No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF FORMER U.S. COUNTERTERRORISM OFFICIALS, NATIONAL SECURITY OFFICIALS, AND NATIONAL SECURITY SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

J. Carl Cecere
Counsel of Record
CECERE PC
6035 McCommas Blvd.
Dallas, TX 75206
(469) 600-9455
ccecere@cecerepc.com

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amici are national security scholars and former federal officials who held senior positions in areas concerned with counterterrorism, diplomacy, and national security. Amici have spent their careers developing, interpreting, and enforcing this country's framework of federal laws designed to prevent heinous acts of terrorism. Amici's experience confirms that successfully starving terrorist organizations of funding is a sure way to save American lives. Amici also understand that private lawsuits must be an integral component of any strategy to keep money out of terrorists' hands.

Amici have previously participated in cases where the potency of private civil lawsuits as weapons for fighting terrorism was threatened. *Kiobel* v. *Royal Dutch Petrol. Co.*, No. 10-1491 (arguing that the Alien Tort Statute, 28 U.S.C. § 1350, allows claims against corporations for violations of international law); *Jesner* v. *Arab Bank PLC*, No. 16-499 (same); *Bank Markazi* v. *Peterson*, No. 14-770 (advocating successfully for the constitutionality of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1258, which allows for execution on funds held by Iran's central bank to satisfy certain terrorism-related judgments against Iran, 22 U.S.C. § 1882); *Rubin* v. *Islamic Republic of Iran*, No. 16-534 (arguing that enactment of Section 1610(g) of the Foreign Sovereign Immunities Act made

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[1] Petitioner and respondents have lodged blanket consent letters with the court. No counsel for any party authored this brief in whole or in part, and no entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

all property of state sponsors of terror available for attachment, not merely property "used for a commercial activity in the United States," *id.* § 1610(a)).

This case concerns another effort to undermine the potency of civil lawsuits as terror-fighting tools by eliminating one of the few available options to effectuate service of process on most state sponsors of terror. That result would further increase the already-astronomical cost, risk, and time required for these suits, and would hand terror-sponsoring nations another strategy to evade justice for their support of heinous acts of hate.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Section 1608(a)(3) of the Foreign Sovereign Immunities Act provides a vital strategic tool for victims of state-sponsored terrorism. This is because, as this case shows, the simple act of effectuating service of process on a foreign sovereign accused of material support of terrorism can stretch out for years—even decades. The strained relations that usually exist between the U.S. and these rogue regimes tends to limit the available avenues for service. Service options are then limited further through these nations' procedural tactics, which turns service alone into a never-ceasing war of attrition against terror victims.

Section 1608(a)(3)'s provision for service by mail supplies a vital counterweight to those tactics, because it provides terror victims with options. That provision dictates *the person* to whom the summons and complaint must be directed: the foreign minister of the recipient state. And it requires that the packet containing those items be transmitted to the foreign minister with appro-

priate "dispatch[]." *Ibid.* But, as Respondents have persuasively demonstrated, Section 1608(a)(3) provides options for getting it there. The service packet might be mailed to the foreign minister directly in the recipient state. Or it might be mailed to that country's embassy here in the U.S., to be provided to the minister. These options allow clerks and victims to determine for themselves the method that will best provide the putative defendant with notice while minimizing the likelihood of strategic evasions from the rogue state. Indeed, this case is a success story in Congress's effort. Service by mail has been effectuated several times—and Sudan has been aware of the underlying lawsuits for years.

Yet Sudan tries to take one of those precious options under 1608(a)(3) off the table, using the hammer-blow of international law. Sudan claims that simply transmitting a letter to another state's foreign minister through its embassy is impermissible, a violation of the principle of mission inviolability embodied in Article 22 of the Vienna Convention on Diplomatic Relations. But the Vienna Convention simply cannot be read as Sudan insists, even with the Government bolstering its position.

The principle of mission inviolability embodied in Vienna Convention Article 22 is a time-honored protection that nations afford to other nations' diplomatic envoys. It protects the physical premises of the embassy as foreign soil, preventing agents of the host state from asserting sovereign rights on the mission's premises. And it imposes a duty on host nations to treat the diplomatic mission with the respect the dignity of its task deserves, and its unique diplomatic function requires, to ensure that respectful discourse between nations can be maintained.

The overwhelming consensus of the nations who drafted and ratified the Vienna Convention, and the considered opinion of signatory nations today, holds that this inviolability principle is not offended by service by mail. Indeed, this consensus holds that service can be made directly on the embassy or the ambassador, by mail sent to the embassy grounds—a circumstance where inviolability concerns are at their zenith. And that consensus controls the Convention's meaning.

That makes this an easy case, because this case does not involve service on an embassy, or even on an ambassador. It involves service *through* an embassy, to a non-embassy official. Even if some lingering inviolability concerns might exist when a summons appears on an ambassador's desk, those concerns are completely absent when a front-desk clerk receives a service packet by mail addressed to the foreign minister, signs for it, and arranges for it to be transported to the home office. That sequence of events might have some importance from a procedural perspective for calculating deadlines. It might even comprise a necessary step for obtaining personal jurisdiction over the foreign sovereign. But the force of U.S. law felt in that sequence lands in the home country, and has not been brought to bear on the embassy premises, or the front-desk clerk—after all, she can refuse to sign for the packet without U.S.-legal consequences being visited upon her. And the embassy's diplomatic functions remain unaffected. No one calls the ambassador in to consult on sending a package, so the ambassador is not distracted from her diplomatic duties. And sending a package to the home office is something that front-desk clerks do all the time. Article 22's inviolability principle is thus in no way implicated in this case, and neither the

Government nor Petitioner cite a single source establishing otherwise.

The Government insists that its contrary reading of the Convention, and its decision to align with a state sponsor of terror, should be given deference based on high-minded rhetoric about protecting other nations in our courts. But the Government's true concerns are more self-interested, and they are reflexive, not rational. The Government ultimately admits that its current treaty interpretation is advanced primarily to support the policy it adheres to when being served in other nations' courts—a stance that provides far narrower and more particular options when others sue us than what we require other nations to accept in our courts. The Government contends that a ruling for Sudan is necessary to ensure reciprocal respect for that policy, and worries that a win for Respondents might provoke a spate of retaliatory legislation from other nations. But Sudan's position is no better for reciprocity than Respondents', because neither cures the asymmetry in the Government's stance. And the mere act of serving a foreign minister through an embassy is unlikely to cause international tensions to flare, because foreign sovereigns enjoy many procedural protections in our courts that serve to cool potential tensions. The Government's illusory foreign-relations concerns thus provide no reason to give uncritical deference to the Government's convenient treaty interpretation, any more than it is a reason to defer to its overly restrictive interpretation of the FSIA. It is certainly no reason to hand state sponsors of terror another procedural roadblock they can use to evade service, thereby undermining an important weapon in the war on terror.

