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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

EDITED BY KRISTINA DAUGIRDAS AND JULIAN DAVIS MORTENSON

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## GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

*Iran Nuclear Framework Agreement Reached; Congress Seeks to Influence Negotiation*

In 2013, the United States joined the other permanent members of the UN Security Council and Germany (the P5 + 1) in opening negotiations with the Iranian government about the scope and content of its nuclear program.<sup>1</sup> The parties agreed on a Joint Plan of Action for negotiating a “comprehensive solution” and began implementing the interim agreement in early 2014.<sup>2</sup> Talks aimed at a final settlement were extended several times, with the final interim deadline set for the end of March 2015.<sup>3</sup> In the early part of 2015, two significant developments occurred in connection with these negotiations: a group of Republican senators wrote an open letter to the Iranian leadership, and the P5 + 1 reached agreement on key parameters of a final comprehensive agreement, leaving key details to be negotiated in coming months.

On March 9, Senator Tom Cotton, a critic of the negotiations, published an open letter to the Iranian leadership that was signed by forty-seven of the fifty-four Republican senators.<sup>4</sup> The letter stated, in part:

It has come to our attention while observing your nuclear negotiations with our government that you may not fully understand our constitutional system. Thus, we are writing to bring to your attention two features of our Constitution—the power to make binding international agreements and the different character of federal offices—which you should seriously consider as negotiations progress.

First, under our Constitution, while the president negotiates international agreements, Congress plays the significant role of ratifying them. In the case of a treaty, the Senate must ratify it by a two-thirds vote. A so-called congressional-executive agreement requires a majority vote in both the House and the Senate (which, because of procedural rules, effectively means a three-fifths vote in the Senate). Anything not approved by Congress is a mere executive agreement.

Second, the offices of our Constitution have different characteristics. For example, the president may serve only two 4-year terms, whereas senators may serve an unlimited number of 6-year terms. As applied today, for instance, President Obama will leave office in January 2017, while most of us will remain in office well beyond then—perhaps decades.

What these two constitutional provisions mean is that we will consider any agreement regarding your nuclear-weapons program that is not approved by the Congress as nothing more than an executive agreement between President Obama and Ayatollah Khamenei.

<sup>1</sup> Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 AJIL 94, 109 (2014).

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

<sup>3</sup> *Background Briefing on Secretary Kerry’s Meetings on the Iran Nuclear Negotiations*, U.S. DEP’T OF STATE (Mar. 4, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/03/238149.htm>; *Extension of Iran Nuclear Talks*, U.S. DEP’T OF STATE (July 18, 2014), at <http://www.state.gov/secretary/remarks/2014/07/229491.htm>; *Solo Press Availability in Vienna, Austria*, U.S. DEP’T OF STATE (Nov. 24, 2014), at <http://www.state.gov/secretary/remarks/2014/11/234363.htm>.

<sup>4</sup> *Cotton and 46 Fellow Senators to Send Open Letter to the Leaders of the Islamic Republic of Iran*, TOM COTTON, U.S. SEN. FOR ARKANSAS (Mar. 9, 2015), at <http://www.cotton.senate.gov/content/cotton-and-46-fellow-senators-send-open-letter-leaders-islamic-republic-iran>; see also Peter Baker, *G.O.P. Senators Write to Tehran on Nuclear Pact*, N.Y. TIMES, Mar. 10, 2015, at A1.

The next president could revoke such an executive agreement with the stroke of a pen and future Congresses could modify the terms of the agreement at any time.<sup>5</sup>

The letter prompted significant political controversy.<sup>6</sup> President Barack Obama said it was “somewhat ironic to see some members of Congress wanting to make common cause with the hardliners in Iran.”<sup>7</sup> Vice President Joseph Biden said the letter was “expressly designed to undercut a sitting President in the midst of sensitive international negotiations [and] is beneath the dignity of an institution I revere.”<sup>8</sup> And Senator Harry Reid accused the signatories of “interv[ing] in an international negotiation, with the sole goal of embarrassing the President” and “undermin[ing] our Commander-in-Chief purely out of spite.”<sup>9</sup>

The Republican signatories defended the letter and reiterated the importance of congressional input in the negotiations. Responding to Obama’s comment about members of Congress and Iranian hardliners, Cotton stated in an interview that there are “nothing but hardliners in Tehran” who have been “killing Americans for 35 years.”<sup>10</sup> Senator Mitch McConnell said that criticism of the letter was a “manufactured controversy” and a “distraction,” while Senators John McCain and Lindsey Graham defended the importance of congressional involvement.<sup>11</sup>

Leaders in Iran took note. Ayatollah Ali Khamenei said the letter illustrated “the collapse of political ethics and the U.S. system’s internal disintegration.”<sup>12</sup> He expressed concern over the “opacity, deceit and backstabbing” of Iran’s negotiating partners.<sup>13</sup> The Iranian delegation

<sup>5</sup> Sen. Tom Cotton et al., *An Open Letter to the Leaders of the Islamic Republic of Iran* (Mar. 9, 2015), available at <http://www.cotton.senate.gov/sites/default/files/150309%20Cotton%20Open%20Letter%20to%20Iranian%20Leaders.pdf> [hereinafter *Open Letter to Iran*].

<sup>6</sup> See Jennifer Steinhauer & Julie Hirschfeld Davis, *Irate Democrats Denounce G.O.P. on Iran Letter*, N.Y. TIMES, Mar. 11, 2015, at A11.

<sup>7</sup> *Remarks by President Obama and European Council President Donald Tusk Before Bilateral Meeting*, THE WHITE HOUSE (Mar. 9, 2015), at <https://www.whitehouse.gov/the-press-office/2015/03/09/remarks-president-obama-and-european-council-president-donald-tusk-bilat>.

<sup>8</sup> *Statement by the Vice President on the March 9 Letter from Republican Senators to the Islamic Republic of Iran*, THE WHITE HOUSE (Mar. 9, 2015), at <https://www.whitehouse.gov/the-press-office/2015/03/09/statement-vice-president-march-9-letter-republican-senators-islamic-repu>.

<sup>9</sup> *Reid Remarks on Senate Republican’s Letter Undermining President Obama’s Efforts to Prevent Iran From Obtaining a Nuclear Weapon*, HARRY REID, U.S. SEN. FOR NEVADA (Mar. 9, 2015), at [http://www.reid.senate.gov/press\\_releases/2015-09-03-reid-remarks-on-senate-republicans-letter-undermining-president-obamas-efforts-to-prevent-iran-from-obtaining-a-nuclear-weapon](http://www.reid.senate.gov/press_releases/2015-09-03-reid-remarks-on-senate-republicans-letter-undermining-president-obamas-efforts-to-prevent-iran-from-obtaining-a-nuclear-weapon) (“[I]t is unprecedented for one political party to directly intervene in an international negotiation, with the sole goal of embarrassing the President. . . . This is not a time to undermine our Commander-in-Chief purely out of spite.”).

<sup>10</sup> *Tom Cotton: I Want Complete Nuclear Disarmament*, MSNBC MORNING JOE (Mar. 10, 2015), at <http://www.msnbc.com/morning-joe/watch/tom-cotton-i-want-complete-nuclear-disarmament-410915907561>. Cotton also stressed that any deal with Iran should be submitted to the Senate for approval. See *id.*

<sup>11</sup> See Jeremy Diamond, *Mitch McConnell Rebukes Iran Letter Criticism*, CNN (Mar. 15, 2015), at <http://www.cnn.com/2015/03/15/politics/mitch-mcconnell-iran-letter-john-kerry>; Patricia Zengerle, *Republicans Stand by Iran Letter, Despite Furor*, REUTERS (Mar. 12, 2015), at <http://www.reuters.com/article/2015/03/12/us-iran-nuclear-congress-idUSKBN0M82L120150312>.

<sup>12</sup> Brian Murphy, *Iran’s Leader: Fall of U.S. “Political Ethics” Highlighted by GOP Letter*, WASH. POST, Mar. 12, 2015, available at [http://www.washingtonpost.com/world/middle\\_east/irans-leader-fall-of-us-political-ethics-highlighted-by-gop-letter/2015/03/12/673dc302-c8a5-11e4-aa1a-86135599fb0f\\_story.html](http://www.washingtonpost.com/world/middle_east/irans-leader-fall-of-us-political-ethics-highlighted-by-gop-letter/2015/03/12/673dc302-c8a5-11e4-aa1a-86135599fb0f_story.html). See also Thomas Erdbrink, *G.O.P. Letter by Republican Senators Is Evidence of “Decline,” Iranian Says*, N.Y. TIMES, Mar. 13, 2015, at A3.

<sup>13</sup> Murphy, *supra* note 12.

raised the letter with its U.S. counterparts during ongoing negotiations.<sup>14</sup> State Department officials said that the letter “was not, in [their] view, helpful. It was ill-timed; it was ill-advised.”<sup>15</sup> But they emphasized that “at the end of the day, this is about the decisions that Iran will make to show the world that its program is exclusively peaceful.”<sup>16</sup>

Beyond the purely political controversy, questions were raised about whether the senators’ letter was accurate, on-point, and itself legal under U.S. law.

First, the letter suggested that “[t]he next president could revoke . . . an executive agreement with the stroke of a pen and future Congresses could modify the terms of the agreement at any time.”<sup>17</sup> Generally, states may not invoke changes in domestic law to revise their international obligations or to justify failure to comply with them.<sup>18</sup> The State Department thus noted that “Congress doesn’t have the power to alter the terms of international agreements negotiated by the Executive.”<sup>19</sup> And the Iranian Foreign Minister responded by observing that a “[c]hange of administration does not in any way relieve the next administration from international obligations undertaken by its predecessor” and that revoking a binding international agreement would be “a blatant violation of international law.”<sup>20</sup>

The accuracy of the letter’s description of the constitutional procedure for treaty ratification has also been challenged. According to the letter, the “Senate must ratify [a treaty] by a two-thirds vote.”<sup>21</sup> While it is fair to describe this formulation as a common shorthand, as a technical matter it is inaccurate. Article II states that the president “shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.”<sup>22</sup> While the Senate provides advice and consent, it is the *president* who formally ratifies a treaty—for example, by depositing an instrument of ratification<sup>23</sup>—after consultation with the Senate.<sup>24</sup>

In any event, the letter’s focus on internationally binding agreements is arguably beside the point because the Obama administration had been focused on negotiating a non-binding

<sup>14</sup> *Background Briefing on P5+1 Talks With Iran*, U.S. DEP’T OF STATE (Mar. 16, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/03/239347.htm> [hereinafter *Background Briefing on P5+1 Talks*].

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

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

<sup>17</sup> Open Letter to Iran, *supra* note 5.

<sup>18</sup> See Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331 (“A party may not invoke the provisions of its internal law as justification for failure to perform a treaty.”); see also *id.* art. 46(1) (“A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”); *id.* art. 46(2) (“A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith.”).

