

In a separate dissent joined by Justice Kagan, Justice Breyer looked to the extent to which the Trump administration was making case-by-case waivers to the travel ban actually available in practice.²⁴ He reasoned that “if the Government is not applying the Proclamation’s exemption and waiver system, the claim that the Proclamation is a ‘Muslim ban,’ rather than a ‘security-based’ ban becomes much stronger.”²⁵ Given evidence suggesting that the executive branch was failing to grant waivers in practice, he would have upheld the lower court’s injunction.²⁶

The Trump administration celebrated the Supreme Court’s decision. Trump described the Court’s decision as a “tremendous victory for the American people and the Constitution” and vowed to continue “fight[ing] for an immigration system that serves the national interests of the United States and its citizens.”²⁷ By contrast, human rights groups condemned the decision,²⁸ and Hawaii’s Lieutenant Governor Doug Chin emphasized that “I hurt today for Hawaii families and others who have experienced discrimination and scapegoating due to President Trump’s bullying remarks and orders.”²⁹

INTERNATIONAL ORGANIZATIONS

United States Withdraws from the UN Human Rights Council, Shortly After Receiving Criticism About Its Border Policy

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On June 19, 2018, the United States withdrew from the UN Human Rights Council.¹ Announcing this decision, U.S. Ambassador to the United Nations Nikki Haley characterized the Council as “a protector of human rights abusers and a cesspool of political bias.”² U.S. Secretary of State Mike Pompeo observed that while “the United States has no opposition in

dissenting). Responding to this point, the Court stated that “*Korematsu* has nothing to do with this case” and described *Korematsu* as “gravely wrong the day it was decided.” *Id.* at 2423.

²⁴ *Id.* at 2429–30 (Breyer, J., dissenting).

²⁵ *Id.* at 2430 (Breyer, J., dissenting).

²⁶ *Id.* at 2431–33 (Breyer, J., dissenting).

²⁷ Donald J. Trump, Statement on the United States Supreme Court Ruling in *Trump v. Hawaii*, 2018 DAILY COMP. PRES. DOC. 455 (June 26, 2018); see also U.S. Dep’t of Homeland Security Press Release, DHS Statement on U.S. Supreme Court Decision on the President’s Executive Order on Protecting the Nation from Foreign Terrorist Entry into the United States (June 26, 2017), at <https://www.dhs.gov/news/2017/06/26/dhs-statement-us-supreme-court-decision-president-s-executive-order-protecting> [<https://perma.cc/7H6Z-A37S>] (announcing that the decision would allow the agency to pursue “rational and necessary steps to protect [the United States] from persons looking to enter and potentially do harm”).

²⁸ E.g., Amnesty International USA, *Amnesty International USA Reaction to Supreme Court Ruling on Muslim Ban* (June 26, 2018), at <https://www.amnestyusa.org/press-releases/amnesty-international-usa-reaction-to-supreme-court-ruling-on-muslim-ban>.

²⁹ *The Latest: Group: Don’t Base Immigration on Race, Religion*, AP (June 26, 2018), at <https://www.apnews.com/019fb806a05c49eab32cb1ed951af363>. As Hawaii’s former attorney general, Chin initially led the challenge against the executive actions. *Id.*

¹ U.S. Dep’t of State Press Briefing, Remarks on the UN Human Rights Council (June 19, 2018), at <https://www.state.gov/secretary/remarks/2018/06/283341.htm> [<https://perma.cc/MPB4-9AQW>] [hereinafter June 19 Press Briefing].

