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SYMPOSIUM

TRANSCRIPT

AMERICA AT THE CROSSROADS: INTERNATIONAL POLICY, GLOBAL RELATIONSHIPS, AND DOMESTIC MARKET CONSEQUENCES

FEBRUARY 6, 2026

DEAN KAREN BRAVO, OPENING COMMENTS

Dean Karen Bravo: All right, good morning, everyone, and welcome to the Indiana International and Comparative Law Review 2026 Symposium. My name is Karen Bravo, and I serve as Dean of the McKinney School of Law. On behalf of IU McKinney and the students of the Law Review, I would like to welcome you and thank you for joining us today.

The Editors have asked that I share the following land acknowledgment with you. We acknowledge that we gather today on the traditional and ancestral territory of the Miami, Potawatomi, and Shawnee people, who were removed unjustly. We honor the heritage of Native peoples, what they teach us about the stewardship of the Earth, and their continuing efforts today to protect the planet. In addition, our campus and school stand on the lands of a vibrant Black community, also displaced. As the present stewards of the land, we honor them all as we live, work, and study on this campus.

This Symposium is organized each year by the students on the *Indiana International and Comparative Law Review*. The Symposium Editors select a topic of their choice and invite accomplished scholars, professors, legal professionals, and practitioners to the campus to discuss the topic. The title of this year's Law Review Symposium is: "America at the Crossroads: International Policy, Global Relationships, and Domestic Market Consequences." This topic is both important and timely, addressing the United States' role on the global stage, with implications for international law, international relations, and innumerable aspects of life and law within our country and around the world. Our speakers today will discuss a wide-ranging array of topics that impact the United States international policy and

relationships and our economic activity. The role of artificial intelligence, algorithms and big data, cyber warfare and security, and diplomacy all will be addressed by the speakers.

This afternoon's Q&A session will give you an opportunity to ask in-depth questions of the speakers, and I think the speakers are also going to ask in-depth questions of each other as well. So, before I introduce our students, allow me to remind you of Indiana University's neutrality policy. In accordance with the Indiana University Statement of Policy on Institutional Neutrality, the comments during today's remarks are solely the views of the speakers. And such comments are not intended to be construed and shall not be construed as the views of Indiana University, or comments made on behalf of or by Indiana University.

Now, without further ado, I'd like to introduce our fabulous Editors of the *Indiana International and Comparative Law Review*, but I'd also like to acknowledge that they have brought together fantastic speakers to address these very important topics. So, Mr. Scott Kosnoff, who serves as a partner at Faegre Drinker, is a seasoned attorney, working in regulatory, transactional, and public policy areas on both sides. Our keynote, Mr. Chip Pitts, is a founding member of the Pacific Council of International Policy. He's a human rights lawyer and activist, and a member of a variety of important organizations, such as the Council on Foreign Relations. I know he's going to bring a great perspective to us. Then we have Professor Glenys Spence, who is with the University of Toledo College of Law. Unfortunately, she will be joining us by virtual, and is not here in person, but her topic as well will be very important, addressing geopolitical risks of private cyber warfare. So, you're in for a real treat in this Symposium. So, without further ado, our wonderful Symposium Editors, Shibani Modi and Lauren Latham, both third-year students now (how is it possible?) here at IU McKinney School of Law. Thank you.

OPENING REMARKS FROM SYMPOSIUM EDITORS

Shibani Mody: Good morning, everyone. We're so happy that you could all join us today. My name is Shibani Mody, and I'm the Executive Symposium Live Editor of Volume 36 of the *Indiana International and Comparative Law Review*.

Lauren Latham: Hi everyone, thank you for being here. My name is Lauren Latham, and I am the Executive Symposium Publication Editor of the *Indiana International and Comparative Law Review*.

Shibani Mody: Last summer, when Lauren and I found out that we were appointed these positions, we spent a lot of time thinking about what we wanted this year's Symposium to be about. We wanted it to be relevant, we wanted it to be important, and we wanted it to be so significant to the current time that we're

living in in our country, where everyone that attends will be able to take something away, learn something, ask questions, and have it be incredibly important to the future of our country, as well as understanding the current state of affairs that we're currently in. And that is how we came to the topic of our symposium, "America at the Crossroads."

The title of our Symposium has never felt more urgent or more literal. As we gather today, America is navigating a transformative moment in its approach to the world. With a new administration charting its course on trade relationships, diplomatic alliances, and international institutions, the consequences of these decisions will shape not only our foreign policy, but our economy, our security, and our standing in the world for years to come.

We are living through a time that will be written about in history. In just the past few months, our government withdrew from 66 international treaties and organizations, and the current administration captured Venezuela's president in an operation the United Nations called a dangerous precedent. ICE raids have torn through communities, taking the lives of citizens and non-citizens with no consequences, with the rest of people with no criminal records up over 2,000%. While tariffs are hitting family budgets, alliances are being fundamentally withdrawn and redrawn. No matter what area of the law you're interested in, no matter what area of the law that you practice, this conversation matters because human rights and international law affect us all.

We have assembled an extraordinary group of speakers to help us navigate these questions, individuals who bring not just academic expertise, but lived experiences at the highest levels of policy, diplomacy, and global commerce. Scott Kosnoff will guide us through the complex regulatory landscape of artificial intelligence and algorithmic accountability. Chip Pitts, our keynote speaker, who has spent four decades working at the intersection of globalization, human rights, and corporate responsibility, will challenge us to think beyond today's headlines to America's next chapter. Professor Glenna Spence, who will be joining us online, will draw lessons from history and international law to help us understand the emerging threats of private cyber warfare. And Ambassador Feisal al-Istrabadi, who has negotiated at the United Nations and helped build democratic institutions from the ground up, will bring the perspective of someone who understands how American power is perceived and experienced abroad. And what it truly takes to balance security, diplomacy, and the principles we claim to uphold.

These are not theorists. They are practitioners, diplomats, and advisors who have shaped the very systems that we are discussing today. Their insights matter because they have seen what works, what fails, and what the stakes truly are.

I encourage you to engage fully, to question boldly, and to think critically about the path forward. The decisions being made today will define America's role in

the world, and our responsibility as legal professionals is to ensure that those decisions are informed, principled, humane, and just.

Lauren Latham: Thank you, Shibani. Those are beautiful words. I am way less eloquent than Shibani is, so I just wanted to share that after the event today, I will be working with the editorial team on our symposium publication. That's going to include the transcript of today, and also two articles that are written by two of our speakers, Professor Glenys Spence and Professor Feisal al-Istrabadi, and the third is written by Shaoxuan Xu.

I'm glad that all of you are here, and I want to thank the Law Review Board, the SNCs, the A&Es, the Office of External Affairs—I know Barb and Liz have been super helpful—and the lovely IT department for setting this all up.

Our first speaker is Scott Kosnoff. He is a partner at Fager Drinker in the insurance practice group. He helps clients capitalize on opportunities and address regulatory and legal issues related to artificial intelligence, big data, and algorithms. He's working with the firm's data scientists; he's using his first-hand knowledge of evolving regulatory standards to help clients assess their algorithms for unintended discrimination and help their clients understand how they can implement a risk management framework.

At the request of the National Association of Insurance Commissioners, Scott has briefed the nation's top insurance regulators regarding AI on multiple occasions, including in closed-door sessions. Most recently, he has briefed regulators on how insurers can employ AI risk management and governance to mitigate their regulatory, litigation, and reputation risk. Please join me in welcoming Scott.

Shibani Mody: And lastly, I will add that on your programs, there is a QR code that will take you to a form for the Q&A session at the end, so as the symposium continues, please use that QR code to ask any questions, and we will ask the speakers for the Q&A panel at the end.

SCOTT KOSNOFF, AI POLICY, REGULATION AND RISK MANAGEMENT

Scott Kosnoff: Thank you, Shibani and Lauren, and thank you all for coming today.

You all look great, you know? Thank you for getting dressed up. It forced me not to wear my usual gray t-shirt and sweatpants, but whatever, for a few hours, we can probably do it. As Shibani and Lauren mentioned, this symposium will consider how foreign policy decisions can have direct and significant impacts on businesses and individuals here in the United States. There are a lot of good examples of that dynamic, many of them coming from the last 12 months. But we're going to start off with artificial intelligence and explore how that dynamic is working.

The leaders of our country are convinced that we are locked in a death race with China for global AI supremacy, and that failure to win that race could prove catastrophic. That view is driving not only foreign policy choices, but it's also going to determine what sort of laws we enact here in the United States, what laws we may choose to set aside, and what risk we as Americans may be forced to accept, whether we want to or not. I'm Scott Kosnoff, and I'll be your guide for the next 40 minutes.

Biden National Security Memo

All right, so I start out every day in a very exciting sort of way. I fire up the laptop, I look at the news that came in overnight, and it's always about AI news. Sometimes it's about new technology development, sometimes it's about new regulations that are proposed, sometimes it's about deals.

I know, it sounds exciting and glamorous, but occasionally something shows up in the inbox, and it makes me sit up straight and pay attention, and that happened back in October of 2024, when the Biden administration released a national security memo focused specifically on AI and what it means for our national security. I gotta tell you, it read like the sort of thing that you might have read back in the earliest days of the space race, when we were locked in the death race with the Soviet Union. The main message of this national security memo from the Biden administration was, if we don't win this war for AI supremacy against China, it could be lights out. Lights out for our country, lights out for democracy, lights out in any number of ways. And that's the sort of thing, you know, as lawyers, you sort of pay attention to.

Drilling down a little bit deeper, you can see here specifically what the Biden administration was concerned about. They were concerned that the misuse of AI could threaten national security, bolster authoritarianism worldwide, undermine democratic institutions and processes, facilitate human rights abuses, and weaken the rule-based international order. Now, I get it. I know that a lot of you in the audience are looking at that list, and you're saying, huh. The Trump administration brought us all of those results in 6 months or less, and they did it without AI. And you would be right, but we're not here to talk about that; we're talking about AI.

Back to the national security memo. The administration went on to say, look, if the federal government does not work closely, hand-in-hand, with industry and civil society and academia to make proper and thoughtful and careful use of AI, and to ensure safety, security, and trustworthiness of our use of AI, we risk losing ground to our strategic competitors. They were talking, of course, about China.

But they weren't just talking about putting our AI out into the stream of commerce and winning the war in the markets. Yes, they thought that success in this war would mean preeminence of U.S. technology and shipping it abroad,

but they also said that our success in this race will be measured by our leadership in developing effective global norms and engaging with civil rights organizations that care about international law, human rights, civil rights, and democratic values. A couple of days before the administration turned over the keys, the outgoing National Security Advisor, Jake Sullivan, gave an interview.

And it [the interview] was even more chilling, frankly, than the national security memo. Jake Sullivan was the primary author of the National Security Memo. He said that—and it was a warning not just for the country, but for the incoming administration—the next few years are going to determine whether AI leads to catastrophe, and whether China or the United States prevails in the AI arms race. This was amazingly forthcoming, and it was intended very much as a warning.

Trump AI Action Plan

Well, the Trump administration took over shortly after that warning was given, and literally within hours of the president retaking the Oval Office, he undid all of the work that the Biden administration had put in with respect to safe, secure, and trustworthy AI. I don't mean, like, the next day, I mean, like, within 2 hours of sitting down in the Oval Office.

And it has sort of been like that ever since. The [Trump] administration issued an AI action plan in July, and it made it very clear that it shared some of the same concerns that the Biden administration had shared. They said in this AI action plan, look, we are in a race to achieve global dominance with respect to AI, and whoever has the largest AI ecosystem, we're going to reap tremendous economic rewards, and military rewards, too.

And the main goal was to export AI technology to the rest of the world to meet that global demand, because the Trump administration believed it was all about meeting that demand, and failure to do so would be an unforced error, and it would cede ground to our adversaries.

It [the AI action plan] went on to say, though, that it's not just about, you know, improving our technology. We've got to wipe the slate clean with respect to regulations that might stand in the way and might prove burdensome to the development of that technology. They noted in that action plan that a very large number of international bodies have proposed AI governance frameworks and AI development strategies, all of which is true.

They went on to say that many of those global efforts have advocated for burdensome regulations and vague codes of conduct—by the way, that's code for caring about civil rights—and that promoting the cultural agendas set forth in those frameworks simply does not align with American values.

Trump AI Executive Order

A few weeks ago, the president issued yet another AI executive order, and again, it said, look, we are in the earliest days of the AI technology revolution, and are in a race with our adversaries again for global supremacy. Here's the thing that you need to circle. It said, to win, U.S. AI companies must be free to innovate without cumbersome regulation. And they go on to say that excessive state regulation thwarts this imperative. They're setting up this false choice, meaning, we can either have innovation or we can have regulation, but we can't have both. And in this administration's view, it's all about innovation, hitting the gas pedal as hard as we can, [and] anything that could possibly stand in the way, we're pushing to the side.

The AI executive order went on to say that, look, we're going to work with Congress to ensure that there is a national standard for AI development and regulation. Not just any old standard, a *minimally burdensome* national standard, not what we're getting from the states. And until we get such a national standard from Congress, the administration is going to be working through the Department of Justice and other federal agencies to identify the most onerous state-based versions of AI regulation, challenge those in court, and try to set them aside. Why? Because the view is that any sort of regulation is impeding innovation, we're in this death race, and we've got to push them aside.

Alright, so to review, we've got two successive administrations agreeing that we're in this death race with China for global AI supremacy, and they both say, "we gotta win." No disagreement there.

They both say that part of winning is exporting as much AI as we can to the rest of the world, at least to nations we can trust. There is some disagreement between the administrations on that front, how much we trust or how much we don't trust, and frankly, whether we care about that or not. One administration says it's imperative that we ensure safety, security, and trustworthiness of American AI innovation. And the other says, that's a bunch of hooey, and what we really need is minimally burdensome national laws that preempt state laws.

I ought to say at this point, I'm a fan of AI. You know, I really think that it can and already has done amazing things to change the way we live, to change the way we work.

And it's going to continue to do all of that. But we also have to be clear-eyed. As with any new technology, it's got its downsides. We would have been having the same discussion about cars or electricity. But we just have to be thoughtful and responsible about how we weigh that balance.

In order to sort of figure out whether to regulate or not to regulate, and how burdensome or not to be, you have to have some grounding in what can go wrong with respect to AI. And this slide captures sort of the greatest hits, you

know, the concerns that get raised over and over again. It is not an exhaustive list, but it's a good place for us to start.

Accuracy, Validity, and Reliability

First, there are concerns about accuracy, validity, and reliability. If you have used ChatGPT or any of its competitor products, even casually, you know it can be amazingly, powerfully correct. And it also can be breathtakingly wrong in the very next paragraph, and if you don't know enough to be skeptical, you know, you can be led astray in a way that could be harmful. Now, if we're talking about Siri and whether it plays the right song for you, it might be irritating, but it's not going to wreck your day. On the other hand, if somebody's using AI to decide whether you get into grad school, or whether you get that loan that you want, or whether your application for insurance gets accepted, or your claim gets denied, or any number of other things that are being decided right now with the strength of AI, you might care a little bit more about accuracy, because those AI models that are working in the background, invisibly to all of us, are having concrete impacts on all of our lives right now, even though we don't know it.

"Algorithmic Discrimination"

All right, the next concern that comes up beyond accuracy is something called algorithmic discrimination; this is discrimination against members of protected classes that can come about as a result of the use of AI. Sometimes it's a result of historical biases that's embedded in the data sets that train AI. Sometimes it's a problem with the AI model itself. Sometimes it's a problem with the way the humans at the backend interpret the output of the AI, whatever. It results in discrimination, and it's a real thing. Now, this administration will tell you it's not a real thing. And they will also tell you that if you care about algorithmic discrimination, and even if you utter those words, it must mean you're "woke."

Well, I'm here to tell you it's a real thing, and just because this administration wants to turn back the clock and act like the Civil Rights Movement never happened, doesn't mean the rest of us have to go along. So, keep that on your list of things to care about.

Lack of Transparency and Explainability

The next list of concerns that come up all the time is with respect to transparency and explainability. A lot of times, people like to know who's making decisions that impact their daily lives. Is it another human? Is it an AI model? Is it a combination? And having transparency can be important, again, depending on the context. Explainability goes to the challenge of explaining how a decision is reached. How did we get from A to B? It's sort of a fact of life in the AI space that the more powerful the model, the more complex its inner workings are, and the more difficult it is for us to explain how it got from A to B. And again, if,

you know, the AI model is choosing the songs for your playlist, who cares whether it's explainable or not?

But, if it's deciding whether you get that mortgage on your first home, you might want to know what the answer was, or why they [the AI] reached a particular answer.

Privacy and Cybersecurity

Privacy and cybersecurity come up all the time. Why? Because AI doesn't exist in a vacuum. It requires oceans and oceans of data for training and for operating purposes. A lot of that data may well be sensitive, and when it is, you gotta ask yourself, do we have the rights to collect all this information that we're collecting? And if we do, do we have the right to use all this information in the way that we want to use it? And if the answer to both of those questions is yes, you better be asking yourself, "Are we taking all the steps we should take to safeguard that sensitive information, and to make sure it doesn't fall into the hands of those who would commit wrongdoing?"

Safety and Extinction

Finally. Very broad category for safety and extinction. It's easy to think about what could go wrong, whether it's autonomous vehicles, you know, maybe you're using AI to operate your local nuclear reactor. There are things that can go wrong. But we are in the very early days right now of AI's adoption, and so we don't know everything that can go wrong. I gotta believe that when the makers of ChatGPT were sitting around brainstorming about all the amazing things this new model would do, nobody said, "yeah, I can see people getting too engaged with the use of our product in a way that it's going to lead to significant emotional distress and potential suicide." No one thinks about that stuff, and yet here we are, right? And my prediction is [that] we're going to continue to see stuff like this. We're going to continue to see new and different evils or risks emerge as a result of our use of AI, and we can't afford to turn a blind eye to it. We can't afford to say, "Well, let the markets rule." We've got to be thoughtful about this. We've got to be responsible about it, and that's sort of all part of the package. Many of the problems that we've identified so far occur unintentionally, right? All of these things can happen even if somebody goes into their use of AI with the best of intentions. And another thing to realize is that when something goes wrong in the AI world, it doesn't go wrong in a one-off, isolated way. It goes wrong at scale. Meaning, if there's a problem with the AI model that insurance companies are using to decide who gets insurance and who doesn't, it's not just one applicant that might get screwed in the process. It's thousands. And if every insurance company is buying the same AI model from the same vendor, all of a sudden, it's all of us that are impacted by the underwriting model. So, remember, it's not just one-off harm, it's problems at scale.

Topics Addressed by State Legislation

Alright, so our state legislators have not been sitting on their hands, turning a blind eye to the AI risk, at least in some states. And this is just sort of a short list of what some of the topics have been that have been addressed by AI legislation across the states. Some states have focused on algorithmic discrimination. And they've tried to do what they can to combat it. Harmful deepfakes, big deal, right? Not just at a micro level, in terms of women being the subject of sexualized images as a result of AI generation. But it's also an issue for our democracy, right? Think about our country right now. We can't agree on anything. We can't agree on any fact that you could point to, right? In the age of AI, especially with generative AI, we are increasingly unable to figure out whether an audio clip is real or AI, whether an image is real or AI, whether a moving picture is real or AI. And if we as a society don't know what's real and what's fake, where does our democracy go, right? How do we figure out what we believe and what we don't believe? I think that may be the single biggest issue for our democracy right now, as far as AI is concerned.

There are a lot of other things on the list. Child safety goes to, you know, the suicide risk that we talked about, but also sexualized content that the kids, teenagers, can engage in.

The safety with frontier models goes to the risk that some fear very much, which is, through the use of these most powerful models, wrongdoers could figure out the secret to nuclear weaponry, to biological weapons. They can use it to hack into our national security systems, and who knows what else. And there's good evidence that exactly that sort of thing can happen.

Algorithmic pricing is the use of AI to figure out how much you might be willing to pay for a particular product or service based on all the data they've collected about you. You know, you don't just pay the price that everyone else pays; you pay the price that somebody or a model has determined is the maximum amount that you will pay for that shirt or whatever.

If you only wear gray t-shirts, it's probably not that big of an issue, but if you want nicer products, it could be an enormous issue.

State Legislation: Colorado

When the administration came out with their most recent AI executive order and said, we're going to look for state-based AI laws that could stand in the way of innovation, stand in the way of progress, and prohibit us or keep us from winning this war against China, that was code for, "we've got our sights set on Colorado." Colorado, a blue state, was the first state in the country to enact legislation specifically focused on the use of AI and on an attempt to prevent algorithmic discrimination. Basically, what this law does is [that] it says to developers of AI and users of AI, it basically says, look, you gotta use

reasonable care to try to avoid algorithmic discrimination. Now, it doesn't apply to all uses of AI. It applies to the use of AI in making or informing what's called a consequential decision. And you can see here what some of those consequential decisions are. These are things you might care about. Education, employment, lending, government services, healthcare, housing, legal services, and insurance. These are decisions being made by AI that have a real and direct impact on all of our lives. And what Colorado said is, look, if you're going to use AI to make these important decisions, exercise reasonable care to make sure that you're doing so in a non-discriminatory way.

There are disclosures that are required, there are risk management policies and impact assessments that are required, there are extensive transparency requirements and more, and it goes on and on. And even in Colorado, they started to get second thoughts about this law that they passed. They started thinking, this law might go too far. Yes, it goes a long way towards, hopefully, preventing algorithmic discrimination, but they were concerned that it was going to kill the golden goose, and it was going to be too burdensome on businesses in Colorado, and so they keep kicking the can down the road in terms of the implementation date. They've already done it a couple of times. And so, the real question in Colorado is, are they going to be able to figure out some sort of compromise to water down this law enough that it will satisfy the business community while still satisfying the consumer advocates that we're doing something. Even I look at Colorado's law and say, "that's a lot. That is a lot." And so, it will be really fascinating to see if they're able to tone it down at all.

Observations

All right, so some observations from me with respect to all of this stuff.

I'm very sensitive to a desire to have a national standard with respect to AI, and standard of care, and reasonable care, and all that stuff. I really am, because AI is deployed globally [and] nationally, not in a state-specific way. And having a patchwork quilt system of regulation where one state says X and another state says Y, that's no way to run a railroad. So, I do think having a single federal standard would make sense, but only if it adequately addresses the full range of risk, of which we said there are many. Reasonable minds, of course, can differ over the appropriate safeguards that we ought to have in place. But I'm here to tell you that minimal or no regulation of AI is dangerous, it's short-sighted, and we're going to pay the price. And it's not going to be, like, 20 years down the road; it's going to be much sooner than that.

And so, we need to figure out a way to come up with a sensible, middle-of-the-road approach. This is a very old man thing to say, but if left to their own device[s], Democrats will over-regulate. And if left to their own device[s], Republicans will under-regulate. We gotta find a way to put it down the middle here, because the stakes are way too high from a national security standpoint,

and just from a micro-individual rights standpoint. And if we don't get it right, we're gonna be in a world of hurt.

Basic Approach: Basic Risk Management Framework

All right, so let's say the worst comes to pass, and the administration and Congress in the next few months come up with a minimally burdensome standard, and they are effective in setting aside, through preemption, all these state laws that have been passed by well-meaning legislators across the country to try to protect us from some of those evils. What do we do? Let's say we want to be responsible and act with good care, despite the fact that our federal legislators and administration have told us otherwise. Here's what we do.

If you are an organization or you're an individual that is using AI and you want to do the right thing, you need to have a good story to tell. And I don't mean that in a cynical way, I mean that in a very sincere way. You need to have a credible, non-smoke-and-mirror story that demonstrates to regulators, to a judge in the worst-case scenario, to *The New York Times* if they come calling, that says, hey, we appreciate the concerns that have been expressed about AI, we're taking those concerns seriously, and we are acting with reasonable care to try to avoid negative outcomes. If you can put together that credible story, that's a good story to tell. Have a party, throw a parade, because right now, that's as well as you're going to be able to do.

The basic approach to all this is to institutionalize critical thinking. And by that, I mean, rather than just sort of view a proposed AI tool that you're developing internally, or buying one from a vendor and focusing on the upside because of all the bells and whistles you're being promised—of course, you need to think about that stuff—but also, pause, take a breath, and think about what could go wrong.

Meaning, what could go wrong? Who could be harmed? How bad would it be? How likely is it to occur, and what, if anything, can we do to try to put guardrails around our use of this AI tool and try to prevent some of these bad things from happening? Only by engaging in that sort of critical thinking are you going to be able to act with reasonable care and avoid many of these bad things that we've already talked about.

A lot of times, people talk about having a human in the loop, and I say, yes, having a human in the loop is a good start, and it's certainly something to think about, but it's got to be the right human, right? It's got to be somebody that understands the AI model and what could go well, but also what could go wrong. It's got to be somebody who's not going to fall asleep at the switch and become overly complacent or reliant on the AI tool, so . . . There's no panacea here, there's no one-size-fits-all, but critical thinking is where it's at.

There are a lot of different components that you can adopt as an organization and put in place to try to prevent some of these bad things from happening. But the most important thing, as I said, is to have critical thinking embedded in your corporate DNA. We can talk about any of these components later if time permits.

Closing Thoughts

Closing thoughts. As I said, AI has tremendous upsides. It really is an amazing thing. We use it in our house all the time. I use it at work all the time. But it also presents very significant risks to our workers, to consumers, to our markets—think about algorithmic pricing—and to our democracy. And a national, minimally burdensome standard that preempts state laws puts all of us at risk.

All of us. We need sensible, middle-of-the-road laws that balance innovation with appropriate protections, and we also need to think not just about what our government can do, but what we can do as individuals and as organizations to try to prevent some of these bad things from happening, both for selfish reasons and because we want to be good corporate stewards. We want to be good citizens in our country.

I said earlier that I was here to talk about AI, and of course, that's true. But I'm also here to talk about democracy and the rule of law. And when I walked in, and I saw the words in your beautiful courtroom here, I mean, it's such a sappy thing, but I almost teared up.

“Where law ends, there tyranny begins.”¹ Those are not just words on our wall that take up space because we didn't have the right painting, right?

Those are words that you ought to hold dear to your heart, and you ought to be thinking about them every single day, and you ought to be speaking up, and standing up, and exercising your right to free speech, and to dissent, and to protest, and to say, enough is enough. Whether we're talking about AI or something else, our country and our world is at stake, and our duty as lawyers is to raise our hands and speak up and to be heard. I can't tell you how crazy it makes me to see . . . to listen to the silence from our law firms and from our corporations and from our leaders across the country. It is deafening, right? Well, what can we do about it? We're not the leaders. Well, we have our own voices. You can speak out on LinkedIn, you can go to demonstrations, you can talk to your friends. What you don't do is suffer in silence, because by suffering in silence, it could be lights out for all of us. Thank you for listening to my rant. I appreciate your attention. Happy to answer questions but have a great Symposium.

1. Quote attributed to William Pitt.

Shibani Mody: Thank you, Scott. That was a phenomenal presentation, and I took so much away from it, I'm sure we all did. So, if you have any questions at all about Scott's presentation, any questions about AI, the AI race in general, and what we're facing in our country today, please use that QR code and submit all of your questions. I'm sure he will be more than happy to address them.

It's my great honor to introduce our keynote speaker of the event, and my friend, Mr. Chip Pitts. Mr. Pitt's remarkable career spans four decades at the crossroads of globalization, human rights, and the rule of law, witnessing both the promise and the perils of our interconnected world.

From his beginnings in the Jim Crow South, working against South African apartheid, to serving as a partner at Baker & McKenzie, chief legal officer of Nokia, and General Counsel and CEO of AI startups, Mr. Pitts has consistently championed accountability and ethical governance in an era of rapid technological and economic change.

He has been a long-time lecturer in law at Stanford and Oxford, teaching the next generation about business and human rights, climate change, and sustainable development.

Mr. Pitts' influence extends far beyond the classroom. He has served as chair of the Amnesty International USA Organization, advised United Nations Global Compact, and participated as a UN expert on the proposed Business and Human Rights Treaty.

He drafted Nokia's groundbreaking global code of conduct and has been instrumental in building governance frameworks from the UN Guiding Principles to the Sustainable Development Goals that hold corporations accountable while promoting responsible innovation.

His pro bono work for vulnerable communities, including victims of sex trafficking, immigrants, and refugees, has earned recognition across the political spectrum. And as a life member on the Council on Foreign Relations, he continues to bridge divides, speaking to audiences around the world, always with the conviction that our shared humanity transcends ideology.

Today, as America stands at a crossroads in its relationship with the world, there is no one better suited to help us understand what comes next and the consequences of the current administration's policies and actions. Please join me in welcoming Chip Pitts.

CHIPS PITTS², BEYOND THE CROSSROADS: AMERICA'S NEXT CHAPTER

Chip Pitts: Thank you, Shibani. I'd also like to thank our other hosts, including Lauren. Where's Lauren? There she is! Thank you so much. These people have been perfect hosts, and I also want to give a special shout-out to Brian. Is he here? Brian Leon?

I didn't expect when we came up here that we would have sleet and hail, but Brian did the kind thing of picking us up at the hotel and getting us over here with our luggage, so the Ambassador [Feisal al-Istrabadi] and I are very grateful to Brian. We did hear about, you know, chilling effects. And we're going to talk a little bit about chilling effects today—both of the legal kind, but also the meteorological kind. And the . . . I won't have much time to get into climate change, but that's another subject very close to my heart. I'm active with a lot of climate organizations, like the Sierra Club. Amnesty [International] has a climate crisis network for years. And we've had statements released this week, for example, on the withdrawal from the Paris Convention, which is now in effect. The UN Framework Convention on Climate Change is one of those 66 agreements that, in the eloquent introduction you referenced, we withdrew from just a week or two ago.

And so, we are really at a different point. It's America at the crossroads. But I just can't tell you how much I appreciate the going beyond the pale. We saw the Kurt Vonnegut Museum—he's one of my favorite authors. I was dyslexic as a kid, and my mother painstakingly helped me learn to read, and then I became extremely enthusiastic about reading, and Kurt Vonnegut was just amazing. I even got reprimanded in the fourth grade because my fourth-grade teacher said, "You didn't read that book." And, you know, "those aren't real words, go stand in the corner." But reading is fundamental, and seeing the banned book exhibits there, with all of these great Pulitzer Prize-winning, Nobel Prize-winning authors, was a great reminder. If you haven't been there, I urge you to check that out.

And Scott [Kosnoff], I want to thank you for your fantastic presentation. Scott has called for the sort of bravery that's represented in the law room's slogan, and is represented, in fact, by the name of your Dean. [Karen Bravo] I want to say "bravo" to the organizers of the symposium. Please join me in thanking them.

And [bravo] to the Dean, for her, you know, her forthrightness in standing behind this effort, because it really is America at the crossroads. But that's what the name was a couple of months ago when we first started talking about this. Literally, within the last couple of weeks, I decided that I would change my title to "*Beyond the Crossroads, America's Next Chapter*."

2. This keynote speech transcript has been lightly edited for clarity and technical corrections.

Because I think it's indisputable that we have now gone beyond the crossroads, and we've actually, in some ways, made a regression back to the 19th century, or even further, which I'll elaborate on. And so that's what I want to do today in my remarks. Talk about the chilling effects all over, including things that are happening. And I'm going to be more forthright, Dean, I hope you don't mind. Fact-specific, nonpartisan, because these are not partisan issues. If you go back to the Founding, you read the Constitution, the Bill of Rights, the Federalist Papers, which I had the privilege of doing as an undergraduate student and studying again in law school.

You know, these are core concerns about checks and balances, separation of powers, the vertical separation of federal powers and state powers, what Congress does, and the horizontal separation between the judicial branch, and the legislative branch, and the executive branch. And of course, under the unitary executive theory, where we're seeing, you know, executive orders replace congressional legislation. And some of them are quite shocking, and a lot of them are hypocritical. On the very first day of the administration, saying you want an order of free speech, and then you see what's been happening.

You know, and we can chronicle some of that stuff and talk about it in more detail today. But my goal today will be to basically focus on some of the most international and domestic facts that have happened, and they've raised very serious policy issues, affect our global relationships, quite obviously—with the speeches of Mark Carney, the Prime Minister of Canada, at Davos—and domestic market consequences. When we think about the latter, domestic market consequences, of course, we have this experiment now where we're trying these variable tariffs, that, you know, no one can rely on, a lot of market uncertainty, the so-called TACO trade, right?

Trump always chickens out, but then the tariffs are back, and so, you know, we really need to look at the implications this is having for our future, and how sustainable this is for our prosperity, our national security, and, of course, our rights.

So, in addition to chronicling some of the international and domestic events, you know, I'm going to then get into some general ideas that could be signposts on how we navigate this path beyond the crossroads, when we're seemingly going back in history in some ways. We need to make a U-turn, I would argue, to get back on the right road, back on the track that the wisdom of the ages . . . this is a symposium, right? Harkens back to the Greek symposia, where they had, you know, reclining, drinking wine.

I will say, I excuse you for not having wine at breakfast, because we had some excellent wine at dinner last night at the Speaker's Dinner, which was great. And we've had those events at some of the other places I've either studied—at Oxford, for example, my teacher locked us in a room for 4 days. This would be

a crime, right? But he was a very eccentric teacher. He wore a top hat and a fur coat in summer.

And yet, he had more firsts in the area of English literature than anyone in the university. But we had only wine and cheese and fruit, and it was a great experience reading *Paradise Lost* aloud. And it taught me many things, including, you know, how eccentric people can sometimes accomplish great things. And that is a quote I may come back to, but it's the famous Robert Jackson quote, which you all know. This is Robert Jackson, the Supreme Court Justice, right, who was also Attorney General, Solicitor General, U.S. Supreme Court Justice, Chief Prosecutor of the Military Tribunal at Nuremberg. And of course, one of my favorite quotes, "if there's any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." Now, that imposed conformity goes against our entire ethos as a vibrant, self-governing body of citizens that is in this marketplace of ideas, and that's where we get our innovation from.

So, we may come back to that quote, but I would add to it these days it's no official high or petty, and no large language model, or AI agent or artificial intelligence engine, that can tell us what is conformity. But if you think about it, for a second—we all do our searches, right, on the search engines. Now we're relying on AI engines. What happens when you've got four or five billionaires and their companies controlling the results, and that becomes the knowledge that we all assume. And that could be what's happening. You know, we've seen it happen with the streaming services that were ad-free and low price, and now they're all on ads and charging more. You know, these people have a way of changing their value propositions and their values. We've seen that again in the last week with Jeff Bezos, the founder of Amazon, who profits from these technologies, right? Collaborative filtering, recommendation engines.

And now, having owned *The Washington Post* and been a good steward of that venerable institution, now we have firing one-third of the journalists, right, including essential coverage, the reporter that's doing foreign affairs coverage in the war on Ukraine, for example, as well as a lot of their investigative reporters.

So, that's a problem. We can't have, you know, a real marketplace of ideas. And we have the problem that Scott talked about. The incredible disinformation and the threat from deepfakes. I don't know if you saw it overnight, but there was another deepfake manipulated image by President Trump that actually had

Michelle Obama and President Obama as apes. You know, they had them dancing to the music of “The Lion Sleeps Tonight.”³

And, you know, we saw in the protests in Minnesota as well, that this . . . this Mrs. [Nekima Levy] Armstrong, Ms. Armstrong, one of the organizers, was actually in a manipulated deepfake image from the official White House account. That’s just one of the legions of unprecedented things. We have never seen anything like that in U.S. history.

And we haven’t had this degree, frankly, of disinformation coming from our official sources. And I want to tell you that this is not a partisan issue, right? Again, these are the principles. Thomas Jefferson, right? If he wanted a government without newspapers, or newspapers without government, he was not hesitant in saying the latter. You know, the free press, and free speech, and the other values in our First Amendment, you know, right to assemble, to have dissent, freedom from established religion, freedom of liberty, religious liberty.

And then the right to petition the government for address of grievances. That’s what we’re seeing today on the streets of our cities, and it’s because the population is rising up. And I would argue we really have special duties, whatever your role is, whether you’re an administrative law judge, or whether you are a law student, or whether you’re a professor here, or you want to be a political leader, or just an ordinary citizen, or you want to be a businessperson. You know, it used to be that we had the courage as citizens of this populace to voice our ideas. And this . . . this . . . you know, under the cloak of “wokeness,” right, of condemning DEI [“Diversity Equity & Inclusion”] and all that, we really now have people—and my students are experiencing this as well, as I’m sure a lot of you are as students here—you’re afraid to speak out, for fear of alienating your colleagues. You know, this political divide is so extreme. So, I’m going to elaborate on that a little bit.

And then I am going to try to get into, you know, some, you know, some of the things that we can do about it, just very briefly, some of the signposts I mentioned that can help us navigate. So, like that classic New Yorker cartoon set in the hospital emergency waiting room. This is a spoiler alert—Mrs. Dumpty, you might want to sit down, because we’re not sure if we’ll be able to put this stuff back together again. It’s a real issue at this point, but I’m hopeful we can. I really am optimistic, because—and I’ll get back into more of this—I think there are cycles of American history, as Arthur Schlesinger wrote in the

3. Craig Hoyle, *Trump shocks with ‘disgusting’ Truth post depicting Barack and Michelle Obama as apes*, INDEPENDENT (Feb. 6, 2026), <https://www.independent.co.uk/news/world/americas/us-politics/trump-obama-video-truth-social-barack-michelle-b2915822.html> [https://perma.cc/4L2C-MNGY].

book of this title⁴ ([describing Schlesinger to the audience] the presidential historian and member of the Kennedy administration).

These things go in cycles, and that's where I get my greatest hope, because we have seen these bad things before. You know, I was in Berlin at the time of the Berlin Wall fell, when I was a NATO delegate of the U.S. government, when the wall fell. I have my piece of the Berlin Wall, right? And I saw the great explosion, you know: Frank Fukuyama's book, *The End of History and the Last Man*, and the confidence that we would have this new liberal democracy, and that would be the way the world goes. But it hasn't happened. We've had the Democratic Depression instead, and an amazing situation now where 72%, according to some estimates, live under repressive as opposed to democratic regimes, and we have Freedom House and other authorities that classify the U.S. as only partially free—when freedom is what has given us our success, [and] diversity is what has given us our strength. It's not a weakness, it's a strength.

And it is just intolerable to have people standing up on the podium at our White House, or at national gatherings, and basically use code words, or sometimes explicitly, do what we saw last night. Racist remarks that enshrine white supremacy, hosting white supremacists at the White House. So, you know, this is not, obviously, where the Republican Party came from, and with its history: Abraham Lincoln, you know, support for abolitionism, and the Emancipation Proclamation, and all that. And it's not where the Democratic Party has come from. You know, we had a corrupt Democratic Jim Crow party in the South, and the Democrats have been pretty cowardly lately, you know, but now the Democrats and a lot of Republicans are starting to speak up. And so, while this is political, it should not be partisan, and it should not be ideological.

I've been a speaker for the Federalist Society, the American Constitution Society. I organized—as president of the Bill of Rights Defense Committee—resolutions and ordinances with my colleagues across the U.S, where we had the Tea Party working with the NRA [the National Rifle Association], the Gun Owners Association of America, Amnesty International, [and] the ACLU. Again, we need to get back to this ability to talk to each other and our neighbors—to remember, in this 250th anniversary year, the meaning of those words in the Declaration of Independence. And there was a decision I'm going to quote from in just a minute, that came out just within the last week, that, if you haven't heard about it, it's the decision regarding Liam, the little kid with the bunny hat, by a Texas judge, and I want to refer to that.

The other thing I just want to put on the table is the concept of deals, right? Like, this is my life's work, and it's the life work of a lot of us, to do deals, whether it's negotiating an international treaty, a trade agreement, or a human rights treaty, or a business deal. You know, where at Nokia, we were trying to bring

4. Mr. Chip Pitts is referring to Arthur Schlesinger's 1986 book, *The Cycles of American History*.

technology that would connect the world; that was our motto, connecting people to the world. And we, thank heavens, explicitly we viewed our competitive advantage as based on human values. Those were our stated values. We trained people in them.

As Shibani mentioned, I was allowed, shockingly, you know, the CEO asked me to draft a code of conduct, which then became replicated at a lot of other companies, and became enshrined in some UN normative business documents where were looking at the interrelationship [among these values], and our code of conduct committed the company to the highest ethical standards. Anti-corruption (so no bribery). I did have to explain, no, you cannot pay that Chinese official the bribe that you're planning to pay. And they were completely content with that, because we were traded then on the New York Stock Exchange, and they realized this could be a criminal problem, right? And we were becoming international and growing, you know, from a nothing company to the top brand in the world for mobile cellular communications.

