
[This is the December 2017 Supplement for CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS (6th ed. 2017). These materials address, among other things, litigation over the Trump administration’s executive orders relating to its “travel ban,” the administration’s announcement that the United States would withdraw from the Paris climate change agreement, the debates and litigation concerning “sanctuary jurisdictions,” President Trump’s recognition of Jerusalem as the capital of Israel, and legal issues raised by various U.S. missile strikes in Syria and by the military detention of a U.S. citizen who was allegedly fighting on behalf of the Islamic State.]

Chapter 1: Historical and Conceptual Foundations

Page 24, add at the end of Note 9:

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

Page 37, add the following Note after Note 10:

11. The American Law Institute (ALI) is a private organization established in 1923 with the goal of helping to clarify and simplify the law. Its members consist of leading lawyers, legal academics, and judges. ALI publishes extensive “Restatements” of areas of law that contain a mix of black-letter propositions, comments, and reporters’ notes. These Restatements typically reflect years of drafting by appointed Reporters and the incorporation by the Reporters of feedback from expert advisors, outside groups, ALI’s Council, and

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the general membership of ALI. Although not binding, Restatements are often influential and courts frequently rely on their accounts of the law.

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

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

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

Chapter 2: Courts and Foreign Relations

Page 67, add at the end of Note 8:

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

In other liberal democracies, courts play (or seem to play) a significant supervisory role in policing exercises of executive power. . . . In this country, however, strict standing requirements, the political question doctrine, and the state secrets privilege confer such deference to the Executive in the foreign relations arena that the Judiciary has no part to play. These doctrines may be deeply flawed. In fact, I suspect that technology has rendered them largely obsolete, but the Judiciary is simply not equipped to respond nimbly to a reality that is changing daily if not hourly. . . .

Of course, this begs the question: if judges will not check this outsized power, then who will? . . . [E]very other branch of government seems to be passing the buck. The President is the most equipped to police his own house. But, despite an impressive number of executive oversight bodies, there is pitifully little oversight within the Executive. Presidents are slow to appoint members to these boards; their operations are shrouded in secrecy; and it often seems the boards are more interested in protecting and excusing the actions of agencies than holding them accountable. Congress, perhaps? But congressional oversight is a joke—and a bad one at that. Anyone who has watched the zeal with which politicians of one party go after the lawyers and advisors of the opposite party following a change of administration can understand why neither the military nor the intelligence agencies puts any trust in congressional oversight committees. They are too big. They complain bitterly that briefings are not sufficiently in-depth to aid them in making good decisions, but when they receive detailed information, they all too often leak like a sieve.

Our democracy is broken. We must, however, hope that it is not incurably so. This nation’s reputation for open and measured action is our national birthright; it is a history that ensures our credibility in the international community. The spread of drones cannot be stopped, but the U.S. can still influence how they are used in the global community—including, someday, seeking recourse should our enemies turn these powerful weapons 180 degrees to target our homeland. The Executive and Congress must establish a clear policy for drone strikes and precise avenues for accountability.
Page 86, add the following Note after Note 17:

17a. Courts in the United Kingdom also apply an act of state doctrine, although it differs in certain respects from the U.S. version of the doctrine. In an important recent decision, *Belhaj v. Straw* (decided Jan. 17, 2017), the United Kingdom’s Supreme Court held that the act of state doctrine was subject to a public policy exception for violations of fundamental rights. There was some disagreement among the judges, however, over the extent to which international law was relevant in determining which rights qualified for this exception. In that case, Belhaj alleged that UK security services had cooperated with U.S. and Libyan authorities in his unlawful rendition to Libya and detention and torture there, and all the judges agreed that the public policy exception applied. For a description of the decision and the reasoning of the various judges, see Natasha Simonson, *The UK Supreme Court’s Blockbuster Decision in Belhaj*, EJIL Talk! (Jan. 18, 2017), at https://www.ejiltalk.org/the-uk-supreme-courts-blockbuster-decision-in-belhaj/. For a consideration of the decision from the perspective of U.S. law, see William Dodge, *The UK Supreme Court’s Landmark Judgment in Belhaj v. Straw: A View from the United States*, Just Security (Jan. 19, 2017), at https://www.justsecurity.org/36507/uk-supreme-courts-landmark-judgment-belhaj-v-straw-view-united-states/.

Page 86, add at the end of Note 18:


Chapter 3: Congress and the President in Foreign Relations

Page 148, add at the end of Note 4:

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

**Page 151, add at the end of Note 9:**

For an argument that the Constitution’s text and structure, early constitutional history, and modern foreign relations law doctrine all suggest that Congress has a broad “power to define” offenses against the law of nations beyond what preexisting international law proscribes, see Alex H. Loomis, *The Power to Define Offenses Against the Law of Nations*, 40 Harv. J. L. & Pub. Pol’y 417 (2017).

**Page 182, add at the end of Note 6:**

The breadth of authority that Congress has delegated to the President to impose sanctions was illustrated by an executive order issued by President Trump in September 2017. In response to repeated missile testing and other provocative behavior by North Korea, Trump issued an executive order that, among other things, blocks access to property within the jurisdiction of the United States if it is owned by any person or company having trade, employment, financial, or other connections to North Korea. As support for his authority to issue the order, Trump invoked IEEPA and other statutes. See White House, *Presidential Executive Order on Imposing Additional Sanctions with Respect to North Korea* (Sept. 21, 2017), at https://www.whitehouse.gov/the-press-office/2017/09/21/presidential-executive-order-imposing-additional-sanctions-respect-north.