² *Id.*

principle to multilateral bodies working to protect human rights,” nonetheless “when organizations undermine our national interests and our allies, we will not be complicit.”³ The withdrawal occurred one day after the UN High Commissioner for Human Rights criticized the United States in a speech at the Human Rights Council for its “unconscionable” practice of forcibly separating undocumented families entering the United States.⁴ In August, U.S. National Security Advisor John Bolton stated that in addition to withdrawing from the Council, the United States would also reduce its assessed contribution to the United Nations by the amount that would ordinarily flow to the Human Rights Council and the UN High Commissioner for Human Rights.⁵

U.S. involvement with the Human Rights Council has varied in the years since its creation. In April 2005, UN Secretary-General Kofi Annan called for the dissolution of its predecessor, the UN Commission on Human Rights, stating that this body had been “undermined by the politicization of its sessions and the selectivity of its work.”⁶ The creation of the Human Rights Council as a replacement for the Commission went to a vote in the General Assembly in March 2006.⁷ The United States under President George W. Bush was one of just four states to vote against the establishment of the new Council, objecting that it needed “stronger mechanisms for maintaining credible membership.”⁸ The United States also declined to seek a seat on the Council in its first round of elections.⁹ After President Obama took office, the United States promptly and successfully sought election to the Human Rights Council “because we believe that working from within, we can make the council a more effective forum to promote and protect human rights.”¹⁰

Not long after President Trump took office, his administration signaled skepticism about the Council and the extent to which the United States should pursue change from within it. On June 6, 2017, Haley remarked in an address to the Human Rights Council that “the United States is looking carefully at this Council and our participation in it.”¹¹ Elaborating in a later speech that same day, she stated that “[i]f [the Council] fails to change,

³ *Id.*

⁴ UN High Comm’r for Human Rights, Opening Statement and Global Update of Human Rights Concerns by UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein at 38th Sess. of the Human Rights Council (June 18, 2018), at <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23206&LangID=E> [hereinafter June 18 Statement].

⁵ Associated Press, *Bolton Presses Russia About Meddling in U.S. Election Process*, POLITICO (Aug. 23, 2018), at <https://www.politico.com/story/2018/08/23/john-bolton-russia-meeting-election-meddling-794339> [hereinafter Bolton story].

⁶ UN Secretary-General, Secretary-General’s Address to the Commission on Human Rights (Apr. 7, 2005), at <https://www.un.org/sg/en/content/sg/statement/2005-04-07/secretary-generals-address-commission-human-rights>.

⁷ John R. Crook, *Contemporary Practice of the United States*, 100 AJIL 697, 699 (2006).

⁸ *Id.* at 697–98 (quoting U.S. Dep’t of State Press Release, *Explanation of Vote on the Human Rights Council Draft Resolution* (Mar. 15, 2006), at <https://2001-2009.state.gov/p/io/rls/rm/63143.htm>).

⁹ *Id.* at 698.

¹⁰ John R. Crook, *Contemporary Practice of the United States*, 103 AJIL 355, 357–58 (2009) (quoting U.S. Dep’t of State Press Release, *U.S. to Run for Election to the UN Human Rights Council* (Mar. 31, 2009), at <https://2009-2017.state.gov/r/pa/prs/ps/2009/03/121049.htm>); John R. Crook, *Contemporary Practice of the United States*, 103 AJIL 604, 608 (2009) (noting that the United States ran unopposed and was elected to the Council).

¹¹ Nikki Haley, U.S. Ambassador to the UN, *Ambassador Nikki Haley Addresses the UN Human Rights Council* (June 6, 2017), at <https://geneva.usmission.gov/2017/06/06/ambassador-nikki-haley-address-to-the-un-human-rights-council> [<https://perma.cc/TR64-WW24>].

then we must pursue the advancement of human rights outside of the Council.”¹² She pointed specifically to two “critically necessary changes.”¹³ First, she called on the United Nations to “keep the worst human rights abusers from obtaining seats on the Council,”¹⁴ a concern reiterated by Trump in his address to the General Assembly that September.¹⁵ Second, she called for the removal of the Council’s Agenda Item Seven, which ensures that the topic of “[h]uman rights violations and implications of the Israeli occupation of Palestine and other occupied Arab territories” and the “[r]ight to self-determination of the Palestinian people” is on the agenda of each Council session.¹⁶ Haley described Agenda Item Seven as “the scandalous provision that singles out Israel for automatic criticism.”¹⁷

Haley returned to these themes in announcing the U.S. withdrawal from the Human Rights Council on June 19, 2018:

Regrettably, it is now clear that our call for reform was not heeded. Human rights abusers continue to serve on and be elected to the council. The world’s most inhumane regimes continue to escape scrutiny, and the council continues politicizing and scapegoating of countries with positive human rights records in an attempt to distract from the abusers in their ranks.