And so that [focus on] value[s]—that allowed us to recruit the best engineers and talents, just as it's allowed our scientific community and our business community to get immigrants from around the world. I'm sure you know this, but the top . . . most of the Silicon Valley companies, and most of the top tech companies in the U.S. are run, or founded, or co-founded by immigrants. Just think of the leaders of Microsoft and Google. I mean, Steve Jobs was the son of an immigrant. He was born here, but his father was a Syrian immigrant, right? So, without this constant inflow, that would be a complete competitive disadvantage for us. Immigrants help the economy, they don't hurt the economy, and—myths to the contrary notwithstanding—you know there are certain things as facts still in the world.

Honesty, also, you know, I've taught leadership a number of times with my colleague, the late Debra Rhode of Stanford, who was a real pioneer in women's leadership and leadership in general, ethical leadership. She founded the Center for Ethics and the Legal Center for Professional Responsibility at Stanford. And I had the honor of regularly being a guest lecturer in her leadership class, and we had a lot of talks about this. And at that time, in 2015, in my leadership classes, you know, in the U.S., at Oxford, in Korea, or in China—in mainland China—they were premised on, and recognized that these values had competitive advantages. Why? Because they're deeply evolved human values. We start with the ingroup, right? And we're fearing the stranger. But then, when we start to trade with a stranger and have dialogue, we recognize that we can learn from them. Maybe they have some food we like. Last night at dinner, we talked about the incredible ethnic cuisine from Syria, from other parts of the Middle East, from India. It was so fun, because what would we do without all this great food we have here? So, I just think it's worth remembering that, you know, these [immigrants] bring personal advantages and delights, as well as competitive economic advantages, and we can't forget that.

But honesty. If you're not aware, honesty—telling the truth—was *the top cross-cultural attribute desired for leaders in the world*. Can you imagine that? Just 10 years ago. Now, what has happened in the intervening 10 years? I mean, we have a problem when we're varying policy all the time, and when we're saying we respect free speech rights, and then we, you know, a top official gets up before the Munich Security Conference and starts endorsing things, you know, telling the Europeans that they don't respect free speech rights or whatnot. And you can argue about quibbles about the First Amendment versus, you know, the hate-speech approach. That's another thing, but we were actually pandering to the AfD [Alternative für Deutschland], the far-right group in Germany.

Similarly, we've had this idea of deal-making. You remember what we've seen in various contexts, you know, both with Jimmy Kimmel, when Brendan Carr, the chair of the FCC, said, "You can do it the easy way, or you can do it the hard way." And we've heard that about what else recently? Venezuela, right? "You can do it the easy way, or you can do it the hard way," the administration told Delcy Rodríguez, the new president of Venezuela. Now, people from Venezuela were very excited when we changed the leadership there. People thought it was a regime change. Turns out it wasn't a regime change. The repressive regime is still in place. The extended security network, kind of akin to the East European Soviet network, is still in place. Rights are still being crushed there. There are some political prisoners that have been released, but what's the main objective of that? What's been the main consequence? The first thing we look for is to find ways to expand production of a past technology—fossil fuels—that are killing the planet, causing, you know, pollution—and that are causing these extreme weather events. Now, you may not believe this, you may think that it's a hoax, but one of the institutions we've withdrawn from is the Intergovernmental Panel on Climate Change, the UN Framework Convention, you know. This is the greatest scientific enterprise in world history. It's so collaborative, cross-cultural. All the National Academies of Science have said, you know, with global warming, you have more volatile weather, you have these extreme effects, you have more pollution, heat that's killing more people, and extremes of cold.

And so, if we're not doing this anymore, we're not going to be able to track those scientists, those immigrants that have helped us found our companies—[that] have been at the forefront of our technical innovation—not only basic research, but applied research—that have allowed us to have these great inventions, [including] our higher education, you know, the highlight of the world. And now, 17% lower international student admissions last fall.

We're seeing, you know, my friends and probably your friends, they're afraid to come here. They can't get visas. We're instituting right now—I did a coalition letter with this surveillance coalition that I started after 9-11, and it's been going strong with companies in it, [including] sometimes, all the NGOs from right to left, [such as] the Cato Institute, which, by the way, just released a great report,

you know, [it's a] libertarian, right-of-center research institute founded by the Koch brothers in large part—they instituted a report that talked about the economic benefits of immigration.⁵ I commend that to you if you have any doubts about the facts on that, all right?

Let's just think about just the last five or six weeks, what's happened, all right, internationally. We had, of course, well, we've already been attacking in Syria and Nigeria. Nigeria, in part, to help the Christians under attack, which is an understandable thing, but why do we need to have armed forces to do that, right? I mean, we were supposed to have good relations with Nigeria. But anyway, and the collateral damage is not exactly being ignored. Regime change in Venezuela that turned out to be actually just decapitating a leader, Maduro. Our president has threatened the life of Delcy Rodriguez, and so she went along with the idea of being our representative there, basically. It wasn't to advance democracy. The U.S. is running the country, we say. And despite the oil and gas purpose of the regime change or decapitation of the de facto head of government.

A lot of legal issues, obviously, still being debated. I think most international lawyers I know agree with me that it's clearly illegal. We can have a good discussion about that if you'd like.

But, you know, the CEO of Exxon saying it [Venezuela] was “uninvestable.” That's kind of a moment, right, when you wake up. So, and now, I hate to say this, I sound like a conspiracy theorist, but you do have friends that I used to know as a Dallas Association of Young Lawyers member, Sidney Powell, who was a member of the Dallas Association [of Young Lawyers] and the Dallas Bar Association. And now we're seeing her stand with Ed Martin, the [U.S.] Pardon Attorney who was in charge of the weaponization department of the DOJ. He was in charge of that department. He was recently demoted due to internal politics. He's still the Pardon Attorney, I think. Alright? And he was at January 6th. He is an election denier, right? He believes in that. And we're seeing the raid on Fulton, Georgia's ballots, where the original ballots were taken by the FBI under Kash Patel. But Tulsi Gabbard, our head of national intelligence, was there. Why was she there? Could it have anything to do with that conspiracy theory that Venezuela, according to Sidney Powell, was dealing with some sort of Italian satellites to change the Dominion and Smartmatic voting machines [to change the election results]? I mean, could it have that purpose? You watch, and you see what happens in the next couple of months.

Right? There's a reason this gang is getting back together. Sidney Powell, Roger Stone, Ed Martin, taking pictures together. And there's a reason we're hearing

5. David Bier, *New Research: Immigrants Created \$14.5T Fiscal Savings*, Cato Institute (Feb. 3, 2026), <https://www.cato.org/news-releases/new-research-immigrants-created-145t-fiscal-savings> [https://perma.cc/385R-9C6X].

talk of nationalizing our elections. If you look at the Constitution, we know that that's under state and local control.

We know that the nationalization of elections is what helps these dictators, like Russia's Putin or Turkey's Erdogan to manipulate elections and declare, "well, we got 99% of the vote, guess we got our authorization."

And so, we all have to be sensitive to that, "where laws ends, tyranny begins," reprise of the big lie that's actually underway right now, I would argue. In Cuba, it's not airstrikes to effectuate regime change, but it's a blockade. Right? Or is it a blockade? Marco Rubio, in distinguishing, you know, what was happening in Cuba from what would be an act of war—a blockade, as you like—he called it a quarantine. So, it's a quarantine, not a blockade. That makes it all right. You're all comfortable with that, right? That makes it fine and dandy.

Now, I'm in favor of regime change in Cuba. I'm not a fan of the Cuban regime, nor was I a fan of the Soviet regime, or all of these other repressive dictatorships of the left or right. When I was running the political asylum clinic at SMU Law School as a young professor, and we, you know, on a non-ideological basis, we were accepting Jewish refugees, Central American refugees, going down and seeing the paramilitary squads in El Salvador and so forth.

We now have the largest funded law enforcement body in the history of the United States. You know, \$75 billion to ICE, \$40 billion to CBP, I believe it is, and that's, of course, what's at issue right now—with the Democrats trying to say, "we're going to stop the brutality happening on our streets,"—which is reminiscent of what we saw in those paramilitary death squads, frankly. And I'm not saying that unadvisedly, because we are seeing not just immigrants shot. And if you didn't see the hearing (earlier this week, I think it was), where you had all U.S. citizens get up, not a single Republican attended, unfortunately. But you had Miramar Martinez talk about how she was shot five times by ICE with seven exit wounds, and then they were joking about it and texting, you know, we got her, you know. How about that, guys? Just bragging about that. She was a U.S. citizen. She wasn't doing anything wrong. She was just trying to be in solidarity with her neighbors when she was shot.

Alright, and then we had [executed U.S. citizen] Renee Good's family, her brothers, expressing their grief, right? And we had, you know, we had this, amazing woman, who was disabled and autistic—did anyone catch her? Her name was Aliya Rahman. She was the one [again, U.S. citizen] that you saw on your televisions, brutally dragged from her car, saying, "I'm sick, I'm on my way to a doctor's appointment." And they [ICE agents] cut her seatbelt, dragged her out, manhandled her, they took her, you know, to detention, a jail, where she passed out, asking for her medication, asking for medical attention, and then they took her to the hospital, and again, you know, [they were] just completely joking about her distress.

And you also had, of course, you know, other testimonies that I would recommend that to you if you want to see something very, very moving. These people, along, of course, with Renee Good, who was just a mother of three. You know, if you haven't seen the footage, how many of you have seen the footage? You don't have to tell me what you think about it, but please raise your hand if you've seen the footage of *The New York [Times]* . . . okay, everybody's seen it! And at first, it was sort of a Rorschach test, right? You don't know what you're looking at, you don't know what happened. Do you believe that Renee Good was a domestic terrorist trying to run over, or as Trump said, actually *ran* over Jonathan Ross, the agent who shot her through the windshield and then shot her execution style, and it was one of those bullets that killed her, according to the autopsy. After he was under no threat from her, she was clearly turning away from him, if you've seen the forensic video analyses by *The Washington Post* and *The New York Times* and others. She was, in my opinion, beyond a reasonable doubt, trying to leave, as her spouse had said, "drive away, girl." And she was driving away, turning away. Jonathan Ross was clearly out of harm's way, and yet he killed her anyway. And he had training. But it was the wrong kind of training. It was Border Patrol-type training, right? Where you're at the border, you're not in the interior, and you're used to dealing with drug cartels in more aggressive situations, where you have to step up your level of aggression.

Alright. But then you had Alex Pretti. A good Samaritan. And it just breaks my heart to see what happened to him. You know, he was standing there merely holding his phone. They said he was brandishing a gun. He was trying to help a woman who had been violently pushed down by ICE. He was helping her up, he turned around, he lifted his hands to show: "I'm not a threat to you." He had his video camera in one hand. And then he was sprayed directly in the face with pepper spray. It's been happening all this time, and that is not in accordance with good training in law enforcement practice. And then he was down on the ground. And he had a gun because he was entitled to carry a gun. Concealed carry and open carry, both in Minnesota.

And that's why the NRA is so up in arms about this, and the Gun Owner's Association [of America], because he [Alex Pretti] had a clear Second Amendment right to do that. And they shot him after they discovered the gun, and they disarmed him within a second, and it could be confusion, you know, the black beanie guy shot him in the back. And then, you know, after delivering what may have been the coup de grâce there, they shot him as they backed away another 8 to 10 times. A U.S. citizen exercising his First Amendment rights to record, right? That's unquestionably the majority of the circuit court decisions, and it's, I think, by consensus among scholars, it's within your rights. This is the purpose of Peter Gabriel's founding of Witness.org, which has been so important in documenting such events all over the world. Because if you don't have [documentation of] those events, as with several other people who've been shot, you know, you actually can't refute these amazing lies, and that's what

they are. I'm not going to use fancy labels here. You had lies by the president, J.D. Vance, Kristi Noem, Greg Bovino (the commandant in charge of the Customs and Border Patrol), Kash Patel—our top officials came out while the bodies were still warm, and then for days, the right-wing media ecosystem, Fox TV, was echoing their lies, saying that Alex Pretti went there as a domestic terrorist trying to massacre people, and trying to kill as many people as possible. This is not right. This is not who we are. And yet, what can we do about it? How did we get to this position?

Well, one way we got there is that at the time of hiring, you know, federal officers, federal employees swear an oath to the Constitution. Right? Uphold the Constitution, including the Bill of Rights, of course. But there was a new thing in this administration, and it's had several different dimensions, and one of them is they're insisting on filling out a loyalty form that says, "these are the executive orders, what would you do? Which executive orders do you like the most?" And Customs and Border Patrol agents are particularly a focus because they're trying to change that culture in order to execute this mass deportation plan that has quotas of 3,000 a day, deliverable by Stephen Miller.

Now, there's a famous case that we teach in business schools and law schools, I've taught it many times, the *Sears Auto Care* case, where Sears, in its wisdom, declared that the auto mechanics have to reach a certain quota per day. Famous business ethics [and] corporate responsibility case. What do you think happened? If they [Sears auto mechanics] had to find more problems with the cars in order to get more money, what do you think happened with a perverse incentive like that? They found more, and they got in ethical trouble, and they got in legal trouble about it. It was a major, major scandal. And so, you know, Sears reversed that policy.

And now we have a quota [with deportations] that is going to be impossible to reach. Right? Because these are not the worst of the worst. You know, we're talking about U.S. citizens, we're talking about, you know, a lot of people like Liam. Let me just tell you about what Judge Biery said about Liam in a very short decision that I would commend to you if you haven't read it. It's pretty amazing. Liam Conejo Ramos, who with his father, is an asylum applicant from Ecuador. They're fleeing persecution, just like Jesus did—Jesus, Mary, and Joseph—looking for asylum from persecution. They were refugees fleeing the state at the time, not a state, but [King] Herod's [kingdom]. Right? And that's what we have in all these religious traditions, and they're in all the major religions [these ethical concepts of asylum, refuge, sanctuary from persecution]. You know, my friend who is a Hindu confirmed to me that this is true in the Hindu religion. It's true in our religion, the Christian religion that I was raised in. It's true in the Muslim religion, it's true in all the major religions and ethical traditions.

And in his opinion, Judge Biery—from the [U.S. District Court for the] Western District of Texas said—he recited the Declaration of Independence grievances that Thomas Jefferson wrote when he was in his mid-30s, young 30s—he said, these [grievances] are listed in the Declaration: ““He has sent hither Swarms of Officers to harass our People. He has excited domestic Insurrection among us. For quartering large Bodies of Armed Troops among us. He has kept among us, in Times of Peace, Standing Armies without the consent of our Legislatures.””⁶ This judge quoted the Fourth Amendment right, of course, to be free from unreasonable searches and seizures, and have no warrants except upon probable cause. And how that’s being violated by these agents that break down the doors without a judicial warrant [and] with only an administrative warrant. Very problematic, because that’s, as the judge says, putting the fox in charge of the hen house, right? If you can draft your own warrant, do what you do, no checks and balances, no independent magistrate or judicial [oversight].

And it reminded me of the quote, this is not from his [Judge Biery’s] opinion, but one of my other favorite quotes, in addition to the Robert Jackson quote, is Felix Frankfurter’s: “The history of liberty has largely been the history of the observance of procedural safeguards.” And so, Justice Biery, to his credit, said, we hold in this case that the circumstances are trumped, pun intended, (he didn’t say pun intended, but it was trumped) by “The Great Writ,” and he put the great writ (of habeas corpus) in caps. Just like someone else we know that posts sometimes in all caps. And then he said at the end, without commentary other than this, he quoted⁷ the shortest verse of the Bible, John 11:35, which says simply . . . Does anybody know? [It says,] “Jesus wept.” Two words.

And that’s why it’s such a relief now that we start to see empathy and solidarity from celebrities, and from sports figures at the Grammys, and hopefully at the Oscars. There is a new movie that I would commend to you; this movie is called *Hamnet*. Anybody seen it? It’s an Oscar contender, but a long shot. And it’s totally fictionalized, based on a novel and a couple of facts from Shakespeare’s life. But it’s all about relationships inside families and relationships between people. And how difficult it is to understand each other sometimes. We used to be able to talk civilly, unlike what we’re doing now.

I was still on the executive committee, but chair of the Organization for Identity and Cultural Development, which is a global organization based in London, founded by an anthropologist, my friend Bruce White. And we’ve taught courses together on advocacy for climate change. And it’s true [for] whatever you’re advocating; you have this method of just respectfully listening. Shut the heck up. Just listen to the other person, whether it’s the crazy uncle at

6. Conejo Arias v. Noem, No. SA-26-CV-415 (W.D. Tex. Jan. 31, 2026).

7. Following his signature at the end of the opinion and order, Judge Biery included a photograph of Liam Conejo Arias, accompanied by two verses from the Bible: Matthew 19:14 and John 11:35. Conejo Arias v. Noem, No. SA-26-CV-415, slip op. at 3 (W.D. Tex. Jan. 31, 2026).

Thanksgiving dinner, or your brothers and sisters, and I've got a couple of them that are in this ecosystem where they're not consuming news except from, literally, foreign propaganda sources. You know, they're in the algorithm that just continues to feed you the stuff from the bots of China and Russia. And I've got other friends that are, you know, still wedded to this ecosystem that's echoing talking points from our state. This is a Pravda-like experience. Real journalists check the facts, and they correct them when they are wrong. It's that simple. And that's what the marketplace of ideas is about, and that's where, if you listen to someone, you reestablish common ground. Right? Like, it can be a love for beer, Justice Kavanaugh and I would get along just fine.⁸ Or it could be, you know, walks in nature. But if you listen carefully, and then hear where they're coming from, then you can really start to have a discussion about, well, why do you think that? Why do you think the election was stolen?

And then you could get to, even if you continue to disagree on the fact, you can reestablish values, because our values are pretty universal. American values, the ones in the Constitution and Bill of Rights, those First Ten Amendments, the 14th Amendment, the 13th Amendment, the 15th Amendment, the 22nd Amendment [limiting U.S. presidents to two terms], which we have to watch. Will there be a third term or not? The 25th Amendment [dealing with disability and succession issues] . . . all of these are very relevant now, as never before in my lifetime. And they were relevant after the war on terror, where we had black sites, supposedly out of the ambit of law.

But this movie, *Hamnet*, which I was talking about, I recommend it to you because it resonates in ineffable ways with our moment, this existential moment that we have, whether we're thinking about, you know, the nuclear situation, or climate change, or public health and possible pandemics—having now withdrawn from the World Health Organization, having withdrawn USAID, and caused perhaps a million unnecessary deaths right now. The medical journals put it at 600-and-something-thousand last fall, and by this time, the estimates are between 750,000 and a million excess deaths. And 14 million by the end of this decade. This was something we did, and we abruptly withdrew that aid. And as a result, people that need the nutrition, need the medical assistance, are dying. So, it's the “to be, or not to be,” soliloquy from *Hamlet*. To be, or not to be. And in this movie [*Hamnet*], they have a couple of versions of it [that soliloquy from *Hamlet*] that are among the best I've ever seen, having seen a lot of productions of *Hamlet*). That is the question [to be, or not to be]. And then the second part, “[w]hether ‘tis nobler in the mind to suffer/The slings and arrows of outrageous fortune,” [which is] *passivity* (he didn't say that, I said that), or whether ‘tis nobler “[t]o take arms against a sea of troubles, And by opposing end them.”⁹

8. Here, Mr. Chip Pitts is using this hypothetical to illustrate how people with conflicting ideologies may establish a “common ground” to facilitate productive conversations about politics and shared values.

9. Mr. Chip Pitts is quoting a speech from *Hamlet* by William Shakespeare.

In other words, *the course of action* which Hamlet does, actually, after dithering throughout the play, take (in the play), with great cost (spoiler alert, if you haven't seen it) to him and to the other people on stage at the end—*except for Horatio, who tells the story [and] lives on; that is how Hamlet's memory lives on. And that's how our people who have been lost, like Alex Pretti, and like Renee Good, in her brother's eloquent testimony, live on in our hearts afterwards.*

It's . . . it's not easy to stand up, and to speak up, to not be silent in the face of injustice, but it's very important. I suggest you see the movie [*Hamnet*], because I won't give you the real spoiler alert, but there's a silent moment that cascades through the audience, and I'm tearing up just thinking about it, because you can't see it and not be moved and take . . . you know, take empathy—basic human empathy—as a guideline, which is something that is not on display right now. You know, we had a . . . the name of the Maine ICE operation. Anybody know what it was? “Catch of the Day.” When interviewed and given a chance to apologize this week for calling Good Samaritan Alex Pretti an assassin, J.D. Vance said of the question, “apologize?” [he responded by saying] “For what?” And then he started gaslighting by saying he wouldn't respond to hypothetical or conjecture. Orwell's 1984: “[t]he party told you to reject the evidence of your eyes and ears. It was their final, most essential command.”

But despite the drawdown in Minneapolis, you know, the troops are still there, the people are reporting that they don't see a change. And then to connect again, to connect the international events. You know, we had not only Venezuela. But we had, you know, these bombings in other places. We've had the legally dubious . . . right now, you know, this Iranian, our massive armada that's there [near Iran] to negotiate a deal. And what is the phrase? “You can do it the easy way, or you can do it the hard way.” To renegotiate a nuclear deal, which Trump walked away from in his first term. You know, the JCPOA—that had actually kept Iran's nuclear program in abeyance for years. So now, as is happening a lot, he's solving a problem that he created. And of course, you know, he's . . . he's . . . I was impressed at first when he said he would stand up for the protesters [in Iran]. And then what a tragedy, just as what happened with the Kurds, you know, at the beginning of our current century, you know: we didn't stand up. For those that we said we would stand up for.

And we're seeing tens of thousands of deaths in Iran. Now, I'm not a fan of the Iranian regime. I would like to see regime change there, but we have to think about how we do this. And the Iranians, of course, are saying, we won't negotiate with you if you threaten us. We're not into that sort of . . . that's not a deal among counterparts. And, you know, they have their own things they can do. We learned this, right? There are terrorist events all over the world. We experienced that on 9-11, not from Iran, but from Sunni terrorists, but they were resisting what they thought was an occupation. And that's how, you know, a lot of the wars you hear from—[in] Minnesota, we're having an occupation of our

city. 3,000 troops, [and] now it's down to 2,300, but they're supposedly, I don't know if they're actually drawn down, but they're experiencing, like, they say sometimes, an invasion.

That's the connection, I think, between these domestic and international contexts; it's an explicit assertion of might makes right, which is why I say it's not going back to 19th-century gunboat diplomacy, it's going back to, you know, the Athenian invaders of the island of Milos. And the famous Thucydides portraying—and he was a general as well as a great historian in his history of the Peloponnesian War—he was portraying the invasion as, well, the strong do what they can, the weak suffer what they must. So, this is going back 2400 years. And we're in a symposium now. You know, Plato and Thucydides overlapped a little bit. I think Thucydides was a bit younger, but in Plato's Republic, he has Thrasymachus voice that doctrine [the strong do what they can, the weak suffer what they must] as one possible definition of justice, and Plato refutes it. And that's because it just doesn't work. We know this.

When we were fighting with our allies in World War I, World War II, you know, we were fighting the good fight against . . . Let's say an autocrat. I won't go further than that. Autocratic powers. And . . . we did well. At great cost to us, great cost to our allies. And we were on the side of justice, and you recall the Niemöller quote. You all know it. I'm sure you've heard versions of it. You know, first they came for the socialists. I didn't stand up because I wasn't a socialist. Then they came for the Catholics. I didn't stand up because I wasn't a Catholic. They came for the intellectuals; I didn't stand up for . . . I wasn't an intellectual. They came for the unionists. I didn't stand up because I wasn't a unionist. There are many versions of the quote, but then, you know, he says, first, then they came for the Jews. I didn't stand up because I wasn't a Jew. And then they came for me, and there was nobody left to stand up. These are our fellow citizens. They're our neighbors and friends, and that's what the brave activists, massively in Minneapolis, in various other cities like Portland, you know, they're not trying to be domestic terrorists, they're trying to stand up for the liberties, the American values, and the universal human rights values that are in the Universal Declaration of Human Rights, affirmed by all the nations of the world and the treaty networks.

And so now to get to the pathway back, very briefly. I think there are short-term things we can do. As Scott said, we've got to speak up. It's uncomfortable to speak to each other in that mode of just respectful listening, civil engagement, never shame, never, you know, humiliate. Listen, when you're tempted to question a fact, don't question it. Let them completely exhaust their worldview. And then you start, after you've established the common ground and listened, you start, you know, saying, well, what's your source? And you get to this critical thinking, media digital literacy that Scott referenced, that we especially need to have in the algorithmic age, when you have, again, the official White House account tweeting that the organizer of the protest, and she was a very

brave, courageous person, a reverend, civil rights attorney, head of the NAACP,¹⁰ peaceful, nonviolent civil resistance, but within a civil disobedience tradition, right? And [former CNN anchor] Don Lemon was there with [award-winning journalist] Georgia Fort covering it, and they have now been arrested. So, we have another unprecedented step, criminalization of journalism in this country. [At a time when we also see] Jeff Bezos laying off a third of the [*Washington Post*] journalists. Criminalization, for the first time in U.S. history, to my knowledge, for just conducting the act of journalism. They were not organizers. You can watch Don Lemon's reporting. Georgia Fort's—her testimony from her house is [as she's encircled] not only [by] the ICE and CBP, but the DEA [as well]. This is a combined law enforcement enterprise that's massively funded.

And even if we are able to get—you know, I say *we* because I'm an American citizen who wants this, it's not a partisan thing—we need to get rid of the masks, in my opinion. We need to make these reforms, have displays of badges. We need to stop the brutal tactics that are bad practice versus good practice. And if we can do that by standing up, by talking to our neighbors, if you have the courage to protest—please consider doing it. The next No Kings protest is coming up, I think it's March 28th, a Saturday, unless I'm mistaken. And there are these protests happening around. But we also then have to think about the medium term and the long term. Medium term, we start to have to, I think, lay the ground for a different culture. You know, not a culture of loyalty to any one man. That is not . . . and it's famously not, you know, the way the Founders constructed the government.

You know, slaveholders, though, many of them, *most* of them were. Not all of them, but, you know, they evolved the Constitution with three coequal branches of government, not one supreme executive that's unitary and can dictate by fiat. All of these executive orders—200 in the first term.

But we need to change the culture, and that's by giving each other, and especially our leaders, the courage to stand up. Encourage business leaders, politicians to stand up. We need to have a human rights prism in mind, both civil and political, to stand up, but also economic, social, cultural rights [prisms in mind]. You know, I practiced with the Legal Resources Center in South Africa as a Visiting Scholar and Extern. And I basically did this during my third year in law school, because I had enough credit, so I went there instead, and was part of the Homeland's denationalization case, where we were resisting the Apartheid government trying to denationalize the majority of South African citizens. We have a birthright citizenship case right now [here in the U.S.] pending. I mean, this stuff is happening, and it's real. The Supreme Court's going to decide on this. Let's hope they decide the right way. I think they will

10. Mr. Chip Pitts is referring to Nekima Levy Armstrong, the subject of an administration AI-deepfake altered social media post as referenced above.

in that case. But they, in the meantime, have done some other very bad things, in my opinion. I'm not speaking here as a partisan, but the Voting Rights Act was a nonpartisan thing, and part of it has been gutted, and another part may be gutted soon.¹¹ So, we're going to need legislation. That'll take a medium or longer-term effort, right? So, Voting Rights Act, getting rid of money in politics, it's very tough. These [challenges] are a marathon, not a sprint.

But, you know, the *Citizens United* decision was very problematic. You have the new, corrective Voting Rights Acts themselves, the John Lewis Voting Rights Act, right, which is restoring the provisions of the Voting Rights Act that either were or about to be gutted. And then you've got the Freedom to Vote Act, right, which is saying, we're going to make voting a thing we celebrate. We don't want to have voter repression. We don't want to remove mail-in ballots. We want to have a national holiday, so it makes it easier to vote. That sort of legislation is what we need.

And with respect to privacy, boy, do we need privacy. This coalition letter I mentioned . . . that I worked on yesterday, is stopping Customs and Border Patrol notice of proposed rulemaking, that would collect DNA information and 5 years of, quote, "mandatory social media history," whatever that is. So, biometric, social media history, and DNA information from people coming into our country, which, again, has a chilling effect on their free speech rights. It's going to complete this brain drain where we're seeing, you know, scientists leave the U.S. in a way unprecedented in my lifetime, academics leaving the U.S. in a way unprecedented in my lifetime. Look it up. Those are the facts. And you have, you know, a reduction of the foreign students, scientists, the collaboration efforts; scientists go abroad to these conferences, and they're ostracized, no matter what their political convictions are, because that's the way we are viewed in the world. Our reputation, our soft power, our ability to get things done on the entire range of issues is gone, because in the national security strategy, echoing Project 2025, we have a hemispheric focus, where we have not only invaded, you know, one country—we have threatened many of our other allies, like Colombia.

President Petro of Colombia was here. And of course, they've exchanged words, you know, you're sick, and, you know, all this. And yet, they got along famously. Why? Well, because Petro gave Trump premium coffee and great chocolate. Nothing gold, surprisingly, but that got them to get along well. And I also think, probably, President Trump liked his name. Petro, right? So at least we have Colombia temporarily off the list. But we now have NATO allies going to Greenland [to defend it]. Mark Carney's statement that we've had a rupture in international relations, and we're focusing on our hemisphere, threatening to invade so many countries. You know, Cuba, Mexico, you know, it's like, which

11. This happened shortly after this Symposium. See *Louisiana v. Callais*, No. 24-109, slip op. (U.S. Apr. 29, 2026).

country are we going to invade? I don't know if it'll all happen, or if it's all just a negotiating threat. But you don't really have a deal. You don't have negotiation of the sort that most of us have done if we're lawyers. Or if you're law students, you're going to be doing as settlements for litigation or business deals. You don't have that kind of deal if it's "an offer you can't refuse, "right? That's like a mafioso-type approach, and that's not what we want.

So let me conclude just by saying, with respect to [this] Symposium, that we don't have the wine, but we have had, hopefully, some stimulating offers so far. We'll have some time for good questions. But, you know, the original symposium, and a lot of Plato's writings, you know, he was not exactly a person that favored civil liberties. He was an "enemy" of society, according to Karl Popper, the open society and its enemies, because he had a top-down, hierarchical rule by one class. And that's not the way we are structured. We're supposed to be a society that values equal protection. But there's a dialogue in *The Symposium*, in other of Plato's discussions, where a wise woman teaches Socrates about the nature of love. And she goes from eros, the love for a lover—physical affection—up to what she calls "the ladder." But first she makes points about lovers. She says, you know, having a lover inspires virtues that are important: courage, and honor. That's pretty impressive to me, two virtues in increasingly short supply and sorely needed these days, because we don't want to feel shame in front of our loved ones or society.

And then there's also a point made in *The Symposium* dialogue, on how to seek wholeness and belonging, when that feels fractured. And of course, the myth that you're separated from your soulmate in some mythological past, and you come together. But that wholeness can come from seeing the truth in everybody's perspective.

Because in every perspective, there's some truth buried in there, in just about every perspective, that's worth really listening for. In fact, seeing the other person, seeing reality in a way that they feel seen, instead of the usual, you know, myopic reaction right now, especially given social media, and it's going to get worse with artificial intelligence.

But ultimately, love discussed in Plato's *Symposium* moves to a higher motive that's more cosmic and moral: to seek justice, the good, including good laws, institutions, and universal truths of the sort we have in the American values and the universal human rights values—respect, dignity for everyone—that is being violated right now.

Sometimes I've seen this, how misdirected love can turn to outrage, right? You're so patriotic, you want to defend against what you perceive as your enemy, be it another partisan political figure or an immigrant, defend to the death, not of yourself, but the immigrant. Famously, Greg Bovino said it wasn't Renee Good or Pretti that were the victims, it was the Customs and Border Patrol agents that were the victims. That was pretty mind-blowing.

So, I just want to conclude with my favorite biblical quote. And this is not to say that Christianity obviously has a, you know, proprietary claim to these truths, because as I say, they [these truths] are in all the major religions. We've got the Golden Rule. We've got the principle of love God, love thy neighbor. But I love the [Gospel of] Matthew [passage], right? "For I was hungry and you gave me food, I was thirsty and you gave me a drink, I was a stranger and you welcomed me, I was naked and you clothed me, I was sick and you visited me, I was in prison and you came to me."¹² This is about the least of those, right? So, I'll end there. And thank you for your patience and putting up with me.

Shibani: Thank you so much, Chip. That was a phenomenal keynote speech. For those of you who don't know, while Lauren and I have been planning this symposium for the past year, Chip and I have kept in contact, and I'm pretty sure we've spoken maybe every single week, because there was something new and some significant event that was happening in our country, where we just had to hop on the phone and talk about whether or not that should be included in the keynote speech, and as we all know, there's been a lot happening. So, I am just so glad that you were able to fit everything in into a one-hour keynote speech. I am so grateful to have you as a friend, a mentor, and a colleague. So, another round of applause for our keynote speaker, Mr. Chip Pitts.

Lauren Latham: Ditto. That's all I'm going to say. [laughter] Okay, so in all seriousness, we're going to take a 10-minute break while we get our third speaker set up, Professor Glenys Spence. She has a very exciting presentation for us. So please feel free to go use the restroom, get water, get more coffee, and then please be back in here, seated by 11. Thank you. And please submit more questions!

10 MINUTE BREAK

Lauren Latham: Hi everyone, welcome back from the break. I'm about to introduce Professor Glenys Spence. She is an Assistant Professor of Law at the University of Toledo College of Law. Since joining the faculty in 2024, Professor Spence has been teaching courses on contracts, business organizations, and international human rights law. She earned her LLM in Admiralty and Maritime Law from Tulane University Law School in 2016, building upon her earlier legal education. She holds a JD from the University of Pittsburgh School of Law, where she received a Certificate of Advanced Studies in International and Comparative Law. For her outstanding academic work, she received the Order of the Barristers Award from the University of Pittsburgh,

12. Matthew 25:35-40.

and the Harry J. Stiles Scholarship, and multiple Cali Awards from Tulane Law School. Please welcome Professor Glennys Spence.

PROFESSOR GLENYS SPENCE, CYBER LETTERS OF MARQUE:

**ADDRESSING THE GEOPOLITICAL RISKS OF PRIVATE CYBER WARFARE—
LESSONS FROM HISTORY AND INTERNATIONAL LAW**

Glenys Spence: Thank you so much, and good morning to everyone. I apologize for my voice. I'm very ill, but I thought I would like to join you all for a little while today. The title of the paper, of course, deals with cyber letters of marque, *Addressing the Geopolitical Risks of Private Cyber Warfare: Lessons from History and International Law*.

I think we can all agree that we are living in an era where the lines between digital crime and state-sponsored warfare have almost vanished. And so, this is the reason for this paper. Because of this problem, some members of Congress are seeking to authorize the President to, issue letters of marque, effectively resurrecting a constitutional relic, that has been created for the maritime space, and has not been used anywhere else but in the maritime space.

By the end of this year, according to reports, cybercrime will have drained \$10.5 trillion from the global economy. In fact, if cybercrime were a nation, it would be the third largest economy on Earth. But it's not just about money. In the last year, we have seen hospitals paralyzed, water systems hijacked, and scam farms in Southeast Asia operating as industrialized factories of fraud.

So, going to the agenda—here's what I hope to articulate to you today, and hopefully at the end, during the Q&A, I can expand more upon some of these. Part one, will address the bill that's being proposed by Congressman Schweikert from Arizona. It's HR4988, called the Cyber Bill. Then I'll get into the landscape, in terms of defining exactly what it is, we are talking about when we talk about cyber warfare, to delineate the lines between cybercrimes and cyber warfare, and the effects that it would have for both. Then I will discuss, the specific constitutional clause, the Letters of Marque and Reprisal, to see how . . . to show, I hope, that this is not the answer—to exhume a constitutional relic—even though the clause may be viable for such threats. Then, we will get into international law, looking at the risk of turning into a wild west, because we are talking about other nations' sovereignty, attribution of crimes to the United States, and of course, conflicts with the UN Charter. And in the last part, I hope to demonstrate that there is a better way forward. There are existing documents and instruments that we can harness and marshal in order to create a better path forward.

Part I: The Legislative Spark

So, what is the threat? The threat here, as I said, is the plethora of crimes. And of course, it is true that it is a threat to national security as well, and so I would be naïve not to acknowledge that we have a right to be concerned, because of these threats. According to, Congressman Schweikert, criminal syndicates who are backed by foreign governments are using cyberspace to prey on American consumers, particularly seniors. I think all of us can attest to that. But his concern is that we do not have the tools, the military tools available to combat this type of crime. And so, his resolution proposes that we sort of go after them by way of letters of marque.

So, here is the bill. I am going to see if I can click on it: the Marque and Reprisal bill. Let me go back here, just to try to show you that the text of it, I mean, it's very short and sweet, so that's good. But it says, HR4988: "To authorize the President of the United States to issue letters of marque and reprisal with respect to acts of aggression against the United States a member of a criminal enterprise or any conspirator associated with an enterprise involved in cybercrimes, and for other purposes." And so, it goes further, it's very short, again, it's called, the short title, "The Scam Farms Marque and Reprisal Authorization Act of 2025." And again, it's because of these findings by Congress; these are cybercrimes, threats to national security, threats to everything that we hold dear is the reason for the bill.

And so, Section 3 of the bill, expands further by showing how the bill would work. First, the president would need to have private parties post a security bond in order to determine that the letter of marque is being executed properly. That's really good, but it's not going to be enough given what we know about the history of these types of situations from the maritime field. And so, regardless to whether or not we think we are going to be able to do this by having safeguards in place, by posting of bonds, the problem is, anything that happens to violate another country's sovereignty, anything that may impact human rights will all come back to us. The chickens always come home to roost.

And so, my thesis is that H.R. 4988 is an anachronistic, dangerous, wild west solution that conflicts with international law. In fact, I could go even further and say it might have some conflicts even with our domestic law as well. But we are talking international today, so I'll stick with that.

So again, the reason for the bill is understandable. The fears that we hold—it is understandable. Most of us, including myself, really do not understand what goes on in cyberspace. I will be the last person to say that I am a technical type. I am really concerned with the international rule of law. I am concerned with human rights, and I am concerned about our national security, obviously.

So, again, these threats are real. Americans have lost tons of money in 2024 alone, over \$10 billion. Some of these cyber criminals operate in what we call a “sovereignty gap,” where traditional law enforcement cannot reach them.

Foreign governments, as we know, are often complicit or corrupted by the profits made by these cybercriminals. They are highly coordinated, so-called “Pig butchering scams,” and [they use] all kinds of deepfakes driven by AI to commit these atrocities on all of us.

Moreover, there is a lot of human trafficking wrapped up in all of these type of scams as well. One statistic says that these scam farms often link to states. Right? Particularly, one case study—and there are several of them—comes out of Southeast Asia, as you see on the map here, this entire area. We have a lot of different of scam farms going on in this area, which of course implicates governments, for example, China, and so forth.

Part II: The Cyber Landscape

I’m moving on to Part II to show the sort of technicalities in the definitions.

So, we need to categorize when we talk about going after cybercrime—combating cyber-attacks and waging cyber warfare—it is important to categorize these threats, not so much by the technology, but by the legal impact. And that’s really the basis of my paper. We have to distinguish between cybercrime, cyber-attacks, and cyber warfare.

Why is that important? Because depending on how these attacks are defined, then we will have to then meet each different type of attack with the requisite degree of force. And so, cybercrimes, according to, the experts. For example, Professor Oona Hathaway wrote a really good paper with these definitions.

Cybercrime entails private thefts, so identity thefts and so on, credit cards, you name it, hacking. “Cyber-attacks” really is an interruption of services, which is, again, it’s more, sustained; [these] have the potential to impact utilities, transportation services, and so forth. And cyber warfare, these are really acts of force which actually target the sovereignty of another nation.

And so, the bill [H.R. 4988] really is struggling with this legal friction, because the Bill sort of treats all of these as a singular criminal enterprise.

And so, by granting letters of marque for broadly defined cybercrimes, the bill, as currently written, risks a disproportionate response. It’s actually authorizing privateers to act in ways that international law usually reserves for state military actors under the UN Charter, and that is going to be very problematic for us, as I said [earlier].

This bill, right now . . . I think it has been submitted to the House Foreign Relations Committee. There has not been any movement on it, but let’s assume

that there might be some movement, because President Trump, in his early days after inauguration, did mention letters of marque to go after cartels. He has done a lot of unilateral executive actions, and so it's not too far-fetched that he might see this as something that he could also do. So, H.R. 4988 can gain traction, because again, the research by the tech giants, like Cisco, Microsoft—it's out there that we have reached a stage where we are not ready to really combat these types of [cyber] attacks. And so, the letter of marque is effectively an attempt to outsource our national security to a few private experts.

