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Contemporary Practice of the United States Relating to International Law (114:3 Am J Int'l L)

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CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY JEAN GALBRAITH*

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

President Trump Impeached and Acquitted of Charges Relating to His Conduct of Foreign Affairs
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On December 18, 2019, by a majority vote, the House of Representatives impeached President Trump for abusing power by soliciting Ukrainian interference in the 2020 presidential election and then obstructing the House's impeachment investigation. The allegations against Trump rested substantially on a phone conversation between Trump and Ukrainian president Volodymyr Zelensky on July 25, 2019. During this conversation, Trump asked Zelensky to investigate the prior conduct of Joe Biden—Trump's likely political opponent for the 2020 presidential election. While the House was conducting its impeachment investigation, the White House directed executive branch officials not to testify or to turn over documents. Less than two months after the impeachment, on February 5, 2020, the Senate voted to acquit Trump of the charges, with a majority of Senators voting in favor of acquittal.

The U.S. Constitution provides that the president "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."¹ If the House of Representatives approves articles of impeachment against the president by a majority vote, then the matter moves to the Senate for trial.² A two-thirds vote in the Senate is required for conviction.³ Trump is the third president to be impeached, after Andrew Johnson in 1868⁴ and Bill Clinton in 1998,⁵ and the first president to be impeached for conduct related to foreign affairs.⁶

According to the House Intelligence Committee's impeachment report (the "Impeachment Report"), Trump and his agents solicited the Ukrainian government to announce investigations that would benefit Trump politically.⁷ The Impeachment Report determined that, over the spring and summer of 2019, Trump and his agents sought an investigation into unsubstantiated allegations that, as President Obama's vice president, Biden had interfered with Ukraine's investigation into corruption at Burisma, a Ukrainian energy company, because his son served on

¹ U.S. CONST. Art. II, § 4. For a discussion of conduct that has been deemed impeachable in past proceedings, see generally MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (3d ed. 2019).

² See U.S. CONST. Art. I, § 2, cl. 5; Art. I, § 3, cl. 6.

³ *Id.* Art. I, § 3, cl. 6.

⁴ *The Impeachment of Andrew Johnson (1868) President of the United States*, U.S. SENATE, at https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Johnson.htm [<https://perma.cc/5ZT3-795M>].

⁵ H.R. Res. 611, 116th Cong. (1998).

⁶ President Richard Nixon resigned in 1974, after the House Judiciary Committee voted to approve articles of impeachment against him but before the House of Representatives voted on impeachment. Joshua Eilberg, *The Investigation by the Committee on the Judiciary of the House of Representatives into the Charges of Impeachable Conduct Against Richard M. Nixon*, 48 *TEMPLE L. Q.* 209, 209 (1975). The Judiciary Committee had approved certain articles of impeachment related to domestic actions undertaken by Nixon, but it had voted against charging him for a matter relating to foreign affairs. See *id.* at 240 (noting that the Judiciary Committee voted down a charge that Nixon concealed the 1969 U.S. bombing of Cambodia from Congress).

⁷ H. PERMANENT SELECT COMM. ON INTELLIGENCE, 116TH CONG., *THE TRUMP-UKRAINE IMPEACHMENT INQUIRY REP. 12* (2019) [hereinafter *INTELLIGENCE COMM. REP.*].

Burisma's board of directors.⁸ The announcement of such an investigation could damage Biden's 2020 election campaign.⁹ Trump also sought an investigation into the discredited theory that Ukraine—not Russia—hacked the Democratic National Committee's server in 2016.¹⁰ Shifting the blame from Russia to Ukraine would detract from allegations that Trump worked with Russia to interfere in the 2016 U.S. election.¹¹

Drawing on witness testimony, the Impeachment Report described a series of events, most of which came after Zelensky's election as president of Ukraine in April of 2019. Following this election, Trump's personal attorney, Rudy Giuliani, sought to secure an announcement of the sought-after investigations from the new Ukrainian administration.¹² The U.S. Ambassador to Ukraine, Marie Yovanovitch, was perceived as an obstacle to these efforts, and Trump recalled her shortly after Zelensky's election.¹³ Her successor, William Taylor, later testified that Giuliani and Trump political appointees conducted a channel of communication with Ukraine that operated outside of the U.S. State Department and that "the irregular policy channel was running contrary to the goals of longstanding U.S. policy."¹⁴

The Impeachment Report determined that, before the July 25 phone call between Trump and Zelensky, Trump's representatives communicated to Ukrainian officials that a meeting between the two leaders was conditioned on Zelensky announcing the investigations.¹⁵ Such a meeting was particularly important for Ukraine because "Russia was watching closely to gauge the level of American support for the Ukrainian government."¹⁶ At one meeting between U.S. and Ukrainian officials, the U.S. Ambassador to the European Union, Gordon Sondland, explained that Trump would meet with Zelensky only after Ukraine announced investigations into "the energy sector" and specified in a follow-up conversation that he was referring to Burisma.¹⁷ Also in the weeks before the phone call, Trump ordered a

⁸ *Id.* at 102–03. According to U.S. State Department officials, there was no credible evidence that Biden acted inappropriately and his actions made an investigation into corruption at Ukrainian companies more—rather than less—likely. *Id.* at 103.

⁹ *Id.* at 42.

¹⁰ *Id.* at 101; see also Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 111 AJIL 483 (2017) (describing U.S. investigations establishing that Russia interfered in the 2016 presidential election).

¹¹ INTELLIGENCE COMM. REP., *supra* note 7, at 10, 42.

¹² *Id.* at 51–58, 63–65; Kenneth P. Vogel, *Rudy Giuliani Plans Ukraine Trip to Push for Inquiries that Could Help Trump*, N.Y. TIMES (May 9, 2019), at <https://www.nytimes.com/2019/05/09/us/politics/giuliani-ukraine-trump.html>.

¹³ INTELLIGENCE COMM. REP., *supra* note 7, at 38–49; Rebecca Ballhaus, Michael C. Bender & Vivian Salama, *Trump Ordered Ukraine Ambassador Removed After Complaints from Giuliani, Others*, WALL ST. J. (Oct. 3, 2019), at <https://www.wsj.com/articles/trump-ordered-ukraine-ambassador-removed-after-complaints-from-giuliani-others-11570137147>.

¹⁴ Amb. William Taylor, Opening Statement Before the H. Permanent Select Comm. on Intelligence, at 8 (Nov. 13, 2019), available at <https://www.nytimes.com/2019/11/13/us/politics/william-taylor-opening-statement-impeachment.html> [hereinafter Taylor Opening Statement]. Similarly, Fiona Hill, a National Security Council official during the relevant time period, testified that she was concerned that "Ukraine was going to be played by Giuliani in some way as part of the campaign." Fiona Hill, Deposition by the H. Permanent Select Comm. on Intelligence, H. Comm. on Oversight and Reform, and the H. Comm. on Foreign Aff., at 130 (Oct. 14, 2019), available at <https://assets.documentcloud.org/documents/6543462/Fiona-Hill-Full-Deposition.pdf>.

¹⁵ INTELLIGENCE COMM. REP., *supra* note 7, at 83–90.

¹⁶ Taylor Opening Statement, *supra* note 14, at 12.

¹⁷ INTELLIGENCE COMM. REP., *supra* note 7, at 88–89. According to Hill, National Security Advisor John Bolton abruptly ended the initial meeting and later stated to her that he wanted no part in Sondland's "drug deal." *Id.* at

hold on \$391 million that Congress had appropriated to Ukraine for security assistance.¹⁸ The aid was withheld until September 11, 2019.¹⁹ Taylor testified to his “astonishment” in learning that the aid was being withheld, as “one of the key pillars of our strong support for Ukraine was threatened.”²⁰

On July 25, Trump and Zelensky spoke by phone. The White House eventually released a rough transcript of the call.²¹ After initial greetings, the two leaders discussed U.S. support for Ukraine:

Trump: [T]he United States has been very very good to Ukraine. I wouldn't say that it's reciprocal necessarily because things are happening that are not good but the United States has been very very good to Ukraine.

Zelensky: . . . I would also like to thank you for your great support in the area of defense. We are ready to continue to cooperate for the next steps specifically we are almost ready to buy more Javelins from the United States for defense purposes.²²

Immediately afterward, Trump asked Zelensky for a “favor”—that Zelensky investigate Trump's theory that Ukraine was responsible for interfering in the 2016 election:

I would like you to do us a favor though because our country has been through a lot and Ukraine knows a lot about it. I would like you to find out what happened with this whole situation with Ukraine, they say CrowdStrike . . . I guess you have one of your wealthy people . . . The server, they say Ukraine has it . . . I would like to have the Attorney General call you or your people and I would like you to get to the bottom of it.²³

After Zelensky agreed, Trump asked Zelensky to work with the U.S. attorney general to investigate the Bidens:

The other thing, [t]here's a lot of talk about Biden's son, that Biden stopped the prosecution and a lot of people want to find out about that so whatever you can do with the Attorney General would be great. Biden went around bragging that he stopped the prosecution so if you can look into it . . . It sounds horrible to me.²⁴

88, 90. Hill testified that Sondland explicitly referred to Burisma in the follow-up conversation with the Ukrainians, and another witness to this follow-up conversation recalled Sondland referring to both Burisma and the Bidens. *Id.* at 89.

¹⁸ *Id.* at 67. State Department official Catherine Croft testified that Ukrainian Embassy officials had begun signaling concern about the delay in the security assistance by the day of the Trump-Zelensky phone call. *Id.* at 81.

¹⁹ *Id.* at 140.

²⁰ Taylor Opening Statement, *supra* note 14, at 8.

²¹ Memorandum of Telephone Conversation with President Zelenskyy of Ukraine (July 25, 2019), available at <https://www.whitehouse.gov/wp-content/uploads/2019/09/Unclassified09.2019.pdf> [<https://perma.cc/T5EH-MMHT>] [hereinafter Trump-Zelensky Phone Call].

²² *Id.* at 2.

²³ *Id.* at 3. Trump was referring to the theory that cybersecurity company CrowdStrike framed Russia for the hack of the Democratic National Committee's emails and hid the server that would prove Ukraine was responsible. INTELLIGENCE COMM. REP., *supra* note 7, at 101.

²⁴ Trump-Zelensky Phone Call, *supra* note 21, at 4. Zelensky responded that, once his administration had a new prosecutor-general in place, “[h]e or she will look into the situation, specifically to the company that you mentioned in this issue.” *Id.*

In the weeks and months that followed, U.S. and Ukrainian officials followed up about the investigations discussed during the phone call.²⁵ The Impeachment Report concluded that Sondland told Ukrainian officials that both the White House meeting and U.S. security assistance were conditioned on Ukraine publicly announcing that it would pursue the investigations.²⁶ Taylor expressed concern multiple times, at one point texting Sondland that “it’s crazy to withhold security assistance for help with a political campaign.”²⁷

On August 12, 2019, a CIA officer filed a whistleblower complaint with the inspector general of the intelligence community about the July 25 phone call.²⁸ On September 24, after the allegations in the whistleblower complaint had come to light, House Speaker Nancy Pelosi initiated an impeachment inquiry.²⁹ House leaders maintained that Trump’s request to Ukraine to conduct the investigations was a “shocking abuse of the Office of the Presidency,” whether or not there was a direct “quid pro quo”:

Let’s be clear: no quid pro quo is required to betray our country. Trump asked a foreign government to interfere in our elections—that is betrayal enough. The corruption exists whether or not Trump threatened—explicitly or implicitly—that a lack of cooperation could result in withholding military aid.³⁰

The House Intelligence, Oversight, and Foreign Affairs Committees immediately began scheduling depositions of officials from the White House, State Department, Defense Department, National Security Council, and Office of Management and Budget.³¹ The Trump administration, however, refused to cooperate with the House investigation, generally declining to produce documents and instructing executive branch employees not to provide testimony.³² The Impeachment Report later described this noncooperation as

²⁵ INTELLIGENCE COMM. REP., *supra* note 7, at 114–39.

²⁶ *Id.* at 132; Taylor Opening Statement, *supra* note 14, at 14.

²⁷ INTELLIGENCE COMM. REP., *supra* note 7, at 135–36.

²⁸ Whistle Blower Complaint (Aug. 12, 2019), available at https://intelligence.house.gov/uploadedfiles/20190812_-_whistleblower_complaint_unclass.pdf; Julian E. Barnes, Michael S. Schmidt, Adam Goldman & Katie Benner, *White House Knew of Whistle-Blower’s Allegations Soon After Trump’s Call with Ukraine Leader*, N.Y. TIMES (Sept. 26, 2019), at <https://www.nytimes.com/2019/09/26/us/politics/who-is-whistleblower.html>.

²⁹ U.S. House of Representatives Speaker of the House Press Release, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019), at <https://www.speaker.gov/newsroom/92419-0> [<https://perma.cc/A5R4-P8YZ>].

³⁰ U.S. House of Representatives Committee on Foreign Affairs Press Release, Joint Statement from Committee Chairs on Release of Ukraine Call Record (Sept. 25, 2019), at <https://foreignaffairs.house.gov/2019/9/joint-statement-from-committee-chairs-on-release-of-ukraine-call-record> [<https://perma.cc/6EVV-9N8V>].

³¹ Harry Stevens, Dan Keating, Kevin Uhrmacher & Chris Alcantara, *How President Trump’s Impeachment Unfolded in the House and Senate*, WASH. POST (updated Feb. 6, 2020).

³² See, e.g., Letter from Michael Pompeo, Sec. of State, to Rep. Eliot Engel, Chairman of H. Comm. on Foreign Affairs, at 1–2 (Oct. 1, 2019), available at <https://games-cdr.s3.amazonaws.com/washingtonpost.com/notes/prod/default/documents/a516c696-4d03-47f5-a8db-af11fa23ac02/note/c3f9c700-4e67-4a33-bc97-fd5687546349.pdf> (referring to, among other things, “the Executive Branch’s unquestionably legitimate constitutional interest in protecting potentially privileged information related to the conduct of diplomatic relations”); Letter from Pat Cipollone, White House Counsel, to Leaders of House Impeachment Inquiry, at 2 (Oct. 8, 2019), available at <https://www.washingtonpost.com/context/letter-from-white-house-counsel-pat-cipollone-to-house-leaders/0e1845e5-5c19-4e7a-ab4b-9d591a5fda7b> (stating that “President Trump and his Administration cannot participate in your partisan and unconstitutional inquiry” in light of how the House was conducting its impeachment inquiry); INTELLIGENCE COMM. REP., *supra* note 7, at 28–33 (describing the Trump administration’s noncooperation).

“unprecedented,” observing that “past Presidents who were the subject of impeachment inquiries—including Presidents Andrew Johnson, Richard Nixon, and Bill Clinton—recognized and, to varying degrees, complied with information requests and subpoenas.”³³ The House committees ultimately issued subpoenas to compel certain administration officials to give depositions. Faced with conflicting demands from the legislative and executive branch, some witnesses—many of them civil servants—gave depositions, while other officials did not appear.³⁴ Pelosi stated that “[t]he White House should be warned that continued efforts to hide the truth of the President’s abuse of power from the American people will be regarded as further evidence of obstruction.”³⁵

After conducting closed-door depositions, the House passed a resolution on October 31, 2019, directing the continuation of the impeachment proceedings and outlining the rest of the impeachment process.³⁶ The resolution provided that Democrats and Republicans on the House Intelligence Committee would question witnesses in open hearings, the Intelligence Committee would write a report summarizing its findings, and the Judiciary Committee would decide whether to report forward any articles of impeachment.³⁷ The chair of the Intelligence Committee, Adam Schiff, announced on the first day of the open hearings that many of the witnesses were appearing under subpoenas to protect them from retribution from the Trump administration.³⁸ He said that directing witnesses not to appear could itself be grounds for impeachment:

The president has instructed the State Department and other agencies to ignore congressional subpoenas for documents. He has instructed witnesses to defy subpoenas and refuse to appear. And he has suggested that those who do expose wrongdoing should be treated like traitors and spies. These actions will force Congress to consider, as it did with President Nixon, whether Trump’s obstruction of the constitutional duties of Congress constitute additional grounds for impeachment.³⁹

Multiple witnesses who previously gave closed-door depositions testified publicly, including Yovanovitch, Taylor, and Sondland.⁴⁰ As during the earlier depositions, various witnesses testified that Trump asked Zelensky to announce investigations into Joe Biden and into whether Ukraine engaged in U.S. election interference in 2016; that Trump conditioned

³³ INTELLIGENCE COMM. REP., *supra* note 7, at 28–29.

³⁴ *See id.* at 30–32. The former deputy national security adviser filed a lawsuit in federal court to determine whether he should comply with the congressional subpoena or the White House directive not to testify. The lawsuit did not get resolved on the merits, as it was dismissed as moot after the House voted to impeach Trump. Bryon Tau, *Judge Dismisses Case Over Testimony of Trump Administration Official*, WALL ST. J. (Dec. 30, 2019), at <https://www.wsj.com/articles/judge-dismisses-case-over-testimony-of-trump-administration-official-11577748048>.

³⁵ Karoun Demirjian, Josh Dawsey, Shane Harris & John Wagner, *White House Escalates Standoff with Congress, Says It Will Not Cooperate with Impeachment Inquiry of Trump*, WASH. POST (Oct. 8, 2019), at https://www.washingtonpost.com/national-security/gordon-sondland-key-us-official-in-political-storm-over-ukraine-to-be-deposed-in-impeachment-inquiry/2019/10/07/c3c1703e-e942-11e9-9306-47cb0324fd44_story.html.

³⁶ H.R. Res. 660, 116th Cong. (2019).

³⁷ *Id.*

³⁸ Washington Post Staff, *Transcript: Kent and Taylor Public Testimony in Front of the House Intelligence Committee*, WASH. POST (Nov. 14, 2019) (Adam Schiff opening statement), at <https://www.washingtonpost.com/politics/2019/11/14/transcript-kent-taylor-public-testimony-front-house-intelligence-committee>.

³⁹ *Id.*

⁴⁰ Stevens, Keating, Uhrmacher & Alcantara, *supra* note 31.

official acts on this announcement; and that these actions were improper and dangerous to U.S. national security.⁴¹ While most witnesses were called by the Democrats on the Intelligence Committee, the Republican minority called several witnesses. These included a former official who testified that he had “made no judgment about any illegal conduct occurring” as he had listened to the July 25 call⁴² and a former U.S. special envoy to Ukraine who testified that he “drew a sharp distinction” between seeking an investigation of Burisma and seeking an investigation of the Bidens.⁴³

Following the public testimony, the Intelligence Committee published the Impeachment Report, which contained its findings. The Report stated:

The impeachment inquiry into Donald J. Trump, the 45th President of the United States, uncovered a months-long effort by President Trump to use the powers of his office to solicit foreign interference on his behalf in the 2020 election. . . . President Trump’s scheme subverted U.S. foreign policy toward Ukraine and undermined our national security in favor of two politically motivated investigations that would help his presidential reelection campaign. The President demanded that the newly-elected Ukrainian president, Volodymyr Zelensky, publicly announce investigations into a political rival that he apparently feared the most, former Vice President Joe Biden, and into a discredited theory that it was Ukraine, not Russia, that interfered in the 2016 presidential election. To compel the Ukrainian President to do his political bidding, President Trump conditioned two official acts on the public announcement of the investigations: a coveted White House visit and critical U.S. military assistance Ukraine needed to fight its Russian adversary.⁴⁴

The Intelligence Committee approved the Impeachment Report on December 3, 2019, in a party-line vote, with thirteen Democrats endorsing the report and nine Republicans dissenting.⁴⁵

⁴¹ See Aaron Blake, Philip Bump & Irfan Uraizee, *The Full Trump-Ukraine Impeachment Timeline*, WASH. POST (updated Jan. 27, 2020), at <https://www.washingtonpost.com/graphics/2019/politics/trump-impeachment-timeline>. Sondland amended his testimony between the private and public hearings. Declaration of Ambassador Gordon D. Sondland (Nov. 4, 2019), available at <https://www.justsecurity.org/wp-content/uploads/2019/11/Ambassador-Gordon-Sondland-Supplemental-Declaration-Nov-4-2019.pdf> [hereinafter Sondland Declaration]. He originally denied that U.S. officials told Ukrainian officials that security assistance was conditioned on the announcement of investigations. Amb. Gordon Sondland, Opening Statement Before the H. Permanent Select Comm. on Intelligence, at 16–17 (Oct. 17, 2019), available at <https://www.politico.com/news/2019/10/17/full-text-gordon-sondland-opening-statement-impeachment-049982>. In his updated testimony, he said that he himself told Ukrainian officials that it was. Sondland Declaration, *supra*, at 2.

