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Contemporary Practice of the United States Relating to International Law


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CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

Trump Administration Takes Steps to Implement Bilateral Agreement with Australia Regarding Refugees

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Shortly after President Trump was elected in November 2016, Australia and the United States finalized a bilateral agreement pursuant to which the United States committed to accepting refugees from Australian-backed immigration detention camps located in Nauru and Papua New Guinea. While Trump criticized the deal after his inauguration, his administration has nevertheless taken steps to implement it.

In 2013, Australia adopted a “border blockade” policy, known as Operation Sovereign Borders.¹ A military directive enacted with the expressed aim of “combating people smuggling,” Operation Sovereign Borders prohibits any unauthorized maritime arrivals on Australia’s shores, including refugees.² To implement this policy, Australia made arrangements with Nauru and Papua New Guinea (PNG). Both countries agreed to operate detention centers on their territories to hold all asylum-seekers who either arrived at Australia’s shores or were detained by Australia while at sea.³ Australia administers the detention centers and pays the full costs of their operation.⁴ According to press reports, Australian government figures from May 2016 listed 466 people in the Nauru camp and 847 on Manus Island, most from Afghanistan, Pakistan, Iraq, Iran, and Sri Lanka.⁵

Australia’s border blockade has been criticized both inside and outside the Australian government. The Australian parliament’s Senate Legal and Constitutional Affairs Committee cited “deeply concerning” reports of “a deeply troubled asylum seeker and refugee population, and an unsafe living environment—especially for children” in demanding that “the major faults which mar the current manifestation of the policy of offshore processing must be acknowledged and rectified.”⁶ Documents leaked from Australia’s detention camp on Nauru revealed that more than 2,000 reported incidents of assault, sexual abuse, child abuse, and abysmal living conditions took place there.⁷ Australia’s practice of detaining asylum seekers offshore came under further legal pressure last year when the Papua New Guinea Supreme Court held that the refugee settlement on Manus Island violated fundamental rights

¹ Australian Government, Department of Immigration and Border Control, Operation Sovereign Borders, at <http://www.osb.border.gov.au>.

² *Id.*

³ Elibritt Karlsen, Parliament of Australia, *Australia’s Offshore Processing of Asylum Seekers in Nauru and PNG: A Quick Guide to Statistics and Resources* (December 2016), available at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/Offshore#_Total_number_of.

⁴ In 2016, Australia spent over \$1.1 billion on its offshore detention facilities. *See id.*

⁵ Robb M. Stewart, *Australia Strikes Deal to Resettle Refugees in U.S. U.S. to Vet Refugees; Most Are from Afghanistan, Pakistan, Iraq, Iran and Sri Lanka*, WALL ST. J. (Nov. 12, 2016).

⁶ Parliament of Australia, *Legal and Constitutional Affairs References Committee—Serious Allegations of Abuse, Self-Harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and Any Like Allegations in Relation to the Manus Regional Processing Centre Report*, at vi (Apr. 2017), available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2F8a71c329-c6de-4ca0-82f4-de5a61931e67%22>.

⁷ Paul Farrell, Nick Evershed & Helen Davidson, *The Nauru Files: Cache of 2,000 Leaked Reports Reveal Scale of Abuse of Children in Australian Offshore Detention*, GUARDIAN (Aug. 10, 2016), at <https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>.

guaranteed by the PNG constitution and therefore ordered the PNG and Australian governments to present a plan for resettlement.⁸

On November 13, 2016, the Australian Prime Minister, Malcolm Turnbull, together with the Minister for Immigration and Border Protection, announced that Australia had reached an agreement

with the United States and it will not under any circumstance be available to any future illegal maritime arrivals (IMAs) to Australia.

The priority under this arrangement will be for resettlement of those who are most vulnerable, namely women, children and families.

US authorities will conduct their own assessment of refugees and decide which people are resettled in the US.

Refugees will need to satisfy standard requirements for admission into the US, including passing health and security checks.

This process will take time and the resettlement will be gradual.

This arrangement is supported by the United Nations High Commissioner for Refugees and we will continue to engage with UNHCR on its implementation.

We will continue to support the Governments of Nauru and Papua New Guinea to return people determined not to be owed protection. These people should return to their country of origin.

...

Settlement in Australia will never be an option for those found to [be] refugees in regional processing centres nor for anyone who attempts to travel to Australia illegally by boat in the future.

Australia's border protection policy remains consistent and firm. Operation Sovereign Borders will continue to turnback people smuggling ventures where it is safe to do so and any illegal maritime arrivals to Australia will be sent to regional processing centres.⁹

Former U.S. Secretary of State John Kerry briefly addressed the agreement earlier in the day in response to a question from a reporter. Kerry said:

[O]bviously this has been a great concern of people everywhere because we have more refugees today than we've ever had since World War II. And it's a pressing, pressing issue.

We in the United States have agreed to consider referrals from UNHCR on refugees now residing in Nauru and in Papua New Guinea. And we know that these refugees are of special interest to UNHCR and we're very engaged with them on a humanitarian basis there and in other parts of the world.¹⁰

UNHCR issued a press release endorsing the agreement:

The approach taken by Australia in transferring refugees and asylum-seekers to open-ended detention in Papua New Guinea and Nauru has caused immense harm to vulnerable people who have sought asylum since 2013. In this context, UNHCR welcomes the announcement today that refugees currently held in Nauru and Papua New Guinea will be relocated under a bilateral

⁸ *Namah v Pato* [2016] PGSC 13; SC1497 (Papau N.G.).

⁹ Prime Minister of Australia Malcolm Turnbull Press Release, Refugee Resettlement from Regional Processing Centres (Nov. 13, 2016), at <https://www.pm.gov.au/media/2016-11-13/refugee-resettlement-regional-processing-centres>.

¹⁰ U.S. Dep't of State Press Release, Remarks by Secretary of State John Kerry (Nov. 13, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/11/264266.htm>.

arrangement between Australia and the United States.

The arrangement reflects a much-needed, long-term solution for some refugees who have been held in Nauru and Papua New Guinea for over three years and who remain in a precarious situation. It is on this basis that UNHCR will endorse referrals made from Australia to the United States, on a one-off, good offices, humanitarian basis, in light of the acute humanitarian situation. . . .¹¹

Further details of the agreement are unavailable because the agreement remains classified.¹² Among other things, the Australian government declined to say whether Australia had promised the United States anything in exchange.¹³ At an early stage of the negotiations, Prime Minister Turnbull had indicated that Australia would accept refugees who are being held in Costa Rica during the assessment of their U.S. asylum claims.¹⁴ More recently, Ann Richard, who was the U.S. Assistant Secretary of State for Population, Refugees and Migration at the time the agreement was negotiated, explained in an interview:

When the Australians first came to us my motivation was let's do this, let's make this happen, we have got to get these individuals to a better place.

I have never been to either of these locations but my understanding is that the people there are really suffering and they are suffering in part because their situation is so open-ended.

They don't know what is going to become of them and they don't know where they are going to live out the rest of their lives so I thought we should really make this happen. Others at the State Department then got involved and said, "Well, what kind of things can we discuss with the Australians in order to affect an arrangement where everybody does a little extra from their country."¹⁵

Richard explained that Australia would be expected to increase its intake of refugees from Africa, a troubled region hosting more than a quarter of the world's refugees, and to do more to reunite families torn apart during the refugee journey.¹⁶

Shortly after his inauguration, President Donald Trump expressed serious reservations about the agreement. President Trump spoke with Australian Prime Minister Malcolm

¹¹ UNHCR Press Release, UNHCR to Endorse the Australia-United States Relocations as "Offshore Processing" Arrangements Fail Refugees (Nov. 13, 2016), at <http://www.unhcr.org/en-au/news/press/2016/11/58290a5b4/unhcr-to-endorse-australia-united-states-relocations-as-offshore-processing.html>.

¹² Helen Davidson, *Senior US Republicans Criticize 'Secret' Refugee Deal with Australia*, GUARDIAN (Nov. 25, 2016), at <https://www.theguardian.com/australia-news/2016/nov/25/us-republicans-secret-refugee-deal-australia>; Zoe Daniel & Stephanie March, *US Refugee Deal: Architect of Deal Says Arrangement Loosely Based on Australia 'Doing More'*, ABC NEWS (Mar. 21, 2017), at <http://www.abc.net.au/news/2017-03-22/us-refugee-deal-architect-says-based-on-australia-doing-more/8375250>.

¹³ Stewart, *supra* note 5. In September 2016, at then-President Obama's global migration summit, Australia announced it would resettle migrants from U.S.-backed detention camps in exchange for the United States taking refugees in Australia's island detention centers. Tara Jon, *U.S. and Australia Might Be Close to a Deal on Refugee Swap*, TIME (Nov. 11, 2016), at <http://time.com/4567890/australia-refugee-deal-obama-nauru>.

¹⁴ Prime Minister Malcolm Turnbull, Speech at President Obama's Leaders' Summit on Refugees (Sept. 21, 2016), at <https://www.malcolmturnbull.com.au/media/speech-at-president-obamas-leaders-summit-on-refugees>; see also Dep't of Homeland Security Press Release, U.S. Expands Initiatives to Address Central American Migration Challenges (July 26, 2016), at <https://www.dhs.gov/news/2016/07/26/us-expands-initiatives-address-central-american-migration-challenges>.

¹⁵ Daniel & March, *supra* note 12.

¹⁶ *Id.*

Turnbull by telephone on January 28, 2017.¹⁷ According to press reports, the conversation became heated when discussing the refugee agreement, and Trump abruptly ended the call.¹⁸ A few days later, White House Press Secretary Sean Spicer said:

So the deal specifically deals with 1,250 people. They're mostly in Papua New Guinea, being held. Those people—part of the deal is that they have to be vetted in the same manner that we're doing now. There will be extreme vetting applied to all of them. That is part and parcel of the deal that was made. And it was made by the Obama administration with the full backing of the United States government.

The President, in accordance with that deal to honor what had been agreed upon by the United States government, and in ensuring that that vetting will take place in the same manner that we're doing it now, will go forward.¹⁹

Then on February 1, 2017, President Trump tweeted: “Do you believe this? The Obama Administration agreed to take thousands of illegal immigrants from Australia. Why? I will study this dumb deal!”²⁰ White House Press Secretary Sean Spicer subsequently addressed the agreement again, saying:

We have a tremendous amount of respect for the people of Australia, for Prime Minister Turnbull, and it was a follow-up on the call. But we're going to continue to work through this. We're going to honor the commitments that we've made in some way, meaning that we are going to vet these people in accordance with the agreement that happened. And we'll continue to have further updates as we do.²¹

In early April, officials from the U.S. Department of Homeland Security reportedly spent several days on Manus Island, distributing information about resettlement, interviewing refugees, and collecting fingerprints and photographs.²² After meeting with Prime Minister Turnbull on April 24, Vice President Mike Pence spoke about the agreement, confirming that the United States would implement the agreement, notwithstanding the Trump administration's doubts about its wisdom:

Let me make it clear the United States intends to honor the agreement, subject to the results of the vetting processes that now apply to all refugees considered for admission to the United States of America. President Trump has made it clear that we'll honor the agreement. It doesn't mean we admire the agreement. Frankly, looking back on the last administration, the President has never been shy about expressing frustration with other international agreements, most notably the so-called nuclear agreement with Iran. But rest assured, as I confirmed today with the Prime

¹⁷ White House Press Release, Readout of the President's Call with Australian Prime Minister Malcolm Turnbull (Jan. 28, 2017), at <https://www.whitehouse.gov/the-press-office/2017/01/28/readout-presidents-call-australian-prime-minister-malcolm-turnbull>.

¹⁸ Greg Miller & Philip Rucker, *This Was the Worst Call by Far': Trump Badgered, Bragged and Abruptly Ended Phone Call with Australian Leader*, WASH. POST (Feb. 2, 2017), at https://www.washingtonpost.com/world/national-security/no-gday-mate-on-call-with-australian-pm-trump-badgers-and-brags/2017/02/01/88a3bfb0-e8bf-11e6-80c2-30e57e57e05d_story.html.

¹⁹ White House Press Release, Press Briefing by Press Secretary Sean Spicer (Jan. 31, 2017), at <https://www.whitehouse.gov/the-press-office/2017/01/31/statement-press-secretary-sean-spicer>.

²⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 1, 2017), at <https://twitter.com/realdonaldtrump/status/827002559122567168>.

²¹ White House Press Release, Press Briefing by Press Secretary Sean Spicer (Feb. 2, 2017), at <https://www.whitehouse.gov/the-press-office/2017/02/03/press-briefing-press-secretary-sean-spicer-232017-8>.

²² Zoe Daniel & Stephanie Anderson, *US Officials Fingerprint Refugees on Manus Island as Part of US-Australia Resettlement Deal*, ABC NEWS (Apr. 5, 2017), at <http://www.abc.net.au/news/2017-04-05/us-officials-fingerprinting-refugees-on-manus-island/8416574>.

Minister, the United States of America will honor the agreement. And actually we've initiated the process of fulfilling that agreement, subject to the results of the vetting processes that now apply to all refugees in the United States.²³

INTERNATIONAL ORGANIZATIONS

Trump Administration Criticizes NATO Members for Failing to Meet Defense Spending Guideline; United States Joins Other NATO Members in Supporting Montenegro's Membership in the Organization

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Throughout Donald Trump's presidential campaign and into the first months of his presidency, he has warned that the United States' commitment to the North Atlantic Treaty Organization (NATO) may depend on whether its partner states increase their defense spending in line with previously adopted guidelines. While senior administration officials have reaffirmed U.S. commitments to the NATO alliance, including the North Atlantic Treaty's mutual defense obligation on several occasions,¹ President Trump himself did not so until mid-June. Separately, the Trump administration signaled its support for NATO by supporting the admission of Montenegro as a new member state.

The North Atlantic Treaty does not impose a quantitative requirement for defense spending. Article 3 provides:

In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.²

This treaty obligation has been supplemented by various subsequent agreements. In 2006, NATO member states made a political commitment to spending at least 2 percent of their gross domestic product (GDP) on defense.³ In 2014, the heads of state present at the meeting of the North Atlantic Council in Wales reiterated and expanded upon this commitment. An excerpt follows:

Allies currently meeting the NATO guideline to spend a minimum of 2% of their Gross Domestic Product (GDP) on defence will aim to continue to do so. . . . Allies whose current proportion of GDP spent on defence is below this level will: halt any decline in defence expenditure; aim to increase defence expenditure in real terms as GDP grows; aim to move towards the 2% guideline within a decade [i.e., by 2024] with a view to meeting their NATO Capability Targets and filling NATO's capability shortfalls.⁴

²³ White House Press Release, Remarks by the Vice President and Australian Prime Minister Turnbull at a Press Conference (Apr. 22, 2017), at <https://www.whitehouse.gov/the-press-office/2017/04/24/remarks-vice-president-and-australian-prime-minister-turnbull-press>.

¹ The North Atlantic Treaty, Art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 UNTS 243.

² *Id.* Art. 3.

³ North Atlantic Treaty Org., *Funding NATO* (last updated June 2, 2017), at http://www.nato.int/cps/en/natohq/topics_67655.htm.

⁴ North Atlantic Treaty Org., *Wales Summit Declaration*, para. 14 (Sept. 5, 2014), at http://www.nato.int/cps/en/natohq/official_texts_112964.htm.

Also included in the Wales Summit Declaration was a political commitment to spend at least 20 percent of defense spending on major new equipment and/or the research and development of such equipment:

Allies spending more than 20% of their defence budgets on major equipment, including related Research & Development, will continue to do so. . . . Allies who currently spend less than 20% of their annual defence spending on major new equipment, including related Research & Development, will aim, within a decade, to increase their annual investments to 20% or more of total defence expenditures.⁵

As of February 2017, only five NATO countries, including the United States, were meeting the 2 percent guideline.⁶ Three more are on track to meet that guideline within a year or two.⁷ Among the remaining member states, seventeen have recently begun to increase their defense spending.⁸ Thus, a growing number of NATO member states appear to be in a position to meet the 2 percent guideline before the 2024 deadline agreed to in Wales.