ARGUMENT

I. Serving other countries' foreign ministers by mail sent to their U.S. embassies is consistent with this country's treaty obligations.

Sudan and the Government lean heavily on the Vienna Convention of Consular Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, to support their interpretation of FSIA Section 1608(a)(3), claiming that their position is necessary to remain faithful to the concept of mission inviolability embodied in Article 22 of the Convention. Respondents have detailed numerous reasons why interpreting the Vienna Convention is not necessary to understand Section 1608(a)(3)'s meaning—the primary one being that the statutory text unambiguously supports Respondents' interpretation. But in any event, the Vienna Convention serves as no obstacle to the service option that Respondents have chosen here—service by mail on the foreign sovereign's foreign ministry through its U.S. embassy.

A. Service by mail on an embassy, or even on an ambassador, does not offend Article 22's principle of mission inviolability.

Both Sudan and the Government claim that service by mail "on," "through," "in care of," or "via" a foreign state's U.S. embassy violates Article 22 of the Vienna Convention. Pet. Br. 31; U.S. Br. 26-27. But that is simply incorrect. In reality, neither Article 22 nor the principles of mission inviolability it embodies are offended when service of process is mailed to an embassy—regardless of the preposition involved.

Article 22 provides protection for a foreign nation's diplomatic mission in the United States from physical intrusions. It protects "[t]he premises of" the mission as foreign soil, requiring that they "shall be inviolable"—meaning that the "[t]he agents of the receiving State may not enter them, except with the consent of the head of the mission." Vienna Convention art. 22(1), 23 U.S.T. 3237, 500 U.N.T.S. 106. That requires the receiving nation to "abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises." Eileen Denza, *Diplomatic Law* 110 (4th ed. 2016). It also requires that receiving nations take "all appropriate steps * * * to prevent any disturbance of the peace of the mission or impairment of its dignity." *Id.* art. 22(2), 23 U.S.T. 3237, 500 U.N.T.S. 106.

Some suggest that the principle of mission inviolability goes beyond these protections for consular mission *premises*, to protect mission *personnel*, requiring that they enjoy "full and unrestricted independence in the performance of their allotted duties," Pet. Br. 36 (citation omitted), and that there be no interference "upon the unique characteristics of [the] diplomatic mission." *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 157 (4th Cir. 2018). It is unlikely, however, that mission inviolability extends so far—especially because mission personnel and their diplomatic business enjoy special immunities provided elsewhere in the Convention.[2]

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[2] Articles 26 and 29, for instance, protect the inviolability of diplomats and embassy officials, while Articles 24 and 27 protect the inviolability of diplomatic files and correspondence.

In any event, nothing in Article 22 or its inviolability principle is violated through service by mail sent to the embassy. It is the act of an agent of the receiving State exercising sovereign power on consular property that Article 22 prohibits. That principle would thus prohibit in-person service of process within an embassy even when conducted by a private process server. This is because in-person service involves a person entering the premises for the purpose of asserting U.S. legal power—as one step necessary to assert jurisdiction of a U.S. court over the foreign sovereign. 28 U.S.C. § 1330(b).

Yet service by mail *to* embassy premises cannot be conflated with in-person service *on* embassy premises, despite what Sudan suggests. Pet. Br. 44. Mailing a letter requires no U.S. government agent—or anyone operating under color of U.S. law—to cross the embassy's threshold. Such agents might place the packet in the mail, but the packet is actually delivered to the embassy by a mailman who is no more an "agent" exercising power of the receiving state than the "milkman." Resp. Br. 37 (quoting 7 Marjorie M. Whiteman, *Digest of International Law* § 36, at 376 (1970)).

Service by mail on the embassy also does not interfere with an embassy's uniquely diplomatic functions. Even if the embassy or the ambassador herself is the addressee for a summons meant for the sovereign, there has been no exercise of U.S. legal power on embassy premises. "No personal service [is] made on diplomats and no attempt would be made to subject them personally to the jurisdiction of a United States court." Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. Rev. 901, 934 (1969). The assertion of jurisdiction is on the

foreign state, not the ambassador, so no U.S. legal force is brought to bear on the embassy premises.

Certainly that situation involves no *more* an assertion of legal power or diplomatic interference than when service "through diplomatic channels to the foreign state" is attempted under 28 U.S.C. § 1608(a)(4), under which the summons is delivered directly to the foreign state's embassy, 22 C.F.R. 93.1(c)(2). That option involves the same use of the embassy's mail as the method Respondents chose, and doubles the compulsion by bringing two branches of government to bear on the embassy premises. The involvement of diplomatic officials also raises the stakes of a simple lawsuit to a potential international conflict. If Congress believed that the Section 1608(a)(4) process was consistent with its treaty obligations, then it must have understood that the practically identical but legally less significant process under Section 1608(a)(3) was too. Accordingly, both the text of Article 22 and the inviolability principles it embodies would permit service by mail on the U.S. consulate of a foreign nation.

The Government and Sudan insist otherwise, claiming support for their position from the Convention's drafting history and interpretations by other signatory nations, commentators, and Executive Branch officials. But at each turn, their position is misleading and incomplete. A more accurate account shows each of these authorities to be on Respondents' side.

1. The Convention's drafting history.

All agree that the Vienna Convention's "drafting history" is relevant in interpreting its provisions. U.S. Br. 23 (quoting *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1511 (2017) (considering treaty drafting history); *Medel-*

lin v. *Texas*, 552 U.S. 491, 507-508 (2008) (same)); Pet. Br. 38; Resp. Br. 38. But a complete and accurate account of the Convention's history shows that it supports Respondents, not Sudan or the Government.

The subject of serving process on embassy officials in a manner compatible with mission inviolability was much discussed by the commission that drafted Article 22—The United Nations' International Law Commission (ILC). The ILC's sessions repeatedly confirmed the same consensus: There was "almost unanimous agreement" that "serving of writs at the premises of diplomatic missions" was "an act contrary to international law." *Summary Records of the Ninth Session of the International Law Commission*, [1957] 1 Y.B. Int'l L. Comm'n 1, 64, U.N. Doc. A/CN.4/SER.A/1957. (*ILC Ninth Session Summary Records*). Yet it was just as "clearly understood that the serving of notices through the post *would not* infringe the inviolability of a mission's premises." *Summary Records of the Tenth Session of the International Law Commission*, [1958] 1 Y.B. Int'l L. Comm'n 1, 131, U.N. Doc. A/CN.4/SER.A/1958 (emphasis added) (*ILC Tenth Session Summary Records*).