Part III: The Historical Analysis

So, why is this problematic? Why do we care? We have to protect our national security, [and] we are the leader of the world, [so] we need to sort of be more proactive. All of these are good rationale[s] for folks who are proponents of this type of bill.

But I think it is important to understand the impact that issuing letters of marque for cybercrimes or cyber warfare [has and] why it's problematic. And to understand that we really need to wrestle with the history of the Letters of Marque and Reprisal Clause [of the U.S. Constitution].

Originally, in medieval times, letters of marque were not the type of, sort of offensive instruments that we understand them to be today, or understand from Hollywood movies, and so forth. Historically, letters of marque were really self-help tools for medieval merchants to recover stolen goods in a time when there were no international courts.

There were these itinerant merchants going from place to place, subject to theft by the crown, and so forth. And so, in a way, letters of marque were a way, that, these medieval types would engage in self-help.

Letters of marque only took on, I should say, a more sinister cloak when states began to use them to wage so-called "imperfect warfare," meaning, war without a formal declaration.

And so, if you look at this, little tiny chart, and I apologize for that that I have here, I tried to show the difference between the medieval rights-based letters of marque and what we in the modern world have come to know as more sort of a swashbuckling, piracy, countries going after these folks for some kind of military [purpose], [type of] defense. So, in terms of, the rights base, it was more of a proportional, internal kind of instrument to neutralize certain threats, to give people their property back, [and] things of that nature. If we pivot to the modern age, it's more of a retaliatory, asset-seizure based [mechanism]. The goal in medieval times was to continue commerce, to maintain some integrity, while in the modern age, the goal of letters of marque is to deter and impose costs on adversaries.

In terms of the authority, in medieval times, letters of marque, again, were derived more from a property rights standpoint, protection of the self, whereas in our time, particularly for us in the United States, this is something that is explicitly granted by Article 1, Section 8, [of the U.S. Constitution] so we have the authority to do so [issue letters of marque] whenever we want. The main risks in medieval times were [associated with] vigilantism kind of behaviors [and] escalation of different skirmishes, maybe in the medieval markets.

Today, however, the risks are state-sponsored cyber privacy, and of course, the violation of international laws. And so, I'm sure all of us in the room have heard about piracy and privateering of Sir Francis Drake. We have seen in the modern times Johnny Depp, [and] all of these things. And so, letters of marque evolved from that property-based rights, sort of, concept, to privateering. Because, again, privateering—issuing letters of marque—[this] was a critical legal document that would distinguish the good guys from the bad guys. That is to say, privateers from pirates.

And so, countries, of course, the maritime powers, including ourselves, the young United States, saw letters of marque as a way to protect their national security, to protect commerce, and so on and so forth. But without a huge navy, they resorted to hiring these private persons to do the job. And so, these privateers were not paid a salary.

Whatever income they had came from the sale of captured ships and cargo—called prizes—and so that was the incentive for them to hunt down these ships on behalf of their country. And so, captured ships were brought to a prize court for legal condemnation. Proceeds were split between the government, the owners of the ships, the investors, the captain, and the crew.

But economically, it worked, because privateers could actually devastate the economy of the enemy. In fact, we used it during the American Revolution. It was even tried during the Civil War by the belligerent South, where President Lincoln was being forced by Congress to issue letters of marque to combat the privateering in the South, but President Lincoln, of course, did not do so. But again, it's a very effective tool for maritime warfare.

And for a young nation like the United States, historically, privateers with letters of marque served as a shadow navy, and to be honest, it really allowed a young nation to thrive and to be more resilient. So, it was really needed at that time. No question about it, the young nation [the United States] needed privateering. We needed Congress to issue letters of marque in order for the nation to survive.

But, as time evolved, the powerful nations around the world, France, Spain, you know, the [and other] maritime nations decided, after, I think, after the Crimean War, that this was not the way to go.

And so, in 1856, they all came together in Paris and decided to outlaw privateering.

The different parties included the United States, [and] importantly, for my paper and what I'm trying to promote, the United States did not sign this declaration, because in 1856, we still did not have a really great navy as we do today, and so the United States wanted to make sure that we would maintain the power to issue letters of marque if it became necessary, because we needed a supplement for our naval exploits.

And therefore, the United States has never signed the Paris Declaration. However, the question arises as to whether or not this declaration to outlaw privateering among civilized nations—as we say in international law—has ripened into custom. And so, because of this, assuming (and we don't know, that's a matter of debate) it has ripened into custom, if we were to, go ahead with H.R. 4988 and revive the letters of marque would this, again, violate international customary law? That's something I hope to flesh out better in the paper.

So just to remind us [of] civics, here is the clause we're talking about [referencing Article I, Section 8, Clause 11 of the U.S. Constitution]. I call it a constitutional relic, but again, as I said previously, it still has currency, because it's in our Constitution, and we have never signed on to the Paris Declaration. Article 1, Section 8 says that "Congress shall have the power to declare war, grant Letters of Marque and Reprisal, and make rules concerning captures on land and water," which can give the president an inroad to issue letters of marque for cyber warfare. It empowers the federal government to adapt to modern challenges—I mean, that's one argument.

It really is a cornerstone of American law, and therefore, it is not too far-fetched that, we can actually do this [issue letters of marque]. But if we do, what's at stake? Again, it is a danger that we are courting, because we're attempting a physical seizure, right, to a sovereignty-sensitive digital world. It's not like, in the War of 1812 and the 18th century and so forth, where we were able to be on the ocean, seizing the ships of the enemy. This is all different. In 1812, seizing a ship was a localized event. But in 2026, seizing a server in Cambodia could trigger a cascade that can take down a regional power grid, and it could also violate the UN Charter's prohibition on the use of force. So that's what's at stake.

We are colliding with the idea of sovereignty in the international system. Those of us who treasure the international legal system [and] world order, we need to keep fighting and writing and talking about these things. Article 2 of the UN's Charter says, "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state," right? So again, when we delegate these things to private actors, we

risk being held responsible for internationally wrongful acts. We risk escalating these tensions in the international system.

A case in point is a comparison to hiring private military companies during the wars in Iraq and Afghanistan. We have [had] a plethora of problems that came out of that.

We couldn't really hold a lot of these private military companies accountable for the abuses in these countries and so think of what can happen when we throw mercenaries into the digital space to perpetrate acts of war on other countries.

And so, shouldn't there be a better way? Yes.

Part V: Alternative Governance Models

Currently, we have a few instruments out there. They're not binding instruments, but they have enough fodder to help us build a better system to combat these state-sponsored, and other, hackers infiltrating our national security. The Montreux Document is one of them, and on top of that, the International Code of Conduct for Private Military Security.

So rather than reverting to unilateral 18th century privateering, we must strengthen these current multilateral frameworks. We cannot achieve security in a world without borders—which is cyberspace—through digital letters of marque.

To do so is to invite retaliation; [to do so is] to attribute crimes to the United States, and so we must adopt a better way. Three pillars, that we need to really strengthen are: state oversight, international law, and of course, private industry certification.

The Montreux Document is a pertinent framework. Again, it is private; it is a framework for private military and security companies who operate in conflict zones, but it has some very good practices. Particularly if we're concerned about international humanitarian law, we can start with these existing documents, again, accompanied by the International Code of Conduct [and] professionalizing the private security sector. Instead of looking for bounties—which incentivizes reckless behavior—we can require private firms to undergo more training, hire more of these experts and technicians, [and] have them undergo more human rights training before we can even talk about using this type of military letters of marque and reprisal to combat these problems. We also have the Tallinn Manual, again, another good [tool]. It's not perfect—nothing in the international system is perfect—but we can build upon these things, and then—and *only* then—can we hope to move beyond the relic of letters of marque. An instrument that was built for the sea cannot operate in this [cyber]space. The complexities of this [space] demand that governments build on transparency and stability.

We cannot resurrect this obsolete relic, even if it's still a viable clause in our Constitution, but instead, we have to lead and must not resort to this wild west of the 18th century.

Thank you so much for listening. I hope to have some questions from you later. Thank you very much.

Lauren Latham: Thank you, Professor Spence. We will see you in about 40 minutes for the Q&A.

Glenys Spence: Thank you.

Shibani Mody: I am honored to introduce our final speaker of the symposium, Ambassador Feisal Rasoul al-Istrabadi. Ambassador al-Istrabadi is the Michael A. and Laurie Burns McRobbie Professor in Global Strategic Studies, Professor of Central Eurasian Studies and Founding Director of the Center for the Study of the Middle East, a national resource center in the Hamilton Luger School of Global and International Studies at Indiana University Bloomington. He is also an affiliate professor of law at the Maurer School of Law.

Prior to his diplomatic appointment, Ambassador al-Istrabadi served as a legal advisor to the Iraqi Minister for Foreign Affairs during the negotiations for the United Nations Security Council Resolution 1546 of June 8, 2004, which recognized the reassertion by Iraq of its sovereignty. He was also the principal legal drafter of Iraq's interim constitution, the law of administration of the State of Iraq for the transitional period, and principal author of its Bill of Fundamental Rights.

Before contributing to the reconstruction of Iraq, Ambassador al-Istrabadi was a practicing trial lawyer in the United States for 15 years, with approximately 70 civil trials in federal and state courts focusing on civil rights, employment discrimination, and constitutional torts. He also served as a Senior Legal Fellow for the Legal Reform and Development in the Arab World at the International Human Rights Law Institute at DePaul University's College of Law in Chicago. In 2015, he was elected as a member of the American Academy of Arts and Sciences, and he is a member of the Council on Foreign Relations.

Ambassador al-Istrabadi brings both intellectual rigor and real-world wisdom to our conversation today about security, diplomacy, and American power. His insights on where America stands today and the choices we face could not be more timely.

Ambassador, we are deeply grateful that you have taken the time to be with us today. Your voice, your experience, and your wisdom are gifts to this conversation and to all of us here. I personally find you extremely inspiring, and

you are incredibly humble, despite having such a wonderful career and resume, and I truly enjoyed getting to know you these past few months.

Thank you for sharing your wisdom and experience with us. Please join me in welcoming Ambassador al-Istrabadi.

AMBASSADOR FEISAL AL-ISTRABADI, AMERICA ALONE: SECURITY, DIPLOMACY AND U.S. POWER

Ambassador al-Istrabadi: Good morning, it's still morning. I, actually have to admit that this is an operation to infiltrate the McKinney School by the Maurer School of Law. And I can report to Dean Ochoa that it has been a successful operation insofar as it failed to come to the attention of the Dean of the McKinney School. But I'm privileged to be here.

My academic mentor, the late M. Cherif Bassiouni, who chaired the UN conference in Rome that resulted in the drafting of the Rome Statute of the International Criminal Court, was a graduate of the McKinney School of Law, so it is a privilege for me to join you today. However, the privilege should have been that I should have been in the audience rather than at this podium.

And the reason that I am standing at this podium is because the speaker who was first invited to be here is not a United States citizen, and that individual feared that an honest academic discussion of the current state of affairs in the United States might cause consequences to that individual, and [so] that individual withdrew from this conference. And that's . . . really sad.

But it is a privilege for me to have been asked to be here, but as I said, I should have been in the audience, as I would have been privileged to be. I want to thank the organizers who did invite me to join you—Ms. Mody and Ms. Latham.

And so, the article that I'm writing has an (I always want to use the word aphorism, and that's wrong) epigram, which I have taken from [Oscar Wilde], for those of you who are [familiar]. My late mother was a professor of Shakespearean drama and English literature. And so, we grew up on Shakespeare and English literature. I have an epigram from Act Three of Oscar Wilde's *Lady Windermere's Fan*: "[t]he man knows the cost of everything and the value of nothing."

I'm afraid I'm less optimistic than my colleagues, in terms of where the United States stands now. Let me give you a very brief history. I know time is short.

Historical Foundations: The World Wars and U.S. Power

But, let me start us—very quickly, I promise—at the end of the First World War. The United States emerged at the end of that war as the predominant power in

the world. The British Empire probably reached its zenith after the First World War in terms of geography, but it had lost the economic power.

This is something some of my colleagues disagree with me on, but I think, obviously, I think I'm right. It [the British Empire] had lost the economic power to maintain it [its zenith], and so it started to lose it right away [at the end of the First World War]. And within 20 years, well, in any event, you know the history. It loses India after the Second World War and so on. After the Second World War, it's absolutely incapable of holding on to the empire.

And so, for instance, the United States dollar in 1920 becomes—for the first time—a reserve currency. Now, the story is somewhat more complicated than that, and I'll come back to it, because it turns out the pound sterling reemerges as a reserve currency in the 1930s, at least according to a couple of economists whose works I relied on.

Now, I have every degree you can get in law in the United States, which is three of them. I'm not an economist. But also at this stage in my career, there's a reason I am affiliated at the law school in Bloomington, and that is [because] I'm more interested in—if I may use a \$10 word—the interstices, [or] the space between law, policy, and politics, and that's where I will be speaking to today.

I should also say, just for the purpose of saying it, number one, I am a natural-born citizen of two countries, including this one, so I also speak as a United States citizen by right of birth, by virtue of where I was born. I am a natural-born Iraqi citizen, which is why I became Iraqi ambassador to the United Nations, by virtue of to whom I was born.

But, I am an IU employee. These are my own thoughts. I'm a United States citizen exercising his First Amendment right and his right of academic freedom. I have to make that disclosure because the Legislature thinks that every time I open my mouth, you think I'm binding the state of Indiana by the power vested in me, as a humble professor in Bloomington.

Be that all as it may, so the United States, which emerges as a predominant economic power decides to revert back onto itself. Isolationism is not new.

By 1939, when the Second World War started, the United States had the 18th or 19th, depending on who you listen to, largest army in the world. Portugal had a larger standing army than the United States. [This is one of] the consequences to America when it comes in upon itself, I would argue, but I don't have time to develop that argument now.

In any event, the U.S. did not join the League of Nations, which, of course you all know was actually [President] Woodrow Wilson's idea. And in any event, in terms of the world order, this is significant. The League of Nations did not actually outlaw the use of force. Professor Spence kindly put up Article 2.4 [of the UN Charter], which I also rely on in my talk, about the renunciation of the

use of force in international relations. The League of Nations, and this is sort of a defect; there are many defects of the League of Nations that the United Nations sought to cure, however imperfectly. And in actual fact, if you look at Article 12 of the League of Nations Covenant—I wouldn't read the whole thing there—I will simply tell you that what it has is a cooling-off period of 6 months. You're welcome to read it if you like, but it just has a 6-month cooling-off period before you go to war with another country. It didn't outlaw the use of force, and in fact, there's a contemporaneous literature I cite in the article from 1925 about whether when Italy bombarded one of the Greek islands and occupied it, whether that even counted as an act of war under the League of Nations Charter. It's very interesting, this is in a footnote, but in any case, there was a treaty that sought to outlaw war, the Kellogg-Briand Pact from the 1920, I think. And although it had ratification by a large number of states, of course, there weren't a hell of a lot of states around in 1920, [because] most of Africa, large swaths of Asia were, colonized. So, now that's the end of the First World War, come to the end of the Second World War, and the United States took precisely the opposite approach, although, of course, it does demobilize, but it doesn't disband its armed forces as it did after the first World War.

The Postwar Order: U.S. Leadership, International Institutions, and "Soft Power"

Now, to be clear, it is one of the theses of my talk, my article, that the greatest beneficiary of the current system—both the political and the economic systems—that the greatest beneficiary of those systems has been the United States of America, and that's not an accident, it's the United States that designed the system.

So, what you end up with is that the United States remains engaged in the international community, and more than that, it designs the system. Even while the war is going on, there are two conferences that the United States convenes in the United States with its allies, or at least some of them. One is on the magnificent estate—it's a wonderful museum in the heart of Georgetown—Dumbarton Oaks. And from that, you get the United Nations. There's another meeting, held at Bretton Woods,¹³ in which U.S. dominance of the economic system is codified.

And it's mostly between the U.S. and three or four or two [countries], depending on the conference we're talking about and when exactly. You know, the UK and the Soviet Union are always at these conferences. Sometimes China's there, sometimes France is there. [At these conferences], you get these systems set up, and so what you end up with is two things. One is the United Nations, where the power is diffused among the so-called victorious powers, which are the five permanent members today on the UN Security Council, which each have a veto;

13. In New Hampshire.

the United Nations are the states that were allied with the United States and the other four victorious powers in the Second World War. And that is a reason why, for instance, Japan, Italy, [and] Germany are not founding members of the United Nations, because they were and are referred to currently in the Charter, it's never been amended out, as the "defeated powers." Be that as it may, the most significant contribution to international law that I think the UN Charter made, and there are several, but one of [the provisions] actually outlaws the use of force. So, you look at Article 2(3), Professor Spence referred to Article 2(4), which you see is also there: "[a]ll members shall." Now, "shall" in international instruments means exactly the same thing that it means in your lease, or your city ordinance, or your state or federal statute; "shall" means *must*, even in international law. If it's a treaty, it uses the same language, at least in English, between may and shall. So, "[a]ll members *shall* settle their international disputes by peaceful means in such a manner that international peace and security," that's a talismanic phrase to invoke the power of the Security Council, "are not endangered."

There's one point I didn't say, and I think it's important. The United States was so powerful at the end of the Second World War, [that] 60% of the world's economy was the United States's economy. Think about what Europe looked like in 1945. It was the only power that had atomic weaponry, and that would remain the case, if memory serves me, until 1949, when the Soviets exploded their first atomic bomb, much to the surprise of [President] Truman. And so, the United States could have dictated terms in 1945. [But] it didn't. Now, it [still] came out on top. Okay, I know that. But what it did, for instance, in establishing the United Nations Charter, it didn't prepare a charter of the Board of Peace and say, sign here, and by the way, no reservations are allowed, as if this document is a treaty.

Instead, it convened a conference in San Francisco of the victorious powers plus their allies, the United Nations. And a document that had been drafted during the war that was 3,500 words long becomes, as a result of the contribution of the other 50-some-odd countries sitting around the table, a document that we have today that is 10,000 words long. In other words, the United States engaged with the international community to develop the legal institutions that govern, at least theoretically, the political process.

But I'm going to have to go much faster than this. Right? But that's an important point. That's, by the way, what political scientists, and I am not one, call "soft power."

Article 2.4, I won't go over again, because Professor Spence very kindly did. But again, the point is, it [Article 2.4] is a prohibition. I will point one thing out. Notice, please, in clause one of paragraph 4, "[a]ll members shall refrain in their international relations from the threat or use of force." The *threat* to use force is prohibited in the Charter. Not just the *use* of force.

Now, there's an exception, because the United Nations and the drafters weren't utopians in the sense that they understood this is a real world we belong to. And I myself have been a practitioner of the dark arts of realpolitik. And so, the drafters created two exceptions to the doctrine of the prohibition on the use of force. The first is Article 42 of the Charter, which empowers the Security Council to authorize the use of force to carry out the decisions of the Security Council, which means the five permanent members have to agree at least to a sufficient degree that none of the permanent members vetoes this authorization.

So, [the] prohibition on the use of force, [has an] exception: authorization by the Security Council. As an Iraqi, I am well aware of this exception because it was used in 1991 to dislodge Iraq from Kuwait, from Iraq's illegal occupation and purported annexation of Kuwait. The United Nations also used this power in Libya against the previous regime there. That's one exception.

The second exception is the one you expect, and it's enshrined in Article 51 of the Charter, which is a lot of verbiage, you're welcome to read it. It amounts to self-defense, which is considered an inherent right of states. The Charter did not grant to states the right of self-defense. That is an inherent right of individual and collective self-defense. Kuwait engaged in collective self-defense in 1990 and 1991 when it asked the international community for assistance. This is actually an interesting question: could the United States have led a coalition into Kuwait to dislodge Iraq under Article 51, even without Article 42 authorization? And the answer to that, the probable answer to that, is absolutely. Why? Because Kuwait had sustained an armed attack.

If an armed attack occurs—once an armed attack occurs—the state has the inherent right of individual and collective self-defense. Which means the state can ask other states for help.

Just a very quick note, in case you're wondering, a state is not required, you know, [to sit idly]. At Pearl Harbor, if the Charter had been enforced, the United States would not have been—while Japanese zero fighters were going overhead, but no actual bomb had fallen yet—the U.S. would not have been required to sit there with its arms folded and say, this is going to be a shame.

If the attack is imminent under customary international law, then the state soon to be attacked has the right to engage in what is called anticipatory or preemptive self-defense before it has sustained an armed attack. And that, by the way, and this is very interesting if you're interested in American history, goes back to the Caroline Affair (the Caroline being a ship); there was some rebellion, if you can believe it, in Canada, and the Brits come into New York State and burn a ship called the Caroline. It sinks, they kill some people, and this becomes a kerfuffle between, His Majesty's government and the U.S. Secretary of State at the time. So that doctrine sort of sets the law on what is required; and what imminence means is that the necessity of using force is "instant, overwhelming, and leaving

no choice of means and no moment of deliberation.”¹⁴ So, if you’ve got a week before the Pearl Harbor fleet gets there, that’s not an imminent attack.

In any event, now, returning to the story: the United States is the undisputed world hegemon in 1945, a position it would occupy again, arguably, after the fall of the Soviet Union, when Jacques Chirac called the United States “the world’s only hyperpower,” and he wasn’t speaking in a complimentary fashion. But in any event, political scientists have been trying to make sense of why countries in Western Europe did not band together to balance against this power.

International relations theorists posit that, a state like the United States in 1945, and again in 1980 (whatever it was, 1989 or 1990) may be more powerful than any other state.

But it is not more powerful than all states put together.

And so, the tendency, when hegemons arise is for other weaker states to band together to balance. Instead, the Western European states, which, it is important to remember, are technologically the peer of the United States. Now, we have military capabilities, nobody else has, I know that. Especially, logistics. Our military logistics cannot be, and I’m no expert on military matters, but I know that our military logistics cannot be duplicated by any other country in the world, or any combination of countries. I’m aware of that. But technologically, it’s not technology that prevents the European allies from doing that [banding together]. It’s the willingness to spend the money to have that kind of worldwide reach. So why didn’t these countries balance against the United States? They have the economies collectively, at least they do by the 1960s, and they have the technology to be able to do it.

They didn’t. Instead of balancing, they did what—rather an elegant word coined as far as I know, by political scientists—they *bandwagoned*, or they engaged in bandwagoning.

They got on the American bandwagon. Well, because if you’re West European, never mind if you’re from the developing world, that’s a whole different story. But if you’re West European, the United States is a benign hegemon. I come from the developing world. I lived in the developing world. Perhaps I’m the only one here that grew up under a fascist dictatorship as a child. So, if you’re a West European, it’s a benign hegemon. In fact, the United States builds the European economies after the Second World War. It’s a point I’ll return to in a moment.

So, they didn’t [balance against the United States]. They went along. They supported American hegemony. Well, that turns out to be important, too, because it isn’t the raw power of the United States that forced the Europeans

14. Ambassador al-Istrabadi is quoting a letter written by U.S. Secretary of State Daniel Webster in 1983.

against their will, with teeth gritted to support the United States. They did it voluntarily. The late Harvard political scientist, former dean of the Kennedy School, former Assistant Secretary of Defense, I think, in the Clinton Administration, Joseph Nye, in his monumental work from the 70s (I think 1977, if memory serves) [discusses] the limits of American Power. Well, actually, this is [from] an article he wrote later, but there's a book by a similar title in 1977, [in which he] says that the impact of American preponderance—the weight it has—is softened when it is embodied in a web of multilateral institutions that allow others to participate in decisions, and that act as a sort of world constitution to limit the capriciousness of American power.

And so, if you're in the club—and granted, not all countries are in the club, but if you are—the fact that the United States is this overwhelming military force is abated by the fact that it is participating in the rulemaking, and doesn't always, but often—maybe even mostly—abides by the rules, which, by the way, it mostly wrote.

Yes, it violates the rule. Yes, you have the occasion. People always like to start with Iraq. People forget that in . . . because everybody thinks—well, I'm in a minority that thinks the Iraq war was legal, [but] we won't debate that here. But if you want to [debate] a truly illegal war, you want to go to Kosovo, 1999. People don't mention that because Kosovo is very popular with the international community, with human rights activists. There is zero justification legally for the war in Kosovo, and in fact, the United Nations Commission on Kosovo—hired by Kofi Annan—said it was illegal, but legitimate. Try that as legal advice to your client.

A state comes to you and says, I want to launch a war here. Well, it's probably illegal but legitimate. What the hell does that even mean? I mean, as a lawyer, right? So, in any case, I digress.

So instead, what you get is a system of alliances with the West European states, which supports American leadership, shall we call it, if we don't want to keep using the word hegemony. And eventually, the U.S. develops a system of alliances that sort of encircles the Soviet Union and all that during the Cold War. All right.

Whereas the Soviets had used force to build their European satrapies, the American side was an empire of persuasion. So, you have, of course, the Soviet Union, famously—I actually remember that Prague in 1968, I'm old enough, I regret to say to you, to remember that—they sent forces in 1956 into Budapest, and in 1968 to Prague to keep those states within the Warsaw Pact.

Can you imagine the U.S. doing the same in London or Paris or Berlin to keep those states in? That was the power of the United States, to make states which could have banded together to balance against the U.S., to instead want to be a part of the American system, of the American empire, if you will.

Contemporary Challenges: Economic Policy, Institutional Erosion, and the Future of U.S. Leadership

So let me talk very briefly, because I know so little about the economic system. One of the things we've been doing is willy-nilly and quite capriciously, applying tariffs around the world. We apply tariffs against Canada because we have a trade deficit with Canada. By the way, we have a trade deficit with Canada, because we have to buy energy from Canada. One of the reasons we have to buy energy from Canada, is because my wife and I own two cars, they're both gas guzzlers, [and] we like them. We don't drive Geo Metros (if they still make those), okay? So, you have to pay a price for that.

We applied tariffs against Brazil, a country with which we not only have a current trade surplus but have had a trade surplus for two decades. Why did we apply tariffs against Brazil? Well, because the Brazilians were trying their former president—who tried to make a coup against the Brazilian constitution to remain in office after he lost his bid for re-election—and he was a Trump ally.

Canada, we do have a trade deficit with. Remember, Canada has a population of, say, 40 million, 30-some-odd million. We [in the U.S.] have a population of 380 million. They're literally 10% of our population. They purchase, per capita, seven times more goods from America than Americans buy from Canada. How much more can they buy from the United States to zero out the deficit? They're one-tenth our population?

We imposed tariffs on Bangladesh, one of the poorest countries in the world, because we have a trade deficit with Bangladesh. This is irrational. It is non-economic. And it is to the detriment of the United States.

There's an article I cite in my article, in a footnote (I love footnotes. I feel scholarly when I have footnotes), the title of which is, "Why You Shouldn't Worry About the Trade Deficit." Now, I don't know if this information is correct or not, it's written by an economist, whatever the hell his name is. But this is what he says—[r]emember, the United States is the reserve currency of the world, it's the trade currency of the world, so countries have a trade surplus with us [and] we have a deficit—[we] shouldn't worry about that, because for every \$100 in trade deficit the United States has with other countries, so a \$100 trade deficit, \$98 of that 100 comes back into investment in the United States. They are buying our debt. They buy our dollars, and you have to have dollars in circulation for them to be able to do that. And then there's direct foreign investment in the United States. Why? Because the United States is a safe harbor. Why are we a safe harbor? Well, because we have things like the reserve currency, we have a country with an independent judiciary and an impartial judiciary, where contracts are enforced, where the government can't just seize your bank accounts. It's got to go into court—march into court—and get an order and abide by the law.

These are the very institutions we are dismantling. And that allows our interest rates to go down. Please don't ask me why—I'm not an economist. But I got citations for every goddamn word I'm saying. Okay? And that allows you and me to get a mortgage to buy a house at a lower interest rate. There's a direct relationship to all of these things. This is why I argue we have been the greatest beneficiaries of the system—let you in, spoiler alert—that we are destroying in fact.

I never in my life thought I would hear a Prime Minister of Canada say what Prime Minister Mark Carney said in Davos. He is telling you the system is finished. He's not saying we need to repair the system, [or] we need to go back to the way it was. He's telling you it's over! We need to create new institutions. And what he says is, we always knew that the U.S. wasn't really bound by the rules.

I mean, think of the 1960s as a prohibition on the use of force. The U.S. would send troops into—especially when LBJ was president—Central America as if it was a parade ground in Washington, D.C. Of course, the French would do the same in Africa. So, you know. But there were rules, and then people would at least have to blush when they did things or find a justification under the existing law for why they did what they did.

But the system is over. And Canada, he [the Prime Minister] said, is not going to choose between the two hegemons. He didn't name the U.S, he didn't name China. But he said, we're not choosing between the two. We are going to, we the middle powers—which is to say, Canada is going to join the Europeans—are going to create our own system.

In other words, Europeans, if they follow Mark Carney's lead, are going to balance against the United States, and hedge between the United States and a rising China. This is a new game, if it happens. Maybe it's "talk" to try to bring sense back to the United States. But I don't think so.

Now, this turns out to be Joseph Nye's last article that he co-authored with his Harvard colleague, Robert Keohane. It was published last year, in the summer, in *Foreign Affairs*—which is the leading publication on U.S. foreign policy (and I don't say that because I and my colleague are elected members of the Council on Foreign Relations, which publishes *Foreign Affairs*).

"But an open society that allows protests and dissent can be an asset, but the soft power derived from American culture will not survive the excesses of the U.S. government during the next four years if American democracy continues to erode and the country acts as a bully abroad."¹⁵ This is 2025, an article in 2025.

15. Ambassador al-Istrabadi is quoting the article, "The End of the Long American Century: Trump and the Sources of U.S. Power," written by Keohane and Nye and published in *Foreign Affairs* on June 2, 2025.

So, what do we have, and why do I say, if Keohane and Nye are correct, “the game is over”? If you put it together with what Connie’s saying, I mean, you had the European allies, the NATO allies—who have fought and bled and died with the United States, some of them in every war the United States has fought since 1945—gather a military force and send it to Greenland, to send a message to Washington. I don’t think there’s a going back to the old camaraderie after that.

I’m close to the end of my time, so I’ll bring this to a close.

In October of 2024, before our election, a French Minister, cabinet minister, Benjamin Haddad was a junior minister at the time. Let me tell you, as a former ambassador, ambassadors and junior ministers and senior ministers don’t freelance it. That’s not the job. We reflect policy, not our personal predilections. If you want to vindicate your personal views, don’t go into diplomacy, don’t go into government. Benjamin Haddad, the French Minister for European Affairs, said, quote “[w]e cannot leave the security of Europe in the hands of voters in Wisconsin every four years.” This is not a rejection of Donald Trump, which, if the United States decides in 3 years, maybe we should go another way, we can go another way. This is an understanding that half the voting electorate in the United States fundamentally no longer believes in the value of the European alliance and is willing to elect a president willing to destroy that alliance.

This problem *will not* be cured in 3 years if you think it should be cured, and if you’re happy with the way it’s going, great, do it again. This is permanent—as permanent as anything is in the world. In the meantime, all these lofty pronouncements about who we are, and what we stand for, and our soft power, and how when we stand up for human rights, it makes us a “soft power.”

Well, ladies and gentlemen, These, are the images the world is seeing. Children being arrested. Our citizens executed in daylight, on our streets. Unarmed. Even Saddam Hussein, in whose Iraq I spent my childhood, knew to do this sort of thing in the basement of prisons away from prying eyes. These are the images our European allies are seeing. These are the images our enemies are seeing (our adversaries, pardon me). These are the images dictators around the world are seeing.

I want to end with two caricatures. They’re both from France.

This is the cover of *Charlie Hebdo*. Now, *Charlie Hebdo* is a left-wing publication. You could call it, if you like, a radical-ish publication consisting of iconoclasts. Their job is to fling mud on the establishment. So, you could dismiss this.

[But] that, ladies and gentlemen, is from *Le Monde*. In France, *Le Monde* is the establishment. This is our image. And if you think we’re going to go back to the system we had, that the countries that have stood with us and have repeated the

language of liberty and freedom and human rights are going to forget all of this, I hope you're right. But I don't think so. On that cheery note, thank you very much, ladies and gentlemen.

Q&A PANEL WITH THE SPEAKERS AND EDITORS

Shibani Mody: Thank you so much, Ambassador. That was a truly impactful presentation, and while the reason you had to step in today is a very sad one, I think I can speak for all of us when I say that we're really grateful that you are here, and that we got to hear from you. So, thank you, another round of applause.

Lauren Latham: Okay, so we're going to do a short panel, about 20 minutes, and then we're all going to go out there and eat lunch. Sound good? Okay, let's invite our speakers up, and then we'll get started.

Shibani Mody: Okay, our first question is for everyone. How do you believe AI will intersect with the First Amendment, if at all?

Scott Kosnoff: I really don't know, I have to say. You know, you worry about AI slop on the internet crowding out legitimate speech and discourse. But, beyond that, I don't know. What do you guys think?

Ambassador al-Istrabadi: I use a fountain pen.

Chip Pitts: Okay, I'm actually a natural optimist, and so I am optimistic about this, if we can do what you suggested. If we can have the guardrails on so that the, you know, the AI slop, et cetera, doesn't crowd out, but it is already, you know, just phenomenally, more advanced. Law does have a problem with keeping up with it.

You know, I was CEO of this AI company and general counsel of another one, and we sold our product to, you know, to different people that licensed it. One of them was Lehman Brothers, and that was shortly before the world financial crisis, because you just don't know what happens in that black box. Now they're trying to enhance that, you know, through interpretability and reach in and know what happens a little bit more. And, you know, at this point, with the exception, you know, of some accidents on, like, ChatGPT's side, and the sometimes horrible things with Grok, Elon Musk's engine, where, you know, it was not only saying it was "Mega Hitler" at one point, but it actually is now being investigated by the EU authorities, and France in particular, for having, you know, the ability on a simple prompt to disrobe women and have child sexual abuse materials. So, it's just, you know, it's irresponsible. So, we need guardrails on that. If we can stop the bad speech from crowding out, you know, there are not utopian, but quite optimistic scenarios.

I participate in the Stanford Medical Center's regular meetings weekly, and it is amazing what AI is doing. And if you have people alive, they can speak better.

And so, in clinical medicine in India, for example, and other places, agentic AI is doing remarkable things by taking, you know, the world's knowledge, and it is creating new cures, it's creating new clinical procedures, it's doing great stuff. But fundamentally, the answer to this question is, if we have the right approach, which isn't an avoidance approach, you know, where you only use a fountain pen, then you won't be able to participate in this, and I'd urge you, and I will work with you on this if you want. You know, it's an amazingly powerful engine, as those of you that know it know. You can also have an approach that is, you know, really, sort of cheating, you know, where you're losing your intellectual capacity and your creative capacity by relying too much on these powerful instruments. And that's a real risk.

And then I think, thirdly, though, the approach that's more optimistic that we're hoping for, and that, you know, the CEOs [of these artificial intelligence companies] are different, but Anthropic's Claude [and CEO Dario Amodei] is probably the best on this. You know, they're trying to use it in a pro-social manner, right? So, you have an *augmentation* of human capabilities, you have the ability to partner with AI so that it can create really original expression.

Now, in my life, I've been looking at all the things that technology can do that are supposedly, you know, humans will never do. So, as a teenager, I sold automated chess machines, and in Neiman Marcus, at the retail store. And then I saw that that line was crossed, just through brute force learning, and then you had expert systems, genetic algorithms, evolutionary computing, and eventually, we get to the point now where tech can pass the Turing Test, and you can actually have AI be quite creative, and it's amazing. It can, you know, do amazing art, and they've had this now for a year and a half on display in major museums. So, this idea of augmenting us to come up with creative, you know, techniques, if used properly, it can complement humanity. And if we have it doing other things that allow us to, in a really utopian scenario, be freed from work and some of the things that some of the CEOs are pushing—I don't think that's going to happen . . . but we really have a job [to do], [developing] the regulations so that humans will be able to survive and, you know, and have a role.

Right now, high school students, college students, you guys, law school students and lawyers, you know, I think we can be, if we're not careful, we can be eliminated, because as I looked at the things we do, I thought creativity was the last reserve, but it [AI] can do that now. Let's be honest, right? Ray Kurzweil, who wrote *The Singularity is Near*, *The Age of Spiritual Machines*, and so forth, [he works at] Google now, you know, he actually has been using this in that way, and they're all working on it. So, I think we need to structure our incentive structures within organizations, and have the right laws that encourage that outcome, and protect everybody else's lives, livelihoods. Human rights include the adequate standard of living. This is why I really do think it's not utopian. I think human rights are among the most practical things we have. You know,

education, health, welfare, you know, the right to work, and if they're properly overseen with good governance frameworks, that is a big part of the path beyond the crossroads we're on. That's positive.

Lauren Latham: That is a good response. I now have a question for Scott. What skills or literacy around AI and data, do you think law students and junior attorneys need to develop to remain effective over the next few years?

Scott Kosnoff: Yes, that's a great question, and it's not relevant only for law students and junior attorneys. Frankly, I think it's relevant for almost all of us, right?

Unless you're maybe a plumber, or you work with your hands, but even then, it's hard to say.

I think the best defense for all of us against being replaced is to go down the augmentation road that Chip talked about. The more comfortable we are with the new technology, the better we understand how it can make us better, stronger, faster than we are on our own, [then] the more likely we are to survive this threat. And, you know, I wish that were true of all the colleagues in my law firm, but, you know, many of us are taking a head-in-the-sand approach and hoping that, you know, we can make it to retirement, and then it'll be someone else's problem, but that's not really a very sensible approach, especially if you're still in law school. So, don't delay. Roll up your sleeves, dig in, get comfortable, but do so sensibly and responsibly and skeptically. Know what the tool can do for you, and know what it can't do for you, and make sure that you don't become over-reliant on it.

Shibani Mody: Thank you, Scott. My next question is for Ambassador al-Istrabadi. Ambassador, how easy or difficult do you think it will be to rebuild relationships with foreign countries after so much inconsistency with the Trump administration and the damage that has been done to foreign relations?

Ambassador al-Istrabadi: Well, not to put too fine a point on it, the questioner used the word "rebuild." You can't. You will not rebuild. You may build something new, you may build different relationships, but you're not going to rebuild in the sense of going back to the way it was before 2017, because what the Europeans thought in 2017 was that Trumpism was an anomaly. Especially when Biden won.

And they thought it was behind them. Well, they have now realized it isn't.

And that this is going to be potentially a generational issue. The United States has always been, in the United States, an undercurrent of isolationism and a failure . . . I mean, if you—I realize this is really, not statistically a sound way to do things, but—pay attention to people who comment on articles and on social media, and what people say "is" and what they think "is," because Trump's told

them this. By having, for instance, a trade deficit, we are, we are sustaining other countries. We are paying for other countries.

But the United States understood what Franklin Delano Roosevelt and, Harry Truman and, Dwight David Eisenhower understood, was that, by helping to rebuild Europe, and rebuild industrial economies and other economies in Europe, we were helping to develop our own trade partners. I mean, not only, yes, we buy goods from them, you know, my own car is a European car, or anyway, a British car. So yes, I buy their goods, but they also buy our goods. So, we were making our own trading partners by helping to rebuild Europe. We were benefiting ourselves, and as I hope my talk convinced you of, we in fact did benefit more than the Europeans. That wasn't good enough for the American voter.

What's the next offer that comes from the United States? I think the Europeans are over it. Now, that's an intermediate and long term. In the short term, they [Europeans] will have to do what they have to do to get through this period. But in the long term, Denmark, for the first time in its history, canceled a purchase of arms from the United States. They're going to purchase from the Europeans. Canada may do the same if it cancels the F-35. There are some parliamentarians who are saying Canada should cancel the F-35 and buy from the Europeans. I don't know if that's going to happen or not. The point is, they are planning for what comes next. And it isn't the way it has been. So, my colleagues have said, be an activist. I support that, whichever activism. If you like what's going on, go out and demonstrate for more of the same of this wonderfulness. On the other hand, if you think this is a real problem, don't try to recreate what has been. That's gone, it's over.

There's an expression in Baghdadi Arabic that you can't fix fractured glass. So, the glass hasn't been shattered, it's just fractured. There's a, say, a stress fracture in the glass. You can't repair that. At the very least, there's a stress fracture, and I think it's shattered, so think of what it should be, what we can do. Don't think of building what it has been.

Lauren Latham: Thank you so much, Ambassador. So, we're going to go back to Professor Spence real quick, and I'm just going to repeat the question so everyone in the audience can remember. With the rule-based international order and multilateral cooperation at risk, to what extent can U.S. lawmakers unilaterally combat international cybercrimes while also mitigating repercussions from acting unilaterally?