As a presidential candidate, Donald Trump described NATO as “obsolete,”⁹ and complained that the United States pays “a totally disproportionate share of NATO.”¹⁰ A few days later, he told a crowd at a rally that other NATO member states were “ripping off the United States.”¹¹ He concluded that “[e]ither they have to pay up for past deficiencies or they have to get out.”¹²

Since his inauguration, President Trump and other administration officials have continued to raise the defense spending issue. On February 15, 2017, Secretary of Defense Jim Mattis addressed the commitments of the United States and other NATO members:

I register the concern in European capitals about America’s commitment to NATO and the security of Europe. I also understand our long-term European allies and friends are seeking reassurance and clarity about American intentions. I join you today representing America’s commitment and President Trump’s “strong support” for our Alliance.

⁵ *Id.*

⁶ Those five countries are Estonia, Greece, Poland, the United Kingdom, and the United States. North Atlantic Treaty Org. Press Release, *Defence Expenditure of NATO Countries (2009–2016)*, PR/CP(2017)045 (Mar. 13, 2017), available at http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2017_03/20170313_170313-pr2017-045.pdf [hereinafter *Defence Expenditure of NATO Countries*]. These figures are based on calculations made by NATO. *Id.* This press release acknowledges that, because of disputes over the definition of defense spending, see *infra* notes 29–34 and accompanying text, the numbers published by NATO may diverge from those published by national authorities. See also White House Press Release, *Joint News Conference at NATO Headquarters, Mike Pence, Vice President of the United States, and Jens Stoltenberg, NATO Secretary General* (Feb. 20, 2017), at <https://www.whitehouse.gov/the-press-office/2017/02/20/remarks-vice-president-and-nato-secretary-general-stoltenberg-jpa> [hereinafter *February Joint News Conference*].

⁷ February Joint News Conference, *supra* note 6.

⁸ *Defence Expenditure of NATO Countries*, *supra* note 6.

⁹ See, e.g., “*This Week*” *Transcript: Donald Trump and Sen. Bernie Sanders*, ABC NEWS (Mar. 27, 2016), at <http://abcnews.go.com/Politics/week-transcript-donald-trump-sen-bernie-sanders/story?id=37949498> (“I think NATO’s obsolete. NATO was done at a time you had the Soviet Union, which was obviously larger, much larger than Russia is today. I’m not saying Russia’s not a threat. But we have other threats. We have the threat of terrorism and NATO doesn’t discuss terrorism, NATO’s not meant for terrorism. NATO doesn’t have the right countries in it for terrorism.”).

¹⁰ *Id.*

¹¹ Ashley Parker, *Donald Trump Says NATO is ‘Obsolete,’ UN is ‘Political Game,’* N.Y. TIMES (Apr. 2, 2016), at <https://www.nytimes.com/politics/first-draft/2016/04/02/donald-trump-tells-crowd-hed-be-fine-if-nato-broke-up>.

¹² *Id.*

A decade ago, when I was serving as Supreme Allied Commander for Transformation, I watched then-Secretary of Defense Robert Gates warn members of this Council that Congress and the American body politic would lose their patience for carrying a disproportionate burden of the defense of Allies. . . .

The impatience Secretary Gates predicted is now a governmental reality. As noted by a European Minister of Defense, calling for two percent defense spending is a “fair” demand from the American people to their long-time Allies and friends in Europe. No longer can the American taxpayer carry a disproportionate share of the defense of western values. Americans cannot care more for your children’s future security than you do. Disregard for military readiness demonstrates a lack of respect for ourselves, for the Alliance, and for the freedoms we inherited, which are now clearly threatened.

. . .

I owe it to you to give you clarity on the political reality in the United States, and to state the fair demand from my country’s people in concrete terms. America will meet its responsibilities, but if your nations do not want to see America moderate its commitment to this Alliance, each of your capitals needs to show support for our common defense.

Specifically, we must ensure we are not in the same spot at the end of the year that we are in today. We must adopt a plan this year, including milestone dates, to make steady progress toward meeting Warsaw and Wales commitments.

If your nation meets the two percent target, we need your help to get other allies there. If you have a plan to get there, our Alliance is counting on you to accelerate your efforts and show bottom-line results. And if you do not yet have a plan, it is important to establish one soon. Showing immediate and steady progress to honor commitments made at Warsaw and Wales must become a reality if we are to sustain a credible Alliance and adequately defend ourselves.

. . . NATO will remain strong only if all nations show their respect for NATO’s benefits and carry a full and equal burden of our defense. There is no substitute for our security—and we can afford peace and survival as free nations.¹³

Vice President Mike Pence echoed Mattis’s key points in a speech and press conference in Europe later that same month.¹⁴ On February 20, 2017, NATO Secretary General Stoltenberg also emphasized the importance of burden-sharing:

At the same time, I fully support what has been underlined by President Trump and by Vice President Pence today, the importance of burden-sharing. And I think we have to remember that this is not only something that the U.S. is asking for, it’s actually something that 28 Allies agreed. The leaders from 28 NATO-allied countries sat around the same table in 2014 and agreed to stop the cuts, to gradually increase defense spending, and then to meet the 2 percent target within a decade. And the good news is that we are moving in the right direction. After many years of decline, after many years of defense cuts across Europe and Canada, we saw that in 2015 we stopped the cuts, the first year after we made the pledge. And then, in 2016, we had

¹³ Jim Mattis, U.S. Secretary of Defense, Intervention by Secretary of Defense Mattis, Session One of the North Atlantic Council (Feb. 15, 2017), at <https://nato.usmission.gov/february-15-2017-intervention-secretary-defense-mattis-session-one-north-atlantic-council>; Dan Lamothe & Michael Birnbaum, *Defense Secretary Mattis Issues New Ultimatum to NATO Allies on Defense Spending*, WASH. POST (Feb. 15, 2017), at <https://www.washingtonpost.com/news/checkpoint/wp/2017/02/15/mattis-trumps-defense-secretary-issues-ultimatum-to-nato-allies-on-defense-spending>; Helene Cooper, *Defense Secretary Mattis Tells NATO Allies to Spend More, or Else*, N.Y. TIMES (Feb. 15, 2017), at <https://www.nytimes.com/2017/02/15/world/europe/jim-mattis-nato-trump.html>.

¹⁴ Mike Pence, Vice President of the United States, Munich Security Conference (Feb. 18, 2017), available at <https://nl.usembassy.gov/remarks-vice-president-pence-munich-security-conference-february-18>; February Joint News Conference, *supra* note 6.

a significant increase of 3.8 percent in real terms, or \$10 billion. There is a long way to go, and much remains to be done, but at least we have turned a corner and we have started to move in the right direction. I am encouraged by that, and I expect all allies to make good on the promise that they made in 2014 to increase defense spending and to make sure to have a fairer burden-sharing.¹⁵

Neither Mattis nor Pence elaborated on what Mattis had in mind when he said that the United States may “moderate its commitment[s]” if other NATO member states failed to meet the 2 percent guideline.¹⁶ As a candidate, President Trump hinted at the possibility that the United States might refuse to fulfill its collective-defense obligations in the event of an attack against a “massive nation[.]” with “tremendous wealth” that hadn’t been spending adequately on defense.¹⁷ These collective-defense obligations are codified in Article 5 of the North Atlantic Treaty, which provides:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.¹⁸

Another possibility would be to withdraw troops from—or stop deploying new troops to—countries that are not meeting the 2 percent guideline. Addressing this possibility, the senior NATO commander based in the United States said: “If the U.S. forces would stop deploying, it would be some kind of strategic shock in Europe.”¹⁹ The United States might also withdraw some of its equipment based in Germany, which hosts the largest contingent of U.S. military personnel in Europe.²⁰ Since the U.S. military relies on its military personnel and bases in Germany for operations beyond the scope of NATO,²¹ however, independent strategic considerations may weigh against such a withdrawal.

¹⁵ February Joint News Conference, *supra* note 6.

¹⁶ Mattis, *supra* note 13.

¹⁷ *Transcript: Donald Trump on NATO, Turkey’s Coup Attempt and the World*, N.Y. TIMES (July 21, 2016), at <https://www.nytimes.com/2016/07/22/us/politics/donald-trump-foreign-policy-interview.html> (On June 21, 2016, Donald Trump said “If we cannot be properly reimbursed for the tremendous cost of our military protecting other countries, and in many cases the countries I’m talking about are extremely rich. . . . I would prefer that we be able to continue, but if we are not going to be reasonably reimbursed for the tremendous cost of protecting these massive nations with tremendous wealth. . . . We’re talking about countries that are doing very well. Then yes, I would be absolutely prepared to tell those countries, ‘Congratulations, you will be defending yourself.’”); see also Steven Erlanger, *As Trump Era Arrives, A Sense of Uncertainty Grips the World*, N.Y. TIMES (Jan. 16, 2017), at <https://www.nytimes.com/2017/01/16/world/europe/trump-eu-nato-merkel-brexit-russia-germany-china.html>.

¹⁸ North Atlantic Treaty, *supra* note 1, Art. 5.

¹⁹ Michael Birnbaum, *A Top NATO General Echoes Trump, Calling Aspects of the Alliance ‘Obsolete,’* WASH. POST (Jan. 17, 2017), at https://www.washingtonpost.com/world/top-nato-general-aspects-of-alliance-are-obsolete-echoing-trump/2017/01/17/9a91eff0-dcd8-11e6-8902-610fe486791c_story.html; see also Michael Birnbaum, *Even as Trump Seeks Warmer Ties with Russia, U.S. Deploys Troops Across Eastern Europe*, WASH. POST (Jan. 30, 2017), at https://www.washingtonpost.com/world/us-troops-begin-long-planned-deployment-across-eastern-europe-even-as-trump-talks-of-cooperation-with-russia/2017/01/30/e516f508-e6f0-11e6-80c2-30e57e57e05d_story.html.

²⁰ Rick Noack, *German Defense Ministry Contradicts Trump, Says It Doesn’t Owe U.S. Money for NATO*, WASH. POST (Mar. 19, 2017), at <https://www.washingtonpost.com/news/worldviews/wp/2017/03/19/german-defense-ministry-contradicts-trump-says-it-doesnt-owe-u-s-money-for-nato>.

²¹ *Id.*

President Trump's displeasure with NATO partners resurfaced again in March. Following a meeting with German Chancellor Angela Merkel, President Trump tweeted: "Germany owes . . . vast sums of money to NATO & the United States must be paid more for the powerful, and very expensive, defense it provides to Germany!"²² German defense minister Ursula von der Leyen responded:

There is no debt account in NATO. To relate the 2% defense spending that we want to reach in the next decade solely to NATO is wrong . . . The defense spending also goes to UN-peace mission[s], into European missions and towards our contributions to the fight against ISIS terrorism.²³

German Chancellor Angela Merkel has reiterated Germany's commitment to meeting the 2 percent guideline by 2024²⁴ and German Defense Minister Ursula von der Leyen described the United States' demand for more spending as "a fair request" and agreed that "[e]veryone has to make a contribution."²⁵ Many German officials see the goal as unrealistic, however.²⁶ On March 31, German foreign minister Sigmar Gabriel said

The idea that Germany in a few years will spend €70 billion each year on the army is an idea that I consider absurd . . . It's particularly absurd if we look at France which spends €40 billion but has also a nuclear program included in it. I would honestly not even know where to put all the aircraft carriers we would buy with €70 billion.²⁷

He went on to emphasize the nature of the spending commitment in the Wales Declaration:

It is important to correctly quote the Wales declaration. Its guidelines say members should lean towards a 2 percent spending, but it is at no point written that this is a fixed goal and that every member state should invest 2 percent of its GDP in defense.²⁸

German leaders also endorsed a broad interpretation of the types of expenses that should be counted for purposes of meeting the 2 percent goal. Defense Minister Leyen emphasized that German expenditure on UN peacekeeping missions is part of a "modern understanding of security."²⁹ German leaders, including Chancellor Merkel and Foreign Minister Gabriel, have pointed out that if Germany's €30–40 billion in spending on the Syrian refugee crisis were included in the NATO security spending calculations, Germany would already be either

²² Donald Trump (@realDonaldTrump), TWITTER (Mar. 18, 2017, 6:15 AM), at <https://twitter.com/realDonaldTrump/status/843088518339612673>; Donald Trump (@realDonaldTrump), TWITTER (Mar. 18, 2017, 6:23 AM), at <https://twitter.com/realDonaldTrump/status/843090516283723776>.

²³ Euan McKirdy, *Germany's Defense Minister to Trump, No We Don't Owe NATO Money*, CNN (Mar. 20, 2017), at <http://www.cnn.com/2017/03/20/politics/nato-commitment-germany-reacts-trump>.

²⁴ Noack, *supra* note 20.

²⁵ Michael Birnbaum, *Trump's Calls for Europe to Increase Defense Spending Could Force Other Upheaval*, WASH. POST (Feb. 15, 2017), at https://www.washingtonpost.com/world/europe/trumps-calls-for-europe-to-increase-defense-spending-could-force-other-upheaval/2017/02/15/fe257b44-efc1-11e6-a100-fdaaf400369a_story.html.

²⁶ *Id.*

²⁷ David M. Herszenhorn & Giulia Paravicini, *Germany Pushes Back on Trump's NATO Demands*, POLITICO (Mar. 31, 2017, updated Apr. 3, 2017), at <http://www.politico.eu/article/germany-pushes-back-on-donald-trump-nato-demands-angela-merkel>.

²⁸ *Id.*

²⁹ Noack, *supra* note 20.

at or very close to the 2 percent guideline.³⁰ Italian Foreign Minister Angelino Alfano has made a similar point about Italian spending on search-and-rescue operations for migrants in the Mediterranean.³¹ In addition, European officials have suggested that foreign development aid—an area where the EU’s spending exceeds that of the United States³²—might properly be understood as part of security spending. At the Munich Security Conference in February, Chancellor Merkel said:

When we help people in their home countries to live a better life and thereby prevent crises, this is also a contribution to security So I will not be drawn into a debate about who is more military-minded and who is less.³³

European Commission President Jean-Claude Juncker has also endorsed a broader understanding of European contributions to stability and security.³⁴

At a press conference on April 12, 2017, President Trump suggested that his views on NATO may have evolved. Most significantly, he explicitly abandoned his earlier characterization of NATO as obsolete. At a joint press conference with Stoltenberg, Trump declared: “I said it was obsolete; it’s no longer obsolete.”³⁵ Trump also took a softer tone but retained his focus on spending, saying:

In facing our common challenges, we must also ensure that NATO members meet their financial obligations and pay what they owe. Many have not been doing that. The Secretary General and I agree that other member nations must satisfy their responsibility to contribute 2 percent of GDP to defense. If other countries make their fair share, instead of relying on the United States to make up the difference, we will all be much more secure and our partnership will be made that much stronger.³⁶

On May 25, 2017, President Trump attended a NATO summit and personally met with other foreign leaders. His remarks again focused on spending:

The NATO of the future must include a great focus on terrorism and immigration, as well as threats from Russia and on NATO’s eastern and southern borders. These grave security concerns are the same reason that I have been very, very direct with Secretary Stoltenberg and members of the Alliance in saying that NATO members must finally contribute their fair share and meet their

³⁰ Lorne Cook, *U.S. Gives NATO Allies 2 Months for Defense Spending Plans*, ASSOCIATED PRESS (Mar. 31, 2017), at <https://apnews.com/ce256f31a023483b8ed5d246abd49290>; Robin Emmott, *Europe Dodges Trump’s Defense Spending Ultimatum*, REUTERS (Feb. 21, 2017), at <http://www.reuters.com/article/us-usa-trump-nato-analysis-idUSKBN1601IF>; Amanda Erickson, *No, Germany Doesn’t Owe America ‘Vast Sums’ of Money for NATO*, WASH. POST (Mar. 18, 2017), at <https://www.washingtonpost.com/news/worldviews/wp/2017/03/18/no-germany-doesnt-owe-america-vast-sums-of-money-for-nato>.

³¹ Herszenhorn & Paravicini, *supra* note 27.

³² Emmott, *supra* note 30.

³³ Erickson, *supra* note 30.

³⁴ Emmott, *supra* note 30 (“Things look very different if we add up our defense budgets, our development aid budgets and our humanitarian efforts all around the world. . . . We want . . . a broader understanding that the word ‘stability’ in the world means defense expenditure, human aid and development aid.”).