Therefore, as we said we would do a year ago if we did not see any progress, the United States is officially withdrawing from the UN Human Rights Council. In doing so, I want to make it crystal clear that this step is not a retreat from human rights commitments; on the contrary, we take this step because our commitment does not allow us to remain a part of a hypocritical and self-serving organization that makes a mockery of human rights.

...

When a so-called Human Rights Council cannot bring itself to address the massive abuses in Venezuela and Iran, and it welcomes the Democratic Republic of Congo as a new member, the council ceases to be worthy of its name. Such a council, in fact, damages the cause of human rights.

And then, of course, there is the matter of the chronic bias against Israel. Last year, the United States made it clear that we would not accept the continued existence of agenda item seven, which singles out Israel in a way that no other country is singled out. Earlier this year, as it has in previous years, the Human Rights Council passed five resolutions against Israel—more than the number passed against North Korea, Iran, and Syria combined. This disproportionate focus and unending hostility towards Israel is clear proof that the council is motivated by political bias, not by human rights.

¹² Nikki Haley, U.S. Ambassador to the UN, Remarks at the Graduate Institute of Geneva on “A Place for Conscience: The Future of the United States in the Human Rights Council” (June 6, 2017), at <https://usun.state.gov/remarks/7828> [<https://perma.cc/R56F-FV88>] [hereinafter June 6 Graduate Institute Address].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Donald J. Trump, Remarks to the United Nations General Assembly in New York City, 2017 DAILY COMP. PRES. DOC. 658 (Sept. 19, 2017) (“[I]t is a massive source of embarrassment to the United Nations that some governments with egregious human rights records sit on the U.N. Human Rights Council”).

¹⁶ Human Rights Council Res. 5/1, UN Doc. A/HRC/RES/5/1 (Aug. 7, 2007).

¹⁷ June 6 Graduate Institute Address, *supra* note 12.

For all these reasons, the United States spent the past year engaged in a sincere effort to reform the Human Rights Council. It is worth examining why our efforts didn't succeed. At its core, there are two reasons. First, there are many unfree countries that simply do not want the council to be effective

. . . .

The second reason our reforms didn't succeed is in some ways even more frustrating. There are several countries on the Human Rights Council who do share our values

. . . .

Ultimately, however, many of these likeminded countries were unwilling to seriously challenge the status quo. We gave them opportunity after opportunity and many months of consultations, and yet they would not take a stand unless it was behind closed doors

. . . .

Even as we end our membership in the Human Rights Council, we will keep trying to strengthen the entire framework of the UN engagement on human rights issues, and we will continue to strongly advocate for reform of the Human Rights Council. Should it become reformed, we would be happy to rejoin it.¹⁸

The President of the Human Rights Council, Vojislav Šuc of Slovenia, greeted the news of the U.S. withdrawal from the Council with regret:

In times when the value and strength of multilateralism and human rights are being challenged on a daily basis, it is essential that we uphold a strong and vibrant Council recognizing it as a central part of the United Nations for the 21st century.

