2023 UPDATE TO

FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT

Seventh Edition

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Chapter 2

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The large number of prosecutions arising out of the January 6 attack on the Capitol—more than 1,000 by March 2023—have strained the resources of the U.S. Attorney's Office in the District of Columbia, where all of the charges have been brought.

In an unprecedented move, the Justice Department issued an internal plea for help, asking each U.S. Attorney to consider whether he or she could provide prosecutors to work on these cases. The designated AUSAs could work either in Washington or out of their home offices. In one case, an AUSA from the District of Alaska appeared for a Zoom hearing, noting cheerfully that it was 5:03 a.m. *See* Mike Levine, *Facing 'significant influx' of Capitol siege cases, DOJ issues 'urgent' internal plea for help to offices across country*, ABC News, (Feb. 4, 2021), https://abcnews.go.com/Politics/facing-significant-influx-capitol-siege-cases-doj-issues/story?id=75664821 and Josh Gerstein & Kyle Cheney, *Capitol riot cases strain court system*, Politico, (March 10, 2021), https://www.politico.com/news/2021/03/10/capitol-riot-court-cases-475081

Chapter 3

Pages 75-77

Applying the two-step analysis for determining whether a statute has extraterritorial effect, in *Abitron Austria GmbH v. Hetronic International, Inc. v. Hetronic International Inc.,* 2023 WL 4239255 (June 29, 2023), the Supreme Court held that the Lanham Act (the federal trademark statute) reaches only conduct "where the claimed infringing use in commerce is domestic" and that confusion to consumers in the United States is not relevant to the analysis. Accordingly, it set aside a jury verdict of about $90 million for infringing acts that largely occurred in Europe. For a discussion of the implications of the decision, *see* Minyao Wang, Supreme Court's narrow read of the Lanham Act: More questions than answers - SCOTUSblog (July 5, 2023).

Chapter 4

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In 2023, for the first time in United States history the Department of Justice charged a former President of the United States with federal crimes. Special Counsel Jack Smith has brought two separate cases against former President Trump. The first, filed in June, charges former President Trump with willful retention of national defense information in violation of 18 U.S.C. § 793(e) arising from Trump's alleged unlawful retention of Presidential records after he left office; false statements in violation of 18 U.S.C. § 1001 arising from alleged misrepresentations to a grand jury and the FBI in connection with their investigation into the records; and conspiracy to obstruct justice and various crimes involving the concealment of records, all arising from Trump's alleged efforts, along with two aides, to keep the documents

when the government tried to reclaim them. The two aides are charged with certain of these crimes as well. You may read the indictment here: https://www.justice.gov/storage/US-v-Trump-Nauta-De-Oliveira-23-80101.pdf. As of this writing, trial of the case is scheduled for May 2024 in the Southern District of Florida.

The second indictment, filed in August, charges Trump with four crimes arising from his efforts to overturn the results of the 2020 election: conspiracy to defraud the United States in violation of 18 U.S.C. § 371, conspiracy to obstruct an official proceeding in violation of 18 U.S.C. § 1512(k), obstruction and attempted obstruction of an official proceeding in violation of 18 U.S.C. § 1512(c)(2), and conspiracy against the free exercise of voting rights, in violation of 18 U.S.C. § 241. You may read that indictment here: https://www.justice.gov/storage/US_v_Trump_23_cr_257.pdf.

The DOJ's investigation of both matters was overseen by Attorney General Merrick Garland up until Trump formally announced his intention to run again for the Presidency; three days later, Garland appointed Smith as Special Counsel to oversee the investigations. Garland explained that

> [b]ased on recent developments, including the former President's announcement that he is a candidate for President in the next election, and the sitting President's stated intention to be a candidate as well, I have concluded that it is in the public interest to appoint a special counsel. Such an appointment underscores the Department's commitment to both independence and accountability in particularly sensitive matters.

See https://www.justice.gov/opa/pr/appointment-special-counsel-0.

Garland also appointed a special counsel, Robert Hur, to investigate the removal and retention of classified documents dating to the Obama Administration discovered in President Biden's home in Delaware and his office at the University of Pennsylvania. For more on the events giving rise to that investigation and appointment, *see* https://www.pbs.org/newshour/politics/a-timeline-of-the-discovery-and-disclosure-of-classified-records-tied-to-biden#:~:text=no%20there%20there."-,Jan.,search%20lasted%20nearly%2013%20hours. As of this writing, the Special Counsel's investigation of Biden's handling of classified documents is still ongoing. In yet a third Department of Justice investigation into the mishandling of classified documents – of former Vice President Mike Pence – Garland did not appoint a special counsel. That investigation was closed by the Department of Justice in June 2023 without the filing of charges, days before Pence announced that he would run for President. *See* https://www.npr.org/2023/06/02/1179672883/pence-documents-doj.

As of this writing, Garland has not spoken publicly about the ongoing Special Counsel matters other than to say that his supervisory role under the Special Counsel regulations is limited and he has faith in the integrity of the Special Counsel's Office. *See* https://www.nbcnews.com/politics/justice-department/attorney-general-garland-emphasizes-special-counsels-independence-trum-rcna89294. Nevertheless, many Republicans in Congress

have criticized the investigations against Trump as politically motivated. *See* https://www.nytimes.com/interactive/2023/06/16/us/republican-trump-indictment-response.html#; https://www.politico.com/news/2023/08/01/lawmakers-respond-to-latest-trump-indictment-00109294.

From the reaction to the investigations run by Special Counsels Mueller and Smith, we can see some of the weaknesses in the Special Counsel regulations. They do help insulate cases to some degree from political interference, but not perfectly. Nor can the regulations fully insulate the Department of Justice from accusations of politicized prosecution. On the other hand, thus far, at least, there has been no indication of actual political interference with a Special Counsel. Do you think the Special Counsel regulations are proving effective? Is the greater independence previously granted under the Independent Counsel statute preferable? Or is it too soon to say?

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Following Michael Flynn's motion to withdraw his plea of guilty to lying to federal agents came an enormous surprise: the Department of Justice moved to dismiss the case against him. The brief filed by the government stated it was seeking to dismiss the case on the grounds that it was not in the interests of justice; that Flynn's lies to FBI agents during an interview were not "material" because the FBI lacked "a legitimate investigative basis" for the interview; and that the government could not prove beyond a reasonable doubt that Flynn's statements, to the extent they were false, were willfully so. (Materiality and willfulness, requisite elements of a false statement charge, are discussed in Chapter 15). The government's request was so unusual – seeking to dismiss a charge to which a defendant had already admitted guilt – that the district judge assigned to the case, Emmet Sullivan, appointed a retired federal judge, John Gleeson, to present arguments in opposition to the government's dismissal motion. Gleeson argued that the government's motion should be denied because its stated reasons were "pretextual" and the motion amounted to "highly irregular conduct to benefit a political ally of the President." *See* https://pacer-documents.s3.amazonaws.com/36/191591/04517871052.pdf. In response, the government argued that the court lacked power to deny its motion, which was well-founded in any event in light of newly discovered evidence of misconduct by the FBI agents involved in the Flynn interview (both the decision to interview him, and the interview itself). *See* https://pacer-documents.s3.amazonaws.com/36/191591/04517884488.pdf (citing findings by the Department's Office of Inspector General).

Before Judge Sullivan ruled on the government's motion, President Trump pardoned Flynn. Following the pardon, Judge Sullivan dismissed the case against Flynn as moot.

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Days before Roger Stone was scheduled to report to Prison, President Trump commuted Stone's sentence in its entirety. *See* https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html.

Chapter 7

Pages 382-383

The Supreme Court has continued to narrow the reach of honest services fraud. In *Percoco v. United States*, 143 S. Ct. 1130 (2023), it rejected honest services jury instructions that it found too vague to give fair notice and prevent arbitrary and discriminatory enforcement. It reversed the conviction of Governor Andrew Cuomo's former executive deputy secretary—who was on a "hiatus" from government service to run the governor's reelection campaign—when he accepted payments totaling $35,000 in return for persuading a government official to drop a costly requirement for certain state-funded projects. The district court had instructed the jury that Percoco could be convicted of a violation of honest services if it found that he "dominated and controlled any government business," and "people working for the government actually relied upon him because of his special relationship." The Court held that these instructions were too vague, noting they could encompass, for example, traditional reliance on respected "*eminence grises,* individuals who lacked any formal government position but nevertheless exercised very strong influence over government decisions," as well as "particularly well-connected and effective lobbyists."

But the Court declined to adopt a bright line rule that no one nominally outside public employment can have the necessary fiduciary duty to the public. It noted that individuals not formally employed by a government entity may enter into agreements that make them actual agents of the government who would owe a fiduciary obligation to the principal—the government and thus to the public it serves. The Court also rejected the government's alternative formulations of the scope of the fiduciary duty owed by private citizens, and it remanded the case without providing additional guidance on the scope of such duties, or proper instructions defining them.

Justice Gorsuch, who concurred only in the judgment, complained that the Court's opinion leaves prosecutors and lower courts in a bind, because "we may know a little bit about when a duty of honest services *does not* arise, but we still have no idea when it *does*." Unless and until Congress revises § 1346 to "provide the clarity it desperately needs," he urged the Court to "decline further invitations to invent rather than interpret this law."

Pages 400-01, note 7

In *Ciminelli v. United States*, 143 S. Ct. 1121 (2023), a unanimous Court rejected the Second Circuit's "right to control" theory, under which "a cognizable harm occurs where the defendant's scheme denies the victim the right-to-control its assets by depriving it of information necessary to make discretionary economic decisions." Stressing that the mail and wire fraud statutes "protect property rights only," the Court held that they did not encompass "[t]he so-called 'right to control,'" which was "not an interest that had 'long been recognized as property' when the wire fraud statute was enacted."

The Court also noted that the right-to-control theory would vastly expand federal jurisdiction without statutory authorization. Treating mere information as the protected interest

would make “a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law—in flat contradiction with [its] caution that, ‘[a]bsent [a] clear statement by Congress,’ courts should ‘not read the mail [and wire] fraud statute[s] to place under federal superintendence a vast array of conduct traditionally policed by the States.’”

Defendants also got an appellate win in another high profile prosecution arising out of the Varsity Blues scandal, which involved 33 wealthy parents (including actress Lori Loughlin) who paid large sums to get their children admitted to elite colleges and universities. A variety of methods were used, including bribing exam administrators to facilitate cheating on college and university entrance exams, and bribing coaches and administrators to nominate unqualified applicants as elite recruited athletes. In *United States v. Abdelaziz*, 68 F.4th 1 (1st Cir. 2023), the question was whether the jury had been correctly instructed that the admissions slots were property. The First Circuit reversed the convictions of two parents, holding that instruction was improper, but rejecting both the government’s theory that admissions slots are always the school’s property and the defense theory that they are never property. The court noted the wide variations in types of admissions slots at the university level (early admission, rolling admission, conditional admission, waiting-list admission, and deferred admission), and the fact that admissions occur at all levels of education, from nursery school through postgraduate studies, and involve millions of students and parents. The court emphasized that narrowness of its holding:

> We do not hold that admissions slots cannot ever be property. Nor do we hold that the jury instruction given by the district court could never be appropriate. The resolution of these questions will require much more detail, both legal and factual, on the nature of the purported property interest at issue.

