(Summer 2019)

Supplement to Curtis A. Bradley & Jack L. Goldsmith, Foreign Relations Law: Cases and Materials (6th ed. 2017)[*]

[*This is the Summer 2019 Supplement for* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS *(6th ed. 2017). These materials cover, among other things, the Supreme Court's decision in Trump v. Hawaii (the "travel ban" case), which is excerpted with questions as part of a newly revised section on judicial deference to the Executive Branch; the Court's decision in Jesner v. Arab Bank concerning corporate liability under the Alien Tort Statute; the Trump administration's withdrawal from various international agreements; President Trump's declaration of a national emergency in connection with his effort to fund construction of a border wall; and the ongoing litigation over "sanctuary jurisdictions."*]

Chapter 1: Historical and Conceptual Foundations

Page 24, add at the end of Note 9:

See also Kevin Arlyck, *The Courts and Foreign Affairs at the Founding*, 2017 B.Y.U. L. Rev. 1 (documenting how, throughout the Neutrality Crisis, "the Washington administration actively sought to enlist the help of the federal judiciary in managing a diplomatic emergency").

Page 37, add the following Note after Note 10:

11. The American Law Institute (ALI) is a private organization established in 1923 with the goal of helping to clarify and simplify the law. Its members consist of experienced lawyers, legal academics, and judges. ALI publishes extensive "Restatements" of areas of law that contain a mix of black-letter propositions, comments, and reporters' notes. These Restatements typically reflect years of drafting by appointed Reporters and the incorporation by the Reporters of feedback from expert advisors, outside groups, ALI's Council, and the general membership of ALI. Although not binding, Restatements are often influential and courts frequently rely on their accounts of the law.

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[*] Instructors using the Bradley & Goldsmith casebook are authorized to distribute this supplement to their students for classroom use. Professor Ashley Deeks will be joining the book as a co-author for the upcoming Seventh Edition, and she has contributed to the preparation of this Supplement.

In 1965, ALI published a Restatement (Second) of the Foreign Relations Law of the United States. (It was referred to as a "Restatement Second" because it was part of the second series of Restatement projects.) In 1987, ALI published a Restatement Third of the Foreign Relations Law of the United States, which both expanded on the coverage of the Restatement Second and departed from the positions of that Restatement on some topics. In 2012, a group of eight appointed Reporters (including one of the authors of this casebook) began work on a Restatement Fourth of Foreign Relations Law, addressing three topics: treaties, jurisdiction, and sovereign immunity. In 2017, they completed their work on these topics and obtained approval of their drafts from ALI's membership, and the Restatement Fourth was published in late 2018. For a symposium on some of the treaty issues addressed in the Restatement Fourth, see Volume 2015, Issue 6 of the BYU Law Review (published in 2016), with contributions from Harlan Cohen, Jean Galbraith, Eric Jensen, David Moore, John Parry, Michael Ramsey, Leila Sadat, David Sloss, and Carlos Vazquez.

Page 39, add at the end of the first full paragraph:

For an account of the potential justifications for crediting historical gloss and an explanation of why these justifications have differing methodological implications, see Curtis A. Bradley, *Doing Gloss*, 84 U. Chi. L. Rev. 59 (2017).

Chapter 2: Courts and Foreign Relations

Page 67, add at the end of Note 8:

For another recent application of the political question doctrine by a lower court, see Jaber v. United States, 861 F.3d 241 (D.C. Cir. 2017). In that case, the family members of individuals allegedly killed by a U.S. drone attack in Yemen sought a declaration that the attack was unlawful under both domestic and international law. The court concluded that the suit was barred by the political question doctrine because "the precise grounds [that the plaintiffs] raise in their Complaint call for a court to pass judgment on the wisdom of Executive's decision to commence military action—mistaken or not—against a foreign target," and "courts lack the competence necessary to determine whether the use of force was justified." The court distinguished *Zivotofsky* on the ground that the Supreme Court in that case "was not called upon to impose its own foreign policy judgment on the political branches, only to say whether the congressional statute encroached on the Executive's constitutional authority." In a provocative concurrence, Judge Brown offered the following observations:

> In other liberal democracies, courts play (or seem to play) a significant supervisory role in policing exercises of executive power. . . . In this country, however, strict standing requirements, the political question doctrine, and the state secrets privilege confer such deference to the Executive in the foreign relations arena that the Judiciary has no part to play. These doctrines may be deeply flawed. In fact, I suspect that technology has rendered them largely obsolete, but the Judiciary is simply not equipped to respond nimbly to a reality that is changing daily if not hourly. . . .
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> Of course, this begs the question: if judges will not check this outsized power, then who will? . . . [E]very other branch of government seems to be passing the buck. The President is the most equipped to police his own house. But, despite an impressive number of executive oversight bodies, there is pitifully little oversight within the Executive. Presidents are slow to appoint members to these boards; their operations are shrouded in secrecy; and it often seems the boards are more interested in protecting and excusing the actions of agencies than holding them accountable. Congress, perhaps? But congressional oversight is a joke—and a bad one at that. Anyone who has watched the zeal with which politicians of one party go after the lawyers and advisors of the opposite party following a change of administration can understand why neither the military nor the intelligence agencies puts any trust in congressional oversight committees. They are too big. They complain bitterly that briefings are not sufficiently in-depth to aid them in making good decisions, but when they receive detailed information, they all too often leak like a sieve.
>
> Our democracy is broken. We must, however, hope that it is not incurably so. This nation's reputation for open and measured action is our national birthright; it is a history that ensures our credibility in the international community. The spread of drones cannot be stopped, but the U.S. can still influence how they are used in the global community—including, someday, seeking recourse should our enemies turn these powerful weapons 180 degrees to target our homeland. The Executive and Congress must establish a clear policy for drone strikes and precise avenues for accountability.

Is Judge Brown too pessimistic about the state of our system of checks and balances? Do her observations about Congress suggest that courts should play a more active role than they currently do? *Compare* Al-Tamimi v. Adelson, 916 F.3d 1 (D.C. Cir. 2019) (rejecting application of the political question doctrine to a suit brought by Palestinians alleging that U.S. individuals and entities were conspiring to expel non-Jews from disputed territory in the Middle East because,

although determining who has sovereignty over the territory would be a political question, a court might be able to rule in the plaintiffs' favor without needing to resolve that question).

Page 82, add the following Note after Note 10:

10a. In 1996, Congress enacted the Cuban Liberty and Democratic Solidarity (Libertad) Act, also known as the Helms-Burton Act. Title III of the Act authorizes U.S. nationals with claims to property confiscated by the Cuban government to sue individuals and companies around the world who are trafficking in that property. The Act further provides that "[n]o court of the United States shall decline, based upon the act of state doctrine, to make a determination on the merits in an action brought under [Title III]." Nevertheless, the Act allows presidents to suspend the allowance of this litigation for repeated six-month periods if they determine that the suspension "is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." Until 2019, every president had repeatedly invoked this suspension provision, thereby preventing litigation from proceeding under Title III of the Act. In April 2019, however, President Trump announced that he would end that suspension and allow suits to begin. The announcement drew sharp protests from the European Union. *See* Peter Baker, *To Pressure Cuba, Trump Plans to Lift Limits on American Lawsuits*, N.Y. Times (Apr. 16, 2019).

Page 86, add at the end of Note 17:

For recent applications of the act of state doctrine, see, for example, Sea Breeze Salt, Inc. v. Mitsubishi Corp., 899 F.3d 1064 (9th Cir. 2018) (holding that an antitrust challenge to the actions of a Mexican government-owned corporation concerning the exploitation of natural resources in Mexico was barred by the act of state doctrine), and Von Saher v. Norton Simon Museum of Art, 897 F.3d 1191 (9th Cir. 2018) (holding that the Dutch government's conveyance of paintings confiscated by the Nazis was an official act protected by the act of state doctrine).

Page 86, add at the end of Note 18:

For a more general consideration of when U.S. courts do, and should, sit in judgment on foreign states, see Zachary D. Clopton, *Judging Foreign States*, 94 Wash. U. L. Rev. 1 (2016).

Page 104, add the following Note after Note 12:

12a. Although the Patent Act generally applies only to infringing conduct within the United States, Section 271(f)(2) of the Act imposes liability for exporting components of a patented invention for assembly abroad. Patent owners who prove a violation of this provision are entitled, under Section 284 of the Act, to "damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer." In WesternGeco LLC v. ION Geophysical Group, 138 S. Ct. 2129 (2018), the Supreme Court held that damages under Section 284 for a violation of Section 271(f)(2) can include lost foreign profits, notwithstanding the presumption against extraterritoriality.

In that case, WesternGeco LLC owned patents relating to a system that it used to survey the ocean floor. Another company, ION Geophysical Corporation, manufactured components for a similar system and shipped them to companies abroad, which the companies used to create their own competing surveying system. WesternGeco sued ION for patent infringement under Section 271(f)(2) and was awarded damages for the survey contracts that it had lost abroad as a result of ION's actions. In an opinion by Justice Thomas, the Court held that the damage award was proper.

The Court considered the "focus" of Section 284. The focus of a statute, the Court explained (quoting from *Morrison*) "is 'the objec[t] of [its] solicitude,' which can include the conduct it 'seeks to regulate' as well as the parties and interests it 'seeks to protec[t]' or vindicate." The Court also noted that "[i]f the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions." Applying those principles to this case, the Court concluded that the focus of Section 284 is "infringement," and that when that focus is applied to claims under Section 271(f)(2), it covers "the act of exporting components from the United States." As a result, explained the Court, "[t]he conduct in this case that is relevant to that focus clearly occurred in the United States, as it was ION's domestic act of supplying the components that infringed WesternGeco's patents." The Court also emphasized, quoting from another decision, that Section 284 was designed to give patent owners "complete compensation" for infringements. Justice Gorsuch dissented and was joined by Justice Breyer. Gorsuch argued that, even if the award of lost profits here did not offend the presumption against extraterritoriality, the award was not authorized by the Patent Act, because the lost profits related to the use of the invention abroad and such use is not an "infringement" under the Act.

Page 118, add at the end of Note 13:

For a critique of the lower courts' reliance on a general doctrine of "international comity abstention" and an argument that the courts should specify narrower grounds for abstention in transnational cases, see Maggie Gardner, *Abstention at the Border*, 105 Va. L. Rev. 63 (2019).

Page 119, add the following Notes after Note 14:

14a. In Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd., 138 S. Ct. 1865 (2018), the Supreme Court unanimously held that U.S. courts are not required to accept the representations of foreign governments about the content of their law. That case involved a class action suit brought against Chinese corporations for allegedly having conspired to fix prices and limit supply for Vitamin C sold into the U.S. market, in violation of U.S. antitrust law. During the litigation, the Chinese government filed statements explaining that Chinese law required the defendants to engage in the actions in question, a proposition that, if accepted, would potentially lead to dismissal of the case under various doctrines. The U.S. Court of Appeals for the Second Circuit held that the Chinese government's representation should be treated as binding, reasoning that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements."

In reversing the Second Circuit, the Supreme Court noted that Rule 44.1 of the Federal Rules of Civil Procedure, which has been in place since 1966, directs that a determination of the content of foreign law "must be treated as a ruling on a question of law" and that in making such a ruling a court may consider "any relevant material or source." This rule, the Court observed, "does not address the weight a federal court determining foreign law should give to the views presented by the foreign government." The Court accepted that, as a matter of "international comity," courts "should carefully consider a foreign state's views about the meaning of its own laws," but it said that "the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials." "Relevant considerations," continued the Court, "include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions." Finally, the Court explained that stronger deference was not warranted in order to obtain reciprocity by foreign courts for representations by the U.S. government about the content of its own law, since "historically, [the U.S. government] has not argued that foreign courts are bound

to accept its characterizations or precluded from considering other relevant sources."*

14b. The global nature of technology companies' activities has raised difficult questions of extraterritoriality and comity. States are regulating those activities in ways that necessarily have extraterritorial effects, and when litigation arises under those laws, courts have had to consider the geographic reach of the laws and of their own orders, as well as whether to apply comity to respect foreign laws. For example, in 2017 the Canadian Supreme Court held that California-based Google was required to remove links, worldwide, to websites that contained pages selling a product that allegedly infringed Canadian trade secret rights. The Canadian Supreme Court was unsympathetic to Google's argument that comity counseled against commanding "a person outside of Canada who has committed no civil wrong to do something." Google then sought and obtained a preliminary injunction in a federal district court in California, preventing the company that won the Canadian suit from enforcing the judgment. In reaching its decision, the U.S. district court did not consider whether it owed comity to the Canadian decision. For a discussion of this case and the benefits of having courts use comity to accommodate states' internet regulations, including those with extraterritorial reach, see Andrew Keane Woods, *Litigating Data Sovereignty*, 128 Yale L.J. 328 (2018).

Page 119, add at the end of Note 15:

For a defense of comity-based abstention and a proposal for a federal common law framework for international comity drawn from historical practice, see Thomas H. Lee & Samuel Estreicher, *In Defense of International Comity*, 92 S. Cal. L. Rev. (forthcoming).

Pages 119-133, replace Section G with the following Section:

G. JUDICIAL DEFERENCE TO THE EXECUTIVE BRANCH

Trump v. Hawaii
138 S. Ct. 2392 (2018)

[In January 2017, shortly after taking office, President Trump signed Executive

* The Court also distinguished United States v. Pink, 315 U.S. 203 (1942), in which the Court had treated as "conclusive" a declaration from the Soviet Union about the extraterritorial effect of a nationalization decree, noting that: *Pink* was decided prior to the adoption of Rule 44.1; the declaration there was obtained by the U.S. government through diplomatic channels; there was no indication that the declaration was inconsistent with the Soviet government's past statements; and the declaration was consistent with expert evidence on point.

Order No. 13769 (EO-1). EO-1 directed the Department of Homeland Security (DHS) to conduct a worldwide review of the adequacy of certain information from foreign governments related to immigration of their citizens, and, pending that review, halted entry of various classes of non-citizens from seven majority-Muslim countries into the United States. The order appeared not to have been extensively vetted within the Executive Branch, and there was substantial confusion about its scope and application, such as whether it applied to lawful permanent residents. After lower courts enjoined that order, the President revoked EO-1 and replaced it with Executive Order No. 13780 (EO-2), which again directed a worldwide review and temporarily restricted the entry of foreign nationals (with waivers) from six of the countries covered by EO-1. The restrictions in this order were enjoined by lower courts, although the injunctions were partially stayed by the Supreme Court. The restrictions then expired, rendering the lower court decisions moot.

In September 2017, the President issued Proclamation No. 9645, the order under review in this case. Based on the worldwide review that began under the previous orders, the Proclamation placed entry restrictions on the nationals of eight nations—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—whose systems for managing and sharing information about their nationals the President deemed inadequate. (Of these eight countries, all but North Korea and Venezuela are majority-Muslim countries.) As authority for imposing these restrictions, the President relied primarily on a provision in the Immigration and Nationality Act (INA), 8 U.S.C. §1182(f), which authorizes the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate" whenever the "finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States." Based on §1182(f) and related authorities, the Proclamation imposed entry restrictions that varied based on the "distinct circumstances" in each of the eight countries, exempted lawful permanent residents, provided case-by-case waivers under certain circumstances, and directed DHS to continue to assess the basis for the restrictions, which resulted in the President lifting the ones on nationals from Chad after DHS determined that Chad had sufficiently improved its practices.

In this case, the State of Hawaii, three individuals with foreign relatives affected by the entry suspension, and the Muslim Association of Hawaii argued that the Proclamation violated several immigration statutes and the Establishment Clause of the U.S. Constitution. The Ninth Circuit upheld the district court's nationwide preliminary injunction barring enforcement of the restrictions.]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court. . . .

III

. . . . Plaintiffs argue that the Proclamation is not a valid exercise of the President's authority under the INA. In their view, §1182(f) confers only a residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct. . . .

By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest); whose entry to suspend ("all aliens or any class of aliens"); for how long ("for such period as he shall deem necessary"); and on what conditions ("any restrictions he may deem to be appropriate"). . . .

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in §1182(f) is that the President "find[]" that the entry of the covered aliens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country's compliance with the information and risk assessment baseline. The President then issued a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments—several of which are state sponsors of terrorism—deprive the Government of "sufficient information to assess the risks [those countries' nationals] pose to the United States." Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries. The Proclamation therefore "craft[ed] . . . country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances," while securing the Nation "until such time as improvements occur."

Plaintiffs believe that these findings are insufficient. They argue, as an initial matter, that the Proclamation fails to provide a persuasive rationale for why nationality alone renders the covered foreign nationals a security risk. And they further discount the President's stated concern about deficient vetting because the Proclamation allows many aliens from the designated countries to enter on nonimmigrant visas.

Such arguments are grounded on the premise that §1182(f) not only requires the President to *make* a finding that entry "would be detrimental to the interests of the United States," but also to explain that finding with sufficient detail to enable judicial review. That premise is questionable. . . . But even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained. The 12-page Proclamation—which

thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions—is more detailed than any prior order a President has issued under §1182(f). . . .

Moreover, plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. "Whether the President's chosen method" of addressing perceived risks is justified from a policy perspective is "irrelevant to the scope of his [§1182(f)] authority." Sale v. Haitian Centers Council, 509 U.S. 155, 187-88 (1993). And when the President adopts "a preventive measure . . . in the context of international affairs and national security," he is "not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions." Holder v. Humanitarian Law Project, 561 U.S. 1, 35 (2010). . . .

IV

A

We now turn to plaintiffs' claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims. [The Court first ruled that the individual plaintiffs had standing to sue because their allegation that the Proclamation kept them separated from relatives who seek to enter the country "is sufficiently concrete and particularized to form the basis of an Article III injury in fact."]

B

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Our cases recognize that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982). . . . Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims.

At the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. [The Court reiterated numerous such statements, including candidate Trump's "Statement on Preventing Muslim Immigration" that called for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on" and his claim "Islam hates us" and that the United States was "having problems with Muslims coming into the country"; President Trump's advisor's claim that after issuance of EO-1, the

president referred to it as "Muslim ban" and asked the advisor to "Put a commission together" and "[s]how me the right way to do it legally"; the President's regret upon issuance of EO-2 that EO-1 had been "watered down" and expression of a desire for a "much tougher version" of his "Travel Ban"; and the President's retweets of links to three anti-Muslim propaganda videos.]

The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf. Our Presidents have frequently used that power to espouse the principles of religious freedom and tolerance on which this Nation was founded. . . . Yet it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation's earliest days—performed unevenly in living up to those inspiring words.

Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself. . . .

C

For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Fiallo v. Bell, 430 U.S. 787, 792 (1977). Because decisions in these matters may implicate "relations with foreign powers," or involve "classifications defined in the light of changing political and economic circumstances," such judgments "are frequently of a character more appropriate to either the Legislature or the Executive." Mathews v. Diaz, 426 U.S. 67, 81 (1976).

Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen. In Kleindienst v. Mandel, 408 U.S. 753, 756-57 (1972), the Attorney General denied admission to a Belgian journalist and self-described "revolutionary Marxist," Ernest Mandel, who had been invited to speak at a conference at Stanford University. The professors who wished to hear Mandel speak challenged that decision under the First Amendment, and we acknowledged that their constitutional "right to receive information" was implicated. But we limited our review to whether the Executive gave a "facially legitimate and bona fide" reason for its action. Given the authority of the political branches over admission, we held that "when the Executive exercises this [delegated] power negatively on the

basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification" against the asserted constitutional interests of U.S. citizens. . . .

A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.

D

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a "bare . . . desire to harm a politically unpopular group." Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973**)**. . . .

The Proclamation does not fit this pattern. It cannot be said that it is impossible to "discern a relationship to legitimate state interests" or that the policy is "inexplicable by anything but animus." . . .

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

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review's baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. Although Somalia generally satisfies the information-sharing component of the baseline criteria, it "stands

apart . . . in the degree to which [it] lacks command and control of its territory." As for Iraq, the Secretary of Homeland Security determined that entry restrictions were not warranted in light of the close cooperative relationship between the U.S. and Iraqi Governments and the country's key role in combating terrorism in the region. It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims. . . .

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which "are delicate, complex, and involve large elements of prophecy." Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp., 333 U.S. 103, 111 (1948). While we of course "do not defer to the Government's reading of the First Amendment," the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving "sensitive and weighty interests of national security and foreign affairs." Holder v. Humanitarian Law Project, 561 U.S. 1, 33-34 (2010). . . .

V

Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion. . . .

JUSTICE KENNEDY, concurring.

I join the Court's opinion in full.

. . . Whether judicial proceedings may properly continue in this case, in light of the substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs, and in light of today's decision, is a matter to be addressed in the first instance on remand. And even if further proceedings are permitted, it would be necessary to determine that any discovery and other preliminary matters would not themselves intrude on the foreign affairs power of the Executive.

In all events, it is appropriate to make this further observation. There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment

upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, dissenting.

The question before us is whether Proclamation No. 9645 is lawful. If its promulgation or content was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment itself. . . . If, however, its sole *ratio decidendi* was one of national security, then it would be unlikely to violate either the statute or the Constitution. Which is it? Members of the Court principally disagree about the answer to this question, i.e., about whether or the extent to which religious animus played a significant role in the Proclamation's promulgation or content.

In my view, the Proclamation's elaborate system of exemptions and waivers can and should help us answer this question. That system provides for case-by-case consideration of persons who may qualify for visas despite the Proclamation's general ban. Those persons include lawful permanent residents, asylum seekers, refugees, students, children, and numerous others. There are likely many such persons, perhaps in the thousands. And I believe it appropriate to take account of their Proclamation-granted status when considering the Proclamation's lawfulness. The Solicitor General asked us to consider the Proclamation "as" it is "written" and "as" it is "applied," waivers and exemptions included. He warned us against considering the Proclamation's lawfulness "on the hypothetical situation that [the Proclamation] is what it isn't," while telling us that its waiver and exemption provisions mean what they say: The Proclamation does not exclude individuals from the United States "if they meet the criteria" for a waiver or exemption.

On the one hand, if the Government is applying the exemption and waiver provisions as written, then its argument for the Proclamation's lawfulness is strengthened. . . .

On the other hand, if the Government is *not* applying the system of

exemptions and waivers that the Proclamation contains, then its argument for the Proclamation's lawfulness becomes significantly weaker. . . .

Unfortunately there is evidence that supports the second possibility, i.e., that the Government is not applying the Proclamation as written. [Justice Breyer drew evidence for this conclusion from *amicus* briefs. That evidence included the government's failure to issue guidance contemplated by the Proclamation for consular officers to follow when deciding whether to grant a waiver; its granting of waivers to only a "miniscule percentage" of those eligible; its issuance of very few nonimmigrant visas to citizens of covered countries; an affidavit in a lower court case by a consular official asserting that he and other officials do not, in fact, have discretion to grant waivers; and instructions allegedly issued to the U.S. Embassy in Djibouti, which processes visa applications for citizens of Yemen, to grant waivers "only in rare cases of imminent danger."]

Declarations, anecdotal evidence, facts, and numbers taken from *amicus* briefs are not judicial factfindings. The Government has not had an opportunity to respond, and a court has not had an opportunity to decide. But, given the importance of the decision in this case, the need for assurance that the Proclamation does not rest upon a "Muslim ban," and the assistance in deciding the issue that answers to the "exemption and waiver" questions may provide, I would send this case back to the District Court for further proceedings. And, I would leave the injunction in effect while the matter is litigated. Regardless, the Court's decision today leaves the District Court free to explore these issues on remand.

If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in Justice Sotomayor's opinion, a sufficient basis to set the Proclamation aside. And for these reasons, I respectfully dissent.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting. . . .

Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs' constitutional challenge, that highly abridged account does not tell even half of the story. The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith. [Justice Sotomayor quotes from numerous additional statements by President Trump and associates, dating from December 7, 2015, to November 29, 2017, that she said supported the plaintiffs' claim that the Proclamation was motivated by anti-Muslim hostility.]

. . . Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications. . . .

Moreover, despite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam. Instead, he has continued to make remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers. Given President Trump's failure to correct the reasonable perception of his apparent hostility toward the Islamic faith, it is unsurprising that the President's lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint. . . .

Ultimately, what began as a policy explicitly "calling for a total and complete shutdown of Muslims entering the United States" has since morphed into a "Proclamation" putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.

Rather than defend the President's problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs' Establishment Clause claim. . . .

. . . [T]he Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review. . . .

But even under rational-basis review, the Proclamation must fall. . . .

The majority insists that the Proclamation furthers two interrelated national-security interests: "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices." But the Court offers insufficient support for its view "that the entry suspension has a legitimate grounding in [those] national security concerns, quite apart from any religious hostility." Indeed, even a cursory review of the Government's asserted national-security rationale reveals that the Proclamation is nothing more than a "'religious gerrymander.'"

The majority first emphasizes that the Proclamation "says nothing about religion." Even so, the Proclamation, just like its predecessors, overwhelmingly

targets Muslim-majority nations. Given the record here, including all the President's statements linking the Proclamation to his apparent hostility toward Muslims, it is of no moment that the Proclamation also includes minor restrictions on two non-Muslim majority countries, North Korea and Venezuela, or that the Government has removed a few Muslim-majority countries from the list of covered countries since EO–1 was issued. Consideration of the entire record supports the conclusion that the inclusion of North Korea and Venezuela, and the removal of other countries, simply reflect subtle efforts to start "talking territory instead of Muslim," precisely so the Executive Branch could evade criticism or legal consequences for the Proclamation's otherwise clear targeting of Muslims. The Proclamation's effect on North Korea and Venezuela, for example, is insubstantial, if not entirely symbolic. . . .

The majority next contends that the Proclamation "reflects the results of a worldwide review process undertaken by multiple Cabinet officials." . . . [The] worldwide review does little to break the clear connection between the Proclamation and the President's anti-Muslim statements. . . . The President campaigned on a promise to implement a "total and complete shutdown of Muslims" entering the country, translated that campaign promise into a concrete policy, and made several statements linking that policy (in its various forms) to anti-Muslim animus. . . .

Beyond that, Congress has already addressed the national-security concerns supposedly undergirding the Proclamation through an "extensive and complex" framework governing "immigration and alien status." Arizona v. United States, 567 U.S. 387, 395 (2012). The Immigration and Nationality Act sets forth, in painstaking detail, a reticulated scheme regulating the admission of individuals to the United States. . . . Generally, admission to the United States requires a valid visa or other travel document. To obtain a visa, an applicant must produce "certified cop[ies]" of documents proving her identity, background, and criminal history. An applicant also must undergo an in-person interview with a State Department consular officer. . . .

In addition to vetting rigorously any individuals seeking admission to the United States, the Government also rigorously vets the information-sharing and identity-management systems of other countries, as evidenced by the Visa Waiver Program, which permits certain nationals from a select group of countries to skip the ordinary visa-application process. To determine which countries are eligible for the Visa Waiver Program, the Government considers whether they can satisfy numerous criteria—e.g., using electronic, fraud-resistant passports, 24-hour reporting of lost or stolen passports, and not providing a safe haven for terrorists. The Secretary of Homeland Security, in consultation with the Secretary of State, also must determine that a country's inclusion in the program will not compromise "the law enforcement and security interests of the United States." Eligibility for the program is reassessed on an annual basis. As a result of a recent review, for

example, the Executive decided in 2016 to remove from the program dual nationals of Iraq, Syria, Iran, and Sudan.

Put simply, Congress has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation. Tellingly, the Government remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation. . . .

Moreover, the Proclamation purports to mitigate national-security risks by excluding nationals of countries that provide insufficient information to vet their nationals. Yet, as plaintiffs explain, the Proclamation broadly denies immigrant visas to all nationals of those countries, including those whose admission would likely not implicate these information deficiencies (e.g., infants, or nationals of countries included in the Proclamation who are long-term residents of and traveling from a country not covered by the Proclamation). In addition, the Proclamation permits certain nationals from the countries named in the Proclamation to obtain nonimmigrant visas, which undermines the Government's assertion that it does not already have the capacity and sufficient information to vet these individuals adequately.

Equally unavailing is the majority's reliance on the Proclamation's waiver program. As several *amici* thoroughly explain, there is reason to suspect that the Proclamation's waiver program is nothing more than a sham. The remote possibility of obtaining a waiver pursuant to an ad hoc, discretionary, and seemingly arbitrary process scarcely demonstrates that the Proclamation is rooted in a genuine concern for national security.

In sum, none of the features of the Proclamation highlighted by the majority supports the Government's claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country. . . .

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court's decision today has failed in that respect, with profound regret, I dissent.

Notes and Questions

1. It is common for courts to give deference to the views of the Executive Branch in cases perceived as implicating foreign affairs. *See, e.g.*, Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 348 (2005) (referring to the

Court's "customary policy of deference to the President in matters of foreign affairs"). Why is this so? Under what circumstances should courts *not* give deference? Should courts be more deferential to the Executive Branch's factual determinations than to its legal determinations? What should the courts do if the Executive's views conflict with those of Congress?

2. "Deference" can take a variety of forms, ranging from respectful consideration to conclusive weight. On issues viewed as falling within the President's exclusive foreign affairs authority, such as the recognition of foreign governments, courts give absolute deference. This deference can be seen as an application of the political question doctrine: the issue is treated as non-justiciable once decided by the Executive. *See, e.g.*, Guaranty Trust Co. v. United States, 304 U.S. 126, 137-38 (1938) ("What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government."). As discussed further in Chapter 7, for several decades prior to Congress's enactment of the Foreign Sovereign Immunities Act (FSIA) in 1976, courts gave absolute deference to the Executive Branch about whether to accord foreign governments immunity from suit. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1935) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."). As also discussed in that chapter, even today courts generally give absolute deference to the views of the Executive Branch about whether to grant immunity to foreign heads of state, something not addressed by the FSIA. *See, e.g.*, Ye v. Zemin, 383 F.3d 620, 627 (7th Cir. 2004) ("A court is ill-prepared to assess these implications and resolve the competing concerns the Executive Branch is faced with in determining whether to immunize a head of state.").

3. When Congress delegates discretionary authority to the Executive Branch concerning foreign affairs, courts typically give substantial deference to the Executive Branch concerning how to exercise that authority. This deference was evident in Part III of the majority's opinion in *Trump v. Hawaii*. What is the rationale for this deference? When Congress trusts the President to make certain determinations, does this mean that courts should also do so?

4. Although courts will not defer to the Executive Branch concerning the meaning of the Constitution, some constitutional standards themselves reflect a degree of deference to governmental decisionmaking. The "rational basis" review that the Court applied in *Trump v. Hawaii* is an example: in applying this standard, the Court required only that the government's action be plausibly related to a constitutional purpose, and it said that it could not "substitute our own assessment for the Executive's predictive judgments on such matters."

Was the Court in *Trump v. Hawaii* too deferential to the President in light

of the process that he had followed in issuing the first executive order and the statements that he and his associates had made? When, if ever, should a court look behind a national-security rationale offered by a President in support of authorized action related to immigration? The Court relied on many factors related to the third executive order—the inclusion of non-Muslim majority countries, the extensive country specific findings, and the like—that were not present with respect to the first two orders. Would the first two orders have survived scrutiny under the Court's rationale? What do you think of Justice Sotomayor's point that despite the "new window dressing" in support of the third order, it appears to be "contaminated by impermissible discriminatory animus against Islam and its followers"? Would Justice Sotomayor's position mean that President Trump would forever be disabled from issuing immigration orders related to persons from Muslim countries?

5. Despite holding for the President, the Court's opinion in *Trump v. Hawaii* is noteworthy for its effort to distance itself from President Trump's statements—for example, when it observes that other presidents have "espouse[d] the principles of religious freedom and tolerance on which this Nation was founded" even while acknowledging that unnamed presidents have "performed unevenly in living up to those inspiring words." Justice Kennedy's concurrence similarly seems to convey an implied critique of the President, including in the observation that "[i]t is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs." Nevertheless, the decision is very deferential to presidential authority. What is the significance in this regard of the Court's observation that "we must consider not only the statements of a particular President, but also the authority of the Presidency itself"?

6. The Supreme Court has stated that, although not conclusive, the views of the Executive Branch concerning the meaning of a treaty are entitled to "great weight." *See, e.g.,* Medellin v. Texas, 552 U.S. 491, 513 (2008); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961). At times, the Court has used somewhat different terms to describe this deference, but it is not clear that the Court has intended these terms to reflect a different standard. *See, e.g.,* El Al Israel Airlines v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) ("[r]espect"); Factor v. Laubenheimer, 290 U.S. 276, 295 (1933) ("of weight"). Deference to the Executive may have a significant effect on the outcome of judicial decisions involving treaties. After studying numerous treaty cases, Professor Bederman observed that judicial deference to the Executive Branch may be "the single best predictor of interpretive outcomes in American treaty cases." David J. Bederman, *Revivalist Canons and Treaty Interpretation,* 41 UCLA L. Rev. 953 (1994). On occasion, however, the Court has seemed not to accord the Executive Branch this deference. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 630-31 (2006) (not accepting the Executive Branch's interpretation of a provision in the Geneva Conventions).

What are the justifications for treaty interpretation deference? One court explained the justifications as follows:

> Because the Executive Branch is involved directly in negotiating treaties, it is well situated to assist the court in determining what the parties intended when they agreed on a particular provision. Moreover, treaties normally carry significant foreign policy implications, matters peculiarly within the purview of the political branches of our government. A court should minimize intrusion in the conduct of foreign affairs by adopting the interpretation suggested by the Executive Branch whenever it can fairly do so. Finally, the Executive Branch generally has administrative authority over the implementation of international agreements. As in the case of domestic legislation, a court should generally give great weight to the interpretations of agencies charged with implementation of treaties because such agencies may possess significant expertise in the relevant subject matter.

Coplin v. United States, 6 Cl. Ct. 115 (1984) (Kozinski, C.J.), *rev'd on other grounds,* 761 F.2d 688 (Fed. Cir. 1985). Is this account persuasive? Do these justifications also apply to Executive Branch interpretations of customary international law? *See* Restatement (Third) of the Foreign Relations Law of the United States, §112, cmt. c (1987) ("Courts give particular weight to the position taken by the United States Government on questions of international law because it is deemed desirable that so far as possible the United States speak with one voice on such matters. The views of the United States Government, moreover, are also state practice, creating or modifying international law.").

7. The Supreme Court returned to the issue of deference to Executive Branch treaty interpretations in Abbott v. Abbott, 560 U.S. 1 (2010). The main treaty issue in the case was whether a Chilean father's "*ne exeat*" right to consent before his child's mother could take the child out of Chile to the United States constituted a "right of custody" under the Hague Convention on the Civil Aspects of International Child Abduction that triggered the treaty's remedial provisions. In ruling that it was, the majority opinion stated:

> This Court's conclusion that Mr. Abbott possesses a right of custody under the Convention is supported and informed by the State Department's view on the issue. The United States has endorsed the view that *ne exeat* rights are rights of custody. In its brief before this Court the United States advises that **"**the Department of State, whose Office of Children's Issues serves as the Central Authority for the United States under the Convention, has long understood the Convention as including *ne exeat* rights among the protected 'rights

> of custody.' " It is well settled that the Executive Branch's interpretation of a treaty "is entitled to great weight." There is no reason to doubt that this well-established canon of deference is appropriate here. The Executive is well informed concerning the diplomatic consequences resulting from this Court's interpretation of "rights of custody," including the likely reaction of other contracting states and the impact on the State Department's ability to reclaim children abducted from this country.

In dissent, Justice Stevens (joined by Justices Thomas and Breyer) stated:

> Without discussing precisely why, we have afforded "great weight" to "the meaning given [treaties] by the departments of government particularly charged with their negotiation and enforcement." We have awarded "great weight" to the views of a particular government department even when the views expressed by the department are newly memorialized, and even when the views appear contrary to those expressed by the department at the time of the treaty's signing and negotiation. In this case, it appears that both are true: The Department of State's position, which supports the Court's conclusion, is newly memorialized, and is possibly inconsistent with the Department's earlier position.
>
> Putting aside any concerns arising from the fact that the Department's views are newly memorialized and changing, I would not in this case abdicate our responsibility to interpret the Convention's language. This does not seem to be a matter in which deference to the Executive on matters of foreign policy would avoid international conflict; the State Department has made no such argument. Nor is this a case in which the Executive's understanding of the treaty's drafting history is particularly rich or illuminating. Finally, and significantly, the State Department, as the Central Authority for administering the Convention in the United States, has failed to disclose to the Court whether it has facilitated the return of children to America when the shoe is on the other foot. Thus, we have no informed basis to assess the Executive's post-ratification conduct, or the conduct of other signatories, to aid us in understanding the accepted meaning of potentially ambiguous terms.
>
> Instead, the Department offers us little more than its own reading of the treaty's text. Its view is informed by no unique vantage it has, whether as the entity responsible for enforcing the Convention in this country or as a participating drafter. The Court's perfunctory, one-paragraph treatment of the Department's judgment of this matter only underscores this point. I see no reason, therefore, to replace our

> understanding of the Convention's text with that of the Executive Branch.

Should courts be more discriminating in the deference they give to Executive Branch treaty interpretations, as Justice Stevens suggests? (Chapter 5 of the casebook contains additional discussion of issues relating to treaty interpretation.)

8. Deference to the Executive Branch on questions of foreign relations law can be analogized to the deference that courts sometimes give to administrative agencies concerning the meaning of the federal statutes they administer. This administrative agency deference is often referred to as "*Chevron* deference," after the Supreme Court's decision in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under *Chevron* deference, courts first examine whether Congress has clearly spoken to the issue before the court. If so, courts will simply apply the statute and not defer to the agency's interpretation. If the statute is ambiguous or does not address the issue, however, courts will defer to the agency's interpretation unless it is unreasonable. This deference is based on the theory that, in charging the administrative agency with administering the statute, Congress may have delegated authority to the agency to fill in gaps and resolve ambiguities in the statute. The Supreme Court has held that this deference applies even to an agency's interpretation of the scope of its own jurisdiction to regulate. *See* City of Arlington v. FCC, 569 U.S. 290 (2013). For a discussion of the similarities and differences between foreign affairs deference and *Chevron* deference, see Curtis A. Bradley, Chevron *Deference and Foreign Affairs,* 86 Va. L. Rev. 649 (2000). *See also* Kevin M. Stack, *The Statutory President,* 90 Iowa L. Rev. 539 (2005); Oren Eisner, Note, *Extending* Chevron *Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President,* 86 Cornell L. Rev. 411 (2001).