³⁵ White House Press Release, Joint Press Conference at White House, Donald Trump, President of the United States, and Jens Stoltenberg, NATO Secretary General, (Apr. 12, 2017), at <https://www.whitehouse.gov/the-press-office/2017/04/12/joint-press-conference-president-trump-and-nato-secretary-general> [hereinafter April Joint Press Conference]. Trump’s comments linked his changed view to NATO’s efforts to combat terrorism. Immediately before describing his changed opinion, Trump said: “The Secretary General and I had a productive discussion about what more NATO can do in the fight against terrorism. I complained about that a long time ago and they made a change, and now they do fight terrorism.” *Id.*

³⁶ April Joint Press Conference, *supra* note 35.

financial obligations, for 23 of the 28 member nations are still not paying what they should be paying and what they're supposed to be paying for their defense.

This is not fair to the people and taxpayers of the United States. And many of these nations owe massive amounts of money from past years and not paying in those past years. Over the last eight years, the United States spent more on defense than all other NATO countries combined. If all NATO members had spent just 2 percent of their GDP on defense last year, we would have had another \$119 billion for our collective defense and for the financing of additional NATO reserves.

We should recognize that with these chronic underpayments and growing threats, even 2 percent of GDP is insufficient to close the gaps in modernizing, readiness, and the size of forces. We have to make up for the many years lost. Two percent is the bare minimum for confronting today's very real and very vicious threats. If NATO countries made their full and complete contributions, then NATO would be even stronger than it is today, especially from the threat of terrorism.³⁷

An omission in Trump's speech garnered significant attention: at no point did he reaffirm the United States' obligations under Article 5. According to press reports, that affirmation was deleted shortly before Trump spoke, though it is unclear by whom.³⁸ More recently, Vice President Mike Pence specifically reaffirmed the United States' commitment to Article 5, saying:

We will meet our obligations to our people to provide for the collective defense of all our allies.

The United States is resolved, as we were at NATO's founding and in every hour since, to live by that principle that an attack on one of us is an attack on us all.³⁹

On June 9, 2017, at a joint press conference with the Romanian president, President Trump finally reaffirmed the U.S. commitment to NATO's collective defense obligation when he said, in response to a question from a journalist:

Well, I'm committing the . . . United States to Article 5. And certainly we are there to protect. And that's one of the reasons that I want people to make sure we have a very, very strong force by paying the kind of money necessary to have that force. But, yes, absolutely, I'd be committed to Article 5.⁴⁰

Separately, the U.S. Senate and President Trump have evinced their continued support for the Alliance by approving Montenegro's membership in NATO.⁴¹ Pursuant to the North Atlantic Treaty, the members of NATO may, by a unanimous decision, invite "any other European State in a position to further the principles of this Treaty and to contribute to

³⁷ White House Press Release, Donald Trump, U.S. President, Remarks by President Trump at NATO Unveiling of the Article 5 and Berlin Wall Memorials (May 25, 2017), at <https://www.whitehouse.gov/the-press-office/2017/05/25/remarks-president-trump-nato-unveiling-article-5-and-berlin-wall>.

³⁸ Susan Glasser, *Trump National Security Team Blindsided by NATO Speech*, POLITICO (June 5, 2017), at <http://www.politico.com/magazine/story/2017/06/05/trump-nato-speech-national-security-team-215227>.

³⁹ White House Press Release, Remarks by the Vice President to the Atlantic Council (June 5, 2017), at <https://www.whitehouse.gov/the-press-office/2017/06/05/remarks-vice-president-atlantic-council>.

⁴⁰ White House Press Release, Joint Press Conference at White House, Donald Trump, President of the United States, and Klaus Iohannis, President of Romania, (June 9, 2017), at <https://www.whitehouse.gov/the-press-office/2017/06/09/remarks-president-trump-and-president-iohannis-romania-joint-press>.

⁴¹ Andrew Hanna, *Senate Votes Overwhelmingly to Admit Montenegro to NATO*, POLITICO (Mar. 28, 2017), at <http://www.politico.com/story/2017/03/senate-approves-montenegro-nato-treaty-236606>; White House Press Release, Statement By the Press Secretary on Montenegro's NATO Accession Protocol (Apr. 11, 2017), at <https://www.whitehouse.gov/the-press-office/2017/04/11/statement-press-secretary-montenegro-nato-accession-protocol> [hereinafter Statement on Montenegro].

the security of the North Atlantic area to accede to th[e] [t]reaty . . .” and thereby become a member of NATO.⁴²

Montenegro began the process to join NATO eight years ago, in 2009, when it joined the Membership Action Plan, NATO’s program of advice and assistance to prepare countries to join NATO.⁴³ Throughout the process, Russia has firmly and vocally opposed to NATO’s expansion in the Balkans.⁴⁴ The current NATO members extended such a formal membership invitation to Montenegro on May 19, 2016, by signing an accession protocol.⁴⁵

When President Harry Truman initially submitted the North Atlantic Treaty to the U.S. Senate for its advice and consent in 1949, he committed to seeking the such advice and consent again for the addition of any new members of NATO.⁴⁶ Accordingly, on June 28, 2016, then-President Barack Obama and then-Secretary of State Kerry submitted the accession protocol to the Senate for its approval.⁴⁷ On March 28, 2017, the Senate approved Montenegro’s accession by a vote of 97–2.⁴⁸

Following the Report of the Senate Committee on Foreign Relations, the Senate included the following declaration in its resolution approving Montenegro’s accession:

The advice and consent of the Senate under section 1 is subject to the following declarations: . . .
 (6) Support for 2014 wales summit defense spending benchmark. The Senate declares that all NATO members should continue to move towards the guideline outlined in the 2014 Wales Summit Declaration to spend a minimum of 2 percent of their Gross Domestic Product (GDP) on defense and 20 percent of their defense budgets on major equipment, including research and development, by 2024.⁴⁹

Several Republican senators likewise emphasized defense spending in their individual statements surrounding the vote on Montenegro.⁵⁰

President Trump signed the U.S. instrument of ratification of the accession protocol on April 11—the day before Trump announced his change of view regarding NATO’s

⁴² North Atlantic Treaty, *supra* note 1, Art. 10.

⁴³ North Atlantic Treaty Org., *Relations with Montenegro* (last updated June 12, 2017), at http://www.nato.int/cps/cs/natohq/topics_49736.htm; North Atlantic Treaty Org., *Membership Action Plan* (last updated June 12, 2017), at http://www.nato.int/cps/en/natohq/topics_37356.htm.

⁴⁴ Steven Erlanger, *NATO Unveils Plans to Grow, Drawing Fury and Threats From Russia*, N.Y. TIMES (Dec. 2, 2015), at <https://www.nytimes.com/2015/12/03/world/europe/kerry-nato-syria-russia.html>; Niraj Chokshi, *Trump Appears to Push Aside the Leader of Montenegro*, N.Y. TIMES (May 25, 2017), at <https://www.nytimes.com/2017/05/25/us/politics/trump-push-aside-leader-montenegro-nato-summit.html>.

⁴⁵ North Atlantic Treaty Org., *NATO Foreign Ministers Sign Accession Protocol with Montenegro* (last updated May 19, 2016), at http://www.nato.int/cps/en/natohq/news_131132.htm.

⁴⁶ Marjorie M. Whiteman, 14 DIG. INT’L L. 93, 100 (1970) (Quoting the report of the Senate Committee on Foreign Relations dated June 6, 1949, recommending advice and consent to ratification of the North Atlantic Treaty: “Inasmuch as the admission of new members might radically alter our obligations under the pact, the committee examined article 10 very carefully. The question arose whether any United States decision respecting new members would be based solely on Presidential action or would require Senate approval. Consequently, the committee was fully satisfied by the commitment of the President, delivered by the Secretary of State, that he would consider the admission of the new member to the pact as the conclusion of a new treaty with that member and would seek the advice and consent of the Senate to each admission. The committee considers this an obligation binding upon the Presidential office.”).

⁴⁷ S. Treaty Doc. No. 114-12 (2016).

⁴⁸ 163 Cong. Rec. S2032-02.

⁴⁹ *Id.*; S. Exec. Rept. No. 115-1, at 8 (2017).

⁵⁰ 163 Cong. Rec. S1982-03 (statements of Senators Marco Rubio and Bob Corker); 163 Cong. Rec. S1981-05 (statement of Senator Mitch McConnell); 163 Cong. Rec. S2019-04 (statement of Senator Mike Lee).

obsolescence.⁵¹ Montenegro became NATO's twenty-ninth member state on June 5, 2017, at a ceremony that took place at the U.S. State Department.⁵²

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

President Trump Issues Executive Orders Suspending Refugee Program and Barring Entry by Individuals from Specified Countries

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On January 27, 2017, President Trump issued an executive order that: (1) prohibited nationals from seven majority-Muslim countries from entering the United States for ninety days; and (2) prohibited individuals from entering into the United States as refugees for 120 days. Courts stayed the order on constitutional and statutory grounds. In response to these stays, President Trump replaced the initial order with a new order that eliminated preferential treatment for refugees fleeing from religious persecution and narrowed the scope of persons prohibited from entering into the United States. Courts again issued stays, holding that the new order violated the Establishment Clause and the Immigration and Nationality Act. The Trump administration appealed, and the Supreme Court agreed to hear the case in October. Along with its grant of certiorari, the Court kept the lower court stays in place except as to people with no connection to the United States either personally or through family.

During the 2016 presidential election, Donald Trump campaigned on a platform of revamping the process and substance of U.S. policy regarding immigrant and nonimmigrant visas. The particulars of his proposals evolved over time. In December 2015, Trump's campaign website 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."¹ This proposal remained on the campaign website until February 2017. Trump frequently discussed these views on the air and during stump speeches. During an interview with CNN in March 2016, Trump said that "Islam hates [America],"² and suggested that the United States should not "allow people coming into the country who have this hatred of the United States."³ On Fox News, shortly after a terrorist attack in Brussels, Trump expressed his view that the country was "having problems with the Muslims."⁴ These "problems," according to Trump, justified implementation of a more rigorous vetting process for entry into the United States:

⁵¹ See Statement on Montenegro, *supra* note 41; see also *supra* note 35.

⁵² NATO Press Release, North Atlantic Treaty Organization, Montenegro Joins NATO as 29th Ally (June 5, 2017), at http://www.nato.int/cps/en/natohq/news_144647.htm; U.S. Dep't of State Press Release, Notice to the Press, Office of the Spokesperson, U.S. Department of State, Montenegro Joins the NATO Alliance, U.S. Department of State (June 2, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/06/271540.htm>.

¹ Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States,'* WASH. POST (Dec. 7, 2015), at <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states>.

² *Donald Trump: 'I Think Islam Hates Us,'* CNN (Mar. 9, 2016), available at <https://www.youtube.com/watch?v=C-Zj0tfZY6o>.

³ *Id.*

⁴ Mark Hensch & Jesse Byrnes, *Trump: 'Frankly, We're Having Problems with the Muslims,'* THE HILL (Mar. 22, 2016), at <http://thehill.com/blogs/ballot-box/presidential-races/273857-trump-frankly-were-having-problems-with-the-muslims>.

The time is overdue to develop a new screening test for the threats we face today. In addition to screening out all members or sympathizers of terrorist groups, we must also screen out any who have hostile attitudes towards our country or its principles—or who believe that Sharia law should supplant American law.⁵

As the campaign continued, Trump began to suggest that his revision of U.S. policy on immigration and refugee admissions would focus on specific geographic areas. In response to Republican criticism of his previous call for barring Muslims from entering the country, Trump said: we “call it territories. OK? We’re gonna do territories.”⁶ Trump’s later commentary suggested that the new focus on geographical territories *expanded* the breadth of his initial proposal to prohibit Muslims from entering the country:

I actually don’t think [focusing on territories instead of religion is] a rollback. In fact, you could say it’s an expansion. I’m looking now at territories. People were so upset when I used the word Muslim. Oh, you can’t use the word Muslim. Remember this. And I’m okay with that, because I’m talking territory instead of Muslim.⁷

Trump further elaborated on his proposal during one of the presidential debates, when he explained that “[t]he Muslim ban is something that in some form has morphed into an extreme vetting from certain areas of the world.”⁸

One week after his inauguration in January 2017, President Trump exercised his power pursuant to Section 212(f) of the Immigration and Nationality Act (INA) to issue an executive order implementing his “extreme vetting” proposal. Section 212(f) provides:

Whenever the President 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, he may by proclamation, and for such period as he shall deem necessary, 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.⁹

The order, which took immediate effect, contained three key provisions that banned immigrants and nonimmigrants from certain countries from entering the United for ninety days,¹⁰ suspended the U.S. Refugee Admissions Program for 120 days,¹¹ and imposed a variety of reporting and vetting requirements.¹²

Section 1 of the executive order noted that “the visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States.”¹³ The text continues:

⁵ Daniel White, *Read Donald Trump’s Ohio Speech on Immigration and Terrorism*, TIME (Aug. 15, 2016), at <http://time.com/4453110/donald-trump-national-security-immigration-terrorism-speech>.

⁶ Lesley Stahl, *The Republican Ticket: Trump and Pence*, CBS NEWS (July 17, 2016), at <http://www.cbsnews.com/news/60-minutes-trump-pence-republican-ticket>.

⁷ *Meet the Press – July 24, 2016*, NBC NEWS (July 24, 2016), at <http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706>.

⁸ *Full Transcript: Second 2016 Presidential Debate*, POLITICO (Oct. 10, 2016), at <http://www.politico.com/story/2016/10/2016-presidential-debate-transcript-229519>.

⁹ 8 U.S.C. § 1182(f) (2012).

¹⁰ Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017), available at <https://www.gpo.gov/fdsys/pkg/FR-2017-02-01/pdf/2017-02281.pdf>.

¹¹ *Id.* at 8979

¹² *Id.* at 8978–89.

¹³ *Id.* at 8977.

In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including “honor” killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.¹⁴

Section 3 prohibited certain immigrants and nonimmigrants from entering the United States for ninety days. The order described the prohibition as a temporary pause to allow the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to “immediately conduct a review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.”¹⁵ To “temporarily reduce investigative burdens on relevant agencies” during the pendency of this review, the order suspended “entry into the United States” for “immigrants and nonimmigrants”—excluding “foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas”—from seven countries: Iraq, Syria, Sudan, Iran, Somalia, Libya, and Yemen.¹⁶ The order also authorized the Secretaries of State and Homeland Security to waive the suspension “on a case-by-case basis, and when in the national interest,” and to “issue visas or other immigration benefits to nationals of countries for which visas and benefits are otherwise blocked.”¹⁷ President Trump issued the temporary ban based on his determination that continued access to the United States for citizens of these countries “would be detrimental to the interests of the United States.”¹⁸

Section 5 of the executive order related to the United States Refugee Admissions Program. The order immediately “suspend[ed] the U.S. Refugee Admissions Program (USRAP) for 120 days,” during which time the president ordered that

the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures.¹⁹

The order provided that 120 days after the date of the order, “the Secretary of State shall resume USRAP admissions only for nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that such additional procedures are adequate to ensure the security and welfare of the United States.”²⁰

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See id.* at 8978.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 8979.

²⁰ *Id.*

Section 5 also provided that once the refugee program re-opened, it would be administration policy to: prioritize admission of refugees who were subject to religious persecution, but only if they belonged to a minority religion within the country of origin;²¹ prohibit Syrian nationals from entering as refugees until “such time as [the president] determine[s] that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest”;²² and cap the total number of refugees allowed per year at 50,000.²³ As with Section 3, the order created a waiver process:

[T]he Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when the person is already in transit and denying admission would cause undue hardship—and it would not pose a risk to the security or welfare of the United States.²⁴

During the announcement of the new executive order, Trump observed: “This is the ‘Protection of the Nation from Foreign Terrorist Entry into the United States.’ We all know what that means.”²⁵ The next day, Rudy Giuliani—a former advisor to President Trump—gave the media some additional information regarding Trump’s proposal: “I’ll tell you the whole history of it. So when [the president] first announced it, he said ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’”²⁶ Giuliani advised Trump to “focus[] on, instead of religion, danger—the areas of the world that create danger for us.”²⁷

Within days, both individual and state plaintiffs filed lawsuits to challenge the executive order.²⁸ Chief among their arguments was a claim that the order violated the Establishment Clause. The plaintiffs relied on statements made by Trump—over the course of his candidacy and during his time in office—to argue that the government “intended to disfavor Islam and favor Christianity.”²⁹ They observed that Section 3 suspended entry into the United States from seven majority-Muslim countries, and that Sections 5(b) and 5(e) operated in conjunction to permit entry by Christian refugees but not Muslim refugees.³⁰ Section 5(b) provides:

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Craig McAndrew, *President Trump Signs Travel Ban Executive Order*, CSPAN, at 4:07 (Jan. 27, 2017), at <https://www.c-span.org/video/?c4653208/president-trump-signs-travel-ban-executive-order>.