Chapter 8

Page 470

The claim raised by Evans on appeal – that the evidence is insufficient to show that the prescriptions he wrote were illegitimate – is common in Pill Mill cases. Another common approach by defendants appealing convictions in Pill Mill cases is to challenge the jury instructions pertaining to mens rea. In *Ruan v. United States*, 142 S.Ct. 2370 (2022), the Supreme Court considered such a challenge. Ruan was a physician convicted of unlawfully dispensing and distributing controlled substances. At trial, Ruan had requested the court to instruct the jury that to find him guilty, they must find beyond a reasonable doubt that Ruan subjectively knew his prescriptions fell outside the scope of his prescribing authority. The court refused the requested instruction, instead telling jurors that a doctor violates §841 when “the doctor’s actions were either not for a legitimate medical purpose or were outside the usual course of professional medical practice.” Ruan was convicted, and his conviction was subsequently affirmed by the Tenth Circuit.

In a unanimous opinion, the Supreme Court reversed. It held that if a defendant offers evidence that their conduct in prescribing or dispensing drugs was authorized, the government "must prove beyond a reasonable doubt that the defendant *knowingly or intentionally* acted in an unauthorized manner." (Emphasis added.) The Court noted that in so-called Pill Mill cases, "authorization plays a 'crucial' role in separating innocent conduct—and, in the case of doctors, socially beneficial conduct—from wrongful conduct." Thus, applying the statute's "knowingly or intentionally" scienter requirement to its authorization clause "helps separate wrongful from innocent acts."

Consider *Evans* again in light of *Ruan*. Do you think the evidence against Evans was sufficient to prove the requisite mens rea?

Chapter 9

Page 551, note 3

According to the 2022 Annual Report and Sourcebook of Federal Sentencing Statistics, [https://www.ussc.gov/research/sourcebook-2022] corporate criminal prosecutions have continued to decrease in the years following the Trump administration. In 2020, there were only 94 corporate criminal prosecutions, less than the 118 that took place in 2019. In 2021, there were 90 corporate criminal prosecutions. There was a slight increase in 2022 with 99 corporate criminal prosecutions total. See Figure O-2 below. Regardless, the number remains quite low compared to the prosecutions during the Obama Administration, which were well into the hundreds. The majority of those prosecutions were for financial or environmental-related crimes. See Figure O-1, below.

Figure O-2

NUMBER OF ORGANIZATIONAL OFFENDERS OVER TIME[1]
Fiscal Years 2013 - 2022

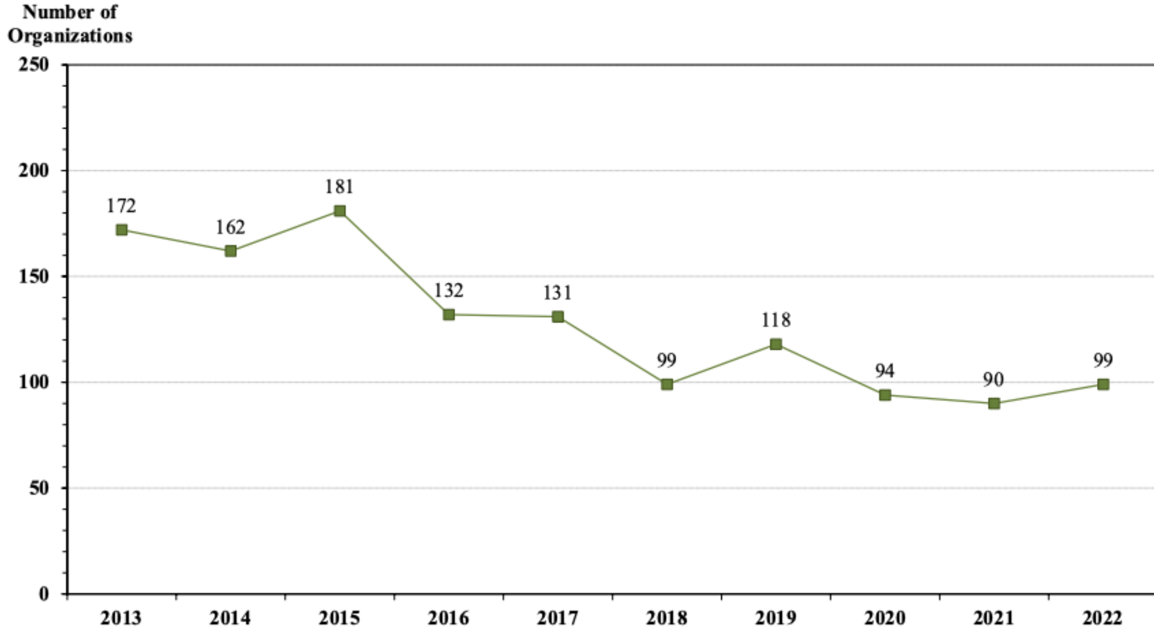
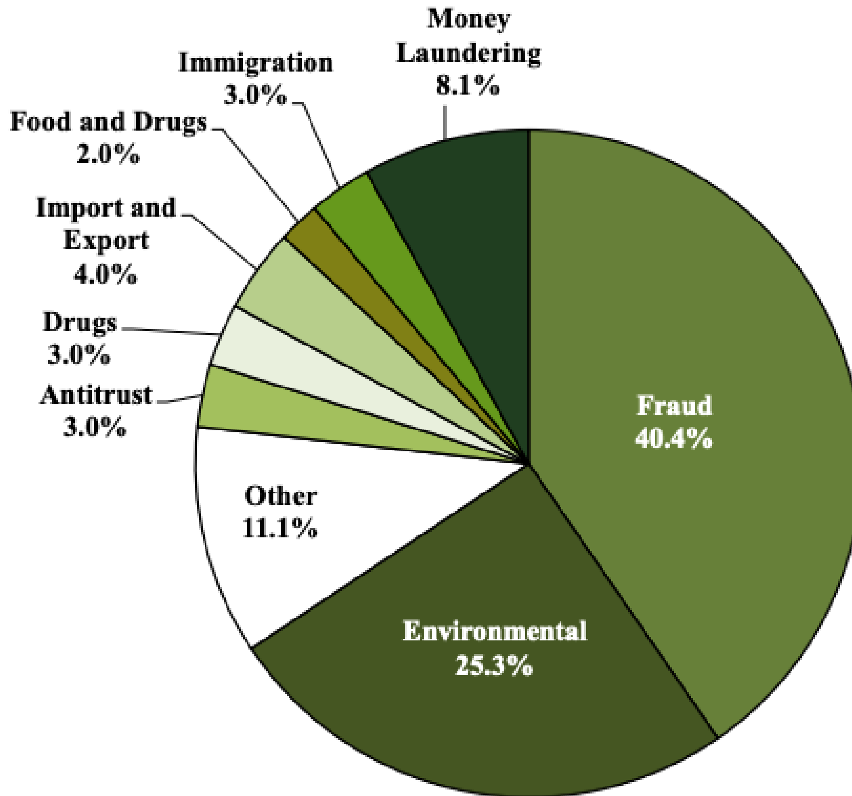


Figure O-1

ORGANIZATIONAL OFFENDERS BY TYPE OF CRIME[1]
Fiscal Year 2022



Page 556, new note 6

6. Can a corporation aid and abet a crime committed by a customer? In 1996, Congress enacted the Communication Decency Act, which states, in part, that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230. This provision was designed to foster freedom of speech by insulating social media corporations from civil liability for content their users shared on their platform. Section 230 has not stopped plaintiffs from bringing civil litigation against social media companies pursuant to 18 U.S.C. § 2333(a) of the Antiterrorism Act, which was enacted in 1990. Under § 2333(a), "any national of the United States who is injured in his or her person, property, or business by reason of an act of international terrorism" can sue for "threefold the damages he or she sustains and the cost of the suit, including attorney's fees." In 2016, Congress enacted the Justice Against Sponsors of Terrorism Act, which extends liability under subsection (a) where the injury arising from an act of international terrorism was committed by an organization designated a "foreign terrorist

organization" ("FTO") by the State Department and the defendant is one who "aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2). Such a case was decided by the Supreme Court in *Twitter v. Taamneh*, 143 S. Ct. 1206 (2023).

Family members of victims of a terrorist attack by ISIS that killed 39 people at a Reina nightclub in Istanbul, Turkey sued social media companies Facebook (now Meta), Twitter, and Google, alleging that their platforms provided material support to a FTO and aided and abetted the organization's attacks. The social media companies had algorithms on their platforms that recommended terrorist recruitment content and propaganda content, and they profited from the circulation of the terroristic content through advertising.

The Court decided that civil aiding-and-abetting liability rests on the common law concept that the defendant "consciously and culpably participated in wrongful act". The Court found that the social media companies had not culpably participated in the Reina attack, so they could not be civilly liable for the terrorist organization's horrific actions in this case. Where the allegations rest less on affirmative misconduct and more of passive nonfeasance, plaintiffs must make a stronger showing of assistance and scienter than they did here. Because of this decision, the Court remanded a similar case (involving the 2015 ISIS terrorist attack in Paris, France killing 130 victims) to the Ninth Circuit. *See Gonzalez v. Google LLC*, 143 S. Ct. 1191 (2023) (Per curiam). Thus, the Court, at least for the moment, dodged the issue of whether § 230 of the Communications Decency Act would have protected the social media companies had plaintiffs had stronger proof.

If plaintiffs were successful in their litigation to recover damages from social media corporations, what effect, if any, might this have on corporate criminal liability more generally? Where plaintiffs are successful in civil litigation against large corporations, is criminal liability likely to be far behind? *See* Susan R. Klein & Crystal Flinn, *Social Media Compliance Programs and the War Against Terrorism,* 8 Harvard Nat'l Sec. Journal 53 (2018) (suggesting that social media companies, like other corporate entities, should be required to institute compliance programs that discover and report terrorist activity using their platforms, and offering model legislation). Note that if a federal criminal prosecutor obtains a conviction against a corporation for an act of international terrorism, said corporation would be estopped from denying liability in a civil action pursuant to 18 U.S.C. § 2333(a). *See* 18 U.S.C. § 2333(b). Of course, such an estoppel argument could not hold if the civil case came first, as the standard of proof in the criminal case is higher.

See **Chapter 14, Criminal Enforcement Against Terrorism, pages 1059-1101**, for a description of the most commonly used anti-terrorism offenses, and an explanation of how an organization is designated a FTO.

Page 556, new note 7

7. Corporate Pleas. For a plea hearing to proceed, the individual pleading guilty on behalf of a corporation must have authority to plead and the corporation's counsel must be present. *United States v. Grayson*, 950 F.3d 386, 401-02 (7th Cir. 2020) (holding that it was not

plain error to accept a guilty plea from Mr. Gire on behalf of Grayson Enterprises, a corporation solely owned by his girlfriend, because Mr. Gire ran the business).