<sup>19</sup> *Jen Psaki, Daily Press Briefing*, U.S. DEP’T OF STATE (Mar. 9, 2015), at <http://www.state.gov/r/pa/prs/dpb/2015/03/238679.htm> [hereinafter *Psaki Mar. 9 Press Briefing*].

<sup>20</sup> *Foreign Minister Javad Zarif, Response to the Letter of US Senators*, ISLAMIC REPUBLIC OF IRAN MINISTRY OF FOREIGN AFFAIRS (Mar. 9, 2015), at <http://en.mfa.ir/index.aspx?siteid=3&fkeyid=&siteid=3&fkeyid=&siteid=3&pageid=1997&newsview=330948>.

<sup>21</sup> Open Letter to Iran, *supra* note 5.

<sup>22</sup> U.S. CONST., art. II, § 2, cl. 2.

<sup>23</sup> See Vienna Convention on the Law of Treaties, art. 16, *supra* note 18.

<sup>24</sup> STANLEY BACH & DAVID M. ACKERMAN, CONG. RESEARCH SERV., S. PRT. 106–71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 117 (2001).

political commitment.<sup>25</sup> The Obama administration had indicated that the final, comprehensive agreement would be treated as a non-binding political agreement rather than an executive agreement that would be binding under international law.<sup>26</sup>

Finally, the letter was also criticized as being in *itself* a violation of U.S. law. Two principal grounds were raised for this claim. First, the administration suggested that the letter might have interfered with the president's constitutional authority to conduct foreign affairs. The State Department emphasized that "the Constitution assigns the authority to the executive to negotiate these deals with foreign partners . . . so implying that Congress has a role . . . is inaccurate."<sup>27</sup> The White House accordingly criticized the senators' letter as part of "an ongoing strategy, a partisan strategy, to undermine the President's ability to conduct foreign policy and to advance [U.S.] interests around the globe."<sup>28</sup> And Secretary of State John Kerry described the letter as "an unconstitutional and un-thought-out action" that was "unprecedented" and "absolutely calculated directly to interfere with these negotiations."<sup>29</sup> In response, some defenders of the letter suggested that the letter was functionally little different from giving a speech or publishing an op-ed,<sup>30</sup> and Cotton asserted that the "critical role of Congress in the adoption of international agreements was clearly laid out by [the] Founding Fathers in [the] Constitution."<sup>31</sup>

Second, the letter raises questions under the 1799 Logan Act. The Logan Act was passed in 1799 after a private citizen—George Logan—travelled to Paris without presidential authorization to negotiate the end of hostilities between France and the United States. Although Logan was successful, President John Adams persuaded Congress to prevent future "temerity and impertinence of individuals affecting to interfere in public affairs between France and the United States" by passing the statute.<sup>32</sup>

The Logan Act provides, in relevant part:

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in

<sup>25</sup> *Background Briefing on P5+1*, *supra* note 14 ("What we are doing here is reaching a political understanding, and the ability for it to be durable is about the quality of the agreement."); *Press Briefing by Press Secretary Josh Earnest*, 3/9/2014, THE WHITE HOUSE (Mar. 9, 2015), at <https://www.whitehouse.gov/the-press-office/2015/03/09/press-briefing-press-secretary-josh-earnest-392014> ("[W]e're seeking commitments from the Iranian government.") [hereinafter *Earnest Mar. 9 Press Briefing*]; *Psaki Mar. 9 Press Briefing*, *supra* note 19 ("It's not a treaty. . . . [O]ur preference is to come to a framework, an understanding—a political understanding . . .").

<sup>26</sup> *Jen Psaki*, *Daily Press Briefing*, U.S. DEP'T OF STATE (Mar. 12, 2015), at <http://www.state.gov/r/pa/prs/dpb/2015/03/238840.htm>. A spokeswoman noted that "the nonbinding international agreement or international arrangement that consists of political commitments provides us with that flexibility to snap back sanctions in a faster manner," adding that "[t]his is the path we've determined is the best path forward." *Id.*

<sup>27</sup> *Psaki Mar. 9 Press Briefing*, *supra* note 19.

<sup>28</sup> *Earnest Mar. 9 Press Briefing*, *supra* note 25.

<sup>29</sup> *Interview with Margaret Brennan of CBS*, U.S. DEP'T OF STATE (Mar. 15, 2015), at <http://www.state.gov/secretary/remarks/2015/03/238892.htm>.

<sup>30</sup> John Yoo, *More on the Cotton Letter*, NAT'L REV. (Mar. 12, 2015), at <http://www.nationalreview.com/corner/415320/more-cotton-letter-john-yoo>.

<sup>31</sup> Tom Cotton, *Why We Wrote the Letter to Iran*, USA TODAY (Mar. 10, 2015), at <http://www.usatoday.com/story/opinion/2015/03/10/iran-nuclear-talks-letter-47-senators-sen-tom-cotton-editorials-debates/24721971>.

<sup>32</sup> See Detlev F. Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AJIL 268, 270 (1966) (quoting 1 THE COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 267 (Richardson ed., 1897)).

relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both.<sup>33</sup>

In the two centuries since it was enacted, the Logan Act has never been successfully enforced; there have been no prosecutions and only one indictment.<sup>34</sup> Despite this record, the possibility of liability is periodically discussed when members of Congress engage with foreign leaders.<sup>35</sup>

While the possibility of liability under the Logan Act attracted media attention,<sup>36</sup> legal scholars have generally been skeptical.<sup>37</sup> The senators' letter might fall within a literal reading of the statutory text, which prohibits correspondence intended to "influence the measures or conduct of any foreign government" regarding a dispute with the United States.<sup>38</sup> Indeed, Cotton had stated that the letter was "about stopping Iran from getting a nuclear deal."<sup>39</sup> But given their official status under Article I of the Constitution, the senators might not have been acting "without authority of the United States."<sup>40</sup> And the State Department had opined in 1975 that the law did not "restrict members of the Congress from engaging in discussion with foreign officials in pursuance of their legislative duties under the Constitution."<sup>41</sup>

While the legal implications of the Cotton letter were still being debated in the United States, the talks went forward in Lausanne, Switzerland.<sup>42</sup> On April 2, Iranian Foreign Minister Zarif and European Union Foreign Minister Federica Mogherini announced that Iran and the P5 + 1 had agreed on "key parameters" for their final agreement, which will be called the Joint Comprehensive Plan of Action (JCPOA).<sup>43</sup> These parameters set the firm outlines for the final agreement; the technical details are scheduled to be negotiated in June 2015.<sup>44</sup>

<sup>33</sup> Logan Act, 1 Stat. 613, ch. 1 (1799) (codified as amended at 18 U.S.C. § 953 (2012)).

<sup>34</sup> MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL33265, CONDUCTING FOREIGN RELATIONS WITHOUT AUTHORITY: THE LOGAN ACT 3 (2006), available at <http://fpc.state.gov/documents/organization/61050.pdf>.

<sup>35</sup> See Ryan M. Scoville, *Legislative Diplomacy*, 112 MICH. L. REV. 331, 352–53 (2013).

<sup>36</sup> See, e.g., Jeremy Diamond, *Did 47 Republican Senators Break the Law in Plain Sight?*, CNN (Mar. 11, 2015), at <http://www.cnn.com/2015/03/10/politics/tom-cotton-iran-letter-logan-act>.

<sup>37</sup> Compare Steve Vladeck, *The Iran Letter and the Logan Act*, LAWFARE (Mar. 10, 2015), at <http://www.lawfareblog.com/iran-letter-and-logan-act> (suggesting that liability and enforcement were both unlikely), with Peter Spiro, *GOP Letter Might Be Unconstitutional. Is It Also Criminal?*, OPINIO JURIS (Mar. 9, 2015), at <http://opiniojuris.org/2015/03/09/gop-iran-letter-might-be-unconstitutional-is-it-also-criminal> (suggesting liability was possible but enforcement was unlikely).

<sup>38</sup> 18 U.S.C. § 953 (2012).

<sup>39</sup> Diamond, *supra* note 36.

<sup>40</sup> 18 U.S.C. § 953 (2012).

<sup>41</sup> SEITZINGER, *supra* note 34, at 9 (quoting DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1975, at 750 (Eleanor C. McDowell ed., 1976)). See also Vladeck, *supra* note 37 (suggesting that defenses of void-for-vagueness and desuetude would also be available).

<sup>42</sup> *Sec'y of State John Kerry, Remarks to the Press*, U.S. DEP'T OF STATE (Mar. 21, 2015), at <http://www.state.gov/secretary/remarks/2015/03/239655.htm>; *Senior Administration Officials on P5+1 Talks With Iran*, U.S. DEP'T OF STATE (Mar. 17, 2015), at <http://www.state.gov/r/pal/prs/ps/2015/03/239368.htm>; *Background Briefing on P5+1*, *supra* note 14.

<sup>43</sup> *Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif in Switzerland*, EUROPEAN UNION (Apr. 2, 2015), at [http://eeas.europa.eu/statements-eeas/2015/150402\\_03\\_en.htm](http://eeas.europa.eu/statements-eeas/2015/150402_03_en.htm) [hereinafter *EU Joint Statement*].

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

The announcement described the agreed-upon key parameters for the JCPOA as follows:

As Iran pursues a peaceful nuclear programme, Iran's enrichment capacity, enrichment level and stockpile will be limited for specified durations, and there will be no other enrichment facility than Natanz. Iran's research and development on centrifuges will be carried out on a scope and schedule that has been mutually agreed.

Fordow will be converted from an enrichment site into a nuclear, physics and technology centre. International collaboration will be encouraged in agreed areas of research. There will not be any fissile material at Fordow.

An international joint venture will assist Iran in redesigning and rebuilding a modernized Heavy Water Research Reactor in Arak that will not produce weapons grade plutonium. There will be no reprocessing and the spent fuel will be exported.

A set of measures have been agreed to monitor the provisions of the JCPOA including implementation of the modified Code 3.1 and provisional application of the Additional Protocol. The International Atomic Energy Agency (IAEA) will be permitted the use of modern technologies and will have enhanced access through agreed procedures, including to clarify past and present issues.

Iran will take part in international cooperation in the field of civilian nuclear energy, which can include supply of power and research reactors. Another important area of cooperation will be in the field of nuclear safety and security. The EU will terminate the implementation of all nuclear-related economic and financial sanctions and the US will cease the application of all nuclear-related secondary economic and financial sanctions, simultaneously with the IAEA-verified implementation by Iran of its key nuclear commitments.