There is a lesser form of deference in administrative law known as "*Skidmore* deference" after a pre-*Chevron* decision, Skidmore v. Swift & Co., 323 U.S. 134 (1944). Under *Skidmore* deference, "[t]he weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140. For an argument that, for treaty interpretation, *Skidmore* deference is preferable to *Chevron* deference, see Evan Criddle, Scholarship Comment, Chevron *Deference and Treaty Interpretation,* 112 Yale L.J. 1927 (2003).

9. Sometimes, *Chevron* deference will be directly applicable in the foreign affairs area: when an Executive Branch agency is interpreting a foreign affairs-related statute that it is charged with administering, it may be entitled to *Chevron* deference. Should the foreign affairs nature of the statute be considered in the deference analysis in these situations? One possibility is that deference is

heightened or triggered more easily in this context, because the Executive Branch will be able to claim both *Chevron* deference and general foreign affairs deference. Perhaps this is what the Supreme Court had in mind when it stated, in connection with an Executive Branch interpretation of an immigration statute, that "judicial deference to the Executive Branch [under *Chevron*] is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.' " INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999). *See also* Abourezk v. Reagan, 785 F.2d 1043, 1063 (D.C. Cir. 1986) (Bork, J., dissenting) ("This principle of [*Chevron*] deference applies with special force where the subject of that analysis is a delegation to the Executive of authority to make and implement decisions relating to the conduct of foreign affairs.").

10. To receive deference, what form must the Executive Branch's position take? Must the position be formulated prior to the litigation? Is an *amicus curiae* brief sufficient? What if the Executive Branch's position is inconsistent with an earlier Executive Branch position? Under *Chevron,* Executive Branch litigating positions are not entitled to deference if they are "wholly unsupported by regulations, rulings, or administrative practice." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988); *accord* Smiley v. Citibank, 517 U.S. 735, 741 (1996). Should a similar limitation apply to foreign affairs deference? Note that, even under *Chevron,* the Executive Branch may receive deference notwithstanding a change in position on an issue. *See Smiley,* 417 U.S. at 742. For a decision declining to defer to the Executive Branch's construction of certain provisions in the Geneva Conventions because the construction was inconsistent with historical practices of the Executive Branch, see American Civil Liberties Union v. Department of Defense, 543 F.3d 59, 78-91 (2d Cir. 2008).

11. For academic discussions of foreign affairs deference, see, for example, Robert M. Chesney, *Disaggregating Deference:* Hamdan*, the Judicial Power, and Executive Treaty Interpretations,* 92 Iowa L. Rev. 1723 (2007); Robert M. Chesney, *National Security Fact Deference*, 95 Va. L. Rev. 1361 (2009); Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 Ariz. St. L.J. 87 (2009); Julian Ku & John C. Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch,* 23 Const. Comm. 179 (2006); and Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law,* 116 Yale L.J. 1170 (2007).

For academic commentary arguing that courts should play a more active and independent role in foreign relations cases, see, for example, Thomas M. Franck, Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs? (1992); K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness,* 40 Tex. Int'l L.J. 1 (2004); and Jonathan I. Charney, *Judicial Deference in Foreign Relations,* 83 Am. J. Int'l L. 805 (1989). For commentary that is more skeptical about judicial involvement in foreign relations cases, see, for

example, John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act,* 20 Hastings Int'l & Comp. L. Rev. 747 (1997). *Cf.* Louis Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 Colum. L. Rev. 805, 826 (1964) ("Inevitably, the courts tend to establish rules of more-or-less general applicability, which can only relate to the needs of foreign policy grossly, and on the basis of assumptions and generalizations hardly consonant with flexibility, currentness, and consistency.").

For an empirical assessment that finds that overall Supreme Court deference to the Executive Branch (not just in the foreign affairs area) has gone down in recent decades, see Lee Epstein & Eric A. Posner, *The Decline of Supreme Court Deference to the President*, 166 U. Pa. L. Rev. 829 (2018). The authors identify two likely explanations for this shift: "The first is that the Court has become more aggressive over the last three decades. As its institutional self-confidence grew, it became increasingly willing to defy the Executive as well as Congress. The second is that a specialized Supreme Court bar has emerged, nullifying the advantage to the president formerly conferred by the [Solicitor General]."

Chapter 3: Congress and the President in Foreign Relations

Page 148, add at the end of Note 4:

In Baston v. United States, 137 S. Ct. 850 (2017), which involved a conviction under U.S. law for sex trafficking by a non-U.S. citizen that occurred in Australia, Justice Thomas dissented from the denial of certiorari in order to question what he viewed as the courts of appeals' erroneous interpretation of the Foreign Commerce Clause "to permit Congress to regulate economic activity abroad if it has a substantial effect on this Nation's foreign commerce." Justice Thomas argued that the courts of appeals had read the original understanding of the Foreign Commerce Clause too broadly, and that this reading "would permit Congress to regulate any economic activity anywhere in the world, so long as Congress had a rational basis to conclude that the activity has a substantial effect on commerce between this Nation and any other." He questioned this interpretation and urged the Court to grant certiorari to consider the Clause's proper scope.

Page 148, add a new Note after Note 4:

4a. The statute at issue in *Clark* applies to "illicit sexual conduct" abroad by U.S. citizens. It defines such conduct to include not only commercial sex acts

with minors, but also certain noncommercial sex acts with minors that would be criminal if they occurred in the United States. At the time of the decision in *Clark*, this statute applied to any U.S. citizen "who travels in foreign commerce, and engages in any illicit sexual conduct with another person." In 2013, however, Congress amended the statute so that it applies to any U.S. citizen "who travels in foreign commerce *or resides, either temporarily or permanently, in a foreign country*, and engages in any illicit sexual conduct with another person." (Emphasis added.) In light of this change, the court in United States v. Pepe, 895 F.3d 679 (9th Cir. 2018), concluded that, prior to the amendment, the statute must have applied only to defendants who had traveled to a foreign country for a temporary stay. It noted that this interpretation allowed it to avoid considering, for now, "the outer limits of Congress's power to regulate the conduct of U.S. citizens residing abroad." In that case, the defendant had been convicted of drugging and raping seven children in Cambodia, for which he was sentenced to 210 years imprisonment. The court remanded for an assessment of whether the defendant had been residing in Cambodia when the conduct occurred. If so, reasoned the court, he should not have been convicted under the pre-2013 version of the statute because he would no longer have been traveling in foreign commerce at the time of the conduct.

Page 151, add at the end of Note 9:

For an argument that the Constitution's text and structure, early constitutional history, and modern foreign relations law doctrine all suggest that Congress has a broad "power to define" offenses against the law of nations beyond what preexisting international law proscribes, see Alex H. Loomis, *The Power to Define Offenses Against the Law of Nations,* 40 Harv. J. L. & Pub. Pol'y 417 (2017). Keep in mind that, even if a criminal activity outside the United States does not fall within the scope of the Define and Punish Clause, it might fall under some other congressional power, such as the power to enact laws necessary and proper to implement treaties. *See, e.g.*, United States v. Noel, 893 F.3d 1294 (11th Cir. 2018).

Page 169, add at the end of Note 3:

For an extensive historical critique of the Vesting Clause Thesis that concludes that Article II's reference to "the executive Power" concerned "only one specific item in a very long list of royal authorities," namely "the narrow but potent authority to carry out projects defined by a prior exercise of the legislative power," see Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169, 1173 (2019).

Page 170, add at the end of Note 4:

In addition to the Take Care Clause, the Constitution also states that the President must take an oath or affirmation to "faithfully execute the Office of President." A recent historical examination of these two "faithful execution" clauses concludes:

> Our history supports readings of Article II of the Constitution that limit Presidents to exercise their power only when it is motivated in the public interest rather than in their private self-interest, consistent with fiduciary obligation in the private law. It also supports readings of Article II that tend to subordinate presidential power to congressional direction, requiring the President to follow the laws, instructions, and authorizations set in motion by the legislature. As a corollary, these conclusions tend to undermine imperial and prerogative claims for the presidency, claims that are sometimes, in our estimation, improperly traced to dimensions of the Take Care and Presidential Oath Clauses.

Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2120 (2019).

Page 173, add a new Note after Note 12:

12a. Are there any limitations on the types of agents the President can use to conduct diplomacy? Article II grants the President the power to appoint "Ambassadors" and "other public Ministers" with the advice and consent of the Senate. This language has traditionally been viewed as requiring Senate confirmation for the appointment of resident ambassadors and other diplomats of similar rank. However, presidents sometimes select other agents to conduct diplomacy without seeking Senate confirmation. For example, President Roosevelt selected his close aide, Harry Hopkins, as his special envoy for some of his most sensitive meetings with foreign leaders during World War II, and President Trump has relied on his son-in-law, Jared Kushner, to facilitate peace negotiations in the Middle East. For a comprehensive historical and legal analysis of such "ad hoc" diplomacy, see Ryan M. Scoville, *Ad Hoc Diplomats*, 68 Duke L.J. 907 (2019). Professor Scoville contends that under the original meaning of Article II, the use of such ad hoc diplomats requires the advice and consent of the Senate because they are typically "public Ministers" and "Officers of the United States" for purposes of the Appointments Clause. In light of the long historical practice of ad hoc diplomacy, how relevant is this original meaning?

Page 182, add the following Notes after Note 6:

6a. Congress has delegated numerous emergency powers to the President beyond the TWEA and IEEPA. By one recent count, 136 statutes imbue the President with authorities that are triggered by the declaration of a national emergency. *See* Brennan Center for Justice, *A Guide to Emergency Powers and Their Use* (2019). The National Emergencies Act of 1976 ("NEA"), 50 U.S.C. §§ 1601-1651, establishes formal procedures for invoking these presidential authorities and for regulating their use. According to the Congressional Research Service, as of February 2019, thirty-one declared national emergencies were in effect under the NEA. Congressional Research Service, *National Emergency Powers* 12 (Feb. 27, 2019). Presidents George W. Bush and Barack Obama each declared a dozen national emergencies, and for both presidents ten of their declarations remain in effect today. *Id.*

As of June 2019, President Trump had declared five national emergencies, including one related to sanctions in the event of foreign interference in a U.S. election, Exec. Order No. 13,848, 83 Fed. Reg. 46843 (Sept. 12, 2018), and one related to securing the information and communications technology supply chain, Exec. Order No. 13,873, 84 Fed. Reg. 22689 (May 15, 2019). The emergency declaration by President Trump that has garnered the most attention, however, is the one that declared a national emergency concerning the southern border of the United States. *See* Presidential Proclamation 9,844, 84 Fed. Reg. 4949-4950 (Feb. 15, 2019) ("Southern Border Proclamation").

The controversy that culminated in the Southern Border Proclamation began in December 2018, when President Trump indicated he would not support any government budget that did not include at least $5.7 billion to build a wall on the southern U.S. border. Democrats and Republicans in Congress subsequently reached an impasse, Congress failed to pass a budget in a timely manner, and a partial government shutdown ensued on December 22, 2018. On January 25, 2019, President Trump agreed to re-open the government for three weeks to give negotiators more time to reach a deal that included border wall funding. At the end of the three-week period, on February 14, 2019, Congress passed a government funding package that included only $1.375 billion to build physical barriers at the southern border.

The Southern Border Proclamation that President Trump issued the following day was designed to trigger additional congressional funding for a border wall. The proclamation stated that the "current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency." In support of this claim, the President stated that the southern border was a "major entry point for criminals, gang members, and illicit narcotics," and for "large-scale unlawful migration" that "has worsened in certain respects in recent years." The

proclamation also noted that the Department of Defense had previously "provided support and resources to the Department of Homeland Security at the southern border," and that because of the "gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis." Based on these predicates, the President "declare[d] that a national emergency exists at the southern border of the United States." He further declared that this emergency "requires use of the Armed Forces." He then invoked 10 U.S.C. § 2808, which, in the event of an emergency that "requires the use of the armed forces," allows the Secretary of Defense to undertake "military construction projects" to "support such use of the armed forces." Based on the emergency declaration and through this legal vehicle, the Trump administration claimed that it could access $3.6 billion in funds for border wall construction. (President Trump also claimed authority to access funds based on predicates unrelated to the emergency declaration.)

Many commentators questioned the accuracy or sufficiency of the factual predicates for President Trump's emergency declaration, as well as his interpretation and invocation of 10 U.S.C. § 2808 to access funds for the border wall. Eleven days after the Proclamation, on February 16, 2019, the House of Representatives passed a Joint Resolution that, pursuant to the NEA, would have "terminated" the national emergency declared by President Trump. The Republican-controlled Senate later approved the Joint Resolution by a narrow majority. President Trump vetoed the Joint Resolution, however, thus leaving the emergency declaration in place.

President Trump's Southern Border Proclamation was greeted by numerous lawsuits. (The lawsuits are listed, with supporting documents, at Jeremy Gordon & Hadley Baker, Lawfare, *Border Wall Litigation Tracker* (June 5, 2019).) In the case that has proceeded the furthest, the Sierra Club and the Southern Border Communities Coalition sued the President, the Secretary of Defense, and other federal officials, alleging that the proposed funding plan for border wall construction violated various statutory and constitutional provisions. In May 2019, the district court preliminarily enjoined the defendants from following through with announced plans to redirect funds for the border wall. *See* Sierra Club v. Trump, 2019 WL 2247689 (No. 19-cv-00892-HSG) (N.D. Cal. May 24, 2019). Because the Defense Department had not yet announced a plan to redirect funds in connection with the emergency declaration and Section 2808, however, the court concluded that no preliminary injunction should issue with respect to those directives since plaintiffs could not yet show irreparable harm from them. In an earlier part of the opinion, however, the court expressed doubt that the government would prevail on the merits if it tried to use the funds pursuant to the emergency declaration and Section 2808. It reasoned that a barrier construction at the border could not reasonably constitute a "military construction project" within the meaning of Section 2808, since the statute appeared to have military bases and

similar institutions—and not a border wall—in mind.* A panel of the Ninth Circuit heard oral arguments in the case in late June 2019.

The plaintiffs in the *Sierra Club* case did not question the validity of the President's declaration of an emergency (although they did question whether the emergency requires the "use of the armed forces" for purposes of Section 2808). Why not? Neither Section 2808 nor the NEA defines the term "emergency," and presidents have historically had discretion, by statute and under Article II of the Constitution, to decide if there is an emergency for various purposes. Is the President's emergency declaration for purposes of border wall funding a political question? On what basis could courts second-guess the President's emergency declaration? In announcing his declaration of a national emergency, President Trump acknowledged that he "didn't need to do this," but wanted to "do it much faster." Does the admitted lack of necessity for the emergency declaration call into question its legality? The term "emergency," after all, connotes a serious or dangerous situation that requires immediate action. And yet past presidents, like President Trump, have often declared emergencies that lacked exigent circumstances. Does it matter to the legality of President Trump's emergency declaration, or to the invocation of Section 2808, that the President claimed the power to secure via emergency declaration what he was unable to get from Congress in budget negotiations?

A presidential declaration of emergency is largely if not exclusively a factual determination. It is but one example of the pervasive phenomenon of a President making factual findings as a predicate to exercising legal authorities. For a comprehensive examination of presidential factfinding across a range of presidential powers, including proposals for regulating presidential factfinding, see Shalev Roisman, *Presidential Factfinding*, 72 Vand. L. Rev. 825 (2019).

6b. Although presidents historically used IEEPA to impose sanctions on foreign governments, they increasingly rely on IEEPA to impose targeted economic sanctions on a range of individuals, groups, and non-state actors, including terrorists. For example, in 2016, in the wake of growing cyber attacks on the United States and its citizens, President Obama declared an emergency under IEEPA to respond to "malicious cyber-enabled activities" and imposed sanctions against nine Russian entities and individuals found to be responsible for cyberattacks designed to interfere with the presidential election. For a discussion of the growing use of targeted sanctions, particularly by the United States, and some of the controversies surrounding that use, see *Symposium on Unilateral*

* The same district court judge granted a similar preliminary injunction (i.e., one not extending to the emergency declaration and Section 2808) in a related lawsuit brought by sixteen states, see California v. Trump, 2019 WL 2247814 (No. 19-cv-00872-HSG) (N.D. Cal. May 24, 2019), while another judge on the same district court dismissed a lawsuit brought by the House of Representatives for lack of standing, see U.S. House of Representatives v. Mnuchin, 2019 WL 2343015 (No. 19-cv-00969-TNM) (N.D. Cal. June 3, 2019).

Targeted Sanctions in volume 113 of AJIL Unbound, *at* https://www.cambridge.org/core/journals/american-journal-of-international-law/ajil-unbound-by-symposium/unilateral-targeted-sanctions.

6c. Although the Constitution assigns to Congress the authority to regulate international commerce and to impose tariffs and duties, it has delegated to the President substantial authority to restrict imports. For example, Section 232 of the Trade Expansion Act of 1962 provides that if the Secretary of Commerce "finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," the President is authorized to take "such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security." President Trump has used this authority to impose tariffs on steel and aluminum and has threatened to use it to impose tariffs on other imports. *See* Congressional Research Service, *Section 232 Investigations: Overview and Issues for Congress* (updated Apr. 2, 2019), *at* https://fas.org/sgp/crs/misc/R45249.pdf. For a decision by the U.S. Court of International Trade upholding the constitutionality of the delegation in Section 232, see American Institute for International Steel, Inc. v. United States**,** 2019 Ct. Intl. Trade LEXIS 36 (U.S. Ct. Int'l Trade Mar. 25, 2019).

6d. Another broad delegation is contained in Section 301 of the Trade Act of 1974, which gives the President the authority to impose tariffs on imports that the U.S. Trade Representative finds either to (a) violate or conflict with a trade agreement, or (b) burden or restrict U.S. commerce unjustifiably. President Trump has used this authority to impose billions of dollars' worth of tariffs on imports from China, prompting China to retaliate against U.S. imports. For an argument that Congress should take back some of the tariff authority that it has delegated, see Clark Packard, *Congress Should Take Back its Authority Over Tariffs*, Foreign Policy (May 4, 2019). For an argument that a foreign affairs paradigm has come to dominate U.S. trade policy, "with the President wielding greater and greater power over trade policy," and that the law in this area should be rebalanced in a way that increases congressional control, see Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 Cal. L. Rev. 583 (2019).