**Page 184, add the following Note after Note 8:**

9. Since he became President on January 20, 2017, President Trump has issued three controversial executive orders relating to immigration that have generated extensive litigation.

*First Executive Order.* The first order, entitled *Protecting the Nation from Foreign Terrorist Entry into the United States*, was issued on January 27, 2017. See Executive Order 13769, 82 Fed. Reg. 8977 (“EO-1”). EO-1 halted entry of various classes of non-citizens into the United States and directed Executive Branch officials to evaluate whether security concerns merited heightened screening of potential immigrants. For authority, EO-1 relied primarily on Section
212(f) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(f), which provides:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Perhaps the most controversial provision of EO-1, Section 3(c), suspended for ninety days all “immigrant and nonimmigrant entry” of aliens from seven countries: Libya, Iran, Iraq, Somalia, Sudan, Syria, and Yemen. (Each of these countries had been deemed by previous administrations as “a country or area of concern” for purposes of excluding them from a visa waiver program under Section 217(a)(12) of the INA, 8 U.S.C. § 1187(12).) EO-1 did not specify whether Section 3(c) applied to aliens with lawful permanent resident status (LPRs), also known as green card holders. After the Trump administration gave conflicting guidance on that question, White House Counsel Donald McGahn issued “authoritative guidance” to several Cabinet secretaries in which he “clarified” that Section 3(c) did not apply to LPRs.

Another controversial provision of EO-1 concerned refugees. Section 5(a) suspended the U.S. Refugee Admissions Program for 120 days, and Section 5(c) suspended entry of Syrian refugees indefinitely. Section 5(b) directed the Secretary of State to prioritize refugee claims made by those facing religious persecution as religious minorities in their home countries. Section 5(d) reduced the cap on all refugee admissions from 110,000 to 50,000 for fiscal year 2017. Section 5(e) empowered the Secretaries of State and Homeland Security to make case-by-case exceptions “when in the national interest,” which EO-1 defined to include when a refugee faces religious discrimination as a religious minority.

Soon after EO-1 was issued, approximately fifty challenges to it were filed in federal district courts around the country. Most were petitions for habeas corpus brought by aliens who had been detained by immigration officials at airports. The detainees challenged their detentions on an array of statutory and constitutional grounds. They claimed, among other things, that EO-1: discriminated on the basis of national origin in violation of the INA; was arbitrary and capricious and thus invalid under the Administrative Procedure Act; violated their right to procedural due process; violated their right to equal protection; and violated the Establishment and Free Exercise Clauses of the First Amendment. Several federal judges quickly blocked enforcement of EO-1, usually by issuing temporary restraining orders (TROs) forbidding officials from deporting aliens
solely on the basis of the order. Within a few days, nearly half of the habeas petitions had been voluntarily dismissed, most likely because the petitioners had been released. The need for further proceedings in the cases for which TROs had been granted was largely obviated by the litigation in the Ninth Circuit in the case of *Washington v. Trump*.

*Washington v. Trump* was a suit by the states of Washington and Minnesota in a federal district court in the Western District of Washington that challenged the validity of EO-1 on substantially the same grounds as the habeas petitioners. After concluding that the states were likely to show that EO-1 was unlawful and that other relevant criteria were satisfied, the district court granted a nationwide TRO that enjoined enforcement of the above-described sections of the order. On appeal, a Ninth Circuit panel affirmed. *See Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), reconsideration en banc denied, 853 F.3d 933 (9th Cir. 2017). The court’s discussion of the merits was preliminary in light of the procedural posture of the case. It began by rejecting the government’s argument that the President’s decision to suspend the admission of aliens into the United States was “unreviewable,” a proposition that the court said “runs contrary to the fundamental structure of our constitutional democracy.” The court then proceeded to rely primarily on the Due Process Clause, which extends to “all persons within the United States.” It concluded that the ban on entry violated the Due Process Clause for LPRs because it deprived them of liberty without due process. The court further reasoned that other persons affected by EO-1 may have had viable Due Process claims, and it therefore declined to narrow the TRO just to LPRs.