Professor Spence: Okay, yes, that's a great question. To what extent can U.S. lawmakers unilaterally combat international crimes while also mitigating repercussions from acting unilaterally? That is really the problem, right? This idea of acting unilaterally.

It is true that we really don't have a properly developed international system to combat these issues. But there's always a problem with acting unilaterally, because we have to think about down the road, and we've seen this happen before in other situations, where the U.S. has gone in, trying to have the right intentions, let's say, to bring about peace or stability. And only to have, years later on, we are facing, these kinds of, repercussions.

Of course, no one has actually hauled us in before the International Court of Justice, because obviously we simply won't go. But, I think to maintain our standing in the world, right? Which we're losing, and I'm really concerned about that. That it's better to have, even if we do not go with the international system as a whole, let's try to maybe forge better partnerships, both with the private sector and other allies, perhaps, to see how we can combat these kinds of actions in cyberspace, protect our citizens, and also our national security. But again, I do not think that giving licenses to private parties to offensively deal with these threats that is really not the way to go. We just need to work with partners from other allies' perspective [and] with the private sector, to bring about more developed and stable rules, to combat these threats. I really do not believe that the U.S. should ever do anything unilaterally.

Shibani Mody: Thank you Professor Spence. Our next question is for Mr. Pitts. How do we address the seemingly large group of Americans who do not see an issue with the actions of the [Trump] administration, who see these brutal tactics as strong and decisive? How do we show them the long-term consequences without being rebuffed as woke or elitist academics?

Chip Pitts: Speaking as a woke and elitist academic, I think that, you know—in just picking up on some of the themes we just heard, and Professor Spencer's answer, and in the prior answers by my colleagues, Ambassador al-Istrabadi and Scott—I did try to allude to this in my talk, which is that it starts at a really basic level, on the person-to-person level, getting back to face-to-face communications, those relationships, because if you're anonymous on the internet doing social media, you know, or if you can create AI slop, you have a tendency to be kind of mean sometimes, to say the least, right? And so, rebuilding those, you know, what de Tocqueville called the “voluntary associations.” And it happens on the individual level. Scott said during his talk, this is no way to run a railroad. It's also no way to run a neighborhood, a family, a community, an organization, a nonprofit, a for-profit, and certainly not a nation-state or an international community.

And that's why I am optimistic. I do believe that it's in our nature to compete, but there's a slight edge for cooperation that has allowed our species to survive and prosper, right? And we're a relatively young species, you know. You can trace the deep history of our species and of human rights. But it involves things like partnerships, as Professor Spence just said, it involves things like coalitions, which is the essence of success of all the social movements that have existed in

history. You know, whether you're talking about the suffragettes, Martin Luther King, the peace movement, Gandhi's movement, etc. And so, I think recognizing that, and again, stop being manipulated.

Alright, so having that person-to-person conversation, respectful listening. Establish common values, you'll find out that we agree on more than we don't. And there are cracks in the fissures of the misinformation-disinformation complex. And you've seen, Marjorie Taylor Greene, over the Epstein Files. Lauren Boebert was with her, and now she's come back into the fold. I don't know what was offered to her.

But, you know, we just know that these things are wrong. When you see the Epstein files, and you see Clinton's name, and you see the name that is mentioned more often than any other name in the files, thousands of times, and we know who that is, and we know what the relation was for decades, it just becomes impossible. At some point reality hits you in the face. And when you're subject to climate change, reality hits you in the face. And when you have your vote destroyed, or you're shot, or your friends and neighbors are shot, it hits you in the face.

And so that's the hope I have, is that that kind of shock and awe will compel us to get back together, and again, we go in cycles, and so I think that listening to others and having, you know, at the raw community level, you know, recognizing that we are being manipulated. And it's happening on both sides, the political rhetoric, you know, George Orwell's essay, "Politics and the English Language," and how politicians "make lies sound truthful and murder respectable, and . . . give an appearance of solidity to pure wind." That's what's happening. It's not just *1984*. It's also good, truthful journalism, theater, music, movies, television, fiction and non-fiction writing, and art in general, reflecting our common "now," our reality. (Though science fiction does a lot to educate us, that's why I'm such a fan of it.)

So, I believe that, if we can, you know, reach out, especially to those you're uncomfortable reaching out to, again, you know, the people here, I saw some of the audience members just sitting, you know, like this [crosses arms]. Talk to me afterwards, you know, let's stay in touch, let's talk about these things, because these need not be as divisive as we feel they are at this point.

Shibani Mody: Thank you so much, Chip. You all have submitted such amazing questions, but due to the time and the need to eat lunch, we're going to wrap up with one final question, so please talk to our speakers afterwards during the networking lunch. So, this is to all of you.

In one sentence or less, what do you think this administration needs to do in order to restore democracy in our country? It'll be hard, one sentence or less.

Lauren Latham: [joking] You have to, or we'll cut you off.

Shibani Mody: Professor? [Ambassador al-Istrabadi]

Ambassador al-Istrabadi: I don't believe in the tooth fairy, is my answer. I will quote the great American poet, was it Kenny Rogers who said, "the best that you can hope for is to die in your sleep?" I'm fundamentally pessimistic.

Lauren Latham: Thank you, Professor.

Shibani Mody: [joking] That *was* one sentence or less.

Scott Kosnoff: I don't think they can. I really don't think they can. I think they're gonna keep doing what they're doing, and they're gonna get routed in the midterms, and then there might be some correction.

Ambassador al-Istrabadi: [joking] That'd be all.

Shibani Mody: Let's end this on a positive note.

Chip Pitts: Oh my god, pressure's on. Pay attention to the market. Pay attention to the dollar. Start listening to people like billionaire Ken Griffin, big MAGA donor, your supporters, right? And, you know, just realize that you just can't keep it up anymore. Come on, guys. It's time to get real, right? Let's get back to what works. It doesn't need to be, you know, what the other side agrees with, but let's get what works instead of what seems to be almost a Putin-esque project to destroy America and make it last rather than first.

Shibani Mody: Thank you all.

Lauren Latham: Thank you all for coming. Can we give one more round of applause to our speakers? [applause from audience]

Okay, so we have, lunch set up, outside in the atrium, so please go ahead and help yourselves. Thank you so much for coming, and it was a pleasure having you. Thank you!

REVIVING THE ALIEN ENEMY: HOW ARCHAIC PROCEDURAL TOOLS CREATE MODERN MARKET UNCERTAINTY

ZHONGFA MA* & SHAOXUAN XU**

ABSTRACT

In January 2025, the President of the United States issued a proclamation that treated the situation at the southern border as an invasion and directed federal officers to bar certain noncitizens from invoking key Immigration and Nationality Act (“INA”) pathways, including asylum. This decision directed removal away from the INA’s screening track and toward an emergency model driven by status labels and rapid transfer. Within weeks, the Executive invoked the Alien Enemies Act of 1798 (“AEA”) against Venezuelan nationals alleged to be members of Tren de Aragua. Litigation followed, and the Supreme Court’s handling of the dispute shows why speed claims break down under a war powers statute. In *Trump v. J.G.G.*, the Court vacated temporary restraining orders while requiring notice timed to allow habeas relief before removal, holding that challenges must proceed through habeas petitions filed in the district of confinement. This structure turns removal into emergency federal litigation and invites uneven results across districts because the minimum notice window is left to case-by-case judgment.

Inconsistent interim rules create business risks when staffing and delivery depend on stable timelines. In agriculture, harvest labor cannot be replaced on short notice without loss. In construction, bid pricing and delay penalties assume a workforce that will remain available through the project phase. When the governing removal track can switch unexpectedly between ordinary immigration procedures and emergency war powers, employers respond with contingency staffing, shorter commitments, and added risk premiums.

Narrow repairs follow from this diagnosis: clarify the Alien Enemies Act trigger around state-linked armed action, codify a notice-and-habeas safeguard with a fixed pre-removal window and stable venue, and issue DHS guidance that keeps INA processing as the default while standardizing notice.

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I. INTRODUCTION

A. The 2025 Procedural Shift

On January 20, 2025, President Donald Trump framed conditions at the southern border as an invasion and directed federal officers to respond through emergency measures, rather than ordinary immigration screening.¹ The proclamation's practical effect was procedural. It treated a large class of noncitizens as participants in an invasion and then limited which Immigration and Nationality Act channels they could invoke after being encountered by federal immigration officials at or near the southern border.²

Section 2 of the proclamation restricted covered individuals from invoking provisions of the Immigration and Nationality Act that can delay or prevent removal, including asylum.³ The restriction altered which statutory steps could be triggered after an encounter and which decision-maker controlled the next stage. Once access to those channels is cut off by proclamation, removal turns on how far the Executive can move a person through custody and out of the country before ordinary statutory and constitutional limits reassert themselves.

Section 4 grounded the authority to suspend physical entry in Article II of the U.S. Constitution, framing such suspension as necessary to fulfill the Article IV duty to protect states against invasion.⁴ The combination of status-based classification and asserted constitutional authority to act outside routine statutory pathways produced a procedural shift. The proclamation treated the Immigration and Nationality Act as a set of rules the Executive could set aside when operational constraints made statutory screening ineffective at the border.⁵ The significance lies in the procedural consequences: the proclamation changed which procedures applied and where challenges could be filed. It also invoked an emergency framework that changed the timing and practical value of notice before removal.

That January 20 proclamation did not itself invoke the Alien Enemies Act. Its importance, rather, was that it recast the southern border as an "invasion" and thereby made a later turn to the Alien Enemies Act appear doctrinally and administratively available. Roughly seven weeks later, the Executive took that next step through a separate proclamation invoking the Alien Enemies Act against Venezuelan nationals alleged to be members of Tren de Aragua.⁶ The shift matters because it marks the bridge between two procedural worlds: the first move narrowed or displaced Immigration and Nationality Act pathways, while the second attempted to replace INA-centered screening with an older war-powers removal framework. That transition is the hinge for the analysis that

1. Proclamation No. 10888, 90 Fed. Reg. 8333, 8334-36 (Jan. 20, 2025).

2. *Id.* at 8334-35.

3. *Id.* at 8335 § 2.

4. *Id.* at 8336 § 4.

5. *Id.* at 8334-35.

6. Proclamation No. 10903, 90 Fed. Reg. at 13034-35.

follows.

B. Argument and Contribution

This Article argues that invoking an eighteenth-century war-powers statute as a substitute for modern adjudication inevitably triggers a habeas-centered judicial response, creating distinct downstream effects on labor-dependent markets.

The Executive's reliance on war-era procedure operates as a substitute for modern immigration adjudication. The Alien Enemies Act shifts the legal question away from Immigration and Nationality Act eligibility and toward an executive determination of enemy status.⁷ That shift is meant to accelerate removals by reducing reliance on immigration courts and ordinary Immigration and Nationality Act adjudication. The second step is that federal courts re-judicialize the system through habeas, notice, and venue rules. In *Trump v. J.G.G.*, the Court treated challenges to removal under the Alien Enemies Act as claims that must proceed in habeas and tied venue to the district of confinement.⁸ The Court also required notice in a form and time that allows detainees to seek habeas relief before removal occurs.⁹ Those requirements do not restore the Immigration and Nationality Act as the governing code; they instead impose a constitutional litigation pathway on top of an executive-driven removal model. This overlay produces market risk. When removals can shift between Immigration and Nationality Act processing and war-powers procedure, firms in labor-dependent sectors cannot plan workforce availability on stable legal assumptions. The uncertainty comes from timing and forum, because emergency procedures invite court-supervised bottlenecks that disrupt staffing and delivery schedules. This Article demonstrates that disputes over habeas-centered procedures impose private ordering costs that operate as indirect barriers analogous to non-tariff barriers in trade.

C. Structure and Method

Part II establishes the statutory baselines: how the INA structures expedited removal as a procedure with defined checkpoints, and how the AEA was built as a wartime tool with different triggers. Against this backdrop, Part III analyzes the 2025 litigation posture as a procedural system, focusing on what *J.G.G.* makes inevitable: habeas-centered venue fights, notice disputes, and repeated emergency applications that convert removal into constitutional litigation. Finally, Part IV offers targeted repairs designed to restore a predictable rule set without requiring a wholesale rewrite of immigration law.

7. Alien Enemies Act, 50 U.S.C. § 21 (2022).

8. *Trump v. J.G.G.*, 604 U.S. 670, 672 (2025) (per curiam).

9. *Id.* at 673.

II. HISTORY AND BACKGROUND

A. The Alien Enemies Act as a War-Powers Removal Regime

The Alien Enemies Act is a federal statute enacted in 1798, now codified in Title 50 of the U.S. Code, that authorizes a distinctive form of executive-controlled detention and removal when the nation is in a legally defined war posture.¹⁰ Its trigger is not unlawful entry, visa overstay, or any of the ordinary predicates of immigration enforcement.¹¹ The statute turns on a public proclamation after either a declared war, or an invasion or predatory incursion against U.S. territory by a foreign nation or government.¹² Once that trigger is met, the statute empowers the President to apprehend and remove noncitizen nationals of the hostile foreign power who meet the statute's age threshold.¹³ The design is categorical. The question is whether a person is an alien enemy as a function of nationality and the President's proclamation, not whether the person is removable under the Immigration and Nationality Act or poses an individualized danger.¹⁴

This structure makes sense in its original setting. The statute predates the modern federal immigration system and was enacted during a period of international conflict, when Congress and the President were building tools for national defense that were not meant to operate as part of ordinary peacetime administration.¹⁵ This historical context also explains why the statute's text and architecture do not resemble those of contemporary removal procedures. The Act does not build in an asylum screening mechanism or a regulated record suitable for routine judicial review. Instead, it assumes executive administration in a domain where political branches claim wide latitude, and courts often proceed cautiously.¹⁶ Even in wartime settings, however, the Act has not been treated as a legal vacuum. The canonical Supreme Court decision addressing removal under the Act is *Ludecke v. Watkins*, which arose after World War II and required the Court to confront how long the President's Act-based authority can persist after fighting ends.¹⁷ The Court treated the end of war as a political determination, but it still interpreted the statute and applied that construction to the case before it, holding that the Act's authority remained available until the war was terminated through recognized political acts such as a treaty,

10. Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21-24).

11. 50 U.S.C. § 21.

12. *Id.*

13. *Id.*; see also Jennifer K. Elsea, *The Alien Enemy Act: History and Potential Use to Remove Members of International Criminal Cartels*, CONG. RSCH. SERV. 2-3 (Apr. 2, 2025) [hereinafter *Alien Enemy Act CRS*].

14. 50 U.S.C. §§ 21-22; Alien Enemy Act CRS, *supra* note 13, at 2-3.

15. Alien Enemy Act CRS, *supra* note 13, at 1-3.

16. *Id.*; *Ludecke v. Watkins*, 335 U.S. 160, 163-65 (1948).

17. 335 U.S. at 166-67.

legislation, or a presidential proclamation.¹⁸ For present purposes, the significance is the baseline premise that even a war-powers removal statute still turns on statutory predicates that can become contested in litigation when the Executive invokes it.¹⁹

The same tension is visible when the Act's invasion language is transposed into a setting framed as domestic security rather than armed conflict between states. In 2025, litigation arising from an Alien Enemies Act proclamation, federal judges treated the meaning of "invasion" in the statute as a legal question and read it in a military sense rather than as a synonym for migration.²⁰ That reading tracks the statute's own linkage of invasion to conduct by a foreign nation or government, and it underscores a basic point that matters for the analysis that follows: the Act is a war-power instrument that expects identifiable wartime predicates, and the further an invocation moves from those predicates, the more likely the invocation generates contestable legal questions rather than administrative speed.²¹

B. Expedited Removal Under the INA as the Modern Fast-removal Baseline

The modern baseline for rapid border removals is not the Alien Enemies Act. It is an expedited removal of certain arriving or recently arrived noncitizens without placing them into full removal proceedings.²² The statutory logic is still severe. It is built to move quickly, and it constrains many forms of review. Yet it is not a blank check. Congress paired the fast-track mechanism with a defined screening step to address protection claims, and that step shapes how the system functions at the border.²³ The key procedural hinge is what happens when a person indicates fear of return or seeks asylum. In that posture, the statute and implementing practice channel the case into a credible fear process conducted by an asylum officer.²⁴ If the asylum officer finds no credible fear, the person can request review by an immigration judge, and the system sets short timelines for that review.²⁵ The process is streamlined and often conducted under intense operational pressure, but it still establishes a clear sequence of steps and a narrow screening inquiry: a fear claim triggers a credible-fear interview, and a negative determination can be reviewed by an immigration judge on an

18. *Id.* at 167-70.

19. *Id.* at 163-64, 170-72.

20. *D.B.U v. Trump*, 779 F.Supp.3d 1264, 1278-83 (D. Colo. 2025) (order granting emergency motion for temporary restraining order).

21. *Id.* at 1280-83.

22. Immigration and Nationality Act § 235(b)(1), 8 U.S.C. § 1225(b)(1); AM. IMMIGR. COUNCIL, *Expedited Removal Explainer* 1 (Feb. 20, 2025) [hereinafter *Expedited Removal Explainer*].

23. 8 U.S.C. § 1225(b)(1)(A)(ii), (B); *Expedited Removal Explainer*, *supra* note 22, at 1-2.

24. 8 U.S.C. § 1225(b)(1)(A)(ii), (B); *Expedited Removal Explainer*, *supra* note 22, at 2.

25. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); *Expedited Removal Explainer*, *supra* note 22, at 2.

expedited timetable.²⁶

Congress also cabined federal court involvement in expedited removal. Judicial review of expedited removal orders is limited, and the Supreme Court has upheld significant limits in this domain, reinforcing the notion that expedited removal is designed to be fast largely because ordinary judicial oversight is sharply constrained.²⁷ In practical terms, expedited removal is the modern legal tool that tries to reconcile two goals that sit in tension: high-volume processing and a minimal protection screen for fear-based claims.²⁸ It is not a generous procedure, but it is a rule-based one with known decision points, and those decision points become important when the Executive seeks to reroute border enforcement away from the INA's procedural architecture.²⁹

C. The January 20, 2025, Proclamation: Limits on INA Procedure

The procedural pivot in January 2025 began with a presidential proclamation that framed conditions at the southern border as an invasion within the meaning of the Constitution's Guarantee Clause.³⁰ The proclamation's language does not present the border as the routine enforcement challenge to be addressed within the INA's ordinary channels; rather, it presents the border as a constitutional emergency in which standard statutory tools are described as ineffective in the border environment.³¹ This framing matters because it shifts the argument from how immigration statutes should be executed to whether the President may invoke constitutional protection-from-invasion language to justify measures that disable statutory pathways.

The proclamation subsequently operationalizes that reclassification by targeting procedure, not simply resources.³² Invoking 8 U.S.C. §§ 1182(f) and 1185(a), it declares that aliens "engaged in the invasion" across the southern border may be denied entry and restricted from invoking Immigration and Nationality Act provisions that would permit their continued presence in the United States, including asylum under 8 U.S.C. § 1158.³³ That move differs from the aggressive use of expedited removal because expedited removal remains inside the INA's screening framework: a fear claim triggers credible-fear screening and, after a negative determination, immigration-judge review on an expedited timetable.³⁴ The proclamation instead attempts to narrow which

26. 8 U.S.C. § 1225(b)(1)(B)(ii), (iii), (v); Expedited Removal Explainer, *supra* note 22, at 2.

27. 8 U.S.C. § 1252(a)(2)(A), (e); Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103 (2020).

28. 8 U.S.C. § 1225(b)(1)(B); Expedited Removal Explainer, *supra* note 22, at 2-3.

29. Expedited Removal Explainer, *supra* note 22, at 1-3.

30. U.S. CONST. art. IV, § 4; Proclamation No. 10888, 90 Fed. Reg. at 8334.

31. Proclamation No. 10888, 90 Fed. Reg. at 8334.

32. *Id.* at 8335 § 2.

33. *Id.*

34. Compare 8 U.S.C. § 1225(b)(1)(B), with Proclamation No. 10888, 90 Fed. Reg. at 8335 § 2.

INA procedures are available in the first place for the class it labels as “engaged in the invasion.” Section 4 separately rests that posture on asserted Article II authority and the Article IV duty to protect States against invasion.³⁵

That January proclamation is not itself an Alien Enemies Act proclamation, and it does not need to be to matter for the Alien Enemies Act story. It supplies the constitutional and rhetorical predicate that makes a later war-powers turn appear administratively available: if the border is an invasion, then a statute that turns on invasion or predatory-incursion language can be presented as an available tool.³⁶ Roughly seven weeks later, a separate proclamation purported to invoke the Alien Enemies Act against Venezuelan nationals alleged to be members of Tren de Aragua, while expressly linking Tren de Aragua to the Maduro regime in Venezuela.³⁷ Whatever the merits of that predicate, the chain of moves is clear: the executive posture began with reframing the border as an invasion and then shifted toward an eighteenth-century wartime statute that operates on a different procedural logic from the INA’s screening framework.³⁸

III. ANALYSIS

A. Applying the Alien Enemies Act Without a Modern Procedure

A modern immigration removal system depends on defined decision points and a workable avenue for review. The January 20 proclamation attempted to displace the Immigration and Nationality Act’s procedural framework without supplying a replacement structure that could operate at scale.³⁹ It framed the southern border as an invasion, described ordinary screening under the INA as potentially “wholly ineffective in the border environment,” and restricted access to Immigration and Nationality Act mechanisms that ordinarily govern screening and relief.⁴⁰ That move produced a procedural shock: the legal system is asked to carry out removals, but the governing rules are no longer the INA’s familiar sequence of statutory steps. The same proclamation explains that information gaps at the border make identity, background, and risk difficult to verify with sufficient reliability. On that account, the document justifies reliance on asserted Article II authority and related constitutional duties to act outside ordinary statutory pathways.⁴¹

Section 2 does the operational work. It restricts the invocation of Immigration and Nationality Act provisions that would otherwise permit continued presence in the United States, including asylum under 8 U.S.C. §

35. Proclamation No. 10888, 90 Fed. Reg. at 8336 § 4.

36. 50 U.S.C. § 21; Proclamation No. 10888, 90 Fed. Reg. at 8334-36.

37. Proclamation No. 10903, 90 Fed. Reg. at 13034-35.

38. *Id.*; Proclamation No. 10888, 90 Fed. Reg. at 8334-36.

39. Proclamation No. 10888, 90 Fed. Reg. at 8334-36; 8 U.S.C. § 1225(b)(1); Expedited Removal Explainer, *supra* note 22, at 1-3.

40. Proclamation No. 10888, 90 Fed. Reg. at 8334-35.

41. *Id.* at 8334-36.

1158.⁴² Section 4 separately rests the proclamation on asserted Article II authority and the Article IV duty to protect States against invasion.⁴³ Even though the January 20 instrument is not itself an Alien Enemies Act proclamation, its practical signal is clear: in the claimed emergency space, the Executive does not regard the INA as the controlling procedure.⁴⁴

At that point, the legal system faces a structural mismatch. The Immigration and Nationality Act is a removal framework with a built-in procedural architecture; the Alien Enemies Act is not.⁴⁵ The AEA authorizes detention and removal in narrow conditions tied to war, invasion, or predatory incursion by a foreign nation or government, and it speaks in the language of executive apprehension, restraint, and removal rather than in the language of hearings, administrative records, and appellate review.⁴⁶

The 2025 invocation of AEA illustrates that mismatch in concrete form. Proclamation No. 10903 declared that Venezuelan citizens aged fourteen or older who are members of Tren de Aragua, who are within the United States, and who are not naturalized citizens or lawful permanent residents, are liable to be apprehended and removed as alien enemies.⁴⁷ The legal trigger was framed in terms of invasion, but the operational classification was categorical and membership-based. That is the key procedural mismatch: the AEA supplies removal power, but it does not supply the INA's contemporary screening and review architecture for determining who fits the category, how disputes are resolved, and how errors are corrected before removal.⁴⁸

B. Re-Judicialization Through Habeas: Trump v. J.G.G. as the Friction Point

Trump v. J.G.G. is the clearest illustration of that re-judicialization. The government sought speed, but the litigation produced a different structure: removal is conditioned on notice and a real opportunity to file in the correct court, and forum rules channel disputes into habeas proceedings tied to the district of confinement.⁴⁹ Five detainees and a putative class sought to block removal under Proclamation No. 10903. The district court issued temporary restraining orders ("TROs"), including a class-wide order. The Supreme Court then vacated the TROs, but it did not resolve whether the Government's interpretation of the AEA was correct or whether the detainees fell within the statute's substantive scope. It instead resolved a threshold procedural question: the proper vehicle and the proper venue for these challenges.⁵⁰

42. Proclamation No. 10888, 90 Fed. Reg. at 8335 § 2; 8 U.S.C. § 1158.

43. Proclamation No. 10888, 90 Fed. Reg. at 8336 § 4; U.S. CONST. art. IV, § 4.

44. Proclamation No. 10888, 90 Fed. Reg. at 8334-36.

45. 8 U.S.C. § 1225(b)(1); 50 U.S.C. § 21; Alien Enemy Act CRS, *supra* note 13, at 1-3.

46. 50 U.S.C. §§ 21-22; Alien Enemy Act CRS, *supra* note 13, at 2-3.

47. Proclamation No. 10903, 90 Fed. Reg. at 13034-35.

48. 50 U.S.C. §§ 21-22; 8 U.S.C. § 1225(b)(1); Proclamation No. 10903, 90 Fed. Reg. at 13034-35.

49. 604 U.S. 670, 672-74 (2025).

50. *Id.* at 671-72.

The Court's central holding was procedural in form but operational in effect. It held that "challenges to removal under the AEA . . . must be brought in habeas."⁵¹ The reason is structural: when the relief sought would necessarily imply the invalidity of confinement and removal, the claim falls within the core of the writ even if the plaintiffs do not formally seek release. From that premise, the venue rule follows: "[f]or core habeas petitions,' 'jurisdiction lies in . . . the district of confinement,'" and because "the detainees [were] confined in Texas, [. . .] venue [was] improper in the District of Columbia."⁵² This alone is enough to create friction. A nationwide injunction strategy concentrates disputes. A district-of-confinement habeas model disperses them. By fragmenting jurisdiction, the ruling not only multiplies filing points and timelines but also raises administrative costs, as custody location becomes the dispositive legal factor.⁵³

The more important point for present purposes is what the Court said about minimum process. The Court reaffirmed that individuals "subject to detention and removal under the [AEA are] entitled to 'judicial review' [on] 'questions of interpretation and constitutionality,' [and] on whether [the person] 'is in fact an alien enemy fourteen years of age or older.'"⁵⁴ This statement matters because it prevents the AEA from operating as a pure executive designation regime. Even in an AEA posture, an individual can litigate whether the statute applies and whether the government has correctly classified the person. The Court then connected that entitlement to notice. It treated due process in removal as a baseline requirement and required that AEA detainees receive notice after the date of the order that they are subject to removal under the Act. The notice must be given within a reasonable time and in a manner that allows the person to actually seek habeas relief in the proper venue before removal occurs.⁵⁵ This is where speed turns into delay. The AEA's appeal, as an emergency tool, is that it bypasses the INA's administrative track. Once the Supreme Court requires notice time to enable habeas litigation, the bypass no longer eliminates procedure; it relocates procedure. The decision point shifts from immigration court to federal district court, and the timeline is no longer the INA's structured sequence, but a race between removal logistics and emergency habeas filings.⁵⁶

Two further features of the Court's approach deepen the friction. First, the Court did not provide a concrete minimum notice period. The order uses a reasonableness formulation tied to the practical ability to seek habeas in the proper venue. This is a standard, not a rule. It invites fact-specific litigation in each district where detainees are confined and where removal is imminent. The predictable result is divergence: different courts implement the standard

51. *Id.* at 672.

52. *Id.*

53. *Id.* at 672; *Rumsfeld v. Padilla*, 542 U.S. 426, 442-43 (2004).

54. *J.G.G.*, 604 U.S. at 672 (quoting *Ludecke v. Watkins*, 335 U.S. 160, 163-64, 172 n.17 (1948)).

55. *J.G.G.*, 604 U.S. at 673.

56. *Id.* at 672-73.

differently, producing inconsistent emergency rulings across jurisdictions. Second, the venue rule forces repeated litigation when custody changes. If detainees are transferred, the relevant district changes. Even if no party intends to manipulate the forum, ordinary detention logistics can reshuffle the litigation map. The consequence is that the legal status of an AEA removal can depend on where a person sleeps that week. That is not a stable procedural environment for any high-volume system.⁵⁷

Trump v. J.G.G. shows why using war powers for modern migration management is not simply a constitutional debate. It is an operational design problem. The AEA can be invoked quickly. A workable removal system cannot operate at scale without clear notice rules and an administrable review pathway. The Supreme Court supplied some of those elements, but it supplied them as constitutional minima enforced through habeas. That is the friction point: every removal becomes a potential federal emergency matter, and the government's attempt to simplify the system moves it into a more demanding forum.⁵⁸

C. Procedural Variation and Labor-Market Risk

Firms can adapt to strict rules when they can price them. The harder case is a regime that cannot be forecast in its timing or forum. Economic scholarship on policy uncertainty defines the concept as dispersion over the future legal environment, rather than the environment's severity.⁵⁹ When the dispersion widens, firms often delay investment and hiring,⁶⁰ or they rewrite contracts to shift risk onto counterparties.⁶¹

The 2025 Alien Enemies Act episode widened that dispersion because it made timing and forum contingent on rapid executive choices and emergency-docket litigation. The Supreme Court confirmed that people targeted for removal under the AEA must receive notice in time to seek habeas review before removal, and it also held that venue lies in the district of confinement.⁶² The Court did not set a minimum notice window. The open question, how much time is enough, was pushed down to a set of district courts whose answers were shaped by local facts, local procedural posture, and local circuit law, as *A.A.R.P.* soon confirmed.⁶³ The result was not a single national rule, but a moving map.⁶⁴

That map moved in verifiable ways in the first litigation cycle. The District

57. *Id.* at 672-73; *Padilla*, 542 U.S. at 442-43.

58. *J.G.G.*, 604 U.S. at 672-73.

59. Scott R. Baker, Nicholas Bloom & Steven J. Davis, *Measuring Economic Policy Uncertainty*, 131 Q.J. ECON. 1593, 1596-98, 1604-06 (2016).

60. Nicholas Bloom, *The Impact of Uncertainty Shocks*, 77 ECONOMETRICA 623, 625-29, 655-56 (2009).

61. Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187, 187-90 (2005).

62. *J.G.G.*, 604 U.S. at 672-73.

63. *A.A.R.P. v. Trump*, 605 U.S. 91, 94-95, 98-99 (2025) (per curiam).

64. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95, 98-99.

of Columbia's nationwide TRO in *J.G.G.* was vacated.⁶⁵ Thereafter, relief emerged unevenly across jurisdictions. The Southern District of New York granted preliminary injunctive relief in *G.F.F.*, and the Western District of Texas first issued temporary relief and then classwide permanent relief in *M.A.P.S.*⁶⁶ The District of Colorado granted preliminary relief in *D.B.U.*, and the Southern District of Texas entered permanent relief in *J.A.V.*⁶⁷ Because venue turns on the district of confinement, transfer decisions also became legally significant: moving a detainee can change the forum in which any habeas petition must be filed.⁶⁸ Notice disputes in adjacent removal litigation reinforce the same operational point: in *D.V.D.*, the district court imposed a specific pre-removal notice-and-opportunity regime for third-country removals, and the Supreme Court later stayed that injunction.⁶⁹ Meanwhile, emergency proceedings in *A.A.R.P.* reflected the continuing instability of notice timing on the Supreme Court's emergency docket.⁷⁰ The point is not merely doctrinal disagreement. It is observable procedural variation in timelines, venues, and interim relief under the same general removal posture.⁷¹

For labor-intensive industries, procedural variance translates into a labor-supply risk that has to be managed, priced, or avoided. Crop agriculture is a clear example. Recent USDA data show that in 2020-2022, 42% of hired crop farmworkers lacked work authorization.⁷² When an enforcement regime creates a credible possibility of rapid detention and removal whose notice period is litigated case by case, and whose forum can shift with transfers, growers and labor contractors face a planning problem that wages alone do not solve. Standard responses to legal uncertainty include adding labor buffers, shortening commitments, or shifting risk through contract pricing. Each response has a cost that appears as higher labor expense, lower output, or a higher contract premium charged to downstream buyers.⁷³

Construction presents the same translation mechanism in a different operational setting. Project bids are priced months in advance, and delay

65. *J.G.G.*, 604 U.S. at 671-72.

66. *G.F.F. v. Trump*, 781 F. Supp. 3d 195 (S.D.N.Y. 2025); *M.A.P.S. v. Garite*, No. 3:25-cv-00171, 2025 WL 1379220, at *1-2 (W.D. Tex. May 13, 2025); *M.A.P.S. v. Garite*, 786 F. Supp. 3d 1026, 1062-65 (W.D. Tex. 2025).

67. *D.B.U. v. Trump*, 781 F. Supp. 3d 1158 (D. Colo. 2025); *J.A.V. v. Trump*, 781 F. Supp. 3d 535 (S.D. Tex. 2025).

68. *J.G.G.*, 604 U.S. at 672; *Rumsfeld v. Padilla*, 542 U.S. 426, 442-43 (2004).

69. *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp.3d 355, 392 (D. Mass. 2025); *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025).

70. *A.A.R.P. v. Trump*, 605 U.S. 91, 94-95, 97-99 (2025) (per curiam).

71. See *J.G.G.*, 604 U.S. at 671-73; *A.A.R.P.*, 605 U.S. at 94-99; *D.B.U.*, 781 F. Supp. 3d at 1158; *G.F.F.*, 781 F. Supp. 3d at 195; *J.A.V.*, 781 F. Supp. 3d at 535; *M.A.P.S.*, 786 F. Supp. 3d at 1026.

72. Marcelo Castillo, *Legal Status of Hired Crop Farmworkers, fiscal 1991-2022*, U.S. DEP'T OF AGRIC., ECON. RSCH. SERV. (Sep. 12, 2025).

73. Baker, Bloom & Davis, *supra* note 59, at 1596-98, 1604-06; Bloom, *supra* note 60, at 625-29, 655-56; Scott & Triantis, *supra* note 61, at 187-90.

penalties are routine.⁷⁴ Workforce volatility is therefore priced as schedule risk. The American Immigration Council estimates that mass deportation would create especially acute labor shocks in construction, agriculture, and hospitality, and that undocumented immigrants account for 13.7% of the construction workforce.⁷⁵ Even when the AEA itself targets a narrower category, the 2025 litigation cycle matters because it shows that ordinary INA constraints can be displaced by a proclamation, and then governed through emergency habeas practice with uneven interim relief.⁷⁶ A contractor who cannot forecast whether a portion of the workforce will face swift detention, what notice will be provided, or what forum will control the dispute has only a few levers: add contingency to bids, rely more heavily on subcontracting chains, or delay starts until the legal environment stabilizes. Those levers raise costs and slow delivery. In that sense, procedural variance functions like a trade-adjacent drag: it raises the domestic cost of producing labor-intensive goods and services without changing a tariff schedule. The key point is concrete: the uncertainty here is concrete because it is anchored in the structure of review and in the observed divergence of interim relief across courts.⁷⁷

IV. RECOMMENDATIONS

A. Statutory Amendment: Define the AEA Trigger and Require Findings

Using an invasion label to reroute border enforcement away from the INA creates the core governance problem addressed here: the governing procedure becomes contingent on an executive characterization rather than on stable statutory predicates. The January 20 proclamation is explicit that the administration is not merely tightening ordinary removal; it is treating the border situation as an invasion and then using that characterization to restrict access to INA-based procedures, including asylum pathways that normally attach once a noncitizen is physically present or arriving.⁷⁸ The same document frames the

74. 48 C.F.R. § 36.213-3(a) (2025); Gen. Servs. Admin., Standard Form 1442, Solicitation, Offer, and Award (Construction, Alteration, or Repair) item 13(d) (rev. Dec. 2022); Tiffany A. Harrod, *The Clock is Ticking: Construction Delays and Liquidated Damages*, PECKAR & ABRAMSON (Aug. 15, 2023), https://www.pecklaw.com/client_alerts/the-clock-is-ticking-construction-delays-and-liquidated-damages/ [<https://perma.cc/C3UX-DEBU>]; Frederick Cohen & John S. Wojak, *Liquidated Damages for Delayed Completion in Construction Contracts*, N.Y. L.J. (2015).

75. AM. IMMIGR. COUNCIL, MASS DEPORTATION: DEVASTATING COSTS TO AMERICA, ITS BUDGET AND ECONOMY 2-4, 20-21 (2024).

76. See Proclamation No. 10888, 90 Fed. Reg. at 8334-36; *J.G.G.*, 604 U.S. at 672-73; *D.B.U.*, 781 F. Supp. 3d at 1158; *G.F.F.*, 781 F. Supp. 3d at 195; *J.A.V.*, 781 F. Supp. 3d at 535; *M.A.P.S.*, 786 F. Supp. 3d at 1026.

77. See *J.G.G.*, 604 U.S. at 671-73; *A.A.R.P. v. Trump*, 605 U.S. 91, 94-99 (2025) (per curiam); *D.B.U.*, 781 F. Supp. 3d at 1158; *G.F.F.*, 781 F. Supp. 3d at 195; *J.A.V.*, 781 F. Supp. 3d at 535; *M.A.P.S.*, 786 F. Supp. 3d at 1026; Baker, Bloom & Davis, *supra* note 59, at 1596-98, 1604-06.

78. Proclamation No. 10888, 90 Fed. Reg. at 8334-35; 8 U.S.C. § 1158(a)(1).

INA as functionally ineffective at the border and pairs statutory entry authorities with an asserted constitutional power to suspend physical entry.⁷⁹ When the trigger is framed this broadly, a labor market that depends on predictable enforcement baselines is exposed to the risk that the applicable rule-set can change by proclamation rather than by legislation.⁸⁰

Congress does not need to repeal the Alien Enemies Act to reduce this volatility. It can narrow the conditions under which the AEA can be invoked in modern immigration governance and force the executive to show its work in a way courts can evaluate without improvising thresholds on a case-by-case basis. The AEA's text already ties the extraordinary authority to a declared war or to an "invasion or predatory incursion perpetrated, attempted, or threatened" by a foreign nation or government.⁸¹ The current controversy turns on how elastic those terms are when the asserted threat is not a state's armed force, but cross-border movement associated with non-state actors. Commentary surrounding the 2025 invocation underscores that the statute was enacted as a wartime authority and that treating migration as the functional equivalent of an invasion pushes it beyond its historical use.⁸² A workable amendment would do two things. It would define invasion and predatory incursion for AEA purposes in military terms tied to state action, and it would require a proclamation invoking the AEA to include a short set of public factual findings connecting the asserted threat to a foreign nation or government.⁸³ This would not eliminate enforcement tools. It would instead reduce the discretionary space in which the executive can toggle between INA processes and war-power removals, a source of repeated emergency litigation and the regulatory shock that spills over into hiring decisions and contracting behavior.⁸⁴ A narrower trigger also improves judicial administration: courts can treat the threshold question as a concrete statutory inquiry rather than an open-ended dispute over whether the executive may redefine "invasion" to fit contemporary enforcement priorities.⁸⁵

In short, it is reasonable for Congress to propose a conceptual statutory direction to amend 50 U.S.C. § 21, specifying that an "invasion" must involve organized armed action attributable to a foreign state, including state-controlled forces. Additionally, the amendment would require any proclamation to explicitly identify the foreign state nexus and the nature of the armed threat.⁸⁶ This keeps the AEA available for its core scenario while making clear that the

79. Proclamation No. 10888, 90 Fed. Reg. at 8334, 8336.

80. Proclamation No. 10888, 90 Fed. Reg. at 8334-36; Baker, Bloom & Davis, *supra* note 59, at 1596-98, 1604-06; Bloom, *supra* note 60, at 625-29.

81. 50 U.S.C. § 21.

82. Alien Enemy Act CRS, *supra* note 13, at 1-3; *D.B.U.*, 2025 WL 1163530, at *10-12.

83. 50 U.S.C. § 21; Proclamation No. 10903, 90 Fed. Reg. at 13034-35 §§ 1, 4.

84. *Trump v. J.G.G.*, 604 U.S. 670, 672-73 (2025); *A.A.R.P. v. Trump*, 605 U.S. 91, 94-95 (2025) (per curiam); Baker, Bloom & Davis, *supra* note 59, at 1596-98.

85. *Ludecke v. Watkins*, 335 U.S. 163-64, 170-72 (1948); *D.B.U.*, 2025 WL 1163530, at *9-12.

