(Summer 2020)

Supplement

Curtis A. Bradley, Ashley S. Deeks, and Jack L. Goldsmith, Foreign Relations Law: Cases and Materials (7th ed. 2020)*

[*This is the Summer 2020 Supplement for* CURTIS A. BRADLEY, ASHLEY S. DEEKS, AND JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS *(7th ed. 2020).* These materials cover, among other things, the Supreme Court's disallowance of a damages suit against a U.S. official for a cross-border shooting in *Hernandez v. Mesa*; recent lower court decisions concerning "sanctuary jurisdictions"; efforts by Congress to regulate presidential withdrawal from certain treaties; lawsuits brought against China relating to the spread of COVID-19; and the Trump administration's targeted killing of an Iranian general, Qassem Soleimani.]

Chapter 1: Historical and Conceptual Foundations

Page 39, add at the end of A. Originalism:

For an argument that an originalist interpretation of the Constitution, by favoring Congress in areas such as war powers, could rein in the expansive contemporary powers of the President, see Saikrishna Bangalore Prakash, The Living Presidency: An Originalist Argument against Its Ever-Expanding Powers (2020).

Chapter 2: Courts and Foreign Relations

Page 82, add at the end of Note 7:

In a recent decision interpreting the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Supreme Court (in a unanimous opinion authored by Justice Thomas) avoided deciding what weight to give to the Executive Branch's interpretation of the Convention. *See* GE

* Instructors using the Bradley, Deeks, and Goldsmith casebook are authorized to distribute this supplement to their students for classroom use.

Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637 (2020). The Court explained:

> The United States claims that we should apply a "canon of deference" and give "great weight" to an interpretation set forth by the Executive in an *amicus* brief submitted to the D.C. Circuit in 2014. GE Energy echoes this request. Outokumpu, on the other hand, argues that the Executive's noncontemporaneous interpretation sheds no light on the meaning of the treaty, asserting that the Executive expressed the "opposite . . . view at the time of the Convention's adoption." Brief for Respondents 33. Outokumpu asserts that this Court has repeatedly rejected executive interpretations that contradict the treaty's text or the political branches' previous understanding of a treaty. *Id.* at 34-35 (citing, e.g., Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 136 (1989) (Brennan, J., concurring in judgment); Perkins v. Elg, 307 U.S. 325, 328, 337-49 (1939)).
>
> We have never provided a full explanation of the basis for our practice of giving weight to the Executive's interpretation of a treaty. Nor have we delineated the limitations of this practice, if any. But we need not resolve these issues today. Our textual analysis aligns with the Executive's interpretation so there is no need to determine whether the Executive's understanding is entitled to "weight" or "deference." *Cf.* Edelman v. Lynchburg College, 535 U.S. 106, 114-15, n. 8 (2002) ("[T]here is no need to resolve deference issues when there is no need for deference").

Page 98, add the following at the end of Note 11:

For a review of the lawsuits that have been brought since the Trump administration ceased the suspension of Article III of the Helms-Burton Act, and a finding that most of these lawsuits have targeted U.S. rather than foreign companies, see John Bellinger, *The First Year of Helms Burton Lawsuits*, Lawfare (Apr. 23, 2020).

Page 121, add the following at the end of Note 14:

For an account of the presumption against extraterritoriality that argues that it was transformed by *Morrison* into a more flexible doctrine, and that this was

confirmed by *RJR Nabisco*, see William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 Harv. L. Rev. 1582 (2020).

Page 136, change citation in the fifth line from the bottom to the following:

Samuel Estreicher & Thomas H. Lee, *In Defense of International Comity*, 93 S. Cal. L. Rev. 169 (2020)

Chapter 3: Congress and the President in Foreign Relations

Page 187, add the following at the end of the carryover paragraph at the top of the page:

In a pair of decisions announced in June 2020, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision and basic reasoning in the challenge by the Sierra Club concerning Section 8005, as well as in a similar suit brought by several states. Sierra Club v. Trump, No. 19-16102, 2020 WL 3478900 (9th Cir. June 26, 2020); California v. Trump, No. 19-16299, 2020 WL 3480841 (9th Cir. June 26, 2020). But the Supreme Court's stay of the district court's injunction in *Trump v. Sierra Club* continues by its terms until there is a "disposition of the Government's petition for a writ of certiorari, if such writ is timely sought."

Page 187, add the following at the end of Note 8:

For a discussion of how economic sanctions, targeted killings, and responses to cyber attacks have become increasingly focused on individuals, and an argument that this individualization "has, in underappreciated ways, bolstered the role of administrative agencies in shaping and implementing key foreign policy and national security measures," see Elena Chachko, *Administrative National Security*, 108 Geo. L.J. 1063, 1066 (2020).

Page 217, change the citation to the Ingber article in Note 17 to the following:

Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 Va. L. Rev. 395 (2020)

Page 219, add the following Note after Note 19:

19a. Even when Congress does not attempt to regulate Executive Branch foreign relations or intelligence activities directly, it may require by statute that the Executive Branch notify Congress of and justify its activities. Reason-giving requirements can be particularly important when the Executive Branch activities are classified, because Congress is one of the few actors able to oversee those activities. Congress has mandated, for example, that the President give reasons for withholding from Congress notice of covert actions (discussed in Chapter 9) and that the Executive Branch provide justifications for changes to its legal and policy frameworks for using military force. For a discussion of the effects of statutory reason-giving requirements on classified Executive Branch activities, see Ashley S. Deeks, *Secret Reason-Giving*, 129 Yale L.J. 612 (2020).

