

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

Trump Administration Imposes Sanctions on Russia for Chemical Weapons Use, While More Generally Sending Mixed Signals Regarding NATO and Russia

doi:10.1017/ajil.2018.94

During the summer of 2018, U.S. diplomacy related to the North Atlantic Treaty Organization (NATO) and Russia took sharp twists and turns. President Trump's statements at a pair of diplomatic events abroad in July sowed confusion regarding the continued U.S. commitment to NATO and the nature of the relationship between the White House and the Kremlin. Yet despite some wariness regarding NATO and a desire to have "a very good relationship with Russia,"¹ Trump joined a robust NATO summit declaration that emphasized Russian malfeasance and reaffirmed the importance of the North Atlantic Alliance.² Several weeks later, the U.S. State Department announced the imposition of new sanctions on Russia pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991.³

The lead-up to the 2018 NATO summit, held in Brussels on July 11 and 12, was contentious in tone. The previous month, Trump sent letters to a number of NATO heads of state, urging them to contribute more funding to the alliance.⁴ To German Chancellor Angela Merkel, he stated that Germany's "underspending on defense undermines the security of the alliance" and observed that it would "become increasingly difficult to justify to American citizens why some countries do not share NATO's collective security burden while American soldiers continue to sacrifice their lives overseas or come home gravely wounded."⁵ Shortly before the summit, Trump followed up with a series of strongly worded tweets about NATO's funding. On July 9, he wrote, "[t]he United States is spending far more on NATO than any other Country. This is not fair, nor is it acceptable. . . ."⁶ On July 10, he wrote, "NATO countries must pay MORE, the United States must pay LESS. Very Unfair!"⁷ On July 11, he wrote:

¹ President's News Conference with Prime Minister Theresa May of the United Kingdom in Buckinghamshire, United Kingdom, at 6, 2018 DAILY COMP. PRES. DOC. NO. 483 (July 13, 2018) (also remarking that "NATO is really there for Europe, much more so than us . . . no matter what our military people or your military people say, it helps Europe more than it helps us").

² NATO Press Release, Brussels Summit Declaration, paras. 1, 4–9 (July 11, 2018), at https://www.nato.int/cps/en/natohq/official_texts_156624.htm [hereinafter Brussels Summit Declaration].

³ U.S. Dep't of State Press Release, Imposition of Chemical and Biological Weapons Control and Warfare Elimination Act Sanctions on Russia (Aug. 8, 2018), at <https://www.state.gov/r/pa/prs/ps/2018/08/285043.htm> [<https://perma.cc/ALF3-RMJ2>] [hereinafter Aug. 8 State Dep't Press Release, Sanctions Imposition].

⁴ Julie Hirschfeld Davis, *Trump Warns NATO Allies to Spend More on Defense, or Else*, N.Y. TIMES (July 2, 2018), at <https://www.nytimes.com/2018/07/02/world/europe/trump-nato.html?rref=collection%2Fsectioncollection%2Furope>. In a separate diplomatic development this month, Trump also cast the G-7 summit "into disarray" by declining to endorse its final communique. Vivian Salama, Kim Mackrael & Paul Vieira, *Trump Says U.S. Won't Endorse G-7 Communique, Threatens Auto Tariffs*, WALL ST. J. (June 9, 2018), at <https://www.wsj.com/articles/donald-trump-pitches-tariff-free-trade-zone-to-g-7-allies-1528556581>.

⁵ Davis, *supra* note 4 (quoting Trump's letter to Merkel).

⁶ Donald J. Trump (@realDonaldTrump), TWITTER (July 9, 2018, 4:55 AM), at <https://twitter.com/realDonaldTrump/status/1016289620596789248> [<https://perma.cc/J7Z3-WFML>].

⁷ Donald J. Trump (@realDonaldTrump), TWITTER (July 10, 2018, 3:42 AM), at <https://twitter.com/realDonaldTrump/status/1016633811378073602?lang=en> [<https://perma.cc/R9VD-K774>].