⁴² Washington Post Staff, *Transcript: Volker and Morrison Public Testimony on Nov. 19*, WASH. POST (Nov. 19, 2019) (testimony of Tim Morrison), at <https://www.washingtonpost.com/politics/2019/11/19/transcript-volker-morrison-public-testimony-nov>.

⁴³ Amb. Kurt Volker, Opening Statement Before the H. Permanent Select Comm. on Intelligence, at 7 (Nov. 19, 2019), available at <https://d3i6fh83elv35t.cloudfront.net/static/2019/11/Final-Volker-Testimony-11.19.19.pdf>. He observed that “[i]n hindsight, I now understand that others saw the idea of investigating possible corruption involving the Ukrainian company, ‘Burisma,’ as equivalent to investigating former Vice President Biden In retrospect, I should have seen that connection differently.” *Id.* at 8.

⁴⁴ INTELLIGENCE COMM. REP., *supra* note 7, at 12.

⁴⁵ Felicia Sonmez, Colby Itkowitz & John Wanger, *House Intelligence Committee Sends Report on Trump and Ukraine to Judiciary Panel, Paving the Way for Possible Articles of Impeachment*, WASH. POST (Dec. 3, 2019), at https://www.washingtonpost.com/politics/impeachment-hearings-live-updates/2019/12/03/50fec098-15ba-11ea-8406-df3c54b3253e_story.html.

The report was sent to the Judiciary Committee, which had been charged with deciding whether to draw up articles of impeachment.⁴⁶

House Republicans prepared their own report on the impeachment proceedings, reaching very different conclusions than those outlined in the Impeachment Report:

At the heart of the matter, the impeachment inquiry involves the actions of only two people: President Trump and President Zelensky. The summary of their July 25, 2019, telephone conversation shows no *quid pro quo* or indication of conditionality, threats, or pressure—much less evidence of bribery or extortion. . . .

Even examining evidence beyond the presidential phone call shows no *quid pro quo*, bribery, extortion, or abuse of power. The evidence shows that President Trump holds a deep-seated, genuine, and reasonable skepticism of Ukraine due to its history of pervasive corruption. The President has also been vocal about his skepticism of U.S. foreign aid and the need for European allies to shoulder more of the financial burden for regional defense. . . .

Understood in this proper context, the President's initial hesitation to meet with President Zelensky or to provide U.S. taxpayer-funded security assistance to Ukraine without thoughtful review is entirely prudent. . . .

There is also nothing wrong with asking serious questions about the presence of Vice President Biden's son, Hunter Biden, on the board of directors of Burisma, a corrupt Ukrainian company, or about Ukraine's attempts to influence the 2016 presidential election. . . .⁴⁷

On December 13, 2019, the Judiciary Committee voted 23 to 17 along party lines to adopt two articles of impeachment against Trump: the first for abuse of power, and the second for obstruction of justice.⁴⁸ The abuse of power charge stated in part that:

Using the powers of his high office, President Trump solicited the interference of a foreign government, Ukraine, in the 2020 United States Presidential election. He did so through a scheme or course of conduct that included soliciting the Government of Ukraine to publicly announce investigations that would benefit his reelection, harm the election prospects of a political opponent, and influence the 2020 United States Presidential election to his advantage. President Trump also sought to pressure the Government of Ukraine to take these steps by conditioning official United States Government acts of significant value to Ukraine on its public announcement of these investigations. . . .

⁴⁶ *Id.*

⁴⁷ Report of Evidence in the Democrats' Impeachment Inquiry in the House of Representatives (Dec. 2, 2019), available at <https://republicans-oversight.house.gov/wp-content/uploads/2019/12/2019-12-02-Report-of-Evidence-in-the-Democrats-Impeachment-Inquiry-in-the-House-of-Representatives.pdf>.

⁴⁸ H.R. Res. 755, 116th Cong. (2019); Nicholas Fandos, *Panel Approves Impeachment Articles and Sends Charges for a House Vote*, N.Y. TIMES (Dec. 13, 2019), at <https://www.nytimes.com/2019/12/13/us/politics/impeachment-vote.html>. Earlier that month, the Judiciary Committee heard testimony from constitutional law scholars about what constitutes an impeachable offense and whether Trump's conduct rose to that level. Michael D. Shear, *Key Moments from the First Impeachment Hearing in the Judiciary Committee*, N.Y. TIMES (Dec. 4, 2019), at <https://www.nytimes.com/2019/12/04/us/politics/impeachment-hearings.html>.

...

In all of this, President Trump abused the powers of the Presidency by ignoring and injuring national security and other vital national interests to obtain an improper personal political benefit. He has also betrayed the Nation by abusing his high office to enlist a foreign power in corrupting democratic elections.⁴⁹

The obstruction of justice charge stated in part:

[W]ithout lawful cause or excuse, President Trump directed Executive Branch agencies, offices, and officials not to comply with [congressional] subpoenas.

...

In the history of the Republic, no President has ever ordered the complete defiance of an impeachment inquiry or sought to obstruct and impede so comprehensively the ability of the House of Representatives to investigate “high Crimes and Misdemeanors.” This abuse of office served to cover up the President’s own repeated misconduct. . . .⁵⁰

On December 18, the House impeached Trump, voting in favor of both articles of impeachment almost entirely along party lines.⁵¹ 229 Democrats and one Independent voted to impeach Trump for abuse of power, while two Democrats and 195 Republicans voted against this first article of impeachment.⁵² 228 Democrats and one Independent voted to impeach Trump for obstruction of justice, while three Democrats and 195 Republicans voted against this second article of impeachment.⁵³

On January 15, 2020, the seven representatives appointed as House impeachment managers delivered the articles of impeachment to the Senate, where the impeachment trial was to be presided over by Chief Justice John Roberts of the U.S. Supreme Court.⁵⁴ The Senate impeachment proceedings began with a debate over the trial rules.⁵⁵ The final rules provided, in essence, that (1) the entire House impeachment record would be admitted into evidence; (2) the House managers and the president’s representatives would each have three days to make opening arguments; (3) senators would have sixteen hours to question the two sides, after which each side would receive two further hours for argument; (4) the Senate would then vote on whether to subpoena witnesses and documents and, if it voted in favor, would hear this additional evidence; and (5) finally, the Senate would vote on the

⁴⁹ H.R. Res. 755, 116th Cong. (2019).

⁵⁰ *Id.*

⁵¹ *All Actions H.Res.755 — 116th Congress (2019–2020)*, CONGRESS.GOV, at <https://www.congress.gov/bill/116th-congress/house-resolution/755/all-actions>.

⁵² Final Vote Results for Roll Call 695, at <http://clerk.house.gov/evs/2019/roll695.xml>.

⁵³ Final Vote Results for Roll Call 696, at <http://clerk.house.gov/evs/2019/roll696.xml>.

⁵⁴ Nicholas Fandos & Sheryl Gay Stoleberg, *House Delivers Impeachment Charges to Senate, Paving the Way for a Trial*, N.Y. TIMES (Jan. 15, 2020), at <https://www.nytimes.com/2020/01/15/us/politics/impeachment-managers.html>. Pelosi delayed sending the articles of impeachment to the Senate for nearly a month in an effort to pressure the Senate to allow additional witnesses and documents to be presented at the trial. *Id.*

⁵⁵ Michael D. Shear, *Senate Adopts Trial Rules*, N.Y. TIMES (Jan. 22, 2020), at <https://www.nytimes.com/live/2020/impeachment-trial-01-21>.

articles of impeachment.⁵⁶ The Senate voted 53 to 47 along party lines to reject multiple amendments to the rules which would have allowed documents to be subpoenaed and witnesses to be called.⁵⁷

The House impeachment managers laid out the case for conviction over three days, drawing on the fact-finding previously conducted in the House proceedings. The lawyers for Trump advanced various arguments against impeachment.⁵⁸ With respect to the abuse of power charge, they argued, among other things, that:

First, the transcript [of the July 25 call] shows that the President did not condition either security assistance or a meeting on anything. The paused security assistance funds aren't even mentioned on the call.

Second, President Zelensky and other Ukrainian officials have repeatedly said that there was no quid pro quo and no pressure on them to review anything.

Third, President Zelensky and high-ranking Ukrainian officials did not even know—that the security assistance was paused until the end of August, over a month after the July 25 call.

Fourth, not a single witness testified that the President himself said that there was any connection between any investigations and security assistance, a Presidential meeting, or anything else.⁵⁹

On the obstruction charge, Trump's lawyers argued that "[i]n every instance, when there was resistance to a subpoena . . . for a witness or for documents, there is a legal explanation and justification for it."⁶⁰

After six days of opening arguments, two days of senators posing questions to the legal teams, and one day of closing arguments,⁶¹ the Senate debated whether to hear testimony from witnesses.⁶² Contemporaneous with the parties' opening arguments, the *New York Times* had reported that an unpublished manuscript of a book by John Bolton, the national security advisor during the summer of 2019, included claims that Trump directed him to help pressure Ukraine to investigate the Bidens.⁶³ The House impeachment managers believed

⁵⁶ S. Res. 483, 116th Cong. (2020).

⁵⁷ John Wagner, Colby Itkowitz & Felicia Sonmez, *Senate Rejects Democratic Effort to Subpoena Acting White House Chief of Staff Mulvaney for Testimony in Trump's Impeachment Trial*, WASH. POST (Jan. 21, 2020), at https://www.washingtonpost.com/politics/impeachment-trial-live-updates/2020/01/21/a52d9a74-3c3c-11ea-b90d-5652806c3b3a_story.html.

⁵⁸ See John Wagner & Colby Itkowitz, *In First Day of Defense, Trump's Team Argues that He Did Nothing Wrong, and that Democrats Presented Selective Case*, WASH. POST (Jan. 25, 2020), at https://www.washingtonpost.com/politics/impeachment-trial-live-updates/2020/01/25/db73d4e6-3f60-11ea-b90d-5652806c3b3a_story.html.

⁵⁹ 166 Cong. Rec. S567, S568-69 (Jan. 25, 2020) (argument of Michael Purpura).

⁶⁰ *Id.* at S575 (argument of Pat Philbin).

⁶¹ See Stevens, Keating, Uhrmacher & Alcantara, *supra* note 31.

⁶² Michael D. Shear & Nicholas Fandos, *Republicans Block Impeachment Witnesses, Clearing Path for Trump Acquittal*, N.Y. TIMES (Jan. 31, 2020), at <https://www.nytimes.com/2020/01/31/us/politics/trump-impeachment-trial.html>.

⁶³ Maggie Haberman & Michael S. Schmidt, *Trump Tied Ukraine Aid to Inquiries He Sought, Bolton Book Says*, N.Y. TIMES (Jan. 26, 2020), at <https://www.nytimes.com/2020/01/26/us/politics/trump-bolton-book-ukraine.html>.

that Bolton's testimony would supply the firsthand evidence against Trump that Republicans claimed was lacking.⁶⁴ On January 31, the Senate voted 51–49 not to hear from additional witnesses, with two Republican Senators joining the forty-seven Democrats who favored hearing from these witnesses.⁶⁵

On February 5, the Senate voted to acquit Trump on both charges.⁶⁶ Fifty-two Republicans voted “not guilty” on the abuse of power charge, while Republican Senator Mitt Romney and all forty-seven Democrats voted “guilty.”⁶⁷ All fifty-three Republicans voted “not guilty” on the obstruction of justice charge, while all forty-seven Democrats voted “guilty.”⁶⁸ Trump thus became the third president in U.S. history to be impeached but not convicted.⁶⁹

Trump Administration Further Restricts Asylum Seekers at the Southern Border Through the Migrant Protection Protocols, Asylum Cooperative Agreements, and COVID-19 Procedures
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During the spring of 2020, the Trump administration continued efforts to reduce the ability of individuals to seek asylum in the United States, particularly at its southern border. The administration received temporary authorization from the U.S. Supreme Court to put into effect the Migrant Protection Protocols (MPP)—an arrangement that requires non-Mexican asylum seekers to wait in Mexico for the duration of their immigration proceedings—while the administration petitions the Court to reverse a lower court decision enjoining the MPP's implementation. The administration has also sought to implement its asylum cooperative agreement with Guatemala, whereby the United States sends certain non-Guatemalan migrants to Guatemala to apply for asylum there. The legality of this agreement is presently being challenged, and, in March of 2020, the COVID-19 pandemic caused Guatemala to stop

⁶⁴ John Wagner, *Democrats Make Final Case for Why Senate Needs to Hear from Bolton, Mulvaney*, WASH. POST (Jan. 31, 2020), at https://www.washingtonpost.com/politics/impeachment-trial-live-updates/2020/01/31/9a853bbe-4415-11ea-b5fc-eefa848cde99_story.html.

⁶⁵ Michael Brice-Saddler, *Senate Votes to Formally Reject Additional Witnesses, Evidence*, WASH. POST (Jan. 31, 2020), at https://www.washingtonpost.com/politics/impeachment-trial-live-updates/2020/01/31/9a853bbe-4415-11ea-b5fc-eefa848cde99_story.html.

⁶⁶ *All Actions H.Res.755 – 116th Congress (2019–2020)*, CONGRESS.GOV, at <https://www.congress.gov/bill/116th-congress/house-resolution/755/all-actions?overview=closed&KWICView=false>.

⁶⁷ Roll Call Vote 116th Congress – 2d Session (Vote 33), at https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00033.

⁶⁸ Roll Call Vote 116th Congress – 2d Session (Vote 34), at https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00034.

⁶⁹ Two days after the conclusion of the trial, Trump took action against some of the witnesses who participated in the congressional inquiry, removing one from the National Security Council staff and recalling Sondland from his position as Ambassador to the European Union. See Scott R. Anderson, *The Legal Limits on Trump's Reprisals Against Impeachment Witnesses*, LAWFARE (Feb. 11, 2020), at <https://www.lawfareblog.com/legal-limits-trumps-reprisals-against-impeachment-witnesses> (noting that “[b]y the end of the day, no one who participated in the House's impeachment proceedings still held a White House position or ambassadorship”).

accepting flights of migrants sent by the U.S. government. Citing COVID-19, the Trump administration itself issued various suspensions of entry into the United States of noncitizens during the spring of 2020, including with respect to asylum seekers at the U.S.-Mexico border.

The MPP requires most foreign nationals from countries other than Mexico “arriving in or entering the United States from Mexico—illegally or without proper documentation—[to return] to Mexico for the duration of their immigration proceedings.”¹ Announcing the MPP in December of 2018, the secretary of Homeland Security stated that:

officials should act consistent with the *non-refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 [Refugee] Convention) and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Specifically, a third-country national should not be involuntarily returned to Mexico . . . if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion (unless such alien has engaged in criminal, persecutory, or terrorist activity . . .), or would more likely than not be tortured, if so returned pending removal proceedings.²

In February of 2019, individual migrants and advocacy groups filed a lawsuit in the Northern District of California seeking an order to vacate the MPP and enjoin government officials “from continuing to apply [the MPP] to third-party nationals seeking humanitarian protection.”³ As part of their arguments for relief, the plaintiffs noted that the MPP lacked the required “safeguards to ensure the critical protection against *nonrefoulement*” as found in Article 33 of the 1951 Refugee Convention and as required through the “specific, universal, and obligatory norm of customary international law.”⁴ On April 8, 2019, the federal district

¹ U.S. Dep’t of Homeland Sec. Press Release, Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration (Dec. 20, 2018), at <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration> [<https://perma.cc/MT4X-XCME>]; see also Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 377, 384–85 (2019) (discussing the issuance of the MPP and describing Mexico’s response).

² Memorandum from Kirstjen M. Nielsen, Sec’y of Homeland Sec., on Policy Guidance for Implementation of the Migrant Prot. Protocols to L. Francis Cissna, Director of U.S. Citizenship & Immigration Servs. et al., at 3–4 (Jan. 25, 2019) (footnotes omitted), available at https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [<https://perma.cc/6RK3-KQLT>]. The United States is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates the relevant articles of the Refugee Convention. *Depositary Status for the Protocol Relating to the Status of Refugees*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5.

³ Complaint for Declaratory and Injunctive Relief at 36, *Innovation Law Lab v. Nielsen*, No. 3:19-cv-00807 (N.D. Cal. Feb. 14, 2019), ECF No. 1. Among the individual plaintiffs were Plaintiff Bianca Doe, “a lesbian woman from Honduras” who “became pregnant by a man who raped her because of her sexual orientation”; Plaintiff John Doe, “an indigenous man from Guatemala who suffered brutal beatings and death threats” and was “targeted for his indigenous identity”; Plaintiff Ian Doe, “a former police officer from Honduras” who was targeted by drug traffickers for working in undercover drug interdiction activity; and Plaintiff Alex Doe, “a youth pastor and organizer from Honduras” who was “at risk of being forcibly recruited by gangs[, a]fter he helped organize a strike to protest the killing a young member of his church.” *Id.* at 9–10.

⁴ *Id.* at 34–35.

court granted the plaintiffs' motion for preliminary injunction,⁵ although this injunction was stayed by the Ninth Circuit pending its consideration of the executive branch's appeal.⁶

On February 28, 2020, by a two-to-one vote, the Ninth Circuit affirmed the lower court's grant of a preliminary injunction setting aside the MPP.⁷ The court found that the plaintiffs were likely to succeed on the merits of their claim for two alternative reasons. One was that the provision of the Immigration and Nationality Act (INA) invoked by the executive branch as authorizing the MPP was not actually applicable.⁸ The second was that the "plaintiffs have shown a likelihood of success on their claim that the MPP does not comply with our treaty-based nonrefoulement obligations codified" in the INA.⁹

In holding that the MPP does not comply with the statutorily mandated obligation of nonrefoulement, the Ninth Circuit determined that the MPP did not adequately protect asylum-seekers from the risk of persecution in Mexico. The court noted the plaintiffs' argument that the Department of Homeland Security required too much of asylum seekers in insisting that they demonstrate it was "more likely than not" that they would face persecution in Mexico, as distinct from the lower "credible fear" threshold that had historically been applicable.¹⁰ The court also noted various arguments raised by plaintiffs for why the screening procedures set forth in the MPP were inadequate to ensure nonrefoulement.¹¹ The court rejected the executive branch's argument that it would be a "rare case where an MPP-eligible alien does have a substantial and well-grounded basis for claiming that he is likely to be persecuted in Mexico."¹² The court observed:

The Government points to no evidence supporting its speculations either that aliens, unprompted and untutored in the law of refoulement, will volunteer that they fear returning to Mexico, or that there is little danger to non-Mexican aliens in Mexico

Several [plaintiffs] described violence and threats of violence in Mexico. Much of the violence was directed at [these plaintiffs] because they were non-Mexican—that is, because of their nationality, a protected ground under asylum law.¹³

⁵ *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1114 (N.D. Cal. 2019).