²⁶ *Giuliani: Immigration Ban is Based on Danger, not Religion*, FOX NEWS, at 3:41 (Jan. 29, 2017), at <http://video.foxnews.com/v/5301869519001/?#sp=show-clips>.

²⁷ *Id.*

²⁸ See, e.g., *Int’l Refugee Assistance Project v. Trump*, No. 8:17-cv-00361-TDC, Complaint, at 150–52 (D. Md. Feb. 7, 2017), available at <https://www.clearinghouse.net/chDocs/public/IM-MD-0004-0001.pdf> [hereinafter IRAP Complaint]; *Washington v. Trump*, No. 2:17-cv-00141-JLR, Complaint, at 48–52 (W.D. Wash. Jan. 30, 2017), available at https://www.pacermonitor.com/view/M6A6GYA/State_of_Washington_v_Trump_et_al_wawdce-17-00141__0001.0.pdf [hereinafter Washington Complaint]; *Sarsour v. Trump*, No. 1:17-cv-00120, Complaint, at 67–73 (E.D. Va. Jan. 30, 2017), available at https://www.cair.com/images/press_releases/Complaint-1.30.2017FOR-FILING.pdf.

²⁹ Washington Complaint, *supra* note 28, at para. 50.

³⁰ See *supra* note 28.

Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality.³¹

Section 5(e), for its part, authorized the Secretaries of State and Homeland Security to grant admission to refugees from the seven majority-Muslim countries notwithstanding Section 3 “so long as they determine that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution”³² Plaintiffs argued that these provisions effectuated President Trump’s “intent to enact policies that exclude Muslims from entering the United States and favor Christians seeking to enter the United States”³³ by “discriminat[ing] between ‘minority religions’ and majority religions, [and by] explicitly granting official preference to foreign adherents of minority faiths in the refugee-application process.”³⁴

Some litigants raised procedural due process challenges,³⁵ citing reports that enforcement agencies were denying entry even to lawful permanent residents.³⁶ Litigants argued that barring lawful permanent residents from reentering the United States violated the Fifth Amendment’s Due Process Clause by taking away rights without sufficient notice or opportunity to be heard.³⁷ On February 1, White House legal counsel—after acknowledging “reasonable uncertainty” concerning the scope of the Order—clarified that the Order did not “apply to lawful permanent residents of the United States.”³⁸ This clarification came after then DHS Secretary John Kelly announced:

In applying the provisions of the president’s executive order, I hereby deem the entry of lawful permanent residents to be in the national interest. Accordingly, absent the receipt of significant derogatory information indicating a serious threat to public safety and welfare, lawful permanent resident status will be a dispositive factor in our case-by-case determinations.³⁹

Other plaintiffs argued that the order violated the Equal Protection Clause.⁴⁰ Like the Establishment Clause claims, these arguments relied in part on “statements made by

³¹ 82 Fed. Reg. at 8979.

³² *Id.*

³³ IRAP Complaint, *supra* note 28, at para. 38.

³⁴ *Id.*, para. 152.

³⁵ *E.g.*, Darweesh v. Trump, No. 1:17-cv-00480, Complaint, at 57–62 (E.D.N.Y. Jan. 28, 2017), available at https://www.aclu.org/sites/default/files/field_document/1_-_complaint.pdf; Loughalam v. Trump, No. 17-cv-10154, Complaint, at 40–43 (D. Mass. Jan. 28, 2017) [hereinafter Loughalam Complaint]. See generally University of Michigan Law School, Civil Rights Litigation Clearinghouse, *Civil Rights Challenges to Trump Refugee/Visa Order* (2017), at <https://www.clearinghouse.net/results.php?searchSpecialCollection=44>.

³⁶ See Dan Merica, *How Trump’s Travel Ban Affects Green Card Holders and Dual Citizens*, CNN (Jan. 29, 2017), at <http://www.cnn.com/2017/01/29/politics/donald-trump-travel-ban-green-card-dual-citizens/index.html>.

³⁷ See Washington Complaint, *supra* note 28.

³⁸ Donald F. McGahn II, Counsel to the President, Memorandum to the Acting Secretary of State, the Acting Attorney General, and the Secretary of Homeland Security (Feb. 1, 2017), available at https://www.clearinghouse.net/chDocs/resources/new_DonaldFMcGahnIICounseltothePresident_1485982416.pdf.

³⁹ Dep’t of Homeland Security Press Release, Statement by Secretary John Kelly on the Entry of Lawful Permanent Residents into the United States (Jan. 29, 2017), available at https://www.clearinghouse.net/chDocs/resources/778_DHSSecretaryJohnKelly_1485981132.pdf.

⁴⁰ *E.g.*, Washington Complaint, *supra* note 28, at paras. 41–47; Loughalam Complaint, *supra* note 29, at paras. 46–52.

[Donald Trump] concerning [the] intent and application” of the Order.⁴¹ These litigants asserted that the Order “target[ed] individuals for discriminatory treatment based on their country of origin and/or religion, without lawful justification.”⁴²

Some challenges to the order relied on statutory claims.⁴³ Title 8 U.S.C. § 1152(a)(1) provides that “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”⁴⁴ Plaintiffs making this argument suggested that the mandate to “suspend entry into the United States” for ninety days should be construed, in effect, as a suspension of the “issuance of visas” under § 1152(a)(1).⁴⁵ These plaintiffs then alleged that the executive order violated this provision by singling out nationals of seven countries for disfavored treatment.⁴⁶

Finally, some challengers argued that the executive order violated international law.⁴⁷ The United Nations Convention Against Torture—which the United States ratified in 1994⁴⁸—prohibits states parties from involuntarily returning “a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁴⁹ In a filing in the Western District of Washington, one group of plaintiffs argued that:

The Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. § 1231 note, implements the United Nations Convention Against Torture, which the United States ratified in 1994. Pub. L. 105–277, div. G, subdiv. B, title XXII, § 2242. Under the Convention Against Torture, the United States may not involuntarily return any person to a country where there are substantial grounds for believing the person would be in danger of being subjected to torture As implemented, the executive order suspends all immigrant and nonimmigrant entry into Washington by individuals from seven countries and forecloses their ability to apply for relief under the Convention Against Torture.⁵⁰

These plaintiffs did not include this claim in their second amended complaint.⁵¹

Most discussion of the executive order’s international law ramifications has appeared in amicus briefs filed in the various cases.⁵² In addition to raising Convention Against

⁴¹ Washington Complaint, *supra* note 28, at para. 43.

⁴² *Id.*

⁴³ *Azad v. Trump*, No. 2:17-cv-00706, Complaint, at 69–70 (C.D. Cal. Jan. 29, 2017), available at <https://www.clearinghouse.net/chDocs/public/IM-CA-0084-0001.pdf>; *Aziz v. Trump*, No. 1:17-cv-116, Complaint, at 43–44 (E.D. Va. Jan. 28, 2017), available at <https://www.clearinghouse.net/chDocs/public/IM-VA-0004-0003.pdf>.

⁴⁴ 8 U.S.C. § 1152(a)(1) (2012).

⁴⁵ Exec. Order No. 13,769, *supra* note 10, at 8977.

⁴⁶ *E.g.*, Washington Complaint, *supra* note 28, at paras. 58–61.

⁴⁷ *E.g.*, *id.* paras. 66–69.

⁴⁸ See generally MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 32276, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS (Jan. 21, 2009).

⁴⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3, Dec. 10, 1984, S. TREATY DOC. NO. 20-100 (1988), 1465 UNTS 85, available at <http://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf>.

⁵⁰ Washington Complaint, *supra* note 28, at paras. 67–68.

⁵¹ *Washington v. Trump*, No. 2:17-cv-00141-JLR, Second Amended Complaint (W.D. Wash. Mar. 16, 2017), at <https://www.clearinghouse.net/chDocs/public/IM-WA-0029-0107.pdf>.

⁵² See *infra* notes 53–56.

Torture claims, amici have argued that the executive order might violate the International Covenant on Civil and Political Rights (CCPR). Specifically, one group of amici claimed:

The substantive rights guaranteed by the CCPR, which must be protected without discrimination based on religion or national origin under article 2, include the protection of the family. Article 23 provides in relevant part: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” The [Human Rights Council] has interpreted this right to include living together, which in turn obligates the state to adopt appropriate measures “to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.”

Restrictions on travel and entry caused by the EO that impose disparate and unreasonable burdens on the exercise of this right violate CCPR article 2 [T]he CCPR’s nondiscrimination principles and protections for family life should be considered by courts in interpreting government measures affecting family unification. This treaty-based protection for family life is consistent with Supreme Court jurisprudence respecting the role of due process of law in governmental decisions affecting family unity.⁵³

According to this brief, the executive order threatened to violate these principles of public international law by preventing persons with family members in the United States from being reunited.⁵⁴

Other amicus arguments have suggested that the executive order violated the International Convention on the Elimination of All Forms of Racial Discrimination:

The International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) also bars discrimination based on national origin. The United States has been a party to the CERD since 1994. Under article 2, paragraph (1)(a), each state party commits to refraining from and prohibiting all forms of racial discrimination, and each further undertakes “to engage in no act or practice of racial discrimination . . . and to ensure that all public authorities and public institutions, national or local, shall act in conformity with this obligation.” CERD defines “racial discrimination” to include distinctions and restrictions based on national origin. With regard to immigration practices, CERD makes clear that states are free to adopt only such “nationality, citizenship or naturalization” policies that “do not discriminate against any particular nationality.” Like the nondiscrimination provisions of CCPR article 26, CERD article 2 does not limit its application to citizens or resident noncitizens Article 4 of CERD further provides that state parties “[s]hall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination,” which (as noted) includes discrimination based on national origin. The Committee on the Elimination of Racial Discrimination, the body of independent experts appointed to monitor CERD’s implementation, interprets article 4 to require states to combat speech stigmatizing or stereotyping noncitizens generally, immigrants, refugees, and asylum seekers, with statements by high-ranking officials causing “particular concern.”⁵⁵

⁵³ *Hawai’i v. Trump*, No. 17-15589, Brief of International Law Scholars and Nongovernmental Organizations as Amici Curiae in Support of Appellees, at 8–9 (9th Cir. Apr. 20, 2017), available at <http://cdn.ca9.uscourts.gov/datastore/general/2017/04/20/17-15589%20International%20Law%20Scholars%20Amicus.pdf> (internal citations omitted) [hereinafter *International Law Amici*].

⁵⁴ See also *Hawai’i v. Trump*, No. 17-15589, 2017 WL 1457828, Brief of Amici Curiae Immigration Equality, the New York City Gay and Lesbian Anti-Violence Project, and the National Queer Asian Pacific Islander Alliance, at 23–24 (9th Cir. Apr. 21, 2017) (arguing that “the public has a strong interest in maintaining personal and familial relationships for persons within the United States and those seeking to immigrate to the United States”).

⁵⁵ *International Law Amici*, *supra* note 53, at 11–12 (internal citations omitted).

The amici urged the court to consider “[t]he legality of the EO in this case, and the proper interpretation of the statutes and constitutional provisions cited by the parties” with the international law “proscriptions in mind.”⁵⁶

In response to these suits, some district courts began issuing temporary restraining orders and preliminary injunctions—relying on a mix of statutory and constitutional grounds—that prevented enforcement agencies from detaining and deporting individuals during the pendency of the litigation.⁵⁷ The temporary restraining order in *Washington v. Trump*, in the Western District of Washington, was notable for its nationwide scope.⁵⁸ Although the district court did not specify which of the plaintiff’s claims were likely to succeed, the court enjoined enforcement of “Section 3(c) . . . , Section 5(a) . . . [and] Section 5(b) of the Executive Order”; “proceeding with any action that prioritizes the refugee claims of certain religious minorities”; and enforcement of “Section 5(c) . . . [and] Section 5(e) of the Executive Order to the extent Section 5(e) purports to prioritize refugee claims of certain religious minorities.”⁵⁹

The temporary restraining order in *Washington v. Trump* was upheld on appeal. In a *per curiam* decision, the Ninth Circuit held that “[t]he Government has not shown that the Executive Order provides what due process requires, such as notice and a hearing prior to restricting an individual’s ability to travel.”⁶⁰ For that reason, the court “conclude[d] that the Government has failed to establish that it will likely succeed on its due process argument in this appeal.”⁶¹ Addressing the Plaintiffs’ Equal Protection and Establishment Clause claims, the court said:

The States’ claims raise serious allegations and present significant constitutional questions. In light of the sensitive interests involved, the pace of the current emergency proceedings, and our conclusion that the Government has not met its burden of showing likelihood of success on appeal on its arguments with respect to the due process claim, we reserve consideration of these claims until the merits of this appeal have been fully briefed.⁶²

The anticipated consideration of these claims never took place, because on March 6—twenty-six days after the Ninth Circuit’s decision—President Trump rescinded his initial executive order and issued a second one.⁶³

The introduction to this second executive order explained that it was issued to address “judicial concerns” about the first order as well as to “clarif[y] or refine[] the approach” of the first.⁶⁴ Like the first order, the second order imposed a “temporary pause on the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, subject to categorical

⁵⁶ *Id.* at 13; *see also* *Washington v. Trump*, No. 17-35105, 2017 WL 553799, Amicus Brief of the Fred T. Korematsu Center for Law and Equality in Support of Appellees, at 6 (9th Cir. Feb. 5, 2017).

⁵⁷ *E.g.*, *Aziz v. Trump*, No. 1:17-cv-116 (LMB/TCB), 2017 WL 580855, at **11 (E.D. Va. Feb. 13, 2017) (preliminary injunction); *Vayeghan v. Kelly*, No. CV 17-0702, 2017 WL 396531, at *1 (C.D. Cal. Jan. 29, 2017) (temporary restraining order); *Darweesh v. Trump*, No. 17 Civ. 480 (AMD), 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017) (temporary restraining order).

⁵⁸ *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

⁵⁹ *Id.* at *2.

⁶⁰ *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017).

⁶¹ *Id.* at 1167.

⁶² *Id.* at 1168.

⁶³ Exec. Order No. 13,780, 82 Fed. Reg. 13209, 13209 (Mar. 6, 2017), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2017-03-09/pdf/2017-04837.pdf>.

⁶⁴ *Id.* at 13212.

exceptions and case-by-case waivers.”⁶⁵ The new order also retained the first order’s data collection requirements.⁶⁶

The second order differed from the first order in several important respects. First, the new order did not include Iraq on the list of banned countries. Second, the new order was prospective, applying only to persons who “are outside the United States on the effective date of this order . . . did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017 . . . and do not have a valid visa on the effective date of this order”⁶⁷ and excluding lawful permanent residents entirely.⁶⁸ Third, the new order eliminated preferential treatment on the basis of religious persecution. Fourth, the new order did not categorically bar Syrians from entering the United States as refugees. Finally, the new order contained a specific section discussing how the executive branch would process and resolve waiver requests under Section 2(c)’s ninety-day visa issuance suspension.⁶⁹ The new order authorized “a consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner’s delegee” to decide whether to grant a waiver⁷⁰—a power that the first order had vested in the Secretaries of State and Homeland Security. The new order also listed nearly a dozen circumstances where “[c]ase-by-case waivers could be appropriate.”⁷¹

Former White House Press Secretary Sean Spicer explained that, although the text had been changed, “the principles of the executive order remain[ed] the same.”⁷² President Trump, in addition to stating that the new order imposed “EXTREME VETTING,”⁷³ also called it a “watered down, politically correct” version of the “first Travel Ban,”⁷⁴ noting at a rally that “[t]his is a watered-down version of the first one. And let me tell you something. I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first place.”⁷⁵

The plaintiffs challenging the first order amended their complaints to update their constitutional and statutory arguments in light of the second order.⁷⁶ A district court in Maryland

⁶⁵ *Id.* at 13211.

⁶⁶ *Id.* at 13217–18.

⁶⁷ 82 Fed. Reg. at 13213–14.

⁶⁸ *Id.* at 13213.

⁶⁹ *Id.* at 13214–15.

⁷⁰ *Id.* at 13214.

⁷¹ *Id.* at 13214–15. The circumstances specified include, for example, instances where “the foreign national seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship”; instances where “the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case”; and instances where “the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government.”