What good is NATO if Germany is paying Russia billions of dollars for gas and energy? Why are there only 5 out of 29 countries that have met their commitment? The U.S. is paying for Europe's protection, then loses billions on Trade. Must pay 2% of GDP IMMEDIATELY, not by 2025.⁸

In Brussels, Trump continued to press aggressively on the issue of NATO funding, as well as to express concerns about German dependence on Russian gasoline.⁹ At the same time, he and the other leaders agreed on a wide-ranging declaration, the text of which was apparently finalized in advance of the summit.¹⁰ Covering seventy-nine paragraphs, the Brussels Summit Declaration identified ongoing shared concerns regarding Russia and spoke to the issue of funding, as well as addressing numerous other topics ranging from military preparedness to energy security.¹¹ It also emphasized that "NATO remains the foundation for strong collective defence" and that "[a]ny attack against one Ally will be regarded as an attack against us all, as set out in Article 5 of the Washington Treaty."¹²

As to Russia, the declaration faulted it for "breach[ing] the values, principles and commitments which underpin the NATO-Russia relationship"¹³ It continued:

The Euro-Atlantic security environment has become less stable and predictable as a result of Russia's illegal and illegitimate annexation of Crimea and ongoing destabilisation of eastern Ukraine; its military posture and provocative military activities, including near NATO borders, such as the deployment of modern dual-capable missiles in Kaliningrad, repeated violation of NATO Allied airspace, and the continued military build-up in Crimea; its significant investments in the modernisation of its strategic forces; its irresponsible and aggressive nuclear rhetoric; its large-scale, no-notice snap exercises; and the growing number of its exercises with a nuclear dimension. This is compounded by Russia's continued violation, non-implementation, and circumvention of numerous

⁸ Donald J. Trump (@realDonaldTrump), TWITTER (July 11, 2018, 10:07 AM), at <https://twitter.com/realdonaldtrump/status/1017093020783710209> [<https://perma.cc/9LY6-ZM9Q>].

⁹ See Donald J. Trump, Remarks at a Breakfast with Secretary General Jens Stoltenberg of the North Atlantic Treaty Organization and an Exchange with Reporters in Brussels, Belgium, at 2, 2018 DAILY COMP. PRES. DOC. 478 (July 11, 2018) ("I think it's very sad when Germany makes a massive oil and gas deal with Russia, where you're supposed to be guarding against Russia, and Germany goes out and pays billions and billions of dollars a year to Russia."); Michael Birnbaum & Philip Rucker, *At NATO, Trump Claims Allies Make New Defense Spending Commitments After He Upends Summit*, WASH. POST (July 12, 2018), at https://www.washingtonpost.com/world/europe/trump-upends-nato-summit-demanding-immediate-spending-increases-or-he-will-do-his-own-thing/2018/07/12/a3818cc6-7f0a-11e8-a63f-7b5d2aba7ac5_story.html?utm_term=.33d0af4238fb ("President Trump jolted a NATO summit on Thursday with a last-minute demand that leaders immediately pour billions into their military budgets").

¹⁰ Brussels Summit Declaration, *supra* note 2; Helene Cooper & Julian E. Barnes, *U.S. Officials Scrambled Behind the Scenes to Shield NATO Deal from Trump*, N.Y. TIMES (Aug. 9, 2018) <https://www.nytimes.com/2018/08/09/us/politics/nato-summit-trump.html> (reporting that the text was finalized in advance of the summit). In addition to this Declaration, the NATO countries agreed on several other declarations, including a considerably shorter Declaration on Transatlantic Security and Solidarity and a joint declaration with Georgia. See NATO Press Release, Brussels Declaration on Transatlantic Security and Solidarity (July 11, 2018), at https://www.nato.int/cps/en/natohq/official_texts_156620.htm?selectedLocale=en; NATO Press Release, NATO-Georgia Commission Declaration at the Brussels Summit (July 12, 2018), at https://www.nato.int/cps/en/natohq/official_texts_156627.htm?selectedLocale=en.

¹¹ See generally Brussels Summit Declaration, *supra* note 2.

¹² *Id.*, para. 1.