⁶ *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019).

⁷ *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1080, 1093, 1095 (9th Cir. 2020).

⁸ The provision at issue states that "the Attorney General may return the alien . . . who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States . . . to that territory pending" removal proceedings. 8 U.S.C. § 1225(b)(2)(C). The executive branch interpreted this provision to apply to asylum seekers who lacked proper documentation, but the Ninth Circuit held that this provision applied only to persons inadmissible for other, specific reasons, such as having previously committed a crime of moral turpitude. *See Innovation Law Lab*, 951 F.3d at 1082–87 (concluding that this provision applied to persons described in 8 U.S.C. § 1225(b)(2) and not to persons described in 8 U.S.C. § 1225(b)(1)).

⁹ *Innovation Law Lab*, 951 F.3d at 1081. The nonrefoulement obligations codified at 8 U.S.C. § 1231(b) are as follows: "[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2018).

¹⁰ *Innovation Law Lab*, 951 F.3d at 1088–89; *cf. id.* at 1090 (rejecting the executive branch's argument that the statutory protection against nonrefoulement invoked by the plaintiffs was inapplicable for purposes of the MPP).

¹¹ *Id.* at 1089.

¹² *Id.* at 1090.

¹³ *Id.*

On March 6, 2020, the executive branch asked the Supreme Court to block the preliminary injunction against the MPP from taking effect while the executive branch sought full Supreme Court review of the Ninth Circuit's decision.¹⁴ On March 11, 2020, the Supreme Court stayed the preliminary injunction, thus leaving the MPP in effect "pending the filing and disposition of a petition for a writ of certiorari."¹⁵ The Supreme Court order stated that "Justice Sotomayor would deny" the executive branch's request for a stay.¹⁶

The Trump administration's efforts to restrict the ability of individuals to seek asylum in the United States have been pursued through other methods besides the MPP. One such method is the negotiation of asylum cooperative agreements, sometimes referred to as safe third-country agreements—agreements by which the United States sends asylum seekers to pursue their asylum claims in countries other than the one from which they are fleeing. In 2019, the Trump administration negotiated such agreements with Guatemala, Honduras, and El Salvador; previously, the only such agreement had been a longstanding, two-way agreement with Canada.¹⁷ The Trump administration reportedly also attempted to negotiate

¹⁴ See *Application for a Stay of the Injunction Issued by the United States District Court for the Northern District of California and for an Administrative Stay, Wolf v. Innovation Law Lab*, No. 19A960 (U.S. Mar. 6, 2020). Following its decision of February 28, the Ninth Circuit briefly stayed the implementation of the district court's injunction, but on March 4, by a two-to-one vote, it lifted this stay with respect to asylum-seekers crossing into California or Arizona—states within the direct purview of the Ninth Circuit. *Innovation Law Lab v. Wolf*, 951 F.3d 986, 987 (9th Cir. 2020). In this decision of March 4, the Ninth Circuit noted but declined to assess dueling statements submitted by the parties with respect to the implications of the MPP's suspension for relations between the United States and Mexico. *Id.* at 990–91.

¹⁵ *Wolf v. Innovation Law Lab*, No. 19A960, 2020 WL 1161432, at *1 (U.S. Mar. 11, 2020).

¹⁶ *Id.* On April 10, 2020, the Department of Justice filed a petition for writ of certiorari, and it is currently pending before the Supreme Court. *Petition for a Writ of Certiorari, Wolf v. Innovation Law Lab*, No. 19-1212 (U.S. Apr. 10, 2020). This stay was not the only one issued recently by the Supreme Court with respect to immigration law. In September of 2019, over two dissenting votes, the Supreme Court stayed a preliminary injunction with respect to a different asylum-related rule issued by the Trump administration. See Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 833, 834–37 (2019) (describing these proceedings and this rule, which bars individuals crossing the southern U.S. border from applying for asylum in the United States if they have not applied for asylum in third countries through which they have transited). On January 27, 2020, by a five-to-four vote, the Supreme Court stayed a preliminary injunction barring the implementation of a rule, issued by the Trump administration, that makes it significantly more difficult for certain noncitizens present in the United States to extend their stays or adjust their statuses if they have received various public benefits in the past. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599 (2020); see also *Wolf v. Cook County*, 140 S. Ct. 681 (2020) (issuing a further, related stay over four dissenting votes on Feb. 21, 2020); cf. *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292, 41486 (Aug. 14, 2019). The Supreme Court is also presently considering *Department of Homeland Security v. Regents of the University of California*, a challenge to the Trump administration's rescission of the Deferred Action for Childhood Arrivals (DACA) program instituted by the Obama administration to give work eligibility to certain migrants who entered the United States as children without proper documentation. The Supreme Court heard oral argument in this case on November 12, 2019 and, as of late May 2020, the case is still pending. See Docket, *DHS v. Regents of Univ. of Cal.*, Nos. 18-587, 18-588, 18-589 (U.S. Nov. 12, 2019). Mexico filed an amicus brief in this case arguing that "[a]llowing DACA to continue will serve [the] mutual national interests" of Mexico and the United States. Brief of Amicus Curiae Gov. of the United Mexican States in Support of Respondents 3, *DHS v. Regents of Univ. of Cal.*, Nos. 18-587, 18-588, 18-589 (U.S. Oct. 3, 2019); see also *id.* at 28 (arguing that DACA facilitates the U.S. obligation under the International Covenant on Civil and Political Rights to protect the family unit). Other challenges to immigration-related rules are ongoing in the lower courts. *E.g.*, *Doe #1 v. Trump*, 957 F.3d 1050, 1056 (9th Cir. 2020) (denying the executive branch's motion "to stay the district court's preliminary injunction enjoining a Presidential Proclamation restricting family-sponsored immigrants from entering the United States without acquiring specified health insurance").

¹⁷ *Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63,994, 63,994 (Nov. 19, 2019) [hereinafter *Regulation on the Implementation of Asylum Cooperative Agreements*] (setting out general procedures for the implementation of such agreements

a similar agreement with Panama, but its efforts to do so in 2019 were unsuccessful.¹⁸ The Department of Homeland Security has generally described these agreements as:

[B]etween the United States and foreign countries where aliens removed to those countries would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection. In certain circumstances, an [asylum cooperative agreement] . . . bars an alien subject to the agreement from applying for asylum in the United States and provides for the removal of the alien, pursuant to the agreement, to a country that will provide access to a full and fair procedure for determining the alien's protection claim.¹⁹

On January 15, 2020, individual plaintiffs and legal organizations filed a lawsuit in the District of Columbia challenging these agreements. They stated that “Guatemala, Honduras, and El Salvador [are] extremely dangerous, refugee-producing countries with asylum systems that are skeletal at best.”²⁰ Among other claims, they argued that the implementation of these agreements contradicts statutory requirements and is arbitrary and capricious. More generally, it

cast[s] aside our asylum laws, which reflect Congress's carefully considered balance between effectuating our broad historical commitment to protecting refugees fleeing persecution and torture—a commitment with origins in the 1951 United Nations Convention Relating to the Status of Refugees—and ensuring fairness and efficiency in the asylum process.²¹

As of late May of 2020, the plaintiffs' motion for summary judgment remained pending in the federal district court.²² By March of 2020, the United States had sent hundreds of

but excepting the preexisting agreement with Canada). For a longer discussion of these agreements, see Galbraith, *supra* note 16, at 834, 837–39 (observing that the United States threatened economic sanctions unless these agreements were negotiated, describing challenges in Guatemala to the legality of its agreement with the United States, and noting that grave concerns had been raised about whether these countries could adequately protect asylum-seekers from human rights violations).

¹⁸ Nick Miroff, *U.S. Seeks Deal to Send Asylum Seekers from Africa and Asia to Panama*, WASH. POST (Aug. 21, 2019), at https://www.washingtonpost.com/immigration/us-seeks-deal-to-send-asylum-seekers-from-africa-and-asia-to-panama/2019/08/20/30bbde66-c37f-11e9-9986-1fb3e4397be4_story.html (noting DHS Secretary Kevin McAleenan's plans to travel to Panama to “discuss regional cooperation to confront irregular migration,” as part of the Trump administration's efforts to secure asylum cooperative agreements); *Panama to US: We Won't Be Your "Safe Third Country,"* TELESUR (Aug. 22, 2019), at <https://www.telesurenglish.net/news/Panama-to-US-We-Wont-be-Your-Safe-Third-Country-20190822-0014.html> (noting the negative response of Panama's president to the prospect of an asylum cooperative agreement).

¹⁹ Regulation on the Implementation of Asylum Cooperative Agreements, *supra* note 17, at 63,994; *see also id.* at 64,001 (providing that the asylum cooperative agreements do not require that a migrant “have transited through the relevant third country . . . or arrive[d] at ports of entry” and further providing that a migrant will not be transmitted to a third country if, during a screening, it is deemed “more likely than not” that the person's “life or freedom would be threatened in the third country on account of a protected ground or that the [person] would be tortured in the third country”).

²⁰ Complaint for Declaratory and Injunctive Relief at 1, *U.T. v. Barr*, No. 1:20-cv-00116 (D.D.C. Jan. 15, 2020), ECF No. 3; *see also id.* at 2 (noting that these countries “have extremely high murder rates, rampant gender-based violence, and virtually no ability to receive asylum seekers”).

²¹ *Id.* at 4.

²² *See generally* Docket, *U.T. v. Barr*, No. 1:20-cv-00116 (D.D.C. 2020).

Honduran and El Salvadorian migrants to Guatemala.²³ That month, however, concerns about the COVID-19 pandemic caused the Guatemala government to suspend U.S. flights of migrants.²⁴

In the early months of 2020, the Trump administration took further steps to restrict the entry of noncitizens into the United States across the southern border and more generally. On January 31, 2020, President Trump suspended the entry of certain categories of immigrants from Myanmar, Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania, relying on the same authority that he had invoked several years earlier in banning the entry of foreign nationals from a handful of other, mostly Muslim-majority countries.²⁵ That same day, Trump issued his first travel restriction related to the COVID-19 pandemic, prohibiting the entry of certain categories of noncitizens “who were physically present within the People’s Republic of China, excluding the Special Administrative Regions of Hong Kong and Macau, during the 14-day period preceding their entry or attempted entry into the United States.”²⁶ On February 29, stating that “Iran is not a trustworthy state actor” and that the “United States Government is therefore unable to rely on official information disseminated by Iran,” Trump prohibited the entry into the United States of certain categories of noncitizens “who were physically present within Iran during the 14-day period preceding their entry or attempted entry.”²⁷

In March, as the COVID-19 pandemic was sweeping through the United States, the Trump administration initiated further restrictions on entry. On March 11, 2020, Trump barred the entry of certain categories of noncitizens “who were physically present within the Schengen Area during the 14-day period preceding their entry or attempted entry into the United States.”²⁸ On March 14, Trump similarly barred entry of certain categories of noncitizens from the United Kingdom and Ireland.²⁹ These restrictions, like the earlier ones regarding China and Iran, are “in effect until terminated by the President.”³⁰

²³ Reynaldo Leños Jr., *Asylum-Seekers Reaching U.S. Border Are Being Flown to Guatemala*, NPR (Mar. 11, 2020), at <https://www.npr.org/2020/03/11/814602596/asylum-seekers-reaching-u-s-border-are-being-flown-to-guatemala> (noting that only about sixteen of these migrants, according to Guatemalan officials, have applied for asylum there).

²⁴ Zolan Kanno-Youngs, Michael D. Shear & Maggie Haberman, *Citing Coronavirus, Trump Will Announce Strict New Border Controls*, N.Y. TIMES (Mar. 17, 2020), at <https://www.nytimes.com/2020/03/17/us/politics/trump-coronavirus-mexican-border.html> (“The coronavirus outbreak has also halted a Trump administration program that had diverted to Guatemala more than 900 asylum seekers trying to enter the United States. The government there suspended the flights as a way to prevent the domestic spread of the virus.”); Sofia Menchu, *Guatemala Suspends Deportation, Asylum Flights From U.S.*, REUTERS (Mar. 17, 2020), at <https://www.reuters.com/article/us-usa-immigration-guatemala/guatemala-suspends-deportation-asylum-flights-from-u-s-idUSKBN2143C2> (“In a statement, Guatemala’s Foreign Ministry said it had suspended the flights until proper sanitary protocols could be established in the country to permit the safe return of the people to their places of origin”).

²⁵ Proclamation No. 9983, 85 Fed. Reg. 6699, 6702 (Jan. 31, 2020) (stating that these countries had “deficiencies in sharing terrorist, criminal, or identity information”). For a description of the prior travel bans and the resulting litigation, see Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 741 (2018). Also in January of 2020, the Department of State released a rule restricting visas that might lead to what it termed “birth tourism.” Visas: Temporary Visitors for Business or Pleasure, 85 Fed. Reg. 4219, 4221-22 (Jan. 24, 2020).

²⁶ Proclamation No. 9984, 85 Fed. Reg. 6709, 6710 (Jan. 31, 2020).

²⁷ Proclamation No. 9992, 85 Fed. Reg. 12,855, 12,855 (Feb. 29, 2020).

²⁸ Proclamation No. 9993, 85 Fed. Reg. 15,045, 15,046 (Mar. 11, 2020).

²⁹ Proclamation No. 9996, 85 Fed. Reg. 15,341 (Mar. 14, 2020).

³⁰ See, e.g., *id.* at 15,343.

On March 20, the Trump administration announced the temporary suspension of the entry of all undocumented individuals who cross the southern border with Mexico and the northern border with Canada at ports of entry or at places where they would be taken to border patrol stations.³¹ In this order, the Centers for Disease Control and Prevention (CDC) stated that “inadmissible aliens” involve longer screening processes, congregate hours or days in areas while undergoing processing, and are in close proximity to U.S. border personnel and other travelers.³² The order had no categorical exceptions for asylum-seekers, persons fleeing torture, or unaccompanied minors.³³ As authority for this broad order, the administration cited the 1944 Public Health Service Act, which authorizes the surgeon general to suspend “in whole or in part, the introduction of persons and property” when there is “serious danger of the introduction of [a communicable] disease into the United States” and a “suspension . . . is required in the interest of public health.”³⁴ Critics have argued that this order violates federal statutory protections for asylum-seekers and torture victims and more generally that, as one critic stated, it “deploys a medical quarantine authorization to override the protections of the immigration and refugee laws through the use of an unreviewable Border Patrol health ‘expulsion’ mechanism unrelated to any finding of disease or contagion.”³⁵

On April 22, 2020, Trump cited COVID-19 in proclaiming yet another travel restriction—this one temporarily suspending, subject to certain exceptions, the entry into the United States of all persons traveling on immigrant visas whose visas or other travel documents were not yet operational as of the date of the proclamation.³⁶ Unlike the other COVID-19 travel restrictions, the justification identified for this one related to economic stability rather than health. The proclamation pointed to “the impact of foreign workers on the United States labor market, particularly in an environment of high domestic unemployment and depressed demand for labor,” as well as noting the need to “conserve critical State Department resources so that consular officials may continue to provide services to United States citizens

³¹ Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060, 17,060-61 (Mar. 26, 2020) [hereinafter Border Suspension Notice]. These travel restrictions were set to expire within thirty days from March 20, 2020. *Id.* Both restrictions were extended on April 21, 2020 until May 20, 2020. Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada, 85 Fed. Reg. 22,352 (Apr. 21, 2020); Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 22,353 (Apr. 21, 2020). These restrictions were again extended on May 21, 2020 until June 22, 2020. Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada, 85 Fed. Reg. 31,059 (May 21, 2020); Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 31,057 (May 21, 2020). As of late May of 2020, it is unclear whether there will be further extensions of these restrictions.

³² Border Suspension Notice, *supra* note 31, at 17,065.

³³ *See generally id.* (allowing for case-by-case exceptions to the overall order “based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health concerns”).

³⁴ *Id.* at 17,088; 42 U.S.C. § 265 (2018).

³⁵ Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY (Apr. 13, 2020), at <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors> (discussing the tensions between this order and the rights of undocumented migrants secured by the 1980 Refugee Act, the prohibitions on refoulement under the 1951 Refugee Convention, and the mandatory protection from torture under CAT and its implementing legislation).

³⁶ Proclamation No. 10014, 85 Fed. Reg. 23,441 (Apr. 22, 2020). This restriction has an initial sixty-day limit; as of late May of 2020, it remains to be seen whether it will be extended. *See id.* at 23,443.

abroad.”³⁷ After a surge of COVID-19 cases in Brazil, on May 24, 2020, Trump imposed travel restrictions on certain categories of noncitizens “physically present within the Federative Republic of Brazil during the 14-day period preceding their entry or attempted entry into the United States.”³⁸

STATE JURISDICTION AND IMMUNITY

U.S. Department of Justice Indicts Venezuelan Leader Nicolás Maduro on Narcotrafficking Charges

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On March 26, 2020, the U.S. Department of Justice (DOJ) announced the indictment of Venezuelan leader Nicolás Maduro, along with fourteen current and former regime officials, on charges mostly related to drug trafficking. Specifically, an indictment unsealed in the Southern District of New York charges Maduro with leading the Venezuelan narcotrafficking group *Cártel de Los Soles* and conspiring with the Revolutionary Armed Forces of Colombia—People’s Army (FARC) guerilla group to “‘flood’ the United States with cocaine” and “us[e] cocaine as a weapon against America.”¹ Although the United States, consistent with international law, normally treats sitting heads of state as immune from prosecution, U.S. Attorney General Barr indicated that Maduro did not qualify for head-of-state immunity because the United States does not recognize him as the president of Venezuela. Instead, the United States and fifty-seven other countries recognize Interim President Juan Guaidó. The indictment may mark a shift in the broader U.S. policy toward Venezuela, which had largely relied on targeted sanctions against key Maduro allies to encourage defection.

After the contested 2018 Venezuelan elections, the United States became the first country to recognize Guaidó as the interim president of Venezuela, causing the incumbent Maduro and the United States to break diplomatic relations in 2019.² Fifty-seven other countries recognize Guaidó, but Maduro is still recognized as president of Venezuela within the United Nations, where his delegation won a seat on the Human Rights Council in October 2019.³ Guaidó

³⁷ *Id.* at 23,441.

³⁸ Donald J. Trump, Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Novel Coronavirus (May 24, 2020), at <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-novel-coronavirus> [<https://perma.cc/MPC3-E3XB>] (further providing that this restriction is “in effect until terminated by the President”).

¹ Superseding Indictment, para. 4, *United States v. Maduro*, No. 11-0205 (S.D.N.Y. unsealed Mar. 26, 2020), available at <https://www.justice.gov/opa/page/file/1261806/download> [<https://perma.cc/9LKP-MA2Z>] [hereinafter *Maduro Indictment*].