The Commission committed this understanding to writing in a 1957 draft report on the Vienna Convention submitted the United Nations General Assembly—the same report from which Sudan and the Government try to glean a contrary understanding. U.S. Br. 23 (citing *Report of the International Law Commission Covering the Work of Its Ninth Session*, 23 April-28 June 1957, 12 U.N. GAOR Supp. No. 9, at 6, U.N. Doc. A/3623 (1957), reprinted in [1957] 2 Y.B. Int'l L. Comm'n 131, 137, U.N. Doc. A/CN.4/SER.A/1957/Add.1 (ILC *Ninth Session Report*)); see also Pet. Br. 38-39 (same). But that report's

sole purpose was to clarify "that certain types of writ"—those that required personal service to be effective—"could not be served *on mission premises*." *Tenth Session Summary Records* 131 (statement of Mr. Fitzmaurice, United Kingdom representative) (emphasis added). The 1957 draft report thus explained that only physical intrusions onto consular premises were prohibited, providing that "no writ shall be served within the premises of the mission, nor shall any summons to appear before a court be serviced in the premises by a process server." *ILC Ninth Session Report* 137. This prohibition extended to bar "process servers" that "carry out their duty at the door." *Ibid.* But care was taken in the 1957 report to *avoid* any implication that the article was meant to "prevent the serving of a process through the post, which was not" the report's aim. *ILC Ninth Session Summary Records* 65. Despite these efforts, however, the 1957 ILC draft report left some room for confusion by including a statement that all writs constituting service of process "must be delivered through the Ministry for Foreign Affairs of the receiving State." *ILC Ninth Session Report* 137. This seemed to suggest that the only internationally acceptable method of service would be service by diplomatic means through the foreign ministry of "the receiving State"—*i.e.*, the state hosting the diplomatic mission to be served.

Yet any confusion on this score did not last long. The Japanese delegation led an effort to have the draft report clarified to ensure that the "possibility of sending writs through the post should not be excluded." *ILC Tenth Session Summary Records* 131. The issue was significant to the Japanese, because for them service by diplomatic agents was the norm: "[I]n cases where civil actions were

brought against diplomatic agents, the procedure was to notify diplomatic agents through the post." *Ibid.* Japan claimed it would experience "some difficulty if no allowance were made for that proceeding." *Ibid.* Other representatives expressed support for Japan's effort. E.g., *id.* at 139 (statement of Iranian representative); *ibid.* (statement of Swedish representative); *ibid.* (statement of Fitzmaurice).

Thus when the ILC produced its final report in 1958, it modified the draft report's language to clarify that "there is nothing [in proposed Article 22] to prevent service through the post if it can be effected in that way." *Report of the International Law Commission Covering the Work of Its Tenth Session*, 28 April-4 July 1958, 13 U.N. GAOR Supp. No. 9, at 17, U.N. Doc. A/3859 (1958), reprinted in [1958] 2 Y.B. Int'l L. Comm'n 78, 95, U.N. Doc. A/CN.4/SER.A/1958/Add.1 (*ILC Tenth Session Report*) (emphasis added). The revised version also deleted the troublesome language suggesting that certain judicial writs "must be delivered through the Ministry for Foreign Affairs Of the receiving [s]tate." *Compare ILC Ninth Session Report* 137 with *ILC Tenth Session Report* 95. Instead, the final report explained that in some countries persons seeking to effectuate service "may"—but are not required to—apply to the Ministry for Foreign Affairs of the receiving State" if they wished assistance in effectuating service. *ILC Tenth Session Report* 95.

Despite these changes in the 1958 final report, the Japanese representative remained concerned. Japan feared that burying the ILC's position on service by mail in an explanatory comment would not be clear enough, thinking that "it cannot be considered as self-evident

from the original text of the article." *ILC Tenth Session Summary Records* 137. The Japanese minister thus proposed adding a new paragraph to the text of Article 22 itself prohibiting writs "served by a process server within the premises of the mission." U.N. Conference on Diplomatic Intercourse and Immunities, *Annexes, Final Act, Vienna Convention on Diplomatic Relations, Optional Protocols, Resolutions*, U.N. Doc. A/CONF.20/14/Add.1, at 22 (Vol. II) (1962). This was meant to "to incorporate" the final report's language regarding service, "[p]articularly, the concept of the fifth sentence" clarifying that service by mail was allowed. *Ibid.*

The Japanese minister later withdrew this proposal for amending Article 22, satisfied that "discussion within the Committee [of the Whole] had established a unanimous consensus that service could be effected by mail." Ernest L. Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and immunities*, 56 Am. J. Int'l L. 88, 102 (1962).

Although this formal amendment was withdrawn, the 1958 final report was still submitted along with the draft articles of the Convention to the U.N. General Assembly *ILC Tenth Session Report* 79. The report thus served as the basis for the Convention's adoption by the General Assembly and its ratification by all 185 of the current signatories. Denza 124.

The Government and Sudan ignore virtually all of this extensive drafting history supporting the view that service by mail to consular premises is permissible. Instead, their collective efforts focus on a single piece of evidence: the 1957 ILC draft report. U.S. Br. 23; Pet. Br. 38-39. But both Sudan and the Government fail to show how this draft report, which deliberately preserved the option of

service by mail, could be compatible with the view that this service method was prohibited. And neither the Government nor Sudan mention the essential fact that the 1957 draft they rely upon was changed in the 1958 final report, to make clear that service by mail was *allowed*. That disingenuous treatment of the Convention's drafting history does not make for a compelling argument.[3]

Sudan, but not the Government, strays even further afield in attempting to cobble together a supposed "unanimous" consensus in favor of its interpretation from two isolated snippets of the ILC hearing records. Pet. Br. 39. But it is easy to see why even the Government will not join Sudan on this ledge.