86. 50 U.S.C. § 21; Alien Enemy Act CRS, *supra* note 13, at 1-3; *D.B.U.*, 2025 WL 1163530, at *10-12.

default governance of noncitizen removals remains with the INA.⁸⁷

B. Procedural Safeguard: Codify a Judicial Savings Clause

The Supreme Court's per curiam order in *Trump v. J.G.G.* illustrates a predictable dynamic: when the government tries to execute removal through a wartime statute that "largely preclude[s] judicial review," courts reintroduce process through habeas corpus, notice, and venue rules.⁸⁸ The Court treated challenges to AEA removal as core habeas, placed venue in the district of confinement, and, crucially, recognized that AEA detainees must receive notice and an opportunity to be heard that is appropriate to the case, with notice provided in time to allow a habeas filing before removal.⁸⁹ This holding is not a full procedural code. It is a minimum floor, delivered in emergency posture, leaving unresolved what counts as enough notice and what operational steps are required to make habeas review real rather than theoretical.⁹⁰

That gap is itself an engine of instability. When the legal minimum is expressed at a high level of generality, implementation disputes shift into urgent, jurisdiction-by-jurisdiction litigation. Post-order filings illustrate the problem: in the absence of a defined minimum notice period and a clear outline of what due process requires under the AEA, courts produced fragmented responses across districts as habeas petitions proliferated.⁹¹ This fragmentation is not just a rights problem. It is an administrative problem with market consequences because the enforcement environment becomes dependent on which district court happens to receive the next emergency filing and what interim relief it grants. A narrow savings clause can convert this unstable equilibrium into a predictable process without preventing removals in cases that genuinely satisfy the AEA trigger. The clause should set a short, fixed notice-and-wait period and specify the procedural vehicle and venue, so both the government and affected parties know what happens next. A savings clause could require written notice that identifies the Alien Enemies Act designation and the basic basis for it. It could also bar removal for a fixed period, such as forty-eight hours, after service of notice, while preserving habeas filing in the district of confinement and giving the court a real opportunity to rule on an emergency stay request.⁹² This approach tracks the Supreme Court's core requirements, notice sufficient to allow habeas in the proper venue, while removing the indeterminacy that fuels repeated emergency filings.⁹³ Even expedited removal under the INA is structured around a defined screening step for people who indicate fear of return. Credible fear screening and short-timeline immigration-judge review after a

87. 8 U.S.C. § 1225(b)(1); 50 U.S.C. § 21.

88. *J.G.G.*, 604 U.S. at 672 (quoting *Ludecke*, 335 U.S. at 163-64).

89. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95.

90. *A.A.R.P.*, 605 U.S. at 95.

91. *A.A.R.P.*, 605 U.S. at 94-95, 99-100 (Kavanaugh, J., concurring).

92. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95.

93. *J.G.G.*, 604 U.S. at 673; *A.A.R.P.*, 605 U.S. at 95.

negative credible fear finding make the process legible, even when the outcome is removal. The point is not that INA expedited removal is generous; it is not. The point is that it is legible. A savings clause for AEA removals would bring a similarly legible sequence to a context that otherwise invites ad hoc judicial reconstruction.⁹⁴

C. Administrative Guidance: Treat INA Screening as the Default Baseline Even in Emergency Removal Postures

Legislation can narrow triggers and set a process floor, but executive implementation still determines whether the system behaves predictably on the ground. The January 20 proclamation directs rapid operational action and frames ordinary INA mechanisms as inadequate in the border environment.⁹⁵ When front-line operations receive that kind of instruction without a detailed procedural map, the predictable result is not speed; it is contestation about which rules apply, followed by litigation that forces a new rule-set back into the system.⁹⁶ DHS, therefore, should issue guidance making INA screening the default baseline unless and until a validly cabined AEA invocation applies.

The guidance should do two things: First, it should require documentation and service of notice in a standardized form that anticipates habeas review. The Supreme Court's order makes notice a prerequisite to meaningful judicial review in the district of confinement.⁹⁷ Standardizing notice content, service method, and timing is the difference between a right that exists on paper and a process that functions without repeated emergency intervention. It should also instruct that, where individuals raise fear-of-return claims, officers must route those claims into the INA's humanitarian screening channels rather than treating AEA labeling as a bypass. Second, it should require officers to route fear-of-return claims into INA humanitarian screening channels rather than treating an AEA label as a categorical bypass.⁹⁸ Even if the government ultimately argues that the AEA displaces parts of the INA for a narrow category of cases, treating fear screening as the default operational posture reduces the risk of erroneous removals that later generate emergency litigation, injunction practice, and sudden policy reversals, which is exactly the cycle that produces enforcement uncertainty and downstream economic disruption.⁹⁹

94. 8 U.S.C. § 1225(b)(1)(A)(ii), (B), (B)(iii)(III); Expedited Removal Explainer, *supra* note 22, at 1-2.

95. Proclamation No. 10888, 90 Fed. Reg. at 8334-36.

96. *Id.*; *J.G.G.*, 604 U.S. at 671-73; *A.A.R.P.*, 605 U.S. at 94-95.

97. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95.

98. 8 U.S.C. § 1225(b)(1)(A)(ii), (B); Expedited Removal Explainer, *supra* note 22, at 1-2.

99. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95; Baker, Bloom & Davis, *supra* note 59, at 1596-98; Bloom, *supra* note 60, at 625-29.

V. CONCLUSION

Developments in 2025 turned on procedure as much as on enforcement. The 2025 revival of the Alien Enemies Act demonstrates the perils of repurposing archaic war powers for modern migration management.¹⁰⁰ That decision mattered because modern immigration enforcement is built around channeling disputes into a structured set of statutory procedures, even when those procedures are expedited and heavily tilted toward removal.¹⁰¹ When the Executive signals that those channels can be sidelined by emergency framing, both courts and regulated actors face a basic question that the Immigration and Nationality Act is designed to suppress: which process governs today?¹⁰²

The Alien Enemies Act is an unusually blunt instrument for answering that question. Its design assumes a wartime posture in which the central task is classification, not adjudication: identify the covered group, detain, and remove.¹⁰³ Congress wrote modern immigration law on the opposite assumption. Even in expedited removal, the statute and implementing practice are organized around screening and documentation, credible fear as a threshold filter, recorded interviews, and a defined administrative sequence that can be reviewed in limited ways.¹⁰⁴ A wartime statute can be applied in peacetime, but it does not carry the institutional scaffolding that makes high-volume removal administrable in a system that still recognizes due process limits. When the Executive attempts to use a war-power procedure to bypass the immigration-law baseline, friction should be expected, and it will be legal friction that arrives as litigation, not as orderly administrative review.¹⁰⁵

Trump v. J.G.G. makes the mechanism visible. The Supreme Court vacated the temporary restraining orders entered by the District Court for the District of Columbia, but it did not accept the premise that Alien Enemies Act removals can proceed without meaningful judicial access. The Court required notice that is timed and delivered in a way that permits detainees to seek habeas relief before removal, and it held that the proper vehicle is habeas in the district of confinement.¹⁰⁶ Those instructions do not eliminate judicial involvement; they relocate it. Once notice and habeas are treated as required conditions of removal, a mass-removal operation under the Alien Enemies Act produces rapid, district-by-district federal litigation, with venue turning on where the government holds

100. Proclamation No. 10903, 90 Fed. Reg. at 13034-35; *J.G.G.*, 604 U.S. at 671-73; Alien Enemy Act CRS, *supra* note 13, at 1-3.

101. 8 U.S.C. § 1225(b)(1)(A)(ii), (B), (B)(iii)(III); Expedited Removal Explainer, *supra* note 22, at 1-3.

102. Proclamation No. 10888, 90 Fed. Reg. at 8334-36; *J.G.G.*, 604 U.S. at 672-73.

103. 50 U.S.C. §§ 21-22; Alien Enemy Act CRS, *supra* note 13, at 1-3; *Ludecke v. Watkins*, 335 U.S. 163-65 (1948).

104. 8 U.S.C. §§ 1225(b)(1), 1252(a)(2)(A), (e); Expedited Removal Explainer, *supra* note 22, at 1-3.

105. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P. v. Trump*, 605 U.S. 91, 94-95 (2025) (per curiam).

106. *J.G.G.*, 604 U.S. at 671-73.

people at a given moment.¹⁰⁷ That relocation has predictable consequences for uniformity. The Court did not set a minimum notice period or supply an operational standard beyond the requirement that notice must allow a real opportunity to file in the proper venue.¹⁰⁸ The result has been a wave of urgent habeas filings across districts and a patchwork of interim rules that differ by jurisdiction and procedural posture.¹⁰⁹ Post-*J.G.G.* decisions include class-based habeas relief in some districts and denials of emergency relief in others, with separate courts reaching materially different remedial endpoints on closely related records.¹¹⁰ That kind of variance is not a side issue. It is a feature of a system that has been forced by the government's own procedural choice to shift from a centralized administrative pipeline to decentralized emergency litigation.¹¹¹

Once the enforcement environment looks like that, market effects are not speculative. They are the ordinary response of firms to legal risk that cannot be priced with confidence.¹¹² A labor-dependent employer does not need a forecast of ultimate merit outcomes; it needs a stable understanding of near-term labor availability and the conditions under which workers may be detained, transferred, or removed. When removal authority can be asserted through an emergency statute, and when the operative safeguards depend on the district where a person is confined, planning becomes contingency planning.¹¹³ Seasonal industries adjust schedules and rely more heavily on subcontracting. Project-based industries tighten completion windows and rewrite termination clauses to allocate delay risk. Even without dramatic changes in headline enforcement numbers, uncertainty alone can raise contracting costs because each party prices in the risk that staffing plans will be disrupted by a rapid shift in procedure, compounded by uneven interim court standards.¹¹⁴

Targeted reforms follow from this diagnosis. A statutory clarification that ties Alien Enemies Act use to a defined trigger narrows the set of cases in which emergency framing can replace the immigration-law baseline.¹¹⁵ A notice-and-

107. *J.G.G.*, 604 U.S. at 672; *Rumsfeld v. Padilla*, 542 U.S. 426, 442-43 (2004).

108. *J.G.G.*, 604 U.S. at 673; *A.A.R.P.*, 605 U.S. at 95.

109. *A.A.R.P.*, 605 U.S. at 99-100 (Kavanaugh, J., concurring); *G.F.F. v. Trump*, 781 F. Supp. 3d 195 (S.D.N.Y. 2025); *D.B.U. v. Trump*, 781 F. Supp. 3d 1158 (D. Colo. 2025); *J.A.V. v. Trump*, 781 F. Supp. 3d 535 (S.D. Tex. 2025); *M.A.P.S. v. Garite*, 786 F. Supp. 3d 1026 (W.D. Tex. 2025).

110. *J.A.V.*, 781 F. Supp. 3d at 535 (granting class habeas relief and permanent injunctive relief); *M.A.P.S.*, 786 F. Supp. 3d at 1026 (granting class-wide habeas relief and permanent injunctive relief); *A.A.R.P.*, 605 U.S. at 91-95.

111. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95, 99-100 (Kavanaugh, J., concurring).

112. *Baker, Bloom & Davis*, *supra* note 59, at 1596-98, 1604-06; *Bloom*, *supra* note 60, at 625-29, 655-56; *Scott & Triantis*, *supra* note 61, at 187-90.

113. *J.G.G.*, 604 U.S. at 672; *Rumsfeld v. Padilla*, 542 U.S. 426, 442-43 (2004).

114. *Baker, Bloom & Davis*, *supra* note 59, at 1596-98, 1604-06; *Bloom*, *supra* note 60, at 625-29, 655-56; *Scott & Triantis*, *supra* note 61, at 187-90; *AM. IMMIGR. COUNCIL*, *supra* note 75, at 20-21.

115. 50 U.S.C. § 21; Alien Enemy Act CRS, *supra* note 13, at 1-3.

habeas savings clause converts the Supreme Court's high-level requirement into an administrable rule that officers can follow, and courts can enforce without reinventing standards in each district.¹¹⁶ Agency guidance that treats Immigration and Nationality Act processing as the default channel reduces the incentive to treat emergency procedure as a routine solution to administrative congestion.¹¹⁷ None of these steps depends on denying the government tools for genuine armed conflict or foreign attack. They depend on insisting that, in peacetime, enforcement choices that destabilize procedure carry foreseeable costs, costs measured in judicial friction and in the market behavior that follows from procedural instability.¹¹⁸

116. *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95.

117. Proclamation No. 10888, 90 Fed. Reg. at 8334-36; 8 U.S.C. § 1225(b)(1)(A)(ii), (B); Expedited Removal Explainer, *supra* note 22, at 1-2.

118. 50 U.S.C. § 21; *J.G.G.*, 604 U.S. at 672-73; *A.A.R.P.*, 605 U.S. at 94-95; Baker, Bloom & Davis, *supra* note 59, at 1596-98, 1604-06.

CYBER LETTERS OF MARQUE: ADDRESSING THE GEOPOLITICAL RISKS OF PRIVATE CYBER WARFARE: LESSONS FROM HISTORY AND INTERNATIONAL LAW

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ABSTRACT

This Article examines H.R. 4988, the “Cybercrime Marque and Reprisal Authorization Act of 2025,” which seeks to revive the historical practice of letters of marque by authorizing cyber letters of marque against state-linked cybercrime. It argues that, although escalating state-sponsored cyberattacks and attribution difficulties have prompted calls for novel defensive tools, this proposal represents an anachronistic and dangerous use of constitutional authority. By delegating coercive power to private actors operating extraterritorially, the bill threatens to recreate in cyberspace the blurred lines between public and private violence that characterized mercenary practices during the Thirty Years’ War and the activities of chartered trading companies in the imperial era.

The Article compares the historical abuses of maritime privateering, which ultimately led to its international abolition, to the foreseeable excesses and accountability gaps that would accompany privately contracted cyber operators. It contends that such delegation conflicts with foundational principles of international law, including state sovereignty, non-intervention, and the prohibition on the use of force under the United Nations Charter, and would exacerbate the attribution and enforcement problems already evident with private military companies. Finally, the Article evaluates how existing instruments, such as the Montreux Document and the International Code of Conduct for Private Security Service Providers, could be adapted to regulate private cyber operators within an established international legal framework. It concludes that meaningful governance of cyber defense requires building on these contemporary regimes rather than resurrecting a discredited constitutional relic.

I. INTRODUCTION

As of late 2025 and early 2026, there has been a significant legislative push to revive the constitutional power to grant Letters of Marque and Reprisal.¹ In

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1. *See* Cartel Marque and Reprisal Authorization Act of 2025, S. 367, 119th Cong. (2025) (demonstrating proposed legislation in the U.S. Congress which seeks to authorize the President to commission private individuals to seize vessels and assets belonging to transnational criminal organizations and drug cartels).

2026, the Scam Farms Marque and Reprisal Authorization Act (H.R. 4988), the proposed “Cyberbill,” seeks to empower the U.S. executive with the authority to issue “cyber letters of marque” to private operators for combating foreign-backed cybercrime and recovering digital assets.² The proposed bill seeks to modernize a dormant constitutional authority by applying centuries-old maritime concepts to the abstract complexities of cyberspace.³ This legislation would empower the President to issue “cyber letters of marque” to private operators, authorizing them to seize the persons or property of individuals or foreign governments involved in broadly defined cybercrime enterprises. Mirroring historical privateers who profited from captured vessels, these digital actors would be incentivized through the recovery of stolen digital assets or financial awards, effectively harnessing private-sector technical expertise to achieve national security objectives.⁴

There is no doubt that cyber-attacks and cybercrimes have become more sophisticated by both state and non-state actors.⁵ Given the recent spate of these attacks on the American government, businesses and consumers, the proposed bill, in theory, is not alarmist. Some solution clearly is needed to combat these issues which have the potential to evolve into full scale cyber-warfare.⁶

Contrary to popular academic writings and the swash-buckling movies of Hollywood, letters of marque were not always confined to state-sponsored naval warfare.⁷ Originally, letters of marque had two functions.⁸ In the early medieval period, letters of marque were employed as a “rights-based” conflict-resolution tool.⁹ It was not until the late medieval and early modern age of sail that letters

2. Scam Farms Marque and Reprisal Authorization Act of 2025, H.R. 4988, 119th Cong. (2025).

3. *See id.*

4. *See id.* § 3.

5. *See* Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 CAL. L. REV. 817, 822 (2012) (describing major state-linked cyber operations and large-scale cyberattacks demonstrating the growing sophistication of cyber warfare and cybercrime).

6. *See id.* (noting uncertainty over whether cyber operations qualify as armed conflict under the law of war); *see also* Stephen Weigand, *Critical infrastructure facing cyber surge in OT and supply chains in 2026*, SC WORLD (Jan. 8, 2026), <https://www.scworld.com/feature/critical-infrastructure-facing-cyber-surge-in-ot-and-supply-chains-in-2026> [https://perma.cc/8F9K-G3A9].

7. *See generally* Christopher D. Beck, *Seizing Liberties: Private Rights, Public Good, and Letter of Marque in Medieval Marseille* pp. 10-19 (Aug. 2012) (Ph.D. dissertation, Fordham University) (ProQuest) (explaining the distinction between privateers in a trade war (called *droit de course*) and letters of marque to resolve individualized judicial conflict. . . . “The use of marque in the Middle Ages represents an instance when the interaction between rulers and citizens became an institutionalized method both to end regional conflicts and to return legal advantage to dispossessed individuals”).

8. *See id.*

9. *See generally id.* (Positing that “while Marseille’s use of marque is not conclusive evidence for the existence of Weber’s modern bureaucracy in the Middle Ages, the use of marque as a tool for conflict resolution suggests the beginnings of a formulaic and institutionalized form of conflict resolution used within the western Mediterranean trade network.” *Citing to*

of marque took on a more sinister cloak of state-sponsored coercion.¹⁰ Nevertheless, the concept of letters of marque, as conceptualized in the modern age to authorize privateers in naval warfare, presents a controversial yet compelling framework for addressing modern cybercrimes.¹¹

The application to cyberspace requires navigating complex legal, ethical, and practical challenges to prevent uncontrolled escalation in the global commons and ensure accountability in the digital domain. While framed as a modern application of constitutional authority, this paper argues the legislation is an anachronistic and dangerous solution. It risks creating a “Wild West” in cyberspace by blending 19th-century legal concepts with 21st-century technological realities, leading to a host of geopolitical and legal conflicts. The paper employs a multidisciplinary qualitative methodology integrating historical legal analysis with comparative international law and doctrinal research. This approach combines historical context, legal conflicts, and potential governance models for private cyber operators.

This analysis examines the historical evolution, legal friction, and governance models surrounding private cyber operators, ultimately arguing that the United States must reject the revival of archaic maritime tools in favor of a framework rooted in established international law. The inquiry begins in Part II by deconstructing the definitions of cybercrime, cyber-attack, and cyber warfare. By adopting Professor Oona Hathaway’s legal framework, the paper identifies the precise responses required to address modern American vulnerabilities. Part III then bridges theory with reality, presenting tech industry forecasts of emerging digital threats and highlighting the alarming lack of U.S. preparedness to meet them.

The study shifts to a historical perspective in Part IV, examining why the “letter of marque,” a tool of imperfect warfare, retains a lingering presence in U.S. jurisprudence. However, Part V demonstrates the danger of this legacy, exploring how applying maritime concepts to a domain without physical borders triggers profound conflicts within the international legal order. Drawing on the precedent of private military companies in anti-piracy operations, Part VI illustrates how deploying privateers to seize digital assets could expose the United States to severe legal consequences and claims of international law violations.

Rather than pursuing unilateral “cyber-privateering,” Part VII advocates for a diplomatic pivot toward strengthening existing multilateral standards, such as the Montreux Document and the International Code of Conduct (“ICoC”).

GIANFRANCO POGGI, *THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION* 30-32 (Stanford Univ. Press 1978); RICHARD SWEDBERG, *THE MAX WEBER DICTIONARY: KEY WORDS AND CENTRAL CONCEPTS* (Stanford Univ. Press, 2005)).

10. *See id.*

11. *See, e.g.,* Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986) (explaining that the use of private actors to carry out military or foreign policy objectives has deep historical roots and is reflected in Congress’s constitutional authority to authorize such force).

Ultimately, Part VIII concludes that the complexities of the digital age demand a sophisticated, modern governance model, one that prioritizes accountability and international stability over an obsolete 18th-century relic.

II. CYBERCRIME OR CYBERWAR? RESOLVING TERMINOLOGICAL AMBIGUITY IN POLICY

A pivotal issue in the debate over cyber letters of marque is the legal classification of digital threats. While our vernacular use often conflates all nefarious cyber activities, a strict legal distinction between cybercrime and cyber-warfare is necessary to authorize privateers without inadvertently triggering an “act of war.” A major obstacle to reform is the lack of terminological clarity.¹² The proposed bill lists definitions that do not contain the language of war, which is required to trigger the Marques and Reprisals Clause of the Constitution.¹³ The inclusion of the offense under section 1030 of title 18 of the U.S. Code may suffice as that section pertains to offenses committed with the intent to injure the United States.¹⁴

In a 2012 Article, Professor Oona Hathaway, along with other international law experts, explored the legal uncertainty surrounding digital strikes, questioning whether the traditional law of war can or should govern what many call “cyber-warfare.” Hathaway argues in “The Law of Cyber-Attack” that current legal frameworks are inadequate to address modern cyber threats and proposes a new approach grounded in international cooperation. A precise definition of “cyber-attack” is central to this framework, distinguishing it from cybercrime and cyber warfare to highlight specific national security threats. A central concern is the risk of escalation.¹⁵ If cyber-attacks are legally classified as warfare, victims like Iran might claim a right to respond to digital incursions, such as *Stuxnet*, with conventional physical force in self-defense.¹⁶ The authors provided the following table to illustrate the distinctions among the various terms.

12. See Hathaway et al., *supra* note 5, at 823.

13. See Scam Farms Marque and Reprisal Authorization Act of 2025, H.R. 4988, 119th Cong. (2025).

14. See 18 U.S.C. § 1030 (2020).

15. See Hathaway et al., *supra* note 5, at 832 (proposing a purpose-based definition of cyberattacks to distinguish them from ordinary cybercrime for legal and policy purposes).

16. See *id.* at 819.

Table 1: Essential characteristics of different cyber-actions¹⁷

	Type of cyber-action		
	Cyber-attack	Cyber-crime	Cyber-warfare
Involves only non-state actors		✓	
Must be violation of criminal law, committed by means of a computer system		✓	
Objective must be to undermine the function of a computer network	✓		✓
Must have a political or national security purpose	✓		✓
Effects must be equivalent to an “armed attack,” or activity must occur in the context of armed conflict			✓

To address these issues, the Article clarifies how cyber-attacks relate to existing legal structures, including international humanitarian law, emerging international regulations, and domestic criminal law. However, the authors demonstrate that these current frameworks are fundamentally deficient.¹⁸ The law of war only applies to the narrow subset of attacks that occur during an ongoing conflict or rise to the level of an “armed attack,” while other legal systems offer only fragmentary solutions. Because existing tools are inadequate, the authors conclude that a new, comprehensive legal framework is essential.¹⁹ However, as this paper discusses, are letters of marque the answer?

III. THE INVISIBLE FRONTLINE: STRATEGIC PRE-POSITIONING AS MODERN WARFARE

In 2026, the landscape of threats to critical infrastructure has shifted from simple data theft to a sophisticated era of strategic pre-positioning and autonomous disruption.²⁰ The most pervasive evolution is the rise of agentic AI, where malicious actors deploy self-governing software agents that can independently conduct reconnaissance, adapt to defensive countermeasures, and execute multi-stage attacks on power grids and water systems without human intervention. This automation allows for “vibe hacking,” AI-driven social engineering so precise in its mimicry of human behavior and corporate tone that

17. *Id.* at 833.

18. *Id.* at 821.

19. *Id.*

20. Weigand, *supra* note 6.

traditional employee training often fails to stop it.²¹

Simultaneously, the geopolitical climate has birthed a doctrine of "living off the land," exemplified by state-sponsored groups like *Volt Typhoon* and *Salt Typhoon*.²² Rather than using identifiable malware, these actors hijack a system's own legitimate administrative tools to remain undetected within the networks of telecommunications and transportation hubs. Their goal is rarely immediate theft. Instead, they are "pre-positioning," embedding themselves deep within the architecture of essential services to ensure they can trigger physical, kinetic failures during a future conflict.²³

The vulnerability of these systems is further exacerbated by the accelerated convergence of IT and Operational Technology ("OT"). As aging industrial sensors and legacy control systems are brought online to leverage cloud efficiencies, they expose previously air-gapped infrastructure to modern ransomware. This creates a dangerous "interdependency risk," where a single vulnerability in a third-party software library can cascade through the entire supply chain, crippling logistics, food distribution, and energy sectors simultaneously.²⁴ Tech experts have signaled the "parade of "horribles" expected from the nefarious uses of technology in cyber-space. According to these experts, "critical infrastructure targeting will expand into sectors supporting logistics and manufacturing."²⁵

Finally, a more patient but equally existential threat looms in the form of "Harvest Now, Decrypt Later" strategies.²⁶ Adversaries are currently intercepting and storing massive volumes of encrypted critical infrastructure data, betting on the near-term arrival of quantum computing to eventually break today's cryptographic standards.²⁷ This ensures that even if a network is secured today, the secrets of its structural weaknesses and strategic communications remain at risk for the decade to come.²⁸

IV. HISTORICAL ANACHRONISM AND THE "WILD WEST" OF CYBERSPACE

A letter of marque was historically defined as a government license issued to an individual, known as a "privateer," authorizing them to attack and

21. *See id.*

22. CHRIS JAIKARAN, CONG. RSCH. SERV., IF12798, *SALT TYPHOON HACKS OF TELECOMMUNICATIONS COMPANIES AND FEDERAL RESPONSE IMPLICATIONS* (2025).

23. *See generally id.* (describing adversary pre-positioning within critical infrastructure to enable later physical or kinetic disruption); *see also* David DiMolfetta, *Cyber experts pinpoint what to look out for in 2026*, NEXTGOV (Dec. 30, 2025), <https://www.nextgov.com/cybersecurity/2025/12/cyber-experts-pinpoint-what-look-out-2026/410306/> [<https://perma.cc/DP8L-XFVP>] (As Beijing continues to pre-position and embed access across U.S. critical infrastructure, questions of preparedness, deterrence, and response will increasingly shape how cyber policy is integrated into broader national security planning).

24. *See* JAIKARAN, *supra* note 22; Weigand, *supra* note 6.

25. Weigand, *supra* note 6.

26. *See* DiMolfetta, *supra* note 23.

27. *See id.*

28. *See id.*

capture the vessels and property of a foreign state.²⁹ The term “reprisal” specifically referred to a state-sanctioned act aimed at seeking redress for an injury committed by a foreign entity through the seizure of their property.³⁰ This mechanism served as a vital tool of economic statecraft, allowing nations with limited naval resources, such as the nascent United States during the Revolutionary War and the War of 1812, to supplement their military forces cost-effectively.³¹ Privateers operated at their own expense and were highly motivated by the profits generated from the sale of captured “prizes,” with these seizures being adjudicated in specialized admiralty courts.³²

The Framers of the U.S. Constitution recognized the gravity of this power, placing the authority to issue letters of marque solely with Congress, not individual states, because granting such letters was inherently viewed as an action that could directly lead to a state of war.³³ Thus, in *Barron v. City of Baltimore*, Chief Justice Marshall stated that the Constitution’s total prohibition on states issuing letters of marque was a necessary safeguard for national peace. He cautioned that allowing individual states to authorize privateers would “lead directly to war,” as such actions are inherently hostile. By stripping states of this power, the Framers ensured that a single state could not unilaterally provoke a foreign conflict and embroil the entire Union in a war that only Congress has the authority to declare.³⁴

The privateering practice eventually declined in the 19th century and was formally abolished among many nations by the 1856 Declaration of Paris respecting Maritime Law.³⁵ While the United States was not a formal signatory to this agreement, it has largely adhered to the principles set forth.³⁶ Consequently, Congress has not authorized the use of letters of marque since the Civil War era, leaving the constitutional authority dormant for well over a century.³⁷

The post-medieval historical use of letters of marque involved

29. Allen Loayza, *Cyber Privateers: Protecting American Intellectual Property from Cyber Theft*, 12 LANDSLIDE 27, 29 (2020).

30. See William Young, *A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal*, 66 WASH. & LEE L. REV. 895, 900 (2009); see also Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, 40 J. MAR. L. & COM. 221, 222 (2009).

31. See, e.g., Cooperstein, *supra* note 30, at 221; see also Young, *supra* note 30, at 902.

32. John M. Golden, *Patent Privateers: Private Enforcement’s Historical Survivors*, 26 HARV. J.L. & TECH. 545, 563 (2013).

33. See generally *id.* at 564 (Privateering could complicate the work of diplomats by stoking conflict with foreign powers).

34. See STEVE P. MULLIGAN, CONG. RSCH. SERV., LSB11272, LETTERS OF MARQUE AND REPRISAL (PART 1): INTRODUCTION AND HISTORICAL CONTEXT 2 (2025); see also *Barron v. City of Baltimore*, 32 U.S. 243, 249 (1833) (Marshall, C.J.) (“To grant letters of marque and reprisal would lead directly to war; the power of declaring which is expressly given to Congress.”).

35. *Id.* at 245; see also Declaration Respecting Maritime Law, Apr. 16, 1856, 46 Brit. & Foreign State Papers 26 (1856) [hereinafter Declaration of Paris].

36. See *id.* at 245-46.

37. Robert P. DeWitte, *Let Privateers Marque Terrorism: A Proposal for a Reawakening*, 82 IND. L.J. 131, 134 (2007).

commissioning private vessels, or privateers, to seize enemy merchant ships during wartime.³⁸ The major maritime powers at the time dispersed mercenaries called privateers by the British Crown, to wage war on the high seas against each other to conquer ocean spaces.³⁹ This practice, while effective in its time, was fraught with abuse, leading to its eventual abolition by the 1856 Declaration of Paris.⁴⁰ The primary concerns with privateering were the lack of consistent state control over these private actors and the difficulty in distinguishing between legitimate privateers and pirates.⁴¹ This historical context offers a cautionary tale for modern cyber-privateering.

Privateers operated with broad discretion as long as they remained loyal to their commissioning nation, a dynamic best exemplified by Sir Francis Drake during the reign of Queen Elizabeth I.⁴² Acting essentially as a contracted private military force for the English crown, Drake was instrumental in numerous naval engagements against the Spanish Armada.⁴³ However, his career illustrates the often-indistinguishable line between privateering and piracy.⁴⁴ While he fought official battles on behalf of the sovereign, his reputation was equally defined by his seizure of immense wealth.⁴⁵ Because of these predatory raids for gold and silver, many historians conclude that Drake and his fellow privateers were frequently no different from the pirates they were legally distinguished from.⁴⁶

The United States declined to sign the 1856 Paris Declaration Respecting Maritime Law, primarily because the treaty's prohibition on privateering favored established naval powers like Great Britain and France.⁴⁷ By maintaining the right to commission privateers, the U.S. preserved a cost-effective method for a smaller navy to challenge dominant maritime forces.⁴⁸

As a matter of constitutional hierarchy, the Paris Declaration cannot be construed as superseding the U.S. Constitution, nor does it diminish the plenary authority granted to Congress under Article I, Section 8 to authorize Letters of

38. MULLIGAN, *supra* note 34, at 1.

39. See generally Glenys P. Spence, *Combating Maritime Perils in the Global Supply Chain: An Analysis of Force Majeure Clauses and the Doctrine of Commercial Impracticability in The Wake of "State-Sponsored Piracy"*, 15 J. NAT'L SEC. L. & POL'Y 267, 286-87 (2025) (describing how major maritime powers commissioned privateers—state-sanctioned mercenaries—to attack enemy shipping and seize oceanic territory, noting legal and commercial impacts).

40. See Declaration of Paris, *supra* note 35; see also Cooperstein *supra* note 30, at 245.

41. See Golden, *supra* note 32, at 566.

42. Spence, *supra* note 39, at 289.

43. See *id.* (There may be no better example of early privateers and the purpose that they served than Sir Francis Drake. Francis Drake was a commissioned privateer during Queen Elizabeth's reign. Drake was instrumental in fighting the Spanish Armada on behalf of Great Britain.)

44. Cooperstein, *supra* note 30, at 224.

45. See Golden, *supra* note 32, at 563.

46. Cale Gressman, *A Brief History of English Privateers*, COLLECTOR (May 9, 2023), <https://www.thecollector.com/english-privateers/> [https://perma.cc/J757-5LL8].

47. See Cooperstein, *supra* note 30, at 245-46.

48. *Id.*

Marque and Reprisal.⁴⁹ While much of the Declaration is now viewed as customary international law, which the U.S. generally respects, such customs do not hold authority when they conflict with the U.S. Constitution or federal statutes.⁵⁰ In the event of a direct conflict between international custom and a Congressional mandate, U.S. courts and the executive branch are bound to prioritize domestic constitutional authority.⁵¹

Applying this 19th-century legal concept to 21st-century cyberspace is deeply problematic. The digital domain lacks clear physical borders, and actions taken by private operators can have unintended, widespread geopolitical consequences.⁵² Delegating sovereign power to private companies operating extraterritorially threatens to create a “Wild West” in cyberspace, where accountability is elusive and attribution remains a complex challenge.⁵³ The rapid, often anonymous nature of cyber operations makes direct state control and immediate de-escalation nearly impossible to manage under a privateering framework.⁵⁴

The central tension surrounding cyber letters of marque lies in whether a 19th-century naval power can be safely repurposed for a 21st-century digital landscape that lacks clear borders or established international norms. Proponents, including the Digital Chamber and Representative David Schweikert, argue that traditional law enforcement tools are fundamentally

49. See e.g., DeWitte, *supra* note 37, at 132.

50. See JAN MARTIN LEMNITZER, POWER, LAW AND THE END OF PRIVATEERING 3 (2014) (describing the Declaration as “almost instantaneous customary law”); *but see* Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 815, 857 (1997) (arguing that customary norms remain subordinate to the federal separation of powers and the Constitution) (“Nor does Article VI list CIL as a source of supreme federal law. Article I does authorize Congress to define and punish offenses against the law of nations, and Congress has exercised this and related powers to incorporate select CIL principles into federal statutes. But Congress has never purported to incorporate all of CIL into federal law. And Congress’s selective incorporation would be largely superfluous if CIL were already incorporated wholesale into federal common law, as advocates of the modern position suggest.”).

51. LEMNITZER, *supra* note 50.

52. See generally Molly Picard, *Cyberspace: The 21st-Century Battlefield Exposing Soldiers, Sailors, Airmen, and Marines to Potential Civil Liabilities*, 4 NAT’L SEC. L.J. 125, 141 (2015) (asserting that “[T]he law regulating cyberspace is neither clear nor precise”).

53. See Ben Haklai, *Cybersecurity Private-Public Partnerships: A Bridge to Advance Global Cybersecurity*, 56 TEX. TECH L. REV. 627, 683 (2024) (attribution is the ability to determine the source, origin, or identity of cyberattackers, by collecting and analyzing evidence, such as technical, operational, or contextual indicators).

54. See e.g., Nicholas Tsagourias & Michael Farrell, *Cyber Attribution: Technical and Legal Approaches and Challenges*, 31 EUR. J. INT’L L. 941, 944 (2020) (attribution in cyberspace has traditionally been presented as a challenge because of anonymization, the falsification of identities, the multi-stage nature of cyber operations, the dynamic landscape of cyber threats, the undifferentiated nature of cyber tools, the human and technical resources required in performing attribution and the lengthy timescales involved. State attribution has been even more challenging for the same reasons but also because of the serious political and legal consequences that attribution or misattribution may trigger).

insufficient against the rapid scale of state-linked cybercrime.⁵⁵ They contend that this constitutional “mechanism provides a legitimate, controlled way to leverage private-sector expertise to hack back,” thereby providing a necessary layer of accountability and a means for restitution.⁵⁶

Conversely, critics view the concept as a dangerous anachronism that threatens to turn cyberspace into a lawless “Wild West.”⁵⁷ One primary concern is the difficulty in maintaining real-time control over private actors, which creates significant risks regarding accountability for unintended collateral damage in the digital realm.⁵⁸ Furthermore, actions taken by private operators could be interpreted as violations of state sovereignty under international law, potentially triggering geopolitical escalation or leaving the operators themselves vulnerable to prosecution in foreign jurisdictions.⁵⁹ There are also grave due process concerns, as authorizing asset seizures without traditional judicial oversight could lead to legal liability and the wrongful targeting of individuals or entities.⁶⁰

Ultimately, the limitations of current proposals like H.R. 4988 suggest that stability in the digital domain is better served by building upon established international law rather than reviving a discredited maritime concept. A modern approach must prioritize robust oversight, clear chains of command, and strict adherence to the principles of state sovereignty and the responsible use of force in cyberspace.

V. FROM MARITIME MARQUE TO CYBER BILL: THE 2026 FRAMEWORK FOR PRIVATE DIGITAL REPRISAL

America is locked in an ongoing “cyber war,” with critical federal networks and private infrastructure under continuous automated attack from nation-state actors and criminal syndicates.⁶¹ Ransomware has evolved into a pervasive and incessant threat, subjecting U.S. consumers and commercial entities to a near-constant state of digital siege. The threat landscape requires focusing on both systemic infrastructure risk and targeted corporate attacks.⁶² In 2026, cyber warfare has evolved into a permanent background risk where automated AI-driven tools launch sophisticated attacks at a scale and speed previously unseen.

55. See Scam Farms Marque and Reprisal Authorization Act of 2025, H.R. 4988, 119th Cong. § 2(2) (2025).

56. See *id.*; see also Loayza, *supra* note 29.

57. See Christopher M. Kessinger, *Hitting the Cyber Marque: Issuing a Cyber Letter of Marque to Combat Digital Threats*, ARMY L. 4, 5 (2013).

58. See Paul Rosenzweig, *International Law and Private Actor Active Cyber Defensive Measures*, 50 STAN. J. INT'L L. 103, 115 (2014).

59. *Id.*

60. *Id.*

61. Michael J. Lebowitz, *The Cyberenemy: Using the Military Justice System to Prosecute Organized Computer Attackers*, J.L. TECH. & POL'Y 83, 84 (2013) (“The United States is literally under cyberassault on a second-by-second basis”).

62. *Id.*

Unlike traditional warfare, these attacks lack the audible cues of explosions or gunfire; however, their silent and unassuming nature is precisely what makes them so dangerous.⁶³

Motivations for these incursions vary widely, ranging from recreational hacking and corporate espionage to financial theft and more sinister geopolitical sabotage.⁶⁴ While the United States maintains a perpetual defensive posture to safeguard its digital infrastructure, scholars and security analysts warn that a sufficiently sophisticated offensive operation could precipitate a systemic collapse. Such a high-impact strike poses an existential threat to the national power grid and the integrity of Department of Defense (“DoD”) communication networks, potentially resulting in catastrophic socioeconomic and national security consequences.⁶⁵ The primary obstacle to accountability is the attribution problem.⁶⁶ Attackers employ anonymization protocols to redirect traffic through multiple intermediary nodes, creating a layered circuit that prevents the attribution of malicious activity to a specific source.⁶⁷

The application of letters of marque to cyberspace has ignited a significant debate over whether a power designed for 19th-century naval warfare can be safely repurposed for 21st-century digital conflicts, which lack clear battlefields, borders, and established international norms. Proponents of the shift, including the Digital Chamber and Representative David Schweikert, argue that traditional law enforcement tools are fundamentally insufficient against the speed and scale of modern, state-linked cybercrime. They contend that this constitutional mechanism offers a legitimate and controlled means of leveraging private-sector talent, enabling “hack-back” operations that provide both accountability and restitution for victims.⁶⁸

Conversely, critics view the concept as an anachronistic and dangerous solution that risks transforming cyberspace into a lawless “Wild West.” A primary concern is the difficulty of maintaining real-time control over private actors, raising critical questions about accountability for unintended

63. *Id.*

64. See Lebowitz, *supra* note 61, at 86.

65. See Scott J. Shackelford & Amanda N. Craig, *Beyond the New “Digital Divide”: Analyzing the Evolving Role of National Governments in Internet Governance and Enhancing Cybersecurity*, 50 STAN. J. INT’L L. 119, 149 (2014); see also Robert Kenneth Palmer, *Critical Infrastructure: Legislative Factors for Preventing A “Cyber-Pearl Harbor”*, 18 VA. J.L. & TECH. 289, 290 (2014); Kessinger, *supra* note 57, at 4.

