatemala-asylum-agreement-fades-new-trump-rule-threatens-migrants.

[30] The White House (@WhiteHouse), TWITTER (July 26, 2019, 2:10 PM), *at* https://twitter.com/whitehouse/status/1154861528539160576 [https://perma.cc/D62L-VRDV]. Guatemala may not view the agreement as amounting to a safe third country agreement. *See* Lauren Carasik, *Trump's Safe Third Country Agreement with Guatemala Is a Lie*, FOR. POL'Y (July 30, 2019), *at* https://foreignpolicy.com/2019/07/30/trumps-safe-third-country-agreement-with-guatemala-is-a-lie ("For his part, [the President of Guatemala] has declined to characterize the accord as a safe third country agreement, calling it a 'Cooperation Agreement' instead, apparently to circumvent the Constitutional Court's injunction."). The countries did not officially release the contents of this agreement at first, but the text appears to have become available online, including at https://www.justsecurity.org/wp-content/uploads/2019/07/Guatemala-Cooperative-Agreement-with-Signature-Blocks-ENG.pdf.

[31] Donald J. Trump, Remarks in an Exchange with Reporters Prior to Departure for Wheeling, West Virginia, 2019 DAILY COMP. PRES. DOC. NO. 506 (July 24) ("So, Guatemala gave us their word. We were going to sign a safe third agreement and then, all of a sudden, they backed up. They said it was their supreme court. I don't believe that. But they use their supreme court as the reason they didn't want to do it. So we'll either do tariffs or we'll do something. We're looking at something very severe with respect to Guatemala . . . . So, Guatemala we're going to take care of and it won't even be tough. We're going to do—we're looking at a couple of different things.").

[32] Remarks on the Signing of the Guatemala-United States Safe Third Country Agreement and an Exchange with Reporters, 2019 DAILY COMP. PRES. DOC. NO. 509 (July 26).

[33] Michael D. Shear, Zolan Kanno-Youngs & Elizabeth Malkin, *After Tariff Threat, Trump Says Guatemala Has Agreed to New Asylum Rules*, N.Y. TIMES (July 26, 2019), *at* https://www.nytimes.com/2019/07/26/world/americas/trump-guatemala-asylum.html.

[34] Safe Third Country Provision, *supra* note 14.

the 1951 [Refugee] Convention and international human rights standards, including—but not limited to—protection from *refoulement*."[35] It is far from clear that Guatemala will meet these standards. The most recent U.S. State Department's human rights country report on Guatemala describe it as rife with human rights abuses,[36] and the incoming president of Guatemala, who takes office in January of 2020, stated in an interview that "'I do not think Guatemala fulfills the requirements to be a third safe country.'"[37] Both U.S. and Guatemalan advocates have threatened to go to court if this agreement takes effect.[38]

On September 20, 2019, the Trump administration announced that the United States had reached an agreement with El Salvador whose "signing reflects the partnership and commitment between both nations to discourage dangerous irregular migration across Central America towards the U.S. and to combat transnational criminal organizations, strengthen border security, and reduce human trafficking and smuggling."[39] A similar agreement was reached with Honduras on September 25, and reporting indicates that both agreements have much in common with the Guatemala agreement.[40]

In addition to taking measures designed to limit the availability of asylum in the United States, the Trump administration has ratcheted up pressure on Mexico to increase enforcement of its own immigration laws and inhibit migrants' progress toward the United States. On May 30, Trump issued a statement condemning Mexico's "passive cooperation" in "allowing th[e] mass incursion" of unauthorized immigrants into the United States.[41] He cited the "severe and dangerous consequences of illegal immigration" that Mexico has "allowed . . . to go on for many years" and called on Mexico to "step up and help solve this problem."[42] Trump threatened devastating economic consequences if Mexico failed to act:

[35] UNHCR, Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries (Apr. 2018), *available at* https://www.refworld.org/docid/5acb33ad4.html. For further discussion of the principle of *non-refoulement*, see Asylum Story, *supra* note 1.

[36] U.S. Dep't of State, 2018 Country Reports on Human Rights Practices: Guatemala (Mar. 13, 2019), *at* https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/guatemala (stating that "Civilian authorities at times did not maintain effective control over the security forces"; that "[h]uman rights issues included reports of harsh and life-threatening prison conditions; widespread corruption; trafficking in persons; crimes involving violence or threats thereof targeting lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons, persons with disabilities, and members of other minority groups; and use of forced or compulsory or child labor"; and that "[c]orruption and inadequate investigations made prosecution difficult, and impunity continued to be widespread").

[37] Sonia Perez D., *President-Elect Says Guatemala Can't Do Migrant Deal with US*, Assoc. Press (Aug. 13, 2019), *at* https://www.apnews.com/ecd51531cbf2428c823ab06233c222a9 (also stating that the agreement would need the approval of the Guatemalan legislature).

[38] Kirk Semple, *The U.S. and Guatemala Reached an Asylum Deal: Here's What It Means*, N.Y. Times (July 28, 2019), *at* https://www.nytimes.com/2019/07/28/world/americas/guatemala-safe-third-asylum.html.

[39] U.S. Dep't of Homeland Security Press Release, Joint Statement Between the U.S. Government and the Government of El Salvador (Sept. 20, 2019), *at* https://www.dhs.gov/news/2019/09/20/joint-statement-between-us-government-and-government-el-salvador.

[40] Nick Miroff, *U.S. Announces Asylum Deal with Honduras, Could Send Migrants to One of World's Most Violent Nations*, Wash. Post (Sept. 25, 2019), *at* https://www.washingtonpost.com/immigration/us-announces-asylum-deal-with-honduras-could-send-migrants-to-one-of-worlds-most-violent-nations/2019/09/25/cca94a86-dfb6-11e9-8fd3-d943b4ed57e0_story.html.

[41] Donald J. Trump, Statement on Emergency Measures to Address Illegal Migration at the Mexico-United States Border, 2019 Daily Comp. Pres. Doc. No. 354 (May 30).

[42] *Id.*

> [S]tarting on June 10, 2019, the United States will impose a 5 percent Tariff on all goods imported from Mexico. If the illegal migration crisis is alleviated through effective actions taken by Mexico, to be determined in our sole discretion and judgment, the Tariffs will be removed. If the crisis persists, however, the Tariffs will be raised to 10 percent on July 1, 2019. Similarly, if Mexico still has not taken action to dramatically reduce or eliminate the number of illegal aliens crossing its territory into the United States, Tariffs will be increased to 15 percent on August 1, 2019, to 20 percent on September 1, 2019, and to 25 percent on October 1, 2019. Tariffs will permanently remain at the 25 percent level unless and until Mexico substantially stops the illegal inflow of aliens coming through its territory.[43]

Shortly thereafter, the United States and Mexico reached an agreement and Trump indicated that "[t]he Tariffs scheduled to be implemented by the U.S. . . . against Mexico, are hereby indefinitely suspended."[44] The United States and Mexico signed a joint declaration on June 7 involving "a set of joint obligations" that, in the words of the accompanying U.S. State Department press release, "benefit both the United States and Mexico" with the goal of "stem[ming] the tide of illegal migration across our southern border and to make our border strong and secure."[45] The joint declaration promised that the United States and Mexico would "work together to immediately implement a durable solution" to "the humanitarian emergency and security situation" resulting from "the dramatic increase in migrants moving from Central America through Mexico to the United States."[46] Mexico agreed to "take unprecedented steps to increase enforcement to curb irregular migration, to include the deployment of its National Guard throughout Mexico, giving priority to its southern border."[47] Since signing this joint declaration, Mexico has taken certain measures to increase its enforcement against unauthorized migration.[48]

The joint declaration also indicated the United States' intention to "expand the implementation of the existing Migrant Protection Protocols across its entire Southern Border."[49] The Migrant Protection Protocols are a Trump administration policy under which asylum seekers arriving in the United States from Mexico await their immigration proceedings in Mexico rather than in the United States.[50] The joint declaration explained: "This means that those

[43] *Id.* For a discussion of the extent to which Trump might have the legal authority to impose these tariffs under the International Emergency Economic Powers Act (IEEPA), see Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump's New Tariffs on Mexico*, LAWFARE BLOG (June 3, 2019), *at* https://www.lawfareblog.com/legal-authority-behind-trumps-new-tariffs-mexico.