Sudan focuses first on a statement attributed to the Japanese representative upon his decision to withdraw the proposal to amend the text of Article 22 to clarify that service by mail was allowed. The Convention record suggests he did so believing "'it was the unanimous interpretation of the [Committee of the Whole] that no writ could be served, even by post, within the premises of a

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[3] Sudan fares no better in emphasizing that portion of the 1957 draft report providing that *"[a]ll judicial notices * * * must be delivered through the Ministry for Foreign Affairs of the receiving State*" Pet. Br. 39 (quoting *ILC Ninth Session Report* 6), as if to suggest that the defendant nation's foreign ministry is the only permissible destination for service of process. For one thing, the "Ministry for Foreign Affairs of the receiving State" does not refer to the ministry of the *defendant* state, but rather that of *host* state—on these facts, the ministry of the *United States*, not that of Sudan. For another, the draft was modified to remove the implication that all process must be sent to any single destination, which was thought to be "unnecessarily categorical." *ILC Tenth Session Summary Records* 131.

diplomatic mission.'" Pet. Br. 37 (quoting United Nations Conference on Diplomatic Intercourse and Immunities, *Summary Records of Plenary Meetings and Meetings of the Committee of the Whole* 141, U.N. Doc. A.CONF.20/14 (Vol. I) (1962) (*U.N. Conference Summary Records*). But this statement sure seems odd. Odd indeed for the Japanese representative to abandon an amendment that his country had championed as critical to preserve its practices for serving diplomats. Odder still for him to do so based on a "consensus"—appearing nowhere in the convention record—that seems to flout the *actual* consensus of the ILC, and the apparent consensus of the Committee of the Whole. Resp. Br. 42 (citing *U.N. Conference Summary Records* 137-140 (statements of Soviet, Norwegian, Spanish, Ghanaian, and Turkish representatives indicating support of service by post on diplomatic premises)). And the kicker: If the Japanese representative (or the rest of the ILC, or the Committee of the Whole) really had a sudden change of heart against service by mail, why would any of them be satisfied with merely withdrawing the proposed amendment to Article 22? Would it not also be incumbent upon them to call for amendment to the 1958 report that expressly permitted service by mail? Sudan answers none of these crucial questions.

It thus seems more likely that the statement attributed to the Japanese representative was a mistranslation or mis-transcription. What the Japanese representative probably *meant* to convey was that he was withdrawing his proposal because "discussion within the Committee had established a unanimous consensus that service *could be* effected by mail." Kerley 102 (emphasis added). That, in fact, is how the statement was apparently under-

stood by at least one former U.S. State Department attorney who would have been likely to know what really transpired. *Ibid.*

Sudan's reliance on a statement of the Argentine representative Pet. Br. 39, is similarly misplaced. The Argentine representative noted that he "approved the idea behind the Japanese amendment," but announced that he would vote against it 'if it were to be interpreted as permitting the service of a writ through the post.'" Pet. Br. 39 (quoting *U.N. Conference Summary Records* 137). Sudan reads this as an objection to any measure that would allow host states to provide for service by mail on embassy premises. But it makes no sense that the Argentine representative would object to a proposal to amend the text of Article 22 based on something that *was already allowed* under the 1958 final report, or that he would do so based on a proposal he had approved of. More likely, he simply wished to register concern that the proposal might be interpreted to foist the obligation to provide service by mail on states against their will, rather than to simply give them the option whether to allow for it. In any event, there is no question that the Argentinian representative was alone even in taking this idiosyncratic view.

In short, these isolated snippets cannot undermine the entire thrust of the Vienna Convention debates, and the unambiguous understanding upon which the Convention was enacted and ratified, which provides that service by mail on embassies is permitted under the Vienna Convention.

2. *The considered consensus of law-abiding states.*

Sudan and the Government also claim to have a consensus of sister states to support their position. See Pet. Br. 46-47; U.S. Br. 22. But it is surprising the lengths that they must go to find supporters. Most of the states on their list were once sponsors of terror themselves, who face potential civil liability for their past terrorist support—even if they are now claim to be reformed. See, e.g., Christopher M. Blanchard, Cong. Research Serv., RL 33142, *Libya: Background and U.S. Relations* 6 (2008) (noting that the State Department designated Libya a state sponsor of terrorism until 2006); *Hurst* v. *Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 26 (D.D.C. 2007) (holding Libya liable for the 1988 bombing of Pan Am Flight 103); *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 78 (2d Cir. 2008) (noting Saudi Arabia's support for terrorism); Glenn R. Simpson, *U.A.E. Banks Had Suspect Transfers*, Wall St. J., Sep. 17, 2003, at A10 (discussing U.A.E.'s financing of terrorism). Even seemingly innocent Austria faces potential liability for its past Holocaust-related acts. See, e.g., *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004).

At least one of these countries has actively lobbied against efforts to allow civil suits for victims of terrorism. See CBS News, *Saudis paid U.S. veterans to lobby against law allowing 9/11 families to sue kingdom*, May 17, 2017) (discussing U.A.E. efforts to lobby against the Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 852), <https://cbsn.ws/2D6g6ox>. All of these countries' opinions ought to be considered of a piece with that effort—yet another attempt to lobby for service loopholes they might someday exploit to escape

justice. In no event should their self-serving positions be trusted as authoritative interpretations of Article 22.

This is especially true when the body of opinion from other, law-abiding countries goes the other way. The true, considered consensus of sister states on the permissibility of service by mail has remained unchanged since the drafting and ratification of the Vienna Convention; in fact, it has only cemented over time. Just last year, the Supreme Court of the United Kingdom held that the Vienna Convention permitted service of process by mail on a diplomatic residence, *Reyes* v. *Al Malki*, [2017] UKDC 61, which, under Article 30 of the Vienna Convention, "enjoy[s] the same inviolability and protection as the premises of the consular mission." Such "decisions of the court of other Convention signatories," *El Al Israel Airlines Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 175 (1999), are entitled to "considerable weight." *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (citation omitted).

The Director of the Norwegian Foreign ministry has announced a similar position that "[c]onveying a writ through the postal services has not in itself * * * been considered an infringement of the inviolability of the premises of the mission." Rolf Einar Fife & Kristian Jervell, *Elements of Nordic Practice 2000: Norway*, 70 Nordic J. Int'l L. 531, 553 (2001). "[W]e must, absent extraordinarily strong contrary evidence, defer to" these interpretations of sister states. *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982).

3. The Government's "longstanding" interpretation.

The Government's fares no better in its bid to obtain deference for its supposed "longstanding policy and in-

terpretation" of Article 22 and "the customary international law it codifies." U.S. Br. 21-22. At best, the deference due to the Government's interpretation of a treaty is never "conclusive," *Sumitomo*, 457 U.S. at 184, and only matters to the extent it illuminates the treaty's true meaning. See *BG Grp., PLC* v. *Republic of Argentina*, 572 U.S. 25, 37-38 (2014). The Government's interpretation does not do that. And its position is anything but "longstanding."