66. See TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 80 (Michael N. Schmitt ed., 2017) (noting that the “technical difficulty of tracing a cyber operation to its source” remains a primary barrier to establishing state responsibility); see also Nicholas Tsagourias, *Cyber Attacks, Self-Defence and the Problem of Attribution*, 17 J. CONFLICT & SEC. L. 229, 233 (2012) (discussing how attackers utilize intermediate “zombie” computers to mask their true geographical origin).

67. Kristen E. Eichensehr, *The Law and Politics of Cyberattack Attribution*, 67 UCLA L. REV. 520, 528 (2020).

68. See e.g. Kessinger, *supra* note 57, at 218.

consequences or collateral damage in the digital realm.⁶⁹ Furthermore, opponents warn that actions taken by private operators could be interpreted as violations of state sovereignty and international law, potentially triggering geopolitical escalation or leaving operators vulnerable to prosecution in foreign jurisdictions. There are also significant due process concerns, as authorizing asset seizures without traditional judicial oversight could lead to potential liability for wrongfully targeted individuals or entities.⁷⁰

To prevent these authorizations from devolving into unchecked digital vigilantism, the regulatory framework should be envisioned as a highly structured, layered oversight model.⁷¹ This model begins with the President issuing specific “suitable instructions” to ensure that every private offensive action aligns with clear national interests.⁷² Accountability can be further reinforced by a mandatory requirement for privateers to post substantial security bonds; these financial guarantees would serve as a deterrent against misconduct and can be forfeited if an operator violates the terms of their commission or causes unauthorized collateral damage.⁷³

Operationally, digital privateers would be governed by strict guardrails designed to limit their reach and prevent domestic overreach.⁷⁴ Commissions would be restricted to actions against specific foreign criminal syndicates or state-backed enterprises, with operations generally mandated to occur outside U.S. geographic boundaries. Eligibility for such a commission would be predicated on passing rigorous federal vetting and background checks, and authorized entities would be required to adhere to stringent data governance protocols, including maintaining auditable logs of all activities.⁷⁵

Finally, the framework would incorporate essential checks and balances through both the legislative and judicial branches. The executive branch will be required to submit periodic reports to Congress detailing all privateer activities, while the judiciary will remain a critical venue for reviewing the legality of specific seizures.⁷⁶ To mitigate the risk of escalating geopolitical tensions, the model emphasizes diplomatic coordination and deconfliction efforts with

69. Jan E. Messerschmidt, *Hackback: Permitting Retaliatory Hacking by Non-State Actors As Proportionate Countermeasures to Transboundary Cyberharm* Shearman & Sterling Student Writing Prize in Comparative and International Law, 52 COLUM. J. TRANSNAT'L L. 275, 294-95 (2013).

70. *See id.*

71. *See e.g.* Kessinger, *supra* note 57, at 4, 19.

72. *See* Scam Farms Marque and Reprisal Authorization Act of 2025, H.R. 4988, 119th Cong. § 3 (2025).

73. *See* Kessinger, *supra* note 57.

74. *See* Allen Loayza, *Cyber Privateers Protecting American Intellectual Property from Cyber Theft*, 12 LANDSLIDE 27, 30 (2020) (Cyber privateers would be required to post a bond and abide by highly detailed operational rules to receive a letter of marque. The letter of marque would also include adequate controls to limit the actions a privateer could take, as well as the duties owed to the people whose systems they infiltrate and any uninvolved third parties.)

75. *Id.*

76. *See* Kessinger, *supra* note 57, at 4.

international partners.⁷⁷ Many proposed versions of this authority also include time-bound commissions, ensuring that the power to disrupt an adversary is temporary and expires once a specific infrastructure threat has been neutralized.⁷⁸

*A. The Letters of Marque and Reprisal Clause: Historical Basis
and Modern Debate*

The “Letters of Marque and Reprisal” clause, enshrined in Article I, Section 8, Clause 11 of the U.S. Constitution, is a historical artifact that grants Congress the power to authorize private citizens to use force on behalf of the government.⁷⁹ This power was a vital tool for the early United States, which lacked a large, standing navy to protect its maritime interests.⁸⁰ During the 1787 Philadelphia Convention, the Framers vested the federal legislature with exclusive, absolute authority to issue letters of marque and reprisal, expressly prohibiting states from doing so.⁸¹ This decision drew little controversy, likely due to the successful use of privateers during the Revolution and the precedent established by the Articles of Confederation.⁸² The practice declined in the 19th century and was formally abolished among many nations by the 1856 Declaration of Paris respecting Maritime Law, which the U.S. has since adhered to in principle, though it is not a formal signatory. Congress has not authorized the use of letters of marque since the War of 1812.⁸³

Just as the young American Republic once relied on private fighting forces to compensate for a lacking navy, modern lawmakers are looking to private cyber operators to bolster national security.⁸⁴ During the American Civil War, the Confederacy utilized letters of marque to commission privateers against the North, an act that defined the era’s maritime struggle.⁸⁵

Today, cyberspace has become the new “high seas”, a vast, lawless frontier where the U.S. government struggles to keep pace with foreign criminal

77. *Id.*

78. *Id.*

79. U.S. CONST. art. 1, § 8, cl. 11.

80. See Lobel, *supra* note 11, at 1035.

81. U.S. CONST. art. 1, § 10, cl. 1.

82. See Mulligan, *supra* note 38.

83. Young, *supra* note 30, at 8907 (Congress issued no more letters of marque and reprisal after the War of 1812, and the few privateers unwilling to give up the lifestyle and potential rewards of privateering began to offer their service as pirates to other nations, especially in Latin America).

84. See Todd Emerson Hutchins, *Structuring A Sustainable Letters of Marque Regime: How Commissioning Privateers Can Defeat the Somali Pirates*, 99 CAL. L. REV. 819, 847 (2011).

85. See *id.* at 856 (During the American Civil War, the Union government declared that it would abide by the principles of the Paris Declaration during hostilities; the South did not and sought to hire British and French privateers.)

syndicates.⁸⁶ In response, proposed legislation, such as the Scam Farms Marquee and Reprisal Authorization Act, seeks to revive this historical tool, granting the President authority to license private entities to disrupt and seize assets from cyber-adversaries. Much like the Civil War-era privateers, these modern “cyber-privateers” would bridge the gap between limited government resources and the rising tide of foreign threats.⁸⁷

Since the 1970’s Cold War rivalries and in the post-cold-war times, governments have turned more and more to covert paramilitary operations to conduct foreign policy.”⁸⁸ Particularly during the Reagan Administration, the use of these operations to overthrow or coerce foreign governments to work towards the U.S. interest doubled.⁸⁹ In the present political climate under President Trump, these covert operations are poised to re-emerge re-energize to assure that countries perceived to be acting against U.S. interests are brought to heel.⁹⁰ Only this time, the activities will be also carried out in cyberspace, terra nullius, no-man’s land.⁹¹

It remains unclear under both United States and international law whether responding to cyberattacks with letters of marque is legally proper. Furthermore, any such response risks triggering significant separation of powers issues concerning the War Powers, the Letter of Marque and Reprisals, and the Foreign Affairs Clauses of the Constitution.⁹²

The enduring debate over the Framers’ original intent, specifically the requirement for a shared war-making authority, has become increasingly salient as the line between Executive prerogative and Legislative mandate blurs.⁹³ While the post-WWII era and the prolonged conflicts in Iraq and Afghanistan highlight an expansion of Executive unilateralism, the recent military intervention in Venezuela and the apprehension of Nicolás Maduro have

86. See e.g. Jesse Jacob McMurdo, *Cybersecurity Firms-Cyber Mercenaries?*, 4 HOMELAND & NAT’L SECURITY L. REV. 35 (2016) (As the threat of conventional World War II-style war continues to diminish, the emergence of a new battlefield-cyberspace-has taken a position equal to that of land, sea, air, and space); see Rosenzweig, *supra* note 58.

87. See generally, Kessinger, *supra* note 57, at 5 (“A cyber letter of marque would enable a privateer to seize digital assets, disrupt fiscal and communication networks, destroy attacking networks, and act as a cyber bounty hunter”).

88. See Lobel, *supra* note 11, at 1037-39.

89. See *id.*

90. See e.g. Exec. Order No. 14,390, 91 Fed. Reg. 18, 271 (Mar. 6, 2026) (establishes a specialized operational cell within the National Coordination Center to dismantle transnational criminal organizations, prioritizes the repatriation of seized assets to fraud victims, and integrates private-sector capabilities to disrupt foreign cyber-enabled criminal syndicates and “scam farms”).

91. Lobel, *supra* note 11, at 1037-39; see Jesse Jacob McMurdo, *Cybersecurity Firms—Cyber Mercenaries?*, 4 Homeland & Nat’l Sec. L. Rev. 35, 38, 40 (2016).

92. See Lobel, *supra* note 11, at 1036-39.

93. See e.g. John C. Dehn, *War Is More Than A Political Question: Reestablishing Original Constitutional Norms*, 51 LOY. U. CHI. L.J. 485, 486 (2019).

reignited questions regarding the limits of Article II power.⁹⁴

In contrast, the proposed use of letters of marque in cyberspace represents a pivotal reassertion of Article I authority.⁹⁵ By utilizing a specific congressional decree rather than relying on inherent Executive clandestine powers, this framework positions the United States to uniquely revive the Marque and Reprisal Clause.⁹⁶ Proponents argue that the characterization of cyberspace as *terra nullius*, a digital “high seas,” legitimizes this legislative delegation to private actors, offering a constitutional mechanism to project power into jurisdictional voids that traditional state-led enforcement cannot reach.

Originating in 1295 under Henry II and formalized through fifteenth-century Admiralty courts, letters of marque became a vital instrument of maritime jurisdiction. In the United States, this authority was incorporated into the Articles of Confederation and, subsequently, the Constitution, where federalists and non-federalists alike viewed it as an essential component of national war power.⁹⁷

The intersection of maritime conflict and international law significantly shaped American governance, beginning with President Washington’s 1793 Proclamation of Neutrality.⁹⁸ This legal evolution eventually produced the “Charming Betsy” canon, which stands for the proposition that an act of Congress should not be construed to violate international law unless there is no other interpretation.⁹⁹ While Congress authorized letters of marque during the War of 1812, the global tide shifted with the Declaration of Paris during the Crimean War.¹⁰⁰ Notwithstanding, the United States initially declined to sign the Declaration to preserve its right to augment a small navy.¹⁰¹ Memories from

94. Marc Weller, *The U.S. Capture of President Nicolás Maduro—and attacks on Venezuela—Have no Justification in International Law*, CHATHAM HOUSE (Jan. 6, 2026), <https://www.chathamhouse.org/2026/01/us-capture-president-nicolas-maduro-and-attacks-venezuela-have-no-justification> [https://perma.cc/5ZRG-8YVD]; C. Kevin Marshall, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 954-55 (1997).

95. Jonathan L. Still, *Resurrecting Letters of Marque and Reprisal to Address Modern Threats*, (Strategy Research Project, U.S. Navy).

96. See Lucian Rombado, *Grant Cyber Letters of Marque to Manage “Hack Backs”*, U.S. NAVAL INST. PROC., at pp. 1400 (2019); Robert P. DeWitte, *Let Privateers Marque Terrorism: A Proposal for a Reawakening*, 82 IND. L.J. 131, 133-34 (2007).

97. See generally Young, *supra* note 30, at 905 (Given the prominence of privateers in the Revolutionary War, it is not surprising that the Framers included a provision for letters of marque and reprisal in both the Articles of Confederation and the Constitution).

98. See e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 329 (2001).

99. See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

100. Zac Morgan & Ian A. Merritt, *Reviving Letters of Marque*, CTR. FOR MAR. STRATEGY (Oct. 29, 2024), <https://centerformaritimestrategy.org/publications/reviving-letters-of-marque/> [https://perma.cc/8JDQ-HB33].

101. See John M. Golden, *Patent Privateers: Private Enforcement’s Historical Survivors*, 26 HARV. J.L. & TECH. 545, 562 (2013).

both the Revolutionary War and the Civil War complicated this stance.¹⁰² When the Confederacy issued its own letters of marque, President Lincoln famously refused to retaliate in kind, despite British recognition of the South as a belligerent.¹⁰³ This refusal led to complex litigation over whether Confederate seizures constituted acts of war or simple piracy, raising the theoretical question of whether the U.S. had informally adopted the Paris Declaration as customary international law.¹⁰⁴

This trend of restraint continued through the Spanish-American War, during which Congress again declined to commission privateers. This period also saw the landmark *Paquete Habana* decision,¹⁰⁵ which affirmed that international law is an integral part of the American legal system and that courts must adhere to the customs of the law of nations in the absence of conflicting domestic legislation.¹⁰⁶ Despite this long period of dormancy, the letter of marque clause remains a functional part of the Constitution.¹⁰⁷ Recent legislative interest suggests that the clause may be repurposed for the digital age, as Congress contemplates using letters of marque to combat cyber-terrorism and rogue states in the realm of information warfare.¹⁰⁸

Furthermore, the paper draws a crucial comparison between the historical abuses of maritime privateering that prompted its international abolition and the potential for similar excesses by private cyber mercenaries. The legal status of these “cyber privateers” would be ambiguous under international humanitarian law. Unlike state agents operating under a clear chain of command, private operators present unique challenges regarding the laws of armed conflict, non-combatant immunity, and accountability for collateral damage.¹⁰⁹ Private cyber-attacks against state-linked actors or infrastructure could be interpreted as coercive interference in another state’s internal affairs, violating the principle of

102. See Young, *supra* note 30 at 900 (in the early years of the United States, the President, constrained by limited military size, manpower, and technology, may have been unable to achieve many commercial and military objectives without relying on privateers).

103. STEVE P. MULLIGAN, CONG. RSCH. SERV., LSB11273, LETTERS OF MARQUE AND REPRISAL (PART 2): DRAFTING HISTORY AND U.S. PRACTICE 3 (2025).

104. See Kessinger, *supra* note 57, at 9.

105. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

106. See *id.* (“[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience, have made themselves particularly well acquainted with the subjects of which they treat.”).

107. See Cooperstein, *supra* note 30, at 253; Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations As Constitutional Law*, 98 VA. L. REV. 729, 729-30 (2012).

108. Press Release, Rep. David Schweikert, *Schweikert Introduces Cybercrime Marque and Reprisal Authorization Act to Combat Foreign Scam Syndicates* (Aug. 20, 2025), <https://schweikert.house.gov/2025/08/20/schweikert-introduces-cybercrime-marque-and-reprisal-authorization-act-to-combat-foreign-scam-syndicates/> [<https://perma.cc/2PVT-UGNQ>].

109. See generally Rosenzweig, *supra* note 58, at 110 (If piracy is the right analogy, then private sector aggressive cyber defense may well be unlawful, and even aggressive countermeasures by nation-states might have to respect the sovereignty of other countries).

non-intervention.¹¹⁰

In both U.S. and international law, a cyberattack is considered an act of war requiring congressional approval when its scale and effects mirror a traditional kinetic strike, resulting in death, injury, or significant physical destruction.¹¹¹ Because there are no universally binding international criteria, these determinations are made on a case-by-case basis using a “consequence-based” approach.¹¹² Under this standard, digital operations that cause catastrophic outcomes, such as destroying a dam to displace populations, inducing a nuclear meltdown, or hijacking air traffic control systems to cause crashes, are viewed as equivalent to kinetic military strikes.¹¹³ Factors such as the intent to cause grave harm, the immediacy of the threat, and the overall severity of the disruption are the primary metrics for identifying an act of war.¹¹⁴

Under the U.S. Constitution, only Congress has the power to declare war, and the War Powers Resolution generally requires the President to seek authorization for introducing armed forces into hostilities.¹¹⁵ While presidential authority as Commander-in-Chief allows self-defense actions, recent legislation still notes that the War Powers Resolution¹¹⁶ may apply to certain military cyber operations. The proposed Cybercrime Marque and Reprisal Authorization Act of 2025 attempts to bypass some of these ambiguities by authorizing private actors,¹¹⁷ but if such a private operation were to result in mass casualties, it would likely fall under existing war powers scrutiny, creating potential legal conflicts.¹¹⁸ The consensus remains that the physical effects of an attack are the decisive factor.

110. *See id.* at 112 (Letters of marque and reprisal are, essentially, “a license authorizing a private citizen to engage in reprisals against citizens or vessels of another nation”).

111. Greg Mgrditchian & Ernest A. Yazzetti, Jr., *2013 National Lawyers Convention International: Cybersecurity-the Policy and Politics of A Leading National Security Threat*, 41 RUTGERS COMPUTER & TECH. L.J. 194, 212 (2015).

112. *Id.*

113. *See* Hathaway et al., *supra* note 5 at 847 (a cyber-attack need only penetrate a critical system to justify a conventional military response that could start a physical, kinetic war—this approach could undermine the security of the international community by making war much more likely).

114. *See id.* at 848 (The key criterion determining when a cyber-attack constitutes an armed attack is the severity of the harm caused. A cyber-attack justifies self-defense “only if its foreseeable consequence is to cause physical injury or property damage and, even then, only if the severity of those foreseeable consequences resembles the consequences that are associated with armed coercion.”).

115. U.S. CONST. art. I, § 8, cl. 11.

116. 50 U.S.C. §§ 1541–48.

117. Cybercrime Marque and Reprisal Authorization Act of 2025, H.R. 4988, 119th Cong. (2025).

118. *See* Hathaway et al., *supra* note 5, at 848 (Under this test, a cyber-attack on the air traffic control system causing planes to crash would be regarded as an armed attack because it is foreseeable that such an attack would cause loss of life and substantial property damage.).

B. Constitutional Authority in the Cyber Domain

The Letters of Marque and Reprisals Clause is a frequently overlooked component of the U.S. Constitution that grants Congress the power to authorize private actors to engage in retaliatory actions.¹¹⁹ In the digital age, this clause faces new scrutiny as a potential tool for “hacking back” against foreign threats.¹²⁰ The primary tension lies in the Separation of Powers: while Congress has the authority to issue these letters, the President, as Commander in Chief, oversees the execution of national defense.¹²¹ This jurisdictional overlap becomes particularly complex when digital attacks originate from state-sponsored actors, triggering the President’s foreign affairs powers.

While Article I gives Congress the power to “define and punish Piracies and Felonies committed on the high seas,” modern digital incursions, such as ransomware or state-led sabotage, often fall outside traditional legal definitions of piracy.¹²² However, historical precedent suggests a shared responsibility. Just as President Jefferson navigated maritime warfare against the Barbary States by merging his Commander-in-Chief authority with Congressional intent, a modern administration might argue that thwarting threats to national digital infrastructure and commerce justifies the use of private cyber-operatives.¹²³

Historical crises, from the use of privateers in the Revolutionary War to the response to Confederate commerce raiding, demonstrate that presidential power is at its peak when facing “quasi-sovereign” threats that endanger the nation’s economic lifeblood. In cyberspace, the Commander-in-Chief clause can be construed not as a declaration of war but as a defensive mandate to neutralize threats to national security and global trade.¹²⁴ By marrying executive action with the spirit of the Letters of Marque, the government could theoretically authorize private “cyber-privateers” to protect the digital commons.¹²⁵

Historically, a Letter of Marque served as the line of demarcation between illegal piracy and legitimate state-sanctioned defense. Although the 1856 Paris Declaration Respecting Maritime Law abolished privateering, the United States never formally acceded to it, leaving a theoretical opening for the use of private vessels, or in this case, private security firms, to respond to violence.¹²⁶

In the current landscape, the absence of a clear government framework

119. See generally JAY WEXLER, *THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS* (2011) (“[t]he United States hasn’t issued a letter of marque or reprisal in almost two hundred years.”); accord Spence, *supra* note 39, at 286.

120. See Rosenzweig, *supra* note 58, at 105 (defining “hack back” as “[T]he synchronized, real-time capability to discover, detect, analyze, and mitigate threats.”).

121. See U.S. CONST. art. I, § 8, cl. 11; U.S. CONST. art. II, § 2, cl. 1.

122. U.S. CONST. art. I, § 8, cl. 10.

123. See Robert F. Turner, *State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates*, 4 CHI. J. INT’L L. 121, 128-29 (2003).

124. U.S. CONST. art. II, § 2, cl. 1.

125. See generally Rosenzweig, *supra* note 58, at 113 (discussing piracy as not prohibited by the Paris Declaration and analogizing to cyber privateering).

126. *Id.* (discussing the legality of cyber privateers).

leaves private corporations in a legal gray area, unsure if hiring Private Cyber Security Contractors (“PCSCs”) to “hack back” or neutralize threats is lawful. Given the scale of modern digital crises and the legal hurdles of direct military intervention, authorizing private entities through a modernized “Digital Letter of Marque” may offer a temporary solution to secure the global digital economy.¹²⁷

C. The Paris Declaration: Has it Ripened into Customary International Law?

In 2026, the question of whether the 1856 Paris Declaration has “ripened” into binding customary international law has moved from academic debate to an urgent matter of national policy.¹²⁸ This legal evolution is unfolding against a backdrop of persistent gray-zone conflicts and strained national budgets, where the centuries-old concept of privateering found fertile ground for revival. Practical necessity drives this movement. Nations are eager to exert global influence without the staggering financial and political costs of traditional military engagement.

The central argument for this new age of “state-sponsored sea dogs” rests on sheer cost-effectiveness.¹²⁹ As modern defense budgets struggle to fund the construction of long-lead warships, private military companies have stepped forward to offer ready-made capacity.¹³⁰ By authorizing private firms to bear the costs of vessels, crews, and equipment, governments can project power through privateers rather than expensive, state-maintained cruisers.¹³¹ This strategy has proven particularly relevant in theaters of economic warfare, such as the Strait of Hormuz, where alliances of nations have employed commissioned privateers to target “ghost fleets” of sanctioned oil tankers.¹³² Operating under strict but opaque letters of marque, these actors inflict steep economic costs on adversaries while maintaining a low-footprint form of deterrence.¹³³

This utility has extended beyond the physical waves into the digital realm, where legislative proposals in the United States have sought to adapt “letters of marque and reprisal” for cyberspace.¹³⁴ This framework allows vetted “white

127. Joshua Parisi, “*WWW*” *Marques the Spot: Privateering as a Solution to Cryptocurrency Theft*, 72 S. METHODIST U.L. REV. 895, 912 (2019).

128. See Rosenzweig, *supra* note 58, at 112-13.

129. John M. Golden, *Patent Privateers: Private Enforcement’s Historical Survivors*, 26 HARV. J.L. & TECH. 545, 560 (2013).

130. Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT’L L.J. 1, 17 (1999).

131. *Id.*

132. See Stop Harboring Iranian Petroleum Act, Pub. L. No. 118-50, div. J, 138 Stat. 915, 966 (2024) (codified at 22 U.S.C. § 10101 note) [hereinafter SHIP Act]; Exec. Order No. 14,390, 91 Fed. Reg. 18,271 (Mar. 6, 2026).

133. See Sapone, *supra* note 130, at 134.

134. See Scam Farms Marque and Reprisal Authorization Act of 2025, H.R. 4988, 119th Congress (2025).

hat” hackers to execute government-authorized “hack-backs” against foreign threats and sophisticated criminal cartels. For the government, the allure of this approach lies in plausible deniability. Operations conducted by private actors offer a degree of separation, allowing states to disrupt enemy operations without triggering the full diplomatic fallout or the rigid rules of engagement associated with official military action.

However, the question remains whether the Paris Declaration, which the United States never signed, now carries the weight of customary international law that forbids such practices. Critics argue that the benefits of privateering are outweighed by the risk of dismantling the international rules-based order and blurring the lines between legitimate combatants and opportunistic mercenaries.¹³⁵ While the return of the privateer offers a pragmatic solution to modern capability gaps in the maritime and cyber domains, it reintroduces a chaotic element into global conflict, challenging the fragile 170-year consensus that sought to keep private warfare abolished.¹³⁶

In 2026, the global landscape is increasingly defined by gray-zone conflicts, a strategic space that exists in the volatile middle ground between peaceful diplomacy and all-out conventional war. These conflicts are characterized by an intentional ambiguity. Actors seek to achieve major geopolitical goals through aggression that is calibrated to remain just below the “red lines” or legal thresholds that would trigger a decisive military response. By operating in this shadow area, nations can challenge the international order while maintaining a degree of plausible deniability.

The hallmark of a gray-zone campaign is the use of non-traditional tools to exert pressure. This includes the deployment of “maritime militias,” civilian-appearing vessels used to harass commercial shipping or probe undersea infrastructure, and the execution of sophisticated cyberattacks designed to degrade a nation’s economy without firing a single shot. In 2026, these tactics are often supported by AI-driven disinformation campaigns intended to destabilize a target’s domestic politics and social cohesion from within.¹³⁷

Strategic experts often describe this as a “salami-slicing” strategy, where a series of small, incremental provocations, none of which alone justify a declaration of war, cumulatively result in a significant strategic shift.¹³⁸ By the time a defender realizes the extent of the damage, the aggressor has already established a new “normal” on the ground or in cyberspace. Consequently, the

135. See Rosenzweig, *supra* note 58, at 117.

136. See *id.*

137. Ben Crowell & Wade Turvold, *Illegal, Unreported, and Unregulated Fishing, and the Impacts on Maritime Security*, in HINDSIGHT, INSIGHT, FORESIGHT: THINKING ABOUT SECURITY IN THE INDO-PACIFIC 209, 214–15 (Alexander L. Vuving ed., 2020).

138. See Richard W. Maass, *Salami Tactics: Faits Accomplis and International Expansion in the Shadow of Major War*, 5 TEX. NAT’L SEC. REV. 33, 33 (2021); see also Lorenz Langer, *The South China Sea As A Challenge to International Law and to International Legal Scholarship*, 36 BERKELEY J. INT’L L. 362 (2018) (citing Robert Haddick, *Salami Slicing in the South China Sea*, FOREIGN POL’Y (Aug. 3, 2012) (describing “salami slicing” as the accumulation of small actions that, over time, add up to a major strategic shift)).

gray zone has become the primary arena for modern power competition, forcing governments to develop new legal and military frameworks to counter threats that are too aggressive to ignore but too subtle to meet with traditional force.

VI. THE THRESHOLD OF CONFLICT: WAR POWERS, ACCOUNTABILITY, AND THE EXTRATERRITORIAL CHALLENGE IN CYBERSPACE

In both U.S. and international law, a cyberattack rises to the level of an act of war requiring congressional approval when its scale and effects mirror those of a traditional kinetic armed attack, resulting in death, injury, or significant physical destruction. Under the prevailing “consequence-based” approach endorsed by the Tallinn Manual and the U.S. State Department, digital operations are viewed as equivalent to military strikes if they cause catastrophic outcomes such as nuclear meltdowns, the destruction of dams, or the hijacking of air traffic control systems.¹³⁹ Beyond physical damage, the determination depends on the severity, immediacy, and scale of the disruption, as well as the clear intent to cause grave harm or destabilization.¹⁴⁰

This legal threshold directly impacts U.S. domestic law, where the Constitution vests the power to declare war solely in Congress.¹⁴¹ While the War Powers Resolution requires the President to seek authorization for hostilities, modern executive authority often relies on the Commander-in-Chief’s power to act in self-defense. Recent laws, such as Public Law 117-263, authorize the Defense Secretary to conduct military cyber operations to defend critical infrastructure, often framing these as actions “short of hostilities.”¹⁴² However, the proposed Act seeks to bypass traditional war power ambiguities by authorizing private actors. If a private operation under a letter of marque were to trigger mass casualties, it would likely fall under existing war powers scrutiny and conflict with the U.N. Charter’s restrictions on the use of force.

A major legal hurdle for such legislation is the presumption against extraterritoriality, a principle holding that U.S. laws apply only within the United States unless Congress explicitly states otherwise.¹⁴³ This principle is justified by the need for international comity, respect for congressional intent regarding domestic matters, and the maintenance of checks and balances. To determine if a law applies abroad, the Supreme Court utilizes a two-step analysis: first, looking for a clear indication of congressional intent, and second, determining if the “focus” of the conduct occurred within the U.S.¹⁴⁴ Because the decentralized nature of cyberspace makes it difficult to pinpoint the location

139. Harold Hongju Koh, Remarks at USCYBERCOM Inter-Agency Legal Conference (Sept. 18, 2012) (transcript archived at the U.S. Department of State) (explaining what constitutes the use of force in cyberspace).

140. See Hathaway et al., *supra* note 5, at 847.

141. U.S. CONST. art. I, cl. 2.

142. James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022).

143. Hathaway et al., *supra* note 5, at 877.

144. Nestle USA, Inc. v. Doe, 593 U.S. 628, 632-33 (2021).

of activity, any legislation like H.R. 4988 must contain explicit language to overcome this presumption and provide legal clarity for authorized actions against foreign threats.

VII. CONFLICTS WITH INTERNATIONAL LAW

International law principles applicable to cyber conflict in 2026 are primarily anchored in the U.N. Charter and international humanitarian law.¹⁴⁵ At the core of peacetime regulations is the principle of state sovereignty, which requires nations to respect the territorial and internal independence of others, meaning unauthorized network penetrations are generally considered legal violations. This is closely linked to the prohibition of the use of force under Article 2(4) of the U.N. Charter, where cyber operations are categorized as a use of force if their scale and effects mimic kinetic attacks, such as those causing physical destruction or loss of life.¹⁴⁶ Correspondingly, Article 51 preserves a state's inherent right to self-defense if a cyber operation reaches the threshold of an armed attack.¹⁴⁷

Beyond these prohibitions, the principle of due diligence dictates that states must ensure their territory is not knowingly used for malicious activities that harm the rights of other nations. This is complemented by the principle of non-intervention, which forbids coercive interference in the internal affairs of a state, particularly regarding electoral integrity or essential government functions.¹⁴⁸

When cyber operations occur within the context of an armed conflict, the framework shifts to international humanitarian law, often referred to as *jus in bello*.¹⁴⁹ The principle of distinction is paramount, requiring that attackers differentiate between civilian objects and military objects to ensure that digital strikes are never directed at the public. This is balanced by the principle of proportionality, which prohibits any attack where the anticipated civilian harm, including indirect effects like the collapse of a power grid, is excessive compared to the direct military advantage gained.¹⁵⁰ Furthermore, the principles of military necessity and precautions in attack require states to limit their operations to legitimate goals and take all feasible measures to minimize incidental civilian damage. By 2026, these frameworks will have evolved through the U.N.'s Global Mechanism, which increasingly treats civilian data

145. U.N. Charter art. 2, para. 4; see generally FRANÇOIS DELERUE, THE THRESHOLD OF CYBER WARFARE: FROM USE OF CYBER FORCE TO CYBER ARMED ATTACK, *in* THE LAWFULNESS OF CYBER OPERATIONS 273-342 (Cambridge Univ. Press 2020) (recognizing that the UN Charter's drafters in 1945 could not have anticipated military cyber operations, but its deliberately flexible language allows it to adapt and apply to such modern developments).

146. See generally *id.* (summarizing that under the UN Charter, cyber warfare begins at the Article 2(4) threshold for the threat or use of force; only cyber operations that rise to that level can qualify as cyber warfare under *jus contra bellum*).

147. U.N. Charter, para. 51.

148. See Hathaway et al., *supra* note 5, at 848.

149. See Delerue, *supra* note 145.

150. See Koh, *supra* note 138.

as a protected object under humanitarian law, reflecting a strategic shift in how international law governs the digital domain.¹⁵¹

The delegation of sovereign power to private companies operating extraterritorially directly conflicts with foundational principles of state sovereignty under international law, which grants a state exclusive authority over its territory. The U.N. Charter generally prohibits the unilateral use of force and emphasizes state sovereignty and non-intervention in the affairs of other nations.¹⁵² While cyber operations exist in a legal “grey zone,” state-sanctioned “hack-backs” could violate the U.N. Charter’s prohibition on the use of force or, at the very least, escalate cyber conflicts. Actions by private U.S. cyber operators against foreign entities, even if authorized by the U.S. government, could be construed as violations of these principles, potentially triggering international disputes or retaliatory actions.

In 2026, the international legal community largely adheres to the “scale and effects” test to determine if a cyber operation constitutes a use of force under Article 2(4) of the UN Charter.¹⁵³ A cyber operation is considered a use of force when its consequences are comparable to those of a traditional kinetic or armed attack.¹⁵⁴ The most prominent examples include operations that directly cause physical injury or death to humans, such as the remote manipulation of a regional air traffic control system to cause a mid-air collision or the hijacking of medical device networks to disrupt life-saving treatments.¹⁵⁵

Beyond direct casualties, operations that cause significant physical destruction of property are also classified as a use of force.¹⁵⁶ This includes the use of malware to override safety protocols at an industrial facility, such as a chemical plant or a nuclear power station, leading to a catastrophic explosion or toxic leak.¹⁵⁷ Similarly, a cyberattack on a national power grid that results in a prolonged, widespread blackout causing secondary deaths and massive infrastructure failure would meet this threshold. In the maritime and logistics sectors, the remote sinking of a commercial or military vessel by manipulating its ballast or navigation systems is considered a clear act of force.¹⁵⁸

Legal interpretations have also expanded to include “functional equivalents” of physical damage. For instance, a cyber operation that permanently disables a nation’s primary financial exchange or its telecommunications backbone, effectively “bricking” the hardware so it is no

151. United Nations Convention Against Cybercrime, *opened for signature* Oct. 25, 2025, G.A. Res. 79/243, U.N. Doc. A/RES/79/243 (Dec. 24, 2024).

152. *See* Koh, *supra* note 138 (cyber activities may in certain circumstances constitute uses of force within the meaning of Article 2(4) of the UN Charter and customary international law).

153. *Id.*

154. *See id.*; *see also* Hathaway, *supra* note 5, at 826.

155. *Id.* at 817 (Cyber-attacks have become increasingly common in recent years. Capable of shutting down nuclear centrifuges, air defense systems, and electrical grids, cyber-attacks pose a serious threat to national security.).

156. *Id.*

157. *Id.*

158. *Id.*

longer usable, is increasingly treated as a use of force due to the severity of the societal and economic devastation. While mere espionage or temporary website defacement generally falls below this threshold, any digital act that results in a “kinetic-like” impact is categorized as a use of force, potentially triggering a state’s right to respond in self-defense.¹⁵⁹

The transition from maritime security to digital defense reveals significant challenges and gaps in the legal landscape. Jurisdictional complexity serves as a primary hurdle. Whereas terrestrial law relies on territory and maritime law relies on the “flag state,” cyberspace mirrors the non-territorial nature of international waters. This creates a jurisdictional maze where actors can bypass stringent national regulations, much like ships using flags of convenience, making attribution and legal recourse exceptionally difficult.¹⁶⁰

The use of force and the establishment of clear rules of engagement present another central conflict. While states typically maintain a monopoly on the use of force, private entities operate within a persistent grey area. In maritime contexts, private guards are generally limited to self-defense against criminal acts of piracy, yet the line between protection and excessive force frequently blurs, leading to diplomatic incidents.¹⁶¹ This ambiguity is amplified in the abstract realm of cyberspace, where defining what constitutes a proportional response versus an act of aggression remains intensely debated.

Furthermore, the structure of corporate vs. individual accountability complicates the enforcement of international standards. Because private military and security companies are corporate bodies, they cannot be tried in international criminal courts; only individual employees face such charges. This reality makes it nearly impossible to trigger state responsibility for wrongful conduct, especially as companies can dissolve and reform under new identities to evade financial liability. Despite these hurdles, the persistent presence of these private actors has begun to play a normative role, subtly pushing states to formalize and regulate the involvement of non-state actors in national and international security frameworks.

This entire debate is framed by the presumption against extraterritoriality, a core principle of U.S. statutory interpretation that assumes U.S. laws apply only domestically to respect the sovereignty of other nations and ensure Congress makes key foreign policy decisions.¹⁶² Courts use a two-step test to determine if a statute applies abroad: first, looking for a clear indication from Congress, and

159. See Koh, *supra* note 138 (A State’s national right of self-defense, recognized in Article 51 of the UN Charter, may be triggered by computer network activities that amount to an armed attack or imminent threat thereof. As the United States affirmed in its 2011 International Strategy for Cyberspace, “when warranted, the United States will respond to hostile acts in cyberspace as we would to any other threat to our country.”).

160. See generally Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 Harv. Int’l L.J. 183, 184 (2004) (recognizing that an assertion of universal jurisdiction may cause conflict and hostilities among countries if it is seen as an encroachment on the sovereign authority of the country with traditional jurisdiction).

161. See *id.* at 185.

162. *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013).

second, determining if the focus of the conduct occurred within the U.S.¹⁶³ This presumption creates a challenge for cyber legislation, as the decentralized nature of cyberspace makes it difficult to pinpoint the location of activity. To provide clarity for authorized actions against foreign threats, legislation must explicitly state its intent for extraterritorial application to overcome this presumption.¹⁶⁴

Reviving privateering in either the maritime or cyber domain would likely prompt significant negative international reactions, legal challenges, and potential escalation of conflicts, potentially casting the United States as an outlaw nation and increasing global instability. Reactions from other countries would likely focus on diplomatic condemnation and legal challenges. The international community has widely considered privateering, abolished under the 1856 Paris Declaration, which has ripened into customary international law.¹⁶⁵ A U.S. revival would therefore be seen as a blatant disregard for established international norms.

Using private actors also blurs the crucial legal distinctions between state agents, combatants, and civilians, creating complex issues regarding accountability under international humanitarian law.¹⁶⁶ Other nations would raise concerns about controlling these private entities, especially if they operate outside strict governmental command structures or commit abuses. Furthermore, in the cyber domain, private actors conducting “hack-backs,” or disruptive operations, could easily affect networks and infrastructure in third-party countries. These nations would likely view such actions as violations of their sovereignty, leading to strong political pushbacks and diplomatic friction.

The move would also likely trigger escalation and reciprocal actions. Adversaries such as China, Russia, and Iran, which already use state-sponsored cyber tactics, would likely use the U.S. move as a justification for escalating their own actions and potentially authorizing their own privateers, conceivably leading to a global free-for-all in both the maritime and cyber domains. Increased tensions would also result from using privateers to target commercial shipping, which would directly impact global trade and create security dilemmas for all nations. The use of private actors, a key element of hybrid warfare, is designed to offer plausible deniability, but this also makes official de-escalation mechanisms more difficult, as the U.S. government would struggle to manage the actions of personnel not integrated into a normal chain of command.

Finally, reviving privateering would likely damage alliances. Many U.S. allies, who strongly support a rules-based international order, would be uncomfortable with the practice. This could jeopardize international cooperation on maritime security and the development of much-needed cyber norms. The “piracy” narrative would become a powerful tool for U.S. adversaries in information warfare, further damaging public support for U.S.

163. *See* Nestle USA, Inc. v. Doe, 593 U.S. 628 (2021).

164. *Id.*

165. *See* LEMNITZER, *supra* note 50.

166. *See e.g.* Collin S. Allan, *Attribution Issues in Cyberspace*, 13 CHI.-KENT J. INT’L & COMP. L. 55, 64 (2013).

actions both domestically and internationally. In essence, reviving privateering would likely be perceived as a dangerous regression to a more chaotic form of conflict, leading to damaged U.S. diplomatic standing and increased global instability.

VIII. THE ACCOUNTABILITY PARALLEL: LAND VS. MARITIME PRIVATE SECURITY COMPANIES

The concerns surrounding H.R. 4988 are not theoretical; they echo the real-world challenges governments face using private military and security companies (“PMSCs”), both on land and at sea. The growth of the PMSC industry, following military downsizing after the Cold War, created a robust global market, often filled with ex-military personnel. This “privatization of security” introduces significant accountability gaps and legal ambiguities that serve as a crucial cautionary tale for the proposed cyber marque system.¹⁶⁷

H.R. 4988 mirrors existing accountability issues with Private Military Companies (“PMCs”). PMSCs share many similarities with historical privateers, despite being primarily employed by private entities. Today, these contractors provide clients with essential services such as intelligence, infrastructure security, and risk analysis. While not a permanent solution to maritime insecurity, they serve as a necessary temporary measure to mitigate rising shipping costs and the loss of life at sea.¹⁶⁸ The unique difficulty of attributing cyberattacks adds a layer of complexity. Inaccurate targeting by a cyber privateer could trigger unintended cyber conflicts with potentially severe consequences.¹⁶⁹

In the realm of piracy, relying solely on national navies is increasingly impractical. In recent years, global maritime forces have become severely overstretched.¹⁷⁰ Beyond persistent piratical attacks, the international community is managing multiple major crises, including the ongoing Russia-Ukraine war and escalated conflicts in Gaza, fueled by threats from Iran and Hezbollah. These concurrent flashpoints have forced regular militaries to prioritize high-stakes regional stability over routine merchant vessel protection, leaving a security gap that PMSCs now fill.¹⁷¹

However, the practice comes with perils for states in the same way that the use of privateers historically pushed their governments into full-scale wars. When privateers violated the laws and customs of war, their home governments often lacked the means to enforce accountability, leading to abuses against

167. *Id.* at 64.