[44] Donald J. Trump (@realDonaldTrump), TWITTER (June 7, 2019, 8:31 PM), *at* https://twitter.com/realdonaldtrump/status/1137155056044826626?lang=en [https://perma.cc/75XT-V4GX].

[45] U.S. Dep't of State Press Statement, Conclusion of Negotiations with Mexico (June 7, 2019), *at* https://www.state.gov/conclusion-of-negotiations-with-mexico [https://perma.cc/3S55-LLTE].

[46] U.S. Dep't of State Press Release, U.S.-Mexico Joint Declaration (June 7, 2019), *at* https://www.state.gov/u-s-mexico-joint-declaration/ [https://perma.cc/Q8CA-2JVJ] [hereinafter Joint Declaration].

[47] *Id.*

[48] James Fredrick, *How Mexico Beefs Up Immigration Enforcement to Meet Trump's Terms*, NPR (July 13, 2019), *at* https://www.npr.org/2019/07/13/740009105/how-mexico-beefs-up-immigration-enforcement-to-meet-trumps-terms.

[49] Joint Declaration, *supra* note 46.

[50] For additional background, see Asylum Story, *supra* note 1. The Trump administration began implementing the Migrant Protection Protocols in January of 2019. Although a federal district court judge initially imposed a preliminary injunction against enforcement of the Migrant Protection Protocols, the Ninth Circuit granted the

crossing the U.S. Southern Border to seek asylum will be rapidly returned to Mexico where they may await the adjudication of their asylum claims."[51]

In April and July of 2019, Attorney General Barr issued binding immigration decisions designed to further deter asylum seekers from coming to the United States and to tighten the legal standard by which applicants could obtain asylum. On April 16, 2019, Barr issued a decision determining that all asylum applicants in DHS custody are subject to mandatory detention pending the adjudication of their claims unless the government allows that applicant to be released on parole—a decision that severely restricts the ability of asylum applicants to be released from detention.[52] On July 2, a federal judge issued an injunction blocking the enforcement of Barr's decision, holding that "it is unconstitutional to deny [immigrants who had entered the United States, requested asylum, and were determined to have a credible fear of persecution] a bond hearing while they await a final determination of their asylum request."[53] Barr's other decision, issued on July 29, 2019, changed the standard by which migrants could obtain asylum for claims involving family groups.[54] Under the Refugee Convention, individuals are eligible for asylum if they express a well-founded fear of persecution based on a protected ground, including "membership of a particular social group,"[55] and U.S. law has long interpreted an immediate family unit to compose a cognizable "particular social group."[56] Barr's ruling narrows this standard, declaring that "an alien's family-based group will not constitute a particular social group unless it has been shown to be socially distinct in the eyes of its society, not just those of its alleged persecutor."[57]

In addition to efforts to restrict the availability of asylum and to encourage the United States' southern neighbors to play an increasingly active role in stemming unauthorized migration through the region, the Trump administration has pushed its agenda with respect

government's motion to stay the injunction and consequently, the program was allowed to take effect as litigation continues. Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110 (N.D. Cal. 2019); Innovation Law Lab v. McAleenan, 924 F.3d 503 (9th Cir. 2019).

[51] Joint Declaration, *supra* note 46.

[52] Matter of M-S-, 27 I&N Dec. 509 (A.G. 2019); *see also* Michael D. Shear & Katie Benner, *In New Effort to Deter Migrants, Barr Withholds Bail to Asylum Seekers*, N.Y. Times (Apr. 16, 2019), *at* https://www.nytimes.com/2019/04/16/us/politics/barr-asylum-bail.html. A recent document issued by UNHCR states that "[i]mportantly, as seeking asylum is not an unlawful act, detaining asylum-seekers for the sole reason of having entered without prior authorisation runs counter to international law. Under international law, individuals have the right to seek asylum, and if they do so, to be treated humanely and with dignity." UNHCR, Beyond Detention 2014–2019: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees, at 5, *at* https://www.unhcr.org/53aa929f6.

[53] Padilla v. U.S. Immigration & Customs Enf't, 387 F. Supp. 3d 1219, 1223 (W.D. Wash. 2019). The White House press secretary condemned this decision as "at war with the rule of law." White House Press Release, Statement from the Press Secretary (July 3, 2019), *at* https://www.whitehouse.gov/briefings-statements/statement-press-secretary-61 [https://perma.cc/TJ68-7HPC].

[54] Matter of L-E-A-, 27 I&N Dec. 581 (A.G. 2019).

[55] Refugee Convention, *supra* note 9, Art. 1(A)(2).

[56] *See, e.g.*, Matter of C-A-, 23 I&N Dec. 951, 959 (BIA 2006), *overruled on other grounds by* Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009) ("Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.").

[57] 27 I&N, *supra* note 54, at 582. In addition to these developments, the Trump administration is also seeking to revisit a long-standing court settlement that limits the extent to which minor children entering the United States can be held in detention. See Michael D. Shear & Zolan Kanno-Youngs, *Migrant Families Would Face Indefinite Detention Under New Trump Rule*, N.Y. Times (Aug. 21, 2019), *at* https://www.nytimes.com/2019/08/21/us/politics/flores-migrant-family-detention.html (describing a newly issued regulation on this issue).

to constructing a wall along the southern border. After Congress refused to provide the desired level of funding to build the wall, Trump declared a national emergency at the southern border on February 15 in order to access additional emergency funds.[58] On April 5, the House of Representatives filed a lawsuit arguing that the Trump administration's attempts to circumvent Congress in using funding appropriated for other purposes violated the Appropriations Clause of the Constitution and the Administrative Procedure Act.[59] On June 3, the House of Representatives' motion for a preliminary injunction was denied for lack of standing and subject matter jurisdiction.[60] A separate challenge to the Trump administration's border wall was filed in the Northern District of California, leading a federal district court to grant a permanent injunction on June 28 against construction of portions of the wall.[61] Although the Ninth Circuit denied the government's motion for a stay of the injunction,[62] the Supreme Court overturned this decision and stayed the injunction on July 26.[63] The litigation is currently pending in the Ninth Circuit.

Secretary of State Establishes Commission on Unalienable Rights

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On July 8, 2019, Secretary of State Mike Pompeo established a Commission on Unalienable Rights. The Commission will "provide the Secretary of State advice and recommendations concerning international human rights matters . . . [and] provide fresh thinking about human rights discourse where such discourse has departed from our nation's founding principles of natural law and natural rights."[1] The Commission has an initial two-year mandate. Democratic lawmakers have raised concerns that the Commission will circumvent existing structures and challenge LGBTQ+ protections and reproductive rights.