As a participant in the ILC, the U.S. was certainly aware of, and put up no resistance to, the consensus view that Article 22 would permit service by mail. And the U.S. ratified the Convention based on that understanding. After ratification, "the United States had consistently favored permitting service by post" for more than a decade. Denza 124. Thus, in 1973, during the drafting of the FSIA, the Secretary of State maintained that "it was generally accepted during the drafting of the Vienna Convention on Diplomatic Relations that the prohibition [on service within the embassy] does not apply to service effected by mail." *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 43 (1973) (*House Report*). And the State Department used this consensus view to support its proposal in the "early draft of the FSIA," U.S. Br. 29, that would allow for service by mail on a foreign state via its U.S. embassy. *House Report* 43.

The Government's interpretation of the Vienna Convention only changed after the Japanese minister's misattributed remarks during the Vienna Convention's

drafting somehow "[came] to [its] attention."[4] See Department of State, *Service of Legal Process by Mail on Foreign Governments in the United States*, 71 Dep't St. Bull., No. 1840, at 459 (Sept. 30, 1974) (citing *U.N. Conference Summary Records* 141).

Only then did the Government change its policy on acceptance of service at U.S. embassies abroad. And only then did the State Department recommend revising the draft of FSIA to disallow service by mail on the embassy. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 26 (1976). It is thus the Government's earlier, correct, interpretation of Article 22, not its newly revised and incorrect one, that controls. "The meaning of [a] treaty cannot be controlled by subsequent explanations" of its meaning, even by "some of those who may have voted to ratify it." *The Diamond Rings*, 183 U.S. 176, 180 (1901).

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[4] The Government claims its opinion has an older vintage, dating to a 1964 letter the Department of State submitted in *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 982 (D.C. Cir. 1965). U.S. Br. 21-22 (citing Letter from Leonard C. Meeker, Acting Legal Adviser, U.S. Dep't of State, to John W. Douglas, Assistant Att'y Gen., U.S. Dep't of Justice (Aug. 10, 1964)) (Meeker Letter). But the Meeker Letter says nothing about Article 22, except it bars service "in the premises of an embassy." *Id.* at 9. And while it concludes that embassies cannot act "as agent of the sending state for the purpose of accepting process," this conclusion results from principles of agency law—that a country's establishment of a diplomatic mission "did not implicitly or explicitly empower that mission to act as agent"—not principles of treaty interpretation. *Ibid.*

4. The scholarly consensus.

Sudan and the Government also claim support for their treaty interpretation from a series of modern scholars, claiming that they represent the "prevailing understanding of Article 22." U.S. Br. 21. But the prevailing understanding among scholars writing around the Convention's ratification was different, and included many State officials that were familiar with the drafting effort. To them, "[n]othing in the Vienna Convention or in customary international law prevents the use of the mail to notify a foreign state that it is required to answer a summons and complaint." Lowenfeld 934; William L. Griffin, *Adjective Law and Practice in Suits Against Foreign Governments*, 36 Temp. L.Q. 1, 13 (1962); see also Note, *Jurisdictional Immunities of Foreign States*, 23 DePaul L. Rev. 1225, 1240 (1974); Richard Crawford Pugh & Joseph McLaughlin, *Jurisdictional Immunities of Foreign State*s, 41 N.Y.U. L. Rev. 25, 31-32 (1966).

The scholars cited by the Government and Sudan cannot upset this settled understanding. U.S. Br. 21; Pet. Br. 37-38. Their leading treatise, U.S. Br. 21, Denza's *Diplomatic Law,* actually recognizes that the "original understanding" of Article 22 was "that service by post would not in itself be a breach of inviolability." Denza 124, 126. Yet it wrongly assumes this original understanding was discarded in "practice," based largely on the U.S. change in interpretation of Article 22. *Id.* at 124. Thus the U.S. demonstrates "consistency" with scholars only by bootstrapping on *its own* shifting position. U.S. Br. 22.

Further, their side's leading scholar admits that rigid prohibition of service by mail on embassy premises is bad policy, "[g]iven that many individuals resident in such premises may not be entitled to immunity from jurisdic-

tion." *Id.* at 126. And she cites cases, such as *Reyes*, that buck the modern "practice," marking a return to the original understanding of Article 22. *Ibid.*

The other scholars cited by Sudan and the Government are worse. One bases his opinion on an irrelevant case about in-person service, *Hellenic Lines*, 345 F.2d at 979, augmented only by the U.S.'s changing position and Denza's infirm one. James Crawford, *Brownlie's Principles of Public International Law* 29 (8th ed. 2012). Another offers little more than his bare read of the Vienna Convention, which to him makes it "perfectly clear" that Article 22 does the exact opposite of what the people who drafted, accepted, and ratified the Convention understood it to do. Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988). And he is reading the wrong part of Article 22 (subsection 3) to boot. *Ibid.* These scholars' views offer little to commend them.

Whatever the confusion percolating through a few self-interested rogue states, academic thinkers, or even the U.S., nothing can undermine the clear, coherent consensus of the ILC, the Committee of the Whole, the General Assembly and the 180 *other* states that ratified the Convention. It likewise cannot control over the understanding possessed by the United States before its deviation in "practice." These are all perfectly consistent, and all agree that even service by mail on an ambassador herself—the head of the consular mission—would be perfectly acceptable, even to the mission—the seat of her office—where inviolability concerns would be at their highest.

B. Service by mail routed *through* the embassy presents even less inviolability concern.

That makes this an easy case, because here inviolability is at its lowest ebb. Whatever theoretical inviolability concerns might exist from service on an ambassador or embassy, they are virtually absent when a service packet is mailed to the foreign minister—who enjoys no inviolability protection—and the service packet is simply routed through the embassy.

When a service packet for the foreign sovereign is addressed to the embassy itself, the summons arrives on the desk of the ambassador as head of the mission. Once there, the ambassador must make decisions about what to do with the summons—decisions could affect the legal rights of the sovereign. It could therefore be said that the ambassador experiences some compulsion of U.S. law, however indirect.

By contrast, when service is delivered by mail *through* the embassy, such compulsion is completely absent. The front-desk clerk is asked only to read the label, sign for the service package, and passes it on for delivery. None of those requests is backed by a compulsion to act under force of U.S. law. She is free to refuse to sign for the package without any U.S. legal repercussions. As Respondent explains (at 28), those events might cause service to fail, but none would subject the clerk to liability under U.S. law. She is completely free from the "official and coercive nature of a summons." Pet. Br. 44.