*Second Executive Order.* The Trump administration issued a revised executive order on March 6, 2017. *See* Exec. Order No. 13780, *Protecting the Nation from Foreign Terrorist Entry into the United States*, 82 Fed. Reg. 13209 (Mar. 6, 2017) (“EO-2”). The new order revoked and replaced the first one and made several significant changes. Section 2 removed Iraq from the list of countries subject to the ninety-day entry freeze. It clarified that EO-2 did not apply to LPRs, to persons already inside the United States on its effective date, or to persons with valid visas dated prior to the effective date of the first order. EO-2 also removed the indefinite ban on Syrian refugees and eliminated preferential treatment for religious minority applicants. In contrast to EO-1, which went into effect immediately, EO-2 was designed to go into effect ten days after signing. Also in contrast to EO-1, EO-2 described the circumstances in each of the six named countries that had led the President to determine that suspending entry was necessary. EO-2 also created more robust case-by-case waiver provisions and expressly identified a wide range of circumstances in which a waiver would be warranted.
On March 15, 2017, one day before EO-2 was to become effective, a federal district judge in Maryland issued a nationwide preliminary injunction barring enforcement of the entry freeze. The plaintiffs in the case were six individuals, all American citizens or lawful permanent residents with at least one family member who sought entry into the United States from a designated country, as well as three organizations with Muslim clients or members. The court concluded that the criteria for issuance of a preliminary injunction were satisfied for plaintiffs’ Establishment Clause claim as well as their claim that EO-2 violated the INA’s prohibition on nationality-based discrimination in the issuance of immigrant visas. The Fourth Circuit, sitting en banc, upheld the injunction by a 10-3 vote. See Int’l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017). After concluding that the plaintiffs had standing, the court considered only the Establishment Clause claim on the merits. In light of various statements made by Donald Trump as both a presidential candidate and as President, and by several of his senior advisors, it concluded that the second order was impermissibly motivated by a desire to exclude Muslims from the United States and thus likely violated the Establishment Clause. The court emphasized that it was not holding that all past statements of a president would be relevant to such an inquiry. “For a past statement to be relevant to the government’s purpose,” said the court, “there must be a substantial, specific connection between it and the challenged government action.” In what it described as a “highly unique set of circumstances,” the court said that there was “a direct link between the President’s numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and [the second order, which the President referred to as] the ‘watered down’ version of that plan that ‘get[s] just about everything,’ and ‘in some ways, more.’” The court declined to accept the government’s claim that EO-2 was principally motivated by national security concerns, citing internal Department of Homeland Security reports and sworn statements from ex-officials that indicated that the order had no legitimate security purpose.

Also on March 15, a federal district judge in Hawaii issued a nationwide TRO blocking enforcement of EO-2’s entry freeze. Two weeks later, it granted Hawaii’s motion to convert the TRO to a preliminary injunction. Unlike the Maryland federal court, the district court in Hawaii also blocked implementation of the refugee-related provisions and certain provisions providing for internal government review of vetting procedures, and it concluded that Hawaii was likely to prevail on the claim that the second order violated the Establishment Clause. On June 12, 2017, a panel of the Ninth Circuit upheld most of the injunction on narrower statutory grounds. See Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017). The court reasoned that Section 212(f) of the INA, 8 U.S.C. § 1182(f), requires the President to “find” that entry “would be detrimental to the United States” before suspending or imposing conditions on the entry on any class of aliens. Because
the President did not adequately make such a finding, the court reasoned, he acted ultra vires in the second order. The court also rejected the government’s stated national security justifications for EO-2 because, it noted, the President made no finding that nationality itself renders a person or a class a heightened security threat. The court similarly held that the President had failed to make a sufficient finding of detrimental impact with respect to the 120-day refugee suspension. It further concluded that EO-2 violated Section 202(a)(1)(A) of the INA, 8 U.S.C. § 1152(a)(1)(A), which provides in relevant part: “[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s . . . nationality, place of birth, or place of residence.” Though by its terms Section 2(c) of the second order concerns entry into the United States, not visa issuance, the court held that in practice it “operates as a ban on visa issuance” that discriminated on the basis of nationality and thus violated Section 202(a)(1)(A).

In June 2017, the Supreme Court agreed to review these cases and consolidated them to be argued in October 2017. See Trump v. International Refugee Assistance Project, 137 S. Ct. 2080 (2017). In a per curiam opinion, the Court also granted the government’s request for a stay of the injunctions, but only to the extent that the injunctions applied to foreign nationals with no “bona fide relationship” to persons or entities in the United States. For relationships to individuals in the United States, the Court stated that “a close familial relationship is required.” For those who lack a bona fide relationship to persons or entities in the United States, the Court reasoned, the balance of the relevant equities favors the government, because exclusion of such individuals “does not burden any American party by reason of that party’s relationship with the foreign national . . . [a]nd the courts below did not conclude that exclusion in such circumstances would impose any legally relevant hardship on the foreign national himself.” Thus, reasoned the Court, for those individuals “the balance tips in favor of the Government’s compelling need to provide for the Nation’s security.” Three Justices (Thomas, Alito, and Gorsuch) would have gone further and stayed the injunctions in full.

The Trump administration interpreted the Supreme Court’s decision to allow it to bar entry of grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States. It also interpreted it to bar entry of refugees without family relationships in the United States even if a resettlement agency in the United States had issued a formal assurance to assist the refugee. A federal judge in Hawaii disagreed with these interpretations and enjoined the government from barring those groups of people. The administration sought direct review in the Supreme Court. On July 19, the Court issued an order declining to overturn the Hawaii judge’s decision with respect to the family relationships, but staying the decision with respect to
refugees pending resolution of the government’s appeal to the Court of Appeals for the Ninth Circuit. Justices Thomas, Alito, and Gorsuch would have stayed the district court’s order in its entirety.

After EO-2’s 90-day entry suspension expired, the Supreme Court vacated the injunction as moot and remanded the case to the Fourth Circuit with instructions to dismiss the challenge to the executive order as moot. See Trump v. International Refugee Assistance Project, 137 S. Ct. 353 (2017). The Court expressed “no view on the merits” of the case. Id.

Third Executive Order. The Trump administration issued a revised executive order on September 24, 2017. See Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) (“EO-3”). Based on a multi-agency review of the information provided by foreign governments concerning their nationals who might enter the United States, the President made a finding that “absent the measures set forth in this proclamation, the immigrant and nonimmigrant entry into the United States of persons described in section 2 of this proclamation would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions.” Section 2 of EO-3 suspended or limited in various ways the entry into the United States of nationals from eight countries: Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia. (This had the effect of removing Sudan and adding Chad, North Korea, and Venezuela to the list of countries that had been the targets of EO-2.) The order indefinitely banned immigration into the United States by nationals of all of these countries except Venezuela, and it imposed various restrictions on the issuance of certain nonimmigrant visas to nationals of all of those countries except Somalia. Like its predecessor, EO-3 provides for discretionary case-by-case waivers.