Chapter 4: States and Foreign Relations

Page 240, add the following after the carryover paragraph in Note 8:

The First and Third Circuits joined the Seventh and Ninth Circuits in concluding that the Attorney General's conditioning of funds on compliance with § 1373 is unlawful. *See* City of Providence v. Barr, 954 F.3d 23 (1st Cir. 2020); City of Philadelphia v. Attorney General of the United States, 916 F.3d 276 (3d Cir. 2019). The Second Circuit, by contrast, recently ruled that Congress had given the Attorney General authority to condition funds on compliance with § 1373 and related actions by the states. *See* New York v. Department of Justice, 951 F.3d 84 (2d Cir. 2020). The Second Circuit also rejected the argument that § 1373 was facially unconstitutional under the anticommandeering doctrine. It doubted that the states had much if any reserved power on these particular immigration issues, and it concluded in any event that "there is no commandeering of reserved State power" because the "State has 'a legitimate choice whether to accept the federal conditions in exchange for federal funds.'" *Id.* at 115 (quoting NFIB v. Sibelius, 567 U.S. 519, 578 (2012)).

For additional articles that focus on these cases, see, for example, Josh Blackman, *Improper Commandeering*, 21 U. Pa. J. Const. L. 959 (2019) (arguing that § 1373 is facially unconstitutional under anticommandeering doctrine); Ilya Somin, *Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State*

Autonomy, 97 Tex. L. Rev. 1247 (2019) (analyzing decisions that ruled against applications of E.O. 13768, and arguing that § 1373 is unconstitutional).

Page 263, add the following Note after Note 13:

13a. Article I, Section 10 of the Constitution prohibits states from entering into any "Treaty, Alliance, or Confederation," and it requires them to obtain the consent of Congress before they enter into any "Agreement or Compact . . . with a foreign Power." The federal government recently invoked these limitations in a suit challenging an agreement that California made with Quebec designed to harmonize and integrate their respective "cap-and-trade" programs for reducing greenhouse gas emissions. *See* United States v. California (E.D. Cal. Mar. 12, 2020).

In rejecting the government's arguments, the court first concluded that the agreement with Quebec is not a "Treaty" for purposes of Article I, Section 10:

> Not all international agreements may be "treaties" in the constitutional sense. . . .
>
> This Agreement is not a treaty creating an alliance for purposes of peace and war. *See* Williams v. Bruffy, 96 U.S. 176, 182 (1877) (finding the Confederate States of America unconstitutional under the Treaty Clause). Nor does it constitute a treaty for "mutual government" or represent a "cession of sovereignty." *See id.* To the contrary, the Agreement explicitly recognizes that Quebec and California adopted "*their own* greenhouse gas emissions reduction targets, *their own* regulation on greenhouse gas emissions reporting programs and *their own* regulation(s) on their cap-and-trade programs." These programs are not identical, and their different aims and structures undercut any mutuality argument.
>
> The programs, adopted independently and informed by each jurisdiction's policy objectives, could (and have) run independently of each other. Furthermore, the Agreement provides it is "each Party's sovereign right and authority to adopt, maintain, modify, repeal, or revoke any of their respective program regulations or enabling legislation." . . . . Accordingly, there is no "mutual government" or "cession of sovereignty" representative of a treaty.
>
> Finally, while both California and Quebec have undeniably reaped significant monetary benefits from their limited commercial

> privileges with one another, the cap-and-trade agreement is not a "general commercial privilege" prohibited by the Treaty Clause. Treaties conferring "general commercial privilege[s]" are treaties regarding amity and commerce and encompass far more than the limited exchange here. . . .

Next, the court concluded that the agreement with Quebec is also not a "Compact":

> "Read literally, the Compact Clause would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States." U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 459 (1978). Rather than adopt that interpretation, the Supreme Court has limited its application to agreements that encroach upon federal sovereignty. . . . Accordingly, the court must first ascertain whether the Agreement falls within Article I's scope.
>
> In Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 176 (1985), the Court was tasked with determining whether there was an agreement between a collection of New England states that amounted to a "compact." *Id.* at 175. To do so, the Court considered whether the arrangement had the "classic indicia of a compact," including: (1) provisions that required reciprocal action for the agreement's effectiveness; (2) a regional limitation; (3) a joint organization or body for regulatory purposes; and (4) a prohibition on the agreement's unilateral modification or termination. It is indisputable that there is an agreement between the parties. However, the court must ascertain whether that Agreement "amount[s] to a compact" first.
>
> The Agreement does not contain the first indicium of a compact because it does not require reciprocal action to take effect. Article 14 explicitly states that "this Agreement does not modify any existing statutes and regulations nor does it require or commit the Parties to their respective regulatory or statutory bodies to create new statutes or regulations in relation to this Agreement." While California requires linking jurisdictions to have equivalent or stricter enforcement goals than it does, the efficacy of the program does not rise or fall with other jurisdictions adopting similar enforcement goals; indeed, the program could operate independently of any other jurisdiction.