Chapter 10:

Page 622

Congress enacted the Anti-Money Laundering Act of 2020 (AMLA) to update the USA PATRIOT Act. AMLA delegates greater enforcement authority to FinCEN by creating new beneficial ownership information reporting requirements for certain types of corporate and non-corporate entities that may be susceptible to abuse by actors seeking to launder money. AMLA also specifically defines currency substitutes like cryptocurrency as falling within the Bank Secrecy Act.

Pages 638-39

The Supreme Court has reduced potential financial penalties under the Bank Secrecy Act by determining a unit of offense issue. In *Bittner v. United States*, 143 S. Ct. 713 (2023), the Court held that a "violation" under the Bank Secrecy Act is the failure to file an annual Report of Foreign Bank and Financial Accounts, no matter the number of accounts, so a person can only be fined the maximum $10,000 penalty once per non-willful failure to file a report, rather than once per account not reported.

Chapter 11

Page 729

In another elements/physical force case, *United States v. Taylor*, 142 S. Ct. 2015 (2022), the Supreme Court held that an attempted Hobbs Act robbery does not constitute a "violent felony" under the ACCA. No elements of that offense, the Court observed, require proof the defendant "used, attempted to use, or threatened to use force." Instead, to prove guilt of an attempted robbery under the Hobbs Act, the government must prove the defendant's mere *intention* to unlawfully take or obtain personal property by means of actual or threatened force, and his completion of a substantial step toward that end. While in a given case a substantial step might include force or its attempted or threatened use, the categorical approach requires that the Court consider only the elements of the offense and not the facts underlying a particular prior conviction.

In *Borden v. United States* 141 S. Ct. 1817 (2021), the Supreme Court considered yet another question regarding the meaning of "violent felony": whether a crime for which the *mens rea* is mere recklessness qualifies. The Court held it does not. Noting that the statute defines "violent felony" as a crime involving "use, attempted use, or threatened use of physical force *against the person of another*" (§924(e)(2)(B)(i)) (emphasis added), the Court reasoned that a defendant must have directed his action at another person, a level of intentionality lacking in reckless conduct.

Page 730

The ACCA requires that the three predicate crimes were "committed on occasions different from one another." In *Wooden v. United States*, 142 S. Ct. 1063 (2022), the Court considered the meaning of that clause. Wooden had been convicted under the statute based on ten burglary convictions arising from a single episode: Wooden had burglarized ten storage units in a single storage facility on the same day. Though the Sixth Circuit upheld Wooden's conviction, the Supreme Court reversed, holding that sequential offenses arising from a single criminal episode count as a single "occasion" under the ACCA.

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Fourteen years after *Heller*, the Supreme Court issued another watershed Second Amendment decision. In *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Court extended *Heller*'s reasoning to gun possession outside the home (known as "public carry"), and further curtailed governments' ability to regulate that type of possession. The case arose as a challenge to New York's firearms licensing scheme, which permitted public carry of certain firearms only with "proper cause," which could be satisfied upon demonstration of "a special need for self-protection distinguishable from that of the general community." In an opinion by Justice Thomas, over a vehement dissent by Justice Breyer (joined by Justices Sotomayor and Kagan), the Court struck down New York's regulation as unconstitutional. In so doing, it rejected the two-step approach adopted by many Courts of Appeals in the wake of *Heller* – in which courts considered a regulation's basis in historical understandings of the Second Amendment right as well as the government's regulatory interest – in favor of a purely historical approach. To survive constitutional challenge, the Court held, a given regulation on the right to bear arms must be "consistent with the Nation's historical tradition of firearm regulation."

The Court provided some guidance to courts assessing the constitutionality of firearms regulations going forward. "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century," it observed, "the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." Conversely, when confronting "modern regulations that were unimaginable at the Founding," the government may successfully defend them by identifying "a well-established and representative historical [regulatory] analogue."

To what extent does *Bruen* affect the validity of Section 922 and other federal firearms statutes? Next term, the Supreme Court will consider the constitutional validity of 18 U.S.C. §922(g)(8) in *United States v. Rahimi*, No. 22-915 (October Term 2023). Following Rahimi's conviction before a Texas trial court, the Supreme Court issued its decision in *Bruen*. Relying on *Bruen*, the Fifth Circuit reversed Rahimi's conviction, holding that because the United States lacks a historical tradition of firearm restrictions against persons subject to civil domestic restraining orders, Section 922(g)(8) violates the Second Amendment. *See United States v. Rahimi*, 61 F.4th 443 (2023).

Before the Fifth Circuit, the government distinguished those subject to domestic restraining orders from the "ordinary, law-abiding citizens" whose rights were at issue in *Heller* and *Bruen*. Drawing on historical analogues to domestic abusers, the government argued that English and American laws before and at the time of the Founding provided for disarmament of "dangerous" people; that some colonies made a criminal offense of "going armed to terrify the King's subjects"; and that under common law, surety laws provided for disarming those who refused to pay a surety upon the demand of a person who claimed "just cause to fear" injury to limb or property. The Fifth Circuit rejected each of these arguments in turn, finding them insufficiently analogous to Section 922(g)(8). Will the government's arguments fare better before the Supreme Court?

Chapter 12

Page 826, add before first full paragraph

The Biden administration has, since winning the election in 2020, been primarily concerned with undoing the Trump administration's immigration policies. For example, the Biden administration has made it a priority to increase refugee admission, preserve deportation relief for those who came to the United States as children, and not enforce the "public charge" rule that denies green cards to noncitizens who may use public benefits. President Biden has also lifted COVID-19 restrictions that reduced visas issuance. His administration has developed an "app" that immigrants from certain countries must use to schedule an asylum hearing before entering the country.

The Biden Administration has attempted to focus immigration enforcement against noncitizens who pose a threat to national security, public safety, and border security. In September of 2021, Secretary of the Department of Homeland Security Alejandro Mayorkas published a memorandum to Immigration and Customs Enforcement, Customs and Border Patrol, and Citizenship and Immigration Services outlining the policy. However, the Mayorkas Memo was blocked by federal courts until June 2023. The memo states that the fact that a person is not a noncitizen and did not enter the country lawfully should not be the sole basis to bring an enforcement action against them. Instead, the memo asks federal agents to prioritize noncitizens who pose a threat. The memo lays out the criteria for what constitutes public safety, national security, and border security threats. Memorandum on Guidelines for the Enforcement of Civil Immigration Law from Alejandro Mayorkas, Sec'y of the Dep't of Homeland Sec., to Tae D. Johnson Acting Dir. U.S. Immigr. and Custom Enforcement (September 30, 2021), available at https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf. Unlike former AG Sessions, current AG Garland has not directed federal prosecutors with any written guidance.

Responding to President Biden's perceived weak immigration policy, border states, particularly those with Republican governors, have fought the administration in federal court. One of the most contentious battles came in June 2021when the Biden administration tried to end the Trump administration's Migrant Protection Protocols ("MPP"s). The policy, also known as the "remain in Mexico" policy, forced certain noncitizens at the southern border to remain in Mexico during their immigration proceedings. Shortly after the Biden administration sought to

end the policy, Texas and Missouri sought an injunction, arguing that the policy change violated immigration law and the Administrative Procedure Act. A district judge agreed and granted the injunction, ordering the Biden administration to enforce the MMPs or change the policy in compliance with the APA. Neither the Fifth Circuit nor the Supreme Court blocked the ruling.

In October 2021, the Biden administration tried to end the policy again with a memo supporting the decision. But the district court again ordered Biden to continue the MPPs. The Fifth Circuit affirmed the order. The Biden administration appealed to the Supreme Court. The Court reversed the Fifth Circuit, holding that the Biden administration ending the policy did not violate the federal immigration law and that the memo supporting the decision to end the policy satisfied the APA. Biden v. Texas, 142 S. Ct. 2528 (2022).

A similar battle took place when the Biden administration tried to implement the Mayorkas Memo in September 2021. Texas and Louisiana sought to prevent the Biden administration from doing this. A district court and the Fifth Circuit sided with the states. But the Supreme Court in June 2023 overturned the lower court decision for want of standing, allowing the policy to go forward. United States v. Texas, 143 S. Ct. 1964 (2023).

As of the date of this Update, the Department of Justice sued Texas Republican Governor Greg Abbott in federal court the Western District of Texas over his placement of a string of floating buoys in the Rio Grande River and miles of razor wire (manufactured by prison labor) on the shoreline along the border between Texas and Mexico. These actions are part of Governor Abbott's Operation Lone Star, a multi-billion-dollar effort to control border crossings, which also involves the use of the Texas National Guard and state troopers to prevent migrant crossings. Government officials in Texas and Florida have also begun bussing and flying new immigrants to New York, Washington D.C., Chicago, and other cities led by Democrats. The substantial cost of housing these individuals have shed some of the luster from the label "sanctuary city."

Page 827 Section A Part 3, add to end

See also Garland v. Aleman Gonzalez, 142 S. Ct. 2057 (2022) (class wide injunctive relief under the INA), Patel v. Garland, 142 S. Ct. 1614 (2022) (concerning jurisdiction on appeal), Johnson v. Arteaga-Martinez, 142 S. Ct. 1827 (2022) (bond hearings and detention after a removal order has been issued), Pereida v. Wilkinson, 141 S. Ct. 754 (2021) (regarding the burden of proof for disproving a crime of moral turpitude when a noncitizen seeks cancellation of removal), Niz-Chavez v. Garland, 209, 141 S. Ct. 1474 (2021) (concerning "notice to appear" and sufficiency for stop-time rule), Sanchez v. Mayorkas, 141 S. Ct. 1809 (2021) (what counts as a lawful admission into the United States), Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020) (habeas review of noncitizens in detention), Nasrallah v. Barr, 140 S. Ct. 1683 (2020) (scope of review of Convention Against Torture orders for noncitizens who commit specific crimes) Kansas v. Garcia, 140 S. Ct. 791 (2020) (preemption), and Barton v. Barr, 140 S. Ct. 1442 (2020) (whether a serious crime makes a lawful permanent resident "inadmissible" for the stop-time rule).

Page 843, add before *United States v. Ramirez-Cortinas*

United States v. Palomar-Santiago
141 S. Ct. 1615 (2021)

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In 1998, respondent Refugio Palomar-Santiago was removed from the United States based on a conviction for felony driving under the influence (DUI). He later returned to the United States and was indicted on one count of unlawful reentry in violation of 8 U.S.C. § 1326(a). Between Palomar-Santiago's removal and indictment, this Court held that offenses like his DUI conviction do not in fact render noncitizens removable. Palomar-Santiago now seeks to defend against his unlawful-reentry charge by challenging the validity of his 1998 removal order.

By statute, defendants "may not" bring such collateral attacks "unless" they "demonstrat[e]" that (1) they "exhausted any administrative remedies that may have been available to seek relief against the [removal] order," (2) the removal proceedings "improperly deprived [them] of the opportunity for judicial review," and (3) "entry of the order was fundamentally unfair." § 1326(d).

The question for the Court is whether Palomar-Santiago is excused from making the first two of these showings, as the Court of Appeals for the Ninth Circuit held, because his prior removal order was premised on a conviction that was later found not to be a removable offense. The Court holds that the statute does not permit such an exception.