⁷² White House Press Briefing, Press Gaggle by Press Secretary Sean Spicer (Mar. 6, 2017), at <https://www.whitehouse.gov/the-press-office/2017/03/06/press-gaggle-press-secretary-sean-spicer>.

⁷³ Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:44 AM), https://twitter.com/realDonaldTrump/status/871679061847879682?ref_src=twsrc%5Etfw.

⁷⁴ Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:29 AM), <https://twitter.com/realDonaldTrump/status/871675245043888128>.

⁷⁵ Laura Jarrett, *Trump Admin to Appeal Travel Ban Rulings ‘Soon,’* CNN POLITICS, at 2:45 (Mar. 16, 2017), at <http://www.cnn.com/2017/03/15/politics/travel-ban-blocked/index.html>.

⁷⁶ See, e.g., *Int’l Refugee Assistance Project v. Trump*, 8:17-cv-00361-TDC, Amended Complaint (D. Md. Mar. 10, 2017), at <https://www.clearinghouse.net/chDocs/public/IM-MD-0004-0018.pdf>; *Hawai’i v. Trump*,

issued a nationwide preliminary injunction on March 16 on the grounds that the plaintiffs had established a likelihood of success “on the merits of their Establishment Clause claim.”⁷⁷ The district court reasoned that, despite the changes between the first and second order,

[T]he history of public statements continues to provide a convincing case that the purpose of the Second Executive Order remains the realization of the long-envisioned Muslim ban. The Trump Administration acknowledged that the core substance of the First Executive Order remained intact. Prior to its issuance, on February 16, 2017, Stephen Miller, Senior Policy Advisor to the President, described the forthcoming changes as “mostly minor technical differences,” and stated that the “basic policies are still going to be in effect.”⁷⁸

The district court reached the constitutional question only after finding, regarding the alternative statutory claim, that the plaintiffs had failed to show “a likelihood of success on the merits of the claim that § 1152(a) prevents the President from barring entry to the United States pursuant to § 1182(f), or the issuance of non-immigrant visas, on the basis of nationality.”⁷⁹ On May 25, the Fourth Circuit—sitting *en banc*—upheld the district court’s preliminary injunction.⁸⁰ The court held in an 11–3 decision that the plaintiffs had “more than plausibly alleged that [the second order’s] stated national security interest was provided in bad faith, as a pretext for its religious purpose.”⁸¹ After “look[ing] behind” the second order, the Court concluded:

EO-2 cannot be divorced from the cohesive narrative linking it to the animus that inspired it. In light of this, we find that the reasonable observer would likely conclude that EO-2’s primary purpose is to exclude persons from the United States on the basis of their religious beliefs. We therefore find that EO-2 likely fails *Lemon*’s purpose prong in violation of the Establishment Clause.⁸²

The court did not reach the statutory question “[b]ecause the district court enjoined Section 2(c) [of the second order] in its entirety based solely on Plaintiffs’ Establishment Clause claim”⁸³

The next month, the Ninth Circuit upheld a similar nationwide temporary restraining order issued by a district court in Hawai’i. In that case, the district court temporarily prohibited enforcement of the second order on the grounds that plaintiffs had demonstrated “a strong likelihood of success on the merits of their Establishment Clause claim.”⁸⁴ The Ninth Circuit affirmed the temporary restraining order on different grounds,⁸⁵ avoiding the constitutional question entirely and finding instead that President Trump exceeded the statutory authority vested in him by the Immigration and Nationality Act (INA).

The Ninth Circuit began by scrutinizing whether the president properly exercised his power under Section 212(f) of the INA,⁸⁶ which authorizes the president to suspend the

No. 1:17-cv-00050, Second Amended Complaint (D. Haw. Mar. 8, 2017), available at <https://www.clearing-house.net/chDocs/public/IM-HI-0004-0010.pdf>.

⁷⁷ *Int’l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 1018235, at **16 (D. Md. Mar. 16, 2017).

⁷⁸ *Id.* at **13.

⁷⁹ *Id.* at **10.

⁸⁰ *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc).

⁸¹ *Id.* at 592.

⁸² *Id.* at 601 (citing *Lemon v. Kurtzmann*, 403 U.S. 602 (1971)).

⁸³ *Id.* at 579.

⁸⁴ *Hawai’i v. Trump*, No. 17-00050 DKW-KSC, 2017 WL 1011673, at *1 (D. Haw. Mar. 15, 2017).

⁸⁵ *Hawai’i v. Trump*, 859 F.3d 741 (9th Cir. 2017).

⁸⁶ *Id.*

entry of certain aliens provided he finds that admitting those aliens would be detrimental to the United States.⁸⁷ The court interpreted the statute to require as a “precondition” that the president “make sufficient findings” justifying a “conclusion that entry of all nationals from the six designated countries, all refugees, and refugees in excess of 50,000 would be harmful to the national interest.”⁸⁸ After reviewing the text of the order, the court held that “[t]here [was] no sufficient finding in EO2 that the entry of the excluded classes would be detrimental to the interests of the United States.”⁸⁹ Next, the court found that, because § 1152(a)’s nondiscrimination provision “cabins the President’s authority under [Section 212(f)],”⁹⁰ the executive order violated the INA by “suspending the issuance of immigrant visas and denying entry based on nationality.”⁹¹

The Trump administration filed petitions for certiorari in both cases and requested a stay of the preliminary injunction in Maryland and the temporary restraining order in Hawai’i. On June 26, the Court agreed to hear the case and—in a *per curiam* opinion—allowed the March 6 executive order to take partial effect.⁹² Under the Court’s decision, the second order may be enforced only against nationals of the six enumerated countries “who lack any bona fide relationship with a person or entity in the United States.”⁹³ The Court elaborated on what constitutes a bona fide relationship:

For individuals, a close familial relationship is required. A foreign national who wishes to enter the United States to live with or visit a family member, like Doe’s wife or Dr. Elshikh’s mother-in-law, clearly has such a relationship. As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO–2. The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity. So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience. Not so someone who enters into a relationship simply to avoid §2(c): For example, a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion.⁹⁴

Two days after the Supreme Court’s ruling, the State Department issued a cable to embassies and consulates around the world, updating the scope of the order in light of the “bona fide relationship” requirement.⁹⁵ The cable stated—consistent with the Court’s ruling—that the order’s “suspension of entry does not apply” to “[a]ny applicant who has a credible claim of a bona fide relationship with a person or entity in the United States.”⁹⁶ For individuals, the order would not apply to those with a “close familial relationship” to a person in the United

⁸⁷ *Id.*

⁸⁸ *Id.* at 770, 776.

⁸⁹ *Id.* at 770.

⁹⁰ *Id.* at 778.

⁹¹ *Id.* at 779.

⁹² *Trump v. Int’l Refugee Assistance Project*, 582 U.S. ____ (2017) (*per curiam*).

⁹³ *Id.* at 9.

⁹⁴ *Id.* at 12.

⁹⁵ Gardiner Harris, Michael D. Shear & Ron Nixon, *Administration Moves to Carry Out Partial Travel Ban*, N.Y. TIMES (June 29, 2017), at <https://www.nytimes.com/2017/06/29/us/politics/travel-ban-trump-muslims.html>; see also U.S. Dep’t of State Press Release, *Executive Order on Visas* (June 29, 2017), at <https://travel.state.gov/con tent/travel/en/news/important-announcement.html>.

⁹⁶ Quinta Jurecic, *State Department Cable on Implementing Travel Ban Executive Order*, LAWFARE (June 29, 2017), at <https://lawfareblog.com/state-department-cable-implementing-travel-ban-executive-order>.

States.⁹⁷ Importantly, the State Department defined “close family” as a “parent (including parent-in-law), spouse, child, adult son or daughter, son-in-law, daughter-in-law, sibling, whether whole or half.”⁹⁸ But “[c]lose family does not include grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-laws and sisters-in-law, fiancés, and any other ‘extended’ family members.”⁹⁹ For entities, the State Department clarified that:

A relationship with a “U.S. entity” must be formal, documented, and formed in the ordinary course rather than for the purpose of evading the E.O. A consular officer should not issue a visa unless the officer is satisfied that the applicant’s relationship complies with these requirements and was not formed for the purpose of evading the E.O.¹⁰⁰

The State of Hawai’i—the lead plaintiff in the Ninth Circuit’s *Hawai’i v. Trump* case—filed an emergency motion in federal district court seeking to clarify the scope of the preliminary injunction in light of the Supreme Court’s June 26 decision and the State Department’s updated interpretation of the executive order.¹⁰¹ Hawai’i argued that the government’s new interpretation violated the Supreme Court’s prohibition against enforcing the ban with respect to persons having “bona fide” connections to the United States.¹⁰² According to Hawai’i, the Supreme Court’s “bona fide relationship” guidance could not be interpreted to exclude “fiancés, grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States.”¹⁰³ Initially, the district court refused to clarify the scope of the Supreme Court’s decision:

[T]he parties’ disagreements derive neither from this Court’s temporary restraining order, this Court’s preliminary injunction, nor this Court’s amended preliminary injunction, but from the modifications to this Court’s injunction ordered by the Supreme Court. Accordingly, the clarification to the modifications that the parties seek should be more appropriately sought in the Supreme Court.¹⁰⁴

The Ninth Circuit affirmed the district court’s order refusing to “clarify” the Supreme Court’s decision, but noted that the district court “possess[ed] the ability to interpret and enforce the Supreme Court’s order.”¹⁰⁵

Hawai’i then filed a new emergency motion to “enforce” or “modify”—rather than “clarify”—the preliminary injunction.¹⁰⁶ The district court partially granted the plaintiff’s

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Hawai’i v. Trump*, No. 1:17-cv-00050-DKW-KSC, Emergency Motion to Clarify Scope of Preliminary Injunction (D. Haw. June 29, 2017), available at <https://www.clearinghouse.net/chDocs/public/IM-HI-0004-0127.pdf>.

¹⁰² *Id.* at 3–4.

¹⁰³ *Id.* at 3.

¹⁰⁴ *Hawai’i v. Trump*, No. 1:17-cv-00050-DKW-KSC, Order Denying Plaintiffs’ Emergency Motion to Clarify Scope of Preliminary Injunction, at 2 (D. Haw. July 6, 2017), available at <https://www.clearinghouse.net/chDocs/public/IM-HI-0004-0131.pdf>.

¹⁰⁵ *Hawai’i v. Trump*, No. 17-16366, Order, at 3 (9th Cir. July 7, 2017), available at <https://www.clearinghouse.net/chDocs/public/IM-HI-0004-0133.pdf>.

¹⁰⁶ *Hawai’i v. Trump*, No. 17-16366, Motion to Enforce or, in the Alternative, to Modify Preliminary Injunction (D. Haw. July 7, 2017), available at <https://www.clearinghouse.net/chDocs/public/IM-HI-0004-0134.pdf>.

request.¹⁰⁷ First, the district court ruled that “the Government’s narrowly defined list finds no support in the careful language of the Supreme Court or even in the immigration statutes on which the Government relies.”¹⁰⁸ The district court modified the injunction to prohibit the government from enforcing the exclusionary provisions of the executive order against: refugees with “a formal assurance from an agency within the United States that the agency will provide, or ensure the provision of, reception and placement services to that refugee”;¹⁰⁹ refugees “in the U.S. Refugee Admissions Program through the Lautenberg Program”;¹¹⁰ and persons with “grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, [or] cousins . . . in the United States.”¹¹¹ The district court denied the plaintiff’s request to expand the preliminary injunction to cover refugees affiliated with certain refugee admissions organizations.¹¹² The government then appealed the district court’s modification of the injunction to the Supreme Court.¹¹³

USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

Trump Administration Maintains Nuclear Deal with Iran, Despite Persistent Skepticism

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Iran, the five permanent members of the UN Security Council, Germany, and the European Union agreed to the Joint Comprehensive Plan of Action (JCPOA) in July 2015. Under the JCPOA, Iran agreed to limit the scope and content of its nuclear program in exchange for relief from various nuclear-related sanctions imposed by the other signatories.¹ Throughout his campaign, President Donald Trump denounced the JCPOA. He said that, if elected, he would “renegotiate with Iran—right after . . . enabl[ing] the immediate release of our American prisoners and ask[ing] Congress to impose new sanctions that stop Iran from having the ability to sponsor terrorism around the world.”² So far, however, the

¹⁰⁷ *Hawai’i v. Trump*, No. 17-16366, Order Granting in Part and Denying in Part Plaintiffs’ Motion to Enforce, or, in the Alternative to Modify Preliminary Injunction (D. Haw. July 13, 2017), available at <https://www.clearinghouse.net/chDocs/public/IM-HI-0004-0138.pdf>.

¹⁰⁸ *Id.* at 12.

¹⁰⁹ *Id.* at 26.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 20–22.

¹¹³ *Trump v. Hawai’i*, No. 16-1540 (16A1191), Motion for Clarification of June 26, 2017, Stay Ruling and Application for Temporary Administrative Stay of Modified Injunction, (S. Ct. July 14, 2017).

¹ Joint Comprehensive Plan of Action, July 14, 2015, 55 ILM 98, 108 (2016) [hereinafter JCPOA]. See also Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 109 AJIL 649 (2015); Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 110 AJIL 789 (2016) [hereinafter Daugirdas & Mortenson, 110 AJIL].

² Donald Trump, *Donald Trump: Amateur Hour with the Iran Nuclear Deal*, USA TODAY (Sept. 8, 2015), at <https://www.usatoday.com/story/opinion/2015/09/08/donald-trump-amateur-hour-iran-nuclear-deal-column/71884090>; see also, e.g., Donald Trump, Full text of Donald Trump’s speech to AIPAC (Mar. 21, 2016), available at <http://www.timesofisrael.com/donald-trumps-full-speech-to-aipac> (indicating that his “number-one priority is to dismantle the disastrous deal with Iran”).

Trump administration has kept the agreement in place. The United States has continued to acknowledge Iran's compliance with the terms of the JCPOA and has waived various sanctions against Iran in compliance with its own obligations thereunder.³ Iran, by contrast, has charged the United States with failing to live up to its own JCPOA commitments.

The Trump administration first engaged with the issue after Iran launched a medium-range ballistic missile test on January 29, 2017, shortly after Trump's inauguration.⁴ Iran's Defense Minister Hosesin Dehghan stated that the test "did not violate the [JCPOA] or [UN Security Council] Resolution 2231" and warned that Iran would "not allow foreigners to interfere in [its] defense affairs."⁵ In response, the United States National Security Advisor stated that the United States was "officially putting Iran on notice" for the launch in what the administration characterized as actions undermining "security, prosperity, and stability."⁶

On February 3, 2017, in a formal response to the missile test, the administration issued new sanctions against Iran. The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) sanctioned twenty-five entities and individuals involved in procuring technology and/or materials to support Iran's ballistic missile program, as well as for providing support to Iran's Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF).⁷ The OFAC specifically designated:

- [S]everal networks and supporters of Iran's ballistic missile procurement, including a critical Iranian procurement agent and eight individuals and entities in his Iran- and China-based network, an Iranian procurement company and its Gulf-based network, and five individuals and entities that are part of an Iran-based procurement network connected to Mabrooka Trading, which was designated on January 17, 2016, pursuant to Executive Order 13382
- [A] key IRGC-QF-run support network working with Hizballah, including IRGC-QF official Hasan Dehghan Ebrahimi, his associates Muhammad Abd-al-Amir Farhat and Yahya al-Hajj, and several affiliated companies in Lebanon pursuant to Executive Order 13224
- Ali Sharifi, an individual providing procurement and other services on behalf of the IRGC-QF, again, pursuant to Executive Order 13224.⁸

³ See *infra* note 30 and accompanying text.

⁴ *Iran Tested Medium-Range Ballistic Missile: U.S. Official*, REUTERS (Jan. 30, 2017), at <http://www.reuters.com/article/us-usa-iran-missiles-idUSKBN15E2EZ>.

⁵ *Iran Confirms Missile Test, Drawing Tough Response from Trump Aide*, REUTERS (Feb. 1, 2017), at <http://www.reuters.com/article/us-usa-iran-missiles-idUSKBN15G3ZO>.

⁶ White House Press Release, Statement by the National Security Advisor (Feb. 1, 2017), at <https://www.whitehouse.gov/the-press-office/2017/02/01/statement-national-security-advisor>.