In May 2019, Pompeo gave formal notice of his intent to establish a Commission on Unalienable Rights, pursuant to the Federal Advisory Committee Act.[2] On July 8, he announced the creation of the Commission.[3] The Commission will study the Universal

[58] Proclamation No. 9844, 84 Fed. Reg. 4,949 (Feb. 15, 2019); *see also* Asylum Story, *supra* note 1.

[59] U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8 (D.D.C. 2019).

[60] *Id.*

[61] Sierra Club v. Trump, No. 19-CV-00892-HSG, 2019 WL 2715422 (N.D. Cal. June 28, 2019).

[62] Sierra Club v. Trump, 929 F.3d 670 (9th Cir. 2019).

[63] Trump v. Sierra Club, No. 19A60, 2019 WL 3369425 (U.S. July 26, 2019).

[1] Department of State Commission on Unalienable Rights, 84 Fed. Reg. 25109 (May 30, 2019).

[2] *Id.*; *see also* 5 U.S.C. App. § 9 (2018) (setting conditions on the establishment of advisory commissions, including that notice of their establishment be published in the Federal Register).

[3] U.S. Dep't of State Press Release, Michael R. Pompeo, Secretary of State, Remarks to the Press (July 8, 2019), *at* https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3 [https://perma.cc/V6MZ-TATP] [hereinafter Pompeo Remarks].

Declaration of Human Rights and Founding-era documents to produce a written guide that, as Pompeo describes it, "the State Department and every American can stare at and say this is consistent with American history."[4] The Commission will automatically be dissolved after two years unless "it is formally determined to be in the public interest to continue it for another two years."[5]

Pompeo emphasized that the Commission is intended to ensure that "human rights discourse not be corrupted or hijacked or used for dubious or malignant purposes," explaining:

> It's a sad commentary on our times that more than 70 years after the Universal Declaration of Human Rights, gross violations continue throughout the world, sometimes even in the name of human rights. International institutions designed and built to protect human rights have drifted from their original mission. As human rights claims have proliferated, some claims have come into tension with one another, provoking questions and clashes about which rights are entitled to gain respect. . . .
>
> I hope that the commission will revisit the most basic of questions: What does it mean to say or claim that something is, in fact, a human right? How do we know or how do we determine whether that claim that this or that is a human right, is it true, and therefore, ought it to be honored? How can there be human rights, rights we possess not as privileges we are granted or even earn, but simply by virtue of our humanity belong to us? Is it, in fact, true, as our Declaration of Independence asserts, that as human beings, we—all of us, every member of our human family—are endowed by our creator with certain unalienable rights?[6]

In a newspaper editorial published around the same time, Pompeo wrote:

> [A]fter the Cold War ended, many human-rights advocates turned their energy to new categories of rights. These rights often sound noble and just. But when politicians and bureaucrats create new rights, they blur the distinction between unalienable rights and ad hoc rights granted by governments. Unalienable rights are by nature universal. Not everything good, or everything granted by a government, can be a universal right. Loose talk of "rights" unmoors us from the principles of liberal democracy. . . . Rights claims are often aimed more at rewarding interest groups and dividing humanity into subgroups. . . . The commission's work could also help reorient international institutions specifically tasked to protect human rights, like the United Nations, back to their original missions.[7]

The Commission currently consists of ten individuals appointed by Pompeo.[8] The Commission's chair is Mary Ann Glendon, a Harvard Law professor and former ambassador

[4] U.S. Dep't of State Press Release, Teleconference Interview by Sebastian Gorka with Michael R. Pompeo, Secretary of State (July 12, 2019), *at* https://www.state.gov/interview-with-sebastian-gorka-of-america-first [https://perma.cc/59FL-TYXM].

[5] U.S. Dep't of State, Commission on Unalienable Rights Charter, at 3 (2019), *available at* https://www.justsecurity.org/wp-content/uploads/2019/06/charter-commission-unalienable-rights.pdf [https://perma.cc/T873-TLQR].

[6] Pompeo Remarks, *supra* note 3.

[7] Michael R. Pompeo, *Unalienable Rights and U.S. Foreign Policy*, WALL STREET J. (July 7, 2019), *at* https://www.wsj.com/articles/unalienable-rights-and-u-s-foreign-policy-11562526448.

[8] Pompeo Remarks, *supra* note 3.

to the Vatican.[9] Glendon stated that, under her leadership, the Commission will focus on "principle[s], not polic[ies]," drawn from the "distinctive rights tradition of the United States of America."[10]

The Commission's creation dismayed a substantial number of Democratic members of Congress, who described its premises as an "Orwellian twist to defend the indefensible"[11] and characterized it as an "attempt to make an end run around career experts, statutorily established State Department structures, and widely accepted interpretations of human rights law to push a narrow, discriminatory agenda that decides whose rights are worth protecting and whose rights the Administration will ignore."[12] They also criticized Pompeo for withholding information about the Commission from Congress until the day he publicly announced the creation of the Commission.[13] And they questioned the redundancy of the Commission in light of the "career, non-partisan human rights experts" at the State Department Bureau of Democracy, Human Rights and Labor (DRL) and the Office of the Legal Adviser.[14] The lawmakers further warned that the Commission could be used to denigrate LGBTQ+ and reproductive rights.[15] In addition to vocalizing their objections, Democratic legislators are seeking to block funding for the Commission through Congress's power of the purse.[16]

[9] Harvard Law School, *Mary Ann Glendon Faculty Profile*, *at* https://hls.harvard.edu/faculty/directory/10311/Glendon [https://perma.cc/4CGK-43HH]; Pompeo Remarks, *supra* note 3.

[10] U.S. Dep't of State Press Release, Mary Ann Glendon, Chairwoman, Comm'n on Unalienable Rights, Remarks to the Press (July 8, 2019), *at* https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3 [https://perma.cc/V6MZ-TATP].

[11] Letter from 23 Democratic U.S. Senators to Mike Pompeo, Secretary of State, at 1 (July 23, 2019), *available at* https://www.foreign.senate.gov/imo/media/doc/07-23-19%20Dems%20letter%20re%20Commission%20on%20Unalienable%20Rights.pdf [https://perma.cc/L9LH-ZLXP] [hereinafter Senate Letter].

[12] Letter from 50 Democratic U.S. Representatives to Mike Pompeo, Secretary of State, at 1 (July 18, 2019), *available at* https://foreignaffairs.house.gov/_cache/files/2/9/294cc9ed-3391-4fa2-968a-424f8e687dac/6B92FE10FE738FAEB3A6FB2BB7E69BC9.doc139.pdf [https://perma.cc/7XHZ-QY28] [hereinafter House Letter]. Separately, a coalition of 178 organizations and various individuals (including some prominent figures from the Obama administration) signed a public letter urging that the Commission be disbanded because it promoted a "hierarchy of rights," reminiscent of those commonly found in autocratic governments. *See generally* Letter from Coal. Opposing the Comm'n on Unalienable Rights to Michael Pompeo, Secretary of State (July 23, 2019), *available at* https://www.humanrightsfirst.org/sites/default/files/Unalienable-Rights-Commission-NGO-Ltr.pdf [https://perma.cc/7Z77-5TWR]. By contrast, the United States Commission on International Religious Freedom, an independent commission lodged in the State Department, praised the creation of the Commission on Unalienable Rights as a "way of ensuring that the protection of these fundamental rights—the most foundational of which is freedom of religion or belief—is a core element of strategic policy discussions." U.S. Comm'n on Int'l Religious Freedom Press Release, USCIRF Statement on State Department's Creation of "Commission on Unalienable Rights" (July 8, 2019), *at* https://www.uscirf.gov/news-room/press-releases-statements/uscirf-statement-state-department-s-creation-commission [https://perma.cc/3N63-K6AT].