A new UN Security Council Resolution will endorse the JCPOA, terminate all previous nuclear-related resolutions and incorporate certain restrictive measures for a mutually agreed period of time.<sup>45</sup>

The State Department issued its own description of the key parameters. Among other things, it provided a description of the timeline of the agreement:

### **Phasing**

- For ten years, Iran will limit domestic enrichment capacity and research and development—ensuring a breakout timeline of at least one year. Beyond that, Iran will be bound by its longer-term enrichment and enrichment research and development plan it shared with the P5+1.
- For fifteen years, Iran will limit additional elements of its program. For instance, Iran will not build new enrichment facilities or heavy water reactors and will limit its stockpile of enriched uranium and accept enhanced transparency procedures.
- Important inspections and transparency measures will continue well beyond 15 years. Iran's adherence to the Additional Protocol of the IAEA is permanent,

<sup>45</sup> *EU Joint Statement*, *supra* note 43.

including its significant access and transparency obligations. The robust inspections of Iran's uranium supply chain will last for 25 years.

- Even after the period of the most stringent limitations on Iran's nuclear program, Iran will remain a party to the Nuclear Non-Proliferation Treaty (NPT), which prohibits Iran's development or acquisition of nuclear weapons and requires IAEA safeguards on its nuclear program.<sup>46</sup>

The State Department stressed, however, that “[i]mportant implementation details are still subject to negotiation, and nothing is agreed until everything is agreed.”<sup>47</sup> Obama praised the framework agreement as “a historic understanding with Iran, which, if fully implemented, will prevent it from obtaining a nuclear weapon.”<sup>48</sup>

Two weeks after the agreement on key parameters was announced, the U.S. Senate Foreign Relations Committee unanimously approved a bipartisan bill that would require congressional review of the eventual deal with Iran and would impose some delays on presidential implementation.<sup>49</sup> The Iran Nuclear Agreement Review Act of 2015 would require the president to submit any agreement to Congress for review.<sup>50</sup> During the thirty days following transmission, the president would not be permitted to “waive, suspend, reduce, provide relief from, or otherwise limit the application of statutory sanctions,” eliminating the possibility of immediate sanctions relief for Iran.<sup>51</sup> Congress would then have an opportunity to pass a joint resolution of disapproval, and presidential actions would be similarly proscribed during the process of considering and reconsidering the joint resolution.<sup>52</sup> Last, the bill established detailed reporting requirements to enable congressional oversight.<sup>53</sup> A White House spokesperson said the president would be “willing to sign” the legislation “in the form in which it passed” the Senate committee.<sup>54</sup>

<sup>46</sup> See *Parameters for a Joint Comprehensive Plan of Action Regarding the Islamic Republic of Iran's Nuclear Program*, U.S. DEP'T OF STATE (Apr. 2, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/04/240170.htm> (fact sheet detailing U.S. understanding of the JCPOA, including limitations on enrichment; conversion of the Fordow facility; limitations at the Natanz facility; inspections and transparency; reactors and reprocessing; and sanctions) [hereinafter *Parameters for JCPOA*]; See also *Press Availability in Lausanne, Switzerland*, U.S. DEP'T OF STATE (Apr. 2, 2015), at <http://www.state.gov/secretary/remarks/2015/04/240196.htm>.

<sup>47</sup> *Parameters for JCPOA*, *supra* note 46.

<sup>48</sup> *Statement by the President on the Framework to Prevent Iran from Obtaining a Nuclear Weapon*, THE WHITE HOUSE (Apr. 2, 2015), at <https://www.whitehouse.gov/the-press-office/2015/04/02/statement-president-framework-prevent-iran-obtaining-nuclear-weapon>. But he also emphasized “nothing is agreed until everything is agreed” and noted “if the verification and inspection mechanisms don't meet the specifications of our nuclear and security experts, there will be no deal.” *Id.*

<sup>49</sup> *Corker: Senate Foreign Relations Committee Unanimously Approves Iran Nuclear Agreement Review Act of 2015*, U.S. S. COMM. ON FOREIGN RELATIONS (Apr. 14, 2014), at <http://www.foreign.senate.gov/press/chair/release/corker-senate-foreign-relations-committee-unanimously-approves-iran-nuclear-agreement-review-act-of-2015>.

<sup>50</sup> Iran Nuclear Agreement Review Act of 2015, S. 615, 114th Cong. § 2 (2015) (as reported by S. Comm. on Foreign Relations, Apr. 14, 2015).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Josh Earnest, Daily Press Briefing*, THE WHITE HOUSE (Apr. 16, 2015), at <https://www.whitehouse.gov/the-press-office/2015/04/16/press-briefing-press-secretary-josh-earnest-4162015>.

## STATE DIPLOMATIC AND CONSULAR RELATIONS

*United States Lifts Some Cuba Restrictions and Explores the Possibility of Normalizing Relations*

In December 2014, following decades of economic sanctions, travel restrictions, and diplomatic alienation, President Barack Obama announced that the United States would begin to “normalize” its relationship with Cuba.<sup>1</sup> Since that announcement, the Obama administration has begun to reestablish diplomatic relations by engaging in a series of negotiations with Cuban officials and has issued new regulations facilitating some Cuba-related travel and commerce.<sup>2</sup>

These developments emerge from a long and often difficult historical relationship between the two states. In May 1960, not long after communist rebels in Cuba overthrew the American-backed Batista government, Fidel Castro’s new Cuban government nationalized all American- and British-owned oil refineries in Cuba.<sup>3</sup> Shortly thereafter, the United States severed diplomatic relations with Cuba,<sup>4</sup> and the U.S. Congress enacted the Foreign Assistance Act of 1961, which empowered the president to impose an embargo on Cuba.<sup>5</sup> On February 2, 1962, U.S. President John F. Kennedy relied on this new statutory power to embargo all trade between the United States and Cuba.<sup>6</sup>

The next year, acting under the authority of section 5(b) of the Trading With the Enemy Act (TWEA), the U.S. Department of the Treasury issued the Cuban Assets Control Regulations (31 C.F.R. § 515 (1963)) with the stated goal of “isolat[ing] the Cuban government economically and depriv[ing] it of U.S. dollars.” The regulations had the practical effect of limiting travel to Cuba because of the restrictions they imposed on travel-related financial transactions. Since that time, the trade embargo against Cuba has been further developed primarily—though not solely—through additional regulations promulgated pursuant to the TWEA.<sup>7</sup>

<sup>1</sup> *Statement by the President on Cuba Policy Changes*, THE WHITE HOUSE (Dec. 17, 2014), at <https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes>.

<sup>2</sup> The potential normalization of relations with Cuba has played a role in United States foreign policy for decades. In 1977, U.S. President Jimmy Carter listed as a goal of his administration the desire to “re-establish normal relationships” with the fourteen countries that did not have diplomatic relations with the United States when he took office, including “even more controversial nations like . . . Cuba . . .” John Boyd, *Contemporary Practices of the United States*, 71 AJIL 753, 753 (1977) (citing 13 WEEKLY COMP. OF PRES. DOC 880 (June 20, 1977)).

<sup>3</sup> Rupinder Hans, *The United States’ Economic Embargo of Cuba: International Implications of the Cuban Liberty and Democratic Solidarity Act of 1995*, 5 J. INT’L L. & PRAC. 327, 330 (1996).

<sup>4</sup> *A Guide To The United States’ History Of Recognition, Diplomatic, And Consular Relations, by Country, Since 1776: Cuba*, U.S. DEP’T OF STATE, OFFICE OF THE HISTORIAN, at <http://history.state.gov/countries/cuba> (last visited June 19, 2015).

<sup>5</sup> Foreign Assistance Act of 1961, § 620, 22 U.S.C. § 2370 (1994).

<sup>6</sup> Proclamation 3447, Embargo on All Trade with Cuba, 27 Fed. Reg. 1083, 3 C.F.R. 157 (1962).

<sup>7</sup> Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 AJIL 826, 826–28 (2014); Andreas Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AJIL 419, 421 (1996) (“From time to time . . . successive Presidents, in exercise of their foreign affairs power and of the broad discretion given by the Trading with the Enemy Act, [have] modified the embargo.”); John R. Crook, *Contemporary Practice of the United States*, 103 AJIL 741, 745 (2009) (“With regard to Cuba, Congress has passed several laws governing permitted travel, while leaving the Executive Branch discretion to adjust many aspects of the travel regulations as circumstances dictate. For the other designated [state sponsors of terrorism], Congress has taken the view that travel to these countries generally should be unencumbered. The Executive Branch has in turn promulgated comprehensive regulations governing, inter alia, commerce with designated states and travel to Cuba. These regulations are

Congress has also enacted further legislation on relations with Cuba. In 1992, President George H. W. Bush signed the Cuban Democracy Act into law, which—among other provisions—forbade subsidiaries of American companies from trading with Cuba, U.S. nationals from traveling to Cuba, and remittances from being sent to Cuba.<sup>8</sup> The act also imposed on-site monitoring requirements for all sales and donations of medical equipment and supplies, making the export of those supplies to Cuba virtually impossible from the United States or from foreign subsidiaries of American companies. In 1996, with the intent to “strengthen international sanctions against the Castro government” and to “plan for support of a transition government leading to a democratically elected government in Cuba,”<sup>9</sup> the United States passed the Cuban Liberty and Democratic Solidarity (Libertad) Act (also known as the Helms-Burton Act).<sup>10</sup>

On December 17, 2014—nearly fifty-three years after Kennedy’s proclamation of the Cuban embargo—Obama announced that the United States “is changing its relationship with the people of Cuba.”<sup>11</sup> The United States and Cuba had—with the help of the quiet diplomacy of Pope Francis—finally overcome the final obstacle to the Obama administration’s long-term goal of reestablishing diplomatic ties with Cuba: the United States exchanged three convicted Cuban spies for American aid worker Alan Gross and an American spy of Cuban origin, both of whom were imprisoned in Cuba.<sup>12</sup> Cuba also agreed to release fifty-three political prisoners.<sup>13</sup>

designed to balance multiple, competing foreign policy considerations and achieve important, often changing, foreign policy objectives.”)

<sup>8</sup> Cuban Democracy Act, 22 U.S.C. § 6001 et seq. (1992). A stated goal of the act was “to seek a peaceful transition to democracy and a resumption of economic growth in Cuba through the careful application of sanctions directed at the Castro government and support for the Cuban people.”

<sup>9</sup> Cuban Liberty and Democratic Solidarity (Libertad) Act [Helms-Burton Act], 22 U.S.C. §§ 6021–6091. The Helms-Burton Act codified the embargo as legislation rather than a series of executive orders and foreign policy and extended it to apply to foreign companies trading with Cuba. Title IV of the Act also allowed for the denial of visas to anyone who allegedly “trafficked” in property formerly owned by U.S. citizens but nationalized by Cuba.

<sup>10</sup> In the press guidance issued simultaneously with guidelines in the Federal Register regarding Title IV, the Department of State emphasized that “the Act is meant to pressure Cuba to change its policies and begin reforms. It also reflects the concerns of U.S. nationals who see foreign companies using confiscated assets in Cuba to which they have claims.” Marian Nash, *Contemporary Practices of the United States*, 91 AJIL 93, 98 (1997) (citing Dept. of State to All Diplomatic and Consular Posts, telegram 123385 (June 14, 1996). *See also* Fed. Reg. 30, 655 (1996)).