> The Agreement also lacks the second indicium of a compact because it does not impose a regional limitation. . . . Quite the contrary—the Agreement's "Accession" provision is written without regard to geographical location.
>
> The third indicium of a compact is also absent. While California has adopted a "joint organization or body" in WCI, Inc. [a non-profit company set up to provide administrative and technical support to the parties] . . . WCI, Inc. exercises no *regulatory* authority under the Agreement or California law. . . .
>
> Finally, there is no enforceable prohibition on unilateral modification or termination. As in *Northeast Bancorp*, "each [jurisdiction] is free to modify or repeal its law unilaterally." 472 U.S. at 175. . . .

When this Supplement was being prepared, the district court was still considering the government's argument that, even if not disallowed under Article I, Section 10, the agreement with Quebec was preempted by federal policy.

Chapter 5: Treaties

Page 319, add at the end of Note 18:

For an account of "popular-sovereignty limitations" on the treaty power in the nineteenth century, pursuant to which neither the federal nor state governments could exercise "eminent dominion" over territory outside of the United States, and how this understanding was eclipsed by "an imperial reframing of foreign-affairs federalism as a question of dual sovereignty," see Brian Richardson, *The Imperial Treaty Power*, 168 U. Pa. L. Rev. 931 (2020).

Page 379, add the following Note after Note 9:

9a. Since 1993, the United States has been a party to the Treaty on Open Skies, a multilateral agreement that allows for unarmed observational flights over member countries in order to promote military transparency. The treaty entered into force in 2002 and currently has thirty-four states parties. Article XV of the

treaty provides that a party may withdraw by providing notice at least six months in advance of the intended date of withdrawal.

In response to indications that the Trump administration was considering withdrawing the United States from this treaty because of alleged breaches by Russia, Congress included Section 1234 in the National Defense Authorization Act for Fiscal Year 2020 (NDAA) (enacted in December 2019), which states:

> (a) NOTIFICATION REQUIRED.—Not later than 120 days before the provision of notice of intent to withdraw the United States from the Open Skies Treaty to either treaty depository pursuant to Article XV of the Treaty, the Secretary of Defense and the Secretary of State shall jointly submit to the congressional defense committees, the Committee on Foreign Affairs of the House of Representatives, and the Committee on Foreign Relations of the Senate a notification that—
>
> (1) such withdrawal is in the best interests of the United States national security; and
>
> (2) the other state parties to the Treaty have been consulted with respect to such withdrawal.

Another provision in the NDAA, Section 1242, addressed withdrawal from the North Atlantic Treaty:

> Notwithstanding any other provision of law, no funds may be obligated, expended, or otherwise made available during the period beginning on the date of the enactment of this Act and ending on December 31, 2020, to take any action to suspend, terminate, or provide notice of denunciation of the North Atlantic Treaty, done at Washington, D.C. on April 4, 1949.

President Trump signed the NDAA into law, but issued a wide-ranging signing statement that called many provisions in the Act into question. With respect to the above two sections, as well as other provisions relating to foreign affairs, he stated:

> My 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, including the authorities to determine the terms upon which recognition is given to foreign sovereigns, to receive foreign representatives, and to conduct the Nation's diplomacy.

Statement by the President, The White House (Dec. 20, 2019), *at* https://www.whitehouse.gov/briefings-statements/statement-by-the-president-34/.

With respect to Section 1234 and other provisions in the NDAA requiring advance certification or notification to Congress, Trump stated:

> I reiterate the longstanding understanding of the executive branch that these types of provisions encompass only actions for which such advance certification or notification is feasible and consistent with the President's exclusive constitutional authorities as Commander in Chief and as the sole representative of the Nation in foreign affairs.

Are the limitations in the NDAA on treaty withdrawal constitutional? Are they judicially enforceable? For discussion of the legal issues implicated by a potential withdrawal from the Treaty on Open Skies, see Scott R. Anderson & Pranay Vaddi, *When Can the President Withdraw from the Open Skies Treaty?*, Lawfare (Apr. 22, 2020). In May 2020, the administration submitted a notice of withdrawal from the Treaty, which will become effective after six months. The administration stated, however, that it might "reconsider our withdrawal should Russia return to full compliance with the Treaty." Michael R. Pompeo, Secretary of State, On the Treaty on Open Skies (May 21, 2020), *at* https://www.state.gov/on-the-treaty-on-open-skies/. The administration did not provide the 120-day advance notice to Congress as specified in the NDAA.

Page 380, add the following at the end of Note 10:

For an argument that, after a president withdraws the United States from a treaty, the Senate's resolution of advice and consent to the treaty normally remains in effect, and that a subsequent president can therefore rejoin the treaty without going back to the Senate, see Jean Galbraith, *Rejoining Treaties*, 106 Va. L. Rev. 73 (2020).

Chapter 6: Executive Agreements

Page 397, add the following Note after Note 19:

19a. In April 2020, President Trump announced that he was suspending U.S. funding contributions to the World Health Organization as a result of what he claimed was the Organization's poor handling of the coronavirus pandemic. *See* Erica Werner, *Congressional Democrats Allege Trump's Move to Defund World*

Health Organization is Illegal, Wash. Post (Apr. 15, 2020). In May 2020, the President announced that he was withdrawing the United States from the Organization. The United States joined the Organization in 1948 pursuant to a congressional-executive agreement. Congress's Joint Resolution authorizing the United States to join the Organization stated that:

> Sec. 4. In adopting this joint resolution the Congress does so with the understanding that, in the absence of any provision in the World Health Organization Constitution for withdrawal from the Organization, the United States reserves its right to withdraw from the Organization on a one-year notice: *Provided, however*, That the financial obligations of the United States to the Organization shall be met in full for the Organization's current fiscal year.