[13] House Letter, *supra* note 12, at 2; *accord* Senate Letter, *supra* note 11, at 1.

[14] House Letter, *supra* note 12, at 1.

[15] Senate Letter, *supra* note 11, at 2. *But see* Carol Morello, *State Department Launches Panel Focused on Human Rights and Natural Law*, WASH. POST (July 8, 2019) (quoting an unnamed State Department official as stating that the Commission "will not make any pronouncements on gay marriage and abortion").

[16] An appropriations bill passed by the House of Representatives for the State Department's next fiscal year would ban the use of its funds for the Commission. Labor, Health and Human Services, Education, Defense, State, Foreign Operations, and Energy and Water Development Appropriations Act, 2020, H.R. 2740, 116th Cong. § 7070 (2019). As of late September 2019, this bill remained pending in the Senate. *All Actions H.R. 2740 — 116th Congress (2019–2020)*, CONGRESS.GOV, *at* https://www.congress.gov/bill/116th-congress/house-bill/2740/all-actions?q=%7B%22search%22%3A%5B%22H.R.+2740%22%5D%7D&s=7&r=1 [https://perma.cc/5W44-Q8TZ].

Use of Force, Arms Control, and Nonproliferation

Trump Administration's Iran Policies Raise Questions About the Executive's Authority to Use Force Against Iran

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In the face of rising tensions between Iran and the United States, some members of Congress have urged the Trump administration to clarify whether it believes it has congressional authorization to use force against Iran.[1] In June of 2019, the U.S. State Department issued a letter stating that it had not "to date" interpreted either the 2001 or the 2002 Authorization for Use of Military Force (2001 AUMF and 2002 AUMF, respectively) "as authorizing military force against Iran, except as may be necessary to defend U.S. or partner forces engaged in counterterrorism operations or operations to establish a stable, democratic Iraq."[2]

In May of 2019, the Trump administration sent an air carrier strike force and a bomber strike force to the Middle East "to send a clear and unmistakable message to the Iranian regime that any attack on United States interests or on those of our allies will be met with unrelenting force."[3] On June 17, Acting Secretary of Defense Patrick Shanahan authorized the deployment of 1,000 additional troops to the Middle East in response to "the reliable, credible intelligence we have received on hostile behavior by Iranian forces and their proxy groups . . . ."[4] After the troop deployment, a bipartisan group of six senators sent a letter to President Trump inquiring about the relationship of the deployed troops' mission to Iran:

[1] *See* Letter from Eliot Engel, Chairman, H. Comm. on Foreign Aff. and Ted Deutch, Chairman, H. Subcomm. on the Middle East, North Africa, and Int'l Terrorism, to Marik String, Acting Legal Adviser, U.S. Dep't of State (June 25, 2019), *available at* https://foreignaffairs.house.gov/_cache/files/6/f/6f43caff-89cd-4a7f-bfe7-841db9f5d305/3D06F9947687C18E9BB46C8A50603AEB.ele-deutch-letter-to-string-aumf-iran.pdf [https://perma.cc/MWH7-M9XB] [hereinafter House Letter]; Letter from Michael S. Lee, Senator, et. al., to Donald J. Trump, President (June 18, 2019), *available at* https://www.scribd.com/document/413785563/Kaine-Lee-Call-on-President-Trump-to-Explain-New-Deployments-to-the-Middle-East-Warn-Against-War-With-Iran, [https://perma.cc/67R9-97N3] [hereinafter Senate Letter].

[2] Letter from Mary Elizabeth Taylor, Assistant Sec'y, Bureau of Legis. Aff., to Eliot L. Engel, Chairman, H. Comm. on Foreign Aff. (June 28, 2019), *available at* https://foreignaffairs.house.gov/_cache/files/8/4/84c1fa85-94cf-43c8-84a1-472972ec9c11/CCDEB9BD152E93A97B89332218E2A89C.aumf.pdf [https://perma.cc/9YLU-59FL] [hereinafter State Department Letter]; *see also* Tess Bridgeman & Ryan Goodman, *Unpacking the State Dept Acknowledgement that 2001 and 2002 AUMFs Don't Authorize War Against Iran*, Just Security (July 3, 2019), *at* https://www.justsecurity.org/64807/unpacking-the-state-dept-acknowledgment-that-2001-and-2002-aumfs-dont-authorize-war-against-iran. The 2001 AUMF authorizes the president to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). The 2002 AUMF authorizes the president to use force to "(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq." Pub. L. No. 107–243, 116 Stat. 1498 (2002).

[3] *See* White House Press Release, Statement from the National Security Advisor Ambassador John Bolton (May 5, 2019), *at* https://www.whitehouse.gov/briefings-statements/statement-national-security-advisor-ambassador-john-bolton-2 [https://perma.cc/N3GP-E7XW].

[4] U.S. Dep't of Defense Press Release, Statement from Acting Secretary of Defense Patrick Shanahan on Additional Forces to U.S. Central Command (June 17, 2019), *at* https://www.defense.gov/Newsroom/Releases/Release/Article/1879076/statement-from-acting-secretary-of-defense-patrick-shanahan-on-additional-force [https://perma.cc/S5SQ-NNYQ].

> Given that growing risk, we want to reiterate that, as of this date, Congress has not authorized war with Iran and no current statutory authority allows the U.S. to conduct hostilities against the Government of Iran. To that end, we expect the administration to seek authorization prior to any deployment of forces into hostilities or areas where hostilities with Iran are imminent . . . . Article One, Section 8 of the United States Constitution provides Congress the exclusive power to declare war. It is critical that Congress fully retain and enforce this authority.[5]

Even before this additional deployment, the administration had faced questioning regarding a potential war with Iran. After the designation of the Iranian Islamic Revolutionary Guards Corps as a foreign terrorist organization,[6] Senator Rand Paul asked Secretary of State Mike Pompeo during testimony at the Senate Foreign Relations Committee if he believed that the 2001 AUMF applied to Iran.[7] Pompeo replied, "I'd prefer to just leave that to lawyers."[8] After Paul pressed him for a direct response, Pompeo stated:

> The legal question I will leave to counsel. The factual question with respect to Iran's connections to Al Qaeda is very real. They have hosted Al Qaeda. They have permitted Al Qaeda to transit their country. There's no doubt there is a connection between the Islamic Republic of Iran and Al Qaeda. Period, full stop.[9]

In response, Paul stated, "I can tell you explicitly you have not been given power or authority by Congress to have war with Iran," to which Pompeo did not reply.[10]

At a House Foreign Relations Committee hearing on June 19, Chair Ted Deutch asked the State Department's Special Representative for Iran Brian Hook if the administration believed that Al Qaeda operatives transiting through or living in Iran were sufficient grounds for the use of force in Iran under the 2001 AUMF.[11] Hook reiterated that it was not the policy goal of the administration to seek a military engagement with Iran but stated, "If the use of military force is necessary to defend U.S. national security interests, we will do everything that we are required to do with respect to Congressional war powers and we will comply with the law."[12] When pushed on the point, Hook referred Deutch to the State Department's Office of the Legal Adviser.[13]

[5] Senate Letter, *supra* note 1.

[6] For more about this designation, see Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 609 (2019).

[7] Review of the FY 2020 State Department Budget Request: Before the S. Comm. on Foreign Relations, 116th Cong., at 1:20:30 (Apr. 10, 2019) (testimony of Secretary of State Mike Pompeo), *available at* https://www.foreign.senate.gov/hearings/review-of-the-fy-2020-state-department-budget-request-041019. Paul did not ask Pompeo about authorization under the 2002 AUMF. *See id.*

[8] *Id.* at 1:21:54.