I

A

Foreign nationals may be removed from the United States if they are convicted of an "aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). Among the offenses that qualify as aggravated felonies are "crime[s] of violence . . . for which the term of imprisonment [is] at least one year." § 1101(a)(43)(F). The term "crime of violence" includes "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U. S. C. §16(a).

Noncitizens facing removal generally receive a hearing before an immigration judge. Noncitizens can proffer defenses at that hearing, including that the conviction identified in the charging document is not a removable offense. If unsuccessful, they may appeal to the Board of Immigration Appeals (BIA). *See* 8 U.S.C. § 1229a(c)(5); 8 CFR §§ 1003.1(b), (d)(3), 1240.15 (2021). If unsuccessful again, they can seek review of the BIA's decision before a federal court of appeals. *See* 8 U.S.C. §§ 1101(a)(47), 1252.

Once a noncitizen is removed, it is a crime to return to the United States without authorization. § 1326(a). The statute criminalizing unlawful reentry did not originally allow defendants to raise the invalidity of their underlying removal orders as an affirmative defense. This Court later held, however, that the statute "does not comport with the constitutional

requirement of due process" insofar as it "impose[s] a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the [noncitizen] the deportation proceeding may have been." *United States v. Mendoza-Lopez*, 481 U.S. 828, 837 (1987). "[A]t a minimum," "a collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the [noncitizen] to obtain judicial review." *Id.*, at 839.

Congress responded by enacting § 1326(d). *See* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 441, 110 Stat. 1279. Entitled "Limitation on collateral attack on underlying deportation order," § 1326(d) establishes three prerequisites that defendants facing unlawful-reentry charges must satisfy before they can challenge their original removal orders.

B

Palomar-Santiago is a Mexican national who obtained permanent resident status in 1990. The following year, he was convicted in California state court of a felony DUI. In 1998, Palomar-Santiago received a Notice to Appear from the Immigration and Naturalization Service stating that he was subject to removal because his DUI offense was an aggravated felony. Following a hearing, an immigration judge ordered Palomar-Santiago's removal on that ground. Palomar-Santiago waived his right to appeal and was removed to Mexico the next day. Six years later, this Court held in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), that "a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense" is necessary for an offense to qualify as a crime of violence. *Id.,* at 11. Accordingly, Palomar-Santiago's DUI conviction was not a crime of violence under 18 U. S. C. §16(a), and so not an aggravated felony under 8 U.S.C. § 1101(a)(43). Palomar-Santiago's removal order thus never should have issued. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–313 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction").

In 2017, Palomar-Santiago was found again living in the United States. A grand jury indicted him on one count of unlawful reentry after removal. Palomar-Santiago moved to dismiss the indictment on the ground that his prior removal order was invalid in light of *Leocal*. The District Court granted the motion, and the Court of Appeals for the Ninth Circuit affirmed. 813 Fed. Appx. 282 (2002).

Both courts were bound by Ninth Circuit precedent providing that defendants are "excused from proving the first two requirements" of § 1326(d) if they were "not convicted of an offense that made [them] removable." *United States v. Ochoa*, 861 F.3d 1010, 1015 (2017). Other Courts of Appeals do not excuse similarly situated unlawful-reentry defendants from meeting § 1326(d)'s first two requirements. This Court granted certiorari to resolve this disagreement. 592 U. S. ___ (2021).

II

The Ninth Circuit's interpretation is incompatible with the text of § 1326(d). That section provides that defendants charged with unlawful reentry "may not" challenge their underlying

removal orders “unless” they “demonstrat[e]” that three conditions are met: (1) they have “exhausted any administrative remedies,” (2) they were “deprived . . . of the opportunity for judicial review,” and (3) “the entry of the order was fundamentally unfair.” 8 U. S. C. § 1326(d). The requirements are connected by the conjunctive “and,” meaning defendants must meet all three. When Congress uses “mandatory language” in an administrative exhaustion provision, “a court may not excuse a failure to exhaust.” *Ross v. Blake*, 578 U.S. 632, 639 (2016). Yet that is what the Ninth Circuit’s rule does.

Without the benefit of the Ninth Circuit’s extrastatutory exception, § 1326(d)’s first two procedural requirements are not satisfied just because a noncitizen was removed for an offense that did not in fact render him removable. Indeed, the substantive validity of the removal order is quite distinct from whether the noncitizen exhausted his administrative remedies (by appealing the immigration judge’s decision to the BIA) or was deprived of the opportunity for judicial review (by filing a petition for review of a BIA decision with a Federal Court of Appeals).

III

Palomar-Santiago raises two counterarguments based on the text of § 1326(d). Neither is persuasive. First, he contends that further administrative review of a removal order is not “available” when an immigration judge erroneously informs a noncitizen that his prior conviction renders him removable. Noncitizens, the argument goes, cannot be expected to know that the immigration judge might be wrong. Because noncitizens will not recognize a substantive basis for appeal to the BIA, that administrative review is not practically “available” under § 1326(d)(1).

Palomar-Santiago looks to *Ross v. Blake* for support. That case addressed the Prison Litigation Reform Act, which requires that prisoners exhaust “such administrative remedies as are available” before suing in federal court. 42 U. S. C. § 1997e(a). *Ross* held that whether such remedies are “available” turns on “the real-world workings of prison grievance systems,” and it acknowledged that there are “circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief.” 578 U. S. at 643. Nothing in *Ross*, however, suggests that the substantive complexity of an affirmative defense can alone render further review of an adverse decision “unavailable.” Administrative review of removal orders exists precisely so noncitizens can challenge the substance of immigration judges’ decisions. The immigration judge’s error on the merits does not excuse the noncitizen’s failure to comply with a mandatory exhaustion requirement if further administrative review, and then judicial review if necessary, could fix that very error.

Second, Palomar-Santiago contends that the § 1326(d) prerequisites apply only when a defendant argues that his removal order was procedurally flawed rather than substantively invalid. There can be no “challenge” to or “collateral attack” on the validity of substantively flawed orders, he reasons, because such orders are invalid from the moment they are entered. Palomar-Santiago’s position ignores the plain meaning of both “challenge” and “collateral attack.” Arguing that a prior removal order was substantively unlawful is a “challenge” to that order. *See* Black’s Law Dictionary 230 (6th ed. 1990) (“Challenge” means “[t]o object or except to” or “to put into dispute”). When a challenge to an order takes place in a separate “proceeding

that has an independent purpose," such as a later criminal prosecution, it is a "collateral attack." *Id*., at 261.

Palomar-Santiago last invokes the canon of constitutional avoidance. Courts should indeed construe statutes "to avoid not only the conclusion that [they are] unconstitutional, but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). But this canon "has no application in the absence of statutory ambiguity." *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001). Here, the text of § 1326(d) unambiguously forecloses Palomar-Santiago's interpretation.

* * *

The Court holds that each of the statutory requirements of § 1326(d) is mandatory. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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3. Obstruction as an aggravated felony. In *Pugin v. Garland*, 143 S. Ct. 1833 (2023) (consolidated with *Garland v. Coredero-Garcia*), the Court addressed whether an obstruction of justice offense must have a nexus with an ongoing investigation or judicial proceeding to qualify as "an offense relating to obstruction of justice" in 8 U.S.C. § 1101(a)(43)(S). Relying on dictionary definitions, federal laws, state laws, and the Model Penal Code, Justice Kavanaugh, writing for the majority, determined that "an offense 'relat[es] to obstruction of justice' even if the offense does not require that an investigation or proceeding be pending." *See also* **Chapter 16, Obstruction**.

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The Court did reach the merits of the issue in *Sineneng-Smith* in 2023**.**

United States v. Hansen
143 S. Ct. 1932 (2023)

JUSTICE BARRETT delivered the opinion of the Court

A federal law prohibits "encourag[ing] or induc[ing]" illegal immigration. 8 U. S. C. § 1324(a)(1)(A)(iv). After concluding that this statute criminalizes immigration advocacy and other protected speech, the Ninth Circuit held it unconstitutionally overbroad under the First Amendment. That was error. Properly interpreted, this provision forbids only the intentional solicitation or facilitation of certain unlawful acts. It does not "prohibi[t] a substantial amount of protected speech"—let alone enough to justify throwing out the law's "plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). We reverse.

I

In 2014, Mana Nailati, a citizen of Fiji, heard that he could become a U. S. citizen through an "adult adoption" program run by Helaman Hansen. Eager for citizenship, Nailati flew to California to pursue the program. Hansen's wife told Nailati that adult adoption was the "quickest and easiest way to get citizenship here in America." App. 88. For $4,500, Hansen's organization would arrange Nailati's adoption, and he could then inherit U. S. citizenship from his new parent. Nailati signed up.

It was too good to be true. There is no path to citizenship through "adult adoption," so Nailati waited for months with nothing to show for it. Faced with the expiration of his visa, he asked Hansen what to do. Hansen advised him to stay: "[O]nce you're in the program," Hansen explained, "you're safe. Immigration cannot touch you." *Id.*, at 92. Believing that citizenship was around the corner, Nailati took Hansen's advice and remained in the country unlawfully. Hansen peddled his scam to other noncitizens too. After hearing about the program from their pastor, one husband and wife met with Hansen and wrote him a check for $9,000—initially saved for a payment on a house in Mexico—so that they could participate. Another noncitizen paid Hansen out of savings he had accumulated over 21 years as a housepainter. Still others borrowed from relatives and friends. All told, Hansen lured over 450 noncitizens into his program, and he raked in nearly $2 million as a result.

The United States charged Hansen with (among other crimes) violations of § 1324(a)(1)(A)(iv). That clause forbids "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." In addition to convicting him under clause (iv), the jury found that Hansen had acted "for the purpose of private financial gain," triggering a higher maximum penalty. App. 116; *see* § 1324(a)(1)(B)(i).

* * *

While Hansen's appeal was pending, the Ninth Circuit held in *Sineneng-Smith* that clause (iv) is unconstitutionally overbroad. *Id.*, at 467–468. That holding was short-lived: We vacated the judgment, explaining that the panel's choice to inject the overbreadth issue into the appeal and appoint *amici* to argue it "departed so drastically from the principle of party presentation as to constitute an abuse of discretion." 590 U. S. ___, ___ (2020) (slip op., at 3). On remand, limited to the arguments that Sineneng-Smith had actually made, the Ninth Circuit affirmed her convictions. 982 F.3d 766, 770 (2020). But Hansen's appeal was waiting in the wings, giving the Ninth Circuit a second chance to address the overbreadth question. It reprised its original holding in *Sineneng-Smith*.