168. Spence, *supra* note 39, at 290-91.

169. *See generally* Allan, *supra* note 166, at 64-65 (under international law, state-authorized conduct is attributable to the authorizing state—even when carried out by private individuals—because authorization effectively makes such actors de facto state organs, most commonly when states recruit private groups for cross-border missions).

170. Spence, *supra* note 39, at 290-91.

171. *Id.*

foreign ships and their crews. Monitoring the actions of privateers/PSCs operating far from governmental authority was nearly impossible.¹⁷²

These uncontrolled and potentially criminal actions created diplomatic incidents and risked escalating conflicts.¹⁷³ The use of PMCs has highlighted significant accountability gaps, often involving debates over jurisdiction and oversight in conflict zones.¹⁷⁴ The unique complexities of attribution in cyberspace exacerbate these issues. A cyberattack launched by a private entity could be easily misattributed or designed to appear as the work of another actor, further complicating international relations and the application of legal standards. The lack of transparent, verifiable operational control makes the PMSC model in cyberspace particularly risky. The central tension is whether a power designed for 19th-century naval warfare can be safely and effectively repurposed for 21st-century digital conflicts, which lack clear battlefields, borders, and established international norms for private-actor engagement.

IX. ALTERNATIVES FOR GOVERNANCE: ADAPTING EXISTING FRAMEWORKS

To address the persistent legal gaps surrounding private security actors, the international community has developed “soft law” frameworks designed to provide guidance where binding treaties are absent. Rather than reviving an outdated and discredited concept, this paper evaluates how existing regulatory frameworks could be adapted to provide a more robust and legally sound mechanism for governing private cyber operators. The Montreux Document, which clarifies international legal obligations related to PMSCs in armed conflict, offers a foundational structure for ensuring compliance with international law.¹⁷⁵

The Montreux Document serves as a primary example, clarifying the existing legal obligations of states regarding private military and security companies during armed conflicts. Although originally intended for land-based operations, its principles have been extended to maritime security, emphasizing that private personnel remain civilians protected from attack unless they directly participate in hostilities.¹⁷⁶ This nonbinding document clarifies the international legal obligations of states concerning PMSCs in armed conflict. It could be a model for applying existing international law to govern private actors in cyberspace.

Complementing this is the International Code of Conduct for Private Security Service Providers (“ICoCPSS”), a voluntary, principles-based

172. Grace Rodden & James Walsh III, *The Legal Issues of Private Armed Security on Commercial Ships*, 58 *FED. LAW.* 30, 32 (2011).

173. *See id.* at 33-34.

174. *Id.* at 32.

175. Permanent Rep. of Switzerland to the U.N., Letter dated Oct. 2, 2008 from the Permanent Rep. of Switzerland to the United Nations addressed to the Secretary-General, U.N. Doc. A/63/467-S/2008/636 (Oct. 6, 2008).

176. *Id.* at ¶ 26.

framework that encourages these companies to respect human rights and humanitarian law in their global operations.¹⁷⁷ Adapting principles from the Montreux Document and the ICoCPSS could lead to a more stable environment.

However, these frameworks also highlight the ongoing struggle to ensure true compliance and accountability. Because they are not legally binding and rely heavily on national enforcement, significant regulatory gaps remain. Applying these lessons to the digital domain suggests that simply authorizing cyber letters of marque without a robust, internationally agreed-upon governance structure would likely replicate the existing challenges seen with private military companies. Without such a foundation, the use of private actors in cyberspace risks exacerbating oversight issues and potentially leading to the same lack of accountability found in traditional private security sectors.

X. CONCLUSION

Ultimately, H.R. 4988 falters by attempting to revive the “letter of marque,” an outdated and discredited concept, ill-suited for modern conflict. By prioritizing a framework rooted in established international law over state-sponsored privateering, policymakers can better promote stability and prevent unintended escalation in the digital domain.¹⁷⁸ The history of PMSCs warns that without a binding international treaty, national enforcement alone leaves dangerous gaps in accountability. Tech leaders, including those at Armis, have already demonstrated that state-level threats are best combated through proactive, data-driven defense and collective technological preparation rather than unregulated offensive proxies.¹⁷⁹ To ensure a secure digital future, modern governance must move beyond the limitations of H.R. 4988, prioritizing robust oversight, clear chains of command, a steadfast commitment to state sovereignty, and the responsible use of force in cyberspace.

177. See *Int'l Code of Conduct for Priv. Sec. Serv. Providers*, ¶¶ 30-31 (as amended Dec. 10, 2021).

178. See generally Allan, *supra* note 166, at 72 (noting that scholars are mixed regarding whether Article 2(4) of the UN Charter should be concretely interpreted to cyber-attacks or if specific treaties on cyber-attacks would prove more useful).

179. See Weigand, *supra* note 6.

AMERICA ALONE: WINDING DOWN *PAX AMERICANA*

FEISAL AMIN AL-ISTRABADI*

“[The] man . . . knows the price of everything, and the value of nothing.”¹

I. INTRODUCTION

The Second Administration of Donald Trump has announced that the United States of America is exhausted, depleted, and no longer sees an advantage in being the world’s hegemon. The Administration’s National Security Strategy (“NSS”), which was published in November 2025, has declared that the shouldering of permanent global burdens has “no connection to the national interest.”² Further, it has pleaded poverty, declaring America cannot afford “a massive military, diplomatic, [and] intelligence” network, provide for the well-being of its most vulnerable citizens, nor indeed fund a modern state.³ Equally astonishing, as one notable observer has remarked, the NSS announces that the “administration’s approach to the world is explicitly transactional.”⁴ No state—no ally—will be exempt from this utilitarian calculation. The NSS literally compares America to Atlas,⁵ the mythical Greek figure condemned eternally to carry the weight of the heavens on his shoulders. And it makes one thing abundantly clear: Atlas has shrugged. The era of American global dominance is over.⁶

Moreover, the NSS charges that “they”—policy elites—“lashed” the U.S. to international institutions it accuses of being “anti-American.”⁷ This is an incredible charge. It is American foreign policy elites who created and sustained these institutions, exactly to preserve the role of the United States as the dominant power in global political and economic affairs. To be sure, the United States has shouldered the burden, economic and political, of sustaining the world order. But it has also reaped the greatest rewards that the system is designed to offer. It is by far the wealthiest country on earth, perhaps the wealthiest country in the history of the world. A great part of the reason it enjoys

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1. Oscar Wilde, *Lady Windermere’s Fan*, in THE PLAYS OF OSCAR WILDE 1, 61 (Vintage Books, 1988).

2. WHITE HOUSE, NATIONAL SECURITY STRATEGY 1 (2025) [hereinafter NSS].

3. *Id.* (decrying also the funding of a “welfare-regulatory-administrative state”).

4. Sumit Ganguly, *New US Security Strategy signals a new world order in the making*, DECCAN HERALD (Dec. 13, 2025), <https://www.deccanherald.com/world/new-us-security-strategy-signals-a-new-world-order-in-the-making-3830430> [https://perma.cc/BYX2-BR7C].

5. NSS, *supra* note 2, at 12.

6. “[T]he United States *rejects* the ill-fated concept of global domination for itself.” *Id.* at 10 (emphasis in original).

7. *Id.* at 2.

such wealth is that its currency is the world's reserve currency and the currency of international trade. Other countries invest in the United States because it has the rule of law, which encompasses an independent judiciary, the enforceability of contracts, and historic checks on the power of the executive. These features also provide the U.S. with the legitimacy to be the leading country in the international political system, the "indispensable nation," as former Secretary of State Madeleine Albright once called it.⁸ Through its reckless disregard of the guardrails the U.S. itself imposed, it is now dismantling the system that has given it such wealth and power, with no certainty that what is to follow will sustain it.

After this introduction, Section II will present a thumbnail sketch of the establishment by the United States of the post-war political and economic dispensations. It will also outline how the U.S. has benefited from these systems. Section III will examine the conduct of the current Administration as it dismantles both systems and argues that the international community has already begun to prepare for a world in which the U.S. no longer participates in the rules-based order. America's closest allies are in the nascent stages of forming blocs to balance the United States and hedge between it and China and Russia. If the U.S. has been the greatest beneficiary of the existing system, it may well be the greatest loser of frittering that system away. One final word: while the author is a lawyer publishing in a law review, this analysis is not intended as a strict legal analysis of the existing world order, though some relevant references to the law abound. Rather, the author's academic interests lie in the interstices between law, policy, and politics. It is this space to which this article seeks to contribute.

II. A BRIEF HISTORY OF THE POST-WAR SYSTEM

At the end of the Second World War, the United States stood alone at the pinnacle of world power, the undisputed global hegemon. Its economic strength dwarfed that of its allies in the war—its cities and industrial heartlands had, after all, never been bombed—and it possessed military might unmatched by any other power, not least as the sole possessor of atomic weapons for the next four years. What the U.S. chose to do with its hegemonic dominance was remarkable. Rather than dictate terms to the rest of the world, the United States instead created the so-called rules-based system that has evolved to regulate the world's political and economic spheres for eighty years. The seeds for the post-war system were planted in Washington, D.C., even as the war continued to rage. This rules-based system consisted of two principal branches: a political system and an economic system, with, to be sure, U.S. dominance over both.

8. *Why the United States Remains an Indispensable Nation*, CHATHAM HOUSE (May 10, 2023), <https://www.chathamhouse.org/2015/06/why-united-states-remains-indispensable-nation> [https://perma.cc/L3DF-ZCT8].

A. Building the International Political Order

At a conference held on the grounds of a Georgetown estate, Dumbarton Oaks, in Washington, D.C., the United States, the United Kingdom, the Soviet Union, and later China, met in the summer and fall of 1944 to negotiate the parameters of the post-war political system and propose an early draft of the Charter of the United Nations.⁹ Later, in April 1945, just before the war in Europe ended, they convened a follow-up conference in San Francisco to establish what in fact became the United Nations. Yet the United States and its allies did not simply dictate the terms of the post-war political order, as they might well have done, presenting the draft U.N. Charter as a take-it-or-leave-it document. Instead, as a contemporary account documents, delegates from the 51 assembled countries were invited to submit what turned out to be hundreds of amendments to the proposed charter produced at Dumbarton Oaks, with the final draft growing to 10,000 words from the original 3,500-word proposal.¹⁰ Core principles such as justice and international law, omitted by the Big Four in Washington, were codified into the U.N. Charter on the insistence of the “small nations.”¹¹

Regardless of the deficiencies of the founding of the United Nations, some of which are sketched below, it remains that the norms it established materially improved the international system. If the post-First World War system preserved European imperialism or racial hierarchies, the post-1945 system at least espoused “[u]niversal rights and protections ... [as being] more central to the ideological vision.”¹² Fundamentally, the new arrangement was built around a “security community,” one that “enshrined basic human rights and social protections.”¹³ Further, the Covenant of the League of Nations did not seek to outlaw aggressive war, even coming as it did in light of the carnage of the First World War. Quite the contrary, the Covenant merely sought to impose a kind of “cooling-off period” prior to the commencement of hostilities.¹⁴ Indeed,

9. J. Simon Rofer, et al., *The UN and the Postwar Global Order: Dumbarton Oaks in Historical Perspective after 75 Years*, 54 J. CONTEMP. HIST. 256, 257 (2019). On China’s later participation, see Edwin Borchard, *The Dumbarton Oaks Conference*, 39 AM. J. INT’L L. 97, 97 (1945).

10. George A. Finch, *The United Nations Charter*, 39 AM. J. INT’L L. 541, 541-42 (1945).

11. *Id.* at 542; see, e.g., U.N. Charter art. 1, ¶ 1, art. 2, ¶ 3. In addition to the 51 voting states, there were several nonvoting non-governmental organizations at the San Francisco Conference. See James Loeffler, “*The Conscience of America*”: *Human Rights, Jewish Politics, and American Foreign Policy at the 1945 United Nations San Francisco Conference*, 100 J. AM. HIST. 401 (2013).

12. G. John Ikenberry, *The End of Liberal International Order?*, 94 INT’L AFF. 7, 14-15 (2018).

13. *Id.*

14. League of Nations Covenant art. 12 (“The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report

acquisition of territory by conquest, which had been legal for centuries, continued to be so in international law for over a decade after the promulgation of the Covenant of the League of Nations.¹⁵

By contrast, the United Nations Charter expressly prohibits not only the use of force, but also the *threat* of force in international relations between states, requiring UN Member States to settle their disputes only through peaceful means.¹⁶ The Charter recognizes only two exceptions to the prohibition on the use of force. The first exception is where the UN Security Council authorizes the use of force to effectuate its will.¹⁷ The second exception is where a state is engaged in self-defense.¹⁸ All other uses of force against territorial integrity or

by the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.”). Indeed, one near-contemporaneous commentator on the Covenant stated that “it is not so clear that all acts of war before the prescribed time are forbidden by Article 12,” as Italy claimed its bombardment and occupation of Corfu in 1923 “was not intended to and did not lead to war,” and thus did not violate the Covenant. Quincy Wright, *The Outlawry of War*, 19 AM. J. INT’L L. 76, 87 (1925); but cf. Arnold D. McNair, *The Legal Meaning of War, and the Relation of War to Reprisals*, 11 TRANSACTIONS GROTIUS SOC’Y 29, 42-43 (1925) (expressing another contemporaneous view that the Italian bombardment, killing a number of non-combatants as it did, nonetheless may not have arisen to the level of an act of war within the meaning of Article 12, being, instead, a “coercive measure.” The U.N. Charter obviates this issue by forbidding the “threat or use of force,” force being an obviously much broader term than war).

15. Oona A. Hathaway & Scott J. Shapiro, *Might Unmakes Right: The Catastrophic Collapse of Norms Against the Use of Force*, 104 FOREIGN AFF. 80, 83-85 (2025) (it was not until 1931 that US Secretary of State John Stimson refused to recognize Japan’s acquisition of Manchurian territory with the Members of the League following suit that the norm against acquisition of territory by conquest appears to have arisen).

16. U.N. Charter art. 2, ¶ 3-4 (Paragraph 3 of Article 2 states that “[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” Paragraph 4 of Article 2 states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

17. U.N. Charter art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”).

18. U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”); See Elisabeth Zoller, *The Law Applicable to the Preemption Doctrine*, 98 AM. SOC’Y INT’L L. 333, 334-36 (2004) (recognizing that a state is not required to sustain an armed attack before engaging in the inherent right of self-defense. Customary international law recognizes states have the right to pre-emptive or anticipatory self-defense where an attack is imminent, even where the armed attack has not yet occurred).

political independence of states are illegal.¹⁹ Equally significant, in the UN era, the acquisition of territory by force is prohibited.²⁰

The UN Charter's newly codified principles did not usher in an earthly Utopia, where peace and harmony would effloresce and state use of force would become unknown; rather, violations remain plentiful. In the last thirty years, NATO bombed Kosovo in 1999 with no legal justification whatsoever.²¹ Other examples from the recent past include the 2003 war in Iraq, China illegally extending its authority in the South China Sea by building artificial islands, and Russia invading Ukraine in 2022.²² At this writing, the U.S. and Israel have been bombing Iran in what appears to be a clear violation of the UN Charter and customary international law.²³ The established norm did, however, instill in the various states a sense of legal obligation to abide by these principles, often to condemn violators, and, on occasion, even to combine the weight of the international community to reverse the effects of violations, such as when Iraq sought to annex Kuwait by force.²⁴

The above discussion is not intended as a credulous, beatific retelling of a tale of U.S. benevolence at the founding of the U.N. Far from it. There are many deeply problematic features of the establishment of the post-war dispensation. To begin with, a large swath of humanity—mainly Africans and Asians—were not represented at the founding conferences as they continued to live under colonial rule.²⁵ Not only were colonized people not formally represented, but they were also often not allowed even informal representation through their

19. John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 741 (2004). Professor Yoo incorrectly states that international law prohibits “all use of force against the political independence and territorial integrity of a nation.” *Id.* (emphasis added). In fact, UN Charter art. 2(4) uses the conjunction “or,” not “and” see U.N. Charter art. 2, ¶ 3-4.

20. Hathaway & Shapiro, *supra* note 15, at 87.

21. See Harold Hongju Koh, *Humanitarian Intervention: Time for Better Law*, 111 AJIL UNBOUND 287, 288 (2017). While Koh describes the view that the Kosovo war was illegal as “simplistic,” he nevertheless begrudgingly concedes that this reading is consistent with the verbatim text of the UN Charter. *Id.* at 287-88. Further, the fact that Koh argues for “better law” implies that he concedes that the *lex lata*, the existing international law, does not recognize the legality of “humanitarian interventions” such as those in Kosovo.

22. See Hathaway & Shapiro, *supra* note 15, at 81. The authors do not mention Kosovo, a war that, however illegal, is nonetheless largely popular with the interventionists. See Koh, *supra* note 21, at 288.

23. Marko Milanovic, *The American Israeli Strikes on Iran are (Again) Manifestly Illegal*, EJILTALK (Feb. 28, 2026), <https://www.ejiltalk.org/the-american-israeli-strikes-on-iran-are-again-manifestly-illegal/> [https://perma.cc/88LM-CRPQ] (“this use of force by the US and Israel is manifestly illegal[.]” being “as plain a violation of the prohibition on the use of force in Article 2(4) of the UN Charter as one could possibly have” and “[n]one of [the] conditions are met” to justify pre-emptive or anticipatory self-defense under customary law).

24. See Colin Warbrick, *The Invasion of Kuwait by Iraq*, 40 INT’L L.Q. 482 (1991); Colin Warbrick, *The Invasion of Kuwait by Iraq: Part II*, 40 INT’L L.Q. 956 (1991).

25. Farina Mir, *Introduction*, 120 AM. HIST. REV. 844, 844 (2015) (“in Africa alone, more than fifty new states were created, beginning in the 1950s” well after the 1944 and 1945 formative conferences).

respective NGOs.²⁶ For instance, Marika Sherwood has demonstrated that the U.S. Government only allowed the National Association for the Advancement of Colored People (“NAACP”) to serve in a consultative capacity on decolonization issues to the Government at the San Francisco Conference, excluding forty-one others that had asked to do so.²⁷ Indeed, she states that the “many black activists in San Francisco [advocating for decolonization] did not have the right of entry into the discussions” inside the conference hall.²⁸ Instead, these activists were forced to seek sympathetic voices to champion their cause from among the Arab states (including Egypt, an Arab but also an African State), Haiti, Liberia, and Ethiopia, which were formally represented in the Conference.²⁹ Perhaps this parlous state was because decolonization of 750 million people³⁰ had seemingly become a secondary issue for U.S. policy by the time the delegates were assembled. After all, it had been Franklin Delano Roosevelt who was keenly interested in the topic.³¹ By the time of the 1945 Conference, however, Harry Truman was president, and he was “not nearly as supportive of independence for colonies as Roosevelt.”³²

There were other deeply problematic aspects regarding the founding of the United Nations. For instance, one of the architects of the Charter’s Preamble, a man “revered” as a “venerable world statesman” at the time, was South African Prime Minister Jan Smuts.³³ It was Smuts who was responsible for introducing the stirring invocation of human rights in the Preamble.³⁴ Yet history recalls Smuts perhaps less for this contribution and more for his infamy in defending the apartheid that the South African Government declared in the immediate aftermath of his premiership in 1948, ironically, the same year the Universal Declaration of Human Rights (“UDHR”) was passed by the General Assembly.³⁵ Even so, as early as 1946, while he was still prime minister and representing South Africa in the General Assembly, the UN became a venue for challenging South Africa’s egregious human rights record.³⁶ The Indian lead

26. Marika Sherwood, “*There Is No New Deal for the Blackman in San Francisco*”: African Attempts to Influence the Founding Conference of the United Nations, April-July 1945, 29 INT’L J. AFR. HIST. STUD. 71, 76 (1996).

27. *Id.*

28. *Id.* at 83.

29. *Id.*

30. *Global Issues: Decolonization*, UNITED NATIONS (last visited Apr. 18, 2026), <https://www.un.org/en/global-issues/decolonization> [<https://perma.cc/95PE-JWEX>].

31. Sherwood, *supra* note 26, at 71-72.

32. *Id.* at 83.

33. Saul Dubow, *Smuts, the United Nations and the Rhetoric of Race and Rights*, 43 J. CONT. HIST. 45, 48 (2008).

34. U.N. Charter pmb1, ¶ 2.

35. Dubow, *supra* note 33, at 53-54 (noting that the UDHR passed unanimously with only eight abstentions, South Africa being one of them).

36. *Id.* at 65-66.

delegate, Vijaya Laxmi Pandit,³⁷ charged Smuts with hypocrisy to his face for having advocated for human rights while pursuing racist policies in South Africa.³⁸

Whatever the flaws of the founding of the United Nations system and the individuals involved in the process, Professors Hathaway and Shapiro conclude:

This shift [in outlawing the acquisition of territory by force], led by the United States, marked one of the most profound legal transformations in world history. During the nearly eight decades after the UN Charter entered into force, the kinds of interstate wars and territorial conquests that shaped and reshaped national borders for centuries became rare. . . . Conflict, of course, has not disappeared, but it has become far less prevalent. The century that preceded World War II saw over 150 successful territorial conquests; in the decades afterward, there have been fewer than ten.³⁹

At the end of the Second World War, America did not use its position of global dominance simply to impose its will capriciously on the world. Instead, it “created and for the most part followed” the rules of the order it established.⁴⁰ It also “gave weaker states a seat at the table and a voice in the decisions” of this new rules-based system.⁴¹ As a consequence, the U.S. not only benefitted, it became “the long[-term] principal beneficiary of the [world] order.”⁴² Aside from a measurably more peaceful world than the one that preceded the current international order, the United States has benefited from that order and the alliances it built at the onset of the Cold War. These benefits continue to pay dividends, both material and otherwise. Policymakers, calculating what the cost of maintaining the current system has been, would do well to consider the cost of disposing of it without knowing what would replace it.

One of the benefits accruing to the U.S. from its European policies over the last eighty years has been a check against the possibility of a return to Europe’s old rivalries and balance-of-power politics that had cost much blood and treasure, including to the United States, in the preceding decades during two world wars. Now, as Europe fears U.S. withdrawal, Germany is preparing to recreate a national defense industry, moving away from purchasing American

37. Manu Bhagavan, *A New Hope: India, the United Nations and the Making of the Universal Declaration of Human Rights*, 44 MOD. ASIAN STUD. 311, 312 (2010) (noting that in 1953, Mrs. Pandit would become the first woman elected to preside over the UN General Assembly).

38. Dubow, *supra* note 33, at 65-66.

39. Hathaway & Shapiro, *supra* note 15, at 86-87.

40. Stephen M. Walt, *The Predatory Hegemon: How Trump Wields American Power*, 105 FOREIGN AFF. 8, 10 (2026).

41. *Id.*

42. C. Raja Mohan, *The Multipolar Delusion: And the Unilateral Temptation*, 105 FOREIGN AFF. 54, 54 (2026).

arms but also maintaining independence from European arms industries.⁴³ While it is possible that greater European integration will result, there is another, more ominous possibility. Europe could fragment, with multiple poles forming around Germany, France and Britain, and Poland and the Northern European States on the other side.⁴⁴ In this scenario, should the far-right Alternative für Deutschland (“AfD”) party, which has a revanchist element making claims on former German territories,⁴⁵ come to power in Berlin, old rivalries could resurface.⁴⁶ The result could replicate the history of Europe that led the United States to intervene in Europe’s wars twice in the twentieth century. Avoiding a return to those days was a reason for the integration of German armed forces into NATO, led by the U.S., in the first place.⁴⁷

The U.S. has derived other tangible benefits from this security arrangement.⁴⁸ It has 30 military bases throughout Europe, giving the U.S. a tremendous forward-operating capability to deal with nascent threats in the Middle East, the Horn of Africa, the Arctic, or elsewhere.⁴⁹ European states have generally allowed the U.S. to operate out of its European bases with few restrictions.⁵⁰ This reduces the time and cost of U.S. action.⁵¹ Indeed, NATO allies have allowed the U.S. overflight rights over Europe, even when disagreeing with U.S. policy.⁵² For instance, in 2003, several European states allowed the U.S. to overfly their territory, even though they opposed the war in Iraq.⁵³

The U.S. derives commercial benefit from these arrangements, as well. In 2022-24 alone, the Europeans collectively spent a total of \$61 billion on U.S. arms, often buying from U.S. manufacturers rather than their own.⁵⁴ Indeed, they have doubled their U.S. purchases since 2020.⁵⁵ Yes, the U.S. may pay more in defense as a percentage of its GDP than the Europeans,⁵⁶ but it is clear that it also benefits from protecting its trading partners by having

43. Liana Fix, *Europe’s Next Hegemon: The Perils of German Power*, 105 FOREIGN AFF. 120, 124 (2026) (Feb. 6, 2026); <https://www.foreignaffairs.com/germany/europes-next-hegemon-liana-fix> [<https://perma.cc/YZ72-DBLE>]. Germany plans to reduce its U.S. defense purchases to 8% through its 2026 procurements, spending half on U.S. weapons systems that it spent in 2023. Chris Lunday, *Germany’s €80B rearmament plan sidelines US weapons*, POLITICO (Sep. 23, 2025), <https://www.politico.eu/article/germanys-defense-donald-trump-air-defense-washington-us-weapons/> [<https://perma.cc/V9JW-VCLG>].

44. Fix, *supra* note 43, at 127-28.

45. *Id.* at 123.

46. *Id.* at 129.

47. *Id.* at 124.

48. See Celeste A. Wallander, *Beware the Europe You Wish for: The Downside and Dangers of Allied Independence*, 104 FOREIGN AFF. 22 (2025).

49. *Id.* at 26-27.

50. *Id.* at 26.

51. *Id.* at 26-27.

52. *Id.* at 26.

53. *Id.*

54. *Id.* at 28.

55. *Id.*

56. *Id.*

technologically advanced allies who generally share its ideological and strategic military and political objectives. America's adversaries must be incredulous that the United States is pushing away perhaps the most constant allies in history—dissolving certainly the most successful alliance in centuries if not ever—to its strategic and economic detriment.

B. Building the International Economic Order

If Dumbarton Oaks led to the establishment of the post-war political system dominated by the U.S.,⁵⁷ another conference convened by the United States at Bretton Woods in New Hampshire established U.S. dominance over the post-war economic system.⁵⁸ American supremacy of the economic system was assured as the U.S. made the dollar the world's reserve currency of choice and the preferred currency of international trade. The Bretton Woods model was initially organized under the General Agreement on Tariffs and Trade ("GATT") in 1947, and was modified in the 1990s into the World Trade Organization.⁵⁹ These arrangements have ensured that the U.S. occupies the "centre of global trade."⁶⁰ It is no accident that the United States is the only country in the International Monetary Fund that wields a veto.⁶¹

As the end of the Second World War approached, American planners considered the degree to which the U.S. would need to reach into the global economy to sustain American domination over the system. The preceding era had been one of trading within imperial blocs.⁶² To sustain the new post-war system, U.S. analysts concluded that the U.S. would first require access to a global market, one whose institutions the U.S. would dominate, institutions increasingly favoring a second pillar, free trade.⁶³ Of course, a worldwide free market implies that the U.S. would buy from other countries, as they would from the U.S. America's policy of post-war European reconstruction should thus not be seen as mere altruism. Not only did the reconstruction of Western Europe foreclose the possibility of Europe turning communist, but it also ensured the rise of trading partners for the U.S.⁶⁴ The eventual trade imbalance that

57. Rofe et al., *supra* note 9, at 257.

58. Thomas Costigan et al., *The US Dollar as the Global Reserve Currency: Implications for US Hegemony*, 8 *WORLD REV. POL. ECON.* 104, 106 (2017) (noting that "[t]he Bretton Woods Conference held in 1944 was the forum where a US-centric world [economic] system was instituted").

59. Serdar Altay, *The Rise and Decline of the Liberal World Order and the Multilateral Trade System: A Critical-Constructivist Synthesis to International Regime Analysis*, 21 *ULUSLARARASI İLİSKİLER [INT'L RELS.]* 97, 97-98 (2024).

60. Costigan et al., *supra* note 58, at 108.

61. *Id.*

62. Ikenberry, *supra* note 12, at 15.

63. *Id.* at 15-16.

64. Brigitte Granville, *Time for a Rescue*, 55 *WORLD TODAY* 7, 7 (1999); cf. Jessica Reinisch, *Comparing Europe's Post-War Reconstructions: First Balzan Workshop*, 61 *HIST. WORKSHOP J.* 299, 301 (2006) (digesting the views of economic historians who argue that the

developed away from the United States, though no doubt an easy political issue in the hands of any populist, actually favors the U.S. in the long run, as economist Douglas Irwin argues. Writing during Trump's first term, he explains:

Because the dollar is the world's reserve currency, the closest thing to a safe asset in the global financial system, foreign demand for dollar-denominated assets will remain strong. The continued demand for safe assets means that other countries will use some of their dollar earnings to buy U.S. assets instead of U.S. goods. This, in turn, means that the United States will continue to buy more from other countries than they do from it.⁶⁵

Irwin thus argues essentially that a trade deficit favors the United States, because, given the safety and desirability of holding assets in dollars, America's trading partners will reinvest some of their trade surpluses back into the United States.

Another analyst agrees, arguing that, at least at the turn of the current century, for every \$100 sent overseas to purchase foreign imports, more than \$98 returns into the United States as foreign direct investment, and some of the balance is used in foreign states as currency.⁶⁶ Also ignored in the populist denunciation of free trade is that the resulting cheaper imports and "greater product variety" result in higher standards of living.⁶⁷ While the populist argument runs to the effect that free trade has resulted in lost manufacturing jobs, there is ample evidence that a more significant factor has been increased productivity.⁶⁸ Automation has also taken its toll on manufacturing jobs. Where it took U.S. steel manufacturers ten man-hours to produce a ton of steel in the 1980s, it now takes two.⁶⁹ Finally, so long as the dollar remains a desirable reserve currency and demand for U.S. debt securities remains high around the world, individual and corporate consumers benefit because interest rates on loans in the U.S. remain low.⁷⁰

The UN and the trading system aside, the United States established two additional pillars of the post-war international system. One additional pillar was

US Marshall Plan for European reconstruction "[w]as not nearly as important [economically] as it was politically. . . .").

65. Douglas A. Irwin, *The False Promise of Protectionism: Why Trump's Trade Policy Could Backfire*, 96 FOREIGN AFF. 45, 52-53 (2017).

66. Daniel T. Griswold, *Stop Worrying about the U.S. Trade Deficit*, 1 GEO. J. INT'L AFF. 67, 68 (2000).

67. Holger Janusch & Witold Mucha, *America First: Power and Geopolitics in US Trade Policy under President Trump*, 35 SEC. & PEACE 110, 111 (2017).

68. *Id.*

69. Irwin, *supra* note 65, at 50.

70. Barry Eichengreen, *The Dollar Dilemma: The World's Top Currency Faces Competition*, 88 FOREIGN AFF 53, 54 (2009).

the establishment of international institutions,⁷¹ such as the International Monetary Fund (“IMF”), the World Bank, and the like.⁷² The fourth pillar was building a community of like-minded states, states that, at the end of the Cold War, would not simply be an anti-Soviet defensive bloc, but a community of like-minded, liberal democracies.⁷³ This pillar became a “democratic alliance” [the North Atlantic Treaty Organization (“NATO”)] to defend and support a shared liberal democratic political space under the leadership of the United States.⁷⁴

The two central features of this *Pax Americana*, the political and the economic, thus worked synergistically to maintain international peace. As Hathaway and Shapiro explain, “The expansion of trade and the prohibition of war went hand in hand, as states could no longer enrich themselves through conquest. Instead, they had to rely on economic cooperation, market competition, and the free flow of goods and capital.”⁷⁵ The system worked when Saddam Hussein attempted in 1990 to annex Kuwait and its oil wealth to Iraq.⁷⁶ Under American political and military leadership, allied with like-minded states, and forearmed with Security Council authorization, an international coalition expelled Iraq from Kuwait.⁷⁷

The question then arises, why did Western Europe and other states accept U.S. hegemony for so long? Once the Europeans rebuilt and developed their own industrial and eventual technological bases, they surely could have asserted their own independence, rather than allying themselves in virtual lockstep with the United States. True, the Soviet Union during the Cold War, then the revanchist Russian Federation, looming over Europe, provides a partial answer to this question. International relations theory, however, provides a more complete answer.

For instance, Jack Snyder argues that realist models of international relations predict that when a state such as the U.S. rises to become a hegemon, weaker states typically band together to balance against it.⁷⁸ The hegemon may be militarily more powerful than any other state, but it is unlikely to be more powerful than all other states combined.⁷⁹ An observer could ask why the

71. Ikenberry, *supra* note 12, at 15.

72. Costigan, et al., *supra* note 58, at 106 (calling these institutions among “the most critical [] components for the functioning of U.S. hegemony”).

73. *Id.* at 16-17.

74. *Id.* at 17.

75. Hathaway & Shapiro, *supra* note 15, at 87.

76. See J. Travis Moger, *The Gulf War at 30*, 118 ARMY HIST. 1, 6 (2021).

77. See *id.* at 7-11; see also EMILY MEIERDING, *THE OIL WARS MYTH: PETROLEUM AND THE CAUSES OF INTERNATIONAL CONFLICT* 159 (2020).

78. Jack Snyder, *One World, Rival Theories*, 145 FOREIGN POL’Y 52, 56 (2004).

79. See Kai He, *The Hegemon's Choice Between Power and Security: Explaining US Policy Toward Asia After the Cold War*, 36 REV. INT’L STUD. 1121, 1124 (2010) (explaining that realism posits that even great hegemons cannot indefinitely cause other states to conform their will to its desires); see also Joseph S. Nye, Jr., *Limits of American Power*, 117 POL. SCI. Q. 545, 558-59 (2002-2003) (“[I]f American diplomacy is unilateral and arrogant, our preponderance would not

Western European States, once their economies recovered, did not balance against the U.S., instead allying with it through NATO? Snyder answers that the Europeans perceived America as a benign hegemon and thus did not perceive a need to balance against it.⁸⁰ They could infer that benignity from a shared set of democratic principles of governance domestically, the rule of law, and the promotion of human rights at home and in the international arena. U.S. allies have thus had no incentive to create an alternate structure to U.S. power. Even if weaker powers were unable to deploy military might against the U.S. in the short term, they might, for example, have deployed their soft power to frustrate U.S. policy;⁸¹ they did not.

How then to measure American power? Joseph Nye, Jr., published a seminal article nearly twenty-five years ago to assess how the U.S. maintained its status as a global hegemon at the dawn of the twenty-first century. He noted that while in the past a state's military power—what he calls its “strength of war”—sufficed as the test of a hegemon's power, in modern times “military power and conquest” are no longer the sole determinant of a state's standing.⁸² If not the sole determinant of power, nonetheless, “military force can still play an important political role among advanced nations” in vindicating their strategic objectives.⁸³ Nye here appeared to be invoking von Clausewitz's famous aphorism that “War is a mere continuation of policy by other means.”⁸⁴ Yet, in addition to military might, economic power has become an increasingly important consideration in assessing a state's strength;⁸⁵ these two components of strength—military and economic—constitute a state's “hard power.”⁸⁶ America's seemingly unmatched military machine, along with a tremendous economic engine, thus marks its “hard power” as that of a world hegemon in Nye's analysis.

But America also has a large reserve of “soft power.”⁸⁷ In distinction to hard power, by which states obtain their political objectives through “inducements (carrots) or threats (sticks),”⁸⁸ soft power results in a state obtaining its desired outcomes, “because other countries want to follow it,

prevent other states and nonstate actors from taking actions that complicate American calculations and constrain its freedom of action.”).

80. See Snyder, *supra* note 78, at 56. It is fair to point out that “band wagoning”—weaker states joining the hegemon—is a cheaper strategy than balancing. See, e.g., Wei Zongyou, *In the Shadow of Hegemony*, 1 CHINESE J. INT'L POL. 195, 197-98 (2006). Certainly, in the jargon of international relations realist theory, the Europeans have “band wagoned” with the US since 1945. See, e.g., Benjamin Schreer, *A New “Pragmatism”: Germany's NATO Policy*, 64 INT'L J. 383, 389 (2009) (“Band wagoning with the United States should continue to inform European allies' NATO policies”).

81. See Nye, *supra* note 79.

82. *Id.*

83. *Id.* at 551.

84. 1 CARL VON CLAUSEWITZ, ON WAR 23 (J.J. Graham, trans. 1918).

85. Nye, *supra* note 79, at 551.

86. *Id.* at 552.

87. *Id.*

88. *Id.*

admiring its values, emulating its example, aspiring to its level of prosperity and openness.”⁸⁹ Further, he states:

In this sense, it is just as important to set the agenda in world politics and attract others as it is to force them to change through the threat or use of military or economic weapons. This aspect of power—getting others to want what you want—I call soft power. It coopts people rather than coerces them.⁹⁰

Finally, this element—soft power—consists of, *inter alia*, the U.S. “behavior at home,” including safeguarding its constitutional institutions and the promotion of democratic ideals at home and peace and human rights internationally.⁹¹ “[I]f the United States wants to remain strong,” Nye warns, “Americans need also to pay attention to our soft power.”⁹²

Speaking almost twenty-five years after Nye’s article, Christine Lagarde, president of the European Central Bank, has affirmed that it is the combination of hard and soft powers that makes a reserve currency—the U.S. dollar for the past eight decades—desirable.⁹³ Military and economic might aside, she has credited two institutions of soft power that give the dollar its credibility to foreign investors: the independence of the Federal Reserve Bank and the rule of law generally in the United States.⁹⁴ In this context, it must, therefore, have come as a shock to Lagarde to read that the Chairman of the U.S. Federal Reserve Bank is under investigation ostensibly for committing perjury in congressional testimony, but apparently because he is, in Trump’s view, insufficiently pliant on interest rates.⁹⁵ Such actions—using the executive prosecutorial power to impinge upon the independence of Federal Reserve—are self-destructive.

In the end, Nye asserts *Pax Americana* will survive only “to the extent that the United States ‘is uniquely capable of engaging in “strategic restraint,” reassuring partners and facilitating cooperation.””⁹⁶

Moreover [he concludes], the impact of American preponderance is softened when it is embodied in a web of

89. *Id.*

90. *Id.* (internal footnote omitted).

91. *Id.* at 554.

92. *Id.* at 552.

93. Christine Lagarde, President of the Eur. Cent. Bank, Speech at an event in Berlin, Earning influence: lessons from the history of international currencies, (May 26, 2025), (transcript available at <https://www.ecb.europa.eu/press/key/date/2025/html/ecb.sp250526~d8d4541ce5.en.html> [<https://perma.cc/FL3Q-K6YV>]).

94. *Id.*

95. See Victoria Guida et al., *DOJ opens probe into Fed’s Powell, drawing backlash from lawmakers*, POLITICO (Jan. 11, 2026, at 21:25 EST), <https://www.politico.com/news/2026/01/11/doj-probe-fed-powell-statements-headquarters-00721679> [<https://perma.cc/35EH-SP3A>].

96. Nye, *supra* note 79, at 559.

multilateral institutions that allow others to participate in decisions and that act as a sort of world constitution to limit the capriciousness of American power.⁹⁷

This is the virtuous synergy of hard and soft powers, coupled with strategic restraint, that has assured the continued leadership of the United States in the order it created. As will be demonstrated in the next section, it is this virtuous synergy, to coin a phrase, that the United States Administration is currently dissipating.

III. DISMANTLING THE INTERNATIONAL ORDER AND ITS CONSEQUENCES

A. Dismantling the International Political Order

Within the first month of his second term in office, Trump issued an Executive Order directing the Secretary of State, in consultation with the UN Permanent Representative, to:

[C]onduct a review of all international intergovernmental organizations of which the United States is a member and provides any type of funding or other support, and all conventions and treaties to which the United States is a party, to determine which organizations, conventions, and treaties are contrary to the interests of the United States and whether such organizations, conventions, or treaties can be reformed.⁹⁸

The Executive Order also pledged renewed scrutiny for the UN Human Rights Council (“UNHRC”), from which Trump withdrew the U.S. in 2018; the UN Education, Scientific, and Cultural Organization (“UNESCO”); and the UN Relief and Work Agency for Palestinians in the Near East (“UNRWA”).⁹⁹ He accused these agencies of being anti-Semitic, anti-Israeli, and, in the case of the latter, of being “infiltrated” by foreign terrorist organizations.¹⁰⁰ The president directed a halt to all cooperation between the U.S. and UNHRC and a stop to all funding for the principal UN body providing humanitarian relief to Palestinian refugees.¹⁰¹ He directed a review of U.S. cooperation with UNESCO, a body

97. *Id.*

98. Withdrawing the United States From and Ending Funding to Certain United Nations Organizations and Reviewing United States Support to All International Organizations, 90 Fed. Reg. 9275 §3 (Feb. 4, 2025).