[9] *Id.* at 1:22:46.

[10] *Id.* at 1:23:08.

[11] Oversight of the Trump Administration's Iran Policy: Before the H. Comm. on Foreign Affairs, 116th Cong., at 32:54 (June 19, 2019) (statement of Special Representative for Iran Brian Hook), *available at* https://www.youtube.com/watch?v=FKK_fABJjl4.

[12] *Id.* at 34:15, 34:34.

[13] *Id.* at 34:55.

The day after Hook's testimony, Iran downed an unmanned U.S. drone.[14] Iran subsequently submitted a letter to the Security Council of the United Nations reporting the downing of the U.S. drone and claiming that its actions were justified under Article 51 of the Charter of the United Nations because the drone "engaged in a clear spying operation."[15] Iran asserted that the drone "entered into the Iranian airspace where the Islamic Republic of Iran . . . targeted the intruding aircraft . . . ."[16] A U.S. press release announcing the incident stated that the drone was operating over international waters thirty-four kilometers from the Iranian coast and that "Iranian reports that this aircraft was shot down over Iran are categorically false."[17]

On the following day, June 21, Trump announced that he had ordered and then cancelled retaliatory strikes against Iran because the strikes would not have been "proportionate to shooting down an unmanned drone."[18] The White House and the Pentagon did not further discuss these potential strikes on the record.[19] While Trump cancelled physical strikes, media reports indicated that he did authorize certain cyberattacks against Iran.[20]

On June 25, Deutch, as well as House Foreign Affairs Committee Chairman Eliot Engel, submitted a letter to the Acting Legal Adviser for the State Department Marik String requesting "[a]ny and all legal analysis, whether contained in electronic documents, emails, or hard copy, concerning, relating, or referring in any way to whether the 2001 or 2002 AUMFs are applicable to any actions that could be undertaken by the Executive Branch in or against the Islamic Republic of Iran."[21]

The response from the State Department on June 28 came not from the Acting Legal Adviser, but rather from Mary Elizabeth Taylor, the assistant secretary of state for legislative affairs. She did not produce any documents in response to the request from Deutch and Engel, but rather stated in her letter:

[14] U.S. Cent. Command Statement, U.S. Air Forces Central Command Statement on the Shoot Down of a U.S. RQ-4, *at* https://www.centcom.mil/MEDIA/STATEMENTS/Statements-View/Article/1882519/us-air-forces-central-command-statement-on-the-shoot-down-of-a-us-rq-4 [https://perma.cc/X6FE-NJSV] [hereinafter Cent. Com. Statement].

[15] Letter from Majid Takht Ravanchi, Ambassador of Iran to the UN, to António Guterres, Secretary-Gen. of the UN (June 20, 2019), *available at* https://www.justsecurity.org/wp-content/uploads/2019/07/Iran-UNSC-Letter-S_2019_512_E.pdf [https://perma.cc/9FWY-AZHF] [hereinafter Iran Article 51 Letter]. Under Article 51 of the UN Charter "[m]easures taken by Members in the exercise of . . . self-defence shall be immediately reported to the Security Council . . . ." UN Charter, Art. 51.

[16] Iran Article 51 Letter, *supra* note 15.

[17] Cent. Com. Statement, *supra* note 14. For discussion of the disagreement between the United States and Iran with respect both to the location of the drone and to the law of the sea as it relates to control over the Strait of Hormuz, see Mark Nevitt, *The Missing Piece in US-Iran Drone Dispute: Navigational Freedoms and the Strait of Hormuz*, Just Security (June 28, 2019), *at* https://www.justsecurity.org/64725/the-missing-piece-in-us-iran-drone-dispute-navigational-freedoms-and-the-strait-of-hormuz.

[18] Donald J. Trump (@realDonaldTrump), Twitter (June 21, 2019, 7:03 AM), *at* https://twitter.com/realDonaldTrump/status/1142055392488374272 [https://perma.cc/42JZ-5LEK].

[19] *See* Michael Shear, Eric Schmitt, Michael Crowley & Maggie Haberman, *Strikes on Iran Approved by Trump, Then Abruptly Pulled Back*, N.Y. Times (June 20, 2019), *at* https://www.nytimes.com/2019/06/20/world/middleeast/iran-us-drone.html.

[20] Ellen Nakashima, *Trump Approved Cyber-Strikes Against Iranian Computer Database Used to Plan Attacks on Oil Tankers*, Wash. Post (June 22, 2019), *at* https://www.washingtonpost.com/world/national-security/with-trumps-approval-pentagon-launched-cyber-strikes-against-iran/2019/06/22/250d3740-950d-11e9-b570-6416efdc0803_story.html; Julian E. Barnes, *U.S. Cyberattack Hurt Iran's Ability to Target Oil Tankers, Officials Say*, N.Y. Times (Aug. 28, 2019), *at* https://www.nytimes.com/2019/08/28/us/politics/us-iran-cyber-attack.html.

[21] House Letter, *supra* note 1.

> The Department of State has great respect for Congress's role in authorizing the use of military force. As Secretary Pompeo has noted, the Administration's goal is to find a diplomatic solution to Iran's activities, not to engage in conflict with Iran. Moreover, the Administration has not, to date, interpreted either AUMF as authorizing military force against Iran, except as may be necessary to defend U.S. or partner forces engaged in counterterrorism operations or operations to establish a stable, democratic Iraq.
>
> President Trump has expressed the U.S. willingness to negotiate with Iran. No one should be uncertain about the United States' desire for peace or a readiness to normalize relations in the event the United States and Iran reach a comprehensive deal. As Special Representative for Iran and Senior Policy Advisor to the Secretary of State Brian Hook testified to your Committee on June 19, 2019, the Administration has implemented an unprecedented maximum pressure campaign focused on Iran with two primary objectives: first, to deprive the Iranian regime of the money it needs to support its destabilizing activities, and second, to bring Iran back to the negotiating table to conclude a comprehensive and enduring deal as outlined by Secretary Pompeo in May 2018.[22]

Neither her letter nor the inquiry to which she was responding discussed the conditions under which the president would have the independent constitutional authority to use force against Iran if neither the 2001 AUMF nor the 2002 AUMF were applicable.[23]

On July 18, approximately a month after the downing of the U.S. drone, Trump announced that the American military had destroyed an Iranian drone located over international waters in the Strait of Hormuz.[24] Trump described the act as one of self-defense, asserting that the drone had approached an American vessel and ignored repeated warnings.[25] Unlike Iran, the United States does not appear to have submitted an Article 51 letter to the Security Council describing its action. Iran denied that it had lost any of its drones.[26]

In addition to the tensions described above, relations between the United States and Iran worsened on other fronts during the summer of 2019. The Trump administration built upon the vast set of sanctions it had already imposed on Iran by implementing sanctions designed to target Iran's metals industry,[27] and by adding sanctions directed at the Office of the Supreme Leader of Iran.[28] In early July, meanwhile, Iran exceeded the uranium enrichment limits set

[22] State Department Letter, *supra* note 2.

[23] For a recent, formalized articulation of the position of the Department of Justice's Office of Legal Counsel relevant to this issue, see April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1 (May 31, 2018) (slip op.) (concluding that the president could order air strikes against Syria under his independent constitutional authority in response to Syria's use of chemical weapons against its own citizens); *see also* Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 522 (2018).

[24] Donald J. Trump (@realDonaldTrump), Twitter (July 18, 2019,1:13 PM), *at* https://twitter.com/realdonaldtrump/status/1151948135868051457 [https://perma.cc/3YGD-X3E3].