As in *Sineneng-Smith*, the Ninth Circuit focused on whether clause (iv) is a narrow prohibition covering solicitation and facilitation of illegal conduct, or a sweeping ban that would pull in "statements or conduct that are likely repeated countless times across the country every day." 25 F. 4th 1103, 1110 (2022). It adopted the latter interpretation, asserting that clause (iv) criminalizes speech such as "encouraging an undocumented immigrant to take shelter during a natural disaster, advising an undocumented immigrant about available social services, telling a

tourist that she is unlikely to face serious consequences if she overstays her tourist visa, or providing certain legal advice to undocumented immigrants." *Ibid.* Concluding that clause (iv) covers an " 'alarming' " amount of protected speech relative to its narrow legitimate sweep, the Ninth Circuit held the provision facially overbroad. *Ibid.*

* * *

[Hansen] argues that clause (iv) punishes so much protected speech that it cannot be applied to *anyone*, including him. Brief for Respondent 9–10.

An overbreadth challenge is unusual. For one thing, litigants typically lack standing to assert the constitutional rights of third parties. *See*, *e.g.*, *Powers v. Ohio*, 499 U.S. 400, 410 (1991). For another, litigants mounting a facial challenge to a statute normally "must establish that *no set of circumstances* exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). Breaking from both of these rules, the overbreadth doctrine instructs a court to hold a statute facially unconstitutional even though it has lawful applications, and even at the behest of someone to whom the statute can be lawfully applied.

We have justified this doctrine on the ground that it provides breathing room for free expression. Overbroad laws "may deter or 'chill' constitutionally protected speech," and if would-be speakers remain silent, society will lose their contributions to the "marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). To guard against those harms, the overbreadth doctrine allows a litigant (even an undeserving one) to vindicate the rights of the silenced, as well as society's broader interest in hearing them speak. *Williams*, 553 U. S. at 292. If the challenger demonstrates that the statute "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep," then society's interest in free expression outweighs its interest in the statute's lawful applications, and a court will hold the law facially invalid. *Ibid.*; *see Hicks*, 539 U. S. at 118–119.

* * *

III

A

To judge whether a statute is overbroad, we must first determine what it covers. Recall that § 1324(a)(1)(A)(iv) makes it unlawful to "encourag[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." The issue is whether Congress used "encourage" and "induce" as terms of art referring to criminal solicitation and facilitation (thus capturing only a narrow band of speech) or instead as those terms are used in everyday conversation (thus encompassing a broader swath). An overbreadth challenge obviously has better odds on the latter view.

1

We start with some background on solicitation and facilitation. Criminal solicitation is the intentional encouragement of an unlawful act. ALI, Model Penal Code §5.02(1), p. 364 (1985) (MPC); 2 W. LaFave, Substantive Criminal Law §11.1 (3d ed. 2022) (LaFave). Facilitation—also called aiding and abetting—is the provision of assistance to a wrongdoer with the intent to further an offense's commission. *See*, *e.g.*, *Twitter, Inc. v. Taamneh*, 598 U. S. ___, ___–___ (2023) (slip op., at 13–14). While the crime of solicitation is complete as soon as the encouragement occurs, *see* LaFave §11.1, liability for aiding and abetting requires that a wrongful act be carried out, *see id.*, §13.2(a). Neither solicitation nor facilitation requires lending physical aid; for both, words may be enough. [citations omitted] And both are longstanding criminal theories targeting those who support the crimes of a principal wrongdoer. *See Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 181 (1994); LaFave §11.1(a).

The terms "encourage" and "induce" are among the "most common" verbs used to denote solicitation and facilitation. [citations omitted]. In fact, their criminal-law usage dates back hundreds of years. *See* 40 F. 4th, at 1062–1064 (opinion of Bumatay, J.). A prominent early American legal dictionary, for instance, defines "abet" as "[t]o *encourage* or set another on to commit a crime." 1 J. Bouvier, Law Dictionary 30 (1839) (emphasis added). Other sources agree. [citations omitted].

This pattern is on display in the federal criminal code, which, for over a century, has punished one who "induces" a crime as a principal. *See* Act of Mar. 4, 1909, §332, 35 Stat. 1152 ("Whoever . . . aids, abets, counsels, commands, *induces*, or procures [the commission of an offense] is a principal" (emphasis added)); 18 U. S. C. §2(a) (listing the same verbs today). The Government offers other examples as well: The ban on soliciting a crime of violence penalizes those who "solici[t], comman[d], *induc[e]*, or otherwise endeavo[r] to persuade" another person "to engage in [the unlawful] conduct." §373(a) (emphasis added). Federal law also criminalizes "persuad[ing], *induc[ing]*, entic[ing], or coerc[ing]" one "to engage in prostitution" or other unlawful sexual activity involving interstate commerce. §§ 2422(a), (b) (emphasis added). * * *

The use of both verbs to describe solicitation and facilitation is widespread in the States too. Nevada considers "[e]very person" who "aided, abetted, counseled, *encouraged*, hired, commanded, *induced*, or procured" an offense to be a principal.[citations omitted].* * * These States are by no means outliers—"induce" or "encourage" describe similar offenses in the criminal codes of *every* State. [citations omitted].

In sum, the use of "encourage" and "induce" to describe solicitation and facilitation is both longstanding and pervasive. And if 8 U.S.C. § 1324(a)(1)(A)(iv) refers to solicitation and facilitation as they are typically understood, an overbreadth challenge would be hard to sustain.

2

Hansen, like the Ninth Circuit, insists that clause (iv) uses "encourages" and "induces" in their ordinary rather than their specialized sense. While he offers definitions from multiple

dictionaries, the terms are so familiar that two samples suffice. In ordinary parlance, "induce" means "[t]o lead on; to influence; to prevail on; to move by persuasion or influence." Webster's New International Dictionary 1269 (2d ed. 1953). And "encourage" means to "inspire with courage, spirit, or hope." Webster's Third New International Dictionary 747 (1966).

In Hansen's view, clause (iv)'s use of the bare words "encourages" or "induces" conveys these ordinary meanings. *See* Brief for Respondent 14. "[T]hat encouragement can *include* aiding and abetting," he says, "does not mean it is *restricted* to aiding and abetting." *Id.*, at 25. And because clause (iv) "proscribes encouragement, full stop," *id.*, at 14, it prohibits even an "op-ed or public speech criticizing the immigration system and supporting the rights of long-term undocumented noncitizens to remain, at least where the author or speaker knows that, or recklessly disregards whether, any of her readers or listeners are undocumented." *Id.*, at 17–18. If the statute reaches the many examples that Hansen posits, its applications to protected speech might swamp its lawful applications, rendering it vulnerable to an overbreadth challenge.

B

We hold that clause (iv) uses "encourages or induces" in its specialized, criminal-law sense—that is, as incorporating common-law liability for solicitation and facilitation. In truth, the clash between definitions is not much of a contest. "Encourage" and "induce" have well-established legal meanings—and when Congress "borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word." *Morissette v. United States*, 342 U.S. 246, 263 (1952); *see* also, *e.g.*, *United States v. Shabani*, 513 U.S. 10, 13–14 (1994).
To see how this works, consider the word "attempts," which appears in clause (iv)'s next-door neighbors. *See* §§1324(a)(1)(A)(i)–(iii). In a criminal prohibition, we would not understand "attempt" in its ordinary sense of "try." Webster's New Universal Unabridged Dictionary 133 (2d ed. 2001). We would instead understand it to mean taking "a substantial step" toward the completion of a crime with the requisite *mens rea*. *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007). "Encourages or induces" likewise carries a specialized meaning. After all, when a criminal-law term is used in a criminal-law statute, that—in and of itself—is a good clue that it takes its criminal-law meaning. And the inference is even stronger here, because clause (iv) prohibits "encouraging" and "inducing" *a violation of law*. *See* § 1324(a)(1)(A)(iv). That is the focus of criminal solicitation and facilitation too.

In concluding otherwise, the Ninth Circuit stacked the deck in favor of ordinary meaning. [citations omitted]. But it should have given specialized meaning a fair shake. When words have several plausible definitions, context differentiates among them. That is just as true when the choice is between ordinary and specialized meanings, *see*, *e.g.*, *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974) ("While a layman might well assume that time of day worked reflects one aspect of a job's 'working conditions,' the term has a different and much more specific meaning in the language of industrial relations"), as it is when a court must choose among multiple ordinary meanings, *see*, *e.g.*, *Muscarello v. United States*, 524 U.S. 125, 127–128 (1998) (choosing between ordinary meanings of "carry"). Here, the context of these words—the water in which they swim—indicates that Congress used them as terms of art.

Statutory history is an important part of this context. In 1885, Congress enacted a law that would become the template for clause (iv). That law prohibited "knowingly assisting, *encouraging* or soliciting" immigration under a contract to perform labor. * * * Most notably, the 1952 version dropped the words "assist" and "solicit," instead making it a crime to "willfully or knowingly encourag[e] or induc[e], or attemp[t] to encourage or induce, either directly or indirectly, the entry into the United States of . . . any alien . . . not lawfully entitled to enter or reside within the United States." Immigration and Nationality Act, § 274(a)(4), 66Stat. 229. Three decades later, Congress brought 8 U. S. C. § 1324(a)(1)(A)(iv) into its current form—still without the words "assist" or "solicit." [citations omitted]. .

On Hansen's view, these changes dramatically broadened the scope of clause (iv)'s prohibition on encouragement. Before 1952, he says, the words "assist" and "solicit" may have cabined "encourage" and "induce," but eliminating them severed any connection the prohibition had to solicitation and facilitation. Brief for Respondent 25–26. In other words, Hansen claims, the 1952 and 1986 revisions show that Congress opted to make "protected speech, not conduct, a crime." *Id.*, at 27.

We do not agree that the mere removal of the words "assist" and "solicit" turned an ordinary solicitation and facilitation offense into a novel and boundless restriction on speech. Hansen's argument would require us to assume that Congress took a circuitous route to convey a sweeping—and constitutionally dubious—message. The better understanding is that Congress simply "streamlined" the pre-1952 statutory language—which, as any nonlawyer who has picked up the U. S. Code can tell you, is a commendable effort. 40 F. 4th, at 1066 (opinion of Bumatay, J.). * * * And critically, the terms that Congress retained ("encourage" and "induce") substantially overlap in meaning with the terms it omitted ("assist" and "solicit"). LaFave §13.2(a). Clause (iv) is best understood as a continuation of the past, not a sharp break from it.

C

Hansen's primary counterargument is that clause (iv) is missing the necessary *mens rea* for solicitation and facilitation. Brief for Respondent 28–31. Both, as traditionally understood, require that the defendant specifically intend that a particular act be carried out. *Supra*, at 6. "Encourages or induces," however, is not modified by any express intent requirement. Because the text of clause (iv) lacks that essential element, Hansen protests, it cannot possibly be limited to either solicitation or facilitation.

Once again, Hansen ignores the longstanding history of these words. When Congress transplants a common-law term, the " 'old soil' " comes with it. *Taggart v. Lorenzen*, 587 U. S. ___, ___–___ (2019) (slip op., at 5–6). So when Congress placed "encourages" and "induces" in clause (iv), the traditional intent associated with solicitation and facilitation was part of the package. That, in fact, is precisely how the federal aiding-and-abetting statute works. It contains no express *mens rea* requirement, providing only that a person who "aids, abets, counsels, commands, induces or procures" a federal offense is "punishable as a principal." 18 U.S.C. § 2(a). Yet, consistent with "a centuries-old view of culpability," we have held that the statute implicitly incorporates the traditional state of mind required for aiding and abetting. *Rosemond v. United States*, 572 U.S. 65, 70–71 (2014).