² Jean Galbraith, *Contemporary Practice of the United States*, 113 *AJIL* 601, 601, 602 & n. 11 (2019).

³ CLARE RIBANDO SEELKE, REBECCA M. NELSON, PHILLIP BROWN & RHODA MARGESSON, CONG. RESEARCH SERV., *VENEZUELA: BACKGROUND AND U.S. RELATIONS* 19 (2020), available at <https://fas.org/sgp/crs/row/R44841.pdf> [<https://perma.cc/99N7-HP5R>]; Michelle Nichols & Lesley Wroughton, *Who Represents Venezuela? U.N., International Lenders Stuck in Limbo*, *REUTERS* (Jan. 30, 2019), at <https://www.reuters.com/article/us-venezuela-politics-un/who-represents-venezuela-un-international-lenders-stuck-in-limbo-idUSKCN1PP00B>; Alexandria

supporters attempted two failed uprisings to oust Maduro from power in 2019.⁴ Meanwhile, the United States continued its “maximum pressure” campaign on the Maduro regime by imposing a series of new targeted sanctions on Venezuelan officials and key sectors of the economy, as well as sanctions restricting access to U.S. markets and blocking the U.S. assets of Maduro regime and persons transacting with it.⁵ In May 2019, Norway began facilitating talks between the Maduro regime and Guaidó, but the Maduro regime boycotted talks in response to increased U.S. sanctions; the negotiations ended in September without producing a deal.⁶

On March 26, 2020, the DOJ announced the indictment of Maduro along with fourteen current and former regime officials on charges related to drug trafficking and corruption.⁷ The announcement followed the unsealing of indictments in the Southern District of New York and the District of Columbia and the filing of a criminal complaint in the Southern District of Florida.⁸

The four-count indictment returned in the Southern District of New York charges Maduro, three Venezuelan officials, and two FARC leaders with narcoterrorism conspiracy,⁹ cocaine importation conspiracy,¹⁰ possession of machine guns and destructive devices,¹¹ and conspiracy to possess machine guns and destructive devices.¹² The indictment covers actions taken “[f]rom at least in or about 1999, up to and including in about 2020.”¹³ It alleges that Maduro:

helped manage and, ultimately, lead the *Cártel de Los Soles* as he gained power in Venezuela. Under the leadership of [Maduro] and others, the *Cártel de Los Soles*

Symonds, *Venezuela to Join U.N. Human Rights Council, Despite Track Record*, N.Y. TIMES (Oct. 17, 2019), at <https://www.nytimes.com/2019/10/17/world/americas/venezuela-united-nations-human-rights-council.html>.

⁴ SEELKE ET AL., *supra* note 3, at 6.

⁵ *Id.* at 23–26; see generally CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., IF10715, VENEZUELA: OVERVIEW OF U.S. SANCTIONS (2020), available at <https://fas.org/sgp/crs/row/IF10715.pdf> [<https://perma.cc/4LDZ-2XZ8>] (discussing U.S. sanctions on Venezuela); Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 103 (2018) (discussing the Trump administration’s imposition of sanctions in 2017 prohibiting certain transactions with the Venezuelan government and its state-owned oil company).

⁶ Galbraith, *supra* note 2, at 609; Rick Noack & Terrence McCoy, *Emissaries of Venezuela’s Government, Opposition in Norway for Talks*, WASH. POST (May 16, 2019), at https://www.washingtonpost.com/world/venezuelan-government-and-opposition-reportedly-headed-to-norway-for-talks/2019/05/16/607ee77c-77b4-11e9-bd25-c989555e7766_story.html; *Venezuela’s Opposition Says Norway-Mediated Dialogue with Maduro “Is Finished”*, REUTERS (Sept. 15, 2019), at <https://www.reuters.com/article/us-venezuela-politics/venezuelas-opposition-says-norway-mediated-dialogue-with-maduro-is-finished-idUSKBN1W100J>.

⁷ U.S. Dep’t of Justice Press Release, Nicolás Maduro Moros and 14 Current and Former Venezuelan Officials Charged with Narco-Terrorism, Corruption, Drug Trafficking and Other Criminal Charges (Mar. 26, 2020), at <https://www.justice.gov/opa/pr/nicol-s-maduro-moros-and-14-current-and-former-venezuelan-officials-charged-narco-terrorism> [<http://perma.cc/XFG3-9AJB>] [hereinafter DOJ Press Release].

⁸ *Id.*

⁹ Maduro Indictment, *supra* note 1, paras. 1–5; see 21 U.S.C. § 960(a) (2018) (prohibiting knowingly or intentionally importing or exporting controlled substances, as well as manufacturing, possessing with intent to distribute, or distributing a controlled substance).

¹⁰ Maduro Indictment, *supra* note 1, paras. 18–23; see 21 U.S.C. § 963 (prescribing the same penalty for attempts and conspiracies as for commission of drug trafficking crimes).

¹¹ Maduro Indictment, *supra* note 1, paras. 24–25; see 18 U.S.C. § 924(c) (enhancing penalties for individuals who use firearms during a drug trafficking crime).

¹² Maduro Indictment, *supra* note 1, paras. 26–28; see 18 U.S.C. § 924(o) (prescribing penalties for conspiring to commit a drug trafficking crime during which a machinegun or destructive device is used).

¹³ Maduro Indictment, *supra* note 1, para. 1.

sought not only to enrich its members and enhance their power, but also to “flood” the United States with cocaine and inflict the drug’s harmful and addictive effects on users in this country. Thus, whereas most drug-trafficking organizations in South and Central America have sought to recede from their roles in importing narcotics into the United States in an effort to avoid U.S. prosecution, the *Cártel de Los Soles*, under the leadership of [Maduro] and others, prioritized using cocaine as a weapon against America and importing as much cocaine as possible into the United States.

While pursuing these and other objectives, [Maduro] negotiated multi-ton shipments of FARC-produced cocaine; directed that the *Cártel de Los Soles* provide military-grade weapons to the FARC; coordinated foreign affairs with Honduras and other countries to facilitate large-scale drug trafficking; and solicited assistance from FARC leadership in training an unsanctioned militia group that functioned, in essence, as an armed forces unit for the *Cártel de Los Soles*.¹⁴

Explaining Maduro’s role in the alleged crimes, U.S. Attorney Geoffrey S. Berman stated: “The scope and magnitude of the drug trafficking alleged was made possible only because Maduro and others corrupted the institutions of Venezuela and provided political and military protection for the rampant narco-terrorism crimes described in our charges.”¹⁵

An additional unsealed indictment in the District of Columbia charged Maduro’s current Minister of Defense Vladimir Padrino López and several undisclosed defendants with cocaine trafficking.¹⁶ A second unsealed Southern District of New York indictment and a Southern District of Florida criminal complaint further implicate former Vice President Tareck Zaidan El Aissami Maddah, the Superintendent of Cryptocurrencies Joselit Ramírez Camacho, and President of the Supreme Tribunal of Justice Maikel José Moreno Pérez in money laundering and corruption.¹⁷ Longer-standing cases against current and former Maduro regime officials

¹⁴ *Id.*, paras. 4–5 (emphasis omitted).

¹⁵ DOJ Press Release, *supra* note 7.

¹⁶ Indictment, *United States v. Padrino Lopez*, No. 19-0176 (D.D.C. May 24, 2019), available at <https://www.justice.gov/opa/page/file/1261721/download> [<https://perma.cc/EP7T-WKHV>].

¹⁷ See Superseding Indictment, *United States v. El Aissami Maddah*, No. 19-0144 (S.D.N.Y. unsealed Mar. 26, 2020), available at <https://www.justice.gov/opa/page/file/1261556/download> [<https://perma.cc/K5KV-AV4R>] (indicting Tareck Zaidan El Aissami Maddah, Joselit Ramirez Camacho, and a Venezuelan businessman for money laundering and violating sanctions imposed under the International Emergency Economic Powers Act and the Kingpin Designation Act); Criminal Complaint, *United States v. Moreno Perez*, No. 20-2407 (S.D. Fla. Mar. 12, 2020), available at <https://www.justice.gov/opa/page/file/1261816/download> [<https://perma.cc/C8WF-7YP9>] (alleging that Maikel Jose Moreno Perez participated in money laundering schemes). A separate indictment in the Southern District of Florida charged two individuals working at state-owned corporations with money laundering. Indictment, *United States v. Motta Dominguez*, No. 19-20388 (S.D. Fla. June 27, 2019), available at <https://www.justice.gov/opa/page/file/1261781/download> [<https://perma.cc/XMP8-L48U>].

and their alleged co-conspirators are pending in the District of Arizona,¹⁸ the Eastern District of New York,¹⁹ and the Southern District of Texas.²⁰

The U.S. Department of State has offered up to \$15 million for information leading to Maduro's arrest.²¹ Though Barr stated that the administration would "explore all options for getting custody" of the defendants, he declined to comment on whether it would seek to extradite Maduro from Venezuela,²² which has an extradition treaty with the United States.²³ One of the indicted individuals, retired general Clíver Alcalá Cordones, surrendered to U.S. authorities on March 27, 2020, and reportedly agreed to cooperate with U.S. prosecutors.²⁴ Intensifying efforts to counter narcotrafficking by "malign actors," the Trump administration announced on April 1 that it was deploying "enhanced counternarcotics operations" in the Eastern Pacific Ocean and the Caribbean Sea.²⁵

Responding to the indictment, Maduro tweeted: "There's a conspiracy from the United States and Colombia and they've given the order of filling Venezuela with violence. As head of state I'm obliged to defend peace and stability for all the motherland, under any circumstances."²⁶ Longtime Maduro allies Russia and Cuba criticized the indictment. The spokesperson for Russia's Foreign Ministry claimed that the indictment was

¹⁸ Indictment, *United States v. Menegazzo Carrasquel*, No. 10-01462 (D. Ariz. Oct. 12, 2010), available at <https://www.justice.gov/opa/page/file/1261981/download> [<https://perma.cc/NW3R-NPS4>] (indicting three individuals for violating the Arms Export Control Act by exporting military aircraft engines to Venezuela).

¹⁹ Indictment, *United States v. Reverol Torres*, No. 15-0020 (E.D.N.Y. Jan. 21, 2015), available at <https://www.justice.gov/doj/page/file/1261891/download> [<https://perma.cc/7EJP-M9NA>] (indicting two officials in the Venezuelan National Anti-Drug Office for conspiring with narcotraffickers to distribute cocaine); Indictment, *United States v. Villaroel Ramirez*, No. 11-0247 (E.D.N.Y. Mar. 20, 2013), available at <https://www.justice.gov/opa/page/file/1261616/download> [<https://perma.cc/6PXL-KKWU>] (charging three members of the Venezuelan National Guard and a customs broker with conspiracy to distribute and distribution of cocaine).

²⁰ Indictment, *United States v. De Leon-Perez*, No. 17-0514 (S.D. Tex. Aug. 23, 2017), available at <https://www.justice.gov/opa/page/file/1262301/download> [<https://perma.cc/B7Y8-V8GA>] (charging five former officials with money laundering and conspiracy).

²¹ U.S. Dep't of State Press Release, Nicolás Maduro Moros — New Target (Mar. 26, 2020), at <https://www.state.gov/nicolas-maduro-moros-new-target> [<https://perma.cc/YW6B-K7KJ>].

²² U.S. Dep't of Justice Press Conference, Attorney General Barr and DOJ Officials Announce Significant Law Enforcement Actions Relating to International Narco-Terrorism, at 24:17 (Mar. 26, 2020), at <https://www.justice.gov/opa/video/attorney-general-barr-and-doj-officials-announce-significant-law-enforcement-actions> [hereinafter DOJ Press Conference].

²³ Extradition, U.S.-Venez., Jan. 19, 1922, 43 Stat. 1698.

²⁴ Angus Berwick, Luis Jaime Acosta & Sarah Kinoshian, *Alleged Maduro Accomplice Surrenders to U.S. Agents, Will Help Prosecution: Sources*, REUTERS (Mar. 27, 2020), at <https://www.reuters.com/article/us-usa-venezuela-dea-exclusive/alleged-maduro-accomplice-surrenders-to-us-agents-will-help-prosecution-sources-idUSKBN21E3IQ>.

²⁵ Remarks at a White House Coronavirus Task Force Press Briefing, 2020 DAILY COMP. PRES. DOC. 222, at 1 (Apr. 1, 2020); Matt Spetalnick & Phil Stewart, *Trump Doubles U.S. Military Assets in Caribbean, Bolstering Drug Fight After Maduro Indictment*, REUTERS (Apr. 1, 2020), at <https://www.reuters.com/article/us-usa-venezuela-navy/trump-doubles-us-military-assets-in-caribbean-bolstering-drug-fight-after-maduro-indictment-idUSKBN21J6VH> [<https://perma.cc/8YN6-PM4A>].

²⁶ Anthony Faiola, Matt Zapotosky & Karen De Young, *U.S. Indicts Venezuela's Maduro on Narcoterrorism Charges, Offers \$15 Million Reward for His Capture*, WASH. POST (Mar. 26, 2020), at https://www.washingtonpost.com/world/the_americas/the-united-states-indicts-venezuelas-maduro-on-narco-terrorism-charges/2020/03/26/a5a64122-6f68-11ea-a156-0048b62cdb51_story.html; accord Nicolás Maduro (@NicolasMaduro), TWITTER (Mar. 26, 2020, 10:44 AM), at <https://twitter.com/NicolasMaduro/status/1243187029875331072> [<https://perma.cc/FW8P-BU49>]. Shortly afterward, Maduro's chief prosecutor launched an investigation into Guaidó and members of the interim government for allegedly plotting a coup against Maduro with Alcalá Cordones—one of the indicted individuals—and "US advisors." Simon Garcia, *MP Appoints Two Prosecutors to Investigate the Alleged Crime of Attempted Coup Against President Maduro*, MINISTERIO DEL PODER POPULAR

[i]n line with [the U.S.] design to overthrow the legitimate Venezuelan government (no one is hiding it) . . . Such statements are absurd and outrageous. At a time when the entire world is joining efforts in fighting the coronavirus pandemic, Washington is carrying on its political bullying of a sovereign state.²⁷

Likewise, Cuba's foreign minister tweeted his condemnation of "the #US immoral drug-trafficking accusation against president @NicolasMaduro and #Venezuela, which is based on brazen lies."²⁸

Maduro's indictment raises international and domestic law questions about the prosecution of foreign heads of state.²⁹ Sitting heads of state enjoy status-based immunity from prosecution in other countries under customary international law.³⁰ As a matter of domestic law, the U.S. Supreme Court has indicated that common law governs immunity for foreign officials,³¹ but the Court has not specifically addressed in recent years how much deference to give to the executive branch's views with respect to who should receive immunity.³² The Court has held, however, that the president has exclusive power as a matter of U.S. constitutional law to recognize foreign nations and governments.³³ The Department of State takes the position that "the Executive Branch has authority to determine the immunity from suit of sitting heads of state."³⁴

PARA RELACIONES EXTERIORES (Mar. 26, 2020), at <http://mppre.gob.ve/en/2020/03/26/mp-prosecutors-investigate-coup-president-maduro> [<https://perma.cc/7DDU-HWTV>].

²⁷ Maria Zakharova, Spokesperson, Ministry of Foreign Affairs of the Russian Fed'n, Briefing by Foreign Ministry Spokesperson Maria Zakharova, Moscow (Mar. 27, 2020), at https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/ckNonkJE02Bw/content/id/4093042 [<https://perma.cc/RK79-64S5>].

²⁸ Bruno Rodríguez Parrilla (@BrunoRguezP), TWITTER (Mar. 26, 2020, 6:04 PM), at <https://twitter.com/BrunoRguezP/status/1243297728307908610> [<https://perma.cc/CH7J-72QG>].

²⁹ The indictment also raises question about the extraterritorial application of U.S. criminal laws. Asked about the U.S. interest at stake during his press conference, Barr stated that the Maduro operation "deliberately targeted" the United States by seeking to import cocaine into the country and using U.S. facilities in their money laundering operations. DOJ Press Conference, *supra* note 22, at 39:11.

³⁰ See OFFICE OF THE LEGAL ADVISOR, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW: 2018, at 412 (2018), available at <https://www.state.gov/wp-content/uploads/2019/10/2018-Digest-Chapter-10.pdf> [<https://perma.cc/ASM2-8X8P>] ("The doctrine of head of state immunity is well established in customary international law") (quoting Suggestion of Immunity Submitted by the United States, *Miango v. Democratic Republic of the Congo*, No. 15-1265, 2019 WL 2191806 (D.D.C. Jan. 19, 2019) [hereinafter *Kabila Suggestion of Immunity*]) [hereinafter OFFICE OF THE LEGAL ADVISOR, 2018 DIGEST]; Int'l L. Comm'n, Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/L.814, at <https://legal.un.org/docs/?symbol=A/CN.4/L.814> (stating in draft article 3 that "Heads of State . . . enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction); cf. Vienna Convention on Diplomatic Relations, Art. 31, Apr. 18, 1961, 23 UST 3227, 500 UNTS 95 (providing diplomats with status-based immunity from criminal prosecution in a foreign state).

³¹ See *Samantar v. Yousuf*, 560 U.S. 305 (2010).

³² See *Samantar v. Yousuf*, 699 F.3d 763 (4th Cir. 2012), *cert. denied*, 571 U.S. 1156 (2014) (taking up these issues). The Fourth Circuit "conclude[d] that the State Department's pronouncement as to head-of-state immunity is entitled to absolute deference," while its "determination regarding conduct-based immunity, by contrast, is not controlling, but it carries substantial weight." *Id.* at 772–73.

³³ *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015).