[25] *Id.*

[26] Seyed Abbas Araghchi (@araghchi), Twitter (July 18, 2019, 10:03 PM), *at* https://twitter.com/araghchi/status/1152081448704196611 [https://perma.cc/6ME4-UYP4].

[27] U.S. Dep't of State Press Release, First Anniversary of President Trump's New Iran Strategy (May 8, 2019), *at* https://www.state.gov/first-anniversary-of-president-trumps-new-iran-strategy [https://perma.cc/6ZAY-H6BG].

[28] U.S. Dep't of State Press Release, Executive Order to Impose Sanctions on the Office of the Supreme Leader of Iran (June 24, 2019), *at* https://www.state.gov/executive-order-to-impose-sanctions-on-the-office-of-the-supreme-leader-of-iran [https://perma.cc/AJ8S-HJA7].

out in the 2015 Joint Comprehensive Plan of Action, justifying this action by pointing to the earlier decision of the United States to withdraw from this commitment and reimpose sanctions.[29] Iran has also warned that it could stop all energy exports through the Strait of Hormuz if sanctions relief is not forthcoming.[30] In September of 2019, a drone attack inflicted major damage on Saudi oil production facilities. Iran denied carrying out the strike, but Pompeo, among others, deemed Iran responsible and warned of consequences.[31]

International Law and Nonstate Actors

U.S. Supreme Court Denies Certiorari in Habeas Case Brought by Guantánamo Bay Detainee Challenging His Continuing Detention

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On June 10, 2019, the Supreme Court denied certiorari in a case in which the D.C. Circuit held that the United States could continue to detain an individual at Guantánamo Bay until the cessation of the hostilities that justified his initial detention, notwithstanding the extraordinary length of the hostilities to date.[1] The case, *Al-Alwi v. Trump*, arises from petitioner Moath Hamza Ahmed Al-Alwi's petition for a writ of habeas corpus challenging the legality of his continued detention at the United States Naval Base at Guantánamo Bay.[2] The Supreme Court's denial of certiorari was accompanied by a statement by Justice Breyer observing that "it is past time to confront the difficult question" of how long a detention grounded in the U.S. response to the September 11 attacks can be justified.[3]

[29] *Iran to Restore Arak Reactor to Original Design from July 7*, Mehr News Agency (July 3, 2019), *at* https://en.mehrnews.com/news/147161/Iran-to-restore-Arak-reactor-to-original-design-from-July-7. In response, the United States called for a special session of the International Atomic Energy Agency. U.S. Mission to Int'l Orgs. in Vienna Media Note, United States Requests Special Meeting of IAEA Board of Governors (July 5, 2019), *at* https://vienna.usmission.gov/media-note-united-states-requests-special-meeting-of-iaea-board-of-governors [https://perma.cc/5CR4-UM8R]; *see also* U.S. Mission to Int'l Orgs. in Vienna Media Note, Statement by the U.S. Mission Spokesperson on the Special IAEA Board of Governors Meeting Agenda Item 1 (July 10, 2019), *at* https://vienna.usmission.gov/media-note-statement-by-the-u-s-mission-spokesperson-on-special-iaea-board-of-governors-meeting-on-iran [https://perma.cc/67AX-GP73] (stating that during this special session "Board Members expressed their concern that Iran is expanding its proliferation-sensitive nuclear activities").

[30] Babak Dehghanpisheh, *Iran Says It Will Further Breach Nuclear Deal in One Month Unless Europeans Act*, Reuters (Aug. 5, 2019), *at* https://www.reuters.com/article/us-mideast-iran/iran-says-it-will-further-breach-nuclear-deal-in-one-month-unless-europeans-act-idUSKCN1UV1TV.

[31] Zack Budryk, *Pompeo Doubles Down on Blaming Iran for Oil Attacks: "This Was a State-on-State Act of War,"* The Hill (Sept. 22, 2019), *at* https://thehill.com/homenews/sunday-talk-shows/462488-pompeo-doubles-down-on-blaming-iran-for-oil-attack-this-was-a (noting additional sanctions and deployments ordered by the Trump administration in the wake of this incident and describing Pompeo as saying that "he and President Trump are 'looking for a diplomatic resolution' but 'we're prepared to do the things we need to do'").

[1] Al-Alwi v. Trump, 139 S. Ct. 1893 (2019).

[2] Al-Alwi v. Trump, 236 F. Supp. 3d 417, 418 (D.D.C. 2017), *aff'd*, 901 F.3d 294, 295 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 1893 (2019).

[3] 139 S. Ct., *supra* note 2, at 1894 (Breyer, J., statement respecting denial of certiorari).

A citizen of Yemen, Al-Alwi was around twenty-five years old when he was captured in Pakistan in late 2001.[4] Among other things, he was accused of participating in Taliban military training, supporting Taliban forces on the battlefield, and continuing to support the Taliban after the September 11, 2001 terrorist attacks.[5] He was detained pursuant to the Authorization for Use of Military Force passed by Congress shortly after the attacks (the 2001 AUMF), and he was transferred to Guantánamo Bay in 2002.[6] The 2001 AUMF authorizes the president to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."[7]

In 2005, Al-Alwi filed his first petition for a writ of habeas corpus, challenging his classification as an enemy combatant and his detention. The federal district court did not decide Al-Alwi's case until 2008, after the Supreme Court had held in *Boumediene v. Bush* that individuals detained at Guantánamo Bay were entitled to challenge their detention through habeas corpus petitions.[8] The district court denied his petition and in 2011, the D.C. Circuit affirmed.[9] In October 2015, an administrative tribunal, which was established to ensure that each prisoner's continued detention was justified, determined that Al-Alwi's continued detention was necessary.[10] There appear to be no plans to either try Al-Alwi before a military commission or to transfer him to a third country; rather, his continued detention is justified by the United States on the basis of the laws of war.[11]

In May 2015, Al-Alwi filed his habeas corpus petition in the case at hand.[12] He did not challenge the prior determination that his initial detention was lawful, but he claimed that his continued detention was not authorized.[13] More particularly, Al-Alwi argued that the government's authority to detain him based on the traditional laws of war had "unraveled" because of the unconventional nature of the conflict, or in the alternative, that the government's authority to detain him had expired because the original conflict in Afghanistan had ended.[14]

Al-Alwi's arguments drew upon language from the opinion of a plurality of Supreme Court justices in the 2004 decision of *Hamdi v. Rumsfeld*. In that case, the plurality interpreted the 2001 AUMF to authorize the detention of combatants, but it expressed some concern about

[4] The Guantánamo Docket, *Moath Hamza Ahmed al Alwi*, N.Y. TIMES (May 2, 2018), *at* https://www.nytimes.com/interactive/projects/guantanamo/detainees/28-moath-hamza-ahmed-al-alwi.

[5] Al-Alwi v. Trump, 236 F. Supp. 3d, *supra* note 2, at 419 (also noting that the finding that at one point Al-Alwi had "voluntarily surrendered his passport at a guesthouse closely associated with al Qaeda").

[6] *See id.* at 418.

[7] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (further stating that such uses of force are "in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons").

[8] Al Alwi v. Bush, 593 F. Supp. 2d 24, 26 (D.D.C. 2008) (discussing how the case was held until after the Supreme Court's decision).

[9] *See generally id.*; Al Alwi v. Obama, 653 F.3d 11, 13 (D.C. Cir. 2011).

[10] Al-Alwi v. Trump, 901 F.3d 294, 296 (D.C. Cir. 2018).