¹³ *Id.*, para. 4.

obligations and commitments in the realm of arms control and confidence- and security-building measures. Russia is also challenging Euro-Atlantic security and stability through hybrid actions, including attempted interference in the election processes, and the sovereignty of our nations, as was the case in Montenegro, widespread disinformation campaigns, and malicious cyber activities. We condemn the attack using a military-grade nerve agent in Salisbury, United Kingdom and note the independent confirmation by the Organisation for the Prohibition of Chemical Weapons (OPCW) of the nerve agent used. The UK assesses that it is highly likely that the Russian Federation was responsible for the attack and that there is no plausible alternative explanation. We stand in solidarity with the UK in its assessment.

...

There can be no return to “business as usual” until there is a clear, constructive change in Russia’s actions that demonstrates compliance with international law and its international obligations and responsibilities. . . .¹⁴

On the issue of funding, the declaration stated that “[f]air burden sharing underpins the Alliance’s cohesion, solidarity, credibility, and ability to fulfil our Article 3 and Article 5 commitments.”¹⁵ It made clear that NATO countries were “committed to improving the balance of sharing the costs and responsibilities of Alliance membership,” in accordance with the Defense Investment Pledge agreed upon in 2014.¹⁶

During a press conference following the summit, Trump emphasized the funding commitments and generally appeared satisfied with the “very amazing 2-day period.”¹⁷ He stated that “I believe in NATO.”¹⁸ In response to a question as to whether he had threatened to pull out of NATO if other member countries failed to meet their spending goals, Trump responded:

I told people that I’d be very unhappy if they didn’t up their commitments very substantially I let them know that I was extremely unhappy with what was happening, and they have substantially upped their commitment, yes. And now we’re very happy and have a very, very powerful, very, very strong NATO, much stronger than it was 2 days ago.¹⁹

Asked whether he believed he could pull the United States out of NATO without Congress’s explicit approval, Trump responded, “I think I probably can, but that’s unnecessary.”²⁰

¹⁴ *Id.*, paras. 6, 9; *see also id.* paras. 4–5, 7–8 (making additional statements regarding Russia).

¹⁵ *Id.*, para. 3.

¹⁶ *Id.* (offering further specifics). This 2014 pledge set various standards with respect to military spending, most notably that NATO countries who spent less than 2% of their gross domestic product on defense would “aim to move towards the 2% guideline within a decade” NATO Press Release, Wales Summit Declaration (Sept. 5, 2014), at https://www.nato.int/cps/en/natohq/official_texts_112964.htm. The extent to which Trump extracted additional commitments beyond those set forth in the 2018 Brussels Summit Declaration is unclear. *See* Birnbaum & Rucker, *supra* note 9 (noting the different views expressed on this point).

¹⁷ Donald J. Trump, President’s News Conference in Brussels, Belgium, at 1, 2018 DAILY COMP. PRES. DOC. 481 (July 12, 2018).

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ *Id.* at 3.

On July 16, 2018, Trump met with Russian President Vladimir Putin in Helsinki. At a joint press conference after their private meeting, Putin noted that during this meeting,

President Trump mentioned the issue of the so-called interference of Russia when the American elections, and I had to reiterate things I said several times, including during our personal contacts, that the Russian state has never interfered and is not going to interfere into internal American affairs, including the election process.²¹

Asked whether he believed Putin or the U.S. intelligence agencies, which have unanimously concluded that Russia did in fact interfere with the 2016 election, Trump replied:

My people came to me—[Director of National Intelligence] Dan Coats came to me and some others—they said they think it’s Russia. I have President Putin; he just said it’s not Russia.

I will say this: I don’t see any reason why it would be

So I have great confidence in my intelligence people, but I will tell you that President Putin was extremely strong and powerful in his denial today. . . .²²

This equivocation triggered immediate domestic pushback, not only from Democrats but also from leading Republicans. Senate Minority Leader Charles Schumer of New York said that the president’s “behavior was so bizarre, so weak, so deleterious to American interests and our national security that millions of Americans are left wondering if Putin indeed has something over the president.”²³ House Speaker Paul Ryan of Wisconsin stated that “[t]here is no question that Russia interfered in our election and continues attempts to undermine democracy here and around the world” and “[t]here is no moral equivalence between the United States and Russia, which remains hostile to our most basic values and ideals.”²⁴

Faced with considerable pressure to walk back his Helsinki remarks, Trump offered a correction of sorts at a meeting the next day:

So I’ll begin by stating that I have full faith and support for America’s great intelligence agencies. Always have. And I have felt very strongly that, while Russia’s actions had no impact at all on the outcome of the election, let me be totally clear in saying that—and I’ve said this many times—I accept our intelligence community’s conclusion that Russia’s meddling in the 2016 election took place. Could be other people also; there’s a lot of people out there.