⁷ U.S. Dep't of the Treasury Press Release, Treasury Sanctions Supporters of Iran's Ballistic Missile Program and Iran's Islamic Revolutionary Guard Corps—Qods Force (Feb. 3, 2017), at <https://www.treasury.gov/press-center/press-releases/Pages/as0004.aspx>. Though this was the first time the United States imposed sanctions on Iran post-JCPOA, the United States has previously made clear its position that the JCPOA does not cover obligations relating to sanctions that are unrelated to Iran's nuclear development program. See Daugirdas & Mortenson, 110 AJIL, *supra* note 1, at 793.

⁸ *Id.* Executive Order 13,382 targets proliferators of weapons of mass destruction and their means of delivery and supporters of such activity. Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (2005). Executive Order 13,224 targets terrorists and those providing support to terrorists or acts of terrorism. Executive Order 13,224, 66 Fed. Reg. 49,079 (2001).

A senior administration official emphasized the administration's view that the sanctions were fully consistent with the JCPOA:

Let me make clear: These steps we have taken today are outside the JCPOA. The JCPOA is limited to Iran's nuclear program, and the U.S. continues to implement its commitment under the JCPOA. Iran's provocative ballistic missile launches and other destabilizing activities in the region are a clear threat to region security. This is why we have acted today in designating these 25 individuals and entities.⁹

The administration further warranted that the February 3, 2017, sanctions did not redesignate any entities that had been previously dropped from the list as a result of the JCPOA.¹⁰ Nor did the sanctions threaten or affect previously negotiated private agreements, such as an agreement between Boeing and Iran for the sale of eighty aircraft that had been concluded in late 2016.¹¹

Adopting the Obama administration's formulation for criticisms of previous ballistic missile launches,¹² the Trump administration described the launches as "inconsistent with" Security Council Resolution 2231, which the Security Council had adopted to help implement the JCPOA. That resolution provides, in relevant part:

Iran is called upon not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology, until the date eight years after the JCPOA Adoption Day or until the date on which the IAEA submits a report confirming the Broader Conclusion, whichever is earlier.¹³

A senior administration official stated: "The January 29th ballistic missile test launch is inconsistent with UN Security Council Resolution 2231 and underscores the importance of the continued international action to curtail such activity."¹⁴ The official further went on to state that "these missile launches now and in the past are in defiance of 2231" but that he did not "recollect an administration official using the term 'violation' per se [of resolution 2231]" to characterize the missile launches.¹⁵

Iran denounced the new sanctions as "not compatible with America's commitments and resolution 2231 of the U.N. Security Council that endorsed the nuclear deal reached between Iran and six powers."¹⁶ Iran warned that it would retaliate by imposing legal restrictions on American individuals—but issued no immediate retaliatory sanctions.

⁹ U.S. Dep't of State Press Release, Senior Administration Officials on an Announcement from the Treasury Department on Iran (Feb. 3, 2017) at <https://www.state.gov/r/pa/prs/ps/2017/02/267435.htm> [hereinafter February U.S. Dep't of State Press Release].

¹⁰ *Id.*

¹¹ *Id.* See also Boeing Press Release, *Boeing, Iran Air Announce Agreement for 80 Airplanes* (Dec. 11, 2016), at <http://boeing.mediaroom.com/2016-12-11-Boeing-Iran-Air-Announce-Agreement-for-80-Airplanes>.

¹² Daugirdas & Mortenson, 110 AJIL, *supra* note 1, at 794.

¹³ S.C. Res. 2231, Annex B, para. 3 (July 20, 2015).

¹⁴ February U.S. Dep't of State Press Release, *supra* note 9.

¹⁵ *Id.*

¹⁶ *Iran to Impose Legal Restrictions on Some U.S. Entities*, REUTERS – TV (Feb. 3, 2017), at <http://www.reuters.com/article/usa-trump-iran-idUSL5N1FO5ZO>.

The International Atomic Energy Agency (IAEA) found that Iran has continued to comply with the JCPOA in its monitoring report released on February 24, 2017.¹⁷ Notably—and following criticism that its previous reports had been insufficiently specific¹⁸—the IAEA for the first time published specific details on Iran’s enriched uranium stockpile, finding that Iran has not exceeded 300kg of UF₆ enriched up to 3.67 percent U-235 during the relevant time period.¹⁹ In response to the report, Acting U.S. Representative to the IAEA Andrew Schofer reiterated the United States’ position that “Iran must strictly and fully adhere to all commitments and technical measures for their duration to enable the IAEA to provide such assurance. . . . [T]he United States will approach questions of JCPOA interpretation, implementation, and enforcement with great strictness indeed.”²⁰

In a letter from Secretary of State Rex Tillerson to U.S. House Speaker Paul Ryan on April 18, 2017, the State Department certified that Iran was in compliance with its obligations under the plan.²¹ The letter indicated that the administration remained concerned about Iran’s sponsorship of terrorism and that President Trump “ha[d] directed a National Security Council-led interagency review of the [JCPOA] that will evaluate whether suspension of sanctions related to Iran pursuant to the JCPOA is vital to the national security interests of the United States.”²² Secretary of State Tillerson criticized the JCPOA in a press briefing the next day, saying that it “fails to achieve the objective of a non-nuclear Iran; it only delays their goal of becoming a nuclear state.”²³ Secretary Tillerson further noted that “[t]he Trump Administration has no intention of passing the buck to a future administration on Iran” and thus, the administration was “conducting a comprehensive review of [its] Iran policy.”²⁴

In response, Iran’s envoy to the IAEA stated that the “US can only talk about strictness if and only if it fully complies with all its obligations under the JCPOA.”²⁵ During the Obama administration, Iran had also complained that the United States was defying the spirit and the letter of the agreement.²⁶ This time, Iranian Foreign Minister Javad Zarif took to Twitter accusing the United States of failing to fulfill its commitments under the JCPOA.²⁷ In response to Secretary Tillerson’s letter to Congress, Minister Zarif highlighted the U.S. commitments to “make every effort to support the successful implementation of this JCPOA including in their

¹⁷ IAEA Director General, Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 (Feb. 24, 2017), at <https://www.iaea.org/sites/default/files/gov2017-10.pdf> [hereinafter IAEA February Report].

¹⁸ *Trump Administration Pledges ‘Great Strictness’ on Iran Nuclear Deal*, REUTERS (Mar. 7, 2017), at <http://www.reuters.com/article/us-iran-nuclear-idUSKBN16E2GZ>.

¹⁹ IAEA February Report, *supra* note 17, at 4.

²⁰ U.S. Statement as Delivered by Chargé d’Affaires a.i. Andrew J. Schofer, IAEA Board of Governors Meeting (Mar. 7, 2017), available at <https://vienna.usmission.gov/u-s-statement-iran>.

²¹ Letter from Rex Tillerson, Secretary of State, U.S. Dep’t of State, to Paul Ryan, Speaker of the U.S. House of Representatives (Apr. 18, 2017), at <https://www.state.gov/secretary/remarks/2017/04/270315.htm>.

²² *Id.*

²³ U.S. Dep’t of State Press Release, Secretary of State Rex Tillerson Press Availability (Apr. 19, 2017), at <https://www.state.gov/secretary/remarks/2017/04/270341.htm>.

²⁴ *Id.*

²⁵ *All Parties to JCPOA Must Fulfill Commitments, Says Iran’s IAEA Envoy*, PRESS TV (Mar. 8, 2017), at <http://www.presstv.ir/Detail/2017/03/08/513531/Iran-IAEA-Najafi-JCPOA-nuclear-deal-US-Amano>.

²⁶ Daugirdas & Mortenson, 110 AJIL, *supra* note 1, at 791.

²⁷ *U.S. Defies Both Letter, Spirit of Nuclear Deal: Iran FM*, PRESS TV (Apr. 21, 2017), at <http://www.presstv.ir/Detail/2017/04/21/518916/Iran-US-Mohammad-Javad-Zarif-JCPOA-Twitter>.

public statements”²⁸ and to “refrain from any policy specifically intended to directly and adversely affect the normalisation of trade and economic relations with Iran”²⁹

On May 17, 2017, despite its criticisms of the agreement, the Trump administration waived sanctions against Iran as required under the JCPOA.³⁰ At the same time, the administration imposed new sanctions against several Iranian individuals and four organizations, including a China-based network, for human rights violations.³¹ OFAC designated the “Ruan Runling Network,” including one Chinese national and several Chinese firms, for providing, or attempting to provide, financial, material, technological, or other support to Iran’s Shiraz Electronic Industries.³² Acting Assistant Secretary of State for the Near Eastern Affairs Ambassador Stuart Jones explained:

As we continue to closely scrutinize Iran’s commitment to the JCPOA and develop a comprehensive Iran policy, we will continue to hold Iran accountable for its human rights abuses with new actions. We urge our partners around the world to join us in calling out individuals and entities who violate international sanctions targeting Iran’s human rights abuses.

Whether it’s imprisoning people arbitrarily, inflicting physical abuse and torture, or executing juvenile offenders, the Iranian regime has for decades committed egregious human rights violations against its own people and foreign nationals, and this pattern of behavior must come to an end. The U.S. and its partners will continue to apply pressure on Iran to protect the human rights and fundamental freedoms for everyone in Iran. This includes the U.S. citizens wrongfully detained or missing in Iran, and we call on Iran to immediately return them to their families.

In addition to the actions taken today, we are communicating to the U.S. Congress that the United States continues to waive sanctions as required to continue implementing U.S. sanctions-lifting commitments in the Joint Comprehensive Plan of Action. This ongoing review does not diminish the United States’ resolve to continue countering Iran’s destabilizing activity in the region, whether it be supporting the Assad regime, backing terrorist organizations like Hezbollah, or supporting violent militias that undermine governments in Iraq and Yemen. And above all, the United States will never allow the regime in Iran to acquire a nuclear weapon.³³

Iran and China criticized these new sanctions. On May 18, 2017, Iranian Foreign Ministry spokesman Bahram Qassemi stated that Iran “condemns the US government’s malintent in its attempts to reduce the positive effects of the implementation of that country’s commitments under the JCPOA by adding natural and legal individuals to the list of its transnational, unilateral and illegal sanctions.”³⁴ In further response, Iran added nine U.S. individuals and

²⁸ JCPOA, *supra* note 1, para. 28. According to the JCPOA, government officials for the United States means senior officials of the U.S. Administration. *Id.*, para. 28, n.1.

²⁹ *Id.*, para. 29.

³⁰ U.S. State Dep’t Press Release, U.S. State Department Issues Report on Human Rights Sanctions on Iran (May 17, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/05/270925.htm>. Acting Assistant Secretary of State for Near Eastern Affairs Ambassador Stuart Jones stated the following with regards to the report: “[W]e are communicating to the U.S. Congress that the United States continues to waive sanctions as required to continue implementing U.S. sanctions-lifting commitments in the Joint Comprehensive Plan of Action.”

³¹ U.S. Dep’t of Treasury Press Release, Treasury Sanctions Iranian Defense Officials and a China-Based Network for Supporting Iran’s Ballistic Missile Program (May 17, 2017), at <https://www.treasury.gov/press-center/press-releases/Pages/sm0088.aspx>.

³² *Id.* In September 2008, pursuant to Executive Order 13,382, OFAC had designated Shiraz Electronics Industries for being owned or controlled by Iran’s Ministry of Defense and Armed Forces Logistics. *Id.*

³³ U.S. Dep’t of State Press Release, U.S. State Department Issues Report on Human Rights Sanctions on Iran (May 17, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/05/270925.htm>.

³⁴ *Iran Condemns Fresh US Sanctions over Missile Program*, PRESS TV (May 18, 2017), at <http://www.presstv.com/DetailFr/2017/05/18/522318/Iran-US-sanction-missile-nuclear>.

corporations to its sanctions list, citing their “confirmed role in blatant human rights violations.”³⁵ The Foreign Ministry alleged that the banned U.S. firms and individuals directly and indirectly cooperated with Israel in its “crimes against humanity in the occupied Palestinian territories” or in the regime’s “terrorist acts.”³⁶ On May 18, 2017, China lodged a complaint with the United States due to the sanctions against Chinese figures.³⁷ Chinese Foreign Ministry spokesperson Hua Chunying stated “China is opposed to the blind use of unilateral sanctions particularly when it damages the interests of third parties. I think the sanctions are unhelpful in enhancing mutual trust and unhelpful for international efforts on this issue.”³⁸

United States Strikes Syrian Government Airbase in Response to Chemical Weapons Attacks by Syrian Forces; Two Additional Strikes on Syrian Government Forces Justified by Defense of Troops Rationale

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On April 6, 2017, the United States launched air strikes against a Syrian government airfield,¹ marking a new development in Syria’s long-running civil war.² U.S. involvement in the conflict had previously been limited to the provision of indirect support for some rebels and the use of direct force against certain nonstate actors, particularly Islamic State of Iraq and the Levant (ISIL).³ This changed in the wake of April 4, however, when a rebel-held town was hit by a nerve gas attack that killed more than eighty people—including at least thirty children—and injured hundreds more.⁴ The attack used Sarin or a Sarin-like substance, which causes death by asphyxiation, often accompanied by blue facial skin and foaming at the mouth.⁵ The United States concluded, along with many other states and the NGO Human Rights Watch, that the attack was perpetrated by Syria’s Assad regime.⁶

³⁵ *Id.*

³⁶ *Id.*

³⁷ *China Complains to U.S. About New Iran Sanctions*, REUTERS (May 18, 2017), at <http://www.reuters.com/article/us-iran-nuclear-usa-china-idUSKCN18E0UC>.

³⁸ *Id.*

¹ *Transcript, Trump Speaks about Strikes in Syria*, N.Y. TIMES (Apr. 6, 2017), at <https://www.nytimes.com/2017/04/06/world/middleeast/transcript-video-trump-airstrikes-syria.html>.

² Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 110 AJIL 567 (2016).

³ Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 429 (2015).

⁴ Anne Barnard & Michael Gordon, *Worst Chemical Attack in Years in Syria; U.S. Blames Assad*, N.Y. TIMES (Apr. 4, 2017), at <https://www.nytimes.com/2017/04/04/world/middleeast/syria-gas-attack.html>; *Syria Chemical ‘Attack’: What We Know*, BBC (Apr. 26, 2017), at <http://www.bbc.com/news/world-middle-east-39500947>. For discussion of the U.S. response to earlier uses of chemical weapons in the Syrian conflict, see Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 AJIL 95 (2014).

⁵ *Syria Chemical ‘Attack,’ supra* note 4.

⁶ Human Rights Watch, *Death by Chemicals: The Syrian Government’s Widespread and Systematic Use of Chemical Weapons* (May 1, 2017), at <https://www.hrw.org/report/2017/05/01/death-chemicals/syrian-governments-widespread-and-systematic-use-chemical-weapons>. See also *infra* footnote 24 (listing statements supporting U.S. strike).

In response, U.S. President Donald Trump ordered a strike on Shayrat Airfield, which the Syrian government allegedly used to launch the nerve gas attacks.⁷ The resulting attack, which used Tomahawk Land Attack Missiles (TLAMs) launched from U.S. naval destroyers in the Eastern Mediterranean Sea,⁸ marked the first time the United States had used force directly against the Assad regime.⁹ Not long after the attack on Shayrat Airfield, the United States launched two additional strikes on Syrian government forces, in each case citing the existence of relevant deconfliction and de-escalation agreements as well as the American-led coalition's right to self-defense.

For domestic legal justification of the strike on Shayrat Airfield, the administration relied on the president's constitutional authority. Trump's initial announcement did not discuss legal justifications,¹⁰ but in a subsequent letter to Congress, sent "consistent with the War Powers Resolution,"¹¹ he stated: "I acted . . . pursuant to my constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive."¹² Press Secretary Sean Spicer's explanation likewise focused on the president's constitutional authority:

I think Article 2 of the Constitution is pretty clear that when it's in the national interest of the country, the President has the full authority to act. He did that. He and his team spoke extensively to congressional leaders on both sides of the aisle that night to describe the action that was being taken forward. So I think we have fully fulfilled every obligation. But the power vested in Article 2 is very clear with the President's ability to act.¹³

While the U.S. government has previously taken the position that the 2001 Authorization for the Use of Military Force (AUMF) authorizes force against ISIL in Syria,¹⁴ the Trump administration did not make a similar argument for its strike on the Assad regime.¹⁵

More detail emerged about the administration's legal theory in press guidance that, according to a reporter, had been provided to spokespeople within the administration:

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

⁷ *Id.*

⁸ U.S. Dep't of Defense Press Release, Statement from Pentagon Spokesman Cpt. Jeff Davis on U.S. Strike in Syria (Apr. 6, 2017), at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1144598/statement-from-pentagon-spokesman-capt-jeff-davis-on-us-strike-in-syria> [hereinafter Cpt. Jeff Davis Statement].