<sup>11</sup> *Statement by the President, supra* note 1.

<sup>12</sup> *Id.* (“While I have been prepared to take additional steps for some time, a major obstacle stood in our way—the wrongful imprisonment, in Cuba, of a U.S. citizen and USAID sub-contractor Alan Gross for five years. Over many months, my administration has held discussions with the Cuban government about Alan’s case, and other aspects of our relationship. His Holiness Pope Francis issued a personal appeal to me, and to Cuba’s President Raul Castro, urging us to resolve Alan’s case, and to address Cuba’s interest in the release of three Cuban agents who have been jailed in the United States for over 15 years.”).

<sup>13</sup> *Daily Press Briefing, Deputy Spokesperson Marie Harf*, U.S. DEP’T OF STATE (Jan. 12, 2015), at <http://www.state.gov/r/pa/prs/dpb/2015/01/235866.htm#CUBA> (“[T]he Cuban Government has notified us that they have completed the release of the 53 political prisoners that they had committed to free. We welcome this very positive development and are pleased that the Cuban Government followed through on this commitment. These political prisoners were individuals who had been cited by various human rights organizations as being imprisoned by the Cuban Government for exercising internationally protected freedoms or for their promotion of political and social reforms in Cuba. During our discussions with the Cubans we shared the names of individuals jailed in Cuba on charges related to their political activities. The Cuban Government made this sovereign decision to release those individuals as Raul Castro indicated in his December 17th speech. I know there’s been a lot of questions about the list. It’s been delivered to the Hill, to a number of folks on the both the Senate and the House side, both Democrats and Republican leadership and chairs and rankings of our key committees.”).

Obama's reasoning for the policy shift was practical: "[T]he United States has supported democracy and human rights in Cuba . . . primarily through policies that aimed to isolate the island. . . . And though this policy has been rooted in the best of intentions, no other nation joins [the United States] in imposing these sanctions, and it has had little effect beyond providing the Cuban government with a rationale for restrictions on its people."<sup>14</sup> With this policy calculation as the foundation of the new policy, Obama outlined the next steps toward what would appear to be an eventual normalization of U.S.-Cuba relations:

First, I've instructed Secretary [of State John] Kerry to immediately begin discussions with Cuba to reestablish diplomatic relations that have been severed since January of 1961. Going forward, the United States will reestablish an embassy in Havana, and high-ranking officials will visit Cuba. . . .

Second, I've instructed Secretary Kerry to review Cuba's designation as a State Sponsor of Terrorism. This review will be guided by the facts and the law. Terrorism has changed in the last several decades. At a time when we are focused on threats from al Qaeda to ISIL, a nation that meets our conditions and renounces the use of terrorism should not face this sanction.

Third, we are taking steps to increase travel, commerce, and the flow of information to and from Cuba. This is fundamentally about freedom and openness, and also expresses my belief in the power of people-to-people engagement. With the changes I'm announcing today, it will be easier for Americans to travel to Cuba, and Americans will be able to use American credit and debit cards on the island. Nobody represents America's values better than the American people, and I believe this contact will ultimately do more to empower the Cuban people.<sup>15</sup>

On January 15, 2015, to implement the policy changes that Obama had announced, the U.S. Treasury and Commerce Department revised the Cuban Assets Control Regulations and Export Administration Regulations.<sup>16</sup> Per the Treasury,

[t]hese measures will facilitate travel to Cuba for authorized purposes, facilitate the provision by travel agents and airlines of authorized travel services and the forwarding by certain entities of authorized remittances, raise the limits on and generally authorize certain categories of remittances to Cuba, allow U.S. financial institutions to open correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions, authorize certain transactions with Cuban nationals located outside of Cuba, and allow a number of other activities related to, among other areas, telecommunications, financial services, trade, and shipping.<sup>17</sup>

<sup>14</sup> *Statement by the President*, *supra* note 1.

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

<sup>16</sup> *Fact Sheet: Treasury and Commerce Announce Regulatory Amendments to the Cuba Sanctions*, U.S. DEP'T OF THE TREASURY (Jan. 15, 2015), at <http://www.treasury.gov/press-center/press-releases/Pages/j19740.aspx>. The Treasury regulations can be found at 31 C.F.R. § 515 (2015); the Commerce regulations can be found at 15 C.F.R. § 730-774 (2015).

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

In announcing the changes, Treasury Secretary Jacob Lew said that the revised regulations “will have a direct impact in further engaging and empowering the Cuban people, promoting positive change for Cuba’s citizens. The amended regulations also will facilitate authorized business for U.S. exporters and enhance communications and commerce between Cuba and the United States.”<sup>18</sup>

In January 2015, taking advantage of previously planned Migration Talks, Assistant Secretary for the Western Hemisphere Roberta Jacobson led an American delegation to Cuba “to launch a discussion with the Cuban Government on re-establishing diplomatic relations.”<sup>19</sup> The Cuban delegation, led by the Foreign Ministry’s Director General for U.S. Affairs, Josefina Vidal Ferreiro, and the American delegation “discussed the opening of embassies in [their] respective countries,”<sup>20</sup> and the reestablishment of diplomatic relations under the Vienna Conventions on Consular and Diplomatic Relations.<sup>21</sup>

The United States and Cuban delegations next met in Washington, D.C., in February 2015, to continue negotiating the reestablishment of diplomatic relations and the reopening of embassies.<sup>22</sup> At the close of that session, Jacobson announced that

[n]ext week, Cuba will send two delegations for separate consultations on trafficking in persons and civil aviation. Next month, a delegation led by Deputy Assistant Secretary of State and U.S. Coordinator for International Communications and Information Policy Ambassador Danny Sepulveda will travel to Havana to work with the Cuban Government on increasing its capacity for greater internet connectivity to better support access to information by the Cuban people. Also in March, an interagency delegation will travel to Cuba to exchange ideas and information about recent U.S. regulatory changes. We agreed to meet at the end of March to discuss the structure of our human rights dialogue.<sup>23</sup>

Cuba’s asserted support for Venezuela following the imposition of sanctions by the United States on seven Venezuelan government members complicated this progress.<sup>24</sup> However, following up on Obama’s December 2014 instruction to the Department of State to review Cuba’s designation as a state sponsor of terrorism, the Department of State recommended

<sup>18</sup> *Statement of Secretary Lew on Amendments to the Cuban Assets Control Regulations*, U.S. DEP’T OF THE TREASURY (Jan. 15, 2015), at <http://www.treasury.gov/press-center/press-releases/Pages/j19739.aspx>.

<sup>19</sup> *Media Note, Assistant Secretary Roberta S. Jacobson to Travel to Cuba, U.S. Department of State*, U.S. DEP’T OF STATE (Jan. 20, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/01/236121.htm>. U.S. and Cuban officials meet semi-annually to discuss the implementation of the 1994 and 1995 U.S.-Cuba Migration Accords. *Migration Talks With Cuba*, U.S. DEP’T OF STATE (JULY 9, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/07/228992.htm>.

<sup>20</sup> *Press Availability Following Re-establishment of Relations Talks, Roberta S. Jacobson, Assistant Secretary, Bureau of Western Hemisphere Affairs*, U.S. DEP’T OF STATE (Jan. 22, 2015), at <http://www.state.gov/p/wha/rls/prsr/236230.htm>.

<sup>21</sup> *Id.* (“[W]hile [the Vienna Convention] may not answer every question in the particular and rather peculiar relationship that we have had in the past, it is certainly the instrument under which normal diplomatic relations are conducted, and the Vienna Convention on Consular Relations and the Vienna Convention on Diplomatic Relations are the legal instruments under which we will conduct our diplomatic relations as we re-establish them.”).

<sup>22</sup> *Press Availability with Assistant Secretary of State for Western Hemisphere Affairs*, U.S. DEP’T OF STATE (Feb. 27, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/02/238040.htm>.

<sup>23</sup> *Id.*

<sup>24</sup> *Background Briefing on Discussions with Cuba*, U.S. DEP’T OF STATE (Mar. 13, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/03/238888.htm>. Addressing Cuba’s stated support of Venezuela, a senior State Department official explained, “obviously we’re disappointed with the statement that Cuba made. We don’t think that our taking sovereign actions of the United States Government on our financial system against human rights abusers or those involved in public corruption or in eroding democratic institutions—we believe that’s our right to do and it’s a sovereign decision, and we defend that.” *Id.*

the removal of Cuba from this list. On April 14, 2015, the president submitted to Congress the statutorily required announcement of the administration's decision to change Cuba's designation.<sup>25</sup>

Domestically, some legislators have criticized Obama's Cuba policy change,<sup>26</sup> while some legal scholars have questioned whether the president needs congressional approval to lift the Cuban embargo.<sup>27</sup> As for the White House, a spokesperson maintains that Obama's Cuba reforms have been directed to "the agencies that are responsible for implementing . . . regulations to make the kinds of changes that are needed to reflect what the President believes is a more effective strategy for dealing with Cuba," and thus "are well within his executive authority as President of the United States."<sup>28</sup> He added, however, that "the President has done all that he can do using his executive authority, and the remaining restrictions can only be removed through congressional action."<sup>29</sup> The spokesman therefore noted that "we certainly would encourage Congress to act in bipartisan fashion" by adopting "the kind of legislative action, specifically repealing Helms-Burton, that would roll back even more of the restrictions that are currently in place that limit some economic activity between the United States and Cuba."<sup>30</sup>

#### STATE RESPONSIBILITY AND LIABILITY

##### *United States Responds to Alleged North Korean Cyber Attack on Sony Pictures Entertainment*

In November 2014, Sony Pictures Entertainment's computer system was infiltrated, and large quantities of confidential information—including personal data, unreleased films, and private emails—were released on the internet. An FBI investigation of the incident quickly focused on North Korea, which was suspected of orchestrating the hack in response to Sony's

<sup>25</sup> *Statement by the Press Secretary on the Proposed Rescission of Cuba's Designation as a State Sponsor of Terrorism*, THE WHITE HOUSE (Apr. 14, 2015), at <https://www.whitehouse.gov/the-press-office/2015/04/14/statement-press-secretary-proposed-rescission-cuba-s-designation-state-s>.

<sup>26</sup> Press Release, Sen. Marco Rubio, Rubio Comments On Reports of Change In U.S. Policy Toward Cuba, Release of Alan Gross (Dec. 17, 2014), available at <http://www.rubio.senate.gov/public/index.cfm/press-releases?ID=d6c39dd4-8d06-4de3-8065-5cb27d865f1f> ("The President's decision to reward the Castro regime and begin the path toward the normalization of relations with Cuba is inexplicable. . . . Cuba, like Syria, Iran, and Sudan, remains a state sponsor of terrorism. It continues to actively work with regimes like North Korea to illegally traffic weapons in our hemisphere in violation of several United Nations Security Council Resolutions. It colludes with America's enemies, near and far, to threaten us and everything we hold dear. But most importantly, the regime's brutal treatment of the Cuban people has continued unabated. . . . I intend to use my role as incoming Chairman of the Senate Foreign Relations Committee's Western Hemisphere subcommittee to make every effort to block this dangerous and desperate attempt by the President to burnish his legacy at the Cuban people's expense.").