EO-3 generated two streams of litigation. In a case brought by the State of Hawaii, an association of Muslims, and three individual plaintiffs allegedly affected by EO-3 in various ways, a federal district court in Hawaii issued a TRO against enforcement of EO-3. See Hawaii v. Trump (D. Hawaii Oct. 17, 2017). The court ruled that the State had standing because its educational system would suffer in recruiting and maintaining faculty and students as a result of EO-3; that the association’s membership and finances would be harmed by EO-3; and that the individuals had standing because EO-3 would impact family members who wanted to come to Hawaii. Relying heavily on the Ninth Circuit’s decision concerning EO-2, the court reasoned that the plaintiffs were likely to succeed on the merits of their claim under 8 U.S.C. § 1182(f) and a similar provision in 8 U.S.C. § 1185(a)(1), since there was not a tight enough fit between the President’s findings
and the restrictions imposed, and because EO-3 improperly used nationality as a proxy for risk. It also reasoned that the plaintiffs were likely to succeed on the merits of their claim under § 1152(a)(1)(A) for reasons similar to the Ninth Circuit’s ruling on the same ground concerning EO-2. The court also relied on the prior Ninth Circuit decision in rejecting the government’s national security concerns in support of EO-3. It did not reach the constitutional issues. On November 13, the Ninth Circuit Court of Appeals granted the government’s motion for an emergency stay of the district court’s preliminary injunction, pending expedited appeal, “except as to ‘foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.’” Hawaii v. Trump (9th Cir. Nov. 13, 2017) (quoting Trump v. Int’l Refugee Assistance Project, 137 S. Ct. 2080, 2088 (2017)).

In a second case, a federal district court in Maryland granted a request by 23 individuals and seven organizations to temporarily enjoin EO-3. See International Refugee Assistance Project v. Trump (D. Md. Oct. 17, 2017). The court ruled that the individual plaintiffs had standing to assert statutory claims because of their alleged harm of prolonged separation from close family members who could not travel to the United States under EO-3, and that the organizational plaintiffs had standing to assert statutory claims because of the alleged injuries to their proprietary and organizational interests, or because their members were harmed by EO-3. It also held that the individuals had standing to assert an Establishment Clause claim because of both separation from family members and direct harm to their religious beliefs as a result of EO-3. On the merits, the court ruled that the plaintiffs were likely to prevail on their statutory claims for reasons similar to those given by the federal district court in Hawaii. It also concluded that the plaintiffs were likely to prevail on the claim that EO-3 violated the Establishment Clause because religious animus was its primary purpose despite its facial religious neutrality, its grounding in the Department of Homeland Security’s threat review, and the inclusion in EO-3 of two non-Muslim countries (North Korea and Venezuela).

The government filed applications to stay both district court preliminary injunctions. The Supreme Court granted the applications, pending the disposition in the Fourth and Ninth Circuits, respectively, and in the Supreme Court, if certiorari is sought there. (Justices Ginsburg and Sotomayor would have denied both applications.) See Trump v. International Refugee Assistance Project (Sup. Ct. Dec. 4, 2017); Trump v. Hawaii (Sup. Ct. Dec. 4, 2017). The effect of this decision was to allow EO-3 to go fully into effect pending final review, if any, in the Supreme Court.

Questions. The litigation over the three EOs raises a number of important issues, some of which are beyond the scope of this casebook because they are
either specific to immigration law or Establishment Clause jurisprudence, or they concern general issues of jurisdiction, justiciability, and the requirements for equitable relief. The central issue for purposes of the casebook concerns the separation of powers. Consider the analyses in the Fourth and Ninth Circuits opinions concerning EO-2. How, if at all, do those analyses fit within Justice Jackson’s tripartite framework for assessing presidential power in *Youngstown*? If President Trump was acting pursuant to statutory authority—most notably, the broad authority conferred by 8 U.S.C. § 1182(f)—his orders would fall within Jackson’s highest category of presidential authority. Why did the lower courts nevertheless rule against him?

Traditionally, the immigration context is one in which the President’s discretionary leeway to act has been at its height because of broad delegations from Congress, such as in Section 1182(f) of the INA, and extraordinary deference from courts, especially when immigration issues intersect with national security issues. In the lower court litigation over the Trump Executive Orders, however, courts in various ways have read the power and discretion conferred by the immigration statutes narrowly, and have given the President less deference than usual in second-guessing his factual and legal claims and in looking behind the face of the orders to their motives. They did this with all three orders even though EO-2 and EO-3 were, compared to EO-1, less rushed, more narrowly cabined, better supported by factual findings, and more closely tied to the relevant statutory authorizations. Why did the lower courts act in this manner? To the extent that the lower courts adopted a non-deferential posture, or inferred illicit motive, because of statements on the campaign trail and by administration officials that did not concern the executive orders directly, is the practice legitimate?