Service by mail routed through the embassy also involves no interference with diplomats' "unrestricted independence in the performance of their allotted duties" Pet. Br. 36, and causes no diversion of embassy resources

from the uniquely diplomatic functions of the mission. It is unlikely that the ambassador or any diplomatic officials will ever *see* the summons, much less be required to make decisions about it. The task is handled entirely by the front desk and the mailroom, and involves functions that mailrooms and front desks do all the time. Thus, the mission might become a de facto *messenger* for the summons, but not a de facto *agent*. U.S. Br. 27, Pet. Br. 42.

Service by mail likewise does not involve conscription of the "diplomatic pouch" in any manner that would be prohibited by the Vienna Convention, despite what Petitioner fears. Pet. Br. 46. Nothing requires that the summons be transmitted in the diplomatic pouch. Embassy personnel may thus transmit the summons to the foreign minister using the same secure email and fax services that virtually all businesses now use. Resp. Br. 28 (citing Anthony Aust, *Handbook of International Law* 122 (2d ed. 2010)).

Perhaps most importantly, while Vienna Convention Article 27 protects the inviolability of the diplomatic pouch, that only prevents the pouch from being *opened* by the receiving State. It cannot be said that principle prohibits anyone from even requesting that the embassy pass on a letter. And compliance with that request is completely voluntarily—if the embassy objects to participating in the transmittal of a service packet, or deems the task too onerous, it can simply refuse. For these reasons, even the most aggressive of scholars have never suggested that service by mail merely routed through an embassy would be inconsistent with U.S. treaty obligations.

II. Service by mail routed through a foreign state's U.S. embassy is unlikely to adversely affect U.S. foreign relations.

Interpretive issues aside, the Government claims that its opinion on the Vienna Convention should control as it is the branch possessing the institutional sensitivity to properly assess the "'diplomatic consequences resulting from' judicial interpretations" of treaty obligations. U.S. Br. 24 (quoting *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010)). But that sensitivity may sometimes prove to be an *over*-sensitivity, as in this case.

The Government claims an interest in ensuring that other countries are served "in a manner consistent with the United States' treaty obligations." U.S. Br. 10. That interest is certainly legitimate, but does not demand preference for the Government's interpretation, because adoption of Respondents' interpretation is equally faithful to those treaty obligations.

The Government gets closer to the heart of the matter when it insists that adoption of its treaty interpretation is necessary to ensure reciprocal respect for its own position on service in foreign courts. But it is difficult to understand how a ruling for Petitioner better respects reciprocity than a ruling for Respondents. After all, *neither* of the options offered to the Court for resolving this case mirrors the U.S.'s aggressive and asymmetrical stance on service abroad. When sued abroad, the Government refuses to accept service by mail on its embassy premises *or* at its foreign ministry—the U.S. Department of State. Instead, it asserts that "service on the U.S. government is only proper when transmitted" through "diplomatic channels" or "Article 5 of the Hague

Service Convention" by delivery to the U.S.'s designated "Central Authority"—the Department of Justice's Office of International Judicial Assistance. Department of Justice, *Service of Process on the United States Government* (Nov. 4, 2016) (*State Service Guidance*) <tinyurl.com/usgservice>. The Petitioner's stance that service must go directly to the foreign minister does no more to the realign this asymmetry than Respondents' position does. Accordingly, concerns of reciprocity have no bearing on this case.

The Government also fails to show how Respondents' position is uniquely dangerous to its service policy. The likelihood that this case will provoke a spate of retaliatory actions from other states is slim—but not because of the protections of international law do anything to prevent it. Indeed, the Vienna Convention's principles already permit states to decide whether to allow service by mail on U.S. embassies abroad, and has since the Convention was approved and ratified. Hence, international law has never offered the U.S. policy *any* protection from retaliation.

What actually prevents retaliation are the multiple layers of protections in U.S. law that make it unlikely that issues surrounding service on foreign sovereigns will produce the kind of outrage that might lead to a raft of retaliatory laws threatening U.S. policy.

These start with the Government's own notice policy. As the Government notes, *State Service Notice* 2, it does not hide behind procedural roadblocks in a strategic attempt to evade justice as Sudan has done. Rather, it gives notice to the serving party's foreign minister when service problems arise, thus ensuring that service can be

properly effectuated. *Ibid.* That simple step will usually keep tensions over service at bay.

There are also mechanisms that prevent issues of service of process upon foreign stations in our courts from escalating into the kinds of conflicts that would produce retaliatory action. The FSIA's procedural rules offer protection to foreign nations in our courts that make issues of service unlikely to cause offense. These include a generous period for the foreign nation to respond to a summons, allowing 60 days in most cases, 28 U.S.C. § 1608(d), so even if there is some delay in transmitting a summons overseas, the delay is unlikely to result in a default. The FSIA also requires a notice of a potential default to be served on the foreign state before the default becomes final. *Id.* § 1608(e). And as Respondent notes, the default can be set aside if the original process is not opened by the foreign minister in time to respond. Resp. Br. 26 (citing, e.g., *Hilt Constr. & Mgmt. Corp.* v. *Permanent Mission of Chad to the United Nations*, Civ. No. 16-6421, 2017 WL 4480760, at *2-*3 (S.D.N.Y. Oct. 6, 2017)). These protections make the risk of default less likely, and serve to diffuse tensions when problems do arise. Perhaps the surest sign that this is true is that there has not been a retaliation *already*. Current U.S. policy hardly "minimize[s]" "foreign-relations and reciprocal-treatment concerns." U.S. Br. at 28. It maximizes them. But if the *current* asymmetry of the U.S. policy is not enough to provoke retaliation, it is hard to see how recognizing the acceptability of service via embassy will prompt any adverse reaction.

Finally, the Government correctly notes that international law is a matter of mutually assured "reciprocity," U.S. Br. 25 (citation omitted), and it thus largely what we

make of it. That ought to make the Government concerned with the signals it sends to other nations, and the legal loopholes it introduces into its domestic laws, with its hypermetrical and over-protective reading of international law. The Government would do better to put aside these concerns, and adhere to the paths of service that Congress provided in FSIA and the obligations regarding service in the treaties it has joined. In short, the Government should be offering more than "sympathy" for victims and "condemn[ation]" of state terror sponsors. U.S. Br. 1. It should be advancing a legal interpretation that protects victims and allows them recourse.

III. Service via mail transmitted through a foreign embassy is a vital option in civil suits against state sponsors of terror.