²¹ Donald J. Trump, President’s News Conference with President Vladimir Vladimirovich Putin of Russia in Helsinki, Finland, at 2, 2018 DAILY COMP. PRES. DOC. 488 (July 16, 2018).

²² *Id.* at 11; see also Jeremy Herb, *U.S. Intel Chiefs Unanimous that Russia is Targeting 2018 Elections*, CNN (Feb. 14, 2018), at <https://www.cnn.com/2018/02/13/politics/intelligence-chiefs-russia-2018-elections-target/index.html> (noting that the director of national intelligence, the CIA director, the FBI director, and three other intelligence chiefs all testified affirmatively to the conclusion that Russia had interfered in the 2016 election).

²³ Paul Leblanc, *Trump “Acting Like Someone Who’s Compromised,” Democratic Congressman Says*, NEWSWEEK (July 22, 2018), at <https://www.newsweek.com/trump-acting-compromised-adam-schiff-democratic-congressman-says-1036390> (quoting comments by Senator Schumer on the day after the Helsinki conference).

²⁴ Office of Speaker Paul Ryan Press Release, *Statement on Russia* (July 16, 2018), at <https://www.speaker.gov/press-release/statement-russia> [<https://perma.cc/S5RH-MGWB>]. For responses of other leading Republicans and Democrats, see Lauren Fox, *Top Republicans in Congress Break with Trump Over Putin Comments*, CNN (July 17, 2018), at <https://www.cnn.com/2018/07/16/politics/congress-reaction-trump-putin-comments/index.html>.

There was no collusion at all. And people have seen that, and they've seen that strongly. The House has already come out very strongly on that. A lot of people have come out strongly on that.

...

In a key sentence in my remarks [at Helsinki], I said the word “would” instead of “wouldn't.” The sentence should have been: I don't see any reason why I wouldn't—or why it wouldn't be Russia. . . . Sort of a double negative.

So you can put that in, and I think that probably clarifies things pretty good by itself.

I have, on numerous occasions, noted our intelligence findings that Russians attempted to interfere in our elections. Unlike previous administrations, my administration has and will continue to move aggressively to repeal any efforts—and repel—we will stop it; we will repel it—any efforts to interfere in our elections. . . .²⁵

On August 8, 2018, the State Department announced the imposition of a new set of sanctions on Russia, based on the determination that Russia used a chemical weapon in an attempted assassination against a former spy and his daughter earlier in the year in the United Kingdom.²⁶ These sanctions were imposed pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991. This act provides that when the president is presented with “persuasive information” suggesting that a foreign government has used chemical weapons, the president “shall” determine within sixty days whether the government has done so either in violation of international law or against its own nationals.²⁷ If the president concludes that this is the case, then he or she “shall forthwith” impose certain sanctions, including terminating most foreign aid and financial assistance, imposing restrictions on arms sales, and limiting the export of “national security-sensitive” goods and technology.²⁸ Even more significantly, if the foreign government has not provided “reliable assurances” of non-repetition and permitted international inspections, then within three months the President “shall impose” a stronger set of sanctions.²⁹ For effectively all of these initial and subsequent sanctions, however, the president has the power

²⁵ Donald J. Trump, Remarks in a Meeting with Republican Members of Congress and an Exchange with Reporters, at 2, 2018 DAILY COMP. PRES. DOC. 489 (July 17, 2018).

²⁶ Aug. 8 State Dep't Press Release, Sanctions Imposition, *supra* note 3. For discussion of earlier U.S. responses to the attack, which occurred in March in the city of Salisbury, see Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 493 (2018).