Neither the Supreme Court’s per curiam opinion in June 2017 concerning EO-2, nor its orders granting the government’s application for a stay of the preliminary injunctions against EO-3, were rulings on the merits. And yet in its brief June opinion, the Court did not look behind EO-2, and it signaled that respect for presidential prerogatives in national security must be taken seriously. And in its December 2017 orders, the Court, at least temporarily, allowed EO-3 to go into effect fully. What explains the contrast between the Supreme Court’s approach and the approach of the lower courts? Do the Supreme Court’s actions indicate how it might resolve the issues if it reaches the merits? That the Court thinks more of the government’s arguments for deference than do the lower courts? Or simply that the Court has been trying to set a calmer tone in the contentious debate over the executive orders?
6a. In December 2017, President Trump officially recognized Jerusalem as the capital of Israel and set in motion a process of eventually moving the U.S. embassy from Tel Aviv to Jerusalem, actions that were contrary to longstanding Executive Branch policy. See Presidential Proclamation Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem (Dec. 6, 2017), at https://www.whitehouse.gov/presidential-actions/presidential-proclamation-recognizing-jerusalem-capital-state-israel-relocating-united-states-embassy-israel- jerusalem/. There was little dispute that the President’s recognition power, as endorsed in Zivotofsky II, gave Trump the legal authority to take these actions. Moreover, Trump’s actions, unlike the presidential action at issue in Zivotofsky II, were not inconsistent with any congressional directive. In fact, since 1995, the Jerusalem Embassy Act had called for these actions, while allowing presidents to waive its requirements every six months (which presidents had done up until Trump). Trump referred to the Act in his proclamation. He also observed that “we finally acknowledge the obvious: that Jerusalem is Israel’s capital. This is nothing more, or less, than a recognition of reality.” In addition, he said that he “judged this course of action to be in the best interests of the United States of America and the pursuit of peace between Israel and the Palestinians.” The implications of the proclamation for disputes between Israel and the Palestinians over Jerusalem were unclear, given that Trump also noted that the United States “continues to take no position on any final status issues” and that “specific boundaries of Israeli sovereignty in Jerusalem are subject to final status negotiations between the parties.”

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

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

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

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

(1) determines that to do so is in the national security interest of the United States; and
(2) submits a notification of the waiver, at the time the waiver is invoked, to the Committee on Armed Services and the Committee on Foreign Affairs of the House of Representatives and the Committee on Armed Services and the Committee on Foreign Relations of the Senate.

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

Page 211, add at the end of Note 17:


Chapter 4: States and Foreign Relations

Page 235, add the following Note after Note 7:

7a. One important locus of legal disagreement about federalism and immigration in recent years has concerned “sanctuary jurisdictions.” Sanctuary jurisdictions are state and sub-state governmental entities that do some combination of the following: (1) refuse to collect information that might be of interest to federal immigration officials; (2) refuse to share immigration-related information with federal immigration officials; (3) refuse to use local government resources to enforce immigration laws; or (4) refuse to honor U.S. Immigration and Custom Enforcement (ICE) detainer requests or deny ICE agents access to inmates in state and local jails. As of 2016, more than 300 jurisdictions across the United States had adopted a “sanctuary policy” with one or more of these restrictions. See Barbara E. Armacost, “Sanctuary” Laws: The New Immigration Federalism, 2016 Mich. St. L. Rev. 1197, 1198 (2016). Sanctuary jurisdictions grew up in part as a response to the legal duties imposed by 8 U.S.C § 1373, which (among other things) provides that “a Federal, State, or local government entity or
official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”

During the 2016 presidential campaign, then-candidate Donald Trump pledged to cancel all federal funding to sanctuary jurisdictions. See Amita Kelly & Barbara Sprunt, Here Is What Donald Trump Wants to Do in His First 100 Days, NPR (Nov. 9, 2016), http://www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days. Shortly after taking office, President Trump issued Executive Order 13768, Enhancing Public Safety in the Interior of the United States. Section 9(a) of the Order directs the Attorney General and Secretary of Homeland Security to “ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.” Executive Order 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

The County of Santa Clara and the City and County of San Francisco challenged the Order as facially unconstitutional. A federal district court agreed, granted the plaintiffs’ motion for summary judgment, and issued a permanent injunction against Section 9(a). See County of Santa Clara v. Trump, No. 17-CV-00485-WHO (N.D. Cal. Nov. 20, 2017). The court reasoned that the Order purported to exercise the congressional spending power, in violation of separation of powers, by delegating to the Attorney General the authority to place restrictions, not authorized by Congress, on the receipt of federal funds. The Court further ruled that the spending conditions violated the Tenth Amendment because, among other things, they seek “to compel the states and local jurisdictions to enforce a federal regulatory program through coercion.” Finally, the court ruled that the Order was unconstitutionally vague because it failed to make clear what conduct it prohibits or clear standards for enforcement, and because it deprives the localities of statutory property interests with a “complete lack of due process.” For other decisions on sanctuary cities that held against the government at earlier stages of litigation, see City of Philadelphia v. Sessions (E.D. Pa. Nov. 15, 2017) (granting preliminary injunction); City of Seattle v. Trump (W.D. Wash. Oct. 19, 2017) (denying motion to dismiss).

Independent of the constitutional arguments in play, should any of the four types of sanctuary policies listed above be deemed to be preempted by 8 U.S.C. § 1373? Although the Court in Arizona v. United States declined to find that federal law preempted Arizona’s information-sharing requirement, isn’t there a stronger argument that § 1373 preempts sanctuary policies that restrict certain kinds of information-sharing? What about the information-collection, non-enforcement,
and anti-detainer restrictions? Even apart from statutory preemption, do the sanctuary policies implicate the dormant preemption doctrine of Zschernig? In answering these questions, consider whether the state and local laws should be viewed as regulating immigration or merely law enforcement procedures and resource allocation.