Interpreting the Vienna Convention to provide terror victims the option of serving a foreign state's foreign minister by mail routed through the country's embassy is important to remain consistent with the text of the Convention and the principles of inviolability it embodies. But it is also important to preserve the means of service most likely to actually reach the foreign minister in many cases, and to preserve civil judgments as an effective terror fighting tool.

A. The most effective way to give notice to a foreign sovereign is often through its embassy.

The efforts of the Government and Sudan to remove the option of mailing service packets through an embassy builds on the assumption that this form of service is less likely to actually make it to the foreign minister herself than a service packet mailed directly to the foreign ministry. U.S. Br. 19; Pet. Br. 45.

That premise is unfounded. In fact, there are a variety of reasons why a service packet routed through the embassy is *more* likely to arrive intact than a service packet mailed directly to the foreign ministry. For one thing, "the reliability of postal service may vary from country to country." Fed. R. Civ. P. 4, *Adv. Comm. Notes to the 1963 Amendments*. So in many countries, simply addressing the packet to the foreign ministry is no guaranty that it will actually get there. For another, it may be hard, especially in many transitional governments, to know who the "foreign minister" is, or whether the "foreign ministry" is located at any given time. And these problems are heightened when it comes to the highly unstable, often infrastructurally weak nations that tend to resort to terror sponsorship.

Service through an embassy minimizes these problems. Foreign missions have direct lines of communications with the home country, and a pipeline to route communications to the proper offices and officials. It is thus no more likely that a letter will be lost in transit between the foreign ministry and the home base, as it would be lost between the foreign-ministry's mailroom and the foreign minister's office. Accordingly the Second Circuit had good reason to believe that the option of service via the embassy "could reasonably be expected to result in delivery to the intended person" and that the embassy was a "logical" location for service. J.A. 214 & n.3.

B. Maintaining the option of service via embassy is essential to protect civil suits as effective terror-fighting tools.

Removing the option of service via the embassy will also make terror suits much harder for plaintiffs. For the particular plaintiffs in this case, they will be forced to start over and try service again, further delaying any recovery after decades of fighting. More generally, shrinking the options-box under Section 1608(a)(3) will also play into the hands of rogue terror states in other lawsuits, giving them opportunities to plague victims with procedural headaches. That will make terror suits even more expensive, risky, and drawn out, which will jeopardize civil suits as key weapons in the war on terrorism.

1. Prohibiting service here would sap the vitality of civil litigation as a key weapon in the war on terror.

Amici have written elsewhere of the vital role that civil litigation plays in supplementing governmental anti-terrorism efforts. Br. of Fmr. U.S. Counterterrorism and National Security Officials as Amici Curiae in Support of Petitioners at 20-28, *Jesner* v. *Arab Bank, PLC*, No. 16-449. This is because terror enterprises "rest[] on a foundation of money." See *Antiterrorism Act of 1990: Hearing on S. 2465 Before the Sen. Subcomm. on Courts & Admin. Practice*, 101st Cong. 84 (1990) (testimony of Joseph A. Morris, former General Counsel, U.S. Information Agency). When funds available to terrorists are constrained, their capabilities decline. Less money is available to maintain the high costs of terror networks and carry out operations. And terrorists are forced to route funds through ever more complicated, and less se-

cure, means, increasing the likelihood that their violent plans will be uncovered.

Government efforts to combat terror financing have had some success. The 9/11 Commission Report, *Final Report of the National Commission on Terrorist Attacks Upon the United State*s 382–383 (2004), <http://bit.ly/1jwpzQZ>. For instance, documents found in Osama Bin Laden's compound revealed that the global efforts to restrict terrorist funding frustrated al Qaeda's efforts to raise and transfer money around the world. Juan C. Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* ix (2013).

Yet government enforcement alone is not enough to stanch the flow of terror funds. Limited government resources mean that many terror transactions simply lie beyond the government's reach, despite the more than $1 trillion spent since 9/11 to combat terror. Amy Belasco, Cong. Research Serv., RL 33110, *The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations Since 9/11* 5 (2014), <http://bit.ly/1IRYWqi>.

Civil litigation provides an essential complement to government enforcement efforts, augmenting the government's capabilities without adding to the taxpayer-borne bottom line. Civil claimants multiply the resources available to uncover terror-funding networks, and they possess monetary incentives that ensure that they will find and pursue leads that might otherwise go unnoticed. Civil litigation also provides advantages over criminal investigation and enforcement or multinational enforcement efforts, including a lower burden of proof, an absence of constitutional restrictions on investigation, and more liberal discovery rules than government or multinational investigating agencies enjoy. Jimmy Gurulé, *Un-*

funding Terror: the Legal Response to the Financing of Global Terrorism 325 (2008) (*Unfunding Terror*). It will thus come as no surprise that it was ultimately private plaintiffs, not federal law enforcement, that brought the Ku Klux Klan to its knees, through a string of wins in civil litigation. See Jack D. Smith & Gregory J. Cooper, *Disrupting Terrorist Financing With Civil Litigation*, 41 Case W. Res. J. Int'l L. 65, 77 (2009).

2. Civil suits targeting foreign sovereigns are especially effective in deterring terror financing.

Suits against designated terror-supporting sovereigns can be especially effective in choking off funding to terror networks. The states that actively support terrorism are few in number—there are currently only four: Iran, North Korea, Sudan, and Syria. U.S. Dep't of State, *Country Reports on Terrorism 2017* 217-220 (*2017 Country Report*), <https://bit.ly/2xlMkHa>. But they represent some of the biggest funding sources of terror activities.

Civil litigation against such terror-supporting nations provides a major opportunity to halt terror funding. These nations provide a large percentage of many terror groups' operating budgets, so persuading even one of them to cease funding terror would deal a major blow to worldwide terror finance. Indeed, "while the prospect of large monetary judgments may have little or no deterrent value for radical jihadists, the same may not be true of individual donors, charitable organizations," or, for that matter, foreign sovereigns. *Unfunding Terror* 324. And changing the behavior of these terror-sponsoring states will likely prove easier than halting terrorists' other sources of funding, such as drug trafficking, counter-

feiting, ransom, bribes, and other illegal trade. Eben Kaplan, Council on Foreign Relations, *Tracking Down Terrorist Financing* (Apr. 4, 2006) <on.cfr.org/2i3KgOE>; Itai Zehorai, *The World's Richest Terrorist Organizations*, Forbes Int'l, Dec. 12, 2014, <bit.ly/2vC8WCA>.