Clause (iv) is situated among other provisions that work the same way. Consider those that immediately follow it: The first makes it a crime to "engag[e] in any conspiracy to commit any of the preceding acts," 8 U. S. C. § 1324(a)(1)(A)(v)(I), and the second makes it a crime to "ai[d] or abe[t] the commission of any of the preceding acts," § 1324(a)(1)(A)(v)(II). Neither of these clauses explicitly states an intent requirement. Yet both conspiracy and aiding and abetting are familiar common-law offenses that contain a particular *mens rea*. *See Rosemond*, 572 U. S., at 76 (aiding and abetting); *Ocasio v. United States*, 578 U.S. 282, 287–288 (2016) (conspiracy). Take an obvious example: If the words "aids or abets" in clause (v)(II) were considered in a vacuum, they could be read to cover a person who inadvertently helps another commit a § 1324(a)(1)(A) offense. But a prosecutor who tried to bring such a case would not succeed. Why? Because aiding and abetting implicitly carries a *mens rea* requirement—the defendant generally must *intend* to facilitate the commission of a crime. LaFave §13.2(b). Since "encourages or induces" in clause (iv) draws on the same common-law principles, it too incorporates them implicitly.

Still, Hansen reiterates that if Congress had wanted to require intent, it could easily have said so—as it did elsewhere in clause (iv). The provision requires that the defendant encourage or induce an unlawful act *and* that the defendant "kno[w]" or "reckless[ly] disregard" the fact that the act encouraged "is or will be in violation of law." §1324(a)(1)(A)(iv). Yet while Congress spelled out this requirement, it included no express *mens rea* element for "encourages or induces." Indeed, Hansen continues, the statute used to require that the encouragement or inducement be committed "willfully or knowingly," but Congress deleted those words in 1986. Brief for Respondent 30. Taken together, Hansen says, this evidence reflects that Congress aimed to make a defendant liable for "encouraging or inducing" without respect to her state of mind.

But there is a simple explanation for why "encourages or induces" is not modified by an express *mens rea* requirement: There is no need for it. At the risk of sounding like a broken record, "encourage" and "induce," as terms of art, carry the usual attributes of solicitation and facilitation—including, once again, the traditional *mens rea*. Congress might have rightfully seen the express *mens rea* requirement as unnecessary and cut it in a further effort to streamline clause (iv). And in any event, the omission of the unnecessary modifier is certainly not enough to overcome the "presumption of scienter" that typically separates wrongful acts "from 'otherwise innocent conduct.' " *Xiulu Ruan v. United States*, 597 U. S. ___, ___ (2022) (slip op., at 5); *see also Elonis v. United States*, 575 U.S. 723, 736–737 (2015).

Nor does the scienter applicable to a distinct element within clause (iv)—that the defendant "kno[w]" or "reckless[ly] disregard . . . the fact that" the noncitizen's "coming to, entry, or residence is or will be in violation of law"—tell us anything about the *mens rea* for "encourages or induces." Many criminal statutes do not require knowledge of illegality, but rather only " 'factual knowledge as distinguished from knowledge of the law.' " *Bryan v. United States*, 524 U.S. 184, 192 (1998). So Congress's choice to specify a mental state for this element tells us something that we might not normally infer, whereas the inclusion of a *mens rea* requirement for "encourages or induces" would add nothing.

* * *

IV

Section 1324(a)(1)(A)(iv) reaches no further than the purposeful solicitation and facilitation of specific acts known to violate federal law. So understood, the statute does not "prohibi[t] a substantial amount of protected speech" relative to its "plainly legitimate sweep." *Williams*, 553 U. S. at 292.

Start with clause (iv)'s valid reach. Hansen does not dispute that the provision encompasses a great deal of nonexpressive conduct—which does not implicate the First Amendment at all. Brief for Respondent 22–23. Consider just a few examples: smuggling noncitizens into the country, *see United States v. Okatan*, 728 F.3d 111, 113–114 (CA2 2013); *United States v. Yoshida*, 303 F.3d 1145, 1148–1151 (CA9 2002), providing counterfeit immigration documents, *see United States v. Tracy*, 456 Fed. Appx. 267, 269–270 (CA4 2011) (*per curiam*); *United States v. Castillo- Felix*, 539 F.2d 9, 11 (CA9 1976), and issuing fraudulent Social Security numbers to noncitizens, *see Edwards v. Prime, Inc.*, 602 F.3d 1276, 1295–1297 (CA11 2010). A brief survey of the Federal Reporter confirms that these are heartland clause (iv) prosecutions. *See* 40 F. 4th, at 1072 (opinion of Bumatay, J.) (listing additional examples, including arranging fraudulent marriages and transporting noncitizens on boats). So the "plainly legitimate sweep" of the provision is extensive.

When we turn to the other side of the ledger, we find it pretty much blank. Hansen fails to identify a single prosecution for ostensibly protected expression in the 70 years since Congress enacted clause (iv)'s immediate predecessor. Instead, he offers a string of hypotheticals, all premised on the expansive ordinary meanings of "encourage" and "induce." In his view, clause (iv) would punish the author of an op-ed criticizing the immigration system, "[a] minister who welcomes undocumented people into the congregation and expresses the community's love and support," and a government official who instructs "undocumented members of the community to shelter in place during a natural disaster." Brief for Respondent 16–19. Yet none of Hansen's examples are filtered through the elements of solicitation or facilitation—most importantly, the requirement (which we again repeat) that a defendant *intend* to bring about a specific result. *See*, *e.g.*, *Rosemond*, 572 U. S. at 76. Clause (iv) does not have the scope Hansen claims, so it does not produce the horribles he parades.

To the extent that clause (iv) reaches *any* speech, it stretches no further than speech integral to unlawful conduct. "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Speech intended to bring about a particular unlawful act has no social value; therefore, it is unprotected. *Williams*, 553 U. S. at 298. We have applied this principle many times, including to the promotion of a particular piece of contraband, *id.*, at 299, solicitation of unlawful employment, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973), and picketing with the "sole, unlawful [and] immediate objective" of "induc[ing]" a target to violate the law, *Giboney*, 336 U. S, at 502. It applies to clause (iv) too.

* * *

The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Jackson, in a dissent joined by Justice Sotomayor, came out on the other side of the overbreadth analysis. Justice Jackson criticized the government and the majority for rejecting the plain meaning of the text of clause (iv), which the parties agreed would be unconstitutionally overbroad, in favor of a narrow reading that saved the statute at the cost of legislating from the bench. Justice Jackson disagreed with the majority's connecting "encourages and induces" to "solicitation and facilitation" on textual and legislative history grounds.

Chapter 13

Page 960

Substitute new notes 1, 2 and 3:

1. Present status of Mongol Nation litigation. The trial court docket in the principal case indicates that a sentence of five years' probation was imposed. Upon cross appeals of the judgment in the principal case, the Ninth Circuit affirmed, *United States v. Mongol Nation,* 56 F. 4th1244 (9th Cir. 2023). Regarding the defendant motorcycle club's contention that as an unincorporated association it was "not an indictable 'person' under the RICO statute, the court applied plain error review on the ground that the defendant had not raised the argument before the district court. The court concluded that the judge below had not plainly erred in ruling that defendant unincorporated association was a RICO "person." A RICO "person" must be capable of holding a legal or beneficial interest in property. Under California law, an unincorporated association can only own property if it exists for a lawful purpose. Since measured by the allegations in the indictment, the motorcycle club's purposes "included, but were not limited to,… unlawful purposes, …the indictment expressly contemplated that the association may exist for other purposes—perhaps including lawful ones…." The court also affirmed the forfeiture ruling, but on a statutory interpretation rather than constitutional ground--that the statute provides that "all right, title, and interest in property … vests in the United States…" and the government's claim in the case was that it "expressly would not vest title in the forfeited marks in the government."

2. Another development in the Mongol Nation litigation. In December 2021, defense counsel filed a motion for a new trial in the Mongol Nation prosecution on the ground that there was evidence that the then president of the motorcycle club had been acting as a confidential informant for an ATFE agent. After conducting a hearing in the matter, Judge Carter denied the motion. *See* Gregory Yee, *Mongols biker club is denied new racketeering trial after claims its leader was informant*, LA Times, October 11, 2022.

https://www.unionleader.com/news/crime/mongols-biker-club-is-denied-new-racketeering-trial-after-claims-its-leader-was-informant/article_38c4e0bd-7775-5a04-a3f1-fb4239777240.html

3. The beginning of another Mongol Nation prosecution in Nashville, Tennessee. A RICO prosecution of individual members of another chapter of the Mongol Nation Motorcycle Club is ongoing in Nashville Tennessee. For disposition of motions in limine regarding evidentiary issues in this prosecution, *see United States v. Frazier*, 442 F.Supp. 3d 1012 (M.D. Tenn. 2020).

Page 1021-1022, add as additional paragraph to note 10

In June 2023, in *Yegiazarayan v. Smagin*, 143 S. Ct. 1900 (2023), the Supreme Court adopted a test to meet the requirement of showing a domestic injury in a civil RICO case involving foreign elements. This requirement had been imposed by the Court in *RJR Nabisco v. European Cmty*., 136 S. Ct. 2090 (2016), *see* casebook, pp. 75-77. The plaintiff, Smagin, lived in Moscow, and the original real estate transaction that triggered this litigation occurred there. The defendant had moved to California, and eventually the plaintiff had obtained a California judgment against him. It was the defendant's actions to avoid enforcement of the California judgment that were the basis for the civil RICO claim, which alleged wire fraud, obstruction of justice and witness tampering as the racketing acts. Defendant argued for a bright line test which had been adopted by the Seventh Circuit, looking to the injury to economic interests as occurring at the plaintiff's residence where the economic loss would be felt—namely in Russia. Rejecting that approach, the Court applied a context specific factual inquiry, examining the facts relating to the alleged injury, to determine whether they occurred in the United States. Justice Sotomayor, speaking for a 6-3 majority, the Court affirmed the judgment of the Ninth Circuit Court of Appeals, concluding that Smagin's interests in his California judgment against Yegiazaryan, a California resident, were directly injured by racketeering activity either taken in California or directed from California, with the aim and effect of subverting Smagin's rights to execute on that judgment in California. On the Court's contextual approach, those allegations suffice to state a domestic injury in this suit.