Page 259, add the following Note after Note 15:

15a. As discussed in more detail in Chapter 6 of the casebook, the Obama administration ratified the Paris agreement on climate change in 2016. In early June 2017, President Trump announced that he would withdraw the United States from the agreement. In response to this announcement, a number of states and localities said that they would continue to pursue efforts to address climate change as a matter of state law. Hawaii went so far as to pass legislation committing the state to meet the emissions reduction goals in the Paris agreement, and California entered into a non-binding agreement with China to cut emissions. It was further reported that “[r]epresentatives of American cities, states and companies are preparing to submit a plan to the United Nations pledging to meet the United States’ greenhouse gas emissions targets under the Paris climate accord.” Hiroko Tabuchi & Henry Fountain, Bucking Trump, These Cities, States and Companies
Commit to Paris Accord, N.Y. Times (June 1, 2017). Are these various efforts legal?

**Page 259, add at the end of Note 16:**

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

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**Chapter 5: Treaties**

**Page 291, add the following Note after Note 13:**

13a. Sometimes the non-self-execution analysis will overlap with the justiciability limitations considered in Chapter 2 of the casebook. For an example, see Republic of the Marshall Islands v. United States, 865 F.3d 1187 (9th Cir. 2017). In that case, the Marshall Islands sued the United States, seeking to compel it to comply with Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, which provides that “[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.” In directing dismissal of the case, the U.S. Court of Appeals for the Ninth Circuit stated: “Whether examined under the rubric of treaty self-execution, the redressability prong of standing, or the political question doctrine, the analysis stems from the same separation-of-powers principle—enforcement of this treaty provision is not committed to the judicial branch.” The court emphasized, among other things, that Article VI “is addressed to the executive, urging further steps only the executive can take—negotiation with other nations.”

**Page 293, add at the end of Note 18:**

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

**Page 320, add the following Note after Note 9:**

9a. In 2010, the Senate gave its advice and consent to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance Convention, while declaring that the Convention would be non-self-executing in the United States. The Convention requires that each country adopt various procedures for the processing of international child support cases, something that in the United States is ordinarily handled at the state and local levels. In 2014, Congress enacted a federal statute designed to bring state law into compliance with the requirements of the Convention. Instead of attempting to preempt state law, the statute threatened to withhold federal funds from any state that did not adopt model implementing legislation proposed on the subject by the National Conference of Commissioners on Uniform State Laws. Although the state of Idaho initially resisted passing such legislation, it eventually did so. Once all states had the required legislation in place, the Obama administration ratified the Convention in September 2016.

**Page 343, add at the end of Note 17:**

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

**Page 385, add the following Note after Note 17:**

17a. In January 2017, the UK Supreme Court held that the executive branch in Great Britain could not invoke the withdrawal clause in the European Union treaty—and thereby initiate “Brexit” (that is, a British exit from the Union)—without first obtaining parliamentary authorization. This was true, reasoned the Court, even though the British public had approved a referendum in support of Brexit. In its lengthy analysis, the Court explained that withdrawal from the European Union will result in “a fundamental change in the constitutional arrangements of the United Kingdom,” and the Court said that it could not “accept
that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be affected in the only way that the UK constitution recognises, namely by Parliamentary legislation.” The Court also noted that withdrawal from the EU would result in a loss to UK citizens of various rights and remedies conferred under EU law, and it reasoned that such loss was “another, albeit related, ground” for its conclusion. For discussion of the decision and a consideration of whether its analysis is relevant to debates in the United States over the executive branch’s authority to terminate treaties, see Curtis Bradley & Laurence Helfer, The Brexit Decision and its Implications for U.S. Debates Over Treaty Withdrawal, Lawfare (Jan. 24, 2017), at https://www.lawfareblog.com/brexit-decision-and-its-implications-us-debates-over-treaty-withdrawal; see also Curtis A. Bradley & Laurence R. Helfer, Treaty Exit in the United States: Insights from the United Kingdom or South Africa?, 111 AJIL Unbound 428 (2018).

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

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

Chapter 6: Executive Agreements

Page 403, add the following Note after Note 19:

19a. Assuming that the President generally has the authority to act unilaterally in withdrawing the United States from Article II treaties (see Section F.3 of Chapter 5 of the casebook), does this withdrawal authority also apply to congressional-executive agreements (such as the NAFTA trade agreement, which President Trump has threatened at times to terminate)? These agreements are “treaties” as a matter of international law and, like many Article II treaties, often have clauses allowing each party to withdraw after a period of notice. But they are authorized or approved by a majority of Congress rather than by two-thirds of the Senate. In that sense, they resemble domestic statutes, and it is settled that presidents cannot unilaterally terminate statutes. Should that difference in process affect the President’s withdrawal authority? For competing views, compare, for example, Curtis A. Bradley, Exiting Congressional-Executive Agreements, 67

Page 412, add at the end of Note 12:


Page 412, add at the end of Note 13:


Page 421, add at the end of Note 8:

Donald Trump was an opponent of the Iran deal when campaigning for the presidency. After he became President, however, he hesitated to terminate it. His hesitation likely stemmed in part from the fact that, because Iran had become reintegrated into the global economy as a result of the deal, a unilateral U.S. termination of the deal, followed by re-imposition of the U.S. sanctions against Iran, would primarily hurt U.S. firms. In May, President Trump waived domestic sanctions against Iran, consistent with the deal, and in May and July he certified to Congress under the Iran Nuclear Agreement Review Act that Iran was complying with the deal. In October 2017, however, Trump refused to certify Iran’s compliance, which had the effect under the Iran Nuclear Agreement Review Act of triggering a 60-day window for expedited consideration of any legislative effort to re-impose sanctions. (Congress declined to act within that window.) President Trump also at that time announced that if he could not “reach a solution working with Congress and our allies, then the agreement will be terminated.” See Mark
Landler & David E. Sanger, *Trump Disavows Nuclear Deal, But Doesn’t Scrap It*, N.Y. Times, Oct. 13, 2017. As of the time this Supplement was going to press, the President had not acted on that threat.