<sup>27</sup> Julian Ku, *Does President Obama Need Congress to Lift the Embargo on Cuba? Yes.*, OPINIO JURIS (Jan. 21, 2015), at <http://opiniojuris.org/2015/01/21/president-obama-need-congress-lift-embargo-cuba-yes> (suggesting that Helms-Burton Act appears to codify the Office of Foreign Assets Control's rules that had originally been issued as regulations pursuant to TWEA, and that calls for the president to unilaterally lift the embargo are legally unsupported).

<sup>28</sup> *Press Briefing by Press Secretary Josh Earnest*, THE WHITE HOUSE (Dec. 18, 2014), at <https://www.whitehouse.gov/the-press-office/2014/12/18/press-briefing-press-secretary-josh-earnest-121814>.

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

<sup>30</sup> *Id.* See also Julie Hirschfeld Davis & Michael R. Gordon, *Obama Will Move Swiftly to Lift Several Restrictions Against Cuba*, N.Y. TIMES, Dec. 19, 2014, at A145, available at <http://www.nytimes.com/2014/12/19/us/politics/obama-intends-to-lift-several-restrictions-against-cuba-on-his-own.html> (describing internal assessment of "how far Mr. Obama could go to unilaterally . . . lift restrictions on travel, commerce and financial activities," which resulted in the White House conclusion that "he had broad authority to do so without violating the embargo's scope").

pending release of *The Interview*, a film satirizing North Korean leader Kim Jong-Un.<sup>1</sup> In the face of threats to attack theaters showing the film, Sony cancelled the film's planned Christmas-day release.

On December 19, the FBI issued a press release accusing North Korea of having perpetrated the cyber attack.<sup>2</sup> On the same day, President Barack Obama discussed the affair in his year-end address. He stated that Sony "made a mistake" by pulling the film: "We cannot have a society in which some dictator someplace can start imposing censorship here in the United States."<sup>3</sup> He went on to address North Korea's involvement in the attack: "They caused a lot of damage, and we will respond. We will respond proportionally, and we'll respond in a place and time and manner that we choose."<sup>4</sup> North Korea immediately denied involvement and "proposed holding a joint inquiry" to determine responsibility.<sup>5</sup>

On December 22, a State Department spokesperson stated: "We are considering a range of options in response. We aren't going to discuss publicly operational details about the possible response options or comment on those kind of reports in any way except to say that as we implement our responses, some will be seen, some may not be seen."<sup>6</sup>

Also in the days following the FBI accusation, North Korea's limited internet suffered intermittent disruptions, followed by an almost ten-hour, nationwide internet outage.<sup>7</sup> An internet technology service detected "denial-of-service attacks aimed at North Korea's infrastructure starting on Saturday and persisting on Monday."<sup>8</sup> While the United States made no formal statement about the outage, one official was quoted as saying "accidents can happen."<sup>9</sup>

On January 2, 2015, Obama issued Executive Order 13687, which imposed fresh sanctions on North Korea. The order

provides criteria for blocking the property and interests in property of any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

<sup>1</sup> Michael S. Schmidt, Nicole Perlroth & Matthew Goldstein, *FBI Says Little Doubt North Korea Hit Sony*, N.Y. TIMES, Jan. 7, 2015, at B1, available at <http://www.nytimes.com/2015/01/08/business/chief-says-fbi-has-no-doubt-that-north-korea-attacked-sony.html>.

<sup>2</sup> *Update on Sony Investigation*, FEDERAL BUREAU OF INVESTIGATION (Dec. 19, 2014), at <http://www.fbi.gov/news/pressrel/press-releases/update-on-sony-investigation> ("[T]he FBI now has enough information to conclude that the North Korean government is responsible for these actions.").

<sup>3</sup> *Remarks by the President in Year-End Press Conference*, THE WHITE HOUSE (Dec. 19, 2014), at <https://www.whitehouse.gov/the-press-office/2014/12/19/remarks-president-year-end-press-conference>.

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

<sup>5</sup> *North Korea Demands Joint Inquiry with US into Sony Pictures Hack*, THE GUARDIAN, Dec. 20, 2014, available at <http://www.theguardian.com/world/2014/dec/20/north-korea-proposes-joint-inquiry-us-sony-pictures-hack>.

<sup>6</sup> *Mari Harf, Daily Press Briefing*, DEP'T OF STATE (Dec. 22, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/12/235472.htm>.

<sup>7</sup> *North Korea's Internet Takes a Hit After Sony Hack*, CBS NEWS (Dec. 22, 2014), at <http://www.cbsnews.com/news/north-korea-internet-down/> ("Industry and intelligence sources tell CBS News . . . that North Korean Internet has been 'slow and spotty' for a couple of days and crashed completely at noon (ET) Monday [Dec. 22]."); *Key N. Korean Websites Suffer Short Outages After Shutdown*, N.Y. TIMES, Dec. 23, 2015, available at <http://www.nytimes.com/aponline/2014/12/23/world/asia/ap-as-nkorea-sony-hacking.html>.

<sup>8</sup> *North Korea's Internet Temporarily Blacked Out*, THE GUARDIAN, Dec. 23, 2014, available at <http://www.theguardian.com/world/2014/dec/22/north-korea-suffers-internet-blackout>.

<sup>9</sup> Nicole Perlroth & David E. Sanger, *North Korea Loses Its Link to the Internet*, N.Y. TIMES, Dec. 22, 2014, at A1, available at <http://www.nytimes.com/2014/12/23/world/asia/attack-is-suspected-as-north-korean-internet-collapses.html?ref=todayspaper>.

- to be an agency, instrumentality, or controlled entity of the Government of North Korea or the Workers' Party of Korea;
- to be an official of the Government of North Korea;
- to be an official of the Workers' Party of Korea;
- to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the Government of North Korea or any person whose property and interests in property are blocked pursuant to the order; or to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, the Government of North Korea or any person whose property and interests in property are blocked pursuant to the order.

In addition, the order suspends entry into the United States of any alien determined to meet one or more of the above criteria.<sup>10</sup>

Some members of Congress have publicly called the hack an “act of war”<sup>11</sup> or “cyberterrorism.”<sup>12</sup> The Obama administration, however, has avoided these characterizations.<sup>13</sup> Secretary of State John Kerry described the hack as a “state sponsored cyber-attack” that displayed “flagrant disregard for international norms,” but he did not suggest that the attack constituted an act either of warfare or terrorism.<sup>14</sup>

The characterization of the Sony hack as an act of cyber warfare would have significant implications for the U.S. right of self-defense under Article 51 of the UN Charter.<sup>15</sup> The *Tallinn Manual on the International Law Applicable to Cyber Warfare* states that a cyber attack “constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the level of a use of force.”<sup>16</sup> Last year, NATO members had “formally affirmed cyber defense as part of member states’ collective defense obligations” under Article 5 of the NATO

<sup>10</sup> *Letter—Imposing Additional Sanctions with Respect to North Korea*, THE WHITE HOUSE (Jan. 2, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/01/02/letter-imposing-additional-sanctions-respect-north-korea>.

<sup>11</sup> In an interview on CNN’s State of the Union, Senator John McCain called the attack “a manifestation of a new form of warfare.” Kate Sheppard, *McCain Calls Sony Hack an ‘Act of War’*, HUFFINGTON POST (Dec. 21, 2014), at [http://www.huffingtonpost.com/2014/12/21/sony-north-korea-war\\_n\\_6362454.html](http://www.huffingtonpost.com/2014/12/21/sony-north-korea-war_n_6362454.html).

<sup>12</sup> Senator Robert Menendez disputed Obama’s description of the attack as vandalism in an interview, calling the hack “terrorism.” Megan R. Wilson, *Democratic Senator Calls Sony Hack ‘Terrorism’*, THE HILL (Jan. 4, 2015), at <http://thehill.com/policy/international/228439-democratic-senator-calls-sony-hack-an-act-of-terrorism>.

<sup>13</sup> In an interview with CNN, Obama specifically stated the attack was not “an act of war” but rather one of “cybervandalism.” Eric Bradner, *Obama: North Korea’s Hack not War, but ‘Cybervandalism’*, CNN (Dec. 24, 2014), at <http://www.cnn.com/2014/12/21/politics/obama-north-koreas-hack-not-war-but-cyber-vandalism/>.

<sup>14</sup> *Condemning Cyber-Attack by North Korea*, U.S. DEP’T OF STATE (Dec. 19, 2014), at <http://www.state.gov/secretary/remarks/2014/12/235444.htm>; see also *Bureau of East Asian and Pacific Affairs, U.S. Relations with North Korea*, U.S. DEP’T OF STATE (Feb. 5, 2015), at <http://www.state.gov/r/pa/ei/bgn/2792.htm> (characterizing the Sony hack as “the DPRK’s cyber attack targeting Sony Pictures Entertainment”).

<sup>15</sup> U.N. Charter art. 51.

<sup>16</sup> NATO COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE, *TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE* 45 (Michael N. Schmitt ed., 2013), available at <https://ccdcoe.org/research.html>; see also Michael Schmitt, *International Law and Cyber Attacks: Sony vs. North Korea*, JUST SECURITY (Dec. 17, 2014), <http://justsecurity.org/18460/international-humanitarian-law-cyber-attacks-sony-v-north-korea/> (suggesting that a cyber attack that rises to the level of an “armed attack” would entitle the United States to “respond forcefully, whether by kinetic or cyber means.”) [hereinafter Schmitt, JUST SECURITY].

Charter at the 2014 Wales Summit.<sup>17</sup> However, they did not define exactly when an attack would trigger such obligations, saying in a joint statement, “[a] decision as to when a cyber attack would lead to the invocation of Article 5 would be taken by the North Atlantic Council on a case-by-case basis.”<sup>18</sup>

Even if the Sony hack did not constitute an armed attack, *Tallinn Manual* principles suggest that confirmed North Korean involvement would still constitute a violation of U.S. sovereignty and therefore an “internationally wrongful act.”<sup>19</sup> If so, the United States would be entitled under the International Law Commission Articles on State Responsibility<sup>20</sup> to take countermeasures “commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”<sup>21</sup> In this regard, the escalation of sanctions against individuals and entities connected with the North Korean government has been the primary public U.S. response to the attack.<sup>22</sup> While the United States has neither accepted nor denied responsibility for the disruption of North Korea’s internet, one U.S. congressman publicly suggested that it was indeed a response to the Sony hack.<sup>23</sup> International norms around such cyber conflicts are still developing; if the outage was in fact a U.S. response, it would constitute state practice regarding proportional response to a cyber attack on private entities.<sup>24</sup>

#### INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

##### *Senate Select Committee on Intelligence Releases Executive Summary of Its Study of CIA’s Detention and Interrogation Program*

In December 2014, the Senate Select Committee on Intelligence declassified the 524-page executive summary of its investigation into the Central Intelligence Agency’s Detention and

<sup>17</sup> Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice in the United States, 109 AJIL 175, 211 (2015).