Page 1035, insert as new note 6 and renumber notes accordingly

6. **Another innovative civil RICO case.** Innovative civil RICO cases continue to be filed, including some that address important public policy issues, akin to the magnitude of those involved in the RICO tobacco litigation. An example is the civil class action lawsuit involving RICO claims filed against oil, gas and coal companies alleging that they produced and marketed products that caused harms of climate change (losses resulting from storms during the 2017 hurricane season) while concealing and misrepresenting the associated facts. *See Municipalities of Puerto Rico v. Exxon*, (Docket numbers: 3:22-cv-01550, D. P.R. 2022). *Also See* Korey Silverman-Roati and Maria Antonia Tigre, *Municipalities of Puerto Rico v. Exxon: a unique class action against fossil fuel companies presses for climate accountability in the United States, Climate Law, Sabin Center Blog, Columbia Law School*, (December 2), 2022_ https://blogs.law.columbia.edu/climatechange/2022/12/02/municipalities-of-puerto-rico-v-exxon-a-unique-class-action-against-fossil-fuel-companies-presses-for-climate-accountability-in-the-united-states

Chapter 14

Page 1037-1039

President Biden issued a policy document on June 15, 2021, titled, National Strategy for Countering Domestic Terrorism, https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf

The National Strategy views purely domestic terrorism as great a threat to the United States as the international variety. The fact that the National Strategy was issued by the President, thus elevating its importance and visibility, distinguishes it from the Trump administration paper quoted in the casebook. In the Biden document, too, the strong focus is on the varieties of domestic terrorism that meet the traditional definition of terrorism. Consequently, less attention is paid to mass shootings divorced from any apparent terrorism purpose. Meanwhile, mass shootings are on the increase in this country. In the first six months of 2023, there were 28 mass killings (defined as a killing of four or more victims not including the killer) with 140 victims, approximately twice the number in recent years for a similar period. *See* https://apnews.com/article/mass-killings-record-gun-violence-0174103c37756fe4d247fd15cd3bc009

Pages 1039-1043

Do the acts involved in the January 6 attack and intrusion into the Capitol qualify as domestic terrorism? If so, what is accomplished by so labeling them? *See* Charlie Savage, *Was the January 6 Attack on the Capitol an Act of 'Terrorism'?* (2022, January 7) NY Times. , https://www.nytimes.com/2022/01/07/us/politics/jan-6-terrorism-explainer.html; Josh Gerstein, *Why DOJ is Avoiding Domestic Terrorism Sentences for Jan. 6 Defendants*, Politico, (January 4, 2022), https://www.politico.com/news/2022/01/04/doj-domestic-terrorism-sentences-jan-6-526407

Page 1070, add to note 10

For a case that arose before the U.S. withdrawal from Afghanistan and involved an individual who planned to travel there to join the Taliban, *see United States v. Hossain*, 579 F. Supp. 3d 477 (S.D. N.Y. 2022).

Page 1101, add to note 3

Reportedly, in the course of the Biden administration's discussions with Iran regarding renewal of the nuclear deal, Iran demanded that the Iranian Revolutionary Guard Corps be removed from the foreign terrorist organization list. On May 24, 2022, Politico reported that a final decision had been made by the Biden administration to keep the IRGC on the list. *See* Alexander Ward and Nahal Toosi, *Biden Made Final Decision to Keep Iran's IRGC on Terrorist List*, https://www.politico.com/news/2022/05/24/biden-final-decision-iran-revolutionary-guard-terrorist-00034789

Page 1107, add to note 3 at top of page

A full withdrawal from Afghanistan, amid disarray, occurred in August 2021, with a decision by President Biden to withdraw completely. The last U.S. planes departed Kabul Airport at 11:59 pm, Kabul time on August 30, 2021. The withdrawal triggered a new set of questions regarding the legal basis for detaining the prisoners at Guantanamo:

Does the withdrawal and the ending of battlefield hostilities with the Taliban end the authority to continue to detain individuals at Guantanamo? Is the answer to that question affected by the fact that U.S forces are still fighting al Qaeda in Somalia and fighting remnants of ISIS in Syria or Iraq? Suppose those military actions end. Are the courts likely to view the authority to detain individuals at Guantanamo anyway as continuing on the theory that we are still at war against al Qaeda? When is that war likely to end?

The issue of whether the end of battlefield actions in Afghanistan against the Taliban and al Qaeda and the withdrawal has affected the authority of the U.S. to continue to detain any of those imprisoned at Guantanamo has been directly addressed in several recent district court cases. See, for example, *Paracha v. Biden*, 2022 WL 2952493 (D.D.C.) where *the court* rejected the petitioner's contention that the withdrawal of U.S. troops from Afghanistan had terminated the authority to hold him under the AUMF. *The court* noted that the AUMF authorizes detention for the duration of the conflict between the United States and the Taliban and al Qaeda, and the determination of when hostilities have ceased is a political decision. *The court* deferred to the Executive Branch's opinion on the matter; in this case, "the record clearly establishes that the United States continues to be engaged in active hostilities with Al Qaeda and its associated forces."

To the same effect, *see Gul v. Biden*, 21 WL 5206199 (D.D.C.); *Husayn v. Austin*, 2022 WL 2093067 (D.D.C.). Compare David Glazier, *Withdrawal from Afghanistan Marks Guantanamo Endpoint*, 13 Harv. Nat. Sec. J. 285 (2022).

[Note: Mr. Paracha was repatriated to his native Pakistan in late October, 2022. Carol Rosenberg, *U.S. Releases Guantanamo's Oldest Prisoner*, NY Times, (October, 29, 2022), https://www.nytimes.com/2022/10/29/us/politics/oldest-prisoner-gitmo-terrorism.html.]

Page 1107, add at end of c

Post-*Boumediene*, the question of whether specific constitutional protections were available to the Guantanamo detainees was periodically raised in the habeas cases, but typically was not definitively resolved. Similarly in *Al-Hela v. Biden*, 66 F.4th 217 (D.C. Cir. 2023) (en banc), a panel of the D.C. Circuit had ruled that the protections of the Due Process Clause were not available to noncitizen Guantanamo Bay detainees. On en banc review, a strong majority of the full court declined to decide the question of whether due process protections apply to the detainees "because even assuming the Due Process Clause applies, we find that the procedures employed by the District Court to adjudicate Mr. al-Hela's habeas petition satisfies procedural due process." The dissenters would have held that the Due Process Clause does not apply to the Guantanamo detainees.

Pages 1108-1109

As of the date of this writing, there are 30 detainees still incarcerated at the Guantanamo Bay Naval Base detention facility.

Of these, 16 have been approved for transfer to another country, but transfer has been delayed while efforts are being made to identify, and negotiate arrangements with, receiving countries. This group of detainees includes 11 Yemenis who cannot be transferred to Yemen both because of unsettled conditions and the fact that there is also an active al Qaeda presence there.

There are ongoing military commission prosecutions of another 10 detainees, including the five high value detainees involved in the September 11, 2001 attacks. These 10 cases are still in the preliminary stages which have been ongoing for a number of years. As of July, 2023, scheduled hearings in all of these cases have been cancelled, reportedly because discussions are underway for negotiated plea/settlements.

One individual has been convicted, sentenced to life imprisonment, with his sentence recently upheld by the U.S. Court of Military Commission Review. *Al Bahlul v. United States*, 603 F.Supp. 3d 1151 (C.M.C.R. 2022). For earlier opinions in the Al Bahlul case, see casebook, pages 1116, 1129 and 1130. There have been a few other convictions in military commission prosecutions, but these individuals have already served their sentences or been transferred.

Three other individuals have not been criminally charged and have not been approved for transfer. They continue to be detained without charge.

As the detention of these 30 Guantanamo detainees continues, new kinds of problems have been arising. This small prison population is aging, and their medical problems are increasing. The medical equipment and facilities at Guantanamo are limited and sometimes not adequate to deal with the medical issues that arise. Federal legislation, however, bars bringing any of the detainees to the mainland United States, even for medical treatment.

The corona virus pandemic added new dimensions to the concerns about the health of the detainees and the adequacy of medical treatment and equipment for dealing with any outbreak of the virus. As recently as July, 2023, it was reported that four high value detainees had tested positive for the Covid-19 Virus and that one of them had been hospitalized for observation. *See* Carol Rosenberg, *Four Prisoners Test Positive as Covid-19 Re-emerges at Guantanamo Bay, NY Times*, (July 16, 2023), https://www.nytimes.com/2023/07/16/us/politics/guantanamo-bay-covid.html. *Also see* Carol Rosenberg, "Red Cross Sounds Alarm over Health of Detainees", *NY Times*, April 22, 2023, A16.

The policy goal of the Biden administration is to close the Guantanamo Bay detention facility. The fewer the number of detainees, the stronger the case for closure. Ideally, the goal would be to reduce the detainee population to zero. Given the steady reduction in numbers that has been thus far achieved, at first blush, that might seem like an attainable goal. But is it?

Consider, for example, where will al Bahlul serve his life sentence? Where will any sentences imposed as the outcome of the current plea negotiations be served?

Opposition to the closure has mainly been based on opposition to transferring any of the detainees to the mainland United States, even if they are to be incarcerated in a supermax federal prison facility. But consider the views of Senator Lindsey Graham who wants Guantanamo to be a wartime prison available for holding and interrogating terrorist suspects without trial. *See* The Editorial Board, "Biden Can Close the Legal Black Hole at Guantanamo", *NY Times*, April 23, 2023, Opinion 11; Charlie Savage and Carol Rosenberg, "Biden Leery of a Role in a Possible Plea Deal with Five 9/11 Suspects", *NY Times*, January 26, 2023, A15.

Pages 1134-1144

The casebook material on these pages describes many of the complex legal issues being litigated before military commission judges, and the extremely slow progress in disposing of those issues. Would negotiated pleas and settlement of all of the cases on the military commissions docket be a sound and just way to resolve what has turned out to be a unduly lengthy judicial process? *See* Carol Rosenberg, "Judge Signals Impatience with Lack of Progress into Plea Talks for 9/11 Suspects", *NY Times*, March 29, 2023, A15.

Page 1144, substitute for note 11

11. **A state secrets ruling regarding a CIA black site.** The rules governing the state secrecy privilege have been litigated in the lower federal courts in a number of cases arising out of anti-terrorism enforcement. The Supreme Court finally agreed to address the subject in *United States v. Zubaydah,* 142 S.Ct. 959 (2022), involving an action brought by a Guantanamo detainee. The detainee, who allegedly had been tortured in a black site operated by the CIA in Poland, had filed a criminal complaint in Poland seeking the prosecution of any Polish nationals involved in the torture. After the United States denied requests by Polish prosecutors for information on the ground that providing the information would threaten national security, Zubaydah filed for discovery under 28 U.S.C. § 1782 which authorizes district courts to order production of testimony or documents "for use in a proceeding in a foreign... tribunal." He proposed to subpoena two former CIA contractors to obtain information regarding his treatment at the alleged black site in Poland. The United States intervened, invoking the state secrets privilege. Justice Breyer wrote the opinion of court in which only the Chief Justice joined fully, and three other justices joined on the main issue. Although the existence of a CIA black site in Poland was publicly known through unofficial sources, it had never been officially confirmed by the CIA or their employees or contractors. Relying on the declaration of the Director of the CIA, the Court ruled that such a confirmation falls within the scope of the state secrets privilege—that "to confirm publicly the existence of a CIA site in Country A, can diminish the extent to which the intelligence services of Countries A, B, C, D, etc., will prove willing to cooperate with our own intelligence services in the future." It is worth noting that Zubaydah is one of the three detainees at Guantanamo who continue to be detained without being criminally charged.