³⁴ OFFICE OF THE LEGAL ADVISOR, 2018 DIGEST, *supra* note 30, at 411 (quoting *Kabila Suggestion of Immunity*). The State Department asserts that the executive branch's determination of immunity "is controlling and is not subject to judicial review." *Id.*

The closest prior parallel to Maduro's indictment was an indictment issued in 1988 against Manuel Noriega of Panama for racketeering and drug trafficking.³⁵ At the time of the indictment, Noriega served as the commander-in-chief of Panama's military³⁶ and the de facto leader of the country.³⁷ Later that year, the United States invaded Panama and gained custody of Noriega, who was brought to the United States to stand trial.³⁸ The district court found that Noriega was not entitled to head-of-state immunity because

Noriega has never been recognized as Panama's Head of State . . . under the Panamanian Constitution More importantly, the United States government has never accorded Noriega head of state status, but rather continued to recognize President Eric Arturo Delvalle as the legitimate leader of Panama while Noriega was in power.³⁹

The court further rejected Noriega's argument that he was entitled to head-of-state immunity as the de facto leader because "the grant of immunity is a privilege which the United States may withhold from any claimant."⁴⁰

In response to questions about the implications of indicting a sitting president, Attorney General Barr made a similar argument: "[W]e do not recognize Maduro as the President of Venezuela. Obviously, we indicted Noriega under similar circumstances. We did not recognize Noriega as the President of Panama."⁴¹

The indictment of Maduro may affect the broader U.S. strategy with respect to Venezuela, which had focused on using sanctions to pressure key Maduro allies to defect from his regime.⁴²

³⁵ See Philip Shenon, *Noriega Indicted by U.S. for Links to Illegal Drugs*, N.Y. TIMES (Feb. 6, 1988), at <https://www.nytimes.com/1988/02/06/world/noriega-indicted-by-us-for-links-to-illegal-drugs.html> ("The Justice Department said this was only the second time it had indicted the sitting leader of a foreign nation."); Aruna Viswanatha, José de Córdoba & Ian Talley, *U.S. Charges Venezuelan President Nicolás Maduro with Drug Trafficking*, WALL ST. J. (Mar. 26, 2020), at <https://www.wsj.com/articles/u-s-indicts-venezuelan-president-nicolas-maduro-on-allegations-of-drug-trafficking-11585236443> ("Mr. Noriega's case was the last time the U.S. charged a sitting head of state."). Several years before Noriega's indictment, in 1985, the United States indicted Chief Minister of Turks and Caicos Norman Saunders for drug trafficking and racketeering—but since Turks and Caicos is a British protectorate, prosecutors argued that Saunders was simply a local leader and that the Queen of England was the actual head of state. See Associated Press, *Three Island Officials Indicted in Drug Case*, N.Y. TIMES (Mar. 15, 1985), at <https://www.nytimes.com/1985/03/15/us/three-island-officials-indicted-in-drug-case.html>; David C. Adams, *Does Venezuela's Maduro Enjoy Head of State Immunity from Prosecution?*, UNIVISION (Mar. 26, 2020), at <https://www.univision.com/univision-news/latin-america/does-venezuelas-maduro-enjoy-head-of-state-immunity-from-prosecution>. Though U.S. prosecutors implicated current Honduran President Juan Orlando Hernández in drug trafficking and corruption during his brother's 2019 trial, Hernández was not—and has not been—publicly indicted on related charges. Claudia Mendoza & Mary Beth Sheridan, *Another U.S. Court Filing Ties the Honduran President, a Trump Ally, to Narco-trafficking*, WASH. POST (Apr. 30, 2020), at https://www.washingtonpost.com/world/the_americas/another-us-court-filing-ties-the-honduran-president-a-trump-ally-to-narcotrafficking/2020/04/30/e2a96406-8b05-11ea-80df-d24b35a568ae_story.html

³⁶ *Full Text of Indictment Against Noriega, Others With PM-Noriega*, AP NEWS (Jan. 5, 1990), at <https://apnews.com/c3ddd507811087aeab4389996e5d8c75>.

³⁷ *United States v. Noriega*, 746 F. Supp. 1506, 1520 (S.D. Fla. 1990).

³⁸ *Id.* at 1511–12.

³⁹ *Id.* at 1519.

⁴⁰ *Id.* at 1520; see also *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (upholding the district court's conclusion, while observing that "the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity" and that "Noriega has cited no authority that would empower a court to grant head-of-state immunity under these circumstances").

⁴¹ DOJ Press Conference, *supra* note 22, at 30:58.

⁴² Geoff Ramsey, *By Indicting Maduro, Trump Is Kneecapping a Transition in Venezuela*, WASH. POST (Mar. 27, 2020), at <https://www.washingtonpost.com/opinions/2020/03/27/by-indicting-maduro-trump-is-kneecapping->

Some observers worry that the indictment may incentivize Maduro and his allies to entrench themselves, hampering attempts to negotiate a democratic transition.⁴³

Less than a week after the unveiling of the Maduro indictment, on March 31, 2020, the Department of State released a proposal for the transfer of power within Venezuela.⁴⁴ Among other things, this “Democratic Transition Framework for Venezuela” calls for the formation of a transitional government composed of members from Maduro’s regime and Guaidó’s opposition party, the creation of an executive body headed by an interim president (who would not be allowed to run for president in the new elections), and the establishment of a Truth and Reconciliation Commission.⁴⁵ In return, the United States would lift sanctions.⁴⁶ Maduro’s foreign minister rejected this proposal:

Venezuela is free, sovereign, independent and democratic country that does not accept, nor will it ever accept, any tutelage from any foreign government.

The United States policy towards Venezuela has completely lost its direction. In one week it has digressed between constant contradictions: it transits from the extortion and threat to Bolivarian Government officials, including rewards for their capture; to the presentation of an eyesore of an agreement for the installation of an unconstitutional so-called transition government, disregarding the democratic will expressed by the Venezuelan people at the polls.⁴⁷

U.S. relations with the Maduro regime worsened even further after a failed operation, conducted on May 3, 2020, to “capture/detain/remove Nicolás Maduro[,] . . . remove the current Regime and install the recognized Venezuelan President Juan Guaidó”—an operation organized in part by U.S. citizens and which Maduro attributed to Guaidó and Trump.⁴⁸

[transition-venezuela](#); see also SEELKE ET AL., *supra* note 3, at 27 (discussing the use of sanctions to encourage defection from the Maduro regime and the lifting of sanctions on a general who defected from the regime in 2019).

⁴³ E.g., Julian Borger & Joe Parkin Daniels, *US Indicts Nicolás Maduro and Other Top Venezuelan Leaders for Drug Trafficking*, GUARDIAN (Mar. 26, 2020), at <https://www.theguardian.com/world/2020/mar/26/nicolas-maduro-us-indictment-venezuela-drug-trafficking-leaders> (“These indictments seriously increase the exit costs for Maduro . . . These moves effectively ensure a longterm deadlock between the US and Venezuela, just as we have seen with Cuba.”); Joshua Goodman & Scott Smith, *US Indicts Venezuela’s Maduro on Narcoterrorism Charges*, AP NEWS (Mar. 26, 2020), at <https://apnews.com/d82797206561db03851e47df125c243f> (“[The indictment] could fragment the U.S.-led coalition against Maduro if European and Latin American allies think the Trump administration is overreaching.”).

⁴⁴ U.S. Dep’t of State Press Release, *Democratic Transition Framework for Venezuela* (Mar. 31, 2020), at <https://www.state.gov/democratic-transition-framework-for-venezuela> [<https://perma.cc/XYN9-28HR>].

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Ministerio del Poder Popular para Relaciones Exteriores, Gobierno Bolivariano de Venezuela Press Release, *Bolivarian Government Reiterates that Venezuela Is a Free and Sovereign Country that Does Not Accept the Tutelage of Foreign Governments* (Mar. 31, 2020), at <http://mppre.gob.ve/en/comunicado/bolivarian-governent-reiterates-venezuela-free-and-sovereign-does-not-accept-tutelage-governments> [<https://perma.cc/G9HK-YL34>].

⁴⁸ Anthony Faiola, Karen De Young & Ana Vanessa Herrero, *From a Miami Condo to the Venezuelan Coast, How a Plan to “Capture” Maduro Went Rogue*, WASH. POST (May 6, 2020), at https://www.washingtonpost.com/world/the_americas/from-a-miami-condo-to-the-venezuelan-coast-how-a-plan-to-capture-maduro-went-rogue/2020/05/06/046222bc-8e4a-11ea-9322-a29e75effc93_story.html (quoting a contract prepared in relation to this operation); Colin Dwyer, *After Failed Coup Plot, Maduro Touts Video of Detained American Conspirator*, NPR (May 6, 2020), at <https://www.npr.org/2020/05/06/851487678/after-failed-coup-plot-maduro-touts-video-of-detained-american-conspirator>.

This operation, which was quickly squelched by Maduro's forces, involved two speedboats containing a "ragtag band" of several dozen fighters, including two U.S. citizens who had previously served in the U.S. military.⁴⁹ Guaidó denied involvement with the attempted attack, accusing Maduro of "trying to create a state of apparent confusion, an effort to hide what's happening in Venezuela."⁵⁰ Similarly, U.S. Secretary of State Mike Pompeo stated that "there was no U.S. Government direct involvement in this operation."⁵¹ Maduro asserted that since the failed operation, the Trump administration "would not answer the phones. They are mute. We have used three different routes with three different officials from the Donald Trump government. We have sent them texts, and they are completely silent."⁵²

INTERNATIONAL ORGANIZATIONS

U.S. Refusal to Appoint Members Renders WTO Appellate Body Unable to Hear New Appeals
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Over the last few years, the United States has been pressuring the World Trade Organization (WTO) to reform the Appellate Body by refusing proposals to fill vacancies. On December 10, 2019, the terms of two Appellate Body members expired, leaving one member left for the seven-member body. This has brought new appeals to a standstill, as an appeal from a panel established by the Dispute Settlement Body must be heard by three Appellate Body members. In February of 2020, the United States elaborated on its complaints about the Appellate Body in a report published by the Office of the United States Trade Representative. In the spring of 2020, in response to the continued U.S. resistance to filling vacancies on the Appellate Body, a group of WTO members established an interim arrangement to handle appeals through arbitration. Also in the spring of 2020, the United States described as invalid a recent Appellate Body report regarding a dispute between Canada and the United States, asserting that none of the three persons who issued the report were in fact bona fide Appellate Body members.

⁴⁹ John Otis, Kejal Vyas & Jessica Donati, "Freedom Fighters" Led by American Tried Invading Venezuela, WALL ST. J. (May 6, 2020), at <https://www.wsj.com/articles/freedom-fighters-led-by-american-tried-invading-venezuela-11588722164>.

⁵⁰ *Trump Denies Ties to Americans Linked to Venezuela "Coup Plot,"* AL JAZEERA (May 5, 2020), at <https://www.aljazeera.com/news/2020/05/trump-denies-link-venezuelan-attack-men-jailed-200505191938812.html>.

⁵¹ Michael R. Pompeo, Sec'y of State, Secretary Michael R. Pompeo at a Press Availability (May 6, 2020), at <https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-5> [<https://perma.cc/Y6AB-9TKG>] (adding "[i]f we had been involved, it would have gone differently. As for who bankrolled it, we're not prepared to share any more information about what we know took place.").

⁵² César Torres, *U.S. Has to Acknowledge Guaidó's Failure as "Puppet President,"* MINISTERIO DEL PODER POPULAR PARA RELACIONES EXTERIORES (May 8, 2020), at <http://mppre.gob.ve/en/2020/05/08/us-failure-guaidos-puppet-presidency> [<https://perma.cc/3SE8-RGX6>].

Through the WTO dispute settlement process, states engaged in a dispute can first try to resolve it through consultations.¹ Should these consultations fail, a state can request the appointment of a panel during a Dispute Settlement Body meeting.² Upon the issuance of the panel's report, either side may appeal.³ Three members of the Appellate Body will hear the appeal, which "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."⁴ The parties to the dispute must accept the Appellate Body report, unless the Dispute Settlement Body rejects the report by consensus.⁵

Because the appointment process for Appellate Body members operates by consensus, a member can block an appointment by formal objection.⁶ In 2016, the United States blocked one proposed reappointment to the Appellate Body and, starting in 2017, it has blocked every proposed appointment or reappointment.⁷ In the latter half of 2019 and the spring of 2020, the United States has continued its refusal to entertain measures to fill the vacancies, citing the lack of progress toward reforms of the Appellate Body.

During the November 2019 Dispute Settlement Body meeting, the United States rejected a proposal for an Appellate Body appointment process that was supported by 116 members.⁸ The U.S. representative stated that "the systemic concerns that the United States had identified remained unaddressed"; that "the fundamental problem was that the Appellate Body was not respecting the current, clear language" of the Dispute Settlement Understanding (DSU); and that this in turn "undermined the legitimacy of the system and damaged the interests of all WTO members."⁹ In a separate portion of the meeting, the United States

¹ Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Art. 4, Apr. 15, 1994, 1869 UNTS 401, 33 ILM 1226 [hereinafter DSU].

² *Id.* Art. 4.7.

³ *See id.* Arts. 16–17. Once the panel has set forth its findings in the final report, the report is distributed to WTO members prior to the Dispute Settlement Body meeting. *Id.* Art. 16. The Dispute Settlement Body will adopt the final report, "unless a party to the dispute formally notifies the [Dispute Settlement Body] of its decision to appeal or the [Dispute Settlement Body] decides by consensus not to adopt the report." *Id.* Art. 16.4.

⁴ *Id.* Arts. 17.1, 17.6.

⁵ *Id.* Art. 17.14.

⁶ *Id.* Arts. 2.4, 17.2.

⁷ *See* Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 822, 823–27 (2019). The Obama administration blocked the reappointment of one member in the spring of 2016, raising both specific concerns about the member and more general concerns about the practice of the Appellate Body, but it did not block the appointment of two new members in November of 2016. Statement by the United States at the Meeting of the WTO Dispute Settlement Body (May 23, 2016), available at https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf [<https://perma.cc/N3AW-B88P>]; World Trade Organization Press Release, WTO Appoints Two New Appellate Body Members (Nov. 23, 2016), at https://www.wto.org/english/news_e/news16_e/disp_28nov16_e.htm [<https://perma.cc/H6X7-PCR4>]. One of these two members has since resigned. World Trade Organization, *Appellate Body Members*, at https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm [<https://perma.cc/V7U4-BB33>] [hereinafter *Appellate Body Members*] (noting the resignation of Hyun Chong Kim). The other—Hong Zhao—is now the sole remaining Appellate Body member; her term expires on November 30, 2020. *Id.*

⁸ WTO, Minutes of Meeting, §§ 5.7–5.8, WTO Doc. WT/DSB/M/437 (Nov. 22, 2019), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=260789,258976,258786,258792,258733,258795,258796,258797,258785,258812&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/J6UN-76UB>].

⁹ *Id.*

initiated a discussion of the compensation provided to Appellate Body members, signaling concern that certain aspects of this compensation were excessive or structured in ways that potentially incentivized members to delay deciding appeals.¹⁰ The United States linked this discussion of compensation to its broader concern that Appellate Body members continue to work on ongoing appeals after the expiration of their terms—a practice enabled by Rule 15 of the Working Procedures for Appellate Review that the United States has previously asserted is incompatible with the DSU.¹¹

After the departure of Appellate Body members Ujal Singh Bhatia and Thomas R. Graham on December 10, 2019, the Appellate Body could no longer meet the three-member requirement to hear new appeals.¹² In a letter to the chairman of the Dispute Settlement Body, Graham informed WTO members that, in accordance with Rule 15, he and Bhatia would continue to work on those appeals where oral hearings had already been conducted.¹³ Despite the Appellate Body's inability to hear new appeals, the United States has persisted in its refusal to fill the six vacancies.¹⁴ During the December 2019 Dispute Settlement Body meeting, the United States again rejected the widely supported proposal for filling the vacancies.¹⁵ The U.S. representative stated that members had not addressed the concerns regarding the Appellate Body that the United States had identified in prior meetings.¹⁶ In the January

¹⁰ *Id.* §§ 4.2–4.3 (noting that the United States had placed this issue on the agenda). Other members were reluctant to make such inferences, responding that competitive compensation is necessary to attract competent individuals and that Appellate Body members were spending more time on appeals because of the backlog of cases stemming from vacancies. *Id.* § 4.5 (European Union's response to the United States); § 4.9 (China's response to the United States); § 4.10 (Mexico's response to the United States). The representative from the European Union also observed that "a 'systematic' discussion on the remuneration of Appellate Body members could only be fruitful if there was indeed a functioning Appellate Body." *Id.* § 4.5.

¹¹ *Id.* §§ 4.2–4.3; see also Galbraith, *supra* note 7, at 824–25 (noting that from January to May 2018 the United States referenced concerns about Rule 15 in rejecting four proposals to fill vacancies in the Appellate Body). Rule 15 provides that "[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 [Dispute Settlement Body], 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." WTO Appellate Body, Working Procedures for Appellate Review, WTO Doc. WT/AB/WP/6 (Aug. 16, 2010), at https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm [<https://perma.cc/6TRK-8MKU>] [hereinafter Appellate Body Working Procedures].

¹² DSU, *supra* note 1, Art. 17.1 (requiring three members of the Appellate Body to hear an appeal); *Appellate Body Members*, *supra* note 7.

¹³ Appellate Body Working Procedures, *supra* note 11, Rule 15; WTO, Communication from the Chairman of the Dispute Settlement Body, WTO Doc. WT/DSB/79 (Dec. 12, 2019), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=259733,259711,259694,259703,259704,259705,259706,259710&CurrentCatalogueIdIndex=1&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/99DP-JXTA>].

¹⁴ WTO, Minutes of Meeting, § 5.7, WTO Doc. WT/DSB/M/438 (Dec. 18, 2019), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=261535,259754,259519,259522,259514,259527,259521,259523,259525,259524&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/8VM7-XQFW>] [hereinafter December 2019 Meeting]; Proposal by Afghanistan, Angola, Argentina, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609/Rev.15 (Dec. 5, 2019), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=259528,259509,259510,258895,258896&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/J8G6-MWTE>].

¹⁵ December 2019 Meeting, *supra* note 14, §§ 5.2, 5.7.

¹⁶ *Id.* § 5.7.

2020 Dispute Settlement Body meeting, the United States once again rejected the proposal for filling the vacancies and insisted that its concerns were still unaddressed.¹⁷

In February 2020, the Office of the U.S. Trade Representative published a 121-page report detailing what the United States perceives to be the Appellate Body's shortcomings.¹⁸ The report describes the Appellate Body as having "strayed far from the limited role that WTO members assigned it" and "increased its own power and seized from sovereign nations . . . authority that it was not provided."¹⁹ Expanding upon prior views that the United States has expressed at Dispute Settlement Body meetings, the report sets forth numerous criticisms of the Appellate Body.²⁰ As "example[s]," the report's executive summary states that:

- The Appellate Body consistently ignores the mandatory deadline for deciding appeals;
- The Appellate Body allows individuals who have ceased to serve on the Appellate Body to continue deciding appeals as if their term had been extended by WTO Members in the Dispute Settlement Body;
- The Appellate Body has made findings on issues of fact, including issues of fact relating to WTO Members' domestic law, although Members authorized it to address only legal issues;
- The Appellate Body has issued advisory opinions and otherwise opined on issues not necessary to assist the WTO Dispute Settlement Body in resolving the dispute before it;
- The Appellate Body has insisted that dispute settlement panels treat prior Appellate Body interpretations as binding precedent;
- The Appellate Body has asserted that it may ignore WTO rules that explicitly mandate it recommend a WTO Member to bring a WTO-inconsistent measure into compliance with WTO rules; and
- The Appellate Body has overstepped its authority and opined on matters within the authority of WTO Members acting through the Ministerial Conference, General Council, and Dispute Settlement Body.²¹

The report asserts that the Appellate Body has erred as well in its substantive interpretations of WTO agreements—interpretations which the U.S. executive branch has elsewhere called "Appellate Body activism."²² As "example[s]," the report's executive summary states:

¹⁷ Proposal by Afghanistan, Angola, Argentina, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609/Rev.16 (Jan. 16, 2020), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=260557,260555,260554,259466,259467&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/WX3N-HPMB>]; World Trade Organization Press Release, Members Adopt Panel Ruling in Australia-Indonesia Paper Duty Dispute (Jan. 27, 2020), at https://www.wto.org/english/news_e/news20_e/dsb_27jan20_e.htm [<https://perma.cc/27ZC-8DUM>].

¹⁸ See generally OFFICE OF THE U.S. TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION (2020), available at https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf [<https://perma.cc/HH97-YU2E>] [hereinafter USTR APPELLATE BODY REPORT]. The report has an additional forty pages of appendixes. See generally *id.*

¹⁹ *Id.* at 1.

²⁰ See generally *id.*; see also *id.*, App. B2 (identifying prior U.S. statements to the Dispute Settlement Body raising various concerns discussed in the report).

²¹ *Id.* at 1.

²² OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2020 TRADE POLICY AGENDA AND 2019 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 8 (2020), available at https://ustr.gov/sites/default/files/2020_Trade_Policy_Agenda_and_2019_Annual_Report.pdf [<https://perma.cc/9DEZ-FUQW>] [hereinafter 2020 TRADE POLICY AGENDA] (outlining U.S. trade policies generally and U.S. interests in

- The Appellate Body’s erroneous interpretation of the term “public body” threatens the ability of Members to counteract trade-distorting subsidies provided through [state-owned enterprises], undermining the interests of all market-oriented actors;
- The Appellate Body has intruded on Members’ legitimate policy space by essentially converting a non-discrimination obligation for regulations into a “detrimental impact” test;
- The Appellate Body has prevented WTO Members from fully addressing injurious dumping by prohibiting a common-sense method of calculating the extent of dumping that is injuring a domestic industry (“zeroing”);
- The Appellate Body’s stringent and unrealistic test for using out-of-country benchmarks to measure subsidies has weakened the effectiveness of trade remedy laws in addressing distortions caused by state-owned enterprises in non-market economies;
- The Appellate Body’s creation of an “unforeseen developments” test and severe causation analysis prevents the effective use of safeguards by WTO Members to protect their industries from import surges; and
- The Appellate Body has limited WTO Members’ ability to impose countervailing duties and antidumping duties calculated using a non-market economy methodology to address simultaneous dumping and trade-distorting subsidization by non-market economies like China.²³

During the March 2020 meeting of the Dispute Settlement Body, the United States again rejected the widely supported proposal to fill Appellate Body vacancies, this time citing to its February report.²⁴ Members in support of the proposal stressed the need for its quick adoption, with some members contending that Article 17.2 of the DSU creates an obligation for members to fill the vacancies.²⁵

In response to the deadlock, the European Union and eighteen other WTO members have established a Multi-Party Interim Appeal Arbitration Arrangement (MPIA) to function as a substitute for the Appellate Body.²⁶ The members notified the WTO of the MPIA on April

relation to the WTO). This annual report to Congress is required under the Trade Act of 1974. 19 U.S.C. § 2213 (2011).

²³ USTR APPELLATE BODY REPORT, *supra* note 18, at 2. For one critical response to the report, see Steve Charnovitz, *Statement on USTR Report on the Appellate Body*, INT’L ECON. L. & POL’Y BLOG (Feb. 13, 2020), at <https://iepl.worldtradelaw.net/2020/02/statement-on-ustr-report-on-the-appellate-body.html> (describing the report as “a sophomoric Report teeming with misstatements”).

²⁴ World Trade Organization Press Release, WTO Members Consider EU Request for Panels on Indian Tech Tariffs, Colombian Duties on Fries (Mar. 5, 2020), at https://www.wto.org/english/news_e/news20_e/dsb_05mar20_e.htm [<https://perma.cc/E8YC-LLFX>] [hereinafter March 2020 Press Release].

²⁵ *Id.*; see DSU, *supra* note 1, Art. 17.2 (“Vacancies shall be filled as they arise.”).

²⁶ European Commission Press Release IP/20/538, EU and 15 World Trade Organization Members Establish Contingency Appeal Arrangement for Trade Disputes (Mar. 27, 2020), at https://ec.europa.eu/commission/press-corner/detail/en/IP_20_538 [<https://perma.cc/4DQ8-H8KF>]. As of April 30, 2020, the eighteen other members are Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, Guatemala, Hong Kong, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine, and Uruguay. Statement on a Mechanism for Developing, Documenting, and Sharing Practices and Procedures in the Conduct of WTO Disputes, WTO Doc. JOB/DSB/1/Add.12 (Apr. 30, 2020), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504,257951,257911,255883,253387,246976,240663,238289,237480,237479&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [hereinafter MPIA Notification]. Later, in May 2020, Ecuador and Nicaragua notified the WTO that they would be joining the MPIA. Communication from Ecuador, Statement on a Mechanism for Developing, Documenting, and Sharing Practices and Procedures in the Conduct of WTO Disputes, WTO Doc. JOB/DSB/1/Add.13 (May 15, 2020), at <https://>

30, 2020, anticipating the pool of arbitrators to be formed three months from that date.²⁷ Rather than pursuing an appeal through the Appellate Body under Articles 16.4 and 17 of the DSU, participating members have committed to receiving comparable review of panel decisions through arbitration, which, if mutually agreed upon, is a form of dispute settlement authorized by Article 25 of the DSU.²⁸ The MPIA will have a pool of ten arbitrators from which three are selected for each appeal.²⁹ While the MPIA substantially mirrors the Appellate Body, it integrates new practices intended to improve the appellate process.³⁰ “Any WTO member [can] join the MPIA at any time,” and the interim arbitration procedure will only hear appeals between participants until the Appellate Body is able to hear new appeals again.³¹

The United States has not signed on to the MPIA, and it remains to be seen what alternatives, if any, it will pursue in lieu of resolving appeals through the Appellate Body. After the departure of the two Appellate Body members in December 2019, the United States notified the Dispute Settlement Body of its decision to appeal the WTO compliance panel’s report addressing the issue of countervailing U.S. measures against Indian carbon steel flat products.³² The United States noted that although “[a]t this time” the Appellate Body would be unavailable to hear its appeal, it would “confer with India so that the parties may determine the way forward in this dispute, including whether the matters at issue may be resolved at this stage or to consider alternatives to the appellate process.”³³ In a later joint communication, India and the United States informed the Dispute Settlement Body that they were “engag[ing] in good faith discussions to seek a positive solution” and that, once the Appellate Body is again operational, the United States “will submit a notice of appeal and

docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263840&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/PLT2-E2XT>]; Communication from Nicaragua, Statement on a Mechanism for Developing, Documenting, and Sharing Practices and Procedures in the Conduct of WTO Disputes, WTO Doc. JOB/DSB/1/Add.14 (May 19, 2020), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263878&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=False [<https://perma.cc/5C2M-YQT3>].

²⁷ European Commission Press Release, Interim Appeal Arrangement for WTO Disputes Becomes Effective (April 30, 2020), at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143> [<https://perma.cc/C2K6-JQJX>].

²⁸ MPIA Notification, *supra* note 26, §§ 1–2; *see also* DSU, *supra* note 1, Art. 25.

²⁹ MPIA Notification, *supra* note 26, § 4. The selection process for the three arbitrators who will hear an appeal under the MPIA parallels the Appellate Body’s process. *See id.*, Annex I, § 7.

³⁰ European Commission Press Release, *supra* note 27. For example, rather than the sixty-day deadline for proceedings with a ninety-day allowance for exceptional cases outlined under Article 17.5 of the DSU, the MPIA provides that arbitrators must issue an award within ninety days. MPIA Notification, *supra* note 26, Annex I, § 12; DSU, *supra* note 1, Art. 17.5. The MPIA also provides that arbitrators may exceed the ninety-day deadline with the parties’ consent. MPIA Notification, *supra* note 26, Annex I, § 14. Furthermore, to aid arbitrators in meeting the ninety-day deadline, the MPIA allows arbitrators to streamline proceedings, such as establishing “page limits, time limits and deadlines as well as on the length and number of hearings required.” *Id.* § 12.

³¹ *Id.* §§ 12, 15.

³² Notification of Appeal by the United States Under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, para. 2, WTO Doc. WT/DS436/21 (Dec. 18, 2019), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=260024&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/ZG7U-CAUP>].

³³ *Id.*

an appellant submission” and India “may file its own appeal.”³⁴ In another dispute with South Korea, the United States and South Korea agreed to forgo appeals under Article 16.4 of the DSU but left open the possibility that they might later agree to review of the panel report through arbitration.³⁵

Despite its criticisms, the United States remains “one of the most active participants in the WTO dispute settlement process.”³⁶ Since the WTO’s inception, the United States has served as complainant in 124 cases, respondent in 155 cases, and third party in 155 cases.³⁷ In 2019, the United States “launched one WTO dispute and pursued actions in 10 other proceedings.”³⁸ In the late months of 2019, the United States celebrated several WTO panel rulings in its favor.³⁹ And despite its reluctance to entertain proposals to fill vacancies in the Appellate Body, the United States brought three appeals between May 2018 and December 2019.⁴⁰

In one of these cases, the United States received an unfavorable report from the Appellate Body and responded by questioning the legitimacy of the three members assigned to the appeal.⁴¹ This was a dispute with Canada over the U.S. adoption of countervailing duties against Canadian supercalendered paper. At the March 2020 meeting of the Dispute

³⁴ Joint Communication from India and the United States, United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, paras. 1–2, WTO Doc. WT/DS436/22 (Jan. 14, 2020), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=260523&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/DB2B-BLB3].

³⁵ Understanding Between the Republic of Korea and the United States Regarding Procedures Under Articles 21 and 22 of the DSU, United States—Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea, paras. 4–5, WTO Doc. WT/DS488/16 (Feb. 10, 2020), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=261132,256173,255958,255585,254984,254318,253366,252356,251575,250969&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/5VGA-BAAG].

³⁶ 2020 TRADE POLICY AGENDA, *supra* note 22, at 49 (listing various active disputes involving the United States).

³⁷ World Trade Organization, *Disputes by Member*, at https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm [https://perma.cc/8WPL-8BM6] (click on hyperlink under “Disputes by Member” section to find cases in which the United States is involved).

³⁸ 2020 TRADE POLICY AGENDA, *supra* note 22, at 49.

³⁹ See, e.g., Office of the U.S. Trade Representative Press Release, United States Wins for the Sixth Time in Airbus Subsidies Dispute (Dec. 2, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/united-states-wins-sixth-time> [https://perma.cc/GJ8V-K9XA]; Office of the U.S. Trade Representative Press Release, United States Wins WTO Challenge to Indian Export Subsidies (Oct. 31, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/united-states-wins-wto-challenge> [https://perma.cc/TT3U-VC6N].

⁴⁰ See Steve Charnovitz, *The Missed Opportunity to Save WTO Dispute Settlement*, INT’L ECON. L. & POL’Y BLOG (Dec. 10, 2019), at <https://ielp.worldtradelaw.net/2019/12/the-missed-opportunity-to-save-wto-dispute-settlement.html> (documenting that since May 2018 the United States filed appeals for United States—Countervailing Measures on Supercalendered Paper from Canada, United States—Countervailing Measures on Certain Pipe and Tube Products, and United States—Certain Measures Relating to the Renewable Energy Sector).

⁴¹ Communication from the United States, United States—Countervailing Measures on Supercalendered Paper from Canada, WTO Doc. WT/DS505/12 (Apr. 17, 2020), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263318,263214,262588,261047,261045,261046,259939,249158,247763,246621&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/7K73-NM2Z] [hereinafter Supercalendered Paper Communication]. As of the end of May 2020, the other two appeals remain pending. World Trade Organization, *Appellate Body*, at https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm [https://perma.cc/XE8F-M22Z].

Settlement Body, the U.S. representative stated that this report was “not a valid Appellate Body report” because “[e]xtraordinarily, none of the individuals serving on this appeal . . . was a valid member of the Appellate Body when the document was issued to WTO Members.”⁴² The United States noted that two of the Appellate Body members had worked on the report after the expiration of their terms,⁴³ thus reprising its preexisting concern about Rule 15 of the Working Procedures for Appellate Review. The U.S. representative asserted that the third Appellate Body member had improper affiliations with the Chinese government and therefore could not be considered a valid member.⁴⁴ In response, Canada stated that “there was no doubt that the Appellate Body report . . . was a valid Appellate Body report subject to the negative consensus rule for its adoption.”⁴⁵ The Dispute Settlement Body then adopted the appeals report despite the U.S. criticism.⁴⁶ On April 17, 2020, the United States communicated to the Dispute Settlement Body its view that “no recommendation was or could be adopted” by the [Dispute Settlement Body] because “there was no valid Appellate Body report in this dispute.”⁴⁷

While the Appellate Body is unable to hear appeals, it remains to be seen how dispute settlement in the WTO will function in practice. Without an Appellate Body or agreed-upon alternative, members can effectively block the adoption of panel findings by notifying the Dispute Settlement Body of their decisions to appeal.⁴⁸ It is unclear how extensively the MPIA will come to substitute for the Appellate Body during its incapacitation. This incapacitation may last for some time, as the Trump administration remains skeptical toward the WTO.⁴⁹

⁴² Statement by the United States at the Meeting of the WTO Dispute Settlement Body 1 (Mar. 5, 2020), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb28.Reconvene.Mar5_.DSB_.Stmt_.Item_.8.SC_.Paper_.DS505.as-deliv.fin_.public.pdf [<https://perma.cc/NKA5-53MM>] [hereinafter U.S. March DSB Statement]; see also March 2020 Press Release, *supra* note 24.

⁴³ U.S. March DSB Statement, *supra* note 42, at 1.

⁴⁴ *Id.* at 2–3 (stating that Hong’s position as vice president in the “Ministry of Commerce Academy of International Trade and Economic Cooperation” in China creates a conflict because “[t]his entity is a ‘public institution’ under Chinese law that is affiliated with and subordinate to China’s Ministry of Commerce” and receives funding from the Ministry). China responded to the U.S. allegations and noted that the institute to which Appellate Body member Hong belongs is an “independent legal entity” that only receives partial funding from the government. March 2020 Press Release, *supra* note 24.

⁴⁵ March 2020 Press Release, *supra* note 24.

⁴⁶ *Id.* The European Union agreed with Canada that the report should be adopted through negative consensus and that any complaints against the Appellate Body members should be submitted to the Appellate Body so that it may deal with the allegations. *Id.*

⁴⁷ Supercalendered Paper Communication, *supra* note 41.

⁴⁸ Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 J. INT’L ECON. L. 297, 303–04 (2019) (explaining that under Article 16.4, if a party were to appeal a panel report without three Appellate Body members available to hear that appeal, the case would not proceed and the panel report could not be adopted); see generally DSU, *supra* note 1, Art. 16.4 (“If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the [Dispute Settlement Body] until after completion of the appeal.”).

⁴⁹ See Remarks at a White House Coronavirus Task Force Press Briefing, 2020 DAILY COMP. PRES. DOC. 254, at 17–18 (Apr. 10, 2020) (“So we have the World Trade Organization. And until I came along, we were losing cases, so many cases. It was ridiculous. . . . [T]he World Trade Organization has treated us very unfairly.”).

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

Trump Administration Authorizes U.S. Military Use of Non-persistent Landmines

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The Trump administration released an updated policy on landmine use on January 31, 2020, significantly changing the prior U.S. policy. Whereas previously the United States supported landmine use only on the Korean peninsula, the revised policy now allows for the universal use of “non-persistent” landmines, i.e., those that have self-destruction mechanisms and self-deactivation features. This policy significantly diverges from provisions of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention), a treaty to which the United States is not a party but which has widespread international support.

The Ottawa Convention, which was finalized in 1997 and currently has 164 states parties, requires the discontinuance of all landmine use, the cessation of the development and acquisition of landmines, the destruction of all landmines in a state party’s possession or control, and abstention from aiding other actors’ development or use of landmines.¹ Although the United States was an early leader in advancing the notion of a universal ban on landmine use, it did not sign the Ottawa Convention and has not acceded to it.² The Obama administration nonetheless sought to increase the alignment between U.S. practice and the provisions in the Ottawa Convention.³ In particular, in 2014, the administration declared that it would generally discard its stockpiles of landmines and refrain from using landmines that are in its control.⁴ Yet, due to what it described as a “unique situation” on the Korean peninsula, the administration created an exception to this policy as it refused to destroy landmines “required for the defense of the Republic of Korea.”⁵

On January 31, 2020, the Trump administration released an updated landmine policy, retreating from the Obama administration’s disapproval of landmines and moving the United States further away from alignment with the Ottawa Convention.⁶ In contrast to

¹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Art. I, Sept. 18, 1997, 2056 UNTS 35597 (2002) [hereinafter Ottawa Convention] (setting these restrictions with respect to anti-personnel landmines); Depositary Status for the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, UNITED NATIONS TREATY COLLECTION, at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-5&chapter=26&clang=_en [<https://perma.cc/N7Z4-29H4>] [hereinafter Depositary Status for the Ottawa Convention].

² See generally Depositary Status for the Ottawa Convention, *supra* note 1; Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 108 AJIL 835, 836 (2014).

³ Daugirdas & Mortenson, *supra* note 2.

⁴ *Id.*

⁵ *Id.* at 837 (quoting a 2014 U.S. Department of State press statement). This policy was formally documented in Presidential Policy Directive-37, which was issued in January 2016. CONG. RESEARCH SERV., IF11440, NEW U.S. ANTIPERSONNEL LANDMINE USE POLICY 1 (2020), at <https://crsreports.congress.gov/product/pdf/IF/IF11440>. The exception with respect to the Korean peninsula hindered the U.S. ability to fully comply in practice with the Ottawa Convention, as Article 1(c) commits states parties to undertake to never “assist, encourage or induce, in any way,” another state in the use or development of landmines. Ottawa Convention, *supra* note 1, Art. 1(c).

⁶ White House Press Release, Statement from the Press Secretary (Jan. 31, 2020), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-107> [<https://perma.cc/PR6U-VS77>]; see also U.S. Dep’t of

the previous U.S. policy, the “ability to employ non-persistent landmines will [now] not have any expressed geographic limitations.”⁷ The Department of Defense defined non-persistent landmines as those that “possess self-destruction mechanisms and self-deactivation features.”⁸ Use of these landmines is now approved “when necessary for mission success in major contingencies or other exceptional circumstances” as determined by combatant commanders.⁹ When asked to specify what constitutes an exceptional circumstance, however, a Department of Defense official responded, “war is exceptional” and “an exceptional circumstance[] is when you have to put troops in harm’s way.”¹⁰ Although this new policy greatly expands the military’s opportunity to use landmines, the policy expressly provides that the Department of Defense “will continue to adhere to all applicable international legal obligations concerning landmines.”¹¹ This includes the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices joined by the United States in 1999, which is more commonly known as the Amended Mines Protocol.¹² As stated by Secretary of Defense Mark Esper: “Consistent with the Amended Mines Protocol, the Military Departments and Combatant Commands will take feasible precautions to protect civilians from the use of landmines, record all necessary information concerning mined areas, and address such mines without delay after the cessation of active hostilities.”¹³

Defense Press Release, Landmine Policy: Statement Attributable to Vic Mercado, Performing the Duties of Assistant Secretary of Defense for Strategy, Plans and Capacities (Jan. 31, 2020), at <https://www.defense.gov/Newsroom/Releases/Release/Article/2071692/landmine-policy> [<https://perma.cc/YRE6-5V6E>] [hereinafter Dep’t of Defense Landmine Policy Press Release].

⁷ Memorandum from Mark T. Esper, Secretary of Defense, on the Department of Defense’s Policy on Landmines to the Secretaries of the Military Departments et al., at 2 (Jan. 31, 2020), available at <https://media.defense.gov/2020/Jan/31/2002242359/-1/-1/1/DOD-POLICY-ON-LANDMINES.PDF> [<https://perma.cc/JF2G-6MPK>] [hereinafter Landmine Policy Memorandum].

⁸ *Id.* In accordance with the prior U.S. policy, the new policy prohibits the use of persistent landmines “that do not incorporate self-destruction mechanisms and self-deactivation features.” *Id.*

⁹ *Id.* at 3. There are eleven combatant commanders, each in charge of a combatant command “which provides command and control of military forces in peace and war.” U.S. Dep’t of Defense, *Combatant Commands*, at <https://www.defense.gov/Our-Story/Combatant-Commands> [<https://perma.cc/X5BQ-G7CL>].