62 Stat. 441, 442 (1948). For arguments that President Trump is obligated to comply with both the notice and funding limitations referenced in this provision before withdrawing the United States from the Organization, see Jean Galbraith, *The US Cannot Withdraw from the WHO Without First Paying Its Dues*, Just Security (May 26, 2020); Harold Hongju Koh, *Trump's Empty "Withdrawal" from the World Health Organization*, Just Security (May 30, 2020).

Page 407, add the following at the end of Note 14:

For a study of the Executive Branch's reporting to Congress and publication of executive agreements, based on documents obtained from the State Department, and an assessment of the legal authority cited in support of executive agreements over several decades, see Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 Harv. L. Rev. (forthcoming 2020).

Chapter 7: Customary International Law

Page 483, add the following at the end of Note 13:

In July 2020, the Supreme Court granted cert. in Doe v. Nestle, S.A., 929 F.3d 623 (9th Cir. 2018), which (as consolidated with another case) raises two questions: (1) whether U.S. corporations are subject to suit under the ATS, and (2) the proper scope of the presumption against extraterritoriality in ATS cases.

Page 498, add the following at the end of Note 14:

In July 2020, the Supreme Court granted cert. in both Simon v. Republic of Hungary, 911 F.3d 1172 (D.C. Cir. 2018), and Philipp v. Federal Republic of Germany, 894 F.3d 406 (D.C. Cir. 2018), both of which concern whether and to what extent the FSIA's expropriation exception applies to a country's taking of the property of its own nationals, as well as related issues concerning international comity.

Page 501, add the following Note after Note 19:

19a. Under the FSIA, even when foreign states can be sued, they are normally not subject to punitive damage awards. *See* 28 U.S.C. § 1606. When Congress added the state sponsor of terrorism exception in 1996, it did not exempt it from this restriction on punitive damages. In 2008, however, Congress amended the state sponsor of terrorism exception and placed it in a stand-alone statutory section with its own cause of action. In doing so, it said that in these cases "damages may include . . . punitive damages." 28 U.S.C. § 1605A. Congress also provided in various ways that plaintiffs in "prior actions" and "related actions" could invoke the new statute.

In Opati v. Republic of Sudan, 140 S. Ct. 1601 (2020), the Supreme Court unanimously held that Congress's allowance of punitive damages against state sponsors of terrorism applied retroactively to conduct that occurred before 2008. This case involved a suit against Sudan for its alleged assistance to Al Qaeda in connection with truck bombings carried out in 1998 outside U.S. embassies in Kenya and Tanzania. A federal district judge awarded the plaintiffs (a group of victims of the bombings and family members of victims) approximately $10.2 billion in damages, including about $4.3 billion in punitive damages. In an opinion by Justice Gorsuch, the Court noted that there is a general presumption that laws do not apply retroactively, but it found that "Congress was as clear as it could have been when it authorized plaintiffs to seek and win punitive damages for past conduct." The Court did not address whether this retroactive application was constitutional because Sudan had not raised a constitutional challenge.

Page 502, add the following Note after Note 20:

20a. Since March 2020, a range of plaintiffs have initiated litigation against China and Chinese government institutions for acts related to the spread of

the COVID-19 virus. The plaintiffs include two U.S. states (Missouri and Mississippi), as well as proposed classes of health care workers, small business owners, and U.S. sheriffs. The plaintiffs assert various state law tort claims, including claims that the defendants were negligent for not containing the spread of the virus, not reporting the virus in a timely manner to the World Health Organization, and creating a public nuisance by allowing their property to be used to create a condition that harms public health.

Because the defendants in this litigation include a foreign sovereign and its agencies or instrumentalities, the FSIA is likely to be an obstacle to suit. *See, e.g.*, Chimène Keitner, *Don't Bother Suing China for Coronavirus*, Just Security (Apr. 8, 2020); Chimène Keitner, *Missouri's Lawsuit Doesn't Abrogate China's Sovereign Immunity*, Just Security (Apr. 22, 2020). Some members of Congress, however, have proposed bills that would facilitate this litigation. Senator Josh Hawley's bill would abrogate China's sovereign immunity and create a cause of action for activities such as withholding critical information about COVID-19. Senators Blackburn and McSally introduced a bill to amend the FSIA to establish an exception to jurisdictional immunity for a foreign state that discharges a biological weapon. And Senator Cotton introduced legislation that would create a civil action against a foreign state for deliberately concealing or distorting information with respect to an international public health emergency. As of late June, the Senate had not yet voted on any of these bills. For an argument that amending the FSIA to facilitate these lawsuits would harm the U.S. government's ability to invoke sovereign immunity for itself in other settings, see John Bellinger, *Suing China Over the Coronavirus Won't Help. Here's What Can Work.*, Wash. Post (Apr. 23, 2020).