Chapter 15

Page 1230, note 2

The Fourth circuit takes a slightly different approach to a similar unit of offense issue. In *United States v. Smith*, 54 F.4th 755 (4th Cir. 2022) (per curiam), the defendant was charged with two counts of lying to FBI officers during an interview, in violation of 18 U.S.C. § 1001(a)(2). Smith was under investigation for attempting to travel to Syria and join ISIS. Count One was for Smith falsely stating that he never discussed his plans to travel to Syria and join ISIS; Count Two was for Smith falsely stating that he did know that his co-conspirator intended to use a transportation pass that Smith had procured to go join ISIS. Smith moved to dismiss Count Two on the grounds that both statements were made during the same interview and constituted the same conduct. The district court denied the motion to dismiss Count Two and Smith appealed.

The Fourth Circuit reversed Smith's conviction, holding that the phrase "any materially false … statement" was ambiguous, and Congressional intent was unclear with respect to what conduct qualifies as one unit of prosecution. Thus, the rule of lenity dictated that the two statements constituted the same conduct. Charging two counts was multiplicitous in violation of the Double Jeopardy Clause.

Chapter 16

Page 1267, add to end of note 6

In Pugin v. Garland, 143 S. Ct. 1833 (2023), consolidated with *Garland v. Cordero-Garcia*, the issue was whether state offenses such as Virginia's accessory after the fact to a felony and California's dissuading a witness from reporting a crime qualify as "an offense relating to obstruction of justice" and therefore constitute an aggravated felony pursuant to 8 U.S.C. § 1101(a)(43)(S), resulting in deportation under 8 U.S.C. § 1227(a)(2). The Court upheld the deportations, distinguishing the federal requirements under 18 U.S.C. §§ 1503 and 1512 that an investigation or proceeding must be pending, based upon 8 U.S.C. § 1101(a)(43)(S)'s broader statutory language.

Page 1277, add to the end of note 3

In *Counterman v. Colorado*, 143 S. Ct. 2016 (2023), the Supreme Court resolved the question left open by *Elonis v. United States*, 135 S. Ct. 2001 (2015). The Court read a *mens rea* requirement into a Colorado anti-stalking law, holding that, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must prove at least a *mens rea* of recklessness with respect to a defendant's understanding of the threatening nature of his statements.

Page 1280, add to the end of note 4

In 2023, Donald Trump became the first former president of the United States to be federally indicted under the Espionage Act as well as Obstruction of Justice pursuant to 18 U.S.C. §§ 1512 and 1519. *See* **casebook pages 1264 n. 2 and 1290**. See this **Update to casebook page 173** for link to full indictment. The originally 37-count (later superseded to 42-count) indictment alleges that Mr. Trump asked his attorney to lie to the FBI regarding whether that he had any documents called for by a grand jury subpoena, otherwise hid or destroyed those documents, directed codefendant Mr. Nauta, his valet, to hide boxes of documents from his attorney and the FBI, falsely certified to the FBI and grand jury that he had produced all documents, and asked another employee to ask third codefendant Mr. Carlos de Oliveira, a maintenance worker at Mr. Trump's Florida Mar-a-Lago hotel, to delete security camera footage of a room containing boxes of Presidential documents. Generally, a prosecutor will attempt to "flip" a low-level conspirator to nab a big fish. See **Chapter 17, Plea Bargaining and Cooperation Agreements. Casebook page 1328, n.2, and 1388**. Is that likely to work under these circumstances?

The second indictment, filed in August 2023, charges former President Trump with four crimes arising from his efforts to overturn the results of the 2020 election: conspiracy to defraud the United States in violation of 18 U.S.C. § 371, conspiracy to obstruct an official proceeding in violation of 18 U.S.C. § 1512(k), obstruction and attempted obstruction of an official proceeding in violation of 18 U.S.C. § 1512(c)(2), and conspiracy against the free exercise of voting rights, in violation of 18 U.S.C. § 241. See this **Update to casebook page 173** for a link to full indictment.

Chapter 17

Page 1414

5. Criminal justice reform and the impact on plea bargaining. In 2018, Congress passed The First Step Act. The law addressed a number of systemic issues including sentencing disparities, prison conditions, good behavior sentence reductions, reintegration procedures, and rehabilitation. The law also granted the possibility of significant penalty reduction to certain sympathetic defendants. One form of relief now known as "safety valve" allows district judges to avoid harsh mandatory minimum sentences in cases where the defendant is accused of a non-violent drug offense and has a minimal criminal history. The First Step Act included amendments to the "safety valve" benefit and required that a defendant meet certain criteria to qualify. A defendant must not have:

> "more than four criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; a prior 3-point offense, as determined under the sentencing guidelines; and a prior 2-point violent offense, as determined under the sentencing guidelines."

18 U.S.C. § 3553(f)(1)-(5) (West 2022). Prior to the First Step Act, 1 criminal history point was sufficient to bar a defendant from this reduction.

Although the United States Sentencing Guidelines are not mandatory, statutory mandatory minimum penalties are. Not all crimes qualify for "safety valve." Violent crimes, sex crimes, and crimes involving firearms often do not qualify and defendants in those cases are unable to escape the mandatory minimum.

A second form of relief is a procedure known as "compassionate release," which essentially allows defendants to file their own petition asking for release from prison. The petitions are filed to the same district court that sentenced the defendant previously and argue that because of some extraordinary circumstance, release from prison is appropriate. The majority of granted compassionate release petitions involve "the Commission's compassionate release policy statement (USSG §1B1.13), or reasons comparable to the reasons specifically described in the policy statement." Compassionate Release: United States Sentencing Commission, *The Impact of the First Step Act and COVID-19 Pandemic* (Mar. 2022). The USSG §1B1.13 policy statement encourages courts to grant compassionate release petitions when an inmate mentions: their medical condition, their old age, their family circumstance, or other extraordinary circumstances. *See* United States Sentencing Commission, *§1B1.13 (Policy Statement) - Compassionate Release: US Sentencing Commission / 2016 Amendments Effective November 1st* (2016).

What impact does this all have on plea bargaining? The opportunity for "safety valve" relief is used as a bargaining chip just like any other intricacy of a criminal case. As for compassionate release, it is more difficult to tell what effects this benefit has on plea bargaining. It may arise if a defendant is older and has serious health issues.

6. Hunter Biden's Plea Hearing. Hunter Biden, President Biden's son, has been under investigation by the FBI and the IRS since at least 2017. Public reporting has indicated the investigation concerns, among other things, his dealings with foreign businesses and foreign state instrumentalities and alleged failures to follow regulatory and tax requirements arising from those dealings. As of this writing, the investigation has led to charges against Hunter Biden for three crimes: two counts of 18 U.S.C. § 7203 for willful failure to pay federal income tax on $1.5 million in 2017 and 2018, both misdemeanors, and one felony count of 18 U.S.C. § 922(g)(3), which makes it a federal crime for any person who is an unlawful user of or is addicted to any controlled substance to possess a weapon. The DOJ offered him a plea agreement for the two tax charges and a diversion agreement for the gun charge that includes no prison time and the expungement of the felony weapons charge. Leaked versions of the proposed agreements can be found here: [https://www.politico.com/news/2023/07/26/proposed-hunter-biden-plea-agreement-00108426.](https://www.politico.com/news/2023/07/26/proposed-hunter-biden-plea-agreement-00108426)

What was expected to be a routine plea hearing exploded when Judge Maryellen Noreika questioned the parties regarding the specifics of the diversion agreement, which stated that the government

> agree[s] not to criminally prosecute Biden outside of the terms of this agreement for any federal crimes encompassed by the attached statement of facts,

Attachment A to the Diversion Agreement, and the statement of facts attached as Exhibit 1 to the Memorandum of Plea Agreement filed this same day.

After a three-hour hearing, Judge Noreika refused to accept the diversion agreement due to doubts about (1) whether the parties had actually reached an agreement regarding future immunity, and (2) whether that agreement was constitutional. Because the court's authority is limited to accepting and enforcing a plea agreement, Judge Noreika would have no authority to enforce the immunity clause. Such agreements are enforced by the DOJ and federal prosecutors, not by judges. The judge questioned the parties extensively regarding the extent of the immunity and found that while the defense attorneys believed their client was immune from all future prosecutions, the government stated that its investigation of Hunter Biden for additional crimes was ongoing. As of July 2023, the hearing has been reset for several weeks, and it is unclear what the parties will do in order to make these agreements enforceable under Judge Noreika's standards. In the meantime, Mr. Biden has pled "not guilty." The full transcript from the hearing can be found at: https://www.politico.com/news/2023/07/26/proposed-hunter-biden-plea-agreement-00108426.

Chapter 18

Page 1444

Defendants have also argued that the Supreme Court's Second Amendment decisions, particularly *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), are applicable to Guidelines enhancements for firearms possession. In *United States v. Alaniz*, 69 F.4th 1124 (9th Cir. 2023), the court rejected the defendant's Second Amendment challenge to U.S.S.G. § 2D1.1(b)(1), which provides for an enhancement if a defendant possesses a dangerous weapon at the time of a felony drug offense. It held "in light of a well-established historical tradition of regulation, [the defendant] did not have the right to 'keep and bear arms' during and in close proximity to his criminal activities."

Pages 1447-1449

The issue of sentencing enhancements based on acquitted conduct continues to generate controversy, but both the Supreme Court and the Sentencing Commission declined to take action in 2023.

During the 2022-23 term the Supreme Court held and relisted for several conferences a large number of cases raising constitutional challenges to reliance on acquitted conduct. Critics of reliance on acquitted conduct hoped that the Court was preparing to take up the constitutional issues. The Court's final order list on June 30, 2023, denied certiorari in all of the cases, but five justices filed statements totaling 12 pages in one of the cases, *McClinton v. United States*, 143 S. Ct. 2400 (2023), suggesting that the Court might grant certiorari in a future case if the Sentencing Commission fails to act. For a discussion of these opinions, *see*

https://sentencing.typepad.com/sentencing_law_and_policy/2023/06/in-final-order-list-of-term-supreme-court-grants-cert-on-big-new-second-amendment-case-and-deniespun.html.

The Sentencing Commission also seemed poised to take action on acquitted conduct in 2023. It published a proposed amendment that would have significantly restricted reliance on acquitted conduct, allowing district courts to consider acquitted conduct only when determining where within the applicable Guidelines range to sentence a defendant and whether a departure (or a variance) was warranted. The Commission received testimony and held hearings on that proposal in February 2023. Although many witnesses testified in favor of the proposed amendment, the Justice Department opposed it, arguing that the Commission could not "practicably exclude acquitted conduct from the definition of relevant conduct," and that if it proceeded with the amendment, the definition of acquitted conduct should be amended. *See* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ3.pdf . The written testimony of all witnesses and a transcript of the hearing are available here: Public Hearing - February 23-24, 2023 | United States Sentencing Commission (ussc.gov) .

It now appears that the Commission has moved the issue of acquitted conduct to the back burner.

Acquitted conduct was included in neither the final amendments the Commission transmitted to Congress in May 2023, nor the proposed 2023-24 priorities the Commission published in June 2023.