¹⁰ U.S. Dep’t of Defense Press Release, Performing the Duties of Assistant Secretary of Defense for Strategy, Plans and Capabilities Victorino Mercado Media Engagement on Landmine Policy (Jan. 31, 2020), at <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2072121/performing-the-duties-of-assistant-secretary-of-defense-for-strategy-plans-and> [<https://perma.cc/BZ3P-YMRZ>] [hereinafter Mercado Press Conference].

¹¹ Landmine Policy Memorandum, *supra* note 7, at 1.

¹² *Id.* at 1–2; see also Depositary Status for the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, UNITED NATIONS TREATY COLLECTION, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2-b&chapter=26&clang=_en [<https://perma.cc/SJ3F-87V5>].

¹³ Landmine Policy Memorandum, *supra* note 7, at 2; see also Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Amended Protocol II, Art. 3(8)(c), May 3, 1996, 35 ILM 1206 (prohibiting use of landmines “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”); *id.* Art. 9 (requiring the recording of “[a]ll information concerning . . . mines”); *id.* Art. 10 (mandating that landmines “be cleared, removed, destroyed or maintained [pursuant to other specified articles]” following “the cessation of active hostilities”).

A Department of Defense official described this policy change as stemming from a shift in the “strategic environment . . . that requires our military to become more lethal, resilient, and ready for future contingencies.”¹⁴ The official further stated:

Landmines . . . remain a vital tool in conventional warfare that the United States military cannot responsibly forgo, particularly when faced with substantial and potentially overwhelming enemy forces in the early stages of combat. Withholding a capability that would give our ground forces the ability to deny terrain temporarily and therefore shape an enemy’s movement to our benefit irresponsibly risks American lives.¹⁵

The Trump administration previously used parallel reasoning in 2017 when, in reversing a 2008 policy established by the George W. Bush administration, it decided to allow the “employ[ment] [of] cluster munitions”—weapons that, once detonated, explode and fire dozens to hundreds of small submunitions towards a target—including those with a detonation failure rate of more than 1 percent.¹⁶ Similar to the new landmine policy, the administration justified its support of the use of such weaponry as being necessary for a “qualitative and quantitative competitive advantage against potential adversaries” in light of “important changes in the global security environment.”¹⁷

The Obama administration, in comparison, promulgated the previous U.S. policy limiting the use of landmines because it concluded that any military advantage that landmines would generate was outweighed by the harm to civilians that these instruments of war have the potential to cause.¹⁸ Many international actors, including leaders of the Ottawa Convention, have expressed concern about the danger to civilians that may result from the new U.S. landmine policy. Osman Abufatima Adam Mohammed, the president of the Eighteenth Meeting of States Parties to the Ottawa Convention, described this new policy as “a step in the wrong direction” and explained that it will “only drift the US further apart from 80% of the world’s States who have committed to protect civilians from these

¹⁴ Dep’t of Defense Landmine Policy Press Release, *supra* note 6. Asked in a press conference if he could “point to any specific example in the past four years” where landmines would have prevented U.S. troops from feeling “at a severe disadvantage,” the official answered: “No, I think it’s a matter of risk.” Mercado Press Conference, *supra* note 10.

¹⁵ *Id.*

¹⁶ Memorandum from Patrick M. Shanahan, Deputy Secretary of Defense, on the Department of Defense’s Policy on Cluster Munitions to the Secretaries of the Military Departments et al. 2 (Nov. 30, 2017), available at <https://dod.defense.gov/Portals/1/Documents/pubs/DOD-POLICY-ON-CLUSTER-MUNITIONS-OSD071415-17.pdf> [<https://perma.cc/S4EG-ZWVF>] [hereinafter Cluster Munition Policy Memorandum]; CONG. RESEARCH SERV., RS22907, CLUSTER MUNITIONS: BACKGROUND AND ISSUES FOR CONGRESS 1 (2019), available at <https://fas.org/sgp/crs/weapons/RS22907.pdf>. Due to their failure rates combined with their lack of self-destructive capabilities, these weapons “can remain explosive hazards for decades.” *Id.* at 2. For a summary of the 2008 U.S. policy, see John R. Crook, Contemporary Practice of the United States, 102 AJIL 889 (2008).

¹⁷ Cluster Munition Policy Memorandum, *supra* note 16, at 1.

¹⁸ White House Press Release, FACT SHEET: Changes to U.S. Anti-Personnel Landmine Policy (Sept. 23, 2014), at <https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/fact-sheet-changes-us-anti-personnel-landmine-policy> [<https://perma.cc/4RA7-YABW>] (“The measures announced today represent a further step to advance the humanitarian aims of the Ottawa Convention and to bring U.S. practice in closer alignment with a global humanitarian movement that has had a demonstrated positive impact in reducing civilian casualties”). A report compiled by a global landmine monitoring organization found that at least 6,897 people were killed or injured from landmines in 2018. International Campaign to Ban Landmines, *Landmine Monitor 2019*, at 53 (2019), available at <http://the-monitor.org/media/3074086/Landmine-Monitor-2019-Report-Final.pdf> [hereinafter Landmine Monitor Report]. Of the casualties, 71% were civilians and 40% were children. *Id.* at 58.

treacherous weapons.”¹⁹ The treaty’s Secretariat Director Juan Carlos Ruan also responded to the new landmine policy by explaining that “[t]here is no such thing as responsible use of anti-personnel mines” because “any perceived or limited military utility of anti-personnel mines is grossly outweighed by the humanitarian consequences of their use.”²⁰ The European Union, comprised of member states who are all parties to the Ottawa Convention, released a statement similarly disapproving the United States’ new policy and describing the use of landmines “anywhere, anytime, and by any actor” as “completely unacceptable to the European Union.”²¹ Further, a collection of U.S. and international nongovernmental organizations signed a joint letter “strongly condemn[ing]” the policy and requesting that Congress “take immediate measures” to prevent any further military action in accordance with the policy.²² Presumably anticipating these responses to its policy change, the Department of Defense in its initial press release denied that the new policy would “exacerbate the problems associated with unexploded munitions” and stated that its policy authorizing the use of landmines does not lessen the U.S. commitment to “international humanitarian demining efforts.”²³

USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

United States Signs Agreement with the Taliban, but Prospects for Its Full Implementation Remain Uncertain

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On February 29, 2020, the United States signed an “Agreement for Bringing Peace to Afghanistan” with the Taliban. The agreement provides that the United States and its allies will withdraw all forces from Afghanistan in stages over a fourteen-month period and that the Taliban will not allow actors within its controlled territory to attack the United States and its allies. The agreement contains additional provisions with respect to prisoner exchanges, sanctions relief, and future negotiations regarding a permanent ceasefire and broader political settlement that the Taliban will pursue with the government of Afghanistan. On the same day, the United States and Afghanistan issued a Joint Declaration reflecting some, though not all, of the terms of the U.S. agreement with the Taliban. Over the three months following the

¹⁹ Anti-Personnel Mine Ban Convention Implementation Support Unit Press Release, *US Landmine Policy Change, a Dangerous Step Forward* (Feb. 3, 2020), available at https://www.apminebanconvention.org/fileadmin/APMBC/press-releases/2020-02-03-Mine_Ban_Convention_on_US_landmine_policy.pdf [hereinafter *Ottawa Convention Press Release*]. According to the Landmine Monitor Report, there are only eleven states, not including the United States, that have not committed to ceasing future production of landmines—China, Cuba, India, Iran, Myanmar, North Korea, Pakistan, Russia, Singapore, South Korea, and Vietnam. Landmine Monitor Report, *supra* note 18, at 5.

²⁰ Ottawa Convention Press Release, *supra* note 19.

²¹ Anti-Personnel Mines: Statement by the Spokesperson on the United States’ Decision to Re-introduce Their Use, EUR. COMM’N, at https://eeas.europa.eu/headquarters/headquarters-homepage/73966/anti-personnel-mines-statement-spokesperson-united-states%E2%80%99-decision-re-introduce-their-use_en.

²² Members of the United States Campaign to Ban Landmines, *Joint Statement on the Trump Administration’s New Landmine Policy* (Feb. 28, 2020), available at <https://www.fcni.org/documents/1265>.

²³ Dep’t of Defense Landmine Policy Press Release, *supra* note 6.

signing of the U.S. agreement with the Taliban, the parties have implemented some aspects of its terms. But others remain unfulfilled, despite the passage of deadlines.

The agreement between the Taliban and the United States was the result of the most recent series of on-and-off negotiations between the two parties, a series that began in 2018.¹ The Trump administration first expressed interest in potential negotiations with the Taliban in 2017.² In July 2018, the United States began direct two-party negotiations with the Taliban in Doha, Qatar,³ following a cease-fire between the Afghan government and the Taliban over the holiday of Eid al-Fitr that year.⁴ These negotiations did not include the Afghan government, which the Taliban had called a “puppet” of the United States,⁵ although intra-Afghanistan peace talks (between the Taliban and the Afghan government) remained the asserted U.S. objective.⁶

By January of 2019, the two sides had agreed to a framework of an agreement “in principle.”⁷ In March, the chief negotiator for the United States, Special Representative Zalmay Khalilzad, announced that the two sides were chiefly negotiating over four issues: “counter-terrorism assurances, troop withdrawal, intra-Afghan dialogue, and a comprehensive ceasefire.”⁸ By September of 2019 they had generated a draft agreement.⁹ Shortly after the announcement of the draft agreement, President Trump cancelled plans for Taliban leaders to meet with him at Camp David after an attack in Kabul that killed an American soldier, calling the negotiations off.¹⁰

¹ CLAYTON THOMAS, CONG. RESEARCH SERV., R45122, AFGHANISTAN: BACKGROUND AND U.S. POLICY: IN BRIEF 2 (2020), available at <https://fas.org/sgp/crs/row/R45122.pdf> [<https://perma.cc/RXK6-MBFF>] [hereinafter CONGRESSIONAL RESEARCH SERVICE 2020 REPORT]. The Obama administration had previously attempted peace talks with the Taliban in 2012, but they were suspended by the Taliban after two months of negotiation. Council on Foreign Relations, *The U.S. War in Afghanistan 1999–2020* (2020), at <https://www.cfr.org/timeline/us-war-afghanistan>. The Obama administration succeeded in negotiating a prisoner swap for Sergeant Beau Bergdahl in 2014 but was unable to reinstate broader negotiations. See *id.*; Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 108 AJIL 517 (2014).

² In a speech given on August 21, 2017, President Trump indicated that the administration’s strategy toward Afghanistan would be “based on conditions” and that “perhaps it will be possible to have a political settlement that includes elements of the Taliban in Afghanistan.” Address to the Nation on United States Strategy in Afghanistan and South Asia, 2017 DAILY COMP. PRES. DOC. 580 (Aug. 21).

³ CONGRESSIONAL RESEARCH SERVICE 2020 REPORT, *supra* note 1, at 2; Mujib Mashal & Eric Schmitt, *White House Orders Direct Taliban Talks to Jump-Start Afghan Negotiations*, N.Y. TIMES (July 15, 2018), at <https://www.nytimes.com/2018/07/15/world/asia/afghanistan-taliban-direct-negotiations.html>.

⁴ DEP’T OF DEFENSE, ENHANCING SECURITY AND STABILITY IN AFGHANISTAN 5 (Dec. 2018), available at <https://media.defense.gov/2018/Dec/20/2002075158/-1/-1/1/1225-REPORT-DECEMBER-2018.PDF> [<https://perma.cc/F8Q4-B5J5>] [hereinafter DEP’T OF DEFENSE 2018 REPORT].

⁵ *Taliban Deal Would See US Troops “Withdraw from Five Bases,”* AL JAZEERA (Sept. 2, 2019), at <https://www.aljazeera.com/news/2019/09/taliban-deal-troops-withdraw-bases-190902151734211.html>.

⁶ DEP’T OF DEFENSE 2018 REPORT, *supra* note 4, at 6.

⁷ Mujib Mashal, *U.S. and Taliban Agree in Principle to Peace Framework, Envoy Says*, N.Y. TIMES (Jan. 28, 2019), at <https://www.nytimes.com/2019/01/28/world/asia/taliban-peace-deal-afghanistan.html>.

⁸ U.S. Special Representative Zalmay Khalilzad (@US4AfghanPeace), TWITTER (Mar. 12, 2019, 12:59 PM), at <https://twitter.com/US4AfghanPeace/status/1105513778886643713> [<https://perma.cc/4AFJ-6VYS>].

⁹ *US Envoy Shows Draft of Deal with Taliban to Afghan President*, AL JAZEERA (Sept. 2, 2019), at <https://www.aljazeera.com/news/2019/09/envoy-shows-draft-peace-deal-taliban-afghan-president-19090211633344.html>.

¹⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 7, 2019, 6:51 PM), at <https://twitter.com/realDonaldTrump/status/1170469618177236992> [<https://perma.cc/9EWJ-LUVT>]; Peter Baker, Mujib Mashal, & Michael Crowley, *How Trump’s Plan to Secretly Meet with the Taliban Came Together, and Fell Apart*, N.Y. TIMES (Sept. 8, 2019), at <https://www.nytimes.com/2019/09/08/world/asia/afghanistan-trump-camp-david-taliban.html>.

Two months later, in November, Trump announced that negotiations had restarted,¹¹ and talks formally reopened on December 7.¹² Just four days later, the Taliban launched an attack on Bagram Air Base, the largest American base in Afghanistan.¹³ Khalilzad immediately called for a “pause” in negotiations.¹⁴ On January 16, 2020, the Taliban proposed a reduction in violence in order to restart the talks, though refusing to offer a complete ceasefire.¹⁵ By February of 2020, media reports indicated that Trump had given approval for a peace deal, conditional on the Taliban’s undertaking a temporary reduction in violence as a show of its commitment.¹⁶ The conditional period was scheduled for a week beginning on February 22.¹⁷ During that week, violence was considerably reduced and a U.S. general stated that he was “satisfied that the Taliban had made a good-faith effort.”¹⁸

On February 28, Trump announced that the United States would sign the agreement.¹⁹ On February 29, Khalilzad and Taliban deputy political leader Mullah Abdul Ghani Baradar signed the “Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America” (Agreement) in front of Secretary of State Mike Pompeo in Doha.²⁰ The State Department later released a joint statement by the United States and its Afghan coalition allies and a separate joint statement by the United States and Russia, with both statements signaling support for the Agreement.²¹

¹¹ Remarks to United States Troops at Bagram Airfield in Bagram, Afghanistan, 2019 DAILY COMP. PRES. DOC. 835 (Nov. 28).

¹² *First Round of Resurrected US-Taliban Peace Talks Open in Qatar*, AL JAZEERA (Dec. 7, 2019), at <https://www.aljazeera.com/news/2019/12/resurrected-taliban-peace-talks-open-qatar-191207105319486.html>.

¹³ Fahim Abed & Mujib Mashal, *Taliban Attack U.S. Base in Afghanistan as Negotiators Talk Peace*, N.Y. TIMES (Dec. 11, 2019), at <https://www.nytimes.com/2019/12/11/world/asia/Afghanistan-bagram-airfield-attack.html>.

¹⁴ U.S. Special Representative Zalmay Khalilzad (@US4AfghanPeace), TWITTER (Dec. 12, 2019, 6:45 PM), at <https://twitter.com/US4AfghanPeace/status/1205272370614812675> [<https://perma.cc/C9H2-CQQF>].

¹⁵ Mujib Mashal & Taimoor Shah, *Taliban Offer to Reduce Violence in Afghanistan Ahead of Deal with U.S.*, N.Y. TIMES (Jan. 16, 2020), at <https://www.nytimes.com/2020/01/16/world/asia/afghanistan-taliban-agreement.html>; Emma Graham-Harrison, *Taliban Offer to Stand Down Fighters to Restart Peace Talks with US*, GUARDIAN (Jan. 16, 2020), at <https://www.theguardian.com/world/2020/jan/16/taliban-offer-to-stand-down-fighters-to-restart-peace-talks-with-us>.

¹⁶ Mujib Mashal & Lara Jakes, *Trump Gives Conditional Go Ahead on Peace Deal with Taliban, Officials Say*, N.Y. TIMES (Feb. 11, 2020), at <https://www.nytimes.com/2020/02/11/world/asia/afghanistan-taliban-peace-deal.html>.

¹⁷ CONGRESSIONAL RESEARCH SERVICE 2020 REPORT, *supra* note 1, at 2–3.

¹⁸ *Id.*

¹⁹ Statement on the United States-Taliban Agreement for Bringing Peace to Afghanistan, 2020 DAILY COMP. PRES. DOC. 106 (Feb. 28).

²⁰ Agreement for Bringing Peace to Afghanistan Between the Islamic Emirate of Afghanistan Which Is Not Recognized by the United States as a State and Is Known as the Taliban and the United States of America, Feb. 29, 2020, available at <https://www.state.gov/wp-content/uploads/2020/02/Signed-Agreement-02292020.pdf> [<https://perma.cc/J6SN-X9RA>] [hereinafter Agreement]; CONGRESSIONAL RESEARCH SERVICE 2020 REPORT, *supra* note 1, at 3. Every mention of the Taliban in the Agreement describes it as “the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban.” See generally Agreement, *supra*.

²¹ Dep’t of State, Joint Statement on the Signing of the U.S.-Taliban Agreement (Mar. 6, 2020), at <https://www.state.gov/joint-statement-on-the-signing-of-the-u-s-taliban-agreement> [<https://perma.cc/KV4J-AAEB>]; Dep’t of State, Joint Statement on the Signing of the U.S.-Taliban Agreement (Mar. 9, 2020), at <https://www.state.gov/joint-statement-on-the-signing-of-the-u-s-taliban-agreement-2> [<https://perma.cc/LA6B-UK38>].

The Agreement begins with the following language:

A comprehensive peace agreement is made of four parts:

1. Guarantees and enforcement mechanisms that will prevent the use of the soil of Afghanistan by any group or individual against the security of the United States and its allies.
2. Guarantees, enforcement mechanisms, and announcement of a timeline for the withdrawal of all foreign forces from Afghanistan.
3. After the announcement of guarantees for a complete withdrawal of foreign forces and timeline in the presence of international witnesses, and guarantees and the announcement in the presence of international witnesses that Afghan soil will not be used against the security of the United States and its allies, the [Taliban] will start intra-Afghan negotiations with Afghan sides on March 10, 2020
4. A permanent and comprehensive ceasefire will be an item on the agenda of the intra-Afghan dialogue and negotiations. The participants of intra-Afghan negotiations will discuss the date and modalities of a permanent and comprehensive ceasefire, including joint implementation mechanisms, which will be announced along with the completion and agreement over the future political roadmap of Afghanistan.²²

The Agreement clarifies that “[t]he four parts above are interrelated and each will be implemented in accordance with its own agreed timeline and agreed terms. Agreement on the first two parts paves the way for the last two parts.”²³ The Agreement then goes on to provide more specifics regarding the implementation of the first two parts, but it does not provide further detail about how the third and fourth parts are to be implemented.