<sup>18</sup> *Wales Summit Declaration, Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Wales*, NORTH ATLANTIC TREATY ORGANIZATION [NATO], ¶ 72 (Sept. 5, 2014), available at [http://www.nato.int/cps/en/natohq/official\\_texts\\_112964.htm](http://www.nato.int/cps/en/natohq/official_texts_112964.htm).

<sup>19</sup> Schmitt, JUST SECURITY, *supra* note 16.

<sup>20</sup> See Int’l Law Comm’n, 53rd Sess., *Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/RES/56/83, arts. 49–53 (2001), available at [http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf).

<sup>21</sup> *Id.* art. 51.

<sup>22</sup> See *Treasury Imposes Sanctions Against the Government of The Democratic People’s Republic of Korea*, U.S. DEP’T OF TREASURY (Jan. 2, 2015), at <http://www.treasury.gov/press-center/press-releases/Pages/j19733.aspx>.

<sup>23</sup> Representative Michael McCaul, Republican Chairman of the House Homeland Security Committee, responded affirmatively when questioned whether the North Korea Internet outage was a response to the attack, but would not say to whether the United States orchestrated the outage. *North Korea Web Outage Response to Sony Hack, Lawmaker Says*, BLOOMBERG POLITICS (Mar. 17, 2015), at <http://www.bloomberg.com/politics/articles/2015-03-17/north-korea-web-outage-was-response-to-sony-hack-lawmaker-says>.

<sup>24</sup> See Kristen Eichensehr, *The Sony Hack: Norms and North Korea*, JUST SECURITY (Dec. 20, 2014), at <http://justsecurity.org/18604/sony-hack-norms-north-korea> (“Secretary Kerry’s emphasis on the hack’s interference with free expression suggests that the United States will factor that right into its countermeasures calculations, and how it does so will provide a template for assessing similar attacks and countermeasures in the future.”).

Interrogation Program.<sup>1</sup> The summary details detention conditions and interrogation techniques deployed by the United States on 119 detainees between 2001 and 2009.<sup>2</sup> Although President Barack Obama's administration did not oppose the summary's release, the administration appears to have rejected international calls for further investigation,<sup>3</sup> while reaffirming its commitment to the ban on torture going forward.<sup>4</sup>

In March 2009, the Senate Committee on Intelligence approved a study of CIA enhanced interrogation techniques. From May 2009 to late 2012, Committee staff reviewed more than six million pages of CIA materials, "includ[ing] operational cables, intelligence reports, internal memoranda and emails, briefing materials, interview transcripts, contracts, and other records."<sup>5</sup>

The Committee did not, however, interview any CIA officials during its investigation. This omission was due, at least in part, to a separate Department of Justice investigation into the CIA's destruction of videotapes of detainee interrogations, initiated by then-Attorney General Michael Mukasey in 2007. According to Senator Dianne Feinstein, then-chairwoman of the Committee, as "the CIA employees and contractors who would otherwise have been interviewed by the Committee staff were under potential legal jeopardy" as a result of the investigation, "the CIA would not compel its workforce to appear before the Committee."<sup>6</sup> Though the Committee did not interview any CIA officials during its investigation, it did draw on interviews of numerous CIA officials conducted by the CIA's Inspector General and Oral History program.<sup>7</sup>

Although both Republican and Democratic members of the Committee supported the investigation in its initial stages, the Republican minority stopped participating after then-Attorney General Eric Holder reopened a criminal inquiry related to the interrogation of certain detainees in the CIA's program.<sup>8</sup> In a document accompanying the release of the summary, the minority condemned the lack of interviews of CIA sources as "preclud[ing] . . . a comprehensive review."<sup>9</sup> The minority statement further noted that "absent the support of the documentary record, and on the basis of a flawed analytical methodology, these problematic claims and

<sup>1</sup> S. SELECT COMM. ON INTELLIGENCE, 114TH CONG., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, EXECUTIVE SUMMARY (2014) *available at* [http://www.intelligence.senate.gov/sites/default/files/press/executive-summary\\_0.pdf](http://www.intelligence.senate.gov/sites/default/files/press/executive-summary_0.pdf) [hereinafter EXECUTIVE SUMMARY].

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

<sup>3</sup> *Feinstein Report: UN Expert Calls for Prosecution of CIA Officers and Other US Government Officials*, OFFICE OF THE HIGH COMM'R FOR HUM. RTS. (Dec. 9, 2014), *at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15397&LangID=E> [hereinafter *UN Expert on Feinstein Report*].

<sup>4</sup> *See, e.g., Statement by the President: Report of the Senate Select Committee on Intelligence*, THE WHITE HOUSE (Dec. 9, 2014), *at* <https://www.whitehouse.gov/the-press-office/2014/12/09/statement-president-report-senate-select-committee-intelligence>; *see also* Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 175, 191–195 (2015).

<sup>5</sup> Dianne Feinstein, *Foreword to S. SELECT COMM. ON INTELLIGENCE, 114TH CONG., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM*, at 5 (2014), *available at* <http://www.intelligence.senate.gov/sites/default/files/press/foreword.pdf>.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> S. SELECT COMM. ON INTELLIGENCE, 114TH CONG., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, MINORITY VIEWS OF VICE CHAIRMAN CHAMBLISS JOINED BY SENATORS BURR, RISCH, COATS, RUBIO, AND COBURN, at I (2014), *available at* <http://www.intelligence.senate.gov/sites/default/files/press/minority-views.pdf> [hereinafter MINORITY VIEWS].

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

conclusions create the false impression that the CIA was actively misleading policy makers and impeding the counterterrorism efforts of other federal government agencies during the Program's operation."<sup>10</sup>

Despite Republican opposition, the Committee voted on April 3, 2014 to declassify the 524-page summary. Feinstein noted that declassifying the full report would have significantly delayed release of the main findings, and remarked that "[d]ecisions will be made later on the declassification and release of the full 6,700 page study."<sup>11</sup>

The summary describes the contours of the Detention and Interrogation Program from late 2001 to early 2009. It concludes that the CIA had "ignored" its pre-September 11 view that coercive interrogations were ineffective<sup>12</sup> and developed a program that involved the use of harsher techniques. These techniques were, moreover, less effective than the Agency had represented to White House officials or to the public.<sup>13</sup>

"Of the 119 known detainees, at least 26 were wrongfully held," in that they did not meet the government's standard for detention.<sup>14</sup> Individuals within this category included a man used as leverage against a family member and two individuals deemed to have a connection to Al Qaeda based on fabricated reports by another detainee that had been subjected to torture.<sup>15</sup> Records were often incomplete and lacked sufficient information to justify keeping these individuals.<sup>16</sup>

The summary also faults the CIA for developing the program in an undisciplined fashion.<sup>17</sup> As the summary notes in regard to the structuring of the detainment program:

The CIA was not prepared to take custody of its first detainee. In the fall of 2001, the CIA explored the possibility of establishing clandestine detention facilities in several countries. The CIA's review identified risks associated with clandestine detention that led it to conclude that U.S. military bases were the best option for the CIA. . . . In late March 2002, the imminent capture of Abu Zubaydah prompted the CIA to again consider various detention options. In part to avoid declaring Abu Zubaydah to the International Committee of the Red Cross, which would have been required if he were detained at a U.S. military base, the CIA decided to seek authorization to clandestinely detain Abu Zubaydah at a facility in [an undisclosed country].<sup>18</sup>

Following this point, from 2002 to 2004, the Detention and Interrogation Program used secret funds to pay a number of foreign officials to host detention sites within their countries.<sup>19</sup> By 2006, according to the summary, "press disclosures, the unwillingness of other countries to host existing or new detentions sites, and legal and oversight concerns had largely ended the

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

<sup>11</sup> Feinstein, *supra* note 5, at 3.

<sup>12</sup> *Id.*

<sup>13</sup> S. SELECT COMM. ON INTELLIGENCE, 114TH CONG., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, FINDINGS AND CONCLUSIONS, at 3 (2014), available at <http://www.intelligence.senate.gov/sites/default/files/press/findings-and-conclusions.pdf> [hereinafter FINDINGS AND CONCLUSIONS].

<sup>14</sup> *Id.* at 12.

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

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

<sup>17</sup> *Id.* at 9.

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

<sup>19</sup> *Id.* at 7, 16, 17.

CIA's ability to operate clandestine detention facilities."<sup>20</sup> Thus, by March 2006, the program only continued operations in one country, and by April 2008, the CIA had ceased holding any detainees.<sup>21</sup>

The summary also criticizes program personnel, noting that overseers largely lacked experience in detainment procedures or interrogation techniques, and had "serious documented personal and professional problems—including histories of violence and records of abusive treatment of others—that should have called into question their suitability to participate in the CIA's Detention and Interrogation Program."<sup>22</sup> The summary highlights the role of two contract psychologists—who were later identified in press reports as James Mitchell and Bruce Jessen<sup>23</sup>—in devising the enhanced interrogation techniques based on ideas of "learned helplessness":<sup>24</sup>

In July 2002, on the basis of consultations with contract psychologists, and with very limited internal deliberation, the CIA requested approval from the Department of Justice to use a set of coercive interrogation techniques. The techniques were adapted from the training of U.S. military personnel at the U.S. Air Force Survival, Evasion, Resistance and Escape (SERE) school, which was designed to prepare U.S. military personnel for the conditions and treatment to which they might be subjected if taken prisoner by countries that do not adhere to the Geneva Conventions.<sup>25</sup>

In 2005, Mitchell and Jessen formed a company in order to conduct their work with the CIA; "shortly thereafter, the CIA outsourced virtually all aspects of the program" to the company in the form of a contract valued upwards of \$180 million in 2006.<sup>26</sup>

The enhanced interrogation techniques—which were repeated for days or weeks at a time—included physical blows; a technique known as "walling," in which detainees were slammed against a wall; sleep deprivation for up to 180 hours in a session, usually undertaken in standing or in stress positions; nudity; ice water baths; rectal rehydration; and waterboarding.<sup>27</sup> Internal CIA records described "the waterboarding of Khalid Shaykh Mohammad as evolving into a 'series of near drownings.'"<sup>28</sup> It also documents the controversy the program generated within CIA: when Abu Zubaydah was waterboarded in Thailand, a number of employees threatened to request a transfer out of the facility if the interrogation methods were continued.<sup>29</sup>

<sup>20</sup> *Id.* at 16.