Page 422, add the following Note after Note 10:


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

As we learned in Section F of this chapter of the casebook, there is a long historical tradition of presidents terminating U.S. treaties pursuant to withdrawal clauses (and sometimes even in the absence of such clauses). And, as discussed in Section C of Chapter 2, a majority of the Court in Goldwater v. Carter ruled that a treaty termination in the context of a treaty with a withdrawal clause was non-justiciable, albeit under differing rationales that did not garner majority support. Assuming (as is likely) that the logic of treaty termination extends to withdrawal clauses in executive agreements made pursuant to treaties, it would appear that President Trump at least has the authority to terminate the Paris Agreement in accordance with its terms. Some commentators have noted, however, that the earliest that the withdrawal could take effect under Article 28.1 is on November 4, 2020, the day after the next U.S. presidential election. See Harold Hongju Koh et al., Trump’s So-Called Withdrawal from Paris: Far from Over, Just Security (June 2, 2017), at https://www.justsecurity.org/41612/trumps-so-called-withdrawal-paris/. In withdrawing the United States from the Agreement, is President Trump bound by the terms of Article 28.1? In answering that question, how might it matter that President Obama acted unilaterally in accepting the Paris Agreement for the United States (albeit ostensibly with authority derived from the Framework Convention)? In any event, it appears that the Trump administration has accepted these limitations on withdrawal, since its August 2017 notice to the United Nations states that the United States will withdraw “as soon as it is eligible to do so, consistent with the terms of the Agreement.”


**Page 422, add the following Note after Note 11:**

12. For a comprehensive assessment of presidential control over international law, including the making of various forms of binding international agreements and political commitments, see Curtis A. Bradley & Jack Goldsmith, *Presidential Control Over International Law*, forthcoming 2018, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3074833. Among other things, this article argues that in the United States the making, interpretation, and termination of international agreements (including political commitments) have come to be controlled almost entirely by presidents, without meaningful congressional input. The article also sets forth a framework for analyzing the legality of such agreements, and for assessing larger normative questions about whether presidents are adequately accountable for their control over international agreements.

For an argument that the various pathways for making international agreements are affected not only by constitutional law, but also by international law and administrative law, and that the latter two types of law impose constraints on presidential power, see Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. Chi. L. Rev. 1675 (2017).

**Chapter 7: Customary International Law**

**Page 437, add the following Note after Note 9:**

9a. For an examination of what U.S. courts look to in identifying rules of customary international law, and a finding that courts tend to focus on (a) federal case law, (b) treaties, and (c) U.S. scholarship, see Ryan M. Scoville, *Finding Customary International Law*, 101 Iowa L. Rev. 1803 (2016). See also Nikki C. Gutierrez & Mitu Gulati, *Custom in Our Courts: Reconciling Theory with Reality in the Debate About Erie Railroad and Customary International Law*, 27 Duke J. Comp. & Int’l L. 243 (2017) (finding that, both before and after *Erie Railroad v. Tompkins*, U.S. courts have tended to rely on U.S. case law as support for statements about the content of customary international law).
Page 475, add at the end of Note 5:

The Supreme Court has agreed to review the Second Circuit’s decision in Jesner v. Arab Bank, 808 F.3d 144 (2d Cir. 2015). In this decision, the Second Circuit adhered to its position that corporate entities cannot be sued under the Alien Tort Statute, and it therefore directed the dismissal of a suit against Arab Bank, PLC, a bank headquartered in Jordan, for allegedly financing and facilitating the activities of organizations that carried out terrorist attacks abroad. Oral argument was held in October 2017.

Page 496, add at the end of Note 14:

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

Page 496, add the following Note after Note 14:

Act creates a new subsection (h) in 28 U.S.C. § 1605 that exempts foreign art exhibitions in the United States from suit under Section 1605(a)(3) where (a) “a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States”; (b) “the President, or the President’s designee, has determined . . . that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest”; and (c) the notice has been published. When those conditions are met, “any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).” There are exceptions for Nazi-era claims and other situations in which the work “was taken in connection with the acts of a foreign government against members of a targeted group as part of a systematic confiscation or misappropriation of works from members of a targeted and vulnerable group.” One impetus for the legislation was the decision in Malewicz v. City of Amsterdam, 517 F. Supp. 2d 322 (D.D.C. 2007), in which the court had held that activity related to the loan of artwork to U.S. museums constituted “commercial activity” under Section 1605(a)(3)—a decision that generated significant concern and criticism from foreign state lenders of artwork. For discussion of the statute, see Ingrid Wuerth, An Art Museum Amendment to the Foreign Sovereign Immunities Act, Lawfare (Jan. 2, 2017), at https://www.lawfareblog.com/art-museum-amendment-foreign-sovereign-immunities-act.