Since their sponsorship of terror is often as much military strategy as political or religious ideology, *e.g.*, U.S. Dep't of Def., *Unclassified Annual Report on Military Power of Iran* 1-3 (2010), <http://bit.ly/2vJQsOu>, that strategic course could change if the costs of the strategy could be made to outweigh the benefits. This is especially true when many of these countries have substantial assets in the United States that might be attached to enforce civil terrorism judgments, such as the estimated $1.7 billion that Iran has here. *Hr'g before the H. Subcomm. on the Constitution and Civil Justice on H.R. 2040*, 114th Cong., 2d Sess. 63 (July 14, 2016) (Testimony of Professor Jimmy Gurulé). Accordingly, there is some chance that these nations' strategic behavior will be shaped by the prospect of massive terror-related judgments. Faced with potential awards that often range in the hundreds of millions—or even billions—of dollars, *e.g.*, *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1317 (2016) (concerning multiple judgments against Iran "together amounting to billions of dollars"), these nations might eventually be persuaded that it is better to stop funding terror, and join the body of legitimate nations, than to continue funneling money to support terror activities only to face massive liabilities on top of those costs. Moreover, for these countries, the condemnation of a civil judgment itself will provide a meaningful disincentive. Indeed, experts estimate that civil judgments have had a

noticeable impact upon the present regime in Iran, even if they have not convinced them to change. *Peterson* v. *Islamic Republic of Iran*, 264 F. Supp. 2d 46, 62 (D.D.C. 2003).

But civil judgments cannot have any meaningful impact unless service can be effectuated. Terror-sponsoring countries will be little dissuaded by threats of monetary awards, no matter their size, when they can evade any award for decades through procedural shenanigans. By the same token, plaintiffs will not bring suit if there is no prospect for recovery. This provides yet another reason why FSIA section 1608(a)(3) and the Vienna Convention should be interpreted to allow service by mail on the foreign minister to be routed through U.S. embassies.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

J. Carl Cecere
Counsel of Record
CECERE PC
6035 McCommas Blvd.
Dallas, TX 75206
(469) 600-9455
ccecere@cecerepc.com

Counsel for Amici Curiae

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APPENDIX

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APPENDIX

William C. Banks – William C. Banks is the Board of Advisors Distinguished Professor at Syracuse University College of Law and Founding Director of the Institute for National Security and Counterterrorism, a recognized leader in research and education on national and international security and terrorism. Professor Banks' wide-ranging research focuses on i national security and counterterrorism law; laws of war and asymmetric warfare; transnational crime and corruption.

Professor Banks has served as a Special Counsel to the US Senate Judiciary Committee (for the confirmation hearings of Supreme Court nominee Stephen G. Breyer); on the ABA Standing Committee on Law and National Security; as a member of the InfraGard National Members Alliance Board of Advisors; on the Advisory Council for the Perpetual Peace Project; on the Executive Board of the International Counter-Terrorism Academic Community (ICTAC); as an Editorial Board member at The International Centre for Counter-Terrorism in The Hague, The Netherlands; and as a Distinguished Fellow of the Institute for Veterans and Military Families at Syracuse University. Banks also is the Editor-in-Chief of the Journal of National Security Law & Policy.

Kevin Cieply – Kevin Cieply is President and Dean of the Ave Maria School of Law and an expert on national security law. Before his academic career, Dean Cieply served as Chief, Legal Operations (Land), North American Aerospace Defense Command (NORAD) and U.S. Northern Command (NORTHCOM), concentrating

on counterterrorism and Defense Support of Civilian Authorities. He also served for more than 22 years in the Army and Wyoming Army National Guard as a helicopter pilot and judge advocate. In civilian life, he also worked as Special Assistant U.S. Attorney and Senior Legal Advisor on all military matters for the Wyoming Army National Guard.

Jimmy Gurulé – Professor Gurulé is a tenured member of the law faculty at Notre Dame Law School, where he teaches courses in criminal law, international criminal law, the law of terrorism, and national security Law. Professor Gurulé served as Under Secretary (Enforcement) at the U.S. Department of the Treasury, from 2001-2003. In this capacity, he played a central role in developing and implementing the U.S. Government's counterterrorist financing strategy. He also served as Assistant Attorney General from 1990-1992 during the administration of President George H.W. Bush. He has published numerous books and articles on counterterrorism law and legal strategies for combating the financing of global terrorism.

Malvina Halberstam – Professor Halberstam is a member of the founding faculty of the Benjamin N. Cardozo School of Law. She has served as an assistant district attorney, as a reporter for the American Law Institute (Model Penal Code Project), and as a counselor on international law for the US Department of State, Office of the Legal Advisor. As counselor, she supervised the State Department's comments on what became the Restatement of U.S. Foreign Relations Law (Third) and headed the U.S. delegation in the negotiations on the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted in Rome in

1988.

Dennis M. Lormel – Mr. Lormel is an international expert addressing terrorist financing, money laundering, fraud, and financial crimes. He amassed extensive major case experience in the FBI while working there from 1976 through 2003, as a street agent, supervisor and senior executive, particularly in complex finance related crimes. In response to the terrorist attacks of September 11, 2001, Mr. Lormel assumed responsibility for establishing, coordinating and directing the FBI's comprehensive terrorist financing initiative, serving as Chief of the Terrorist Financing Operations Section, in the Counterterrorism Division. Mr. Lormel is a member of the Advisory Board of the Association of Certified Anti-Money Laundering Specialists.

Rachel E. VanLandingham – Professor Rachel E. VanLandingham, Lt Col (ret.), is a national security law expert and former judge advocate in the U.S. Air Force. She currently teaches criminal law, constitutional criminal procedure, and national security law. During Professor VanLandingham's military career, she served as a military prosecutor, criminal defense attorney, appellate defense attorney and nuclear surety inspector, stationed in the United States, South Korea, and Italy with deployments to the Middle East. She was the legal advisor for international law at Headquarters, U.S. Central Command, where she advised on operational and international legal issues related to the armed conflicts in Afghanistan and Iraq. She also served as the Command's Chief Liaison to the International Committee of the Red Cross, and traveled throughout those countries in efforts to improve procedural safeguards and humane treatment standards for detainees in U.S. custody, as well as

provided advice to the Department of Justice regarding habeas cases brought on behalf of detainees in Afghanistan. She was the Deputy Department Head of the Department of Law and Assistant Professor of Law at the U.S. Air Force Academy in Colorado Springs, Colorado, where she managed a legal department of 19 professors and taught international law and military law courses.