With respect to withdrawal, the United States “is committed to withdraw from Afghanistan all military forces of the United States, its allies, and Coalition partners . . . within fourteen (14) months following the announcement of this agreement.”²⁴ Over the first 135 days, the United States “will reduce” its troop numbers to 8,600 and withdraw, along with its allies, from five military bases.²⁵ Over the remaining time period, the United States and its allies “will complete withdrawal,” given “the commitment and actions on the obligations of the” Taliban.²⁶ The Agreement further provides that the “United States and its allies will refrain from the threat or the use of force against the territorial integrity or political independence of Afghanistan or intervening in its domestic affairs.”²⁷

The Taliban agreed to take immediate “steps to prevent any group or individual, including al-Qa’ida, from using the soil of Afghanistan to threaten the security of the United States and its allies.”²⁸ Specifically, the Taliban agreed (1) that it “will not allow” such threatening of the security of the U.S. and its allies; (2) that it will “send a clear message that those who pose a

²² Agreement, *supra* note 20.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* The agreement specifies elsewhere that the Taliban’s “obligations . . . apply in areas under their control until the formation of the new post-settlement Afghan Islamic government as determined by the intra-Afghan dialogue and negotiations.” *Id.*

threat to the security of the United States and its allies have no place in Afghanistan”; (3) that it will prevent any such threatening actors “from recruiting, training, and fundraising and will not host them”; (4) that it will “deal with those seeking asylum or residence in Afghanistan according to international migration law . . . so that such persons do not pose a threat to the security of the United States and its allies”; and (5) that it “will not provide visas, passports, travel permits, or other legal documents . . . to enter Afghanistan” to anyone who might threaten “the security of the United States and its allies.”²⁹

The agreement also includes the following provisions:

The United States is committed to start immediately to work with all relevant sides on a plan to expeditiously release combat and political prisoners as a confidence building measure with the coordination and approval of all relevant sides. Up to five thousand (5,000) prisoners of [the Taliban] and up to one thousand (1,000) prisoners of the other side will be released by March 10, 2020, the first day of intra-Afghan negotiations The relevant sides have the goal of releasing all the remaining prisoners over the course of the subsequent three months. The United States commits to completing this goal. The [Taliban] commits that its released prisoners . . . will not pose a threat to the security of the United States and its allies.

With the start of intra-Afghan negotiations, the United States will initiate an administrative review of current U.S. sanctions and the rewards list against members of the [Taliban] with the goal of removing these sanctions by August 27, 2020

With the start of intra-Afghan negotiations, the United States will start diplomatic engagement with the other members of the United Nations Security Council and Afghanistan to remove members of the [Taliban] from the sanctions list with the aim of achieving this objective by May 29, 2020

. . .

The United States will request the recognition and endorsement of the United Nations Security Council for this agreement.

The United States and the [Taliban] seek positive relations with each other and expect that the relations between the United States and the new post-settlement Afghan Islamic government as determined by the intra-Afghan dialogue and negotiations will be positive.

The United States will seek economic cooperation for reconstruction with the new post-settlement Afghan Islamic government as determined by the intra-Afghan dialogue and negotiations, and will not intervene in its internal affairs.³⁰

The Agreement also reportedly contains secret annexes.³¹ Notably absent from the Agreement, at least in its public form, is a provision for an immediate ceasefire or a reduction in violence by the Taliban with respect to the government of Afghanistan; the only provision regarding such a cessation of hostilities is that a “ceasefire will be an item on the agenda of the

²⁹ *Id.*

³⁰ *Id.* (numbering omitted).

³¹ CONGRESSIONAL RESEARCH SERVICE 2020 REPORT, *supra* note 1, at 3.

intra-Afghan dialogue.”³² Also absent are any concrete enforcement provisions for either side.³³

The same day that the United States signed the Agreement, it also issued a Joint Declaration between the Islamic Republic of Afghanistan and the United States for Bringing Peace to Afghanistan (Joint Declaration).³⁴ The Joint Declaration in many ways parallels the Agreement with the Taliban. It sets out the following goal for a future peace agreement:

A comprehensive and sustainable peace agreement will include four parts: 1) guarantees to prevent the use of Afghan soil by any international terrorist groups or individuals against the security of the United States and its allies, 2) a timeline for the withdrawal of all U.S. and Coalition forces from Afghanistan, 3) a political settlement resulting from intra-Afghan dialogue and negotiations between the Taliban and an inclusive negotiating team of the Islamic Republic of Afghanistan, and 4) a permanent and comprehensive ceasefire. These four parts are interrelated and interdependent.³⁵

The Joint Declaration “takes note of the U.S.-Taliban agreement” and “affirms [the] readiness” of Afghanistan “to participate in [intra-Afghan] negotiations and its readiness to conclude a ceasefire with the Taliban.”³⁶ The Joint Declaration contains provisions for U.S. withdrawal similar to those found in the Agreement and commits Afghanistan to work diplomatically toward the removal of UN sanctions on Taliban personnel once intra-Afghan negotiations have begun.³⁷ Nonetheless, the Joint Declaration does not perfectly mirror the Agreement. As one notable example, the Joint Declaration does not contain a provision for the release of up to 5,000 imprisoned Taliban persons by March 10.³⁸ Instead, it states that “Afghanistan will participate in a U.S.-facilitated discussion with Taliban representatives . . . to include determining the feasibility of releasing significant numbers of prisoners on both sides.”³⁹

Neither the Agreement nor the Joint Declaration is necessarily binding as a matter of international law. It would be difficult to deem the Agreement to be “concluded between States” as envisioned by Article 2 of the Vienna Convention of the Law of Treaties⁴⁰ in light of the general lack of recognition accorded to the Taliban—as well as the repeated emphasis in the text of the Agreement itself that the United States does not recognize the Taliban as the government of Afghanistan. This does not necessarily preclude the Taliban and the United States from entering into an agreement with international legal force, as armed

³² Agreement, *supra* note 20.

³³ See generally *id.*

³⁴ Joint Declaration Between the Islamic Republic of Afghanistan and the United States of America for Bringing Peace to Afghanistan, Afg.-U.S., Feb. 29, 2020, available at <https://www.state.gov/wp-content/uploads/2020/02/02.29.20-US-Afghanistan-Joint-Declaration.pdf> [<https://perma.cc/8SZB-LA3V>] [hereinafter Joint Declaration].

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Compare generally Joint Declaration, *supra* note 34 with Agreement, *supra* note 20.

³⁹ Joint Declaration, *supra* note 34 (adding that the two nations would “seek the assistance of the ICRC to support this discussion”).

⁴⁰ Vienna Convention on the Law of Treaties, Art. 2, May 23, 1969, 1155 UNTS 331 [hereinafter VCLT].

opposition groups may have some such capacity with respect to peace-related commitments.⁴¹ But the Agreement, while signed, also has indicia sometimes associated with non-binding commitments, such as the repeated use of “will” rather than “shall.”⁴² The Joint Declaration uses similar language.⁴³ And while the Joint Declaration was reached between states, it is unsigned and titled as a “Declaration” rather than an “Agreement”—further signals of nonbinding status.⁴⁴

Consistent with a term in the Agreement, the United States promptly sought a UN Security Council resolution signaling support for the Agreement. On March 9, the Security Council unanimously passed Resolution 2513, which “[w]elcomes the significant steps towards ending the war and opening the door to intra-Afghan negotiations enabled by” the Joint Declaration and the Agreement.⁴⁵ The resolution also “[c]alls upon all States” to support the peace negotiations and signals the Security Council’s willingness to review the UN sanctions imposed on Taliban personnel once intra-Afghan negotiations have begun.⁴⁶

Trump welcomed the Agreement, stating:

If the Taliban and the government of Afghanistan live up to these commitments, we will have a powerful path forward to end the war in Afghanistan and bring our troops home. These commitments represent an important step to a lasting peace in a new Afghanistan, free from Al Qaeda, ISIS, and any other terrorist group that would seek to bring us harm.⁴⁷

Shortly after the signing of the Agreement and the Joint Declaration, however, prospects for their timely implementation dwindled. In early March the Taliban ended its reduction-in-

⁴¹ See Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AJIL 373, 381 (2006) (reasoning that in “many peace agreements signed by armed opposition groups, grounds can be found to assert that the parties intended the agreement to be binding on the international legal plane, and that the nonstate signatories were ‘subjects of international law’—based on the recognition of such groups under international law, in particular through humanitarian law”); see also Beatrice Walton, *The U.S.-Taliban Agreement: Not a Ceasefire, or a Peace Agreement, and Other International Law Issues*, JUST SECURITY (Mar. 19, 2020), at <https://www.justsecurity.org/69154/the-u-s-taliban-agreement-not-a-ceasefire-or-a-peace-agreement-and-other-international-law-issues> (noting the lack of clarity around the international legal status of the Agreement).

⁴² See generally Agreement, *supra* note 20; ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 30 (3d ed. 2013) (observing that “most states now follow a practice of manifesting their intention to conclude a treaty by consciously employing a fairly standard form, and mandatory terminology such as (in English) ‘shall,’ ‘agree,’ ‘undertake,’ ‘rights,’ ‘obligations’ and ‘enter into force’” whereas “when they do not [in]tend to conclude a treaty . . . instead of ‘shall’ they use a less mandatory term, such as ‘will’”).

⁴³ See generally Joint Declaration, *supra* note 34.

⁴⁴ *Id.*; AUST, *supra* note 42, at 30–31 (further discussing conventions used for distinguishing binding and non-binding commitments). Within the United States, the Trump administration has not sought legislative approval for either the Agreement or the Joint Declaration.

⁴⁵ SC Res. 2513 (Mar. 10, 2020).

⁴⁶ *Id.* (also indicating that “Taliban action, or lack thereof” towards certain objectives “will affect this review”). In her remarks regarding the resolution, U.S. Ambassador Cherith Chalet stated that “[t]he support and engagement of the international community will continue to be critical in the next steps of the peace process.” U.S. Mission to the United Nations Press Release, Explanation of Vote on the UN Security Council adoption of a U.S.-Draft Resolution on the U.S.-Taliban Agreement, (Mar. 10, 2020), at <https://usun.usmission.gov/explanation-of-vote-on-the-un-security-council-adoption-of-a-u-s-draft-resolution-on-the-u-s-taliban-agreement> [<https://perma.cc/4GH2-PMDV>].

⁴⁷ Statement on the United States-Taliban Agreement for Bringing Peace to Afghanistan, *supra* note 19.

violence period and resumed attacks against Afghan forces, leading the United States to respond with air strikes to protect Afghan forces.⁴⁸ Additional Taliban attacks and U.S. airstrikes came hours after a telephone call between Trump and the Taliban's chief political leader, the first such phone call between a U.S. president and a Taliban leader since the beginning of the U.S. military intervention in Afghanistan.⁴⁹ By March 10, a U.S. military commander stated that the rate of Taliban attacks was inconsistent with carrying out the Agreement.⁵⁰

The fulfillment of the Agreement's provisions was further complicated by the response of the Afghan government. The day after the Agreement was signed, Afghan President Ashraf Ghani rejected the exchange of 5,000 prisoners by March 10, stating to the press that "[f]reeing Taliban prisoners is not [under] the authority of America but the authority of the Afghan government."⁵¹ Ghani pointed out that his government had made no commitment to release 5,000 prisoners and asserted that a prisoner swap could not be a precondition to intra-Afghan talks.⁵² By March 10, however, Ghani proposed the release of 1,500 Taliban prisoners over a two-week period, providing that 3,500 more would be released in batches of five hundred conditional upon a decrease in violence and direct negotiations between the Taliban and the Afghan government.⁵³ The Taliban rejected this as insufficient, and intra-Afghan negotiations did not begin by the March 10 date specified in the Agreement.

Conditions for the prisoner release and intra-Afghan negotiations were made even more challenging by a power struggle between Ghani and Chief Executive Abdullah Abdullah, who both claimed to have been elected Afghan president in September of 2019 and who both took oaths of office for that role on March 9, 2020.⁵⁴ Disputes between Ghani and Abdullah continued during March, leading Secretary Pompeo to visit Afghanistan on March 24 in an unsuccessful attempt to mediate, which was followed by a one-billion-dollar

⁴⁸ Najim Rahim & Mujib Mashal, *Taliban Ramp Up Attacks on Afghans After Trump Says "No Violence,"* N.Y. TIMES (Mar. 4, 2020), at <https://www.nytimes.com/2020/03/04/world/asia/afghanistan-taliban-violence.html>.

⁴⁹ Anne Gearan, *Trump Speaks with Senior Taliban Leader by Phone, in a First Between a U.S. President and Insurgent Force Since Afghan War Began,* WASH. POST (Mar. 3, 2020), at https://www.washingtonpost.com/politics/trump-taliban-phone-call-baradar/2020/03/03/b2a01a4e-5d87-11ea-9055-5fa12981bbbf_story.html; Susannah George, *U.S. Targets Taliban Hours After Trump Phone Call with Militant Leader,* WASH. POST (Mar. 4, 2020), at https://www.washingtonpost.com/world/asia_pacific/us-targets-taliban-with-airstrike-days-after-peace-deal/2020/03/04/6cfa775e-5e0a-11ea-ac50-18701e14e06d_story.html.

⁵⁰ CONGRESSIONAL RESEARCH SERVICE 2020 REPORT, *supra* note 1, at 5.

⁵¹ Susannah George & Dan Lamothe, *Afghan Government Objects to Elements of U.S.-Taliban Peace Deal,* WASH. POST (Mar. 1, 2020), at https://www.washingtonpost.com/world/asia_pacific/afghan-government-questions-aspects-of-us-taliban-peace-deal/2020/03/01/0a973228-5a68-11ea-8efd-0f904bdd8057_story.html.

⁵² *Id.*

⁵³ Mujib Mashal, *Afghan President Orders Taliban Prisoner Release,* N.Y. TIMES, (Mar. 10, 2020), at <https://www.nytimes.com/2020/03/10/world/asia/taliban-prisoner-release.html>. The prisoners would be released after considering their health, age, and length of time served, and would be required to sign a statement vowing not to return to the war. Sediq Sediqqi (@SediqSediqqi), TWITTER (Mar. 10, 2020, 3:19 PM), at <https://twitter.com/SediqSediqqi/status/1237458170815098891>.

⁵⁴ CONGRESSIONAL RESEARCH SERVICE 2020 REPORT, *supra* note 1, at 5; Mujib Mashal, Fatima Faizi & Najim Rahim, *Ghani Takes the Oath of Afghan President. His Rival Does, Too,* N.Y. TIMES (Mar. 9, 2020), at <https://www.nytimes.com/2020/03/09/world/asia/afghanistan-president-inauguration-ghani-abdullah-.html>.

reduction in U.S. aid for Afghanistan.⁵⁵ A power-sharing agreement between the two leaders was finally reached in mid-May.⁵⁶

Over April and May, the issue of prisoner releases continued to be a sticking point between the Taliban and the Afghan government.⁵⁷ In the meantime, the Taliban stepped up attacks, leading to an increase in violence in comparison with recent years.⁵⁸ In late May, following a cease-fire over the holiday of Eid al-Fitr, the Afghan government stated that it would release nine hundred prisoners.⁵⁹ It remains to be seen what further developments will occur with respect to prisoner releases or the long-delayed start to intra-Afghan negotiations. Under the Agreement, the start to such negotiations is a prerequisite to the United States pursuing the removal of UN and U.S. sanctions against Taliban members.⁶⁰

Even as the prisoner talks teeter and conflicts continue between the Taliban and the Afghan government, the United States has signaled continued willingness to reduce the number of U.S. troops in Afghanistan. In late March, as the United States expressed frustration with the Afghan government, Secretary Pompeo stated that the Taliban had “largely” satisfied their side of the Agreement and reiterated commitment to a troop draw-down.⁶¹ COVID-19 has posed a potential challenge to withdrawal; the United States announced that it would pause troop movement due to concerns about the virus, although Trump has also stated that he would be in favor of accelerating withdrawal due to the virus.⁶² On May 20, Taliban leadership reaffirmed their commitment to the Agreement and called on the United States to “not allow this critical opportunity to go [to] waste.”⁶³

⁵⁵ Pamela Constable, *Afghans Are Fearful, Angry with Their Warring Leaders After U.S. Pulls \$1 Billion in Aid*, N.Y. TIMES (Mar. 24, 2020), at https://www.washingtonpost.com/world/afghans-are-fearful-angry-with-their-warring-leaders-after-us-pulls-1-billion-in-aid/2020/03/24/42b6290e-6dd0-11ea-a156-0048b62cdb51_story.html.

⁵⁶ Mujib Mashal, *Afghan Rivals Sign Power-Sharing Deal as Political Crisis Subsides*, N.Y. TIMES (May 17, 2020), at <https://www.nytimes.com/2020/05/17/world/asia/afghanistan-ghani-abdullah.html>.

⁵⁷ E.g., Sharif Hassan & Susannah George, *Afghan-Taliban Talks Over Prisoner Swap Collapse, Threatening to Upend U.S. Peace Deal*, WASH. POST (Apr. 7, 2020), at https://www.washingtonpost.com/world/asia_pacific/afghan-taliban-talks-over-prisoner-swap-collapse-threatening-to-upend-us-peace-deal/2020/04/07/6479f324-738c-11ea-ad9b-254ec99993bc_story.html.

⁵⁸ Mujib Mashal, *Taliban Ramp Up Attacks Even as Coronavirus Spreads in Afghanistan*, N.Y. TIMES (Apr. 24, 2020), at <https://www.nytimes.com/2020/04/24/world/asia/taliban-attacks-afghanistan-coronavirus.html>; Susannah George, *Afghanistan’s Civilian Casualties Rise Following U.S.-Taliban Deal*, WASH. POST (May 19, 2020), at https://www.washingtonpost.com/world/asia_pacific/afghanistans-civilian-casualties-rise-following-us-taliban-peace-deal/2020/05/19/18c9e52a-99a6-11ea-ad79-eef7cd734641_story.html. Tensions were heightened still further by a heinous attack on a maternity ward in Kabul, although the Taliban denied responsibility for this attack. See Ryan Browne & Kylie Atwood, *Afghan President Orders Resumption of Offensive Operations Against the Taliban in Blow to Trump’s Deal*, CNN (May 12, 2020), at <https://www.cnn.com/2020/05/12/politics/afghanistan-taliban-resumption-deal/index.html>.

⁵⁹ Kathy Gannon & Tameem Akhgar, *Afghan Government Release Hundreds of Taliban Prisoners*, APNEWS (May 26, 2020), at <https://apnews.com/43469a4f62dda76b3880eddfc352a749> (noting that “[t]his would bring to 2,000 the number of Taliban prisoners released so far under” the Agreement, while the “Taliban say they have released 240 captives”).

⁶⁰ Agreement, *supra* note 20.

⁶¹ Constable, *supra* note 55.

⁶² CONGRESSIONAL RESEARCH SERVICE 2020 REPORT, *supra* note 1, at 6–7.

⁶³ *Afghan Taliban Leader Says Committed to Deal with the US*, AL JAZEERA (May 20, 2020), at <https://www.aljazeera.com/news/2020/05/afghan-taliban-leader-committed-deal-200520084836131.html>.

As the end of May approached, Trump was reportedly considering a variety of options, including one for full withdrawal before November.⁶⁴

⁶⁴ Thomas Gibbons-Neff & Julian E. Barnes, *Trump Wants Troops in Afghanistan Home by Election Day. The Pentagon Is Drawing Up Plans*, N.Y. TIMES (May 26, 2020), at <https://www.nytimes.com/2020/05/26/world/asia/afghanistan-troop-withdrawal-election-day.html>.