Over the past 12 years, the Human Rights Council has tackled numerous human rights situations and issues keeping them in sharp focus. In many senses, the Council serves as an early warning system by sounding the alarm bells ahead of impending or worsening crises. Its actions lead to meaningful results for the countless human rights victims worldwide, those the Council serves.¹⁹

UN Secretary-General António Guterres stated via a spokesperson that he “would have much preferred for the United States to remain in the Human Rights Council.”²⁰

The day before its withdrawal, on June 18, the United States came in for severe criticism in an address delivered to the Human Rights Council by the UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein.²¹ This criticism concerned the “zero-tolerance” policy

¹⁸ June 19 Press Briefing, *supra* note 1; see also White House Fact Sheet, President Donald J. Trump is Standing Up for Human Rights at the UN (June 21, 2018), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-standing-human-rights-u-n> [<https://perma.cc/G2ZM-VK78>] (noting that “[t]he Administration believes that withdrawal from the [Council] will cast a spotlight on the urgent need for structural reform”).

¹⁹ UN, Human Rights Council, Press Statement by the President of the Human Rights Council, Ambassador Vojislav Šuc (Slovenia) (June 19, 2018), at <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23220&LangID=E>.

²⁰ UN Secretary-General, Note to Correspondents on the Withdrawal of the United States of America from the Human Rights Council (June 19, 2018), at <https://www.un.org/sg/en/content/sg/note-correspondents/2018-06-19/note-correspondents-withdrawal-united-states-america-human>.

²¹ June 18 Statement, *supra* note 4.

for undocumented immigrants crossing the border, which was implemented by the Trump administration in April 2018.²² As U.S. Attorney General Jeff Sessions described the policy in a May 7, 2018 speech in San Diego, “If you cross this border unlawfully, then we will prosecute you. It’s that simple. . . . If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law.”²³ As a result of this policy, the Trump administration separated thousands of children from their parents at the border.²⁴

At the Human Rights Council, Al Hussein expressed his “deep concern” at the policy, lamenting that in the United States over the course of the preceding six weeks:

. . . nearly two thousand children have been forcibly separated from their parents. The American Association of Pediatrics has called this cruel practice “government-sanctioned child abuse” which may cause “irreparable harm,” with “lifelong consequences.” The thought that any State would seek to deter parents by inflicting such abuse on children is unconscionable. I call on the United States to immediately end the practice of forcible separation of these children, and I encourage the Government to at last ratify the Convention on the Rights of the Child, in order to ensure that the fundamental rights of all children, whatever their administrative status, will be at the centre of all domestic laws and policies.²⁵

In addition to Al Hussein, other world leaders condemned the U.S. policy, including UK Prime Minister Theresa May, Canadian Prime Minister Justin Trudeau, and Pope Francis.²⁶ Mexican Secretary of Foreign Affairs Luis Videgaray said that the “cruel and inhumane” policy “clearly represents a violation of human rights.”²⁷ The Inter-American Commission on

²² See U.S. Dep’t of Justice Press Release, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), at <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/QNE3-LY8J>].

²³ Jeff Sessions, Attorney General, U.S. Dep’t of Justice, Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/3Z79-5V7W>]. A long-standing settlement between the United States and immigration rights groups—the *Flores* settlement—prevents the United States from detaining children for more than brief periods of time. See Katherine Hawkins, *Where Family Separation Began: A Case in El Paso Shows Flores is the Solution, Not the Problem*, JUST SECURITY (June 22, 2018), at <https://www.justsecurity.org/58363/family-separation-began-case-el-paso-shows-flores-solution-problem> (describing aspects of the 1997 *Flores* settlement agreement). As Sessions’s comments indicate, the Trump administration understood that its decision to detain and prosecute all adults thought to be crossing illegally would therefore result in the separation of families.

²⁴ See Brian Naylor, *DHS: Nearly 2,000 Children Separated from Adults at Border in 6 Weeks*, NPR (June 16, 2018), at <https://www.npr.org/2018/06/16/620451012/dhs-nearly-2-000-children-separated-from-adults-at-border-in-six-weeks> (noting that the U.S. Department of Homeland Security reported the separation of 1,995 minors from April 19 to the end of May).