Page 206, add the following Notes after Note 6:

6a. In December 2017, President Trump officially recognized Jerusalem as the capital of Israel and set in motion a process, now complete, of moving the U.S. embassy from Tel Aviv to Jerusalem, actions that reversed longstanding Executive Branch policy. *See Presidential Proclamation Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem* (Dec. 6, 2017), *at* https://www.whitehouse.gov/presidential-

actions/presidential-proclamation-recognizing-jerusalem-capital-state-israel-relocating-united-states-embassy-israel-jerusalem/. There was no dispute that the President's recognition power, as endorsed in *Zivotofsky II*, gave Trump the legal authority to take these actions. Moreover, Trump's actions, unlike the presidential action at issue in *Zivotofsky II*, were in accord with congressional directives. Since 1995, the Jerusalem Embassy Act had called for these actions, while allowing presidents to waive its requirements every six months (which presidents had done up until Trump). Trump referred to the Act in his proclamation. He also observed that "we finally acknowledge the obvious: that Jerusalem is Israel's capital. This is nothing more, or less, than a recognition of reality." In addition, he said that he "judged this course of action to be in the best interests of the United States of America and the pursuit of peace between Israel and the Palestinians." The implications of the proclamation for disputes between Israel and the Palestinians over Jerusalem were unclear, given that Trump also noted that the United States "continues to take no position on any final status issues" and that "specific boundaries of Israeli sovereignty in Jerusalem are subject to final status negotiations between the parties."

On March 25, 2019, President Trump proclaimed that "the United States recognizes that the Golan Heights are part of the State of Israel." *See Proclamation on Recognizing the Golan Heights as Part of the State of Israel* (March 25, 2019), *at* https://www.whitehouse.gov/presidential-actions/proclamation-recognizing-golan-heights-part-state-israel/. The Golan Heights is an area on Israel's northeast border with Syria. Israel seized control of the territory from Syria in the 1967 six-day war and effectively annexed it in 1981. However, the status of the territory under international law has remained contested, and the U.N. Security Council has condemned Israel's de-facto annexation of the Golan Heights as a violation of the U.N. Charter. Prior presidents had declined to recognize Israel's sovereignty over the Golan Heights on the ground that its status should be determined in negotiations among the relevant parties. President Trump's sharp change in U.S. policy almost certainly falls within his recognition power as articulated in *Zivotofsky II*. But Trump's action implicates questions about the relationship of international law to the President's recognition power. The U.N. Charter is, after all, a treaty, and treaties are part of "the supreme Law of the Land" under the Constitution. Did the President violate his constitutional obligation to "take Care that the Laws be faithfully executed" by acting in contravention of international law? Or does the President get to decide what international law requires for the United States in this context? Is it relevant that the provisions of the U.N. Charter in question are probably "non-self-executing"? (The distinction between self-executing and non-self-executing treaties is addressed in Chapter 5.) For further analysis, see Scott R. Anderson, *Recognizing Israel's Claims to the Golan Heights: Trump's Decision in Perspective*, Lawfare (Mar. 22, 2019).

In January 2019, President Trump recognized Juan Guaidó, the Venezuelan opposition leader, as the interim president of Venezuela in the wake of turmoil in that country. *Statement from President Donald J. Trump Recognizing Venezuelan National Assembly President Juan Guaido as the Interim President of Venezuela*, *at* https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-recognizing-venezuelan-national-assembly-president-juan-guaido-interim-president-venezuela/. Note that this is a case of recognition not of a state's sovereignty over territory, but rather of a particular government within the borders of an existing state. While recognition of governments implicates different issues under international law than the recognition of states, *Zivotofsky II* makes reasonably clear that the President has power over this form of recognition as well.

6b. In December 2017, Congress passed the National Defense Authorization Act for Fiscal Year 2018. Section 1232 of the Act provides:

SEC. 1232. PROHIBITION ON AVAILABILITY OF FUNDS RELATING TO SOVEREIGNTY OF THE RUSSIAN FEDERATION OVER CRIMEA.

(a) PROHIBITION.—None of the funds authorized to be appropriated by this Act or otherwise made available for fiscal year 2018 for the Department of Defense may be obligated or expended to implement any activity that recognizes the sovereignty of the Russian Federation over Crimea.

(b) WAIVER.—The Secretary of Defense, with the concurrence of the Secretary of State, may waive the restriction on the obligation or expenditure of funds required by subsection (a) if the Secretary—

(1) determines that to do so is in the national security interest of the United States; and

(2) submits a notification of the waiver, at the time the waiver is invoked, to the Committee on Armed Services and the Committee on Foreign Affairs of the House of Representatives and the Committee on Armed Services and the Committee on Foreign Relations of the Senate.

Is this section constitutional under *Zivotofsky II*? Note that President Trump in a signing statement expressed the view that this section and various other sections in the Act "could potentially dictate the position of the United States in external military and foreign affairs and, in certain instances, direct the conduct of international diplomacy" and that his administration "will treat these provisions consistent with the President's exclusive constitutional authorities as Commander in Chief and as the sole representative of the Nation in foreign affairs to determine the terms on which recognition is given to foreign sovereigns and conduct the Nation's diplomacy."

Page 207, add the following Note after Note 10:

10a. For a consideration of the constitutionality of courts or Congress taking actions "that result in the opening of a direct channel of official communications between the US nonexecutive branch and a foreign executive branch," see Kristen E. Eichensehr, *Courts, Congress, and the Conduct of Foreign Relations*, 85 U. Chi. L. Rev. 609 (2018). The author describes this practice as "nonexecutive conduct of foreign relations" and proposes a "converse *Youngstown*" framework for evaluating its constitutionality that takes account of the extent to which the actions are supported or opposed by the Executive Branch.

Page 210, add at the end of Note 16:

For a consideration of the role that Congress can and does play in structuring the relative powers of actors within the Executive Branch and their processes of decisionmaking, see Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 Va. L. Rev. (forthcoming).

Page 211, add at the end of Note 17:

See also Daniel B. Rodriguez et al., *Executive Opportunism, Presidential Signing Statements, and the Separation of Powers*, 8 J. Leg. Analysis 95 (2016); Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 U. Pa. L. Rev. 1801 (2016). In August 2018, President Trump issued an especially wide-ranging signing statement identifying "constitutional concerns" with over 50 provisions in the National Defense Authorization Act for 2019. *See* Statement by President Donald J. Trump on H.R. 5515 (Aug. 13, 2018), *at* https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-h-r-5515/. For a detailed analysis of this statement, see Scott R. Anderson, *What to Make of Trump's NDAA Signing Statement*, Lawfare (Aug. 23, 2018).

Page 212, add at the end of Note 19:

See also Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 Vand. L. Rev. 357, 361 (2018) (distinguishing between "resource-independent" executive powers that the President "may exercise . . . without regard to any direct conditions or limits Congress imposes upon them," such as the veto, pardon, and removal powers, and the supervision of the military, and "resource-dependent powers" that "may be exercised only insofar as Congress provides resources for their exercise," for which "Congress accordingly holds near-complete discretion to

impose whatever limits and conditions it chooses with respect to use of those resources," such as law enforcement and the use of force).

Page 215, add the following Note after Note 20:

19a. Another way that Congress undertakes its legislative fact-finding responsibilities is to travel abroad. Here, too, the President can make it difficult for Congress to obtain information about executive activities because the President, as Commander in Chief, controls military assets (including aircraft) that members of Congress often use to travel. In a recent example, House Speaker Nancy Pelosi and other members of a congressional delegation planned to travel by military aircraft to NATO's headquarters in Brussels, as well as to Afghanistan, for security and intelligence briefings. President Trump denied the delegation the use of a military aircraft, apparently in response to tensions with Congress about funding a wall along the U.S.-Mexican border. *See* Steve Holland & James Oliphant, *Trump Blocks Pelosi Trip as Tensions Mount Over U.S. Government Shutdown*, Reuters (Jan. 17, 2019).

Chapter 4: States and Foreign Relations

Page 235, add the following Note after Note 7:

7a. One important locus of legal disagreement about federalism and immigration in recent years has concerned "sanctuary jurisdictions." Sanctuary jurisdictions are state and local governmental entities that limit their cooperation with federal immigration authorities. As noted by the Congressional Research Service:

> traditional sanctuary policies are often described as falling under one of three categories. First, so-called "don't enforce" policies generally bar state or local police from assisting federal immigration authorities. Second, "don't ask" policies generally bar certain state or local officials from inquiring into a person's immigration status. Third, "don't tell" policies typically restrict information sharing between state or local law enforcement and federal immigration authorities.

Congressional Research Service, *"Sanctuary" Jurisdictions: Federal, State, and Local Policies and Related Litigation* (May 3, 2019), *at* https://fas.org/sgp/crs/homesec/R44795.pdf.

Sanctuary jurisdictions grew up in part as a response to the legal duties imposed by 8 U.S.C § 1373, which (among other things) provides that "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."

Shortly after taking office, President Trump issued Executive Order 13768, *Enhancing Public Safety in the Interior of the United States*. Section 9(a) of the Order directs the Attorney General and Secretary of Homeland Security to "ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary." Executive Order 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

The County of Santa Clara and the City and County of San Francisco challenged the Order as facially unconstitutional. A federal district court agreed, granted the plaintiffs' motion for summary judgment, and issued a permanent nationwide injunction against Section 9(a). The U.S. Court of Appeals for the Ninth Circuit affirmed on the merits, although it vacated the nationwide injunction and remanded for a determination of whether such relief was appropriate. *See* City and County of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018). The court reasoned:

> For us, then, the question is whether the Executive Order violates the Separation of Powers, pursuant to which the Constitution committed the Spending power to Congress.
>
> The President's authority to act "must stem either from an act of Congress or from the Constitution itself." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584 (1952). Justice Jackson's *Youngstown* concurrence provides the operative test in this context:
>
> > When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . .
>
> In this instance, because Congress has the exclusive power to spend and has not delegated authority to the Executive to condition new grants on compliance with § 1373, the President's "power is at its lowest ebb." And when it comes to spending, the President has none of "his own constitutional powers" to "rely" upon.

> Rather, the President has a corresponding obligation—to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Because Congress's legislative power is inextricable from its spending power, the President's duty to enforce the laws necessarily extends to appropriations. . . .
>
> Here, the Administration has not even attempted to show that Congress authorized it to withdraw federal grant moneys from jurisdictions that do not agree with the current Administration's immigration strategies.

In July 2017, soon after the Executive Order was challenged in the California case, the U.S. Attorney General sought to implement the policy in the Order by issuing conditions for state and local recipients of the Edward Byrne Memorial Justice Assistance Grant Program, 34 U.S.C. § 10151, which allocates funds annually to support state and local law enforcement. The City of Chicago challenged the conditions on constitutional and statutory grounds. A federal district court in Chicago entered a nationwide preliminary injunction with respect to two of the conditions: a condition mandating advance notice to federal authorities of the release date of persons in state or local custody who are believed to be aliens, and a requirement that local correctional facilities give federal agents access to meet with those persons. In April 2018, a three-judge panel of the Seventh Circuit Court of Appeals affirmed, concluding that the Justice Department was unlikely to be able to show that it had statutory authority to impose the conditions, and it concluded that nationwide relief was appropriate. *See* City of Chicago v. Sessions, 888 F.3d 272 (7th Cir. 2018). The Seventh Circuit subsequently granted rehearing en banc to consider the propriety of the nationwide injunction. *See also* City of Philadelphia v. Sessions, 309 F. Supp. 3d 289 (E.D. Pa. 2018) (permanently enjoining enforcement of Byrne Grant conditions on constitutional and statutory grounds); City & County of San Francisco v. Sessions, 349 F. Supp. 3d 924 (N.D. Cal. 2018) (same).

In 2018, the U.S. government brought suit against the state of California, seeking to enjoin provisions under California law that (a) require employers to alert employees prior to federal immigration inspections, (b) prohibit state and local law enforcement agencies from providing information regarding a person's release date from incarceration and other personal information, and (c) impose inspection requirements on facilities that house civil immigration detainees. The government argued, among other things, that these provisions were preempted by federal immigration law, citing *Arizona v. United States*.

The U.S. Court of Appeals for the Ninth Circuit held that the U.S. government was unlikely to succeed in its challenge to most of these provisions, and it therefore held that the government was not entitled to a preliminary

injunction as to those provisions. *See* United States v. California, 921 F.3d 865 (9th Cir. 2019). It reasoned, for example, that the employee notice provision concerns the relationship of employers to their employees, not the relationship of employers to the federal government, and that the provision does not "undermine or disrupt the activities of federal immigration authorities." And it reasoned that the limit on information sharing did not directly conflict with 8 U.S.C § 1373. But the court held that one aspect of the inspection provision, which required that the California Attorney General examine the circumstances surrounding the apprehension and transfer of federal immigration detainees, was subject to a preliminary injunction because it entailed the imposition of a discriminatory burden by a state on the federal government's activities, in violation of the constitutional doctrine of intergovernmental immunity. The court noted that "[t]his is a novel requirement, apparently distinct from any other inspection requirements imposed by California law."

A number of commentators have analyzed these and other issues relating to the legality of sanctuary jurisdictions. *See, e.g.*, Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 Yale L. & Pol'y Rev. 87 (2016); Barbara E. Armacost, *"Sanctuary" Laws: The New Immigration Federalism*, 2016 Mich. St. L. Rev. 1197 (2016); Jane Chong, *Sanctuary 101, Part IV: Does § 1373 Unconstitutionally Commandeer the States?*, Lawfare (Mar. 16, 2017) (fourth of four-part series); Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. Rev. 1 (2015); Stella Burch Elias, *The Perils and Possibilities of Refugee Federalism*, 66 Am. U. L. Rev. 353 (2016); Arthur C. Helton et al., *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy Foreword*, 21 Harv. C.R.-C.L. L. Rev. 493 (1986); Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 UC Irvine L. Rev. 247 (2012); Christopher N. Lasch et al., Understanding "Sanctuary Cities," 59 B.C. L. Rev. 1703 (2018); Peter Marguilies, *Deconstructing "Sanctuary Cities": The Legality of Federal Grant Conditions that Require State and Local Cooperation on Immigration Enforcement*, 75 Wash. & Lee L. Rev. 1508 (2018); Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and Poor Substitute for Real Reform*, 20 Lewis & Clark L. Rev. 165 (2016); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. Cin. L. Rev. 1373 (2006); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 Nw. U. L. Rev. 583 (2017); Richard C. Schragger, *The Attack on American Cities*, 96 Tex. L. Rev. 1163 (2018). *See also* the November 2018 symposium issue of the U.C. Davis Law Review on "Immigration Law & Resistance: Ensuring a Nation of Immigrants."

Page 259, add the following Note after Note 15:

15a. As discussed in more detail in Chapter 6 of the casebook, the Obama administration ratified the Paris agreement on climate change in 2016. In early June 2017, President Trump announced that he would withdraw the United States from the agreement. In response to this announcement, a number of states and localities said that they would continue to pursue efforts to address climate change as a matter of state law. Hawaii went so far as to pass legislation committing the state to meet the emissions reduction goals in the Paris agreement, and California entered into a non-binding agreement with China to cut emissions. It was further reported that "[r]epresentatives of American cities, states and companies are preparing to submit a plan to the United Nations pledging to meet the United States' greenhouse gas emissions targets under the Paris climate accord." Hiroko Tabuchi & Henry Fountain, *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, N.Y. Times (June 1, 2017). *See also Symposium on Climate Change Localism* in volume 112 of AJIL Unbound, at https://www.cambridge.org/core/journals/american-journal-of-international-law/ajil-unbound-by-symposium/climate-change-localism. Are these various efforts legal?

Page 259, add at the end of Note 16:

For a defense of Congress's authority to police foreign affairs federalism that at the same time critiques the judicial foreign affairs preemption doctrines applied in cases like *Crosby* and *Garamendi*, see Ryan Baasch & Saikrishna Bangalore Prakash, *Congress and the Reconstruction of Foreign Affairs Federalism*, 115 Mich. L. Rev. 47 (2016). The authors further propose a set of novel legislative schemes that would permit Congress rather than courts to police foreign affairs federalism in a fine-grained manner.

Chapter 5: Treaties

Page 291, add the following Note after Note 13:

13a. Sometimes the non-self-execution analysis will overlap with the justiciability limitations considered in Chapter 2 of the casebook. For an example, see Republic of the Marshall Islands v. United States, 865 F.3d 1187 (9th Cir. 2017). In that case, the Marshall Islands sued the United States, seeking to compel it to comply with Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, which provides that "[e]ach of the Parties to the Treaty undertakes to

pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control." In directing dismissal of the case, the U.S. Court of Appeals for the Ninth Circuit stated: "Whether examined under the rubric of treaty self-execution, the redressability prong of standing, or the political question doctrine, the analysis stems from the same separation-of-powers principle—enforcement of this treaty provision is not committed to the judicial branch." The court emphasized, among other things, that Article VI "is addressed to the executive, urging further steps only the executive can take—negotiation with other nations."

Page 293, add at the end of Note 16:

The domestic status of a non-self-executing treaty may also be relevant to whether a federal court has subject matter jurisdiction to hear a treaty claim. For a decision holding that "whether a treaty is self-executing does not present a jurisdictional issue regarding the court's power to hear a case; rather, that inquiry relates to whether the plaintiff has a cause of action," see Sluss v. U.S. Dep't of Justice, 898 F.3d 1242, 1248 (D.C. Cir. 2018).

Page 293, add at the end of Note 18:

For a challenge to "the assumption that Congress is the only appropriate intermediary between the courts and treaty provisions that are not directly enforceable" and an argument that "actors in the executive branch can serve this intermediary role, at least when certain conditions are met," see Jean Galbraith, *Making Treaty Implementation More Like Statutory Implementation*, 115 Mich. L. Rev. 1309, 1312-13 (2017).

Page 320, add the following Note after Note 9:

9a. In 2010, the Senate gave its advice and consent to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance Convention, while declaring that the Convention would be non-self-executing in the United States. The Convention requires that each country adopt various procedures for the processing of international child support cases, something that in the United States is ordinarily handled at the state and local levels. In 2014, Congress enacted a federal statute designed to bring state law into compliance with the requirements of the Convention. Instead of attempting to preempt state law, the statute threatened to withhold federal funds from any state that did not adopt model implementing legislation proposed on the subject by the National Conference of Commissioners on Uniform State Laws.

Although the state of Idaho initially resisted passing such legislation, it eventually did so. Once all states had the required legislation in place, the Obama administration ratified the Convention in September 2016.

Page 322, add the following Note after Note 12:

12a. In 1996, Congress enacted a law making female genital mutilation (FGM) a federal criminal offense. *See* 18 U.S.C. § 116(a) ("whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both"). In United States v. Nagarwala, 350 F. Supp. 3d 316 (E.D. Mich. 2018), the district court held that this statute is unconstitutional because it exceeds Congress's legislative authority. The court rejected the government's argument that the statute could be justified as a necessary and proper implementation of the International Covenant on Civil and Political Rights (ICCPR). The government pointed to two provisions in the ICCPR: Article 3, which calls on the parties to "ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant"; and Article 24, which states that "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." The court concluded that the statute was not sufficiently related to either of these provisions to qualify as a necessary and proper implementation. The court further reasoned that, "even accepting the government's contention that the criminal punishment of FGM is rationally related to the cited articles of the ICCPR, federalism concerns and the Supreme Court's statements regarding state sovereignty in the area of punishing crime—and the federal government's lack of a general police power—prevent Congress from criminalizing FGM."