Page 498, add at the end of Note 17:

In Rubin v. Islamic Republic of Iran, the Supreme Court has agreed to decide whether plaintiffs who obtained a $71.5 million default judgment against Iran under the FSIA’s state-sponsor-of-terrorism exception can seek to satisfy their judgment by attaching Persian artifacts owned by Iran that are currently held in Chicago museums. (The judgment stemmed from a suicide bombing in Jerusalem carried out by Hamas in 1997 that seriously injured a number of U.S. citizens.) The Seventh Circuit held that they could not attach the artifacts, reasoning that the allowance in the FSIA for attachment of property “used for a commercial activity in the United States” (see 28 U.S.C. § 1610(a)) extends only to property being used by the foreign state, not property being used by third parties. The court also reasoned that 28 U.S.C. § 1610(g), which relates to attachment in state-sponsor-of-terrorism cases, is not itself a freestanding exception to immunity from attachment but rather simply allows recovery of property held by entities affiliated with the
foreign state even if they are legally separate. See Rubin v. Islamic Republic of Iran, 830 F.3d 470 (7th Cir. 2016).

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

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

Page 523, add at the end of Note 14:

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

The majority, in an opinion by Justice Kennedy, first concluded that the plaintiffs’ claims did not fall within what was already allowed under the Bivens line of cases. “The proper test for determining whether a case presents a new Bivens context,” the majority explained, “is as follows”:

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

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

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

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

In this case, the majority found a number of special factors that weighed against allowing a *Bivens* claim: (1) “these claims would call into question the formulation and implementation of a general policy,” which would “necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged”; (2) “the discovery and litigation process would either border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question” and thereby “require courts to interfere in an intrusive way with sensitive functions of the Executive Branch”; (3) the claims “of necessity requir[e]
an inquiry into sensitive issues of national security,” whereas “[n]ational-security policy is the prerogative of the Congress and President”; (4) Congress, in the years since the September 11 attacks, had not elected to create a damage remedy for this situation; and (5) equitable and habeas relief will often be effective in challenging the sorts of abuse alleged in this case, so it is not “damages or nothing.” (The Court remanded a claim against a prison warden, however, in which it was alleged that the warden had allowed prison guards to abuse the plaintiffs. It also directed dismissal of a statutory civil conspiracy claim against the federal officials on the ground that the officials were entitled to qualified immunity because “reasonable officials in petitioners’ positions would not have known, and could not have predicted, that [the statute] prohibited their joint consultations and the resulting policies that caused the injuries alleged.”) Justices Breyer and Ginsburg dissented.

Chapter 8: International Crime

Page 560, add at the end of Note 8:

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

Chapter 9: War Powers

Page 664, add at the end of Note 13:

Charles Evans Hughes famously stated that “the power to wage war is the power to wage war successfully.” For an analysis that puts this axiom in its World War I context and traces its implications for the modern “war on terror,” see Matthew C. Waxman, The Power to Wage War Successfully, 117 Colum. L. Rev. 613 (2017).
Page 665, add the following Note after Note 16:

17. On April 6, 2017, the United States, on orders from President Trump, launched 59 Tomahawk cruise missiles at the Shayrat airbase in Syria in response to an alleged chemical attack by forces associated with the Syrian government on civilians in the Syrian town of Khan Shayshun. In a letter to Congress “consistent with the War Powers Resolution,” President Trump stated that he “acted in the vital national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive.” The Trump administration never provided an official public legal rationale beyond this conclusory statement. But it did circulate unsigned talking points “among representatives in various agencies about the strike’s legal basis” that provide some insight into its thinking. Charlie Savage, Watchdog Group Sues Trump Administration, Seeking Legal Rationale Behind Syria Strike, N.Y. Times (May 8, 2017), at https://www.nytimes.com/2017/05/08/world/middleeast/syria-united-protect-democracy-trump-lawsuit.html; see also Marty Lederman, (Apparent) Administration Justifications for Legality of Strikes Against Syria, Just Security (April 8, 2017), at https://www.justsecurity.org/39803/apparent-administration-justifications-legality-strikes-syria/.

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

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

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


Page 686, add the following Note after Note 18:

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

Page 687, add at the end of Note 19:

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

Chapter 10: War on Terrorism

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

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

Page 761, add at the end of Note 11:

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

**Page 767, add at the end of Note 14:**

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

**Page 770, add at the end of Note 15:**

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

**f. Detention of American Citizen.** In September 2017, militia forces in Syria captured a U.S. citizen who allegedly had been fighting as part of ISIL, and they turned him over to the U.S. military. Since then, the U.S. military has held him in Iraq as an enemy combatant. To date, the military has not released the detainee’s name or other information about him, although it has allowed the International Committee of the Red Cross to visit him. The American Civil Liberties Union (ACLU) has filed a habeas corpus petition on his behalf in the
federal district court in Washington, D.C. In that case, the government has informed the judge that the detainee was given *Miranda* warnings about a right to remain silent and have a lawyer present, and that the detainee has requested a lawyer but has not yet been provided with one. The government also has said that it was unsure whether the detainee wanted to seek habeas relief, and it contested the right of the ACLU to sue on his behalf.

Does the government have the legal authority to detain this person in military custody? For how long? What does *Hamdi* suggest? Does the government’s legal authority depend on whether the AUMF applies to the U.S. conflict with ISIL?

**Page 783, add at the end of Note 11:**

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