²⁵ June 18 Statement, *supra* note 4 (making this criticism in the course of a broader address that also criticized the human rights practices of various other countries). His office had expressed “deep[] concern[]” about the policy several weeks earlier. UN, Office of the UN High Comm’r for Human Rights, Press Briefing Note on Egypt, United States and Ethiopia (June 5, 2018), at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174&LangID=E>.

²⁶ Chico Harlan & William Branigin, *Trump’s Family-Separation Policy Faces International Condemnation from Pope Francis, Theresa May, and Others*, WASH. POST (June 20, 2018), at https://www.washingtonpost.com/world/pope-francis-criticizes-trumps-family-separation-policy-on-migrants-says-populism-is-not-the-solution/2018/06/20/65c15102-7472-11e8-9780-b1dd6a09b549_story.html?utm_term=.2b9406109e08.

²⁷ Stephanie Murray, *Mexican Foreign Minister Calls U.S. Family Separations “Cruel and Inhumane,”* POLITICO (June 19, 2018), at <https://www.politico.com/story/2018/06/19/family-separations-mexico-foreign-minister-reaction-654183>.

Human Rights also expressed “deep concern” over the policy, with its Rapporteur on the Rights of Migrants Luis Ernesto Vargas Silva stating that “[i]mmigration policies and practices can never be used as mechanisms to cause cruel, inhuman and degrading treatments, to separate families, to attack children and their families, or to place the lives of persons in need of protection at greater risk. This is just inhuman and above any comprehension.”²⁸

Faced with domestic and international outrage, Trump officially ended the policy of family separation on June 20, 2018.²⁹ As protocols for tracking parents and children concurrently were poor or lacking, however, numerous children already separated from their parents remain in limbo. Having sent hundreds of parents back to countries such as Honduras and Guatemala, the Trump administration has no simple way of locating them or reconnecting them with their children, who remain in government custody. On June 26, a federal district court ruled that the government must reunite separated children under the age of five with their parents by July 10, and all other separated children with their parents by July 26.³⁰ The Trump administration met these deadlines for many but far from all of the children.³¹ As of August 27, 2018, the majority of children have experienced family reunification, but 497 children were reported to still be separated from their families.³²

In announcing the U.S. withdrawal from the Human Rights Council, Trump administration officials did not connect the timing of this withdrawal with the contemporaneous criticism it was receiving regarding family separation. Pompeo did state in general terms that the “United States . . . will not take lectures from hypocritical bodies and institution[s] as Americans selflessly give their blood and treasure to help the defenseless . . .”³³ The U.S. term on the Human Rights Council was due to expire at the end of 2019, and Iceland has

²⁸ Org. of Am. States [OAS], *IACHR Expresses Concern over Recent Migration and Asylum Policies and Measures in the United States* (June 18, 2018), at http://www.oas.org/en/iachr/media_center/PReleases/2018/130.asp.

²⁹ Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018). While making family separation no longer a norm, this order sought to preserve the underlying “zero-tolerance” prosecutorial approach. It therefore instructed the attorney general to seek modification of the *Flores* settlement to make it lawful for undocumented families to be detained together. See *id.*; see also Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486 (Sept. 7, 2018) (announcing a proposed rule intended to “terminate the” *Flores* settlement by “creat[ing] an alternative to the existing licensed program requirement for family residential centers, so that ICE may use appropriate facilities to detain family units together during their immigration proceedings”). As this litigation and related regulatory efforts are ongoing, however, the United States has “effectively return[ed] to the ‘catch and release’ policy that President Trump promised to eliminate.” Miriam Jordan, Katie Benner, Ron Nixon & Caitlin Dickerson, *As Migrant Families Are Reunited, Some Children Don’t Recognize Their Mothers*, N.Y. TIMES (July 10, 2018), at <https://www.nytimes.com/2018/07/10/us/politics/trump-administration-catch-and-release-migrants.html>.

³⁰ *L. v. U.S. Immigration & Customs Enft*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018) (including an exception if “the parent is unfit or presents a danger to the child” or “the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child”).