The U.S. Justice Department decided not to appeal this ruling. In a letter to Senator Diane Feinstein, the ranking member of the Senate Judiciary Committee, the Department explained that it had concluded that it lacked a reasonable defense of the constitutionality of the statute. The Department explained that, "even maintaining the full continuing validity of *Holland*," the Department had "determined that it does not have an adequate argument that Section 116(a) is within Congress's authority to enact legislation to implement the ICCPR, which does not address FGM." The Department noted, however, that Congress could address the constitutional problem by revising the statute to ground it in Congress's Commerce Clause authority. It suggested in particular that the statute be revised to be limited to circumstances in which "(1) the defendant or victim travels in or uses a channel or instrumentality of interstate or foreign commerce in furtherance of the FGM; (2) the defendant uses a means, channel, facility, or

instrumentality of interstate commerce in connection with the FGM; (3) a payment is made in or affecting interstate or foreign commerce in furtherance of the FGM; (4) an offer or other communication is made in or affecting interstate or foreign commerce in furtherance of the FGM; (5) the conduct occurs within the United States' special maritime and territorial jurisdiction, or within the District of Columbia or a U.S. territory; or (6) the FGM otherwise occurs in or affects interstate or foreign commerce." *See* Letter from Noel J. Francisco, Solicitor General, to Sen. Diane Feinstein (Apr. 10, 2019), *at* https://www.justice.gov/oip/foia-library/osg-530d-letters/4_10_2019/download.

Page 343, add at the end of Note 17:

See also Eric Chung, Note, *The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations*, 126 Yale L.J. 170, 176 (2016) (finding that "U.S. courts and international courts consistently enforce RUDs, except for international courts reviewing treaties that expressly prohibit their use").

Page 384, add at the end of Note 15:

For a challenge to the conventional wisdom that the President has a general power of treaty termination, and an argument that, "absent exceptional circumstances, the degree of congressional participation constitutionally required to exit any particular agreement should mirror the degree of congressional participation that was required to enter that agreement in the first place," see Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 Yale L.J.F. 432, 435-36 (Nov. 12, 2018). *See also* Catherine Amirfar & Ashika Singh, *The Trump Administration and the "Unmaking" of International Agreements*, 59 Harv. Int'l L.J. 443, 444 (2018) (arguing that "it is too simplistic to say either that the President always or never can unilaterally withdraw from international agreements more generally").

Page 385, add the following Notes after Note 17:

17a. The Trump administration has acted to withdraw the United States from a number of international agreements. Some of these agreements were concluded outside of the Article II process for making treaties and thus are addressed in the materials for the next chapter. But several of them were Article II treaties:

(1) In July 2018, Iran brought suit against the United States in the International Court of Justice (ICJ) concerning the United States' re-imposition of sanctions relating to Iran's nuclear program, and the ICJ subsequently issued a provisional measures order requiring that the United States ensure that its sanctions exempt certain humanitarian goods. The Trump administration responded in early October 2018 by giving notice that the United States was withdrawing from the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States, which was the basis for Iran's suit. The Treaty of Amity is an Article II treaty approved by the Senate in 1956 and ratified by the United States that same year. Pursuant to the terms of the treaty, the withdrawal will take effect one year after the U.S. announcement. The U.S. withdrawal does not, however, affect pending ICJ cases implicating the treaty.[*]

(2) After the self-proclaimed nation of Palestine brought suit against the United States in the ICJ challenging the relocation of the U.S. embassy in Israel from Tel Aviv to Jerusalem, the Trump administration announced that it was withdrawing from the Optional Protocol to the Vienna Convention on Diplomatic Relations, which Palestine had invoked as the basis for the Court's jurisdiction. The Optional Protocol is an Article II treaty approved by the Senate in 1965 and ratified by the United States in 1972, and it provides that disputes "arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." The announcement of withdrawal was made on the same day as the announcement of withdrawal from the Treaty of Amity with Iran. Unlike the Treaty of Amity, the Protocol does not have a withdrawal clause and thus does not specify a notice period, and the Trump administration appeared to view the U.S. withdrawal as effective immediately. It is not clear, however, that international law allows for such an immediate withdrawal. The Vienna Convention on the Law of Treaties, which the United States has not ratified but which is thought to reflect customary international law

[*] The Treaty of Amity was also the basis for a different ICJ suit that Iran brought against the United States in 2016. In that case, *Certain Iranian Assets*, Iran alleged that the United States violated the Treaty of Amity and the international law of state immunity by allowing execution of U.S. court judgments against the property of the Central Bank of Iran and freezing other Iranian assets. The U.S. judgments were issued under the terrorism exception of the Foreign Sovereign Immunities Act to compensate victims of Iran-backed terrorist attacks. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016). At the ICJ, the United States raised preliminary objections to the Court's jurisdiction. It argued, among other things, that the Treaty of Amity exempted national security measures, and that it did not incorporate the international law of state immunity. Since the Treaty did not apply, the United States argued, the Court lacked jurisdiction since the United States withdrew from compulsory ICJ jurisdiction in 1986. In its February 2019 judgment on the U.S. preliminary objections, the ICJ concluded that it had jurisdiction to hear the case under the Treaty of Amity and that the national security exception question was an issue for the merits stage. The ICJ agreed with the United States, however, that the treaty does not give it jurisdiction to hear claims based on the international law of state immunity. For further analysis of these cases, see Elena Chachko, *Certain Iranian Assets: The International Court of Justice Splits the Difference Between the United States and Iran*, Lawfare (Feb. 14, 2019).

in at least many respects, provides for a default period of a year's notice when a treaty does not specify a withdrawal period.

(3) In late October 2018, President Trump announced that he intended to withdraw the United States from the Intermediate-Range Nuclear Forces (INF) Treaty with Russia. The INF Treaty is an Article II treaty approved by the Senate in 1988 and ratified by the United States that same year. It allows either party to withdraw "if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests" but requires that the party give six months' notice of the withdrawal and provide "a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests." In December 2018, Secretary of State Mike Pompeo declared that Russia had been in material breach of the treaty for years. He gave notice that the United States would suspend its obligations under the treaty unless Russia returned to compliance. On February 1, 2019, Pompeo announced that the United States was suspending its obligations under the treaty, beginning on February 2, in light of Russia's continued non-compliance. He further stated that the United States would give Russia and other treaty parties formal notice of the U.S. withdrawal from the INF Treaty in six months, pursuant to Article 15 of the Treaty. *See Remarks by Secretary of State Michael R. Pompeo* (Feb. 1, 2019), at https://ee.usembassy.gov/remarks-by-secretary-pompeo/.

* * *

Do these actions by the Trump administration, by adding to the historical practice of treaty terminations, further strengthen the argument that the President has the constitutional authority to act unilaterally in terminating treaties? In answering this question, how if at all might it matter that Congress as an institution has not objected to the President's legal authority to terminate these treaties? President Trump has also claimed that he has the authority to withdraw the United States from the NATO treaty, although he has not done so. The United States ratified this treaty in 1949 after the Senate gave its advice and consent. It allows any party to withdraw by giving a year's notice. If presidents generally can withdraw the United States from Article II treaties, is there any reason to conclude that this is not true for a significant security agreement like the NATO treaty?

For discussion of the first two treaty withdrawals, see Scott R. Anderson, *Walking Away from the World Court*, Lawfare (Oct. 5, 2018); John Bellinger, *Thoughts on the ICJ's Decision in Iran v. United States and the Trump Administration's Treaty Withdrawals*, Lawfare (Oct. 5, 2018); and Chimène Keitner, *What are the Consequences of the Trump Administration's Recent Treaty Withdrawals?*, Just Security (Oct. 17, 2018). For discussion of the contemplated withdrawal from the INF Treaty, see Hilary Hurd & Elena Chachko, *U.S.*

Withdrawal from the INF Treaty: The Facts and the Law, Lawfare (Oct. 25, 2018).

17b. Can Congress or the Senate take steps to prevent the President from withdrawing from treaties? This question has arisen in light of President Trump's many treaty withdrawals, and especially in light of news reports in 2018 and 2019 that he had contemplated the possibility of withdrawing from the North Atlantic Treaty, which established NATO. In response to this possibility, several bills were proposed in Congress to prevent Trump from achieving this end.

For example, in January 2019, Senator Kaine introduced a bill, S.J. Res. 4, that provided: "The President shall not suspend, terminate, or withdraw the United States from the North Atlantic Treaty, … except by and with the advice and consent of the Senate, provided that two thirds of the Senators present concur, or pursuant to an Act of Congress." The bill also barred the use of appropriated funds to suspend, terminate, or withdraw the United States from the treaty absent approval by the Senate or Congress. And it required the President to notify the congressional foreign relations committees about "any effort" to suspend, terminate, or withdraw the United States from the treaty. If this bill became law, would it be constitutional? Of what relevance, if any, is *Zivotofsky II* to your answer? For commentary, see Scott R. Anderson, *Saving NATO*, Lawfare (July 25, 2018); Curtis A. Bradley & Jack Goldsmith, *Constitutional Issues Relating to the NATO Support Act*, Lawfare (Jan. 28, 2019).

Page 386, add at the end of Note 19:

For an argument that the Constitution requires some degree of "synchronicity" in acts of federal lawmaking, and that this means that presidents must conclude treaties within a reasonable time after receiving the Senate's advice and consent, see Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 Harv. L. Rev. 1220 (2019). Drawing on an analogy to the time that it took the states to ratify the Articles of Confederation, Professor Prakash contends that, "as a constitutional matter, treaties generally may be made within the scope of seven years from Senate consent" and that "[p]eriods appreciably longer would vitiate the sense that the Senate consented to the treaty in the context in which the treaty ultimately purported to become a valid international contract and supreme federal law."

Page 386, add the following Note after Note 21:

21a. How, if at all, is the President's authority to eliminate the legal effects of a signed but unratified treaty affected once the treaty has been submitted to the Senate? President Obama signed the the Arms Trade Treaty in 2013, and he

transmitted it to the Senate in 2016. But the Senate has not acted on the treaty. On April 29, 2019, President Trump sent a "Message" to the Senate stating that he had "concluded that it is not in the interest of the United States to become a party" to the treaty and thus had "decided to withdraw the aforementioned treaty from the Senate and accordingly request that it be returned to [him]." *Presidential Message to the Senate of the United States on the Withdrawal of the Arms Trade Treaty* (Apr. 29, 2019), *at* https://www.whitehouse.gov/briefings-statements/presidential-message-senate-united-states-withdrawal-arms-trade-treaty/. Does the Senate have an obligation to return the treaty to the President? What would the effect be if, after the President's request, the Senate consented to the treaty? The President can always refuse to ratify a treaty that the Senate has consented to, but what steps, if any, can a President take at that point to prevent a *future* President from ratifying the treaty? Why didn't President Trump "unsign" the treaty, as President Bush did with the treaty establishing the International Criminal Court? Was he barred from doing so because the treaty had been submitted to the Senate? For an examination of these and related questions in connection with earlier treaties, see David C. Scott, Comment, *Presidential Power to "Unsign" Treaties*, 69 U. Chi. L. Rev. 1447 (2002).

Page 387, add at the end of the last full paragraph in Note 23:

See also Daniel J. Hessel, Note*, Founding-Era Jus Ad Bellum and the Domestic Law of Treaty Withdrawal*, 125 Yale L.J. 2394 (2016) (arguing that, because the constitutional Founders understood that treaty termination could be a justification for war, they would have anticipated that Congress would have a role in such termination).

Chapter 6: Executive Agreements

Page 403, add the following Note after Note 19:

19a. Assuming that the President generally has the authority to act unilaterally in withdrawing the United States from Article II treaties (see Section F.3 of Chapter 5 of the casebook), does this withdrawal authority also apply to congressional-executive agreements (such as the NAFTA trade agreement, which President Trump has threatened at times to terminate)? These agreements are "treaties" as a matter of international law and, like many Article II treaties, often have clauses allowing each party to withdraw after a period of notice. But they are authorized or approved by a majority of Congress rather than by two-thirds of the Senate. In that sense, they resemble domestic statutes, and it is settled that presidents cannot unilaterally terminate statutes. Should that difference in process

affect the President's withdrawal authority? Should the answer be different for ex ante congressional-executive agreements than for ex post congressional-executive agreements? For competing views, compare, for example, Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 Duke L.J. 1615 (2018) (arguing that presidential termination authority is the same for Article II treaties and congressional-executive agreements), with Joel Trachtman, *Power to Terminate U.S. Trade Agreements: The Presidential Dormant Commerce Clause Versus an Historical Gloss Half Empty*, 51 Int'l Law. 445 (2018) (arguing that presidents cannot unilaterally terminate congressional-executive agreements relating to trade). *See also* Alison Peck, *Withdrawing from NAFTA*, 107 Geo. L.J. 647 (2019) (concluding that the President does not have statutory or constitutional authority to withdraw the United States from NAFTA).

The Trump administration has already acted to withdraw the United States from two ex ante congressional-executive agreements:

(1) In October 2017, the administration announced that it was withdrawing the United States from the United Nations Educational, Scientific and Cultural Organization (UNESCO), due to alleged anti-Israel bias. The United joined UNESCO in 1946 pursuant to an authorization from Congress. The Trump administration's action is not unprecedented: The Reagan administration withdrew the United States from UNESCO in 1984 without seeking congressional authorization. The George W. Bush administration later had the United States rejoin UNESCO, also without seeking congressional authorization. Pursuant to the terms of the UNESCO Constitution, the Trump administration's withdrawal became effective on December 31, 2018.

(2) In October 2018, the Trump administration announced that the United States was withdrawing from the Universal Postal Union (UPU), contending that the "current international postal practices in the UPU do not align with United States economic and national security interests." According to Article 12 of the UPU Constitution, the U.S. withdrawal becomes effective one year after its notice is received. The United States first joined the UPU in the 1870s pursuant to an ex ante congressional-executive agreement. Subsequent statutes have continued to delegate to the Executive Branch the authority to conclude postal agreements and amendments to such agreements, although these statutes do not mention authority to terminate the agreements. *See, e.g.*, Postal Accountability and Enhancement Act, Pub. L. No. 109-435, § 405, 120 Stat. 3198, 3230 (2006) (codified at 39 U.S.C. § 407). For discussion of the U.S. decision to withdraw from the UPU, see Eliot Kim, *Withdrawal from the Universal Postal Union: A Guide for the Perplexed*, Lawfare (Oct. 31, 2018).

Page 412, add at the end of Note 12:

For additional elaboration by Harold Koh on this theme, see Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 Yale L.J. Forum 338 (Jan. 17, 2017), *at* http://www.yalelawjournal.org/pdf/KohMacroedFinal_kisb8bmo.pdf.

Page 412, add at the end of Note 13:

For an argument that the Executive Agreements+ idea is inconsistent with standard separation of powers principles and is not supported by *Dames & Moore*, see Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 Harv. L. Rev. 1201, 1259-67 (2018).

Page 422, add the following Note after Note 10:

10a. In 2017, President Trump announced two steps to reverse President Obama's initiatives related to the Paris Agreement. First, in March he issued an executive order that initiated a process of "suspending, revising, or rescinding" the Clean Power Plan that, as discussed in Note 10 of the casebook, was the domestic legal support for the political commitment on emissions reduction made in the Paris Agreement. *See* White House, *Presidential Executive Order on Promoting Energy Independence and Economic Growth* (Mar. 28, 2017), *at* https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1. Second, in June he announced that "the United States will withdraw from the Paris Climate Accord." White House, *Statement by President Trump on the Paris Climate Accord* (June 1, 2017), *at* https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord. This intent to withdraw was formally communicated to the United Nations in early August 2017. *See* U.S. Dep't of State, *Communication of Intent to Withdraw from Paris Agreement* (Aug. 4, 2017), *at* https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm.

The President faces legal hurdles to succeeding on each step. With regard to the Clean Power Plan, he will need to satisfy all of the normal procedural and substantive requirements for terminating or reversing agency regulations. *See, e.g.,* David Doniger, *Scrapping the Clean Power Plan Will Not Be Easy*, Natural Resources Defense Council (Dec. 19, 2016), *at* https://www.nrdc.org/experts/david-doniger/scrapping-clean-power-plan-will-not-be-easy; Jody Freeman, *Implications of Trump's Victory and the Republican Congress for Environmental, Climate and Energy Regulation: Not as Bad as it Seems?*, Harvard Law School Environmental Law Program (Nov. 10, 2016),

at http://environment.law.harvard.edu/postelection/; Brandon Storm, *Can President Trump Kill the Clean Power Plan and the Paris Agreement?*, Lawfare (Nov. 17, 2016).

With regard to withdrawal from the Paris Agreement, the primary issue is the effect of the Agreement's withdrawal clause. Recall that the Agreement is a legally binding agreement under international law (with an embedded political commitment on emissions reduction) that was likely made under domestic law as an executive agreement pursuant to authority purportedly conferred by the 1992 Framework Convention, which was concluded with Senate consent. (*See* Note 10 in the casebook.) Article 28.1 of the Agreement provides that a Party "may withdraw from this Agreement by giving written notification to the Depositary" at "any time after three years from the date on which this Agreement has entered into force for a Party," and that the withdrawal "shall take effect" one year later.

As we learned in Section F of Chapter 5 of the casebook, there is a long historical tradition of presidents terminating U.S. treaties pursuant to withdrawal clauses (and sometimes even in the absence of such clauses). And, as discussed in Section C of Chapter 2, a majority of the Court in *Goldwater v. Carter* ruled that a treaty termination in the context of a treaty with a withdrawal clause was non-justiciable, albeit under differing rationales that did not garner majority support. Assuming (as is likely) that the logic of treaty termination extends to withdrawal clauses in executive agreements made pursuant to treaties, it would appear that President Trump at least has the authority to terminate the Paris Agreement in accordance with its terms. Some commentators have noted, however, that the earliest that the withdrawal could take effect under Article 28.1 is on November 4, 2020, the day after the next U.S. presidential election. *See* Harold Hongju Koh et al., *Trump's So-Called Withdrawal from Paris: Far from Over,* Just Security (June 2, 2017). In withdrawing the United States from the Agreement, is President Trump bound by the terms of Article 28.1? In answering that question, how might it matter that President Obama acted unilaterally in accepting the Paris Agreement for the United States (albeit ostensibly with authority derived from the Framework Convention)? In any event, it appears that the Trump administration has accepted these limitations on withdrawal, since its August 2017 notice to the United Nations states that the United States will withdraw "as soon as it is eligible to do so, consistent with the terms of the Agreement."