<sup>21</sup> *Id.* at 16.

<sup>22</sup> *Id.* at 11.

<sup>23</sup> James Risen & Matt Apuzzo, *C.I.A., On Path to Torture, Chose Haste Over Analysis*, N.Y. TIMES, Dec. 15, 2014, at A1.

<sup>24</sup> FINDINGS AND CONCLUSIONS, *supra* note 13, at 11.

<sup>25</sup> *Id.* at 9–10.

<sup>26</sup> *Id.* at 11.

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.* at 3.

<sup>29</sup> EXECUTIVE SUMMARY, *supra* note 1, at 45.

The summary faults the CIA's use of interrogation techniques based on "inaccurate claims of their effectiveness,"<sup>30</sup> exploring twenty case studies to demonstrate that the enhanced interrogation techniques did little to disrupt terrorist plots, capture terrorist leaders, or help find Osama Bin Laden.<sup>31</sup> To the contrary, the summary reports,

according to CIA records, seven of the 39 CIA detainees known to have been subjected to the CIA's enhanced interrogation techniques produced no intelligence while in CIA custody. CIA detainees who were subjected to the CIA's enhanced interrogation techniques were usually subjected to the techniques immediately after being rendered to CIA custody. Other detainees provided significant accurate intelligence prior to, or without having been subjected to these techniques.

While being subjected to the CIA's enhanced interrogation techniques and afterwards, multiple CIA detainees fabricated information, resulting in faulty intelligence.<sup>32</sup>

According to the summary, the CIA regularly provided inaccurate information to Congress, the Department of Justice, and the White House, thereby "impeding a proper legal analysis" of the Detention and Interrogation Program.<sup>33</sup> The summary details, for example, dozens of instances in which CIA records contradicted then-CIA Director Michael Hayden's testimony to Congress. These included instances in which—contrary to Director Hayden's Congressional testimony—enhanced interrogation techniques were used on detainees who had not stopped cooperating.<sup>34</sup> The CIA also failed to present an accurate count of the number of individuals held in its custody, regularly representing that it detained 98 individuals when its own records indicated, by the Committee's count, at least 119.<sup>35</sup> The CIA also impeded oversight by its own Office of the Inspector General by providing false information, failing to evaluate the effectiveness of its techniques, rarely holding personnel accountable for significant violations, and marginalizing numerous internal critiques, criticisms, and objections concerning the program's operation.<sup>36</sup>

Feinstein's introduction concluded that—although the Office of Legal Counsel for the Department of Justice had found otherwise between 2002 and 2007<sup>37</sup>—"under any common meaning of the term, CIA detainees were tortured. I also believe that the conditions of confinement and the use of authorized and unauthorized interrogation and conditioning techniques were cruel, inhuman, and degrading."<sup>38</sup>

Notably, the minority Republican response to the Committee report contested not only the process the Committee used to gather the information, but also its analysis and conclusions.

<sup>30</sup> FINDINGS AND CONCLUSIONS, *supra* note 13, at 2.

<sup>31</sup> *Id.* at 2–3.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> *Id.* at 4, 6, 7.

<sup>34</sup> EXECUTIVE SUMMARY, *supra* note 1, at 462, 463.

<sup>35</sup> *Id.* at 14, 15, 143.

<sup>36</sup> FINDINGS AND CONCLUSIONS, *supra* note 13, at 8, 14.

<sup>37</sup> See John R. Crook, Contemporary Practice of the United States, 102 AJIL 359, 359–61 (2008).

<sup>38</sup> Feinstein, *supra* note 5, at 4.

The minority response ultimately endorsed the CIA's characterization of the detention program as a "crucial pillar of US counterterrorism efforts, aiding intelligence and law enforcement operations to capture additional terrorists, helping to thwart terrorist plots, and advancing our analysis of the al-Qa'ida target."<sup>39</sup>

While Obama administration officials stated that they welcomed the release of the report, they reaffirmed their belief in the importance of the CIA's work more generally. As Secretary of State John Kerry noted, "Release of this report affirms again that one of America's strengths is our democratic system's ability to recognize and wrestle with our own history, acknowledge mistakes, and correct course." He continued, however: "I want to underscore that while it's uncomfortable and unpleasant to reexamine this period, it's important that this period not define the intelligence community in anyone's minds."<sup>40</sup>

Obama sounded similar notes, highlighting the "profound debt of gratitude to our fellow citizens who serve to keep us safe, among them the dedicated men and women of our intelligence community, including the Central Intelligence Agency. . . . Our intelligence professionals are patriots, and we are safer because of their heroic service and sacrifices."<sup>41</sup> According to Obama:

The report documents a troubling program involving enhanced interrogation techniques on terrorism suspects in secret facilities outside the United States, and it reinforces my long-held view that these harsh methods were not only inconsistent with our values as a nation, they did not serve our broader counterterrorism efforts or our national security interests. Moreover, these techniques did significant damage to America's standing in the world and made it harder to pursue our interests with allies and partners. That is why I will continue to use my authority as President to make sure we never resort to those methods again.<sup>42</sup>

In part, this statement referenced Executive Order 13491,<sup>43</sup> which Obama had signed in January 2009 to prohibit long-term detention by the CIA and to limit interrogation techniques to those included in the Army Field Manual.<sup>44</sup> (In Feinstein's introduction to the summary, she had urged the codification of these restrictions in congressional legislation, noting that the Executive Order limitations "could be overturned by a future president with the stroke of a pen."<sup>45</sup>)

UN representatives—as well as those of non-governmental organizations<sup>46</sup>—called on Obama to re-open the criminal investigation and pursue prosecution both of individuals who had carried out interrogations and of those who had approved the program as a whole. UN Special Rapporteur on Counterterrorism and Human Rights Ben Emmerson called for the

<sup>39</sup> MINORITY VIEWS, *supra* note 8, at XXVIII.

<sup>40</sup> *Release of Senate Select Committee on Intelligence Report*, U.S. DEP'T OF STATE (Dec. 9, 2014), at <http://www.state.gov/secretary/remarks/2014/12/234844.htm>.

<sup>41</sup> *Statement by the President Report of the Senate Select Committee on Intelligence*, THE WHITE HOUSE (Dec. 9, 2014), at <https://www.whitehouse.gov/the-press-office/2014/12/09/statement-president-report-senate-select-committee-intelligence>.

<sup>42</sup> *Id.*

<sup>43</sup> Exec. Ord. No. 13,491, 74 C.F.R. 4893 (Jan. 22, 2009).

<sup>44</sup> *Id.* See also John R. Crook, *Contemporary Practice of the United States*, 103 AJIL 760, 760–63 (2009).

<sup>45</sup> Feinstein, *supra* note 5, at 4.

<sup>46</sup> See, e.g., *US: Senate Report Slams CIA Torture, Lies*, HUMAN RIGHTS WATCH (Dec. 10, 2014), at <http://www.hrw.org/news/2014/12/10/us-senate-report-slams-cia-torture-lies>.

prosecution of senior U.S. officials who authorized and carried out torture as part of the program, as well as those CIA and U.S. officials who used waterboarding and other torture techniques. He noted that the summary demonstrated that “there was a clear policy orchestrated at a high level within the Bush administration” permitting “systematic crimes and gross violations of international human rights law.”<sup>47</sup> He emphasized the United States’ obligations under international legal agreements:

As a matter of international law, the US is legally obliged to bring those responsible to justice. The UN Convention Against Torture and the UN Convention on Enforced Disappearances require States to prosecute acts of torture and enforced disappearance where there is sufficient evidence to provide a reasonable prospect of conviction. States are not free to maintain or permit impunity for these grave crimes.

It is no defence for a public official to claim that they were acting on superior orders. CIA officers who physically committed acts of torture therefore bear individual criminal responsibility for their conduct, and cannot hide behind the authorisation they were given by their superiors.

However, the heaviest penalties should be reserved for those most seriously implicated in the planning and purported authorisation of these crimes. Former Bush Administration officials who have admitted their involvement in the programme should also face criminal prosecution for their acts.

President Obama made it clear more than five years ago that the US Government recognises the use of waterboarding as torture. There is therefore no excuse for shielding the perpetrators from justice any longer. The US Attorney General is under a legal duty to bring criminal charges against those responsible.

Torture is a crime of universal jurisdiction. The perpetrators may be prosecuted by any other country they may travel to. However, the primary responsibility for bringing them to justice rests with the US Department of Justice and the Attorney General.<sup>48</sup>

Shortly before the release of the summary, the UN Committee Against Torture had likewise urged investigations into the occurrence of torture and the possibility of prosecutions.<sup>49</sup> The Committee criticized U.S. investigations to date as insufficient. While noting the Department of Justice’s successful prosecution of two extrajudicial killings by the Department of Defense and CIA contractors in Afghanistan,<sup>50</sup> the Committee severely faulted investigations of the destruction of interrogation videotapes and of other detainee deaths as insufficient for various reasons.<sup>51</sup>

Following the release of the summary, Department of Justice spokesman Marc Raimondi noted that authorities had already conducted two criminal investigations but that the Department had declined to prosecute anyone, based on insufficient admissible evidence. “The U.S.

<sup>47</sup> *UN Expert on Feinstein Report*, *supra* note 3.

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

<sup>49</sup> Comm. against Torture, *Concluding Observations on the Third to Fifth Periodic Reports of the United State of America*, U.N. Doc. CAT/C/USA/CO/3-5 (Nov. 28, 2014).

<sup>50</sup> *Id.* at 4–5.

<sup>51</sup> Among other criticisms, the Committee faulted the delegation’s inability to describe the investigative techniques used during the investigation, as well as the witnesses interviewed, thereby “casting doubts as to whether this high-profile inquiry was properly conducted.” In addition, the Committee expressed concern over the “absence of criminal prosecutions for the alleged destruction of torture evidence by CIA personnel.” *Id.* at 5.

is committed,” Raimondi stated, “to complying with its domestic and international obligations and we believe that allegations about conduct by U.S. officials are best handled through appropriate domestic mechanisms.”<sup>52</sup> He continued: “In the event of action by a foreign court or prosecuting authority against U.S. government officials, the U.S., through the Departments of Justice and State, would raise appropriate jurisdictional and other legal defenses to prevent unwarranted prosecution of U.S. officials.”<sup>53</sup>

## USE OF FORCE AND ARMS CONTROL

### *President Obama Seeks Statutory Authorization for the Use of Military Force Against ISIL*

President Barack Obama has asked Congress to enact statutory authorization for military action against the entity known as the Islamic State of Iraq and the Levant (ISIL). The proposed bill would rescind the 2002 Authorization for the Use of Military Force in Iraq (2002 Iraq AUMF),<sup>1</sup> but it would not affect the 2001 Authorization for the Use of Military Force in Afghanistan (2001 Afghanistan AUMF).<sup>2</sup>

The United States and its coalition partners continue to pursue military action against ISIL in both Iraq and Syria.<sup>3</sup> To justify the actions under domestic U.S. law, the Obama administration has so far relied principally on the 2001 Afghanistan AUMF and the 2002 Iraq AUMF.<sup>4</sup> Obama has also made clear, however, that he is open to a new AUMF as an “expression of support from Congress” that would enable the United States to send “a more united message overseas.”<sup>5</sup> On February 11, 2015, Obama announced just such a proposal, submitting a draft bill to Congress that would “authorize the continued use of military force to degrade and defeat ISIL.” Obama justified the proposal on the ground that ISIL “threatens American personnel and facilities located in the region and is responsible for the deaths of [multiple] U.S. citizens,” and he warned that “if left unchecked, ISIL will pose a threat beyond the Middle East, including to the United States homeland.”<sup>6</sup>

<sup>52</sup> *CIA Report Draws Fire from US Friends and Foes*, CBS NEWS (Dec. 11, 2014), at <http://www.cbsnews.com/news/cia-torture-report-draws-fire-from-us-friends-and-foes>.