[11] *See* The Guantánamo Docket, *supra* note 4.

[12] *See* Al-Alwi v. Trump, 236 F. Supp. 3d, *supra* note 2.

[13] *Id.*

[14] *Id.*

the potential duration of the conflict.[15] It recognized the possibility that if "the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken through the litigation of this case suggests that Hamdi's detention could last for the rest of his life."[16] The plurality then observed that "we understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles."[17] Notably, the plurality added that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel."[18]

On February 22, 2017, the federal district court denied Al-Alwi's petition, finding by a preponderance of the evidence that he was lawfully detained as an enemy combatant.[19] The court found that "the record establishes clearly that both Congress and the President agree that the military is engaged in active hostilities in Afghanistan"[20] and that "this case does not present a situation in which petitioner's detention would be inconsistent with the 'clearly established principle of the law of war that detention may last no longer than active hostilities' or the rationale underlying that principle."[21]

On August 7, 2018, the D.C. Circuit affirmed the district court's decision, upholding Al-Alwi's continued detention.[22] Like the district court, the circuit court rejected Al-Alwi's argument that changes in the circumstances of the conflict warranted his release.[23] The court was not persuaded by Al-Alwi's argument that the conflict's unprecedented "duration, geographic scope, and variety of parties involved" rendered inapplicable the principle that detention may last until the end of hostilities.[24] The court observed that neither the 2001 AUMF nor a related subsequent statute "places limits on the length of detention in an ongoing conflict."[25] The court observed:

> Our baseline, then, is that the AUMF remains in force if hostilities between the United States and the Taliban and al Qaeda continue. . . .
>
> Al-Alwi's cited authorities merely suggest the possibility that the duration of a conflict may affect the Government's detention authority and, in any event, are not

[15] 542 U.S. 507, 520–21 (2004) (plurality opinion) (considering the extent to which the 2001 AUMF authorized the detention of a U.S. citizen considered by the government to be an unlawful combatant).
[16] *Id.* at 520.
[17] *Id.* at 521.
[18] *Id.*
[19] *See* Al-Alwi v. Trump, 236 F. Supp. 3d, *supra* note 2.
[20] *Id.* at 421.
[21] *Id.* at 423 (quoting *Hamdi*, 542 U.S., *supra* note 15, at 520–21).
[22] *See* Al-Alwi v. Trump, 901 F.3d, *supra* note 10, at 295.
[23] *Id.*
[24] *Id.* at 297.
[25] *Id.* The court was referring not only to the 2001 AUMF, but also to the National Defense Authorization Act for Fiscal Year 2012. *Id.* That act "affirms" the president's power to detain covered combatants "under the law of war without trial until the end of hostilities authorized by the Authorization for Use of Military Force." National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298 (2011).

> controlling. . . . These statements, then, do not provide a "foundation" for Al-Alwi's theory to prevail or persuade. . . .
>
> Moreover, Al-Alwi has not identified any international law principle affirmatively stating that detention of enemy combatants may *not* continue until the end of active hostilities, even in a long war. Instead, law-of-war principles are open-ended and unqualified on the subject. . . . Nor has Al-Alwi advanced an alternative detention rule that should apply at this point. . . .
>
> Therefore, we reject Al-Alwi's argument that the United States' authority to detain him has "unraveled."[26]

The D.C. Circuit also rejected Al-Alwi's argument that, although the U.S. military is still operating in Afghanistan, the current conflict is not the same as the one in which he was captured.[27] Al-Alwi pointed to the transition from Operation Enduring Freedom to Operation Freedom Sentinel in 2014, as well as the reduction of the U.S. role in Afghanistan.[28] To the court, however, "[n]othing in the text of the [2001] AUMF . . . suggests that a change in the form of hostilities, if hostilities between the relevant entities are ongoing, cuts off [2001] AUMF authorization."[29] Moreover, the court noted that the "Executive Branch represents that armed hostilities between the United States forces and these entities persist," and it concluded that the political branches have the primary authority to determine when hostilities have ended.[30]

Al-Alwi then sought review from the Supreme Court, arguing that the D.C. Circuit did not sufficiently consider whether the unprecedented nature of the conflict had altered the government's detention authority.[31] His petition observed that, if the hostilities are viewed as a single conflict, it has lasted for seventeen years, making it the longest declared conflict in American history and longer than many conflicts under which the law of war developed.[32]

[26] Al-Alwi v. Trump, 901 F.3d, *supra* note 10, at 297–98. The court did not discuss international human rights law. *But see, e.g.*, Committee Against Torture, Conclusions and Recommendations on the Second Periodic Report of the United States of America, at para. 22, 36th Sess. May 1–19, 2006, UN Doc. CAT/C/USA/ CO/2 (2006) ("[D]etaining persons indefinitely without charge constitutes per se a violation of the Convention [against Torture.]"); *UN Rights Chief Speaks Out Against US Failure to Close Guantánamo Detention Facility*, UN NEWS (Jan. 23, 2012), *at* https://news.un.org/en/story/2012/01/400992-un-rights-chief-speaks-out-against-us-failure-close-guantanamo-detention#.VQ2WoN75j8E [https://perma.cc/N8SR-UQFN] (condemning indefinite detention at Guantánamo Bay as a violation of international law).

[27] *See* Al-Alwi v. Trump, 901 F.3d, *supra* note 10, at 299. Whether or not it should be characterized as the same conflict for purposes of the 2001 AUMF, the U.S. conflict in Afghanistan has changed its character considerably since 2001. *See, e.g.*, KENNETH KATZMAN & CLAYTON THOMAS, CONG. RESEARCH SERV., RL30588, AFGHANISTAN: POST-TALIBAN GOVERNANCE, SECURITY, AND U.S. POLICY, at 17–22 (2017) (stating that "the enemy" in Afghanistan includes the Islamic State-Khorasan Province, which has only been active in Afghanistan since 2014 and noting that the various enemy groups are not always allied with each other); 159 CONG. REC. H5002-01 (daily ed. July 24, 2013) (statement of Rep. Schiff) (stating that the AUMF is being "used to go after groups like al Shabaab, which may not even have been in existence at the time of 9/11"); U.S. Dep't of Defense, Enhancing Security and Stability in Afghanistan, at 17 (2019) (listing nine enemy groups that the U.S. is currently fighting in Afghanistan).

[28] *See* Al-Alwi v. Trump, 901 F.3d, *supra* note 10, at 300.

[29] *Id.*

[30] *Id.* at 299 (*citing* Ludecke v. Watkins, 335 U.S. 160 (1948)). For further discussion of this issue, see Recent Case, *Law of War—Guantánamo Detention Authority—D.C. Circuit Holds the Government's Authority Has Not Unraveled*—Al-Alwi v. Trump, *901 F.3d 294 (D.C. Cir. 2018)*, 132 HARV. L. REV. 1542, 1546–47 (2019).

[31] Petition for Writ of Certiorari at 11, Al-Alwi v. Trump, 139 S. Ct. 1893, *supra* note 1.

[32] *Id.* at 14.