For commentary on President Trump's efforts to withdraw from the Paris Agreement, see, for example, Eugene Kontorovich, *The U.S. Can't Quit the Paris Climate Agreement, Because it Never Actually Joined*, Volokh Conspiracy (June, 1, 2017), *at* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/01/the-u-s-cant-quit-the-paris-climate-agreement-because-it-never-actually-joined/?utm_term=.7622e52530de]; Stephen P. Mulligan, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement* (Cong. Res. Serv., Feb. 9, 2017), *at*

https://fas.org/sgp/crs/row/R44761.pdf; Michael Ramsey, *The Legal Basis for Withdrawing from the Paris Agreement*, The Originalism Blog (June 6, 2017), *at* http://originalismblog.typepad.com/the-originalism-blog/2017/06/the-legal-basis-for-withdrawing-from-the-paris-agreementmichael-ramsey.html; Adam J. White, *Diplomacy, Distrust, and the Paris Climate Accord*, Lawfare (June 1, 2017); David A. Wirth, *While Trump Pledges Withdrawal from Paris Agreement on Climate, International Law May Provide a Safety Net*, Lawfare (June 2, 2017).

Page 422, add the following Notes after Note 11:

12. Donald Trump was an opponent of the Iran deal when campaigning for the presidency. After he became President, however, he initially hesitated to terminate it. In May 2017, President Trump waived domestic sanctions against Iran, consistent with the deal, and in May and July he certified to Congress under the Iran Nuclear Agreement Review Act that Iran was complying with the deal. In October 2017, however, Trump refused to certify Iran's compliance, which had the effect under the Iran Nuclear Agreement Review Act of triggering a 60-day window for expedited consideration of any legislative effort to re-impose sanctions. (Congress failed to act within that window.) President Trump also at that time announced that if he could not "reach a solution working with Congress and our allies, then the agreement will be terminated." *See* Mark Landler & David E. Sanger, *Trump Disavows Nuclear Deal, But Doesn't Scrap It*, N.Y. Times (Oct. 13, 2017).

In May 2018, President Trump announced that the United States was withdrawing from the Iran deal, and he signed a Presidential Memorandum that instructed federal agencies to re-impose the sanctions lifted or waived pursuant to the Iran deal within 180 days of the announcement. *See* Presidential Memorandum, *Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon* (May 8, 2018), *at* https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/. The administration also signaled that it would re-instate other sanctions provided for in executive orders that the Obama administration had revoked when it implemented the Iran deal. In addition, the Treasury Department indicated that it would re-designate Iranian persons and entities as Specially Designated Nationals (SDN), meaning that their assets within the jurisdiction of the United States would be blocked. Such designations would also trigger secondary sanctions that essentially close the U.S. market to third parties that do business with Iran-related SDNs. In May 2019, the Trump administration imposed a new round of sanctions against Iran's metal sector, in response to Iran's threat to resume enrichment work. *See* David Sanger et al., *U.S. Issues New Sanctions as Iran Warns It Will Step Back from Nuclear Deal*, N.Y. Times (May 8, 2019).

For commentary on legal and policy issues relating to the withdrawal, see Elena Chachko, *Trump Withdraws from the Iran Nuclear Agreement: What Comes Next*, Lawfare (May 8, 2018); Jean Galbraith, *The End of the Iran Deal and the Future of the Security Council Snapback*, Opinio Juris (May 9, 2018); Jack Goldsmith, *The Trump Administration Reaps What the Obama Administration Sowed in the Iran Deal,* Lawfare (May 9, 2018); Josh Rubin, *No, Making the Iran Deal a Treaty Wouldn't Have Stopped Trump from Withdrawing From It*, Just Security (May 25, 2018).

13. For a comprehensive assessment of presidential control over international law, including the making of various forms of binding international agreements and political commitments, see Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 Harv. L. Rev. 1201 (2018). Among other things, this article argues that in the United States the making, interpretation, and termination of international agreements have come to be controlled almost entirely by the President, without meaningful congressional input. The article also sets forth a framework for analyzing the legality of such agreements, and for assessing larger normative questions about whether presidents are adequately accountable for their control over international agreements. For an argument that the various pathways for making international agreements are affected not only by constitutional law, but also by international law and administrative law, and that the latter two types of law impose constraints on presidential power, see Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. Chi. L. Rev. 1675 (2017).

Chapter 7: Customary International Law

Page 434, add at the end of Note 3:

For a recent article concluding that the Founders understood references to the "Laws of the United States" in the Constitution as encompassing only federal statutes and thus as not including the law of nations, see John Harrison, *The Constitution and the Law of Nations*, 106 Geo. L.J. 1659 (2018). For an argument that the reference to "Laws of the United States" in Article III (but not in Article VI) encompassed the law of nations, see Michael D. Ramsey, *The Constitution's Text and Customary International Law*, 106 Geo. L.J. 1747 (2018).

Page 435, add at the end of Note 4:

For an historical account that contends that "there was a broad consensus in the Founding period that the law of nations was incorporated into federal law and bound not only the states and the judiciary, but also the executive branch and, in the view of at least some, Congress as well," see David M. Golove & Daniel J. Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 Geo. L.J. 1593, 1597 (2018).

Page 437, add the following Note after Note 9:

9a. For an examination of what U.S. courts look to in identifying rules of customary international law, and a finding that courts tends to focus on (a) federal case law, (b) treaties, and (c) U.S. scholarship, see Ryan M. Scoville, *Finding Customary International Law*, 101 Iowa L. Rev. 1803 (2016). *See also* Nikki C. Gutierrez & Mitu Gulati, *Custom in Our Courts: Reconciling Theory with Reality in the Debate About Erie Railroad and Customary International Law*, 27 Duke J. Comp. & Int'l L. 243 (2017) (finding that, both before and after *Erie Railroad v. Tompkins*, U.S. courts have tended to rely on U.S. case law as support for statements about the content of customary international law).

Page 439, add at the end of Note 14:

Even if Congress is not bound by customary and other forms of international law, it often takes account of such law when enacting statutes, in part because of the influence of the Executive Branch during the legislative process. For an extensive analysis of this phenomenon, see Ashley Deeks, *Statutory International Law*, 57 Va. J. Int'l L. 263 (2018), in which the author documents how:

> Congress . . . employs international law in a wide variety of ways, some of which express a congressional objection to international law, but many of which embrace that law. These international law-utilizing statutes (which this Article calls "statutory international law" or "SIL") operate like capillaries throughout the corpus of the U.S. Code, delivering small doses of international law to help minimize conflicts between U.S. law and behavior, on the one hand, and foreign behavior and expectations, on the other. Statutory international law addresses a wide variety of subjects, including tax, trade, maritime, criminal, military, human rights, and foreign relations issues. . . .

> In at least some examples of SIL, the Executive has helped identify the relevance of international legal concepts to particular pieces of draft legislation and persuaded Congress to include those concepts in the statute. Congress has independent strategic reasons to enact SIL, to be sure, including because Congress agrees substantively with the rule, wishes to reduce its drafting costs, or hopes to use SIL to shift interpretive burdens to the other branches. However, executive pressure is an important exogenous reason for the production of SIL.

Page 440, add the following at the end of Note 15:

Professors Bellia and Clark have now published a book, *The Law of Nations and the United States Constitution* (2017), reflecting their views on these issues relating to the domestic status of the law of nations. This book was the subject of a 2018 symposium in the Georgetown Law Journal featuring articles by William S. Dodge, David M. Golove & Daniel J. Hulsebosch, John Harrison, Thomas H. Lee, Michael D. Ramsey, Paul B. Stephan, and Ingrid Wuerth. For an argument that "the text, structure, and objectives of the Constitution, and the weight of judicial authority, require treating all rules of customary international law as rules of federal law, but that such rules will be directly applicable in U.S. courts only when the federal political branches have expressly or impliedly provided for judicial application of a particular rule," see Gary Born, *Customary International Law in United States Courts*, 92 Wash. L. Rev. 1641, 1643 (2017).

Page 477, add the following Note after Note 10:

10a. In Jesner v. Arab Bank, 138 S. Ct. 1386 (2018), the Supreme Court held, in a 5-4 decision, that foreign corporations could not be sued under the ATS. In that case, foreign nationals were attempting to sue Arab Bank, PLC, a bank headquartered in Jordan, for allegedly financing and facilitating the activities of terrorist organizations that had carried out attacks in the Middle East. Although most of Arab Bank's allegedly wrongful conduct occurred outside the United States, the bank was also alleged to have used its New York branch for electronic transactions and other activities that benefited terrorist groups.

In explaining why foreign corporations could not be sued under the ATS, Justice Kennedy wrote in part for a majority of the Court and in part for only a plurality. The majority opinion framed the question to be decided as "whether common-law liability under the ATS extends to a foreign corporate defendant." In holding that it does not, the Court emphasized its "general reluctance to extend judicially created private rights of action," even outside the foreign affairs area, and it noted that "the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the

ATS." It also explained that the ATS was "intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." But in ATS cases brought against foreign corporations, the Court observed, "the opposite is occurring." The Court noted that Jordan had vigorously objected to this suit, and that other nations had filed objections to ATS litigation directed at their corporations. "These are the very foreign-relations tensions the First Congress sought to avoid," said the Court.

The Court concluded that "judicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government." In making that determination, the Court noted that the political branches could decide not only whether to impose liability, but also whether to impose various limitations on that liability. "These delicate judgments," said the Court, "involving a balance that it is the prerogative of the political branches to make, especially in the field of foreign affairs, would . . . be entitled to special respect, especially because those careful distinctions might themselves advance the Rule of Law."

Writing for only a plurality, Kennedy also considered whether judicial recognition of an ATS cause of action against foreign corporations would be proper under the first prong of the test in *Sosa v. Alvarez-Machain*—that is, whether such a cause of action would be based on "a norm that is specific, universal, and obligatory." After analyzing various international law materials, the Court expressed doubt that corporate liability for human rights liability satisfied this test. Among other things, Justice Kennedy noted that "[t]he international community's conscious decision to limit the authority of . . . international tribunals to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law." The plurality also emphasized the lack of corporate liability under the Torture Victim Protection Act, noting that "Congress' decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive of the present case."

Justice Alito concurred to explain why he thought the majority's decision was "compelled not only by 'judicial caution,' but also by the separation of powers." He noted that he was not certain that *Sosa* was correct in keeping the door open to some judicially-developed ATS causes of action. But, in any event, he contended that "[a]s part of *Sosa*'s second step, a court should decline to create a cause of action as a matter of federal common law where the result would be to further, not avoid, diplomatic strife" and that "[p]roperly applied, that rule easily resolves the question presented by this case."

Justice Gorsuch concurred to make two points. First, he noted that he had "serious doubts" about the suggestion in *Sosa* that courts have some ability to recognize new causes of action under the ATS. He explained that "[d]eciding that, henceforth, persons like A who engage in certain conduct will be liable to persons like B is, in every meaningful sense, just like enacting a new law," and that "in our constitutional order the job of writing new laws belongs to Congress, not the courts." Second, Gorsuch thought that it was unlikely that the ATS was originally designed to allow suits against foreign defendants, whether corporate or otherwise: "because Article III's diversity-of-citizenship clause calls for a U.S. party, and because the ATS clause requires an alien plaintiff, it follows that an American defendant was needed for an ATS suit to proceed." Even if there is doubt about this historical point, he contended, "it is a doubt that should counsel restraint all the same."

Justice Thomas wrote a brief concurrence to note that he agreed with the Court's opinion in full and also with the points made by Justices Alito and Gorsuch.

Justice Sotomayor wrote an extensive dissent that was joined by Justices Ginsburg, Breyer, and Kagan. Sotomayor first took issue with the plurality's assumption that the inquiry in *Sosa* about whether the norm is sufficiently "specific, universal, and obligatory" is relevant in determining whether corporations can be sued as a categorical matter. She explained that "[i]nternational law imposes certain obligations that are intended to govern the behavior of states and private actors," and these "are the norms at which *Sosa*'s step-one inquiry is aimed and for which *Sosa* requires that there be sufficient international consensus." But the test "does not," she said, "demand that there be sufficient international consensus with regard to the mechanisms of enforcing these norms, for enforcement is not a question with which customary international law is concerned." Footnote 20 of *Sosa* is not to the contrary, Sotomayor explained, because it simply observes that international law norms sometimes apply only to state conduct and does not purport to be addressing which actors can be sued under the ATS when there is an underlying international law violation.

In light of her conclusion on this point, Sotomayor explained that:

> Instead of asking whether there exists a specific, universal, and obligatory norm of corporate liability under international law, the relevant inquiry in response to the question presented here is whether there is any reason—under either international law or our domestic law—to distinguish between a corporation and a natural person who is alleged to have violated the law of nations under the ATS.

She noted that corporations have long been subject to tort liability under the common law, and she argued that nothing in the ATS or its history suggested that it was intended to displace the normal presumption of corporate liability.

Proceeding to *Sosa*'s second step, Sotomayor argued that "[n]othing about the corporate form in itself justifies categorically foreclosing corporate liability in all ATS actions." Among other things, she contended that the potential foreign relations difficulties associated with such suits could and should be addressed through doctrines more specifically tailored to address them:

> In addition to the presumption against extraterritoriality, federal courts have at their disposal a number of tools to address any foreign-relations concerns that an ATS case may raise. This Court has held that a federal court may exercise personal jurisdiction over a foreign corporate defendant only if the corporation is incorporated in the United States, has its principal place of business or is otherwise at home here, or if the activities giving rise to the lawsuit occurred or had their impact here. Courts also can dismiss ATS suits for a plaintiff's failure to exhaust the remedies available in her domestic forum, on *forum non conveniens* grounds, for reasons of international comity, or when asked to do so by the State Department.

Sotomayor concluded by arguing that "[i]mmunizing corporations that violate human rights from liability under the ATS undermines the system of accountability for law-of-nations violations that the First Congress endeavored to impose."

* * *

Are the concerns articulated by the majority and concurrences in *Jesner* about the separation of powers and foreign relations friction persuasive? What about Justice Sotomayor's response that the danger of foreign relations friction can be adequately addressed through other doctrines? Note that the Executive Branch had filed an amicus brief in *Jesner* opposing a categorical ban on corporate ATS liability, for reasons similar to those articulated by Justice Sotomayor. Should the Court have deferred to the Executive Branch's position?

After *Kiobel* and *Jesner*, what suits can still be brought under the ATS? The Court in *Jesner* does not address whether *U.S.* corporations can be sued, but does its reasoning suggest an answer? For a recent decision allowing an ATS suit to proceed against U.S. corporate defendants, see Doe v. Nestle, S.A., 906 F.3d 1420 (9th Cir. 2018), which involved allegations that U.S. companies funded and otherwise supported child slave labor practices on cocoa farms in the Ivory Coast. Individuals, including individual officers of corporations, can still potentially be

sued under the ATS. In addition to the extraterritoriality limitation imposed by *Kiobel*, what obstacles are such suits against individual defendants likely to encounter?

Page 479, add at the end of Note 14:

For a decision construing *Kiobel* to require that conduct relating to the tort must have occurred within the United States, even in a suit brought against an individual now residing in the United States, see Jara v. Núñez, 878 F.3d 1268 (11th Cir. 2018). For a decision concluding that the "touch and concern" test was met in a suit against an individual who allegedly was involved in mass killings in Liberia because of "the Defendant's alleged involvement in the violent raid of a USAID compound under the control of a United States agency, . . . Defendant's residence in the United States, . . . and Defendant's allegedly fraudulent participation in a U.S. visa and immigration program designed to benefit the victims of the crimes that Defendant himself allegedly perpetrated, " see Jane W. v. Thomas, 354 F. Supp. 3d 630, 639 (E.D. Pa. 2018).

Page 481, add at the end of Note 17:

See also Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. Rev. 397, 405 (2018) (arguing in support of state remedies for international human rights violations, and contending that "[s]tate authority to provide redress is the default; the limits are what require justification").

Page 496, add at the end of Note 14:

See also Philipp v. Federal Republic of Germany, 894 F.3d 406 (D.C. Cir. 2018) (applying this principle); de Csepel v. Republic of Hungary, 859 F.3d 1094 (D.C. Cir. 2017) (same). In a later proceeding in the *Simon* case, the D.C. Circuit held that principles of comity did not require the plaintiffs to first exhaust remedies in Hungary, noting: "When Congress wanted to require the pursuit of foreign remedies as a predicate to FSIA jurisdiction, it said so explicitly." Simon v. Republic of Hungary, 911 F.3d 1172, 1181 (D.C. Cir. 2018). The court also concluded that the case should not be dismissed under the *forum non conveniens* doctrine.

Page 496, add the following Notes after Note 14:

14a. In Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017), the Supreme Court held that a party's non-frivolous but ultimately erroneous assertion that property was taken in violation of international law is insufficient to sustain jurisdiction under Section 1605(a)(3). In that case, an American company and its Venezuelan subsidiary sued the Venezuelan government, arguing that the government had unlawfully expropriated the subsidiary's oil rigs. The U.S. Court of Appeals for the D.C. Circuit held that, although it was not clear that the expropriation actually violated international law, there was jurisdiction to hear the case because the plaintiffs had raised a non-frivolous argument that an international law violation had occurred. In disagreeing with this approach, the Supreme Court emphasized both the text of Section 1605(a)(3) as well as the FSIA's purpose of freeing foreign sovereigns from suit unless a case falls within a statutory exception to immunity. The Court also observed more generally that the FSIA was designed to codify the restrictive theory of immunity under international law, which generally preserves sovereign immunity for a sovereign's public acts within its own territory, and the Court said that it had "found nothing in the history of the statute that suggests Congress intended a radical departure from these basic principles." While a violation of international law might qualify as an exception to these principles, the Court said that this requires a finding that there actually has been such a violation, not merely a non-frivolous allegation. The Court therefore vacated the D.C. Circuit's opinion and remanded for further proceedings. (On remand, the D.C. Circuit dismissed the claims of the subsidiary company for failure to allege facts that would establish a taking in violation of international law.)

14b. In December 2016, Congress enacted the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. 114-319 (Dec. 16, 2016). This Act creates a new subsection (h) in 28 U.S.C. § 1605 that exempts foreign art exhibitions in the United States from suit under Section 1605(a)(3) where (a) "a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States"; (b) "the President, or the President's designee, has determined . . . that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest"; and (c) the notice has been published. When those conditions are met, "any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3)." There are exceptions for Nazi-era claims and other situations in which the work "was taken in connection with the acts of a foreign government against members of a targeted group as part of a systematic confiscation or misappropriation of works from members of a targeted and

vulnerable group." One impetus for the legislation was the decision in Malewicz v. City of Amsterdam, 517 F. Supp. 2d 322 (D.D.C. 2007), in which the court had held that activity related to the loan of artwork to U.S. museums constituted "commercial activity" under Section 1605(a)(3)—a decision that generated significant concern and criticism from foreign state lenders of artwork. For discussion of the statute, see Ingrid Wuerth, *An Art Museum Amendment to the Foreign Sovereign Immunities Act*, Lawfare (Jan. 2, 2017).

Page 498, add at the end of Note 16:

In November 2017, the Trump administration added North Korea back to the list of state sponsors of terrorism, which meant that there were four states on the list: Iran, North Korea, Sudan, and Syria.