³¹ See generally Nick Miroff, Amy Goldstein & Maria Sacchetti, “Deleted” Families: What Went Wrong with Trump’s Family-Separation Effort, WASH. POST (July 28, 2018), at https://www.washingtonpost.com/local/social-issues/deleted-families-what-went-wrong-with-trumps-family-separation-effort/2018/07/28/54bcdcc6-90cb-11e8-8322-b5482bf5e0f5_story.html?utm_term=.61090872e29c.

³² Leslie Shapiro & Manas Sharma, *How Many Migrant Children Are Still Separated from Their Families?*, WASH. POST, at https://www.washingtonpost.com/graphics/2018/local/tracking-migrant-family-separation/?noredirect=on&utm_term=.068a91015164 (last updated Aug. 27, 2018) (noting that as of August 27, the adults originally attached to 322 still-separated children are now outside the United States, presumably because of deportations or decisions to depart voluntarily rather than to face formal removal).

³³ June 19 Press Briefing, *supra* note 1. Pompeo and Haley left the briefing room without answering any questions, the first of which was: “Is the timing related to the criticism of the border policy?” See *id.*

now been elected to fill this seat.³⁴ In August 2018, a high-ranked U.S. administration official made clear that, in addition to withdrawing, the United States was also “going to de-fund the Human Rights Council” by decreasing its assessed contribution to the UN budget by the amount that would ordinarily go to the Human Rights Council and the High Commissioner for Human Rights.³⁵ As of the end of August, the Trump administration has not addressed whether and to what extent the United States will continue to participate in the Universal Periodic Review, a process under the auspices of the Human Rights Council through which states voluntarily have their human rights practices reviewed every few years. The United States is scheduled for its third cycle of assessment during the Human Rights Council’s thirty-sixth session in the spring of 2020.³⁶

INTERNATIONAL ECONOMIC LAW

Tariff-Based Disputes Continue to Characterize Trump Administration Trade Policies
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Over the summer of 2018, trade relations between the United States and many of its trading partners continued to be marked by tensions. The United States and China ratcheted up their use of tariffs against each other. The United States both received and initiated requests for consultation with various countries at the World Trade Organization (WTO) related to its earlier steel and aluminum tariffs and to tariffs imposed in response by other countries. President Trump has continued to pursue the possibility of further tariffs, including with respect to automobile and uranium imports. The United States also escalated trade tensions with Turkey through various measures, explicitly linking some of these measures to Turkey’s detainment of an American pastor. Despite the broader theme of tensions, negotiations have proved productive between the United States and two of its major trading partners—the European Union and Mexico—paving a way for future settlements. With the European Union, the Trump administration has reached a tentative understanding and agreed not to impose new tariffs while the parties negotiate toward finalizing this understanding. As to Mexico, in late August 2018 the Trump administration announced that the two countries had reached agreement with respect to many issues underlying their ongoing North American Free Trade Agreement (NAFTA) negotiations.

In March 2018, the Trump administration determined that China was engaging in unfair trade practices and announced its intent to respond by imposing new tariffs under Section

³⁴ *Iceland to Take Vacated U.S. Seat on Human Rights Council*, UN NEWS (July 13, 2018), at <https://news.un.org/en/story/2018/07/1014672>.

³⁵ Bolton story, *supra* note 5 (quoting Bolton as remarking that: “We’ll calculate 22 percent of the Human Rights Council and the High Commissioner’s budget, and our remittances to the U.N. for this budget year will be less 22 percent of those costs—and we’ll say specifically that’s what we’re doing”). The United States pays 22% of the general UN budget. *Id.*

³⁶ UN, Human Rights Council, 3rd UPR Cycle: Contributions and Participation of “Other Stakeholders” in the UPR, at <https://www.ohchr.org/en/hrbodies/upr/pages/ngosnhris.aspx> (last updated May 22, 2017).