Page 529, add the following at the end of Note 15:

The Court again disallowed a *Bivens* claim in a foreign affairs context in Hernandez v. Mesa, 137 S. Ct. 2003 (2020), which is discussed more fully in the materials below for Chapter 8. This case involved the cross-border shooting and killing of a fifteen-year-old Mexican national by a U.S. border patrol agent. As in *Ziglar v. Abbasi*, the Court concluded that this was a "new context" not covered by established precedent, and that there were foreign affairs and national security considerations that weighed against allowing a *Bivens* claim. The Court more generally expressed skepticism about allowing damage claims for violations of the Constitution unless those claims have been authorized by Congress.

Chapter 8: International Crime

Page 566, add the following Note after Note 7:

7a. In a statute enacted in 2003, Congress allocated billions of dollars in aid for U.S. and foreign nongovernmental organizations that combat HIV/AIDS abroad. Congress provided that the funds could be given only to those organizations that have, or agree to have, a "policy explicitly opposing prostitution and sex trafficking." In a 2013 decision, the Supreme Court held that this condition, when applied to U.S. organizations, violated the First Amendment. *See* Agency for Int'l Development v. Alliance for Open Society Int'l, Inc., 570 U.S. 205 (2013).

In a subsequent decision in the case, however, the Court held that the condition did not violate the First Amendment when applied to the foreign affiliates of the U.S. organizations. *See* Agency for Int'l Development v. Alliance for Open Society Int'l, Inc. (Supreme Court, June 29, 2020). The Court, in an opinion by Justice Kavanaugh, reasoned that it is "settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution." The Court distinguished *Boumediene* as involving a territory that is under the complete jurisdiction and control of the United States. The Court also reasoned that "it is settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations." As a result, said the Court, "[a]s foreign organizations operating abroad, plaintiffs' foreign affiliates possess no rights under the First Amendment." The Court further observed that "[p]laintiffs are free to choose whether to affiliate with foreign organizations and are free to disclaim agreement with the foreign affiliates' required statement of policy."

Justice Breyer dissented and was joined by Justices Ginsburg and Sotomayor. Breyer argued that applying the condition to the foreign affiliates violated the First Amendment rights *of the U.S. organizations* because, when speaking abroad, these organizations often need to speak through affiliates, and statements by their affiliates will be attributed to them. He also disputed the majority's claim that it is settled that foreign citizens never have constitutional rights abroad: "At most, one might say that they are unlikely to enjoy very often extraterritorial protection under the Constitution. Or one might say that the matter is undecided."

Page 566, replace Note 8 with the following Note:

8. The right to sue federal officials for damages for constitutional violations is governed by the Supreme Court's decision in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1972), and its progeny. Under the *Bivens* line of cases, the Court has allowed damage suits for a few types of constitutional violations, including violations of the Fourth Amendment by federal police officials. But it has often declined to extend the right to seek damages to other rights violations, citing "special factors counseling hesitation," which can include sensitive subject areas like military affairs, concerns about judicial competence in adjudicating the issue (such as the difficulty of developing a workable standard or complexity of an administrative scheme), or a danger of creating a flood of claims. In addition, the Court held in Ziglar v. Abbasi, 137 S. Ct. 1843 (2017), that its prior decisions allowing *Bivens* claims do not apply to "new contexts." "If the case is different in a meaningful way from previous *Bivens* cases decided by this Court," explained the Court, "then the context is new."

The Supreme Court disallowed a *Bivens* claim in Hernandez v. Mesa, 137 S. Ct. 2003 (2020). In that case, Mesa, a U.S. border patrol agent, shot and killed Hernandez, a fifteen-year-old Mexican national, while Mesa was on the U.S. side of the U.S.-Mexico border and Hernandez was on Mexican side. The Justice Department investigated the incident and decided not to bring charges or otherwise take action against Mesa. Hernandez's parents brought suit against Mesa in a federal district court in Texas, seeking damages for what they alleged was a violation of Hernandez's Fourth and Fifth Amendment rights.

The U.S. Court of Appeals for the Fifth Circuit initially ordered the case dismissed on the grounds that (a) Hernandez was not entitled to Fourth Amendment protection because he was "a Mexican citizen who had no 'significant voluntary connection' to the United States" and "was on Mexican soil at the time he was shot," and (b) Mesa was entitled to qualified immunity with respect to plaintiffs' Fifth Amendment claim. The Supreme Court vacated that decision and remanded for a consideration of what it called an "antecedent" question: whether Hernandez had the right to bring a damages claim for the alleged constitutional violations. On remand, the Fifth Circuit held that he did not.

In an opinion by Justice Alito, the Supreme Court affirmed. It began by emphasizing the "tension between th[e] practice [of allowing damage claims for constitutional violations] and the Constitution's separation of legislative and judicial power," and it observed that "for almost 40 years, we have consistently rebuffed requests to add to the claims allowed under *Bivens*." While the Court did

not suggest overturning *Bivens*, it expressed disagreement with the reasoning in the decision, stating, for example, that "[w]ith the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress, … and no statute expressly creates a *Bivens* remedy."

As in *Abbasi*, the Court considered whether this case involved a "new context," and it concluded that it did. The Court observed that "[t]here is a world of difference between [the claims in the prior *Bivens* cases] and petitioners' cross-border shooting claims, where 'the risk of disruptive intrusion by the Judiciary into the functioning of other branches' is significant."