Page 502, add the following Note after Note 20:

20a. In 1997, Hamas carried out several suicide bombings on a pedestrian mall in Jerusalem, and among those injured were a number of U.S. citizens. The victims and their family members brought suit against Iran under the state sponsor of terrorism exception to immunity, 28 U.S.C. § 1605A, alleging that Iran had provided material support and training to Hamas. The plaintiffs obtained a default judgment of $71.5 million. They then sought to enforce the judgment by attaching Persian artifacts owned by Iran that are currently held by a University of Chicago museum. The plaintiffs relied in particular on 28 U.S.C. § 1610(g), which was enacted in 2008 and provides:

> (g) Property in Certain Actions.—
>
> (1) . . . [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or

> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

In Rubin v. Islamic Republic of Iran, 138 S. Ct. 816 (2018), the Supreme Court unanimously held that the artifacts were not subject to attachment. In an opinion by Justice Sotomayor, the Court explained that Section 1610(g) was enacted to overturn First National City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983), in which the Court had held that judgments against foreign states could not normally be enforced against the foreign states' juridically-separate agencies and instrumentalities. Section 1610(g) does not, explained the Court, set forth an independent exception to attachment immunity: it "serves to identify property that will be available for attachment and execution in satisfaction of a § 1605A judgment, but it does not in itself divest property of immunity." As a result, reasoned the Court, its reference to attachment "as provided in this section" means that an exception to immunity from attachment must be found elsewhere in Section 1610.

Page 504, add after the second full paragraph:

In Jam v. Int'l Finance Corp., 139 S. Ct. 759 (2019), a group of Indian nationals brought suit against the International Finance Corporation (IFC), an international organization based in Washington, D.C. that is part of the World Bank. The plaintiffs alleged that after the IFC loaned $450 million to an Indian company for the construction of a power plant in India, the company constructed the plant in a manner contrary to the funding agreement and IFC policy, and that the plant ended up causing environmental and social damage to the surrounding communities.

The D.C. Circuit upheld dismissal of the suit under a 1945 statute, the International Organizations Immunities Act (IOIA), which provides that international organizations "shall enjoy the same immunity from suit . . . as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a(b). Pursuant to a statutory delegation, the Executive Branch determines which organizations qualify for coverage under this provision, and, since 1956, it has designated the IFC as one of these organizations. In concluding that the IFC was entitled to immunity in this case, the D.C. Circuit interpreted the IOIA as conferring essentially absolute immunity on international organizations, since that is the sort of immunity that foreign governments would have had when the IOIA was enacted.

The Supreme Court reversed in a 7-1 decision, holding that the IOIA affords international organizations only the same immunity from suit that foreign

governments receive today under the FSIA. In an opinion by Chief Justice Roberts, the Court emphasized the plain language of the statute, reading the IOIA's "same . . . as" formulation as making international organization immunity and state immunity continuously equivalent. The Court confirmed this reading using what it called the "reference canon" of interpretation, pursuant to which a statute that refers to a general subject is understood to adopt the law on that subject as it exists whenever a question arises under the statute. By contrast, the Court said that a statute that refers to another statute by specific title or section number adopts the referenced statute as it existed when the referring statute was enacted. The IOIA refers to an external body of potentially evolving law rather than a specific statute, and therefore, the Court reasoned, it requires reference to the rules governing foreign sovereign immunity as they evolve. In response to the IFC's argument that this outcome would open up international organizations such as international development banks to a host of litigation under the FSIA's commercial activities exception, the Court noted that the charters of international organizations could specify a different level of immunity from the FSIA, and that there are other hurdles to litigation under the commercial activities exception. Justice Breyer dissented, invoking "the statute's history, its context, its purposes, and its consequences" to argue that international organizations should continue to have immunity for their commercial activities, subject to Executive Branch override, "just as foreign governments possessed that immunity when Congress enacted the statute in 1945."

Page 522, add the following Note after Note 13:

13a. In Lewis v. Mutond, 918 F.3d 142 (D.C. Cir. 2019), the D.C. Circuit considered a suit brought by a U.S. citizen against two officials of the Democratic Republic of the Congo (DRC). The plaintiff alleged that the defendants had subjected him to torture in the DRC, and he sought damages under the Torture Victim Protection Act (TVPA). In response, the defendants argued that they were entitled to foreign official immunity. The D.C. Circuit rejected this argument. Relying on the *Restatement (Second) of the Foreign Relations Law of the United States*, the court held that, absent a suggestion of immunity from the State Department, foreign officials have conduct immunity under U.S. common law only when exercising jurisdiction over them would have the effect of enforcing a rule of law against the foreign state. This standard requires, reasoned the court, that "a judgment against the official would bind (or be enforceable against) the foreign state." That was not true in this case, said the court: "Defendants have not proffered anything to show that Plaintiff seeks to draw on the DRC's treasury or force the state to take specific action, as would be the case if the judgment were enforceable against the state. Defendants in this case are being sued in their individual capacities and Plaintiff is not seeking compensation out of state funds." The court further stated: "In cases like this one, in which the plaintiff pursues an individual-capacity claim seeking relief against an official in a personal capacity,

exercising jurisdiction does not enforce a rule against the foreign state." Two of the three judges on the panel also concluded that, in any event, the TVPA displaces the conduct immunity of foreign officials.

Page 523, add at the end of the first full paragraph:

In Saleh v. Bush, 848 F.3d 880 (9th Cir. 2017), the U.S. Court of Appeals for the Ninth Circuit held that the Westfall Act barred a suit against officials of the George W. Bush administration for allegedly violating international law in waging war against Iraq.

Page 523, add at the end of Note 14:

In Ziglar v. Abbasi, 137 S. Ct. 1843 (2007), the Supreme Court held that illegal aliens detained in allegedly harsh conditions in the United States in the immediate aftermath of the September 11 terrorist attacks could not sue officials of the federal government for damages. The plaintiffs claimed that they had an implied right under the Constitution to seek damages in this context. They relied primarily on Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388 (1971), where the Court had recognized an implied right to seek damages for unreasonable searches and seizures carried out by federal law enforcement personnel in violation of the Fourth Amendment. In a 4-2 decision (with Justices Sotomayor, Kagan, and Gorsuch not participating), the Court rejected this argument.

The majority, in an opinion by Justice Kennedy, described the "proper test for determining whether a case presents a new *Bivens* context" as follows:

> If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Under that analysis, the majority explained, the claims in this case went beyond what prior Supreme Court decisions had allowed:

> In the present suit, respondents' detention policy claims challenge the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil. Those claims bear little resemblance to the three *Bivens* claims the Court has approved in the past: a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma.

The majority then emphasized that before allowing a new *Bivens* claim, courts must consider whether there are "special factors counseling hesitation," a concept drawn from earlier decisions that the majority explained as follows:

> It is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims in the complex sphere of litigation, with all of its burdens on some and benefits to others. It is true that, if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations. Yet the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide. Those matters include the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies. These and other considerations may make it less probable that Congress would want the Judiciary to entertain a damages suit in a given case.

In this case, the majority found a number of special factors that weighed against allowing a *Bivens* claim: (1) "these claims would call into question the formulation and implementation of a general policy," which would "necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged"; (2) "the discovery and litigation process would either border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question" and thereby "require courts to interfere in an intrusive way with sensitive functions of the Executive Branch"; (3) the claims "of necessity requir[e] an inquiry into sensitive issues of national security," whereas "[n]ational-security policy is the prerogative of the Congress and President"; (4) Congress, in the years since the September 11 attacks, had not elected to create a damage remedy for this

situation; and (5) equitable and habeas relief will often be effective in challenging the sorts of abuse alleged in this case, so it is not "damages or nothing." (The Court remanded a claim against a prison warden, however, in which it was alleged that the warden had allowed prison guards to abuse the plaintiffs. It also directed dismissal of a statutory civil conspiracy claim against the federal officials on the ground that the officials were entitled to qualified immunity because "reasonable officials in petitioners' positions would not have known, and could not have predicted, that [the statute] prohibited their joint consultations and the resulting policies that caused the injuries alleged.") Justices Breyer and Ginsburg dissented.

Chapter 8: International Crime

Page 560, add at the end of Note 8:

In June 2017, the Supreme Court issued a per curiam decision vacating the Fifth Circuit's decision and remanding for consideration of whether the plaintiff had a viable *Bivens* claims for damages in light of the Court's decision in *Ziglar v. Abbasi* (described above in the notes for Chapter 7). It also held that the plaintiff's Fifth Amendment claim was not barred by qualified immunity. But it declined to resolve whether the plaintiff was protected by the Fourth Amendment when he was shot. Justice Thomas dissented, arguing that the Court should have addressed the *Bivens* issue itself instead of remanding. Justice Breyer dissented, and was joined by Justice Ginsburg, arguing that Court should have held that the plaintiff was protected by the Fourth Amendment when he was shot.

On remand, the Fifth Circuit held that the "transnational aspects of the facts" presented a new context in which a *Bivens* remedy was inappropriate. The court also held that there were numerous "special factors" counselling restraint, including a concern that the extension of *Bivens* here would threaten "the political branches' supervision of national security" and would risk "interference with foreign affairs and diplomacy more generally." In May 2019, the Supreme Court agreed to review this ruling.

The U.S. Court of Appeals for the Ninth Circuit considered another case involving a shooting by a U.S. border patrol agent of someone in Mexico. *See* Rodriguez v. Swartz, 899 F.3d 719 (9th Cir. 2018). In that case, the agent allegedly fired numerous shots across the border at night and killed the victim, without any justification. The court held (in a 2-1 decision) that, assuming the allegations were true, the agent violated clearly established Fourth Amendment rights and thus would not be protected from suit by qualified immunity, and the victim's mother could pursue a *Bivens* claim for damages against the agent. With

respect to the extraterritorial application of the Fourth Amendment, the court reasoned:

> Applying the Constitution in this case would simply say that American officers must not shoot innocent, non-threatening people for no reason. Enforcing that rule would not unduly restrict what the United States could do either here or abroad. So under the particular circumstances of this case, [the victim] had a Fourth Amendment right to be free from the objectively unreasonable use of deadly force by an American agent acting on American soil, even though Swartz's bullets hit him in Mexico. *Verdugo-Urquidez* does not require a different conclusion.

Page 568, add at the end of Note 2:

For an analysis of the legal issues implicated by the extraterritorial application of federal criminal statutes, and an argument that, although the Supreme Court's strong presumption against extraterritoriality is questionable in the civil context, it is appropriate to apply such a presumption in the criminal context, see Julie Rose O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 Geo. L.J. 1021 (2018).

Page 572, add at the end of Note 10:

For a discussion of how "more U.S. prosecutions than ever involve criminal conduct, fugitives, and/or evidence outside of the United States, often touching on the criminal justice interests of foreign countries," see Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. Rev. 340, 341-42 (2019). The author argues that such prosecutions "represent a consequential shift in U.S. criminal law, offering the promise of promoting criminal accountability and closing global impunity gaps," while also presenting risks of undermining defendant interests and adversely affecting U.S. foreign policy.

Page 591, add after the carry-over paragraph:

In 2019, the United States sought the extradition of Wikileaks founder Julian Assange from the United Kingdom, which took him into custody after he left the Ecuadorian embassy in London. (He had lived at the embassy for nearly seven years until Ecuador decided to withdraw its diplomatic protection of him.) Because the United States has charged Assange with offenses related to

dissemination of classified information and espionage, UK decisionmakers may need to consider whether he is being sought for a political offense. For a discussion of the case, see Josh Gerstein, *Dispute Over "Political" Crimes Looms Over Assange Extradition*, Politico (Apr. 12, 2019), *at* https://www.politico.eu/article/julian-assange-extradition-dispute-over-political-crimes-looms/. *See also* Stephen P. Mulligan, *Frequently Asked Questions About the Julian Assange Charges*, Cong. Res. Serv. (Apr. 22, 2019), *at* https://fas.org/sgp/crs/secrecy/LSB10291.pdf.

Chapter 9: War Powers

Page 641, add at the end of Note 11:

See also McKaye Neumeister, Note, *Reviving the Power of the Purse: Appropriations Clause Litigation and National Security Law*, 127 Yale L.J. 2512 (2018).

Page 664, add at the end of Note 13:

Charles Evans Hughes famously stated that "the power to wage war is the power to wage war successfully." For an analysis that puts this axiom in its World War I context and traces its implications for the modern "war on terror," see Matthew C. Waxman, *The Power to Wage War Successfully*, 117 Colum. L. Rev. 613 (2017).

Page 665, add the following Notes after Note 16:

17. On April 6, 2017, the United States, on orders from President Trump, launched 59 Tomahawk cruise missiles at the Shayrat airbase in Syria in response to an alleged chemical attack by forces associated with the Syrian government on civilians in the Syrian town of Khan Shayshun. In a letter to Congress "consistent with the War Powers Resolution," President Trump stated that he "acted in the vital national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive." The Trump administration never provided an official public legal rationale beyond this conclusory statement. But it did circulate unsigned talking points "among representatives in various agencies about the strike's legal basis" that provide some insight into its thinking. Charlie Savage, *Watchdog Group Sues Trump Administration, Seeking Legal Rationale Behind*

Syria Strike, N.Y. Times (May 8, 2017); *see also* Marty Lederman, *(Apparent) Administration Justifications for Legality of Strikes Against Syria*, Just Security (Apr. 8, 2017).

The rationale under domestic law in the talking points was as follows:

> As Commander in Chief, the President has the power under Article II of the Constitution to use this sort of military force overseas to defend important U.S. national interests. The United States has a strong national interest in preserving regional stability, averting a worsening of the humanitarian catastrophe in Syria, and deterring the use and proliferation of chemical weapons, especially in a region rife with international terrorist groups with long-standing interests in obtaining these weapons and using them to attack the United States and its allies and partners. This domestic law basis is very similar to the authority for the use of force in Libya in 2011, as set forth in an April 2011 opinion by the Department of Justice's Office of Legal Counsel.

Is this persuasive? Is the domestic legal basis for the 2017 Syria strike "very similar to the authority for the use of force in Libya in 2011" under the Krass OLC opinion? It seems to satisfy the low "scale of operations" test for unilateral presidential action under that opinion, but what about the "national interest" prong? In the Libya opinion, OLC argued that "at least two national interests" were at stake, namely, "preserving regional stability and supporting the [Security Council's] credibility and effectiveness." The 2017 Syria operation presumably is supported by the first interest, preserving regional stability. Can you think of a plausible air strike by a President that would not satisfy this criterion? But the 2017 Syria operation is not supported by the second criterion, since the Security Council had not authorized the use of force against Syria. Instead, the additional national interests invoked for this operation were "averting a worsening of the humanitarian catastrophe in Syria, and deterring the use and proliferation of chemical weapons." Does the 2017 Syria strike stand as a precedent for the proposition that a President can use unilateral military force short of war to avert humanitarian catastrophes and deter weapons of mass destruction? What if only one of these latter two factors is present? Have we reached a point where, under the Executive Branch view of the law, Article II imposes no appreciable limits on relatively small-scale unilateral presidential uses of force in any plausible instance in which the President would want to use such force?

For commentary on the legality of the April 2017 Syria strike under domestic law, see Jack Goldsmith, *The Constitutionality of the Syria Strike Through the Eyes of OLC (and the Obama Administration)*, Lawfare (Apr. 7, 2016); Harold Koh, *Not Illegal: But Now the Hard Part Begins*, Just Security (Apr. 7, 2017); Marty Lederman, *Why the Strikes Against Syria Probably Violate the*

U.N. Charter and (therefore) the U.S. Constitution, Just Security (Apr. 6, 2017); Charlie Savage, *Was Trump's Syria Strike Illegal? Explaining Presidential War Powers*, N.Y. Times (Apr. 7, 2017). For analysis of the strikes' international legality, see Ashley Deeks, *How Does the Syrian Situation Stack up to the "Factors" that Justified Intervention in Kosovo?*, Lawfare (Apr. 7, 2017); Charlie Dunlap, *Yes, the Attack on Syria was Justifiable, and International Law Will Benefit from It*, Lawfare (Apr. 7, 2017); Koh, *supra*; Lederman, *supra*.

18. On April 13, 2018, President Trump ordered the U.S. military to launch airstrikes against three facilities associated with the Syrian government's chemical weapons capability. The strikes came in response to the Syrian government's alleged deadly use of chemical weapons on civilians on April 7 in Douma, Syria.

On May 31, 2018, the Justice Department's Office of Legal Counsel issued an opinion that memorialized its advice to the White House Counsel, prior to the strikes, that the strikes were lawful. *See Memorandum Opinion for Counsel to the President, April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities* (May 31, 2018), *at* https://www.justice.gov/olc/opinion/file/1067551/download. The opinion used the same two-part framework that OLC had used in its 2011 opinion supporting the use of force in Libya.

The first issue was "whether the President could reasonably determine that the action serves important national interests" that "would justify use of the President's Article II authority to direct military force." OLC determined that three national interests supported the President's use of force: (1) the promotion of regional stability, (2) the prevention of a worsening of the region's humanitarian catastrophe, and (3) the deterrence of the use and proliferation of chemical weapons. The first interest had been recognized in many prior OLC opinions. The second interest was apparently recognized for the first time in a 2014 OLC opinion that is cited in the Syria opinion but that had not at that point been published (see Note 19 below). The third interest was recognized for the first time in the Syria opinion. OLC concluded that "these interests fall comfortably within those that our Office has previously relied upon in concluding that the President had appropriately exercised his authority under Article II, and we so advised prior to the Syrian strikes."

The second issue was whether the "anticipated nature, scope and duration" of the conflict might rise to the level of a "war." If so, then the President might be constitutionally required to secure congressional authorization even if national interests would otherwise support his use of force under Article II. OLC explained that "military operations will likely rise to the level of a war only when characterized by 'prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.'" Under this standard, OLC had little trouble concluding that the air

strikes in Syria did not constitute "war," because (1) the United States "did not plan to employ any U.S. ground troops, and in fact, no U.S. airplanes crossed into Syrian airspace," (2) the mission and its time frame were limited, and (3) the Trump administration took steps to avoid escalation of the conflict in Syria.

What types of unilateral presidential uses of force, if any, are ruled out by the OLC analysis? Can you imagine any circumstance in which a President might want to use force abroad that would not be supported by a national interest that OLC would recognize? How "prolonged and substantial" must the anticipated military engagement be to trigger a requirement of congressional authorization? OLC cited the Korean War as "precedent . . . for the commitment of United States armed forces, without prior congressional approval or declaration of war, to aid an ally in repelling an armed invasion." If that lengthy and bloody conflict did not require congressional authorization, what type of military intervention does?

For analyses of the Syria strikes and the OLC opinion, see Curtis Bradley & Jack Goldsmith, *OLC's Meaningless "National Interests" Test for the Legality of Presidential Uses of Force*, Lawfare (June 5, 2018); Jack Goldsmith, *The New OLC Opinion on Syria Brings Obama Legal Rationales Out of the Shadows*, Lawfare (June 1, 2018); Deborah Pearlstein, *One More Thing About That New OLC Opinion on Syria,* Balkinization (June 4, 2018); Steve Vladeck, *OLC's Formal (and Remarkably Broad) Defense of the April Syria Strikes*, Just Security (June 1, 2018); Keith E. Whittington, *R.I.P. Congressional War Power*, Lawfare (Apr. 20, 2018).