Aside from the unprecedented length of the conflict, the fighting has expanded beyond Afghanistan and beyond the Taliban and Al Qaeda, as enemies have "regrouped and dissolved" since the conflict began and the 2001 AUMF was passed, making the conflict more indeterminate than previous wars.[33] Al-Alwi argued that the Supreme Court's guidance in *Hamdi* called upon the Court to evaluate whether these circumstances warrant judicially enforceable limits on the duration of military detention:

> If the D.C. Circuit's interpretation of *Hamdi* stands, no set of practical circumstances differentiating the Afghan conflict from its predecessors could impact the government's authority to imprison Mr. al-Alwi. For *Hamdi* to have any meaning, the plurality must have envisioned that changes in the conflict's practical circumstances other than a formal declaration of surrender could affect the judicial understanding of detention authority. And if the differences in duration and other circumstances setting apart this conflict from its predecessors are not sufficient, it is hard to imagine what differences would be.[34]

Al-Alwi also argued that the Supreme Court should determine whether the judiciary has the authority to make an independent determination that a particular conflict has ended since "[i]f the judiciary yields to executive declarations in the face of contrary facts, then habeas is no check at all."[35]

On June 10, 2019, the Supreme Court denied Al-Alwi's petition for a writ of certiorari.[36] Justice Breyer issued a statement respecting the denial of certiorari, arguing that the time to reevaluate the government's detention authority has arrived:

> In my judgment, it is past time to confront the difficult question left open by *Hamdi*. See *Boumediene v. Bush*, 553 U.S. 723, 797–798, 128 S. Ct. 2229, 171 L.Ed.2d 41 (2008) ("Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.").
>
> Some 17 years have elapsed since petitioner Moath Hamza Ahmed al-Alwi, a Yemeni national, was first held at the United States Naval Base at Guantánamo Bay, Cuba. In the decision below, the District of Columbia Circuit agreed with the Government that it may continue to detain him so long as "armed hostilities between United States forces and [the Taliban and Al Qaeda] persist." The Government represents that such hostilities are ongoing, but does not state that any end is in sight. As a consequence, al-Alwi faces the real prospect that he will spend the rest of his life in detention based on his status as an enemy combatant a generation ago, even though today's conflict may differ substantially from the one Congress anticipated when it passed the AUMF, as well as those "conflicts that informed the development of the law of war."[37]

[33] *Id.* at 15.
[34] *Id.* at 11–12.
[35] *Id.* at 32.
[36] Al-Alwi v. Trump, 139 S. Ct. 1893, *supra* note 1.
[37] *Id.* at 1894 (Breyer, J., statement respecting denial of certiorari) (citations omitted). Justice Breyer had previously signaled concern about the length of detention justified under the 2001 AUMF. *See, e.g.*, Hussain v. Obama, 572 U.S. 1079 (2014) (Breyer, J., statement respecting denial of certiorari) (agreeing with the

Of the forty current detainees at Guantánamo Bay, twenty-three, like Al-Alwi, are currently held in law-of-war detention and not recommended for transfer.[38] All have been there for at least ten years.[39] Many of the other detainees have also challenged their detention.[40] In 2018, the Center for Constitutional Rights filed a petition for a writ of habeas corpus on behalf of eleven detainees.[41] The petitioners in that case argued that their due process rights have been violated in many ways, including by the effective cessation by President Trump of case-by-case determinations with respect to the potential release, and they also made arguments similar to Al-Alwi's with respect to the duration of detention justified under the 2001 AUMF.[42] Sharqawi Al Hajj, one of the detainees who joined the lawsuit, observed that "[t]he government says my detention is legal because of the indefinite war against terrorism. When terrorism ends, the war will end. So, never."[43] News reporting indicates that the Department of Defense is preparing plans for having the detention center at Guantánamo operational for an additional twenty-five years.[44]

Trump and Congress have also taken action that could affect the future of the Guantánamo Bay detention facility. In January 2018, Trump signed an executive order signaling his support for the detention facility at Guantánamo Bay, both in terms of its continued operation and as a place to which the United States could potentially bring new detainees.[45] Additionally, recent versions of the annual National Defense Authorization Act (NDAA) have contained provisions limiting the president's authority to curtail operations at Guantánamo Bay or to transfer detainees to the United States.[46] With the House of Representatives passing to Democratic control in 2019, it is unclear whether different provisions will be included in the NDAA for 2020, which is likely to pass Congress in the fall of 2019. The version passed by the House in July of 2019 differed from previous NDAAs with respect to Guantánamo in several ways, among them: omitting a provision prohibiting the use of funds for the transfer of Guantánamo detainees to the United States; including a provision

Court's denial of certiorari on the ground that the petition at hand did not seek review of "unanswered questions" like "whether . . . either the [2001] AUMF or the Constitution limits the duration of detention").

[38] The Guantánamo Docket, *supra* note 4.

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

[40] *See* Respondents' Opposition to Petitioners' Motion for Order Granting Writ of Habeas Corpus at 7–9, Al-Bihani v. Trump, (D.D.C. filed Feb. 16, 2018) (No. 1:-4-cv-01194-UNA) (including a table with the status of eleven current detainees' petitions for habeas corpus).

[41] Center for Constitutional Rights Press Release, Gitmo Attorneys to Court: Find Perpetual Detention Unlawful and Order Release (July 11, 2018), *at* https://ccrjustice.org/home/press-center/press-releases/gitmo-attorneys-court-find-perpetual-detention-unlawful-and-order.

[42] Motion for Order Granting Writ of Habeas Corpus at 1–4, Al-Bihani v. Trump (D.D.C. filed Jan. 11, 2018) (No. 1:09-cv-00745-RCL).

[43] *See* Center for Constitutional Rights Press Release, *supra* note 41.

[44] Carol Rosenberg, *Guantánamo Bay as Nursing Home: Military Envisions Hospice Care as Terrorism Suspects Age*, N.Y. Times (Apr. 27, 2019), *at* https://www.nytimes.com/2019/04/27/us/politics/guantanamo-bay-aging-terrorism-suspects-medical-care.html (quoting the detention center's commander as remarking that "[u]nless America's policy changes, at some point we'll be doing some sort of end of life care here").

[45] Protecting America Through Lawful Detention of Terrorists, Exec. Order No. 13823, 83 Fed. Reg. 4831 (Jan. 30, 2018); *see also* Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 326 (2018) (discussing this executive order in more depth).

[46] *See, e.g.*, John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §§ 1032–35, 132 Stat. 1636 (2018) (prohibiting, among other things, the use of funds for transferring detainees to the United States).

prohibiting the use of funds for the transfer of new detainees to Guantánamo; and adding a provision expressing Congress's sense that "the United States has an ongoing obligation to provide medical care to individuals detained" at Guantánamo, "meeting appropriate standards of care."[47] The version passed by the Senate over the summer of 2019 did not include these provisions,[48] and as of mid-September 2019, the two chambers of Congress had not agreed on a final version. The future of these provisions—as well as of more ambitious efforts to repeal the 2001 AUMF[49]—remains to be seen.

[47] National Defense Authorization Act for Fiscal Year 2020, §§ 1032–34, H.R. 2500, 116th Cong. (2019).

[48] *See* National Defense Authorization Act for Fiscal Year 2020, §§ 1021–25, S. 1790, 116th Cong. (2019) (largely reiterating provisions that had been included in earlier NDAAs).

[49] In the summer of 2019, for example, the House of Representatives included such a provision in another appropriation bill—a bill that, as of late September, was pending in the Senate. Labor, Health and Human Services, Education, Defense, State, Foreign Operations, and Energy and Water Development Appropriations Act, 2020, H.R. 2740, 116th Cong. § 9025 (2019) (text as engrossed in the House on June 19, 2019); U.S. Congress, *All Actions H.R.2740 — 116th Congress (2019–2020)*, *at* https://www.congress.gov/bill/116th-congress/house-bill/2740/all-actions?q=%7B%22search%22%3A%5B%22H.R.+2740%22%5D%7D&s=7&r=1 [https://perma.cc/RG6W-6WLP].