<sup>53</sup> *Id.*

<sup>1</sup> Authorization for Use of Military Force Against Iraq Resolution 2002, Pub. L. No. 107-243, 116 Stat. 1498.

<sup>2</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. §1541 (2006)).

<sup>3</sup> See Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice in the United States*, 109 AJIL 175, 199–211 (2015).

<sup>4</sup> See Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice in the United States*, 109 AJIL 175, 207–08 (2015). See also Steve Preston, General Counsel, Dep’t of Defense, Address at the Annual Meeting of the American Society of International Law: The Legal Framework for the United States’ Use of Military Force Since 9/11 (Apr. 10, 2015).

<sup>5</sup> *Background Conference Call on the Administration’s Request for Overseas Contingency Operations*, THE WHITE HOUSE (Nov. 7, 2014), at <http://www.whitehouse.gov/the-press-office/2014/11/07/background-conference-call-administrations-request-overseas-contingency->.

<sup>6</sup> *Letter from the President—Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant*, THE WHITE HOUSE (Feb. 11, 2015), at <https://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection> [hereinafter *Letter from the President*].

The draft ISIL AUMF would convey broad military authority to the president, with some important limitations.<sup>7</sup> The central operative text in Section 2 states:

(a) AUTHORIZATION.—The President is authorized, subject to the limitations in subsection (c), to use the Armed Forces of the United States as the President determines to be necessary and appropriate against ISIL or associated persons or forces as defined in section 5.<sup>8</sup>

It defines “associated persons or forces” to mean “individuals and organizations fighting for, on behalf of, or alongside ISIL or any closely-related successor entity in hostilities against the United States or its coalition partners.”

After emphasizing that the proposed Act would satisfy the “War Powers Resolution Requirements,”<sup>9</sup> the text then imposes two important limitations. First, on the type of force: Section 2(c) provides that “the authority granted in subsection (a) does not authorize the use of the United States Armed Forces in enduring offensive ground combat operations.”<sup>10</sup> Second, Section 3 limits the duration of military engagement: It provides that “[t]his authorization for the use of military force will terminate three years after the date of the enactment of this joint resolution, unless reauthorized.”<sup>11</sup>

In addition to granting new authority, the proposed bill would also revise the current structure of congressional force resolutions. In particular, Section 6 of the draft proposal would explicitly repeal the 2002 Iraq AUMF.<sup>12</sup> While the draft does not address the 2001 Afghanistan AUMF, Obama’s letter did suggest a continuing commitment to “working with the Congress and the American people to refine, and ultimately repeal, the 2001 AUMF.” As he put it, “enacting an AUMF that is specific to the threat posed by ISIL could serve as a model for how we can work together to tailor the authorities granted by the 2001 AUMF.”<sup>13</sup>

Administration officials have subsequently elaborated the administration’s justification for the proposal. Secretary of State John Kerry, for example, noted that

[w]e are strongest as a nation when the Administration and Congress work together on issues as significant as the use of military force. The world needs to hear that the United States speaks with one voice in the fight against ISIL. I spent almost thirty years in the Senate. I care about the institution and I particularly respect the voice that Congress can and should have on foreign policy and national security. This is a moment where Congress can

<sup>7</sup> JOINT RESOLUTION to Authorize the Limited use of the United States Armed Forces against the Islamic State of Iraq and the Levant, 161 Cong. Rec. H-926, 927 (2015), available at <http://www.gpo.gov/fdsys/pkg/CREC-2015-02-11/pdf/CREC-2015-02-11-pt1-PgH926-6.pdf#page=1> (“Draft Force Authorization”).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* § 2(b) (“Consistent with section 8(a)(1) of the War Powers Resolution (50 U.S.C. 1547(a)(1)), Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)). . . . Nothing in this resolution supersedes any requirement of the War Powers Resolution (50 U.S.C. 1541 et seq.)”); see also *id.* § 4 (requiring the President to “report to Congress at least once every six months on specific actions taken pursuant to this authorization”).

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

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* § 6 (“The Authorization for Use of Military Force Against Iraq Resolution of 2002 (Public Law 107–243; 116 Stat. 1498; 50 U.S.C. 1541 note) is hereby repealed.”).

<sup>13</sup> *Letter from the President, supra* note 6.

make it clear all over the world that no matter differences on certain issues, at home we're absolutely united and determined in defeating ISIL.<sup>14</sup>

Department of Defense General Counsel Stephen Preston further explained that

the President has made clear that as part of the counter-ISIL mission he will not deploy U.S. forces to engage in long-term, large-scale ground combat operations like those our nation conducted in Iraq and Afghanistan. With its proposed AUMF, the Administration has sought to strike a balance, putting in place reasonable limitations . . . while continuing to provide the authority and flexibility needed to accomplish the mission and preserve the Commander in Chief's authority to respond to unforeseen circumstances. . . . A central question . . . is what follow-on legal framework will provide the authorities necessary in order for our government to meet the terrorist threat to our country, but will not greatly exceed what is needed to meet that threat. . . . [T]he answer is not legislation granting the Executive "unbound powers more suited for traditional armed conflicts between nations." Rather, the objective is a framework that will support "a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America."<sup>15</sup>

Congress's initial reaction to Obama's draft AUMF was mixed. Some Republicans suggested that the AUMF gave too little power to the president; as House Speaker John Boehner remarked, "the president should have all the tools necessary to win the fight we're in. . . . I'm not sure that the strategy that's been outlined will accomplish the mission that the president wants to accomplish."<sup>16</sup> While some Democrats were supportive, some criticized the bill as having given too much authority to the president.<sup>17</sup> At least one scholar has questioned whether the draft bill's limitations have any real significance so long as the 2001 Afghanistan AUMF remains in force.<sup>18</sup>

To date, little progress has been made on the proposal. House Majority Leader Kevin McCarthy announced in mid-April that the AUMF was stalled in the House of Representatives, observing that he did "not see a path to [passing the bill] with what the president sent up

<sup>14</sup> *Support for Authorization for Use of Military Force*, U.S. STATE DEP'T (Feb. 11, 2014), at <http://www.state.gov/secretary/remarks/2015/02/237384.htm>; see also *Statement by Secretary of Defense Chuck Hagel on the Proposed Authorization for Use of Military Force*, U.S. DEP'T OF DEFENSE (Feb. 11, 2014), at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=17144> ("ISIL represents a serious threat to the interests of the United States and its allies. The depths of ISIL's barbarism are matched only by the scale of its ambition. DoD personnel are working each day—with 60 coalition partners—in our campaign against ISIL. We want Congress' full, bipartisan support in this fight because the country is stronger when both parties and both branches of government stand and work together.").

<sup>15</sup> Preston, *supra* note 4.

<sup>16</sup> Daniel Newhauser, *Why Obama's AUMF Faces Trouble on the Hill*, NATIONAL JOURNAL (Feb. 11, 2015), at <http://www.nationaljournal.com/white-house/here-s-why-an-aumf-may-never-pass-the-house-20150211>.

<sup>17</sup> See, e.g., *Kaine Statement on President Obama's Proposed Authorization For Use of Military Force Against ISIL*, TIM KAINE, U.S. SEN. FOR VIRGINIA (Feb. 11, 2015), at <http://www.kaine.senate.gov/press-releases/kaine-statement-on-president-obamas-proposed-authorization-for-use-of-military-force-against-isil> (noting concern by Senator Tim Kaine, a Foreign Relations Committee member, about "the breadth and vagueness of the U.S. ground troop language"); U.S. Senate Committee on Foreign Relations, *Hearing on Authorization for the Use of Military Force Request*, C-SPAN (Mar. 11, 2015), at <http://www.c-span.org/video/?324700-1/john-kerry-ashton-carter-general-martin-dempsey-testimony-use-force-isis> (Senator Menendez) (observation by the ranking Democrat on the Foreign Relations Committee, that "Democrats are not willing to . . . give this or any other President an open ended authorization for war").

<sup>18</sup> Jack Goldsmith, *The Administration's Hard-To-Fathom Draft AUMF*, LAWFARE (Feb. 12, 2015), at <http://www.lawfareblog.com/administrations-hard-fathom-draft-aumf> ("[T]he President can simply revert to reliance on the 2001 AUMF as an independent basis of authority for any actions not authorized by the ISIL-specific AUMF.").

because the world has become a more dangerous since he laid out Yemen as the strategy of how to move forward.”<sup>19</sup> A month later Boehner echoed his earlier comments against Obama’s proposal, arguing that “[t]he president’s request for an authorization of the use of military force calls for less authority than he has today. . . . [T]he president, frankly should withdraw the authorization of use of military force and start over.”<sup>20</sup> Following a Senate Foreign Relations Committee hearing on March 11,<sup>21</sup> the Senate appears still to be attempting to find a workable solution.<sup>22</sup>

<sup>19</sup> Scott Wong, *GOP: Obama War Request is Dead*, THE HILL (Apr. 13, 2015), at <http://thehill.com/policy/defense/238619-gop-obama-war-request-is-dead>.

<sup>20</sup> John T. Bennett, *Boehner Drives Another Nail in AUMF’s Coffin*, DEFENSE NEWS (May 19, 2015), at <http://www.defensenews.com/story/defense/policy-budget/congress/2015/05/19/isis-aumf-boehner-iraq/27579137>.

<sup>22</sup> John T. Bennett, *Kaine Declares AUMF Still Alive in Senate*, DEFENSE NEWS (Apr. 15, 2015), at <http://www.defensenews.com/story/defense/policy-budget/congress/2015/04/15/aumf-boehner-iraq-isis/25823301> (noting that Senator Kaine said members are “try[ing] to find a formulation of the mission close to what the president proposed that would engender bipartisan support,” while also suggesting that the AUMF was delayed by negotiations over an Iran nuclear bill, as it is “hard to do two things so high burn at once”).