19. In November 2018, the Justice Department's Office of Legal Counsel released a memorandum, which it had prepared in late 2014, concluding that the President had the constitutional authority to conduct airstrikes in Iraq against the Islamic State. Applying the approach set forth in its 2011 Libya opinion, OLC reasoned that the airstrikes served sufficiently important national interests and that the nature of the operation was sufficiently limited in its nature, scope, and duration. Among the national interests that OLC credited was an interest "in averting humanitarian catastrophe." *See* Memorandum Opinion for the Counsel to the President, *Authority to Order Targeted Airstrikes Against the Islamic State of Iraq and the Levant* (Dec. 30, 2014), *at* https://www.justice.gov/olc/file/1108686/download.

Page 684, add after the last full paragraph in Note 14:

Congress tried more recently, although unsuccessfully, to impose legally binding limits on military activities in Yemen. Since 2015, the United States has been providing military and intelligence assistance to Saudi Arabia in its conflict

in Yemen, without congressional authorization. In April 2019, Congress approved a joint resolution providing as follows:

> Congress hereby directs the President to remove United States Armed Forces from hostilities in or affecting the Republic of Yemen, except United States Armed Forces engaged in operations directed at al Qaeda or associated forces, by not later than the date that is 30 days after the date of the enactment of this joint resolution (unless the President requests and Congress authorizes a later date), and unless and until a declaration of war or specific authorization for such use of United States Armed Forces has been enacted.

In support of its authority to enact this provision, Congress referred to the War Powers Resolution as well as other statutes. President Trump vetoed the joint resolution, stating, among other things, that it:

> would interfere with the President's constitutional authority as Commander in Chief of the Armed Forces, and could endanger our service members by impairing their ability to efficiently and effectively conduct military engagements and to withdraw in an orderly manner at the appropriate time.

Presidential Veto Message to the Senate to Accompany S.J. Res. 7 (Apr. 16, 2019). Congress failed to overturn Trump's veto, and it seems unlikely that Congress will be able to find another legislative avenue that would avoid a veto. What does this suggest about the efficacy of the War Powers Resolution?

Page 686, add at the end of Note 17:

See also Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 Vand. L. Rev. 357, 362 (2018) (arguing that Congress "may deny funds for specific anticipated military operations or activities [and] limit the location or disposition of particular forces").

Page 686, add a new Note after Note 17:

17a. After President Trump in December 2018 reportedly ordered a full withdrawal of U.S. troops from Syria—a decision that he later qualified—many members of Congress expressed opposition to the decision. Most notably, representatives Tom Malinowski and Van Taylor introduced the "Responsible Withdrawal From Syria Act," which would prohibit the use of appropriated funds to draw down U.S. forces from Syria below 1,500 troops, unless the secretaries of

defense and state, and the director of national intelligence, first submitted a report to Congress addressing a range of policy issues. Would such a law, if enacted, be constitutional? What would the basis be in Article I for forcing the President to retain troops abroad? Even if Congress has an Article I basis for the action, would it unduly burden the President's Commander-in-Chief authority? Or would it simply be another example of congressional regulation of how and for what purposes the President uses the military? As a practical matter, why does this situation arise infrequently? For commentary, including historical analogies, see Ashley Deeks, *Can Congress Constitutionally Restrict the President's Troop Withdrawals?*, Lawfare (Feb. 9, 2019).

Page 686, add the following Note after Note 18:

18a. Does Congress have the authority to restrict presidential use of nuclear weapons? In response to threatening statements made by President Trump concerning North Korea, there was some discussion in Congress in Fall 2017 about the possibility of enacting legislation that would restrict presidential use of nuclear weapons—for example, by disallowing such use unless either the United States or an ally has been attacked by nuclear weapons or Congress has specifically authorized their use, or by imposing procedural requirements relating to the chain of command over the use of such weapons. It seems unlikely that any such legislation will be enacted. But if Congress could muster the votes and override a presidential veto, could it limit the President's ability to launch nuclear weapons? Given that Congress has the authority to decide whether to appropriate money to make, store, and protect nuclear weapons, does this mean that it can also regulate the circumstances of their use? What if the constraints impinge on a President's perceived need to act in self-defense to protect the country? What about a perceived need to act in anticipatory self-defense? For discussion of some of these issues, see Stephen P. Mulligan, *Legislation Limiting the President's Power to Use Nuclear Weapons: Separation of Powers Implications* (Nov. 3, 2017), *at* https://fas.org/sgp/crs/nuke/separation.pdf.

Page 687, add at the end of Note 19:

For discussion of the Obama administration's legacy relating to the domestic and international law of war powers, see *Agora, President Obama's War Powers Legacy*, Volume 110, Issue 4, American Journal of International Law (with essays by Curtis Bradley & Jack Goldsmith, Ashley Deeks, Ryan Goodman, Rebecca Ingber, and Michael Ramsey).

Page 726, add the following Note after Note 8:

8a. For an extensive account of the military commission trial of the individuals charged with having conspired with John Wilkes Booth in the assassination of President Lincoln, and "the ways in which that proceeding, and other Civil War military trials, have been accorded authority, or dismissed as nonauthoritative, in subsequent generations," see Martin S. Lederman, *The Law(?) of the Lincoln Assassination*, 118 Colum. L. Rev. 323, 354 (2018). The author contends that, "[u]ntil very recently it was folly—virtually unthinkable—for anyone to rely on the conspirators' proceeding as a venerated example that might *support*, rather than undermine, the argument that domestic-law offenses in wartime can be tried in military commissions rather than in Article III courts." *Id.* at 350.

Page 726, add at the end of Note 10:

In Trump v. Hawaii, 138 S. Ct. 2392 (2018), which is excerpted earlier in this Supplement, the Supreme Court upheld President Trump's "travel ban" order. In her dissent in that case, Justice Sotomayor wrote:

> Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of Korematsu v. United States, 323 U.S. 214 (1944). In *Korematsu*, the Court gave "a pass [to] an odious, gravely injurious racial classification" authorized by an executive order. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting). As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. As here, the exclusion order was rooted in dangerous stereotypes about, *inter alia*, a particular group's supposed inability to assimilate and desire to harm the United States. As here, the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect. And as here, there was strong evidence that impermissible hostility and animus motivated the Government's policy.

In response, the majority expressly repudiated *Korematsu*, stating: "The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.' 323 U.S. at 248 (Jackson, J., dissenting)." Is this repudiation anything more than symbolic? What do you think of Justice Sotomayor's charge that the Court "redeploys the same dangerous logic

underlying *Korematsu* and merely replaces one 'gravely wrong' decision with another"? In what ways is *Trump v. Hawaii* like or unlike *Korematsu*?

Chapter 10: War on Terrorism

Page 755, add the following Note after Note 6:

6a. Irek Hamidullin, a former Russian army officer affiliated with the Taliban and the Haqqani Network, was apprehended in Afghanistan after having planned and participated in an attack on an Afghan border police post. After initially being held by the U.S. military, he was subsequently charged in federal court with, among other things, providing and conspiring to provide material support to terrorists and attempting to destroy an aircraft of the U.S. armed forces. He moved to dismiss the charges against him on the ground that, under the Third Geneva Convention, he was entitled to combatant immunity. In United States v. Hamidullin, 888 F.3d 62 (4th Cir. 2018), the court held, in a 2-1 decision, that he was not entitled to such immunity. The court reasoned that, at the time of Hamidullin's offenses, the conflict in Afghanistan had become a non-international armed conflict against Taliban insurgents. As a result, the court found that the conflict was governed by Common Article 3 of the Geneva Conventions, which does not confer combatant immunity. The court also rejected Hamidullin's argument that he should receive immunity under the common law "as an enemy soldier fighting for a rival sovereign," reasoning that the Third Geneva Convention displaced any such common law immunity. Finally, the court rejected Hamidullin's contention that Army Regulation 190-8, which broadly requires that a military tribunal determine the status of anyone who has committed a belligerent act, deprived the district court of jurisdiction. Even though no such military tribunal determination had been made here, the court reasoned that the regulation applies only to international armed conflicts and that, in any event, an internal Executive Branch regulation cannot strip federal courts of their statutorily-conferred jurisdiction. The dissent, by contrast, argued for remanding the case back to the district court "for the limited purpose of the Executive's consideration and explanation of Hamidullin's POW status." Until the Executive makes such an express determination, the dissent maintained, Hamidullin should be treated as covered by the Third Geneva Convention and Army Regulation 190-8.

Page 757, add at the end of the first paragraph of Note 9:

In December 2017, when signing the National Defense Authorization Act for fiscal year 2018 into law, President Trump made similar constitutional objections to transfer restrictions relating to the Guantanamo Bay detention facility. *See* White House, *Statement by President Donald J. Trump on H.R. 2810* (Dec. 12, 2017), *at* https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-h-r-2810/.

In January 2018, President Trump signed an Executive Order relating to the Guantanamo Bay detention facility. *See Executive Order on Protecting America Through Lawful Detention of Terrorists* (Jan. 30, 2018), *at* https://www.whitehouse.gov/presidential-actions/presidential-executive-order-protecting-america-lawful-detention-terrorists/. The Order replaced the withdrawn Obama Executive Order but was otherwise largely symbolic. It reaffirmed the need for the detention facility and restated the legal basis for it. The Order also directed Secretary of Defense James Mattis to recommend a policy within 90 days about what to do with newly captured terrorism suspects. Mattis delivered the report to the President in May 2018 but it has not been made public. Also in May 2018, President Trump transferred to Saudi Arabia Guantanamo detainee Ahmed Muhammed Haza al-Darbi. That was the first and only detainee transfer from the detention facility during the Trump administration. At the time this Supplement was going to press, the Trump administration had not brought any new detainees to the detention facility, and there were 40 detainees there.

Page 761, add at the end of Note 11:

For an extensive analysis of executive, congressional, and judicial decisionmaking concerning Guantanamo detainees during the Obama administration, and an explanation for why the detention facility there persisted despite President Obama's strenuous efforts to close it, see Aziz Z. Huq, *The President and the Detainees*, 165 U. Pa. L. Rev. 499 (2017).

Page 766, add at the end of Note 13:

In Al-Alwi v. Trump, 901 F.3d 294 (D.C. Cir. 2018), the court concluded that the hostilities encompassed by the AUMF are still ongoing and that the changes that have occurred in those hostilities since 2001 have not had the effect of ending the statutory authorization of the use of force. The court reasoned, among other things, that "the Executive Branch represents, with ample support from record evidence,

that the hostilities described in the AUMF continue. In the absence of a contrary Congressional command, that controls."*

Page 767, add at the end of Note 14:

For a comprehensive analysis of how the AUMF became "a protean foundation for indefinite war against an assortment of terrorist organizations in numerous countries" during the Obama administration, including an assessment of the role that international law played in informing the content of the AUMF during this period, see Curtis A. Bradley & Jack L. Goldsmith, *Obama's AUMF Legacy*, 110 Am. J. Int'l L. 628 (2016).

Page 770, add at the end of Note 15:

e. *Military Strikes*. In May and June 2017, the Trump administration carried out various military strikes against the Syrian government and pro-Syrian-government forces. Senator Bob Corker, Chairman of the Senate Foreign Relations Committee, sought an explanation from the administration of its legal authority to conduct such operations. In a letter dated August 2, 2017, the State Department responded to Corker by contending that the 2001 AUMF "provides authority to use force to defend U.S., Coalition, and partner forces engaged in the campaign to defeat ISIS to the extent such use of force is a necessary and appropriate measure in support of counter-ISIS operations." The letter further explained that "[t]he strikes taken by the United States in May and June 2017 against the Syrian government and pro-Syrian-Government forces were limited and lawful measures to counter immediate threats to U.S. or partner forces engaged in that campaign." Finally, the letter noted that "the Administration is not seeking revisions to the 2001 AUMF or additional authorizations to use force." *See* Letter from Charles Faulkner, Bureau of Legislative Affairs, Department of State, to Sen. Bob Corker (Aug. 2, 2017), *at* https://www.justsecurity.org/wp-content/uploads/2017/08/8-2-17-Corker-Response.pdf.

f. *New Proposed AUMF*. In April 2018, Senators Bob Corker (Republican) and Tim Kaine (Democrat) proposed a new AUMF. The Corker-Kaine bill would authorize the President to "use all necessary and appropriate force against (1) the

* The Supreme Court declined to review this decision. Justice Breyer issued a statement in connection with the denial, however, noting that: "I would, in an appropriate case, grant certiorari to address whether, in light of the duration and other aspects of the relevant conflict, Congress has authorized and the Constitution permits continued detention." For discussion of this statement, see Robert Chesney, *Justice Breyer's Question in al-Alwi: Is Detention Still Justified?*, Lawfare (June 10, 2019).

Taliban, al Qaeda, and the Islamic State in Iraq and Syria (ISIS); and (2) associated forces designated pursuant to section 5."

Section 5 of the bill has three innovations related to "associated forces." First, it lists five current groups that qualify as "associated forces." Second, it defines an "associated force" as any organization, person, or force "that the President determines has entered the fight alongside and is a co-belligerent with al Qaeda, the Taliban, or ISIS, in hostilities against the United States or its coalition partners, or that has been a part of al Qaeda, the Taliban, ISIS, or an associated force designated pursuant to this authorization and is engaged in hostilities against the United States or its coalition partners." This definition is broader than the one recognized by courts in habeas corpus litigation, and appears to sweep in something like the rationale under which the Obama administration concluded that the Islamic State was covered by the 2001 AUMF. Third, Section 5 creates a mechanism for the Executive Branch to make formal designations of additional "associated forces" under the new definition and send to Congress a report explaining the designation within 48 hours.

The bill has other notable features. It repeals the 2001 and 2002 AUMFs but makes clear that it "provides uninterrupted authority" for using force that had previously been authorized by the 2001 AUMF. It does not contain a geographical or ground force limitation. But it does require the President to inform Congress within 48 hours after the use of military force under the AUMF in a new country (which is defined as a country other than Afghanistan, Iraq, Syria, Somalia, Yemen, or Libya), and it creates an expedited congressional procedure to consider whether to remove authorization for such use. The bill does not contain a sunset clause. But it does require Congress every four years to consider whether to modify or repeal the AUMF, although the authority under the AUMF continues unless and until Congress acts to change it. For additional discussion of the bill, see Robert Chesney, *A Primer on the Corker-Kaine Draft AUMF*, Lawfare (Apr. 17, 2018). As of June 2019, no action had been taken on the bill.

g. *Use of Force Against Iran?* Meanwhile, tension between the United States and Iran growing out of the Trump administration's termination of the 2015 Iran Deal, related nuclear weapons issues, and Iran's regional activities triggered speculation that the Trump administration might invoke the 2001 AUMF as a basis for taking military action against Iran. According to reports, administration officials claim that Iran has harbored Al Qaeda officials and provided the group with material support. Since the AUMF extends to nations that harbored the perpetrators of the 9/11 attacks, the argument goes, it also extends to Iran. *See* Charlie Savage, *Could Trump Use the Sept. 11 War Law to Attack Iran Without Going to Congress?*, N.Y. Times (June 19, 2019). For criticism that this argument stretches the AUMF beyond its limits, see Steve Vladeck & Tess Bridgeman,

About that Trial Balloon on Using 9/11 AUMF to Authorize Strikes on Iran, Just Security (Feb. 21, 2019).

Page 783, add at the end of Note 11:

The government in *Bahlul* and other cases has argued that the Constitution was ratified against, and should be presumed not to have called into question, military adjudication during the Revolutionary War of offenses that would not have violated the international laws of war, such as the conduct of certain spies and disloyal civilians. For a detailed treatment of the Revolutionary War precedents that seeks to rebut this argument, see Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History's Lessons for the Constitutionality of Wartime Military Tribunals*, 105 Geo. L.J. 1529 (2017).

Page 801, add the following Note after Note 5:

5a. In September 2017, militia forces in Syria captured a dual U.S./Saudi national who allegedly had been fighting as part of Islamic State forces, and they turned him over to the U.S. military. The military subsequently detained him in Iraq. The government did not release his name, so he was referred to as "John Doe." In October 2017, the ACLU filed a habeas corpus petition on Doe's behalf in federal district court. The court concluded that the ACLU had standing to sue, and it entered a preliminary injunction requiring the government to provide 72 hours' notice before transferring Doe to any other country. After the government informed the court of its intent to transfer Doe to a particular third country (a country that was referred to in public documents merely as "Country B," but which appears to have been Saudi Arabia), the court enjoined the government from doing so. A divided panel of the U.S. Court of Appeals for the D.C. Circuit affirmed. *See* Doe v. Mattis, 889 F.3d 745 (D.C. Cir. 2018).

The appeals court first reasoned that this situation is not covered by the Supreme Court's decision in *Munaf v. Geren*, in which the Court declined to enjoin the U.S. military from transferring U.S. citizens held in Iraq to Iraqi custody for criminal trial. In this case, unlike in *Munaf*, the government was seeking to transfer Doe to a third country, and the court observed that "[w]e know of no instance—in the history of the United States—in which the government has taken an American citizen found in one foreign country and forcibly transferred her to the custody of another foreign country." The court did agree with the government that, "if Doe is an enemy combatant, the military can transfer him to the custody of Country B, a partner in the campaign against ISIL." But, relying heavily on *Hamdi v. Rumsfeld*, the court said that two conditions must be met for such a transfer: "(i) there must be legal authority for the Executive to wage war

against the enemy, and (ii) there must be an opportunity for the citizen to contest the factual determination that he is an enemy combatant fighting on behalf of that enemy." The court noted that "[n]either the legal inquiry nor the factual inquiry has taken place in this case."

The dissent argued, by contrast, that the majority decision represented "a hazardous expansion of the judiciary's role in matters of war and diplomacy." *Hamdi* was not on point, contended the dissent, because it did not purport to "empower a court to enjoin our military from *transferring* a battlefield captive not facing extended detention," much less to "authorize injunctive relief where, as here, the receiving country has a facially strong interest in the captive and the Executive Branch has determined in good faith that he is an enemy combatant." The dissent also thought that the majority decision was inconsistent with the Supreme Court's reasoning in *Munaf*.

It was later learned that Doe's name is Abdulrahman Ahmad Alsheik. In October 2018, the government released Alsheik, transferred him to Bahrain, and canceled his U.S. passport. For discussion, see Robert Chesney, *Doe v. Mattis Ends with a Transfer and a Cancelled Passport: Lessons Learned*, Lawfare (Oct. 29, 2018).

Page 830, add at the end of Note 4(b):

The Trump administration reportedly lifted some of the Obama administration's restrictions on targeted killings outside of areas of active hostilities. For example, the Trump administration seems to have designated sections of Somalia and Yemen as areas of active hostilities to which the restrictions did not apply, and to have allowed U.S. forces to target not only high-level militants but also foot-soldiers. *See* Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. Times (Sept. 21, 2017). In March 2019, President Trump issued an executive order that ended a requirement, imposed by President Obama in 2016, of reporting the number of strikes undertaken by the United States against terrorist targets outside areas of active hostilities and assessing the combatant and non combatant deaths resulting from those strikes. *See* Executive Order on Revocation of Reporting Requirement (Mar. 6, 2019), *at* https://www.whitehouse.gov/presidential-actions/executive-order-revocation-reporting-requirement/.