Because it found the context to be new, the Court proceeded to consider whether there were "factors that counsel hesitation," and it concluded that there were. One factor was the foreign relations context:

> "The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018). Indeed, we have said that "matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" Haig v. Agee, 453 U.S. 280, 292 (1981) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)). "Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in [these matters]." Department of Navy v. Egan, 484 U.S. 518, 530 (1988). We must therefore be especially wary before allowing a *Bivens* remedy that impinges on this arena.
>
> A cross-border shooting is by definition an international incident; it involves an event that occurs simultaneously in two countries and affects both countries' interests. Such an incident may lead to a disagreement between those countries, as happened in this case.
>
> The United States, through the Executive Branch, which has "'the lead role in foreign policy,'" Medellín v. Texas, 552 U.S. 491, 524 (2008) (alteration omitted), has taken the position that this incident should be handled in a particular way—namely, that Agent Mesa should not face charges in the United States nor be extradited to stand trial in Mexico. . . .

> The Government of Mexico has taken a different view of what should be done. . . .
>
> Both the United States and Mexico have legitimate and important interests that may be affected by the way in which this matter is handled. The United States has an interest in ensuring that agents assigned the difficult and important task of policing the border are held to standards and judged by procedures that satisfy United States law and do not undermine the agents' effectiveness and morale. Mexico has an interest in exercising sovereignty over its territory and in protecting and obtaining justice for its nationals. It is not our task to arbitrate between them.

Another factor counseling hesitation, said the Court, were the national security aspects of border protection:

> One of the ways in which the Executive protects this country is by attempting to control the movement of people and goods across the border, and that is a daunting task. The United States' border with Mexico extends for 1,900 miles, and every day thousands of persons and a large volume of goods enter this country at ports of entry on the southern border. The lawful passage of people and goods in both directions across the border is beneficial to both countries.

The Court also noted that its reluctance to allow a *Bivens* claim was "reinforced by our survey of what Congress has done in statutes addressing related matters," noting that "Congress has repeatedly declined to authorize the award of damages for injury inflicted outside our borders." The Court pointed out, for example, that claims under the Torture Victim Protection Act are limited to conduct taken under color of foreign law and thus cannot normally be brought against U.S. officials. The Court also invoked its general presumption against extraterritoriality:

> We presume that statutes do not apply extraterritorially to "ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013); *see also* EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991).
>
> If this danger provides a reason for caution when Congress has enacted a statute but has not provided expressly whether it applies abroad, we have even greater reason for hesitation in deciding

> whether to extend a judge-made cause of action beyond our borders. "[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified" where "the question is not what Congress has done but instead what courts may do." *Kiobel*, 569 U.S. at 116. Where Congress has not spoken at all, the likelihood of impinging on its foreign affairs authority is especially acute.

Justice Ginsburg dissented and was joined by Justices Breyer, Sotomayor, and Kagan. Ginsburg rejected the proposition that this case presented a new context:

> Plaintiffs' *Bivens* action arises in a setting kin to *Bivens* itself: Mesa, plaintiffs allege, acted in disregard of instructions governing his conduct and of Hernandez's constitutional rights. . . . Using lethal force against a person who "poses no immediate threat to the officer and no threat to others" surely qualifies as an unreasonable seizure. Tennessee v. Garner, 471 U.S. 1, 11 (1985). The complaint states that Mesa engaged in that very conduct; it alleged, specifically, that Hernandez was unarmed and posed no threat to Mesa or others. For these reasons, as Mesa acknowledged at oral argument, Hernandez's parents could have maintained a *Bivens* action had the bullet hit Hernandez while he was running up or down the United States side of the embankment.
>
> The only salient difference here: the fortuity that the bullet happened to strike Hernandez on the Mexican side of the embankment. But Hernandez's location at the precise moment the bullet landed should not matter one whit. . . . Mesa's allegedly unwarranted deployment of deadly force occurred on United States soil. It scarcely makes sense for a remedy trained on deterring rogue officer conduct to turn upon a happenstance subsequent to the conduct—a bullet landing in one half of a culvert, not the other.

As for the foreign relations aspects of this case, Ginsburg argued that the suit here was "no different from one that a federal court would entertain had the fatal shot hit Hernandez before he reached the Mexican side of the border." While she acknowledged that cross-border shootings will prompt diplomatic discussions, she said that this is true of "a range of smuggling and other border-related issues that courts routinely address." She also argued that the Court was not escaping foreign relations considerations by refusing to allow a *Bivens* claim here, since that refusal was likely to create additional friction with Mexico and undermine the United States' compliance with international commitments. As for national security considerations, Ginsburg complained that "the Court speaks with

generality of the national-security involvement of Border Patrol officers. It does not home in on how a *Bivens* suit for an unjustified killing would in fact undermine security at the border." Finally, with respect to Court's reference to the presumption against extraterritorially, Ginsburg noted that the "plaintiffs in this case allege a tort stemming from stateside conduct" and thus "seek the application of U.S. law to conduct occurring inside our borders."