99. *Id.* §1.

100. *Id.*

101. Yezzen Saadah, *Trump Withdraws From UNESCO For A Second Time—Here’s Why He’s Opposed To The U.N. Agency*, FORBES (July 22, 2025, at 16:18 EDT), <https://www.forbes.com/sites/yezzenaadah/2025/07/22/trump-withdraws-from-unesco-for-a-second-time-heres-why-hes-opposed-to-the-un-agency/> [https://perma.cc/AH65-X4AZ] (“Trump pulled the U.S. out of the World Health Organization (WHO) and the United Nations Human Rights Council

from which he withdrew the U.S. in 2018 because it had admitted the State of Palestine as a full member, and he did so again in 2025 for the same reason, after President Joseph R. Biden had caused the U.S. to rejoin the body.¹⁰²

In January 2026, following up on the Executive Order, Trump issued a memorandum withdrawing the United States from 66 international arrangements he asserted were contrary to U.S. interests.¹⁰³ Among the UN institutions from which the U.S. withdrew were all the ECOSOC regional development offices; the International Law Commission; three Offices of the Special Representative of the Secretary-General: those for Children in Armed Conflict, for Sexual Violence in Conflict, and for Violence against Children; the Peacebuilding Commission; the Democracy Fund; the Entity for Gender Equality and the Empowerment of Women; the Population Fund; and perhaps most prominently, the UN Framework Convention on Climate Change (“UNFCCC”),¹⁰⁴ a treaty that underlies such other climate agreements as the Kyoto Protocol and the Paris Climate Agreement.¹⁰⁵ Of these entities, the last is the most interesting, as it is a treaty ratified by the U.S. on the advice and consent of the Senate in 1992.¹⁰⁶ Presumably, all other withdrawals can be rescinded by a subsequent president through a revocation of Trump’s Executive Orders.

Trump’s withdrawal from UNFCCC, on the other hand, raises interesting constitutional questions. As Professor Jean Galbraith has argued recently, it is not entirely certain whether the president in fact has the unilateral constitutional right to withdraw from a treaty once the Senate has acted, although “such

(UNHRC), citing WHO’s “mishandling of the COVID-19 pandemic” and the UNHRC’s alleged bias against Israel. Trump’s February executive order also cut funding to the United Nations Relief and Works Agency (UNRWA), which provides aid to Palestinians”).

102. *Id.*; Thomas Adamson, *First Lady Jill Biden to mark US reentry into UNESCO with flag-raising ceremony in Paris*, INDEPENDENT (July 25, 2023 9:53 BST), <https://www.independent.co.uk/news/ap-unesco-jill-biden-united-nations-trump-b2381364.html> [https://perma.cc/W57C-VLRS]. For other international organizations and agreements Biden re-entered after assuming office, see Lindsay Maizland, *Biden’s First Foreign Policy Move: Reentering International Agreements*, COUNCIL ON FOREIGN RELS. (Jan. 21, 2021, at 09:00 EST), <https://www.cfr.org/articles/bidens-first-foreign-policy-move-reentering-international-agreements-2> [https://perma.cc/D82X-52ZX].

103. *Withdrawing the United States from International Organizations, Conventions, and Treaties that Are Contrary to the Interests of the United States*, WHITE HOUSE (Jan. 7, 2026), <https://www.whitehouse.gov/presidential-actions/2026/01/withdrawing-the-united-states-from-international-organizations-conventions-and-treaties-that-are-contrary-to-the-interests-of-the-united-states/> [https://perma.cc/KTV8-FKJK].

104. U.N. Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC NO. 102-38, 1771 U.N.T.S. 107.

105. *United Nations Framework Convention on Climate Change (UNFCCC) and Climate, Peace and Security*, UNITED NATIONS, <https://www.un.org/climatesecuritymechanism/en/united-nations-framework-convention-climate-change-unfccc-and-climate-peace-and-security> [https://perma.cc/7CCF-FS7C] (last visited Apr. 21, 2026).

106. See Jean Galbraith, *Retreating from Internationalism: The Announced U.S. Withdrawal from Many International Entities*, VERFASSUNGSBLOG (Jan. 10, 2026), <https://verfassungsblog.de/the-announced-u-s-withdrawal-from-many-international-entities/> [https://perma.cc/MDV7-DDSS].

withdrawals occur in practice.”¹⁰⁷ A related question is whether a future president could rely on the 1992 Senate advice and consent to re-enter the UNFCCC. Galbraith has argued that this route is, though untested, likely available.¹⁰⁸ On the other hand, the current Republican Senate could presumably act now in a fashion to effectively repeal the prior advice and consent, thereby foreclosing the possibility of a future president rejoining the treaty without a new resolution from the Senate.¹⁰⁹ It is a complicated tangle with little constitutional certainty.

As the Trump Administration doubles down on withdrawing from the political institutions of the international order, including casting doubt on whether it is committed to defending the allies in Europe under the NATO Charter,¹¹⁰ it has added a new tactic. After years of saying that NATO allies must spend 2.5% of their GDP if they expect the U.S. to honor its defense commitments, once most allies met that target in 2024,¹¹¹ Trump has now doubled his demand to 5%.¹¹² Even more bizarrely, Trump has spent much of his first year in office openly musing about the U.S. taking, by force if necessary, Greenland, a sovereign territory of Denmark, a NATO ally that sent forces into U.S. wars in Afghanistan and Iraq.¹¹³ A hallmark of what made the U.S. generally more attractive as a hegemon, in distinction to the Soviet Union, for example, was that while the former has been an “empire by invitation,” the latter was an empire of coercion.¹¹⁴ Where the Soviet Union had to send troops into Budapest in 1956 and Prague in 1968 to prevent reform, it would have been unthinkable for the U.S. to do the same, say, in London or Paris or Berlin. That is because of the inherent attraction of the American commitment to the ideals of democracy, human rights, and the rule of law. None of this is ordained. If the

107. *Id.*

108. *Id.* (citing Jean Galbraith, *Rejoining Treaties*, 106 VA. L. REV. 73, 97-102 (2020)).

109. Jean Galbraith, *Rejoining Treaties*, 106 VA. L. REV. 73, 103-04 (2020) (explaining different mechanisms at the Senate’s disposal to effectuate rescission of advice and consent, whether through a resolution (as has occurred twice), or by subsequent legislation that makes the substance of the treaty contrary to US law (the “last-in-time rule”). Under US law, treaties have traditionally been regarded as legal equivalents to statutes, both subservient to the Constitution. *Id.* Subsequent legislation, therefore, may effectively amend a treaty obligation. Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1776 (2009); see U.S. CONST. art. VI, cl. 2.

110. Seung Min Kim, *'Depends on Your Definition': Trump Casts Doubt on Commitment to NATO Mutual Defense Guarantee*, MILITARY.COM (June 24, 2025, at 11:21 ET), <https://www.military.com/daily-news/2025/06/24/depends-your-definition-trump-casts-doubt-commitment-nato-mutual-defense-guarantee.html> [<https://perma.cc/V6GP-E6ZJ>].

111. Celeste A. Wallander, *Beware the Europe You Wish For: The Downside and Dangers of Allied Independence*, 104 FOREIGN AFF. 22, 22 (2025).

112. NSS, *supra* note 2, at 12.

113. Mariam Khan, *US military is 'always an option' for Trump to acquire Greenland, White House official says*, ABC NEWS (Jan. 6, 2026, 18:01 EST), <https://abcnews.com/Politics/us-military-option-acquiring-greenland-white-house-official/story?id=128960041> [<https://perma.cc/9PSU-77VY>].

114. Robert O. Keohane & Joseph S. Nye, Jr., *The End of the Long American Century: Trump and the Sources of U.S. Power*, 104 FOREIGN AFFS. 68, 73 (2025).

United States—as it is currently doing—dismantles these institutions at home and engages the world as a bully abroad, it will dissipate its soft power.¹¹⁵

That dissipation is underway. In a widely reported speech at the last World Economic Forum in Davos, the prime minister of America’s largest trading partner and perhaps closest ally, Canada, Mark Carney described the American rejection of the rules-based system it had developed as a “rupture.”¹¹⁶ He went on to describe the current moment in world affairs as “the end of a pleasant fiction, and the beginning of a harsh reality where geopolitics—where the large, main power, read the United States, “is submitted to no limits, no constraints.”¹¹⁷ Carney acknowledged that the “rules-based system” was itself always partly a fiction, that the U.S. could always exempt itself from the rules, and did so from time to time.¹¹⁸ Still, he also acknowledged that Canada, and by extension the world, benefitted from “American hegemony,” because it “provided public goods: open sea lanes,¹¹⁹ a stable financial system, collective security, and support for frameworks for resolving disputes.”¹²⁰

Further, Carney said the United States is threatening international structures that middle powers like Canada have relied on. He acknowledged what the NSS also states, that “the old order is not coming back,” and called for like-minded states to combine their strengths to create a “third path,” one that is independent of the great powers.¹²¹ Carney expressly rejected “relying on their institutions”¹²²—the institutions built by the U.S., but perhaps also those being built by China, like BRICS and the Shanghai Cooperation Agreement. The Canadian prime minister never used the word “balancing.” But he did use words such as “hedging,” *i.e.*, between the U.S. and China, “not being forced to choose between hegemons,” and “reducing leverage that enables coercion.”¹²³

Two additional reasons augur ill for continued U.S. leadership of the international system. First, as Keohane and Nye argue, America’s perceived commitment to a human rights regime, whether overseas or at home, and the rule of law give the U.S. international legitimacy.¹²⁴ While the U.S. historically has not ratified many human rights treaties, it has always participated in negotiations over definitions and practices, with its voice always heard at such

115. *Id.* at 74.

116. Mark Carney, Prime Minister of Can., Speech at World Economic Forum Annual Meeting, Principled and pragmatic: Canada’s path (Jan. 20, 2026) (transcript available at <https://www.pm.gc.ca/en/news/speeches/2026/01/20/principled-and-pragmatic-canadas-path-prime-minister-carney-addresses> [<https://perma.cc/ZD2N-ATZU>]).

117. *Id.*

118. *Id.*

119. For context on the role the U.S. undertakes to ensure the freedom of navigation on the high seas as a “global public good” that benefits “all comers” as well as to ensure its own national security interests, see Amitai Etzioni, *Freedom of Navigation Assertions: The United States as the World’s Policeman*, 42 ARMED FORCES & SOC’Y 501, 507 (2016).

120. Carney, *supra* note 116.

121. *Id.*

122. *Id.*

123. *Id.*

124. Keohane & Nye, *supra* note 114, at 74.

fora. No doubt that it is because it has been perceived as championing human rights at home. Yet what does the world see on their television screens coming from the United States? The use of the military to “police” Democratic-led cities,¹²⁵ ICE executing American citizens on the streets of U.S. cities without reason or consequences (at this writing),¹²⁶ and criminal proceedings commenced against the president’s political opponents,¹²⁷ including at least one journalist.¹²⁸ What state that adheres to international and municipal conceptions of the rule of law would be proud to accept such a hegemon’s invitation to join it?

Second, the U.S. is squandering what theorists call “usable power.”¹²⁹ Determinants of the extent of a state’s usable power include bipartisanship and the credibility of commitments,¹³⁰ the ability of leaders to frame strategic issues in terms that make it difficult to oppose them,¹³¹ and economic buy-in by voters into the foreign-policy agenda of the leadership.¹³² By each of these measures, the United States is failing. Given the fragmentation of political parties, leaders cannot articulate a persuasive foreign-policy strategic vision that acquires buy-in across the divides of the political class, let alone voters. An example is the Paris Climate Agreement. Obama negotiated the agreement.¹³³ Trump withdrew the United States from it,¹³⁴ and Biden later reentered it.¹³⁵ Trump has now not only withdrawn the United States from the Paris Agreement again, but from the UNFCCC altogether.¹³⁶ The constraint, then, on the ability of the U.S. to project international stability and cohesion is not extrinsic, imposed by a rising power or a combination of powers, but intrinsic, as American policy careens from one extreme to another every four to eight years. The U.S. has become utterly

125. Kayla Epstein, *Why is Trump deploying the National Guard to US cities?*, BBC (Nov. 27, 2025), <https://www.bbc.com/news/articles/cwy9z7yg2n7o> [<https://perma.cc/PE4W-P38Y>].

126. *Minneapolis left to decide future of streetside memorials to 2 people killed by federal officers*, MPR NEWS (Feb. 15, 2026, at 08:23 EST), <https://www.mprnews.org/story/2026/02/15/minneapolis-to-decide-future-of-renee-good-alex-pretti-memorials> [<https://perma.cc/4A6R-AF5S>].

127. Dareh Gregorian & Ryan J. Reilly, *Justice Department investigating a growing number of Trump political foes*, NBC NEWS (Jan. 24, 2026, at 05:23 EST), <https://www.nbcnews.com/politics/justice-department/growing-number-trump-political-foes-investigated-justice-department-rcna255049> [<https://perma.cc/2M6U-74WB>].

128. Whitney Wild & Andi Babineau, *Don Lemon pleads not guilty to federal charges stemming from church protest*, CNN (Feb. 13, 2026), <https://www.cnn.com/2026/02/13/media/don-lemon-arraignment-minnesota> [<https://perma.cc/F9PN-P584>].

129. Peter Trubowitz & Peter Harris, *The End of the American Century? Slow Erosion of the Domestic Sources of Usable Power*, 95 INT’L AFF. 619, 619 (2019).

130. *Id.* at 623-27.

131. *Id.* at 627-33.

132. *Id.* at 633-37.

133. *Id.* at 627.

134. *Id.*

135. Sara Schonhardt, *So long, Paris: US officially leaves landmark climate pact*, POLITICO (Jan. 27, 2026, 10:04 EST), <https://www.politico.com/news/2026/01/27/so-long-paris-u-s-officially-leaves-landmark-climate-pact-00746628> [<https://perma.cc/8YJ8-DE3V>].

136. *Withdrawing the United States from International Organizations, Conventions, and Treaties*, *supra* note 103.

unpredictable to all and especially unreliable to allies. For all its military and economic might, then, it appears the U.S. is losing its usable power because of its internal incoherence.

B. Dismantling the International Economic Order

The Trump Administration has given the world pause about the U.S.-led economic order. For instance, Trump's abuse of the sanction power at his disposal could also harm the use of the dollar in international trade. In his first term, he withdrew the U.S. from the Joint Comprehensive Plan of Action ("JCPOA"), the agreement the Permanent Five Security Council Members and Germany made with Iran to limit the latter's nuclear program.¹³⁷ By reimposing sanctions on Iran, he forced the Europeans, who opposed the U.S. withdrawal,¹³⁸ to abide by those sanctions, cutting off the ability of European firms to do business with Iran and Iranian companies.¹³⁹ The U.S. has leverage to impose its will unilaterally by excluding access to the dollar and to U.S. markets by any foreign entity that does business with a sanctioned entity, through so-called secondary sanctions.¹⁴⁰ So against their will, the Europeans complied with the sanctions regime. At the time, calls arose for the establishment of the euro as an alternative currency to the dollar,¹⁴¹ a move that would deleteriously affect the value of the dollar.

Trump is doing the same in his second term. The Administration imposed sanctions against six judges and three prosecutors of the International Criminal Court ("ICC") because of the arrest warrants the ICC issued against Israeli Prime Minister Benjamin Netanyahu and former Defense Minister Yoav Gallant for war crimes and crimes against humanity allegedly committed in Israel's war

137. VALI NASR, *IRAN'S GRAND STRATEGY: A POLITICAL HISTORY*, 246 (2025).

138. *See generally* ELLIE GERANMAYEH & MANUEL LAFONT RAPNOUIL, *MEETING THE CHALLENGE OF SECONDARY SANCTIONS* (Eur. Council on Foreign Rels., 2019), https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/ [<https://perma.cc/VKF8-LTF2>] (Although Europe and the United States continue to closely coordinate their sanctions policies in other situations, disagreements between them – such as on [withdrawal from] the JCPOA – have led to not only a sharp divergence in their approaches to sanctions but also a clash between their respective foreign policies”).

139. *Id.* (“Given its extensive power to investigate and fine European actors – and to cut them off from the US market – the US Treasury’s influence prevails when US and EU regulations and foreign policy diverge. As such, the mere threat of US secondary sanctions on European entities has led to an exodus of EU companies from Iran and undercut a nuclear deal that once stood as a signal achievement of European foreign policy”).

140. *Id.* “European capitals were reminded of the harsh reality that, through secondary sanctions, Washington can use access to the US markets as a source of immense political power. . . ,”

141. *Id.* (noting proposals by European Union officials “to bolster its currency in the hope of one day competing with the US dollar” but also noting that, similarly, “China has sought to elevate the renminbi”).

in Gaza.¹⁴² Trump has also imposed sanctions against the UN Special Rapporteur on the Occupied Palestinian Territories, Francesca Albanese, with the same type of sanctions because she has been extremely critical of Israel's war in Gaza and what she has described as the displacement of Palestinians from the Occupied Territories.¹⁴³ These are sanctions designed to deal with human rights abusers, terrorists, and drug traffickers, not judges and lawyers who are international civil servants.¹⁴⁴

While there has yet to be a hue and cry over these latest sanctions, the Trump Administration's continued use of unilateral sanctions will predictably cause economic partners to question the efficacy of relying on the dollar. Fifty-five years ago, when President Richard Nixon took the U.S. off the gold standard, effectively ending GATT, there was no viable alternative to the dollar, and the world went along.¹⁴⁵ That is no longer necessarily true today.¹⁴⁶ As noted above, both the euro and the renminbi have both been postulated as possible alternatives.¹⁴⁷ Nor would it be the first time in the last century that there has been more than one dominant currency. In the interwar years of the last century, the dollar and the pound sterling were vying for dominance, with the dollar being more dominant by the last half of the 1920s, but sterling rising again by the mid-1930s.¹⁴⁸ The authors of this seminal work conclude that these data "throw into question the idea" that there is "room for only one significant international currency," since "sterling and the dollar shared reserve-currency status in the interwar period."¹⁴⁹ Indeed, beyond economics, the authors argue that political factors within the sterling zone were determinative in the perception of the pound's re-emergence as the dominant currency in the

142. Stéphanie Maupas, *Nicolas Guillou, French ICC judge sanctioned by the US: 'You are effectively blacklisted by much of the world's banking system'*, LE MONDE (Jan. 13, 2026), https://www.lemonde.fr/en/international/article/2025/11/19/nicolas-guillou-french-icc-judge-sanctioned-by-the-us-you-are-effectively-blacklisted-by-much-of-the-world-s-banking-system_6747628_4.html [<https://perma.cc/5MYX-2CL5>] (the list of those sanctioned includes "nearly 15,000 individuals . . . , mostly members of Al-Qaeda, the Islamic State group (IS), mafia organizations and the leaders of authoritarian regimes").

143. Filip Timotija, *UN investigator: US sanctions 'going to hurt me'*, HILL (July 25, 2025, at 18:52 ET), <https://thehill.com/policy/international/5428893-un-official-albanese-sanctioned/> [<https://perma.cc/A76L-89Z3>].

144. *See id.*

145. *See* Costigan et al., *supra* note 58, at 109 ("[President Richard] Nixon's removal of the US dollar from the gold standard represented a key departure from the protocols established by the Bretton Woods Conference.").

146. *See* Rana Al Mosharrafa, *Navigating the Tides of De-dollarization: Impact on Global Economy and BRICS Initiatives*, 15 WORLD REV. POL. ECON. 566, 572 (2024) (stating that "a growing perception" of the weaponization of the dollar has "prompt[ed] nations to actively seek de-dollarization").

147. GERANMAYEH & RAPNOUIL, *supra* note 138 (noting proposals by European Union officials "to bolster its currency in the hope of one day competing with the US dollar" but also noting that, similarly, "China has sought to elevate the renminbi").

148. Barry Eichengreen & Marc Flandreau, *The Rise and Fall of the Dollar, or When Did the Dollar Replace Sterling as the Leading Reserve Currency?*, 13 EUR. REV. ECON. HIST. 377, 393 (2009).

149. *Id.* at 403.

1930s.¹⁵⁰ It is doubtful that such political factors would today redound to the dollar's benefit.

The issue then turns on what the United States policy is doing to ensure the comparative favorability of maintaining the dollar's dominance on the global economic stage. Unfortunately, very little. Its tariff policies over the past year (at this writing) are irrational. It imposed a 10% tariff on all imported goods, reserving the highest tariffs for the sixty countries with which it has the highest trade deficit.¹⁵¹ The U.S. imposed multiple layers of tariffs (10%, 35%, 25%) on goods that are non-Canada-U.S.-Mexico-Agreement ("CUSMA") compliant.¹⁵² But any argument that proof of Canada's unfair trading practices can be inferred from the U.S. trade deficit is absurd. Canada has roughly one-eighth the population of the United States, yet Canadians consume eight times the value of U.S. goods per capita than Americans consume from Canada (\$8500 versus \$1208).¹⁵³ Why would the U.S. rationally expect Canada to consume even more U.S. goods?

Brazil is an even less rational case. The U.S. has enjoyed a trade *surplus* with Brazil for two decades, yet it slapped it with 50% tariffs.¹⁵⁴ Why? Because Brazil was prosecuting, and has since convicted, its former president, a Trump-aligned far-right politician, of attempting to subvert Brazil's political order by remaining in office after losing his re-election bid.¹⁵⁵ Bangladesh, surely one of the poorest countries in the world, saw a 37% tariff imposed on it by the U.S., while Sri Lanka and Vietnam had initial tariffs of 44% and 46%, respectively.¹⁵⁶

150. *Id.*; see also Patricia Meredith, *Digital Payments and Payment Infrastructure* 4-5 (Ctr. Int'l Governance Innovation Paper No. 341, 2025), https://www.cigionline.org/static/documents/Patricia_Meredith_Ieg3kE7.pdf [<https://perma.cc/UEN3-HCHC>] (explaining that while it is unlikely the dollar will be replaced soon, *inter alia*, geopolitical factors "could alter this trend").

151. Bryan Mena, *Key takeaways from Trump's 'Liberation Day' tariffs*, CNN (Apr. 2, 2025, at 21:20 EDT), <https://www.cnn.com/2025/04/02/economy/key-takeaways-from-trumps-liberation-day-tariffs> [<https://perma.cc/4WZX-VPYB>].

152. Abby Hughes, *The U.S. bumped its tariff on Canadian goods to 35%. How big of an impact will it have?*, CBC NEWS (Aug. 1, 2025, at 17:59 EDT), <https://www.cbc.ca/news/business/what-in-canada-is-subject-to-35-per-cent-tariff-1.7600029> [<https://perma.cc/8DQQ-WUNK>].

153. Chris Nelson, *Canadians have been high rollers when it comes to spending on American goods*, CALG. HERALD (Mar. 27, 2025), <https://calgaryherald.com/opinion/columnists/nelson-canadians-high-rollers-spending-american-goods> [<https://perma.cc/63KW-LJL2>].

154. Valentina Sader & Ignacio Albe, *The numbers that define the US-Brazil trade partnership*, ATLANTIC COUNCIL (July 17, 2025), <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-numbers-that-define-the-us-brazil-trade-partnership/> [<https://perma.cc/847L-A5WV>].

155. Caio Quero, *Why is Trump targeting Brazil - and will it backfire for Bolsonaro?*, BBC NEWS (July 10, 2025), <https://www.bbc.com/news/articles/crk68drj57mo> [<https://perma.cc/CP5B-5FUN>] (Bolsonaro was convicted and sentenced to 27 years in prison); Vanessa Buschschlüter, *Bolsonaro sentenced to 27 years in jail - what you need to know*, BBC NEWS (Sep. 11, 2025), <https://www.bbc.com/news/articles/cy4d409v2neo> [<https://perma.cc/PH2H-Y6UM>].

156. Monika Noshin & Sajid Amit, *Donald Trump's Tariff and Implications for Bangladesh*, CTR. FOR ENTER. & SOC'Y, 1, 3 (Apr. 2025), https://ulab.edu.bd/sites/default/files/uploads/2025/04/28/CES%20TLA_Donald%20Trump%E2%80%99s%20Tariff%20and%20Implications%20f

Incredibly, Trump threatened NATO allies with retaliatory tariffs for failing to support his bid to acquire Greenland.¹⁵⁷ While several countries ultimately negotiated lower tariff rates than the U.S. initially imposed, this type of tariff war and its concomitant upheaval may be just the type of stimulus to push countries away from the United States and the dollar.

In the same speech at Davos, quoted above, in which Canadian Prime Minister Carney criticized U.S. actions in the global political order, the head of government of America's largest trading partner and perhaps closest ally, gave a devastating account of America's role in the current global economy.¹⁵⁸ Carney, a former governor of the Bank of Canada and the Bank of England, described the U.S., without naming it, as having "begun using economic integration as weapons, tariffs as leverage, financial infrastructure as coercion, and supply chains as vulnerabilities to be exploited."¹⁵⁹ It should not be lost on the observer that, four days before giving this speech, Carney announced a "landmark" agreement with China on certain goods, an agreement he described as "realistic, *respectful* and interest-based."¹⁶⁰ "Respectful"—a word Carney surely used deliberately after Trump mooted annexing Canada as the fifty-first state and referred to the Canadian prime minister as "governor."¹⁶¹ More recently, Trump threatened to delay the opening of a new bridge between Windsor and Detroit—built entirely at Canada's expense and approved by Trump in his first term—"until the United States is fully compensated for everything we have given [Canada]" and until "Canada treats the United States with the Fairness and Respect [sic]."¹⁶² It then emerged that the Ambassador Bridge, the existing private toll bridge that is currently open, is owned by a billionaire megadonor to the Republican Party, who lobbied the White House

or%20Bangladesh_Monika%20Noshin_Sajid%20Amit_April%202025.pdf [https://perma.cc/Y5L4-7CGT].

157. Lara Jakes, Jim Tankersley & Zolan Kanno-Youngs, *Trump Says He Has Framework for Greenland Deal as NATO Mulls Idea of U.S. Sovereignty Over Bases*, N.Y. TIMES (Jan. 21, 2026), <https://www.nytimes.com/2026/01/21/us/politics/trump-greenland-threats-diplomacy-force.html> [https://perma.cc/5UTX-AJPL].

158. Carney, *supra* note 116.

159. *Id.*

160. Darren Major, *Here's what you need to know about the Canada-China deal on EVs and canola*, CBC NEWS (Jan. 16, 2026, at 16:24 EST), <https://www.cbc.ca/news/politics/what-is-in-canada-s-trade-agreement-with-china-9.7049082> [https://perma.cc/7Y65-9ATD] (emphasis added).

161. John Paul Tasker, *Trump again floats Canada joining the U.S. as the 51st state*, CBC NEWS (Sep. 30, 2025, at 11:49 EDT), <https://www.cbc.ca/news/politics/trump-51st-state-again-1.7647268> [https://perma.cc/8YHB-TYEG]; Michelle Butterfield, *Trump trolls Trudeau, calls him 'governor' of the 'Great State of Canada'*, GLOBAL NEWS (Dec. 10, 2024, at 21:38 ET), <https://globalnews.ca/news/10910501/donald-trump-justin-trudeau-governor-state-of-canada/> [https://perma.cc/M4V9-LKQ2].

162. Anna Clark, *Trump Is Threatening to Block the Michigan-Canada Bridge. He Used to Cheer It.*, PROPUBLICA (Feb. 13, 2026, at 05:00 ET), <https://www.propublica.org/article/trump-michigan-canada-gordie-howe-bridge-reversal> [https://perma.cc/6QXD-VJ6X].

before Trump's announcement.¹⁶³ This is how a banana republic behaves, not a great world power.

Such erratic and impetuous conduct by the leader of the global order must give policymakers the world over pause. While economist Barry Eichengreen, for instance, does not foresee an imminent change in the status of the dollar as the preferred reserve currency, he expresses concern that "election of a U.S. administration prepared to engage in trade wars with other countries and dismissive of geopolitical alliances could accelerate this transition."¹⁶⁴ Further, he notes that, to the extent global trade could be "split into nonoverlapping U.S.- and Chinese-centric blocs," then states in each respective bloc would naturally turn to the currency of their trading partner.¹⁶⁵ Canada's halting and limited steps toward China do not yet augur such a tectonic shift; however, policymakers in Washington and anyone who wishes the U.S. economy well should note these developments with concern.

A new phrase has entered the lexicon describing how the U.S. currently comports itself on the global stage, even with respect to its hitherto closest allies: predatory hegemony.¹⁶⁶ As Prof. Walt correctly notes, Trump's predatory view of the world encompasses both the economic sphere (e.g., his view that "trade deficits are a 'rip off' and a form of looting" of the U.S.)¹⁶⁷ and the political (e.g., by repeatedly "raising doubts about whether he would honor alliance commitments").¹⁶⁸ The nature of America's predation on the world is to use its economic and political dominance "to extract economic concessions."¹⁶⁹ Walt concludes with a dire warning:

To be sure, the United States is not about to face a vast countervailing coalition or lose its independence—it is too strong and favorably positioned to suffer that fate. It will, however, become poorer, less secure, and less influential than it has been for most living Americans' lifetimes. Future U.S. leaders will operate from a weaker position and will face an uphill battle to restore Washington's reputation as a self-interested but fair-minded partner. Predatory hegemony is a losing

163. Emma Loop, *Morouns ramped up bridge lobbying before Trump's Gordie Howe threats*, CBC NEWS (Feb. 12, 2026, at 04:00 ET), <https://www.cbc.ca/news/canada/windsor/trump-gordie-howe-moroun-bridge-lobby-ambassador-ballard-9.7085529> [https://perma.cc/4TGP-3DM7].

164. Barry Eichengreen, *When the Facts Change: The Future of the Global Monetary System*, 5 (Ctr. for Int'l Governance Innovation Paper No. 32, June 9, 2025), https://www.cigionline.org/static/documents/Barry_Eichengreen_phCpxAb.pdf [https://perma.cc/S6YL-4BNN].

165. *Id.*

166. See Walt, *supra* note 40, at 8 ("[T]he grand strategy of [Trump's] second presidential term is perhaps best described as 'predatory hegemony. Its central aim is to use Washington's privileged position to extract concessions, tribute, and displays of deference from both allies and adversaries, pursuing short-term gains in pursuing what it sees as a purely zero-sum world.'").

167. *Id.* at 14.

168. *Id.* at 15.

169. *Id.* at 15-16.

strategy, and the sooner the Trump administration abandons it, the better.¹⁷⁰

IV. CONCLUSION

This article began with an epigram by Oscar Wilde expressing Lord Darlington's definition of the cynic, a man who knows the price of everything and the value of nothing. In the second half of the nineteenth century, at the zenith of the British Empire, the English constitutional essayist, Walter Bagehot, had a similar, if less pithy, warning for his countrymen. "The characteristic danger of great nations," he admonished, "is that they may at last fail from not comprehending the great institutions which they have created."¹⁷¹ This article seeks, at the beginning of the second quarter of the twenty-first century, to sound precisely the same alarm. *Pax Americana*, flawed and imperfect as it may be, has nonetheless sustained a global order with America at its apex, one that has, on the whole, resulted in a more peaceful and prosperous world than the era before it. To be sure, there are costs to the U.S. in maintaining its position. The questions at this moment in history, questions that have not been raised, much less debated, by the American political class, are: What are the costs to the U.S. should it dismantle the system? And do those costs outweigh the costs of maintaining it?

In the closing days of the Second World War, the United States designed the post-war dispensation.¹⁷² It established an international political and economic order in which it would be the indispensable player. It established the rules of the order and pledged that it would generally, though not always, play by those rules.¹⁷³ From time to time, when the U.S. national interest seemed to warrant it, the U.S. did violate the rules, but, as Prime Minister Carney acknowledged at Davos, most states went along because the benefits from the existing system, while perhaps not universal, were nevertheless substantial, especially for countries closely allied with the U.S.¹⁷⁴ It is no accident that the states of Eastern Europe, once enslaved by the Soviet Union, rushed to ally with the United States and NATO at the first opportunity.¹⁷⁵ They had before them the example of Western European states, which embraced the United States upon their liberation from German and Italian fascism and tyranny.

In exchange, the states that participated in this American creation prospered, most of all, the United States itself.¹⁷⁶ The political order it created generally allowed the U.S. freedom of action to engender its interests as succeeding

170. *Id.* at 23.

171. Walter Russell Mead, *The United States and the World Economy*, 6 WORLD POL'Y J. 1, 1 (1988).

172. Rofe et al., *supra* note 9, at 257; Costigan et al., *supra* note 58, at 106.

173. Walt, *supra* note 40, at 10; Carney, *supra* note 116.

174. *Id.*

175. Mary Elise Sarotte, *A Broken Promise? What the West Really Told Moscow About NATO Expansion*, 93 FOREIGN AFF. 90, 90 (2014).

176. Walt, *supra* note 40, at 10; Carney, *supra* note 116.

generations of its leaders saw those interests, within the limits of a competing hegemon during the Cold War.¹⁷⁷ But then, during the Cold War, it had a voluntary alliance with like-minded states, the most technologically advanced in the world, after the U.S. itself. Since the fall of the Soviet Union, there have been few limits, indeed, to stand in the way of the United States. As for the economic system, it suffices to say that by helping to rebuild the industrial capacity of its partners, the United States became perhaps the wealthiest state in world history.

For the past year, the Administration has been throwing all of that away. It has alienated virtually every ally and every trading partner. Because of its sheer mass, the U.S. can maintain this posture for the short and intermediate terms. But in the long term, the U.S. is encouraging the formation of political and economic blocs to balance against its newly found predatory instincts.¹⁷⁸ The benefits the U.S. derives from the existing system are profound and demonstrable. What it hopes to gain from its current policies remains illusory and ephemeral.

There is virtually no arena related to international relations and commerce in which the U.S. is not inflicting harm on itself. For example, it is making it more difficult for business travelers, tourists, temporary workers, and students to obtain U.S. visas.¹⁷⁹ No doubt partly due to the crass fight the U.S. picked with its northern neighbor, air travel from there is down 43%, and losses for the U.S. tourism industry generally are estimated to be between \$8 and \$12 billion dollars.¹⁸⁰ Some of these losses may be anticipatory, as the U.S. has proposed a rule requiring visitors from America's closest allies to allow consular officers access to five years' worth of the traveler's social media.¹⁸¹ In the meantime, China has announced that it will no longer require visas from UK and Canadian business travelers.¹⁸²

Whatever options a future president may have for attempting to re-establish the international order from which Trump is withdrawing, the international community is unlikely simply to wait out the next three years and hope for a *volte face* by the next administration. The damage—intentional as it is—to a world order led by the United States and with the consent of like-minded states will be permanent. Even before the 2024 presidential election, France's Europe

177. *Id.*

178. See Walt, *supra* note 40, at 23.

179. Suzanne Rowan Kelleher, *Struggling U.S. Tourism Takes Another Hit: New Visa Requirement For Foreign Visitors*, FORBES (Sep. 8, 2025), <https://www.forbes.com/sites/suzanne-rowan-kelleher/2025/09/08/struggling-us-tourism-takes-another-hit-new-visa-requirement-for-foreign-visitors/> [<https://perma.cc/K4NM-3UK7>].

180. *Id.*

181. Agency Information Collection Activities; Revision; Arrival and Departure Record (Form I-94) and Electronic System for Travel Authorization (ESTA), 90 Fed. Reg. 57208 (proposed Dec. 10, 2025).

182. Adam Goldsmith, *China confirms visa-free travel for UK and Canadian nationals*, BBC NEWS (Feb. 15, 2026), <https://www.bbc.com/news/articles/c875d3d3x34o> [<https://perma.cc/57G5-YWV3>].

Minister, Benjamin Haddad, said publicly, “We cannot leave the security of Europe in the hands of voters in Wisconsin every four years.”¹⁸³ This comment reflects an awareness that the Administration’s actions are not the idiosyncrasies of one man; they reflect, at best, the indifference of American voters, or at worst, are supported by tens of millions of voters who no longer believe in American leadership of the rules-based system.

The above sentiment is underscored by a conversation that former U.S. Assistant Secretary of Defense Celeste Wallander documents:

In 2017, Europe could comfort itself with the thought that American voters didn’t really know what they were getting when they elected him. But in 2024, Americans had already watched Trump bully U.S. allies, toy with leaving NATO, and cozy up to Russia. They voted for him anyway. As one European diplomat told me in January, the continent must consider the idea that Joe Biden’s presidency, not Trump’s, was the blip.¹⁸⁴

If that view prevails in Europe—as rational behavior dictates it must—there will be no turning back the clock.

That reality aside, there is another that is even more grim. For the past year, the United States has been broadcasting images of its security forces as brutes who have no regard for human life. In our name, these masked men, without the visible accoutrements of law enforcement and wearing facemasks to hide their identity, have shot unarmed American citizens in the head without justification and without facing consequences.¹⁸⁵ The world has been watching these horrifying images, which must remind Europeans of the worst days of the 1930s and 1940s. In response, the French satirical magazine, *Charlie Hebdo*, published a cover in January 2026, Figure 1, wherein the blood of U.S. civilians killed by ICE forms the stripes of the American flag and their bodies form the canton in lieu of the fifty stars.¹⁸⁶ It is possible to dismiss this jarring image as the rantings of an iconoclastic publication, one whose *raison d’être* is bombast and to sling mud on the Establishment. But Figure 2, shows an ICE agent holding a gun to the back of the Statue of Liberty, her pose evoking that of Alex Pretti the instant before an ICE agent killed him. The fear is palpable in her face. Her torch, representing Liberty, is discarded on the ground, extinguished, but still smoldering. This is an image published in the French newspaper *Le Monde*.¹⁸⁷

183. Nicholas Vinocur, *It doesn’t matter if Trump or Harris win. Europe has already lost.*, POLITICO (Oct. 31, 2024, at 04:03 CET), <https://www.politico.eu/article/donald-trump-kamala-harris-jd-vance-tim-waltz-eu-nato-us-elections-weapons/> [https://perma.cc/6W5A-JKL2].

184. Wallander, *supra* note 48, at 33.

185. *Minneapolis left to decide future*, *supra* note 126.

186. See Felix, CHARLIE HEBDO (cover) (Jan. 28, 2026), <https://abo.charliehebdo.fr/common/categories/3> [https://perma.cc/ND86-TB9J].

187. Marco De Angelis, LE MONDE (Jan. 26, 2026, 16:40), https://www.lemonde.fr/idees/article/2026/01/26/vu-par-marco-de-angelis_6664185_3232.html [https://perma.cc/WX4M-

Le Monde is the Establishment. If this is how our closest ideological allies view us now, it is difficult to conceive, brute force aside, how the United States can ever again assert moral leadership in world affairs.

REXP]. On what appears to be the artist's personal website, the image is entitled "Stop Liberty!" See Marc De Angelis, *Stop Liberty*, CARTOON MOVEMENT (Jan. 21, 2026), <https://www.cartoonmovement.com/cartoonist/717> [<https://perma.cc/4M9R-L9U2>].

APPENDIX A: FIGURES

Figure 1: Cover of the French magazine, *Charlie Hebdo*, published on January 28, 2026, and drawn by *Charlie Hebdo* caricaturist Felix.¹⁸⁸

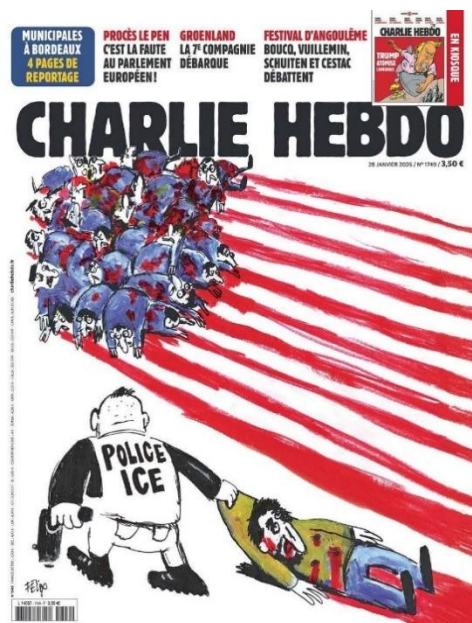


Figure 2: Caricature by Marco de Angelis published in the French newspaper, *Le Monde*, January 26, 2026.¹⁸⁹



188. Felix, *supra* note 186.

189. De Angelis, *LE MONDE*, *supra* note 187.