⁹ Jeremy Herb, *How Trump's Syria Airstrike Is Similar to — and Different from—Obama's*, CNN (Apr. 7, 2017), at <http://www.cnn.com/2017/04/07/politics/obama-syria-airstrikes-trump/index.html>.

¹⁰ See *Transcript, Trump Speaks about Strikes in Syria*, *supra* note 1.

¹¹ White House Press Release, A Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Apr. 8, 2017), at <https://www.whitehouse.gov/the-press-office/2017/04/08/letter-president-speaker-house-representatives-and-president-pro-tempore>.

¹² *Id.*

¹³ White House Press Release, Daily Press Briefing by Press Secretary Sean Spicer (Apr. 10, 2017), at <https://www.whitehouse.gov/the-press-office/2017/04/10/daily-press-briefing-press-secretary-sean-spicer-35>.

¹⁴ Caroline D. Krass, *Authority to Use Military Force in Libya*, OPINIONS OF THE OFFICE OF LEGAL COUNSEL Vol. 35 (Apr. 1, 2011), at <https://www.justice.gov/file/18376/download>. For more on the president's domestic authority to use force against ISIL, both in its interaction with the War Powers Resolution and otherwise, see Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 407, 429 (2015).

¹⁵ See Human Rights Watch, *Death by Chemicals*, *supra* note 6.

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 force in Libya in 2011, as set forth in an April 2011 opinion by the Department of Justice’s Office of Legal Counsel. Consistent with the War Powers Resolution, the President will notify Congress of the use of force. Key congressional leaders received oral notifications yesterday evening.¹⁶

A senior administration official later elaborated that the United States has a special interest in regional stability in the Middle East, especially as both Iran and Russia have used the Syrian conflict as a proxy for wider geopolitical struggle.¹⁷ The official also noted that U.S. interests are served by reinforcing the ability to make credible threats and draw meaningful “red line[s],”¹⁸ and that the use of chemical weapons against civilians is intolerable and inherently against national interests.¹⁹ More generally, the press guidance’s reference to the 2011 Office of Legal Counsel memorandum suggested a reliance on that document’s argument that sufficiently “limited military operations”—in which the ““anticipated nature, scope, and duration”” of the action falls short of being a “war” for constitutional purposes—may not require congressional approval.²⁰

As for justifications under international law, the Trump administration has not supplied an extensive explanation.²¹ Under the heading “international,” the April 8 reported press guidance lists a variety of factors that were “carefully considered” by the administration:

- Severe humanitarian distress, including the suffering caused by this and other previous unconscionable chemical weapons attacks by the Syrian military;
- Widespread violations of international law by the Syrian government, in particular the repeated use of banned chemical weapons against civilians in direct violation of its obligations under the Chemical Weapons Convention, which it acceded to in 2013, as well as UN Security Council Resolution (UNSCR) 2118, which was adopted by the Security Council under its Chapter VII authority, and which required Syria to cease using chemical weapons and eliminate its chemical weapons program in its entirety;
- Syria’s contempt for multiple UNSCRs including UNSCR 1540 and those seeking to give effect to UNSCR 2118, specifically UNSCRs 2209, 2235, 2314, and 2319;
- The recognition in UNSCRs that the proliferation and use of chemical weapons is a serious threat to international security and a violation of international law;

¹⁶ Marty Lederman, (*Apparent*) *Administration Justifications for Legality of Strikes against Syria*, JUST SECURITY (Apr. 8, 2017), at <https://www.justsecurity.org/39803/apparent-administration-justifications-legality-strikes-syria>.

¹⁷ White House Press Release, Background Briefing on the U.N. Vote on Syria, and China Relations (Apr. 12, 2017), at <https://www.whitehouse.gov/the-press-office/2017/04/12/background-briefing-un-vote-syria-and-china-relations>; Daugirdas & Mortenson, *supra* note 2, at 359.

¹⁸ White House Press Release, Statement from President Donald J. Trump (Apr. 4, 2017), at <https://www.whitehouse.gov/the-press-office/2017/04/04/statement-president-donald-j-trump>.

¹⁹ White House Press Release, President Trump’s 100 Days of Security and Safety (Apr. 27, 2017), at <https://www.whitehouse.gov/the-press-office/2017/04/27/president-trumps-100-days-security-and-safety>.

²⁰ Krass, *supra* note 14, at 8–9, 13.

²¹ See Human Rights Watch, *Death by Chemicals*, *supra* note 6; Cpt. Jeff Davis Statement, *supra* note 8.

- Syria’s indiscriminate use of such banned weapons to kill and inflict other horrific injuries on civilians in violation of the law of armed conflict, which tragically has been something that Syria has shown little respect for;
- Regional destabilization and international security concerns produced by the Syrian government’s actions, which include large and growing flows of refugees and the potential proliferation of chemical weapons;
- Widespread international condemnation of the Syrian government’s conduct, including its use of chemical weapons;
- A convincing body of reporting that the Syrian Government has committed widespread violations of international law during the conflict;
- The exhaustion of all reasonably available peaceful remedies before using force, including extensive and intensive diplomatic efforts both to end armed conflict in Syria and to eliminate Syria’s chemical weapons stockpile;
- The U.S. use of force is necessary and proportionate to the aim of deterring and preventing the future use of chemical weapons by the Syrian government; and
- The U.S. efforts to minimize civilian casualties in the planning and execution of the strike.²²

None of these factors were specifically framed as a justification for the strike as a matter of *jus ad bellum*—and indeed, a number of commentators have suggested that the United States’ use of force on April 6 was inconsistent with its obligations under Article 2(4) of the UN Charter.²³

A number of states that addressed the April 6 strikes—including Australia, Germany, Italy, Japan, Jordan, Saudi Arabia, Spain, Turkey, and the United Kingdom—voiced cautious approval.²⁴ France’s newly elected president, Emmanuel Macron, seemed likewise to signal

²² Lederman, *supra* note 16.

²³ Ryan Goodman, *What Do Top Legal Experts Say About The Syria Strikes*, JUST SECURITY (Apr. 7, 2017), at <https://www.justsecurity.org/39712/top-legal-experts-syria-strikes> (quoting suggestions by commentators that the April 6 strikes did not fit within established exceptions to Article 2(4)).

²⁴ Press & Information Office of Federal Government of Germany Press Release, Joint Statement by Federal Chancellor Merkel and President Hollande of France Following the Air Strikes in Syria (Apr. 7, 2017), at https://www.bundesregierung.de/Content/EN/Pressemitteilungen/BPA/2017/2017-04-07-erklaerung-merkel-hollande_en.html?nn=393794; Foreign & Commonwealth Office of the UK Press Release, The United Kingdom Supports the U.S. Air Strike on the Al Shayrat Airfield Because War Crimes Have Consequences (Apr. 7, 2017), at <https://www.gov.uk/government/speeches/the-united-kingdom-supports-the-us-air-strike-on-the-al-shayrat-airfield-because-war-crimes-have-consequences>; Presidency of the Republic of Turkey Press Release, A Positive Response to the Assad Regime’s War Crimes (Apr. 7, 2017), at <https://www.tccb.gov.tr/en/news/542/74644/cumhurbaskanligi-sozcusu-kalin-esed-rejiminin-savas-suclarina-karsi-verilmis-olumlu-bir-cevap.html>; Prime Minister of Japan and His Cabinet Press Release, Press Conference by the Chief Cabinet Secretary (Apr. 7, 2017), at http://japan.kantei.go.jp/tyoukanpress/201704/7_p.html; Prime Minister of Australia Press Release, Press Conference with the Minister for Defense and Chief of the Defense Force (Apr. 7, 2017), at <https://www.pm.gov.au/media/2017-04-07/press-conference-minister-defence-and-chief-defence-force>; Royal Embassy of Saudi Arabia Press Release, Kingdom Supports Courageous Decision by U.S. Against Assad Regime (Apr. 7, 2017), at <https://www.saudiembassy.net/news/kingdom-supports-courageous-decision-us-against-assad-%E2%80%8Eregime>. See also Madison Park, *Who’s with the US on Syria Strikes and Who Isn’t*, CNN (Apr. 9, 2017), at <http://www.cnn.com/2017/04/07/world/syria-us-strike-world-reaction/index.html> (quoting official support from Italy, Jordan, and Spain).

his approval when he said (after the strikes) that “any use of chemical weapons [in Syria] would result in reprisals.”²⁵ That said, support for the strikes has not been universal: Iran, Russia, and China criticized the strikes, and Russia called them illegal under international law.²⁶ Notably, Russia had earlier exercised its veto to prevent Security Council condemnation of the original nerve gas attack.²⁷ According to the Russian Defense Ministry, the Syrian regime did not use chemical weapons at all on April 4; rather, Syrian regime warplanes attacked a rebel base which was storing the rebels’ own chemical weapons.²⁸ The Russian Ministry of Defense has since tweeted: “Syria has no chemical weapons. This fact was documented and confirmed by official representatives of the OPCW.”²⁹

Following the Shayrat Airfield strikes, the United States has used armed force against the Syrian government on at least two more occasions, in May and June 2017. In a letter to Senator Bob Corker, the Administration explained that the legal justification in each case—under both domestic and international law—was grounded in the United States’ right to use force in defense of its own troops and its allies.³⁰

The application of that principle in the May–June strikes appears to emerge in part from an unreleased July 2015 memorandum of understanding between Russia and the United States.³¹ That memorandum established a “deconfliction” channel through which the two countries could coordinate aircraft movements, in order to prevent accidents and inadvertent escalations.³² By 2017, the U.S. Department of Defense was referring to areas in which the entrance of Russian or other pro-regime forces would trigger the United States’ opening of the deconfliction channel as “deconfliction zone[s].”³³ Importantly, the U.S. and Russia disagree about whether one such deconfliction zone exists in the 55-kilometer radius around the U.S.-led coalition training base at al-Tanf, near the border of Iraq.³⁴ While U.S. Central

²⁵ Michel Rose, *Chemical Weapons a Red Line in Syria, France’s Macron Says*, REUTERS (May 29, 2017), at <http://www.reuters.com/article/us-france-russia-syria-macron-idUSKBN18P1OH>.

²⁶ Michelle Nichols, *Russia Blocks U.N. Security Council Condemnation of Syria Attack*, REUTERS (Apr. 12, 2017), at <http://www.reuters.com/article/us-mideast-crisis-syria-un-vote-idUSKBN17E2LK>.

²⁷ *Id.*

²⁸ *Syrian Aviation Airstrike in Idlib Targeted Chemical Arms Lab—Russian Defense Ministry*, RUSSIAN NEWS AGENCY (Apr. 5, 2017), at <http://tass.com/world/939417>; Matthew Weaver, Rowena Mason, Martin Chulov & Emma Graham-Harrison, *Putin Stands by Assad as Firm Evidence of Chemical Attack Mounts*, GUARDIAN (Apr. 6, 2017), at <https://www.theguardian.com/world/2017/apr/06/postmortems-confirm-syria-chemical-attack-turkey-says>.

²⁹ Russian Ministry of Defense (@mod_russia), TWITTER (Apr. 11, 2017), at https://twitter.com/mod_russia/status/851826675386122240.

³⁰ Letter from Charles Faulkner, Bureau of Legislative Affairs, to Senator Bob Corker (Aug. 2, 2017), at <https://www.lawfareblog.com/white-house-letter-legal-basis-syria-airstrikes>.

³¹ Neil MacFarquhar, *U.S. Agrees with Russia on Rules in Syrian Sky*, N.Y. TIMES (Oct. 20, 2015) at <https://www.nytimes.com/2015/10/21/world/middleeast/us-and-russia-agree-to-regulate-all-flights-over-syria.html>.

³² Ministry of Defense of the Russ. Fed’n Press Release, *Russian and US Defense Ministries Signed Memorandum of Understanding on Prevention of Flight Safety Incidents in the Course of Operation in the Syrian Arab Republic* (date not listed), available at <http://syria.mil.ru/en/index/syria/news/more.htm?id=12061345@egNews>. See also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 170 (2017), available at doi:10.1017/ajil.2016.5 (describing Memorandum of Understanding).

³³ See, e.g., Carla Babb, *Mattis: Pro-Syrian Government Forces in Deconfliction Zone Were ‘Iranian-directed,’* VOA NEWS (May 19, 2017), at <https://www.voanews.com/a/jim-mattis-pro-syrian-government-forces-deconfliction-zone-iranian-directed/3862614.html>.

³⁴ U.S. Dep’t of Defense Press Release, *Briefing by Col. Dillon Via Teleconference from Baghdad, Iraq* (June 1, 2017), at <http://www.centcom.mil/MEDIA/Transcripts>.

Command has referred to the al-Tanf surroundings as an “agreed upon”³⁵ and “established deconfliction zone,”³⁶ Russian Foreign Minister Sergey Lavrov has called these claims “unilateral” and “illegitimate.”³⁷

It was on this background that the United States conducted additional strikes on Syrian government forces. On May 18, U.S. aircraft struck a convoy of Syrian regime vehicles that had entered the disputed al-Tanf deconfliction zone.³⁸ According to Secretary of Defense Jim Mattis, the U.S. strike was necessitated “by offensive movement with offensive capability of what we believe were Iranian-directed—I don’t know [if] there were Iranians on the ground, but by Iranian-directed force[s] inside an established and agreed-upon deconfliction zone.”³⁹ Secretary Mattis continued: “[W]e’re not increasing our role in the Syrian civil war, but we will defend our troops . . . [including] a coalition element made up of more than just U.S. troops.”⁴⁰

The United States struck regime forces again on June 19, this time downing a Syrian warplane. Official explanations again emphasized the Russia-U.S. deconfliction zones—perhaps in relation to the reasonableness of U.S. forces’ perception of hostile intent—without specifying their precise legal relevance. According to the United States, the warplane had demonstrated “hostile intent” by dropping bombs near American-backed Syrian Democratic Forces (SDF) around the SDF-held town of Ja’Din,⁴¹ two kilometers north of “an established East-West SDF-Syrian Regime de-confliction area.”⁴² Explaining this third strike, a U.S. Department of Defense spokesperson said that “the coalition will not tolerate demonstrated hostile intent and actions of pro-regime forces toward coalition or partner forces in Syria who are conducting legitimate operations to defeat ISIS.”⁴³

³⁵ *Id.*

³⁶ Lisa Ferdinando, *Spokesman Reports on Progress in Effort to Defeat ISIS*, US CENTRAL COMMAND NEWS (June 1, 2017), at <http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/1200694/spokesman-reports-on-progress-in-effort-to-defeat-isis>.

³⁷ *Lavrov: Deconfliction Zones Announced without Damascus’ Consent Illegitimate*, RT NEWS (June 7, 2017), at <https://www.rt.com/news/391216-lavrov-syria-us-strike>.

³⁸ *US Aircraft Conduct Strike on Syrian Army Convoy*, CBS NEWS (May 18, 2017), at <http://www.cbsnews.com/news/us-aircraft-strike-syrian-regime-forces-al-tanf-base>.

³⁹ U.S. Dep’t of Defense Press Release, *Press Briefing by Secretary Mattis, General Dunford, and Special Envoy McGurk on the Campaign to Defeat ISIS* (May 19, 2017), at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1188225/department-of-defense-press-briefing-by-secretary-mattis-general-dunford-and-sp>.

⁴⁰ U.S. Dep’t of Defense Press Release, *Remarks by Secretary Mattis and Minister Hultqvist* (May 18, 2017), at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1186980/remarks-by-secretary-mattis-and-minister-hultqvist-at-the-pentagon>.

⁴¹ U.S. Dep’t of Defense Press Release, *Coalition Defends Partner Forces from Syrian Fighter Jet Attack* (June 18, 2017), at https://www.defense.gov/Portals/1/features/2014/0814_iraq/docs/20170618-02-CoalitionDefendsSDFfromSyrianAttack.pdf. This took place twelve days after coalition forces affiliated with the United States had destroyed two artillery pieces and an anti-aircraft weapon when pro-regime forces entered the al-Tanf deconfliction zone. U.S. Dep’t of Defense Press Release, *Coalition Strikes at Pro-Regime Forces in Syria Deconfliction Zone* (June 6, 2017), at <https://www.defense.gov/News/Article/Article/1205056/coalition-strikes-at-pro-regime-forces-in-syria-deconfliction-zone>.