Page 615, add the following at the end of Note 8:

For an account of how "more U.S. prosecutions than ever involve criminal conduct, fugitives, and/or evidence outside of the United States, often touching on the criminal justice interests of foreign countries," and a normative assessment of the benefits and potential dangers associated with this development, see Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. Rev. 340 (2019)

Chapter 10: War on Terrorism

Page 772, add the following at the end of Note 13:

The D.C. Circuit accorded substantial weight to the conclusions of the PRB in its decision in Ali v. Trump, 959 F.3d 364 (D.C. Cir. 2020). In that case, the court upheld the denial of habeas corpus relief to Abdul Razak Ali, an Algerian national who has been held at the Guantanamo Bay Naval Base since June 2002. In response to Ali's contention that his continued detention violated substantive and procedural due process, the court noted that the "Periodic Review Board has specifically reviewed Ali's detention no less than eight times to determine whether his continued detention remains necessary to protect against a significant security threat to the United States," and it concluded that "the fact that hostilities have endured for a long time, without more, does not render the government's continued detention of Ali a shock to the conscience, in light of the dangers the Periodic Review Board has found to be associated with his release."

Page 825, add the following Note after Note 14:

14a. The International Criminal Court (ICC) is an international court that can hear prosecutions concerning war crimes, crimes against humanity, genocide, and aggression. The Court has jurisdiction over cases committed on the territory of states parties or by nationals of states parties, as well as over cases referred to it

by the U.N. Security Council. Afghanistan became a party to the ICC's governing treaty (the Rome Statute) in 2003.

In 2017, the Prosecutor for the ICC asked the ICC's Pre-Trial Chamber for authorization to investigate alleged crimes against humanity and war crimes in Afghanistan by the Taliban; alleged war crimes by Afghan national security and police forces; and alleged war crimes by members of the U.S. armed forces in Afghanistan and by the CIA in secret detention facilities in Afghanistan and on the territory of other states parties to the ICC. Specifically, the Prosecutor alleged that members of the U.S. military and intelligence agencies "committed acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence against conflict-related detainees in Afghanistan and other locations, principally in the 2003-2004 period." ICC, Situation in Afghanistan, Summary of the Prosecutor's Request for Authorization of an Investigation Pursuant to Article 15 (Nov. 20, 2017), https://www.icc-cpi.int/itemsDocuments/Afghanistan/171120-afgh-art_15-app-summ_ENG.pdf.

The United States, which is not a party to the ICC, disputes the Court's ability to prosecute Americans. Secretary of State Michael Pompeo characterized the Prosecutor's request as "outrageous, . . . unjustified and unwarranted." Press Statement, U.S. Policy on the International Criminal Court Remains Unchanged, Oct. 9, 2019. In response to the Prosecutor's efforts, the State Department revoked her U.S. visa. *See* Marlise Simons & Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, N.Y. Times (Apr. 5, 2019).

In April 2019, the Pre-Trial Chamber rejected the Prosecutor's request to initiate the investigation, finding that an investigation "would not serve the interests of justice" because of the time that had elapsed and the likely lack of cooperation from relevant states during the investigation and in the possible surrender of suspects. Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan (Apr. 12, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF.

In March 2020, however, the ICC Appeals Chamber reversed the Pre-Trial decision and authorized the ICC's Prosecutor to open the investigation. Appeals Chamber, Judgment on the Appeal Against the Decision on the Authorization of an Investigation into the situation in the Islamic Republic of Afghanistan (Mar. 5, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF. The Appeals Chamber concluded that the Pre-Trial Chamber should only have decided whether there was a reasonable factual basis for the investigation and a reasonable probability that the ICC had jurisdiction, not whether the prosecution would serve the interests of justice. In response, Secretary of State Pompeo stated, "The United

States is not a party to the ICC, and we will take all necessary measures to protect our citizens from this renegade, unlawful, so-called court." Secretary Pompeo's Remarks to the Press (Mar. 5, 2020), https://www.state.gov/secretary-pompeos-remarks-to-the-press/.

On June 11, 2020, President Trump signed an executive order finding that the ICC Prosecutor's investigation into actions allegedly committed by U.S. personnel in Afghanistan "threaten[s] to infringe upon the sovereignty of the United States and impede the critical national security and foreign policy work of United States Government and allied officials, and thereby threaten[s] the national security and foreign policy of the United States." Among other things, the order blocks assets in the United States of foreign persons determined by the Secretary of State, Secretary of the Treasury, and Attorney General "to have directly engaged in any effort by the ICC to investigate, arrest, detain, or prosecute" without consent any U.S. personnel or personnel of an ally of the United States. The Order also suspends the entry into the United States of such persons, except where the Secretary of State determines that their entry would not be contrary to U.S. interests. *See* Executive Order on Blocking Property of Certain Persons Associated with the International Criminal Court (June 11, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court/.

The ICC is only supposed to pursue cases when the states involved are unwilling or unable to genuinely investigate the alleged wrongdoing themselves. Should the fact that the Department of Justice investigated but declined to prosecute individuals involved in the U.S. interrogation program affect whether the ICC should pursue cases against U.S. officials for the same conduct? What about the fact that U.S. courts have reviewed and dismissed civil cases against U.S. officials for alleged torture and other mistreatment of detainees?