²⁷ Pub. L. No. 102–182, § 306, 105 Stat. 1233, 1252–53 (1991) (codified at 22 U.S.C. § 5604). One of the two poisoning victims, Yulia Skripal, is a Russian citizen. Patrick Wintour & Shaun Walker, *Russia Expels Diplomat in Tit-for-Tat Actions Over Salisbury Attack*, GUARDIAN (Mar. 29, 2018), at <https://www.theguardian.com/uk-news/2018/mar/29/russia-accuses-uk-of-violating-international-law-skripal-case>.

²⁸ Pub. L. No. 102–182, at § 307(a), 105 Stat. at 1254 (codified at 22 U.S.C. § 5605(a)).

²⁹ *Id.* at § 307(b), 105 Stat. at 1254–55 (codified at 22 U.S.C. § 5605(b)). For the second round, the president is instructed to impose at least three of the following six kinds of sanctions: opposing loans and assistance to that country by international development banks; banning U.S. banks from making most kinds of loans to that government; imposing additional restrictions on exports to that country; imposing additional restrictions on imports from that country; downgrading diplomatic relations; and suspending air transportation into and out of the United States by an airline controlled by that government. *Id.*

to waive them if he or she “determines and certifies to the Congress that such waiver is essential to the national security interests of the United States”³⁰

In its announcement, the State Department explained that the United States had determined “that the Government of the Russian Federation has used chemical or biological weapons in violation of international law or has used lethal chemical or biological weapons against its own nationals.”³¹ In imposing the initial sanctions, which went into effect on August 27,³² the State Department made some use of the waiver power. Specifically, it waived the termination of foreign assistance, waived the termination on arms sales to the extent that it applied to “government space cooperation and commercial space launches,” and granted various specific waivers with respect to the prohibition on the export of national security-sensitive goods and technology.³³ Of the sanctions that remained, a State Department official explained that “the most significant” aspect of them would be:

the imposition of a presumption of denial for all national security sensitive goods or technologies that are controlled by the Department of Commerce pursuant to the Export Administration Regulations. These goods are currently subject to a license—a case-by-case license determination, but we are—henceforth, when these sanctions go into effect, we will be presumptively denying such applications.³⁴

As to the extent to which the Trump administration would move forward with the second round of sanctions after three months, the official explained that in the event Russia fails to provide assurances of non-repetition and take the other statutorily mandated steps, then “we will have to be in a basis of considering whether or not to impose a second—or what sanctions to impose in a second tranche as specified by the structure of the statute.”³⁵

The words and actions of the Trump administration in relation to Russia have unfolded against the backdrop of the ongoing investigation into Russian interference in the 2016 election led by Special Counsel Robert Mueller. The scope of the investigation encompasses any coordination between the Trump campaign and Russian agents in the months leading up to the election.³⁶ Trump repeatedly refers to the investigation as a “Witch Hunt.”³⁷ On July 13,

³⁰ *Id.* at § 307(d), 105 Stat. at 1256 (codified at 22 U.S.C. § 5605(d)) (further requiring that the president give the relevant congressional committees fifteen days of notice of the exercise of a waiver). The waiver authority covers all sanctions except the sanction of downgrading diplomatic relations, which is one that the president likely has the constitutional authority to decline to impose regardless.

³¹ Aug. 8 State Dep’t Press Release, Sanctions Imposition, *supra* note 3; *see also* U.S. Dep’t of State Press Release, Special Briefing, Previewing the Imposition of Chemical and Biological Weapons Control and Warfare Elimination Sanctions on Russia (Aug. 8, 2018) [hereinafter Aug. 8 State Dep’t Press Release, Sanctions Preview], at <https://www.state.gov/r/pa/prs/ps/2018/08/285046.htm> [<https://perma.cc/7BGF-NWNZ>] (explaining that this determination was made somewhat later than the sixty-day period mandated by the statute because “[t]hese are complicated pieces of moving equipment, if you will, inside the U.S. bureaucracy”).

³² Determinations Regarding Use of Chemical Weapons by Russia Under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, 83 Fed. Reg. 43,723 (Aug. 27, 2018).