⁴² *Id.*

⁴³ Cheryl Pellerin, *DoD Official: Sole Focus in Iraq, Syria Remains on Isis*, U.S. DEPARTMENT OF DEFENSE NEWS (June 20, 2017), at <https://www.defense.gov/News/Article/Article/1220818/dod-official-sole-focus-in-iraq-syria-remains-on-isis>.

On August 2, in a response to a request from Chairman of the Senate Foreign Relations Committee Bob Corker, the Administration offered a more extended explanation of the May and June strikes:

The United States has sufficient legal authority to prosecute the campaign against al-Qa'ida and associated forces, including against the Islamic State of Iraq and Syria (ISIS). This legal authority includes the 2001 Authorization for the Use Military Force (AUMF) which authorizes the use of military force against these groups. Accordingly, the Administration is not seeking revisions to the 2001 AUMF or additional authorizations to use force.

The 2001 AUMF also 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. As Secretary Tillerson indicated in his testimony before the Committee on June 13, 2017, our purpose and reason for being in Syria are unchanged: defeating ISIS. The 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. The United States does not seek to fight the Syrian Government or pro-Syrian-Government forces. However, the United States will not hesitate to use necessary and proportionate force to defend U.S., Coalition, or partner forces engaged in the campaign against ISIS.

As a matter of international law, the United States is using force in Syria against al-Qa'ida and associated forces, including ISIS, and is providing support to Syrian partners fighting ISIS, such as the Syrian Democratic Forces, in the collective self-defense of Iraq (and other States) and in U.S. national self-defense. Upon commencing airstrikes against ISIS in Syria in September 2014, the United States submitted a letter to the U.N. Security Council consistent with Article 51 of the U.N. Charter explaining the international legal basis for its use of force. As the letter explained, Iraq has made clear that it faces serious threats of continuing armed attacks from ISIS, operating from safe havens in Syria; the Syrian Government has shown it cannot, or will not, confront these safe havens. The Government of Iraq has requested the United States lead international efforts to strike ISIS sites and strongholds inside Syria to end armed attacks on Iraq, to protect Iraqi citizens, and to enable Iraq to control its borders. Moreover, ISIS threatens Iraq, U.S. partners in the region, and the United States. Therefore, consistent with the inherent right of individual and collective self-defense, the United States initiated necessary and proportionate actions in Syria against ISIS in 2014, and those actions continue to the present day. Such necessary and proportionate measures include the use of force to defend U.S., Coalition, and U.S.-supported partner forces from threats by Syrian Government and pro-Syrian Government forces.⁴⁴

United States Alleges Russia Continues to Violate INF Treaty
doi:10.1017/ajil.2017.48

The Intermediate-Range Nuclear Forces Treaty (INF Treaty), signed by Ronald Reagan and Mikhail Gorbachev in 1987, obligates the parties “not to possess, produce, or flight-test a ground-launched cruise missile (GLCM) with a range capability of 500 km to 5,500 km, or to possess or produce launchers of such missiles.”¹ In 2014, the State Department reported

⁴⁴ Letter from Charles Faulkner, *supra* note 30.

¹ Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, U.S.-U.S.S.R., Dec. 8, 1987, 1657 UNTS 485, available at <https://www.state.gov/t/avc/trty/102360.htm#text> [hereinafter INF Treaty]; see also Marian Nash Leich, Contemporary Practice of the United States, 82 AJIL 341(1988).

that Russia was in violation of its obligation not to possess intermediate- or short-range missiles.² Russia denied the violation and expressed its own doubts about the United States' compliance with the INF Treaty; the meetings and discussions that followed did not resolve either state's concerns.³ Subsequent State Department reports in 2015 and 2016 continued to express concern about Russia's violation.⁴

In October 2016, two members of Congress wrote a letter to then-President Obama, observing that "the situation regarding Russia's violation has worsened and Russia is now in material breach of the Treaty."⁵ They did not publicly elaborate on the nature of the violation, but urged Obama to impose sanctions to respond to it. According to a press report, the letter was prompted by concerns raised by some U.S. officials that "Russia is producing more missiles than are needed to sustain a flight-test program, spurring fears that the Kremlin is moving to build a force that could ultimately be deployed."⁶ The State Department declined to comment.⁷ The Obama administration took the unusual step of calling for a meeting of the Special Verification Commission, which was established by the INF Treaty to preside over compliance issues.⁸ The commission met in November 2016; publicly, the U.S. State Department revealed only that "the United States, Belarusian, Kazakh, Russian, and Ukrainian Delegations met to discuss questions relating to compliance with the obligations assumed under the Treaty."⁹

Shortly after President Donald Trump's inauguration, press reports indicated that Russia had completed production and deployed the contested missile system.¹⁰ The State Department spokesperson declined to "comment on intelligence matters," and said: "We have made very clear our concerns about Russia's violation, the risks it poses to European

² U.S. DEP'T OF STATE, ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL, NONPROLIFERATION, AND DISARMAMENT AGREEMENTS AND COMMITMENTS 1 (July 2014), available at <http://www.state.gov/documents/organization/230108.pdf>; Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 108 AJIL 837 (2014).

³ Daugirdas & Mortenson, *supra* note 2, at 840–42.

⁴ 2015 Report on Adherence to and Compliance With Arms Control, Nonproliferation, and Disarmament Agreements and Commitments, at <https://www.state.gov/t/avc/rls/rpt/2015/243224.htm#INF2>; 2016 Report on Adherence to and Compliance With Arms Control, Nonproliferation, and Disarmament Agreements and Commitments, at <https://www.state.gov/t/avc/rls/rpt/2016/255651.htm#INF%20TREATY> (both reports noting that "[t]he United States has determined that [the previous year], the Russian Federation (Russia) continued to be in violation of its obligations under the INF Treaty not to possess, produce, or flight-test a ground-launched cruise missile (GLCM) with a range capability of 500 km to 5,500 km, or to possess or produce launchers of such missiles").

⁵ Letter from William M. Thornberry, Chairman, Committee on Armed Services and Devin Nunes, Chairman, Permanent Select Committee on Intelligence, to President Barack Obama, October 17, 2016, available at https://intelligence.house.gov/uploadedfiles/20161017_wmt_nunes_to_potus_re_inf.pdf.

⁶ Michael R. Gordon, *Russia is Moving Ahead with Missile Program that Violates Treaty*, U.S. OFFICIALS SAY, N.Y. TIMES (Oct. 19, 2016), at <https://www.nytimes.com/2016/10/20/world/europe/russia-missiles-inf-treaty.html>.

⁷ *Id.*

⁸ INF Treaty, *supra* note 1, Art. XIII (establishing the Special Verification Commission as a forum to "resolve questions relating to compliance with the obligations assumed" and to "agree upon such measures as may be necessary to improve the viability and effectiveness of this Treaty").

⁹ Thirteenth Session of the Special Verification Commission Under the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (INF Treaty), Nov. 16, 2016, available at <https://2009-2017.state.gov/r/pa/prs/ps/2016/11/264375.htm>.

¹⁰ Michael R. Gordon, *Russia Deploys Missile, Violating Treaty and Challenging Trump*, N.Y. TIMES (Feb. 14, 2017), at <https://www.nytimes.com/2017/02/14/world/europe/russia-cruise-missile-arms-control-treaty.html>.

and Asian security, and our strong interest in returning Russia to compliance with the treaty.”¹¹ On February 24, in an interview with Reuters, President Trump stated that he would take up the matter with Vladimir Putin “if and when we meet.”¹²

On March 8, General Paul Selva, Vice Chairman of the Joint Chiefs of Staff, testified before the House Armed Services Committee. In his prepared testimony, he stated,

Russia, for example, is not only modernizing its strategic nuclear triad and developing new non-strategic nuclear weapons, but remains in violation of its Intermediate Range Nuclear Forces Treaty obligations and has threatened nuclear use against U.S. forces and allies in Europe.¹³

His oral testimony, however, avoided this reference to a “violation of . . . Treaty obligations,” instead describing the Russian deployment as “violat[ing] the spirit and intent” of the treaty:

We believe that the Russians have deployed a land-based cruise missile that violates the spirit and intent of the Intermediate Nuclear Forces Treaty. The system itself presents a risk to most of our facilities in Europe. And we believe that the Russians have deliberately deployed it in order to pose a threat to NATO and to facilities within the NATO area of responsibility I don’t have enough information on their intent to conclude, other than that they do not intend to return to compliance.¹⁴

Selva added that the United States was considering various options to respond to Russia’s actions, but declined to provide specifics.¹⁵

Responding to the press stories and to Selva’s testimony, Russia denied any violation. On February 15, Kremlin spokesperson Dmitry Peskov, through a state-run media outlet, had stated that “[n]obody officially accused Russia of violating the INF Treaty. . . . Of course Russia was and remains committed to its international obligations, including in the framework of the agreement.”¹⁶ The Russian Ministry of Foreign Affairs also posted a copy stamped “FAKE” of the New York Times story describing the U.S. allegations¹⁷ and issued another statement calling the accusations “groundless.”¹⁸ After Selva’s testimony, Peskov further stated:

I want to remind you of [Russian President Vladimir] Putin’s words about the fact that Russia sticks to the international obligations, even if in situations where sometimes it doesn’t correspond to Russia’s interests. Russia still remains committed to its obligations, so we disagree and reject any accusations on this point.¹⁹

The Russian Foreign Ministry published an extended response to General Selva’s testimony:

¹¹ *Id.*

¹² Steve Holland, *Trump Wants to Make Sure U.S. Nuclear Arsenal at ‘Top of the Pack,’* REUTERS (Feb. 23, 2017), at <http://www.reuters.com/article/us-usa-trump-exclusive-idUSKBN1622IF>.

¹³ Nuclear Deterrence Assessment, House Armed Services Committee Hearing (Mar. 8, 2017), available at <http://congressional.proquest.com/congressional/docview/t39.d40.03087703.d98?accountid=14667>.

¹⁴ *Id.* at 57; see also Michael R. Gordon, *Russia Has Deployed Missile Barred by Treaty, US General Tells Congress*, N.Y. TIMES (Mar. 8, 2017), at <https://www.nytimes.com/2017/03/08/us/politics/russia-inf-missile-treaty.html>.

¹⁵ Nuclear Deterrence Assessment, *supra* note 13, at 57.

¹⁶ *Kremlin: Russia Not Officially Accused of Violating INF Treaty*, SPUTNIK (Feb. 15, 2017), at <https://sputniknews.com/world/201702151050698427-kremlin-peskov-russia-inf>.

¹⁷ Neil MacFarquhar, *With Big Red Stamp, Russia Singles Out What It Calls ‘Fake’ News*, N.Y. TIMES (Feb. 22, 2017), at <https://www.nytimes.com/2017/02/22/world/europe/russia-fake-news-media-foreign-ministry-.html>.

¹⁸ *Id.*

¹⁹ Frederik Pleitgen, Alla Eshchenko & Laura Smith-Spark, *Russia Denies Deploying Cruise Missiles in Treaty Breach*, CNN (Mar. 9, 2017), at <http://edition.cnn.com/2017/03/09/europe/russia-us-cruise-missile-treaty>.

We have noted statements made by Vice Chairman of the US Joint Chiefs of Staff Gen. Paul J. Selva, in which he told the US Congress that Russia had allegedly deployed a land-based cruise missile that violates the “spirit and intent” of the Intermediate-Range Nuclear Forces (INF) Treaty.

Such statements are certainly disappointing. As you know, this is not a new story. An informed person representing the military leadership of a major country should have known better. In particular, he could have finally explained what exactly they consider our “violations” to be and how they came to this conclusion.

However, this is not the first time that public accusations of Russia’s non-compliance with the INF Treaty are not backed up by any evidence. They seem to be following what has already become a familiar pattern—making claims and immediately evading any specificity.

We have repeatedly affirmed our commitment to the INF. We explained to the US side that all missile tests in Russia are in compliance with the Treaty. During all negotiations, consultations and meetings we asked them to list Russia’s specific actions that are causing concern in Washington. Invariably, we got little in response except vague proposals to guess what they meant. This hardly seems like a serious approach.

Indicatively, though, the Americans are threatening to retaliate for Russia’s mythical violations with certain steps of a military nature. The very fact that US representatives are persistently using such rhetoric, without bothering to bring any evidence or specific examples whatsoever, raises questions about the purpose of these false media narratives.

At the same time, the Americans stubbornly refuse to discuss our well-founded claims concerning their own compliance with the INF Treaty. I am referring to the Mk-41 vertical launching units in the Aegis Ashore ground-based anti-missile systems, which the United States has deployed in Romania and plans to deploy in Poland, and which can reasonably be considered cruise missile launchers. The large-scale programme of building ballistic missile targets for missile defence-related applications, with similar characteristics to intermediate-range and shorter-range missiles, is also causing a lot of questions. In addition, the United States produces and uses unmanned combat air vehicles, which fit the definition of ground-based cruise missiles contained in the INF Treaty.

Once again, we suggest abandoning this unsubstantiated rhetoric and public accusations without specific examples in favour of a substantive dialogue aimed at addressing existing concerns and clarifying potential points of disagreement. All the mechanisms are there. We are open to such a dialogue through the appropriate channels.²⁰

For its part, the April 2017 State Department Report, echoing the 2015 and 2016 reports, continued to describe Russia as violating the INF Treaty:

The United States has determined that in 2016, the Russian Federation (Russia) continued to be in violation of its obligations under the INF Treaty not to possess, produce, or flight-test a ground-launched cruise missile (GLCM) with a range capability of 500 kilometers to 5,500 kilometers, or to possess or produce launchers of such missiles.²¹

In response, the Russian Foreign Ministry issued a lengthy statement on April 29 detailing what it viewed as U.S. violations of various international obligations:

²⁰ Ministry of Foreign Affairs of the Russ. Fed’n Press Release, Briefing by Foreign Ministry Spokesperson Maria Zakharov (Mar. 10, 2017), at http://www.mid.ru/en/web/guest/foreign_policy/news/-/asset_publisher/ckNonkJE02Bw/content/id/2673614.

²¹ 2017 Report on Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments (Apr. 14, 2017), at <https://www.state.gov/t/avc/rls/rpt/2017/270330.htm>.

The U.S. formally advocates for unconditional implementation of the norms of international law, which also refers to abiding, to the fullest extent, by international agreements aimed at strengthening international security and maintaining global stability, key among which are arms control, nonproliferation, and disarmament treaties and conventions.

While proclaiming this approach and setting its own criteria, “ideal” from Washington’s point of view, in terms of implementation of a particular treaty, the U.S. aspires to a monopoly in assessing other nations’ compliance with their treaty obligations. Moreover, Washington does so categorically, ignoring the established practice of resolving issues through designated multilateral mechanisms.

The annual report, released by the U.S. Department of State on April 25, 2017, is subject to the same deficiencies as all the previous ones. While making absolutely unsubstantiated accusations against specific countries, its authors have once again attempted to portray the U.S. as being all but the only state with an impeccable track record in terms of compliance with arms control, nonproliferation, and disarmament agreements and commitments. Such unacceptable manner of presenting and compiling facts has already become a traditional U.S. way of validating its claims to the “exceptional right” to judge the “guilty” and demand punishment for them.

While sharing the commitment to full and unconditional compliance with its obligations under international treaties, the Russian Federation strongly opposes the methods and means used by Washington in order to supposedly “expose” those countries which, in its opinion, are treaty obligations violators.

For the past years, there has been a growing number of reasons suggesting that such U.S. line of conduct is not at all due to the fact that it is plainly unwilling to burden itself with a complicated and time-consuming expert dialogue; it could be something even more serious than that, such as Washington’s fear of itself being exposed for making unsubstantiated accusations against other countries, as well as for its own violations of arms control, nonproliferation, and disarmament agreements and commitments.

Russia’s Foreign Ministry is once again compelled to draw attention to such unacceptable activities by the U.S. and to the irrefutable facts aimed at contributing to an unbiased assessment of U.S. and Russia’s actual compliance with their treaty obligations under arms control, nonproliferation, and disarmament agreements and commitments.²²

²² Ministry of Foreign Affairs of the Russ. Fed’n Press Release, Comment by the MFA of Russia on the U.S. Department of State’s Annual Report on Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments (Apr. 29, 2017), at http://www.mid.ru/en/web/guest/kommentarii_predstavatelya/-/asset_publisher/MCZ7HQUMdqBY/content/id/2740264.