Page 842, add the following Note after Note 8:

8a. On January 2, 2020, the Department of Defense announced that U.S. military forces had killed Iranian Major General Qassem Soleimani and several Iran-backed Iraqi officials in drone airstrikes near the Baghdad International Airport in Iraq. Soleimani was the commander of the Quds Force of Iran's Islamic Revolutionary Guards Corps. Immediately following the strike, the Department of Defense claimed that "Soleimani was actively developing plans to attack American diplomats and service members in Iraq and throughout the region," that he and his Quds Force "were responsible for the deaths of hundreds of American and coalition service members and the wounding of thousands more," and that Soleimani had orchestrated numerous attacks on coalition bases in Iraq over the

previous months, and had approved attacks on the U.S. Embassy in Baghdad earlier that week. Statement from Department of Defense (Jan. 2, 2020), *at* https://www.defense.gov/Newsroom/Releases/Release/Article/2049534/statement-by-the-department-of-defense/. In response to the U.S. strikes, Iran two days later fired several missiles at U.S. bases in Iraq that resulted in no casualties but numerous injuries.

The Trump administration's notification of the strike to Congress under the War Powers Resolution was classified, and senior administration officials gave different and not always consistent factual and legal justifications for the attack in the weeks following it. The administration's formal legal explanation finally came in February 2020, in a notice to Congress "consistent with" the 2018 National Defense Authorization Act. This document claimed that the attack on Soleimani was a response to escalating attacks on U.S. interests and forces in the Middle East—and especially in Iraq—by Iran and Iran-backed militias, and aimed to protect U.S. personnel, to deter Iran from further attacks, to degrade the ability of Iran and Quds Force-backed militias to conduct attacks, and to end Iran's strategic escalation of attacks. The notice offered two legal bases for the action: (1) Article II of the Constitution, which "empowers the President, as Commander in Chief, to direct the use of military force to protect the Nation from an attack or threat of imminent attack and to protect important national interests"; and (2) the 2002 AUMF, which "the United States has long relied upon … to authorize the use of force for the purpose of establishing a stable, democratic Iraq and addressing terrorist threats emanating from Iraq." *Notice on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations,* at https://www.justsecurity.org/wp-content/uploads/2020/02/notice-on-the-legal-and-policy-frameworks-guiding-the-united-states-use-of-military-force-and-related-national-security-operations.pdf (undated). A few weeks later, the General Counsel of the Department of Defense offered a similar but more elaborate justification for the strikes. *See* Paul Ney, *Legal Considerations Related to the U.S. Airstrike Against Qassem Soleimani* (Mar. 4, 2020), at https://assets.documentcloud.org/documents/6808252/DOD-GC-Speech-BYU-QS.pdf.

Is either the Article II rationale or the 2002 AUMF rationale for the Soleimani strike persuasive? Consider, first, Article II. What threshold of past and threatened future attacks justifies unilateral presidential use of force? Does Soleimani's status as a state actor make the analysis different than the 2011 attack on Bin Laden? Or does the fact that he led the Quds Force, which specializes in and supports unconventional warfare, make this action like the Bin Laden strike? Does it matter to the legal analysis that many people at the time believed the strike against Soleimani would lead to war-level escalation in hostilities, even though

that escalation did not in fact occur? Does the Article II justification for the Soleimani strike entail an authority to target other senior Iranian officials?

With respect to the 2002 AUMF, recall that it was enacted to authorize the use of force *against* Iraq, but also that the Obama administration invoked it to justify in part its 2014 air strikes against the Islamic State in Iraq. Does the language of the 2002 AUMF lend itself to this extension to threats from within Iraq? How is the strike against Soleimani like or unlike the 2014 strike against the Islamic State? Does this statutory rationale for killing Soleimani mean that any strike with "the purpose of establishing a stable, democratic Iraq and addressing terrorist threats emanating from Iraq" is lawful under U.S. domestic law? For analysis of various legal issues posed by the attack, see Scott R. Anderson, *Did the President Have the Domestic Legal Authority to Kill Qassem Soleimani?* Lawfare (Jan. 3, 2020); Tess Bridgeman, *The Soleimani Strike and War Powers*, Just Security (Jan. 6, 2020); Robert Chesney & Eric Talbot Jensen, *The Pentagon General Counsel Defends the Legality of the Soleimani Strikes,* Lawfare (March 11, 2020); Ryan Goodman, *White House '1264 Notice' and Novel Legal Claims for Military Action Against Iran*, Just Security (Feb. 14, 2020).

In response to the Soleimani strike, Congress passed a Joint Resolution that "directs the President to terminate the use of United States Armed Forces for hostilities against the Islamic Republic of Iran or any part of its government or military, unless explicitly authorized by a declaration of war or specific authorization for use of military force against Iran." S.J. Res. 68, 116th Cong. (2020). President Trump vetoed the Joint Resolution on May 6, 2002. His veto message claimed that the Resolution would "weaken the President's authority in violation of Article II," and was unnecessary because "the United States is not engaged in the use of force against Iran." He also claimed that the Joint Resolution was unnecessary since the 2002 AUMF authorized the action he took in January 2020. Trump further claimed that his interpretation of the AUMF was consistent with the interpretation of it by the Obama administration, which relied on the 2002 AUMF "to conduct operations in response to attacks and threats by Iran-backed militias in Iraq." *Presidential Veto Message to the Senate to Accompany S.J. Res.* 68 (May 6, 2020). Congress failed to override the President's veto. Should this episode be viewed as congressional opposition to the president's actions and legal rationale related to the Soleimani strike? As acquiescence? As having no legal significance?