³³ *Id.* at 43,723–24.

³⁴ Aug. 8 State Dep’t Press Release, Sanctions Preview, *supra* note 31.

³⁵ *Id.*

³⁶ Rod J. Rosenstein, Acting Attorney General, Order. No. 3915–2017 re Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), available at <https://www.justice.gov/opa/press-release/file/967231/download> [<https://perma.cc/6M9E-T4ZV>].

³⁷ *E.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 1, 2018, 6:24 AM), at <https://twitter.com/realdonaldtrump/status/1024646945640525826> [<https://perma.cc/9P2G-A39E>]; Olivia Paschal, *Trump’s*

shortly before Trump headed to Helsinki to meet with Putin, Mueller indicted twelve Russian intelligence officers for conspiracy to launder money, conspiracy to commit an offense against the United States, and, with respect to eleven of these officers, aggravated identity theft.³⁸ “The object of the conspiracy,” the indictment states, “was to hack into the computers of U.S. persons and entities involved in the 2016 U.S. presidential election, steal documents from those computers, and stage releases of the stolen documents to interfere with the 2016 U.S. presidential election.”³⁹

Congress, meanwhile, has signaled its unflinching support for NATO and continued concern regarding the threat posed by Russia. The Countering America’s Adversaries Through Sanctions Act, which became law on August 2, 2017, previously expressed Congress’s sense of the “vital importance” of the North Atlantic Treaty⁴⁰ and imposed various sanctions on Russia.⁴¹ Consistent with this stance, the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which Trump signed into law on August 13, 2018,⁴² described the United States as having an “ironclad commitment . . . to its obligations under the North Atlantic Treaty” and stated that the United States should pursue in coordination with NATO “an integrated approach to strengthening the defense of allies and partners in Europe as part of a broader, longer-term strategy backed by all elements of United States national power to deter and, if necessary, defeat Russian aggression.”⁴³

U.S. Supreme Court Upholds Presidential Proclamation Restricting Entry of Individuals from Covered Countries

doi:10.1017/ajil.2018.91

On June 26, 2018, the U.S. Supreme Court upheld President Trump’s most recent iteration of restrictions on entry to the United States by nationals from certain foreign countries.¹

Tweets and the Creation of “Illusory Truth,” ATLANTIC (Aug. 3, 2018), at <https://www.theatlantic.com/politics/archive/2018/08/how-trumps-witch-hunt-tweets-create-an-illusory-truth/566693> (noting Trump had used “Witch Hunt” to describe the Mueller investigation at least eighty-four times in 2018).

³⁸ See generally *Indictment, United States v. Netyksho*, No. 1:18-cr-00215, 2018 WL 3407381 (D.D.C. filed July 13, 2018), available at <https://www.documentcloud.org/documents/4598892-DNC-Hack-Indictment.html#document> [<https://perma.cc/B3KC-GJ25>].

³⁹ *Id.*, para. 20.

⁴⁰ Pub. L. No. 115–44, § 292, 131 Stat. 886, 939–40 (2017) (also stating Congress’s sense that “the United States remains fully committed to the North Atlantic Treaty Organization and will honor its obligations enshrined in Article 5”).

⁴¹ For discussion of these sanctions and the extent to which they have been implemented by the Trump administration, see Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 1015, 1017–21 (2017); Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 296, 296–302 (2018); Galbraith, *supra* note 26, at 493.

⁴² White House Press Release, President Donald J. Trump Signs H.R. 5515 into Law (Aug. 13, 2018), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signs-h-r-5515-law> [<https://perma.cc/HD4G-XXEH>].

⁴³ Pub. L. No. 115–232, § 1248(a), _ Stat. _ (2018). For a summary of other provisions in the act, including ones relevant to NATO and Russia, see Scott R. Anderson, Sarah Tate Chambers & Molly E. Reynolds, *What’s in the New NDA*, LAWFARE (Aug. 14, 2018), at <https://www.lawfareblog.com/whats-new-ndaa>.

¹ Trump v. Hawaii, 138 S. Ct. 2392, 2402–06, 2423 (2018).